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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001518-MR

DAVID G. SORRELL — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 00-CI-00388

MABEL VINSON AND
DON VINSON, HER HUSBAND;
AND PAMELA VINSON — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: David Sorrell has appealed from an order entered by the Greenup Circuit Court on June 18, 2001, which confirmed a report by the Domestic Relations Commissioner. The trial court awarded custody of Sydney Vison to her maternal grandparents, Mabel Vinson and Don Vinson, and set David's visitation rights.[1]

[1]This order also referred the child support issue "back to the Commissioner for further review and recommendation." Pursuant to Kentucky Rules of Civil Procedure (CR) 54.02 this order appeared to be a non-final and non-appealable order, so this Court on August 29, 2002, sua sponte entered an order for the parties to show cause why this appeal should not be dismissed. This Court was advised that a final order was entered

Having concluded that the trial court's finding that David had waived his superior right to custody was not supported by clear and convincing evidence and that the award of custody to the Vinsons was an abuse of discretion, we reverse and remand for further proceedings.

Sydney, whose date of birth is January 21, 1993, is the daughter of David Sorrell and Pamela Vinson. While David and Pamela never married, they were living together when Sidney was born; and they continued to live together in Cincinnati, Ohio, as a family until David left in November 1996. After the separation, Pamela and Sydney moved to Greenup County and David voluntarily paid Pamela $435.00 per month in child support until October 2000.[2] Before this action was commenced in August 2000, David filed a motion to obtain joint custody of Sydney and to have specific visitation rights established.[3]

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by the Greenup Circuit Court on September 10, 2002, and subsequently a supplemental record on appeal was certified which includes this order. Accordingly, this appeal was allowed to proceed based on the fact that the order entered on September 10, 2002, caused the interlocutory order of June 18, 2001, to become final and appealable.

[2]There was no court order for child support and the record is unclear as to the total child support paid by David. The last check and some previous checks were for $300.00, instead of $435.00. However, it is agreed that David paid substantial and regular child support from November 1996 until October 2000, a date after the Vinsons had filed their custody petition.

[3]The motion was filed in the Greenup Circuit Court on March 7, 2000, in Civil Action No. 00-CI-00114. This motion was not included in the record on appeal, but the parties stipulate to its existence. Having obtained a copy of this record from the Greenup Circuit Court, we take judicial notice that the motion was filed but never ruled upon, and that David's counsel was allowed to withdraw based on his claim "that there has been a

The Vinsons began the action that is before us by filing a motion for custody of Sydney on August 16, 2000. The evidence showed that after Pamela moved to Greenup County in 1996 the Vinsons became very concerned about the safety and well being of Sydney due to the serious substance abuse problems that Pamela experienced. During the summer before the Vinsons filed the custody petition, Pamela had allowed Sydney to stay with them for an extended period of time.[4] Pamela's son Brandon, who was born during a previous relationship and who was 17 years old at the time of the hearing, had been living with the Vinsons since Pamela voluntarily relinquished custody of him to them when she went to prison around 1990. Pamela testified that she allowed Sydney to live with the Vinsons during the summer of 2000 because they had a swimming pool, Sydney had more friends to play with, the Vinsons lived in a safer neighborhood than her, and it would give Sydney an opportunity "to bond with her brother." Pamela said she viewed the summer visit for Sydney "like Camp Nanny and Poppy's." David was made aware of the summer visit, but he and Pamela both testified that he thought Sydney was merely spending

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break down [sic] in communication between the Petitioner and [counsel]" and that "[a]pparently the Petitioner does not want [counsel] to proceed any further on his behalf." The trial court entered an order on July 26, 2000, allowing counsel to withdraw and giving David 30 days to obtain new counsel. No further action was taken in that particular case.

[4]In the trial court's order entered on September 19, 2000, granting the Vinsons temporary custody, the trial court found that Sydney had been living with the Vinsons "since at least June 11, 2000, with the consent of the Respondent/mother." At the final hearing, the parties stipulated to the trial court's findings contained in that temporary order.

the summer with the Vinsons. Both parents testified that when David learned that the Vinsons had taken court action to obtain temporary custody of Sydney that David "was upset".

