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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000559-ME

R.T. APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 07-CI-00644

D.R.; V.R.; AND J.T. APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: The mother of E.C.T. (Mother) appeals from an order of the Greenup Family Court which determined that she had waived her superior right to custody of the child, awarded joint custody of the child to Mother and D.R. and V.R., and established a fifty-fifty time sharing schedule between the two

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

residences. Because we conclude that Mother did not, as a matter of law, waive her superior right to custody to E.C.T. by merely agreeing to the entry of an order designating D.R. and V.R. to be temporary guardians of the child, we reverse the trial court's determination to the contrary, and remand for the entry of a judgment restoring custody of the child to her as existed prior to the guardianship.

FACTUAL AND PROCEDURAL BACKGROUND

E.C.T. was born June 4, 2004. In connection with the dissolution of their marriage Mother and Father agreed to joint custody of the child with Mother being the primary residential custodian. D.R. and V.R. (a married couple) are friends of Mother and are not related to E.C.T. Prior to the events at issue herein, D.R. and V.R., who live in Lexington, Kentucky, had on occasion cared for E.C.T. for short periods of time.

Following the divorce, Mother began suffering severe financial difficulties. She lost her job at King's Daughters Medical Center and had to take a lower paying job at Wendy's. As a result, she could not meet her monthly bills, and the threat of utility service cut-offs loomed.

Faced with this predicament, Mother asked D.R. and V.R. for assistance in caring for E.C.T. until her financial circumstances improved. D.R. and V.R. first took custody of the child in May 2007. Shortly thereafter, with the cooperation of Mother, D.R. and V.R. petitioned the Greenup District Court to be appointed as the legal guardians of E.C.T. pursuant to Kentucky Revised Statutes (KRS) Chapter 387.025. It appears that a primary reason for undertaking the

guardianship route was so that D.R. and V.R. would have the legal authority to make timely medical decisions for the child if need be. On May 22, 2007, the district court signed an order appointing D.R. and V.R. as the legal guardians of E.C.T.

During the period of guardianship Mother maintained contact with E.C.T. by way of visitations and telephone calls. She soon obtained a better paying job at Wal-Mart and got her utility bills paid up to date. Believing that her financial situation had stabilized, toward the end of July, 60 days or so since the beginning of the guardianship and 90 days or so following the transfer of custody, Mother requested that E.C.T. be returned to her. Unconvinced that Mother had stabilized her financial situation, D.R. and V.R. refused to return the child, and requested that Mother provide them with documentation of her current financial situation.

On August 2, 2007, Mother filed a Motion to Terminate Guardianship in Greenup District Court. In her affidavit in support of the motion Mother stated, among other things, as follows:

> The Affiant agreed with [D.R. and V.R.] to grant them temporary guardianship because she was experiencing financial problems, with the understanding that the child would be returned to the Affiant when those issues were resolved. The Affiant has resolved the issues and is requesting that the minor child be returned to her, and [D.R. and V.R.] have refused to abide by the agreement to return the child to her. This was to be a temporary guardianship intended only to assist the Affiant while working through the financial difficulties, and was never intended as anything but temporary assistance.

D.R. and V.R. filed a response objecting to an immediate termination of the guardianship, arguing instead for "a gradual re-integration of the child into [Mother's] household." In support of the pleading V.R. filed an affidavit in which she stated, in part, "[t]here was an understanding that the guardianship was temporary in nature and was based upon [Mother's] financial incapability at the time to provide for the child's basic needs." Following a hearing, on August 17, 2007, the district court entered an order ruling that it "does not believe it is the proper forum for the litigation of a contested issue as to the continuation of the guardianship, which in this case more closely resembles a custody dispute." The district court advised Mother that she should perhaps consider further pursuit of the matter in Family Court.

On September 18, 2007, Mother filed a Petition for Custody and to Terminate Guardianship and a Motion for Return of Custody in Greenup Family Court. In their response to the motions, D.R. and V.R. that stated "while recognizing that the infant child should ultimately be with his mother," the reintegration should be gradual "in order that these Respondents might have adequate opportunity to make observations as to the physical and emotional well being of the child." D.R. and V.R. also stated that Mother should be required to document her financial situation "since it was difficulty along these lines which caused Petitioner to believe she might not be able to provide the proper care for [E.C.T.] to begin with."

Despite their previous statements that they agreed that E.C.T. should in due course be returned to Mother, at the January 29, 2008, hearing on Mother's motions D.R. and V.R. changed their position and asserted that they should be awarded permanent custody of the child.

On February 7, 2008, the family court entered an order wherein it determined that Mother had waived her superior right to custody by agreeing to grant guardianship to D.R. and V.R., and that therefore the parties should be treated as being on level ground in its custody determination. Upon application of the best interest custody factors contained in KRS 403.270 the court determined that it was in the best interest of E.C.T. that Mother and D.R. and V.R. be awarded joint custody of the child. The court ordered that residential custody of the child be shared on a fifty-fifty basis. This appeal followed.

DISCUSSION

Before us, Mother contends that the family court erred in its determination that her agreement to the guardianship proceedings in district court constituted a waiver of her superior right to custody of the child. We agree.

