

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000410-ME

PAUL STAMPER

APPELLANT

v. APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 09-CI-00463

DEREK NAPIER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND THOMPSON, JUDGES, LAMBERT,¹ SENIOR
JUDGE.

MOORE, JUDGE: Paul Stamper appeals the Anderson Circuit Court's (family court division) order dismissing his petition for custody of his minor grandson, Elijah Napier, who was ten years old at the time. After a careful review of the record, we reluctantly affirm because the record evidence does not support the required clear and convincing finding that the child's father, Derek Napier, is unfit.

¹ Senior Judge Joseph Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

I. FACTUAL AND PROCEDURAL BACKGROUND

As the facts of this case will illustrate, this is a classic example of the best interests of the child colliding with a natural parent's superior—and constitutional—right to custody over a nonparent. In the absence of clear and convincing evidence of unfitness, the latter principle will prevail. This rule of law brings no satisfaction to the Court, particularly in the case at bar. The record evidence is clear that Derek has taken little interest in fathering Elijah, but he has done at least enough to keep his parental rights intact.

Derek and Elijah's mother, Brenda, were married, but they separated less than a year before Brenda was tragically killed in an automobile accident. During the time they were separated, Elijah resided with Brenda. Brenda took Elijah to visit Derek because Derek did not have means of transportation as he was convicted of DUI in 2008. Elijah was with Derek at the time he was arrested. Derek also had a 2003 conviction for public intoxication. Following Brenda's death, the child lived with Derek in his mother's home. Stamper, Elijah's maternal grandfather, petitioned the family court for custody of Elijah, contending that during Brenda and Derek's separation, Derek

offered no financial support for either Brenda or the child. It was [Stamper] who provided for the child financially, providing a home for the child to live in, food for the child to eat, and all of the child's needs over and above what Brenda could afford. Even during the time when Brenda and [Derek] were living together, [Derek] offered no financial support to the family whatsoever.

A hearing was held on the matter, and the family court apparently ruled from the bench and orally informed the parties that it was dismissing Stamper's petition.² After Derek responded to Stamper's motion to reconsider, the family court entered a written order dismissing Stamper's petition for custody. In that order, the court stated that Derek

admitted to having had drug problems in the past but denied use of any illegal drugs at the present time. . . . Derek agreed to submit to a drug test the day of the hearing. The results of that test, which were positive for benzodiazepines, marijuana metabolites, and oxymorphone, were submitted for the record.

The family court also noted that a guardian *ad litem* (GAL) was appointed for Elijah, and the GAL had filed a report acknowledging "that the best interest standard might not apply in this case but nonetheless opined that it would be in Elijah's best interests to reside with his grandfather [Stamper]."

The family court noted that Stamper had withdrawn his assertion that he was a *de facto* custodian but continued to allege that Derek was unfit to have custody of Elijah. The court, after noting the types of evidence that had to be produced to show Derek's unfitness, pursuant to *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989), found as follows:

There is no evidence in the record that Derek inflicted or allowed to be inflicted physical injury, emotional harm, or sexual abuse a[g]ainst Eli[j]ah. As Elijah has continually been cared for by one or the other of his parents without interruption, there is no issue of abandonment. While there was testimony at the hearing from [Stamper] and his son James that Derek has suffered from depression, there was no expert testimony on this issue. The testimony from [Stamper] and his son cannot be

² There is no written order in the record before Stamper's motion to reconsider the court's dismissal of his petition for custody.

seen as rising to the level of clear and convincing evidence that Derek suffers from an emotional or mental illness sufficient to abrogate his superior right as a parent. Further, there is no allegation that Elijah is not receiving essential care while in the custody of his father.