In the Vinsons' verified motion for custody filed in the Greenup Circuit Court in August 2000, they alleged that Pamela was unfit to have custody of Sydney, but they failed to name David as a party to the custody action as required by KRS[5] 403.480. On December 19, 2000, David filed a motion to intervene in the custody action; and on February 27, 2001, he filed a motion for custody and visitation of Sydney. On March 5, 2001, the Vinsons filed a response to David's motion, and alleged that he was unfit to have custody of Sydney and that his visitation "on a temporary basis . . . [should] be supervised and not overnight." The Vinsons' position was based on David being "a practical stranger to the child;" and they claimed that "unfettered visitation with the child would subject her to serious endangerment."

On April 3, 2001, a custody hearing was held before the Commissioner for the Greenup Circuit Court. In an order entered on April 6, 2001, David was granted temporary visitation with Sydney on every other weekend from Friday evening until Sunday evening.[6] On May 3, 2001, the Commissioner filed a report containing his recommendations for custody and visitation. Since

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[5]Kentucky Revised Statutes.

[6]This visitation was in accordance with the Greenup Circuit Court's standard visitation guidelines.

the trial court confirmed the report "in its entirety[,]" the findings as recommended by the Commissioner became the findings of the trial court.[7]

The trial court's order of June 18, 2001, confirmed the Commissioner's report and found, as alleged by the Vinsons, that Pamela was unfit to have custody of Sydney.[8] The trial court did not find David to be unfit, but it did find that he had waived his superior right to custody of Sydney. Specifically, the trial court found that David's "lack of contact with Sydney from the time she moved to [Greenup County] in 1996 to the present constitutes a waiver of his superior right to custody as the biological father[.]" The trial court further found that Sydney was in a stable home environment with the Vinsons and that it was in her best interests for the Vinsons to have custody of her. David was granted visitation of one weekend per month, but this limited visitation was a reduction from the temporary visitation he had received just two months earlier. This appeal followed.

David has identified three issues on appeal: (1) that the trial "court did not apply the correct standard for custody as between parents and non-parents";[9] (2) that the trial "court

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[7]CR 52.01.

[8]This finding was based largely on Pamela's continuing substance abuse problems. While Pamela has been named as an appellee in this appeal, she did not file an appeal, a cross-appeal, or a brief.

[9]A determination of custody as between parents and non-parents often involves the application of the de facto custodian

abused its discretion in finding that [David had] relinquished his superior right to custody"; and (3) that the trial "court abused its discretion in reducing [David's] visitation rights."[10]

The only issue that requires full discussion on appeal is whether the trial court's finding that David waived his superior right to custody of Sydney[11] was supported by clear and convincing evidence. As our Supreme Court has noted, "[t]he United States Supreme Court has recognized that parents have fundamental, basic and constitutionally protected rights to raise their own children and that any attack by third persons (and we would include grandparents in that category) seeking to abrogate that right must show unfitness by 'clear and convincing evidence'" [emphasis original].[12] In a custody dispute between a parent and a non-parent, the "best interests of the child" standard set forth in KRS 403.270 applies only if the parent "has made a waiver of his superior right to custody, an intentional or

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statute at KRS 403.270(1), but the trial court did not rely upon the de facto custodian statute in awarding custody to the Vinsons. David's counsel voluntarily conceded this issue at oral argument.

[10]Due to our reversal of the custody award, the issue of David's visitation is moot. However, we note that if the custody award had been affirmed, the order restricting David's visitation would have been reversed for insufficient evidence to support a finding of serious endangerment to Sydney. See Hornback v. Hornback, Ky.App., 636 S.W.2d 24, 26 (1982); and KRS 403.320(1).

[11]KRS 405.020.

[12]Davis v. Collinsworth, Ky., 771 S.W.2d 329, 330 (1989)(citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); and Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)).

voluntary relinquishment of a known right to custody."[13] "[T]he best interests of the child is considered only after the trial court finds that the parent 'knowingly and voluntarily' surrendered the right to custody by clear and convincing evidence."[14]

In 1995 our Supreme Court addressed this issue when it simultaneously rendered decisions in the two important cases of Greathouse, supra, and Shifflet v. Shifflet.[15] The Supreme Court remanded both of these cases back to the trial court for additional findings to determine whether a waiver of the natural parent's superior right to custody had occurred.[16]

It was stated in Shifflet that "[t]he parent's superior right of custody is not lost to a non-parent, including a grandparent, simply because a child is left in the care of the non-parent for a considerable length of time."[17] In Greathouse, the Court stated:

> We recognize that, at present, in usual circumstances grandparents must realize, when they take in a grandchild to care for, that agreeing to care for a grandchild is a

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[13]Greathouse v. Shreve, Ky., 891 S.W.2d 387, 390 (1995).

