

RENDERED: NOVEMBER 2, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002097-ME

PAUL JOHNSON AND
TINA JOHNSON

APPELLANTS

v. APPEAL FROM LEE CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, SENIOR JUDGE
ACTION NO. 07-CI-00223

JAMES ROBERT OVERBEE
AND DONNA OVERBEE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Paul Johnson and Tina Johnson bring this appeal from a September 15, 2011, order of the Lee Circuit Court denying a petition for custody of their biological child, S.J. We affirm.

Paul and Tina Johnson were living together but not married when S.J. was born on December 21, 2004.¹ As a result of Tina's drug use, S.J. tested positive for opiates, benzodiazepines, amphetamines, and methamphetamines upon her birth. As a result of S.J.'s positive drug test, the Commonwealth of Kentucky Cabinet For Health and Family Services (Cabinet) filed a petition for emergency custody of S.J. The Cabinet temporarily placed S.J. with a maternal aunt on December 29, 2004. The Johnsons regained custody of S.J. on February 4, 2005.

Some four months later on July 20, 2005, the Cabinet filed a second petition for emergency custody of S.J. This time S.J. had been admitted to the hospital for a gunshot wound through the abdomen. Tina apparently shot S.J. with a .22 caliber handgun during a domestic dispute with Paul. While Tina brandished the gun, Paul held S.J. in front of his body as a shield. Even though S.J. was in the direct line of fire, Tina apparently fired the gun and wounded both S.J. and Paul.

In light of the shooting, the Lee District Court granted the Cabinet emergency custody of S.J. on July 20, 2005. To keep S.J. in the care of family, Tina contacted her cousin Donna Overbee. Tina requested that Donna and her husband, James Robert Overbee, volunteer for kinship care through the Cabinet and assume custody of S.J. The Overbees agreed and were given temporary custody of S.J. in December of 2005. The Lee District Court ultimately conducted an adjudication hearing and granted permanent custody of S.J. to the Overbees.

The order awarding permanent custody was entered March 22, 2006. The

¹ Sometime after the birth of S.J., Tina Kidd and Paul Johnson were married and Tina's name became Tina Johnson.

Johnsons were present during the hearing, were represented by counsel, and made no objection to the award of permanent custody to the Overbees. Additionally, the Johnsons did not appeal the March 22, 2006, permanent custody award.

On December 11, 2007, the Johnsons filed a petition for custody of S.J. in Lee Circuit Court and named the Overbees as respondents. By order entered September 15, 2011, the Lee Circuit Court found that the Johnsons waived their superior right to custody of S.J. and reasoned:

[T]he [Johnsons] waived their superior right to custody when Ms. Johnson (then Kidd) solicited her cousin, Donna Overbee, to serve as custodian for [S.J.] to resolve the juvenile abuse case. . . . The parents were present in Court, represented by counsel and took no exception nor appeal to the Cabinet's recommendation or the Court's order. These unique circumstances cause the Court to conclude that these parents voluntarily and intentionally surrendered parental custody of their infant child.

After so concluding, the circuit court found that it was in the best interest of S.J. to remain in the Overbees' custody. This appeal follows.

The Johnsons maintain that the trial court erred by finding that they waived their right to superior custody of S.J. For the following reasons, we disagree.

Kentucky has long recognized the superior claim of a biological parent to the custody and control of his or her child. *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004). However, such a superior claim is not without limit. A third party may acquire standing to obtain custody of a child if the biological parent is unfit or if the biological parent waived his or her superior right to custody. *Moore v.*

Asente, 110 S.W.3d 336 (Ky. 2003). To waive the superior right to custody, the biological parent must have intended to voluntarily and indefinitely relinquish custody of the child. *Id.*

The determination of waiver is a factual finding made by the trial court and must be proven by clear and convincing evidence. *Vinson*, 136 S.W.3d 465. A finding of waiver will be disturbed on appeal only if clearly erroneous. Kentucky Rules of Civil Procedure 52.01; *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005); *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010).

In the present case, the record indicates that Tina directly requested the Overbees to assume custody of S.J. During the permanent custody proceeding in district court on March 22, 2006, the Johnsons were present in court, were represented by counsel, and made no objection to the Overbees being awarded permanent custody of S.J. It is clear that the Johnsons intended to relinquish permanent custody of S.J. to the Overbees at the permanent custody proceeding. Moreover, the Johnsons' failure to pursue an appeal of the March 22, 2006, order awarding permanent custody of S.J. to the Overbees further evidenced their intent to permanently relinquish custody of S.J. Consequently, we conclude that clear and convincing evidence existed to support the trial court's finding that the Johnsons waived their superior right to custody of S.J.

We view any remaining contentions of error as either moot or without merit, although we note that substantial evidence appears of record that would support a finding that the Johnsons were unfit to be parents of S.J. at this time.

For the foregoing reasons, the order of the Lee Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Bruce Francisky
Winchester, Kentucky

BRIEF FOR APPELLEES:

Melissa C. Howard
Jackson, Kentucky