[] The real issue in this case boils down to Derek's drug use and whether it rises to the level of moral delinquency and is of such a nature as would support an involuntary termination of parental rights under the Kentucky statutes. Clearly, Derek's testimony that he was drug free in the face of a positive drug test taken the same day raises serious questions as to his credibility and is certainly suggestive of . . . either moral delinquency or lack of contact with reality. Further, the fact of Derek's drug use raises serious concerns about his ability properly to parent Elijah. . . . While the Court has serious concerns about Derek's drug use and his willingness to lie about it, these issues alone would not support involuntary termination of his rights under Kentucky law. In the proper setting, they might support a temporary removal of Elijah from his father's custody but all parties would thereafter be bound to work to return Elijah to his father's custody at the earliest time.

Therefore, the court dismissed Stamper's petition for custody.

Stamper now appeals, contending that the family court erred in concluding that there was no clear and convincing evidence that: (a) Derek had inflicted or allowed to be inflicted emotional harm upon Elijah; (b) Derek was morally delinquent; (c) Derek suffered from emotional or mental illness; and (d) Derek had failed to provide essential care for Elijah.

II. STANDARD OF REVIEW

We may "set aside the trial court's findings when those findings are clearly erroneous." *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004). "To determine whether findings are clearly erroneous, reviewing courts must focus on whether those findings are supported by substantial evidence." *Id.*

“[S]ubstantial evidence” is [e]vidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men. Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, [m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal, and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. (internal quotation marks omitted). Accordingly, the standard for Stamper to prevail on appeal is very high.

III. ANALYSIS

A. CLAIM REGARDING FAILURE TO FIND EMOTIONAL HARM

Stamper first alleges that the family court erred in concluding that there was not clear and convincing evidence that Derek had inflicted or allowed to be inflicted emotional harm upon Elijah. Regardless of whether it is in the child’s best interest, the precedent and law that we are mandated to follow is clear that “a natural parent is entitled to custody over a non-parent unless it is demonstrated that the natural parent (1) is unsuitable to have custody, (2) is harmful to the child, (3) has contracted to give his child away, or (4) is clearly estopped to claim custody.” *Forester v. Forester*, 979 S.W.2d 928, 929 (Ky. App. 1998). “The United States Supreme Court has recognized fundamental, basic and constitutionally protected rights of parents to raise their own children; and, that an attack by third persons

seeking to abrogate that right must show unfitness by ‘clear and convincing evidence.’” *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). “[A] natural parent’s superior right to the child’s care and custody can be abrogated in an action involving a non-parent seeking custody [only] by a showing of unfitness sufficient to support an involuntary termination of parental rights.” *Id.* (internal quotation marks omitted).

[T]he evidence necessary to show unfitness of a parent when a third party seeks custody includes: (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.

Id.

Stamper admits that there was no evidence that Derek inflicted or allowed to be inflicted physical injury or sexual abuse upon Elijah. However, he asserts that Derek inflicted emotional harm on Elijah when, following Brenda’s death, Derek “promptly withdrew Elijah from his school, friends, family, and everything that was familiar to Elijah, and cut off all visitation between Elijah and Stamper.” Stamper also notes that the GAL opined Elijah was detrimentally affected by not allowing visitation between Stamper and Elijah. Stamper contends that he and one of his relatives testified at the hearing that Elijah had “a paralyzing fear of the dark, of demons and of death and dying which has only become exacerbated since Brenda’s death,” yet Derek had not provided Elijah with “grief counseling or any other therapy which might assist him in dealing emotionally

with his mother's death and the move from their home in Lawrenceburg to Derek's mother's home in Irvine." Finally, Stamper alleges that he and one of his relatives "testified about acts of domestic violence committed by Derek against Brenda in Elijah's presence."³

In the present case, the family court found that there was no evidence of emotional harm to Elijah. There is some evidence in the record that a court *could* find emotional harm, but this was a factual and credibility finding left to the discretion of the family court. It is unfortunate that Elijah was moved into his father's home in another county, his school was changed, his visitation with his grandfather was terminated, and he was provided no grief counseling following Brenda's death. If Derek has Elijah's best interest at heart, logically it would follow that he would make this seemingly difficult time in Elijah's life as easy as possible, which rationally would include maintaining a connection with Brenda's family and counseling. But, as the GAL, the family court and this Court have noted *supra*, this case cannot be judged by the best interest standard. And, because whether Elijah suffered emotional harm is a factual finding based on credibility, we cannot find error on the family court's part. We do pause to note that a psychological evaluation on Elijah's mental status does not appear in the record, which may have given the family court more guidance on this issue.