> Custody contests between a parent and a nonparent who does not fall within the statutory rule on 'de facto' custodians are determined under a standard requiring the nonparent to prove that the case falls within one of two exceptions to parental entitlement to custody. One

> exception to the parent's superior right to custody arises if the parent is shown to be 'unfit' by clear and convincing evidence. A second exception arises if the parent has waived his or her superior right to custody.

Moore v. Asente, 110 S.W.3d 336, 359 (Ky. 2003), *quoting* 16 Louise E. Graham & James E. Keller, *Kentucky Practice-Domestic Relations Law* § 21.26. It is undisputed that D.R. and V.R. do not qualify as de facto custodians and that Mother is not an unfit parent. At issue in this case is whether the family court correctly determined that Mother waived her superior right to custody.

The factors relevant to determining generally whether a parent has waived his or her superior custody right were set forth in *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004). These factors include: (1) the 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 non-parent; (4) time elapsed before the parent sought to claim the child; and (5) frequency and nature of contact, if any, between the parent and the child during the non-parent's custody. *Id.* at 470; *see also Shifflet v. Shifflet*, 891 S.W.2d 392 (Ky. 1995) (Spain, J., concurring opinion).

Upon application of the first *Vinson* factor, the record discloses that E.C.T. had been with D.R. and V.R. only about 90 days prior to Mother's request for the return of the child and 60 days since the guardianship order was entered.

The reason for the separation was that Mother had fallen upon hard financial times, was unable to meet her bills, and faced the impending cut-off of

her utility services. E.C.T. was a few weeks short of his third birthday at the time of the separation.

Factor four substantially overlaps with factor one, and, as previously noted, it had been about 90 days since the separation when Mother sought return of the child; when return was refused, Mother timely sought to terminate the guardianship in district court.

Under factor five, the record discloses that Mother maintained contact with the child during the separation by way of actual visitation and by telephone communications.

We believe that application of the *Vinson* factors compels the conclusion that Mother did not waive her superior right to custody by agreeing to D.R. and V.R.'s assumption of his guardianship. The ink had barely dried on the guardianship papers prior to Mother seeking the return of her child. Moreover, there were extraordinarily compelling circumstances which led to the separation – Mother's loss of her job at the hospital, the attendant reduction in pay at her job at Wendy's, and the looming cut-off of her utility services. Further, Mother maintained frequent contact with the child during the period of separation.

Accordingly, upon application of the *Vinson* factors, it is evident that Mother did not waive her superior right to custody of the child.

In its February 7, 2008, order the family court stated as follows:

> The Court finds the Petitioner has in fact waived her superior right to custody by agreeing to grant guardianship to [D.R. and V.R.]. Therefore the Court

> must view both [Mother and D.R. and V.R.] on level ground in determining custody of the child and therefore the standard to be used is the best interest of the child.

The family court did not apply the *Vinson* factors in reaching its conclusion, nor did it make any other findings in support thereof. In summary, the family court appears to have labored under the misimpression that a parent's agreement to the guardianship of a nonparent amounts to a *per se* waiver of her superior right to custody.

Contrary to the family court's misimpression, however,

> [h]istorically, a parent's superior right to custody, as opposed to a non-parent, is paramount and generally requires that a third party prove that the parent is unfit by clear and convincing evidence. The best interests of the child is [sic] considered only after the trial court finds that the parent "knowingly and voluntarily" surrendered the right to custody by clear and convincing evidence.

Diaz v. Morales, 51 S.W.3d 451, 454 (Ky. App. 2001). And, a short term visit or delivery of possession is not proof of waiver. *Id.*; *Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995). Further, a waiver of the parent's superior right to custody requires statements and circumstances equivalent to an express waiver. *Id.*; *Shifflet v. Shifflet*, 891 S.W.2d 392 (Ky. 1995). In the present case the evidence was insufficient to show that Mother had knowingly and voluntarily surrendered her superior right to custody of her child by clear and convincing evidence. Moreover, there was but a short term delivery of possession of the child, and the statements and circumstances of record do not reflect an express waiver by Mother of her superior right to custody.

Finally, we note that the family court did not cite any authority in support of its conclusion that a temporary agreement to guardianship amounts to the relinquishment of a parent's superior right to custody, nor do D.R. and V.R. cite us to such authority, nor have we been able to locate such authority. In addition, we are persuaded that such a rule would be a counterproductive public policy because such a penalty for agreeing to a temporary guardianship would discourage the use of the guardianship procedure, a procedure which has definite advantages over a less formal relinquishment of custody. *See*, e.g., KRS 387.065 (Granting guardian powers of a parent regarding the ward's support, care, and education).

In summary, the family court erroneously concluded that Mother had waived her superior right to custody by merely relinquishing temporary guardianship to D.R. and V.R. and, moreover, upon application of the *Vinson* factors we are persuaded that she did not so relinquish her superior right.

CONCLUSION

For the foregoing reasons the judgment of the Greenup Circuit Court is reversed, and the cause is remanded for the entry of an order awarding Mother custody to her child unimpeded by interference by D.R. and V.R.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES, D.R. AND V.S.:

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