[14]Diaz v. Morales, Ky.App., 51 S.W.3d 451, 454 (2001).

[15]Ky., 891 S.W.2d 392 (1995).

[16]For a discussion of Greathouse and Shifflet, see Kathryn B. Hendrickson, Maintaining the Status Quo in Custody Disputes Between Parents and Third Party Contestants, 23 N.Ky.L.Rev. 451 (1996); and see also D. E. Ytreberg, Annotation, Award of Custody of Child Where Contest is Between Child's Father and Grandparent, 25 A.L.R.3d 7 (1969).

[17]Shifflet, supra at 394.

> temporary arrangement, not a surrender of custody, regardless of the quality of care and the bonding that follows. A short term visit or delivery of possession shall not be construed as proof a knowing and voluntary waiver has occurred.[18]

Our Supreme Court further stated in Greathouse, that to constitute a waiver of that superior right,

> waiver requires proof of a "knowing and voluntary surrender or relinquishment of a known right." Because this is a right with both constitutional and statutory underpinnings, proof of waiver must be clear and convincing. As such, while no formal or written waiver is required, statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof.[19]

In Fitch v. Burns,[20] which also involved a child custody dispute between the father and the grandparents, our Supreme Court addressed the clear and convincing standard of proof as follows:

> Because there is no recent Kentucky case attempting to define precisely what this means, we turn to McCormick on Evidence, 2nd ed., p. 796, Sec. 340(b) (1972), a textbook discussion of "satisfying the burden of persuasion" where there is a "requirement of clear and convincing proof." McCormick states that the "phrasing within most jurisdictions has not become as standardized as is the 'preponderance' formula," and that "no high degree of precision can be obtained by these groups of adjectives." He concludes that the best formulation of the various terms that have been used to express this concept is that the trier of fact "must be

[18]Greathouse, supra at 391.

[19]Id.

[20]Ky., 782 S.W.2d 618 (1990).

> persuaded that the truth of the contention is 'highly probable.'" Id.
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> We conclude that where the "burden of persuasion" requires proof by clear and convincing evidence, the concept relates more than anything else to an attitude or approach to weighing the evidence, rather than to a legal formula that can be precisely defined in words. Like "proof beyond a reasonable doubt," "proof by clear and convincing evidence" is incapable of a definition any more detailed or precise than the words involved. It suffices to say that this approach requires the party with the burden of proof to produce evidence substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt.

Turning to the case sub judice, we note that we have thoroughly reviewed the record, including reading the entire 140-page hearing transcript. The record shows that Sydney had been left with the Vinsons for a period of only approximately 9 1/2 weeks when the custody petition was filed.[21] The basis for the trial court's finding that David had waived his superior right to custody was that after David and Pamela separated in 1996 David's contact with Sydney has been infrequent and sporadic, with only three to four visits per year. The trial court found that Sydney had spent very little, if any, extended visitation time with David other than some occasional daytime visitation in the Greenup County area.[22]

We believe the separate concurring opinion in Shifflet,

[21]June 11, 2000, to August 16, 2000.

[22]Rhonda Ward, David's fiancee at the time of the hearing, acknowledged that she and David had only seen Sydney twice in the last year, for a total of 14 hours.

which has been referred to by both David and the Vinsons, is helpful in addressing this issue. Justice Spain wrote:

> Among the factors the trial court should consider in deciding whether waiver occurred are: (1) length of time the child has been away from the parent; (2) circumstances of separation; (3) age of the child when care was assumed by the nonparent; (4) time elapsed before the parent sought to reclaim the child; and (5) frequency and nature of contacts, if any, between the parent and the child during the nonparent's custody.[23]

In considering these factors, which are all interrelated, we note that during some periods David did not visit with Sydney for months at a time, but there is also evidence in the record that during most, if not all, of these extended periods when David did not visit with Sydney that he had made attempts to visit with her but that he had been thwarted in his efforts. Pamela's testimony revealed that she was not agreeable to David visiting with Sydney if his fiancee was going to be there because "she has pushed herself into our lives rather than to just let he and I work things out." While the Vinsons denied David's allegations that they had denied him visitation or contact with Sydney by telephone, there was testimony beyond David's claims to at least raise questions about the Vinsons' attitude toward David. At the beginning of Mrs. Vinsons' testimony when she was asked "Who is Sydney's father?" she responded, "As far as I know, this gentleman has stepped up and said that he is." From all the evidence in the record, there was

