RENDERED: OCTOBER 19, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000597-ME

CHRISTOPHER A. WILLIAMS — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NOS. 06-J-506-517 AND 06-J-506-838

RACHEL A. CUNNINGHAM — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; KNOPF,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Christopher Williams appeals from an order granting joint custody of his daughter, Emily Cunningham, to him and the child's mother, Rachel Cunningham, but finding it to be in the child's best interest that her primary residence be with her mother. After careful review, we affirm the judgment of the Jefferson Family Court.

[1] Senior Judge William L. Knopf, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Christopher and Rachel are the natural parents of ten-month old, Emily, but have never been married. Neither party asserts that the other is an unfit parent nor does either question paternity.

Rachel, who resides with her mother and twenty-three year old brother, has been Emily's primary caregiver since birth. After initially not being involved in Emily's life, Christopher began calling Rachel once or twice a week seeking to come by her house to visit Emily. Rachel allowed access to Emily unless she was breast-feeding or needed care, and alternative times were always offered in those situations. Christopher never asked to take Emily away from the house, or for an overnight visit until after the filing of court proceedings.

On October 27, 2006, Christopher filed a Petition for Paternity, Custody, and Visitation. A hearing was held on January 10, 2007. At the hearing, Christopher admitted that he was not comfortable being alone with Emily. Rachel then testified that, on November 25, 2006, she agreed to drop Emily off at Christopher's house for their first visit on their own. Christopher, however, did not have the essentials to care for Emily, i.e. bottles, diapers, wipes, etc. Christopher also failed to listen or follow medication needs for Emily and ignored Rachel's instructions to properly cover Emily's head and ears when outdoors.

Based upon the testimony at the hearing, the court determined it to be in Emily's best interest for the parties to share joint custody but for Emily to primarily reside with Rachel. Christopher filed a Motion to Amend, Alter, or Vacate the January 30,

2007, Order, and the court, by a separate one-page Order entered March 7, 2007, granted the Motion to Alter or Amend, but denied the Motion to Vacate. The court by Amended Order concluded that Rachel had been the primary provider since birth and that she had provided a stable and caring environment. The court further determined that although Christopher had "demonstrated a willingness to care for Emily that he had not provided a stable environment and seemed to lack insight into the need to plan ahead for the care of a young infant." The court then fashioned a parenting plan taking into consideration among other things the age of the child and the parties' work schedule. This appeal followed.

In *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003), the Kentucky Supreme Court held that a reviewing court may set aside findings of fact in a custody case "only if those findings are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence." *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App. 2005), *citing Moore*, 110 S.W.3d at 354. Substantial evidence has been defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Id*. Mere doubt as to the correctness of a finding will not justify its reversal. *Id*.

> After a trial court makes the required findings, it must then apply the law to the facts. The determination of the proper law to be applied to the facts is reviewed *de novo*. [Furthermore], 'the resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion.' 'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or

> capricious disposition under the circumstances, at least an unreasonable and unfair decision.'

Id. (citations omitted).

Christopher presents two arguments: first, that the trial court wrongfully applied the long-since abolished tender years presumption to determine custody; second, that the trial court's findings were not supported by substantial evidence. We disagree on both counts.

While the court did state as part of its reasoning that "Emily had spent all of her young life in the home of a loving, caring mother who is closely bonded to [her]," this is not tantamount to applying the tender years presumption. The tender years presumption, which expressed preference for mothers as custodians of young children, applied only where both parents were found equally fit to raise the child. *See Jones v. Jones*, 577 S.W.2d 43, 45 (Ky.App. 1979). The court clearly found that although "[Christopher] has demonstrated a willingness to care for his daughter...[he] does not have a stable environment at this time and appears to lack insight into the need to plan ahead for the care of a very young infant." The court weighed the testimony it heard and determined that Christopher was not as fit as Rachel at this time. Therefore, we find no error.

Christopher's second argument must also fail. He essentially contends that the court erroneously placed greater weight on the testimony and opinion of Rachel than on his own testimony and opinions. This Court, however, will not second guess a trial court that has had the opportunity not only to listen to the testimony of the witnesses but

also to observe their demeanor when presenting it. *Richardson v. Richardson*, 18 S.W.2d 387, 390 (Ky. 1949). Having carefully reviewed the record, we conclude that the court's findings were supported by credible evidence and that none of the findings were clearly erroneous.

Accordingly, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sammy Deeb
A. Holland Houston
Louisville, Kentucky

BRIEF FOR APPELLEE:

Denise M. Helline
Ruck, Wilson, Helline & Brockman, PLLC
Louisville, Kentucky