RENDERED: APRIL 29, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002283-ME

BOBBY P. INGRAM — APPELLANT

v.

APPEAL FROM MADISON FAMILY COURT DIVISION
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 00-CI-00451

AMANDA ANGLIN, HERSHELL RAY ANGLIN
and ETTA VIOLA ANGLIN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Bobby Ingram brings this appeal from the September 10, 2003, and October 2, 2003, orders of the Madison Circuit Court, Family Court Division, granting sole custody of his biological child to the maternal grandparents, Etta and Hershell Anglin (also referred to as the Anglins.) We affirm.

The Anglins' daughter, Amanda Anglin, and Bobby Ingram are the parents of a child, Konner Ingram, born November 28, 1998. Amanda and Bobby never married, but apparently

cohabitated until April 2000. Thereafter, Amanda filed a petition for custody in the Madison Circuit Court. Bobby and Amanda subsequently agreed to temporary joint custody with an equal time-sharing plan. An order reflecting the agreement was entered by the circuit court on May 23, 2000. No child support was ordered.

In September 2002, the Cabinet for Families and Children (Cabinet) and Bobby both filed juvenile petitions alleging Konner was dependent or neglected. The petitions were filed following Amanda's arrest on (1) charges of operating a motor vehicle on a suspended license; (2) possession of a controlled substance; and (3) possession of a prescription drug not in the proper container. Despite a stipulation of neglect by Amanda, the juvenile court ordered Bobby and Amanda to continue with their joint custody arrangement.

On January 7, 2003, another juvenile petition was filed alleging that Konner was dependent or neglected. Therein, Amanda's mother, Etta, alleged that Amanda had abandoned Konner and that Etta had been caring for him. During the pendency of the juvenile proceeding, Bobby filed a motion in circuit court to modify the custody order of May 23, 2000. On March 10, 2003, the Anglins made an oral motion to intervene in the custody action. There being no objection, the Anglins' motion to intervene was granted, and on April 3, 2003, they filed a third

party petition for permanent sole custody. On April 23, 2003, Bobby and the Anglins were granted joint custody in the juvenile proceeding.

Following a hearing on the pending motions in the custody action, the circuit court entered Findings of Fact, Conclusions of Law, and Decree Granting Third Party Petitioners Sole Custody on September 10, 2003. The conclusions of law, in relevant part, state as follows:

> 2. This Court specifically finds that the third party petitioners have standing to bring this action as they have been de facto custodians of said child pursuant to KRS 403.340(3)(f).
>
> 3. That the petitioner, Amanda Anglin, the biological mother, stipulated that she was unfit to parent the child. The Court accepts this stipulation and believes that absent such stipulation that the third party petitioners would have proved her unfit by clear and convincing evidence.
>
> 4. This Court finds by clear and convincing evidence that Bobby Ingram is the biological father of the minor child. However, he is currently unfit to parent the child. This has been evidenced by the fact that the respondent [Bobby] admitted to illegal drug usage, gambling, and being habitually unemployed and unable to support the minor child while the child is in his custody. Furthermore, the respondent failed to abide by the orders of the Madison Family Court with regard to producing a clean drug screen in April 2003 and further refused to submit to drug testing on the date of this hearing.

As the circuit court found both parents unfit, sole custody of the child was awarded to the Anglins. Both Amanda and Bobby were granted supervised visitation.

On September 16, 2003, Bobby filed a motion pursuant to Ky. R. Civ. P. (CR) 59.05 to alter, amend or vacate the custody order. On October 2, 2003, an order was entered sustaining Bobby's request to strike the court's finding that the Anglins were de facto custodians of the child. All other grounds and arguments set forth in Bobby's CR 59 motion were denied. On October 8, 2003, Bobby filed a "Motion To Reconsider Pursuant to CR 60.02, Motion For Viola Gabbard To Supervise Visitation And Motion To Consolidate Cases." The CR 60.02 motion was heard on October 20, 2003.[1] This appeal follows.

Bobby contends the Anglins did not have standing to file the petition for custody. Specifically, Bobby argues that pursuant to Moore v. Asente, Ky., 110 S.W.3d 336 (2003), standing cannot be conferred upon a non-parent unless the non-parent has actual possession and control of the child and the non-parent can show that the natural parent has voluntarily and indefinitely relinquished custody of the child. Bobby asserts

[1] This appeal was filed on October 27, 2003, while the Ky. R. Civ. P. (CR) 60.02 motion was still pending before the circuit court. On September 23, 2004, this Court entered an order placing the appeal in abeyance pending entry of a final order disposing of the CR 60.02 motion. On December 22, 2004, the circuit court entered an order denying the CR 60.02 motion. By order entered February 14, 2005, this appeal was returned to the Court of Appeal's active docket.

he never relinquished custody of the child and, thus, standing could not have been conferred upon the Anglins.

Bobby ignores two dispositive facts – his attorney stated there was no objection to the Anglins being joined as parties and the Anglins had physical custody of Konner as they were exercising Amanda's portion of the shared custody arrangement. In a custody proceeding, Kentucky Revised Statutes (KRS) 403.490 requires joinder of any person who has physical custody of the child or claims to have custody of the child.[2] Since the Anglins had physical custody of the child, the circuit court was required to join the Anglins in the custody proceeding. Thus, the circuit court properly determined the Anglins' had standing to petition for custody.

Bobby next contends the circuit court abused its discretion by concluding he was an unfit parent. Specifically, Bobby argues the circuit court did not make the findings of fact necessary to support a determination that he was unfit.