[23] Shifflet, supra at 397.

not even a hint that anyone else could have been Sydney's father or that David had ever failed to claim her as his child. When Mrs. Vinson was asked about David visiting with Sydney, she stated, "I had no problem with Mr. Sorrell as far as being able to work with him. There is a new respect there between each of us. There certainly is on my part." This testimony provides insight into the relationship between the parties when it is juxtaposed with the fact that the Vinsons failed to even name David in the custody petition as being Sydney's father.[24]

It is also important to note that Mrs. Vinson testified that she had had the concept of joint custody explained to her and the she "would have no problems with [the Vinsons having physical custody of Sydney and David and Pamela having joint custody] as long as there is due respect between each person." She saw no problem with notifying Sydney's parents of important matters such as medical treatment and progress at school. It is also noteworthy that the trial court did find, to David's favor, that David has paid some child support to Pamela during the four or five years that they have lived apart, even though there was no court order requiring him to provide such child support. In fact, it appears that for four years David voluntarily paid child support in an amount consistent with any amount that could have

[24]There was also evidence that before the custody petition was filed Mrs. Vinson had been interviewed by a social services caseworker concerning Pamela's neglect of Sydney and the report did not reveal the name of Sydney's father. It was Mrs. Vinson's testimony that she had not been asked to provide the name of the father.

been ordered by a court.[25]

When the Vinsons filed their petition for custody, Sydney, had been living with them for a little more than two months. David had sought custody and specific visitation with Sydney in March 2000, and he intervened in this action in December 2000 to assert his superior right to custody. David argues in his brief that his actions in filing two motions for custody or visitation with Sydney are "hardly the actions of a parent who wants to give up his custody rights." David further asserts that he visited with Sydney regularly after she and Pamela moved to Kentucky, but the Vinsons would only allow him to visit Sydney on their terms and conditions. He also claims that after the Vinsons were awarded temporary custody, there was a long period of time when he could not reach Sydney by telephone. David and Pamela both testified that Pamela did not intend to relinquish permanent custody of Sydney to the Vinsons when she allowed Sydney to spend the summer with her parents.

"The determination of custody of children is perhaps the most important and difficult function of the courts."[26] We are acutely aware of the role of the trial court and this appellate court in matters of child custody. A reviewing court should not substitute its findings of fact for those of the trial court and we must affirm the trial court's findings unless they

[25]Ironically, David paid child support for four years without a court order, but he stopped paying during the pendency of this custody action.

[26]Chastain v. Chastain, Ky., 405 S.W.2d 758, 759 (1966).

are not supported by the evidence.[27] We recognize that the trial judge is in the best position to judge the credibility of the witnesses and to weigh the evidence.[28]

If the standard of proof in this matter were a mere preponderance of the evidence, we would probably agree with the trial court that there was substantial evidence of record to support the finding that David waived his superior right to custody.[29] However, the standard of proof under these special circumstances is much higher. Even if David's testimony is rejected, the record still contains sufficient evidence favorable to him to at least mitigate against a finding that the evidence is clear and convincing that he waived his superior right to custody. We cannot say that the record supports a finding that David's wavier of his superior right to custody was highly probable; there is just too much evidence to the contrary.

Accordingly, we reverse the trial court's award of custody and remand this matter for further proceedings consistent with this Opinion, including an award of custody to David, visitation rights to Pamela, and child support from Pamela to David. The Vinsons' claims must be dismissed since they have

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[27]Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

[28]Taylor v. Taylor, Ky., 591 S.W.2d 369, 370 (1979).

[29]That is, if the fact-finder had chosen to wholly reject David's evidence and to wholly accept the Vinsons' evidence, there would have been sufficient evidence to induce such a conviction in the mind of a reasonable person, whereby the finding could not be held to be clearly erroneous. See Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777, 782 (2002).

failed to meet the burden of proof required to defeat David's superior right to custody of his daughter.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roger W. Hall
Catherine C. Hadden
Ashland, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

James W. Lyon, Jr.
Greenup, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Roger W. Hall
Ashland, Kentucky