³ Stamper cites an unpublished case, *Knight v. Young*, No. 2008-SC-00404-DG, 2010 WL 252246 *1 (Ky. Jan. 21, 2010) (unpublished), in support of his claims. However, we do not find *Knight* to meet the criteria for citation to unpublished cases pursuant to CR 76.28(4)(c). Even if we did, *Knight* does not compel the result Stamper seeks.

Additionally, Stamper claims that Elijah was exposed to emotional harm based on domestic violence while Derek and Brenda were married. Stamper testified that late one evening when Elijah, Derek, and Brenda lived next door to Stamper, Elijah came running out of his house yelling that Derek was going to kill Brenda. The family court found that there was no evidence of emotional harm to Elijah. Based on our restrictive standard of review, these findings are generally within the exclusive province of the family court so long as they are not clearly erroneous. Perhaps, the family court did not believe Stamper, and no records were introduced to support that a police or other report was made regarding this incident. Accordingly, on the record before us, we cannot say that the family court's determination regarding this claim was clearly erroneous.

B. CLAIM THAT DEREK WAS MORALLY DELINQUENT

Stamper next asserts that the family court erred in concluding that there was no clear and convincing evidence that Derek was morally delinquent. Regarding Derek's positive drug test the day of the custody hearing, Derek's attorney explained to the circuit court during a subsequent hearing on Stamper's motion to reconsider that the oxycodone was in Derek's system because he allegedly had a prescription for it, although his attorney said that Derek did not have any record of that. As for the marijuana that Derek tested positive for, his attorney explained that Derek had a problem with marijuana. Certainly counsel's explanation for drugs in Derek's system was not evidence for the court to consider.

Concerning Derek's alleged moral delinquency, the family court wrote in its order that "Derek's testimony that he was drug free in the face of a positive drug test taken the same day raises serious questions as to his credibility and is certainly suggestive of . . . either moral delinquency or lack of contact with reality." The court continued, noting that although it had "serious concerns about Derek's drug use and his willingness to lie about it, these issues alone would not support involuntary termination of his rights under Kentucky law."

We certainly do not condone Derek's drug use and lying about his drug use in court. Even so, we cannot find that the family court erred in its factual determination that Derek's actions did not constitute moral delinquency that would render him legally unfit. We reluctantly must agree with the family court that drug use alone would not support the involuntary termination of Derek's parental rights.

C. CLAIM REGARDING EMOTIONAL OR MENTAL ILLNESS

Stamper next contends that the family court erred in concluding that there was no clear and convincing evidence that Derek suffered from emotional or mental illness. He contends that, in addition to his own testimony concerning Derek's history of emotional and mental illness, Derek himself testified that he had suffered from severe depression in the past and that he had been prescribed medication. Furthermore, Stamper notes that one of those medications was present in Derek's system on the day the drug test was performed.

Concerning Derek's alleged emotional or mental illness, the family court held that although Stamper and his son testified

that Derek has suffered from depression, there was no expert testimony on this issue. The testimony from [Stamper] and his son cannot be seen as rising to the level of clear and convincing evidence that Derek suffers from an emotional or mental illness sufficient to abrogate his superior right as a parent.

This determination was clearly a credibility determination and without expert testimony to lend a more solid foundation for Derek's alleged emotional or mental illness, the family court did not err in this determination.