It is well-established that when a "third party seeks custody, the parent must prevail unless it can be demonstrated

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[2] Kentucky Revised Statutes (KRS) 403.490 states, in relevant part, as follows:

> If the court learns . . . that a person not a party to the custody proceeding has physical custody of the child or claims to have custody . . . it shall order that person to be joined as a party . . . .

We note KRS 403.490 was repealed effective July 13, 2004. However, KRS 403.490 was in effect and controlling at the time of the circuit court's order.

by clear and convincing evidence that the parent is unfit . . . ." Forester v. Forester, 979 S.W.2d 928, 930 (Ky.App. 1998). The evidence necessary to demonstrate the unfitness of the parent is: "(1) evidence of inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children." Davis v. Collinsworth, 771 S.W.2d 329, 330 (Ky. 1989).

Having reviewed the record, we are of the opinion that substantial evidence was presented to the circuit court demonstrated Bobby was unfit to parent Konner. Testimony was presented that Bobby used oxycontin, sold oxycontin and associated with persons that also used or sold drugs. There was also evidence presented that Bobby failed or refused to take two drug tests and that his girlfriend also refused to take a drug test. Furthermore, Bobby admitted to marijuana use, extensive prescription drug use, and gambling activity. This evidence taken together with Bobby's failure to comply with the circuit court's order to produce a clean drug screen in April 2003 and refusal to submit to a drug test on the date of the final custody hearing demonstrate his unwillingness to comply with basic directions from the circuit court. As such, we are of the

opinion there is sufficient evidence to support the circuit court's finding that Bobby is unfit to parent his child.

Bobby next argues that the circuit court's award of supervised visitation is clearly erroneous. Specifically, Bobby contends that before the circuit court could deny him reasonable visitation there must be a finding that visitation would seriously endanger the child.

It is well-established that a judgment will not be reversed because of the circuit court's failure to make a finding of fact on an essential issue unless the failure is brought to the circuit court's attention by a written request for such finding or by a motion pursuant to Rule 52.02. CR. 52.04.[3] If the failure to make adequate findings of fact is not brought to the circuit court's attention as required by CR 52.02 or CR 52.04, the issue is waived. Cherry v. Cherry, 634 S.W.2d 423 (Ky. 1982). As Bobby did not make a request pursuant to CR 52.02 or CR 52.04 for more definite findings of fact, this issue is waived. See Cherry, 634 S.W.2d 423.

Bobby also asserts that the circuit court "abused its discretion when it refused to consider any of the testimony of Joan Young, social worker." Specifically, Bobby asserts that the "Sixth Amendment to United States Constitution grants the

[3] This is distinguished from a case where a court fails to make any findings of fact pursuant to CR 52.01, which is reversible error. Brown v. Shelton, 156 S.W.3d 319 (Ky.App. 2004). Here, the circuit court made substantial findings of fact.

right to make a defense in Court . . . [and] the court violated [his] Sixth Amendment rights when it arbitrarily excluded all the testimony of Ms. Young."[4]

The Sixth Amendment to the United States Constitution states in relevant part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .

U.S. CONST. amend. VI.

By its very terms, the Sixth Amendment is limited to criminal cases. Additionally, Bobby has not cited this Court to any authority that would indicate that the Sixth Amendment applies to a custody matter and has not indicated how his right to confront a witness or his right to have compulsory process for obtaining a witness was implicated. As such, we are of the opinion that Bobby's contention is without merit.

Bobby next alleges the circuit court made numerous findings of fact that were not supported by substantial evidence and, thus, were clearly erroneous. As Bobby made several such allegations, we address only the most troublesome: whether the circuit court's finding that Joan Young's investigation and report were unreliable is supported by substantial evidence.

[4] Relevant to Ms. Young's testimony, the circuit court stated that it found "by clear and convincing evidence that the Cabinet for Families and Children did not pursue a thorough investigation in this case and its findings and recommendations will not be considered."

Relevant to this issue, the circuit court found as follows:

> Joan Young testified on behalf of the Cabinet for Families and Children and generated a report with respect to the juvenile case. On cross-examination by counsel for the third party petitioner, Ms. Young admitted that she did not pursue a thorough investigation as she was unaware that Mr. Ingram had failed a drug test and also specifically stated that any visits she made to the Ingram home were conducted at night. Ms. Young admitted that based on what she heard in open court, that her investigation and report would not be reliable and complete.

Bobby argues the circuit court's finding that the report was unreliable and incomplete does not accurately reflect Young's testimony and, thus, is not supported by substantial evidence. Bobby alleges Young testified that Bobby was cooperative, the home was suitable, there appeared to be no problems, and the visits did not reveal any evidence of drug abuse. Bobby insists Young did not testify that the report she prepared for the Cabinet would be unreliable.

Having reviewed the record, we are of the opinion that Bobby's contention is without merit. Other than the circuit court's statement that the visits were "conducted at night," when in fact the visits occurred during the day, the circuit court's finding that Young's investigation and report were unreliable and incomplete was supported by Young's own

testimony. Thus, the circuit court's finding is supported by substantial evidence and is not clearly erroneous.

For the foregoing reasons, the orders of the Madison Circuit Court are affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Tracey E. Burkett
Richmond, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

James W. Baechtold
SHUMATE, FLAHERTY, EUBANKS, & BAECHTOLD, P.S.C.
Richmond, Kentucky