D. CLAIM REGARDING ESSENTIAL CARE

Finally, Stamper alleges that the family court erred in concluding that there was no clear and convincing evidence that Derek had failed to provide essential care for Elijah. Stamper contends that Derek and Elijah share a bedroom in Derek's mother's four-bedroom home, in which five other people reside, and that Derek has no job and he survives only on student loans, survivorship benefits from Brenda's employment, Elijah's social security⁴ benefits, and financial assistance from his family. Stamper asserts that Derek failed to provide for Elijah's emotional needs because he did not provide grief counseling to Elijah after Brenda's death. He alleges that Derek failed to provide for Elijah's educational needs because Derek testified that he did not believe Elijah had any special educational needs, even though Elijah received social security benefits due to his developmental delays and Elijah's counselor from the school he attended at the time of Brenda's death testified that Elijah should be in special education classes, as he had been when he attended that school.

⁴ Derek testified that Elijah began receiving social security benefits when he was younger because he had problems with his hearing that resulted in developmental delays.

Derek testified that he was told by Elijah's new school that Elijah, who was in the third grade at the time of the hearing, was somewhat behind other students in his class, but that by the end of the school year, he would be ready to progress to the fourth grade. The family court found that there was "no allegation that Elijah is not receiving essential care while in the custody of his father."

There was no allegation that Derek had not provided Elijah with food, clothing, or shelter. Additionally, Stamper failed to present any expert evidence showing that Elijah required or even wanted grief counseling. Derek testified that Elijah had spoken with his school counselor on more than one occasion, and that Derek had told Elijah that if he wanted to speak with a grief counselor, he would provide that for him, but Elijah turned down the offer. As for the allegation that Elijah had special educational needs, it is reasonable to assume that his new school would make that determination, and school employees informed Derek that Elijah would be ready for fourth grade at the time he was scheduled to progress to that grade. Consequently, the evidence was sufficient to show that Elijah's essential needs were being met by Derek.

IV. CONCLUSION

Although we are affirming the circuit court's order, we do so reluctantly. We agree with the GAL that under the best interests of the child standard, the result would be decidedly different. But that is not the standard we are required to apply under the law.

We would also like to note that we find Derek's behavior to be disturbing, particularly in light of the tragedy of Brenda's death. The fact that he took Elijah out of his school and away from his friends, his teachers, and his mother's family (whom he had lived next door to for many years) *immediately* after Brenda's death, which was likely a time that he needed those people to help maintain some "normalcy" in his life, although it may not have been sufficient for the family court to make a factual finding of emotional harm, is something that this Court finds highly troubling. Additionally, Derek's act of lying to the court about his drug use, only to have a positive drug test for marijuana later that day, causes much concern. It is remarkable and sad that at a time when Derek was fighting to maintain custody of Elijah that he chose to use marijuana and other drugs, for which he failed to prove he had a doctor's prescription. Additionally, Derek testified that his monthly income is approximately \$1,300.00, and of that amount, about \$680.00 is his survivorship benefit, and the rest is comprised of Elijah's survivorship and social security benefits. It appears that Derek lives off of Elijah, benefits from Brenda's death and others, rather than Derek earning a living to care for Elijah. Derek also has a history of drug use and a criminal record that includes

DUI, public intoxication controlled substances (excludes alcohol), and possession of marijuana. Despite these numerous concerns we have, we are unfortunately bound by a high standard of review, rigid criteria to prove unfitness and a record that raises many concerns but fails to prove by clear and convincing evidence that Derek's superior rights as a natural parent can be severed due to unfitness as legally defined. Reluctantly, the order of the Anderson Circuit Court is affirmed. We certainly hope that Derek takes the opportunity to become the father that Elijah needs and looks beyond his own selfish interests to the best interests of Elijah, including allowing him to continue a meaningful relationship with Brenda's family.

LAMBERT, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

S. Marie Hellard
Lawrenceburg, Kentucky

BRIEF FOR APPELLEE:

Joshua R. Kidd
Richmond, Kentucky