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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-001494-ME

DAVID LYNCH — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 12-CI-00032

TINA LYNCH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: David Lynch brings this appeal from Findings of Fact, Conclusions of Law, and Final Custody Order entered August 8, 2012, by the Caldwell Circuit Court denying his motion for custody and visitation. We affirm.

David and Tina were married on October 15, 2004. During the marriage, Tina gave birth to a daughter on August 13, 2008. Although the facts surrounding the child's conception are unclear in the record, it is undisputed that

during Tina's pregnancy both Tina and David acknowledged David was not the child's biological father.[1] Despite this knowledge, Tina and David decided that Tina would have the child and they would raise the child together. During the first three-and-a-half years of the child's life, David and Tina raised the child together and represented to others that David was the father.

On February 15, 2012, David filed a Petition for Dissolution of Marriage in the Caldwell Circuit Court. Therein, David sought joint custody of the child. Following a bench trial, the circuit court rendered Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage (decree) which was entered on August 3, 2012. At the bench trial, the circuit court also heard evidence of David's custody petition. On August 8, 2012, Findings of Fact, Conclusions of Law and Final Custody Order (custody order) were entered. In the custody order, the circuit court held that David did have standing to bring the custody action but that he was not entitled to custody. The custody order specifically provided:

> [T]he Court does not find by clear and convincing evidence that [Tina] waived or partially waived her superior right to custody. There was no express long-term or permanent waiver by [Tina] in favor of [David], despite their co-parenting agreement.

Simply put, the circuit court determined that although David had standing to bring the custody action he could not be awarded custody of the child as Tina, the child's

[1] David Lynch testified that upon hearing that his wife was pregnant he immediately knew he was not the biological father as he had not engaged in sexual relations with his wife during the time the child would have been conceived. And, Tina Lynch testified that she had been raped by David Matheny resulting in the child's conception. Matheny was apparently criminally charged but died before going to trial.

biological parent, had not waived her superior right to custody. Therefore, the court denied David's motion for custody. This appeal follows.

David asserts that although the circuit court correctly determined he had standing to pursue custody of the child, David believes the court erred in its determination that Tina did not waive her superior right to custody. David asserts that by agreeing to and actively participating in a co-parenting arrangement with him for over three years, Tina waived her superior right to custody thus entitling David to a best interests analysis resulting in his entitlement to custody.

It is undisputed that David had standing to bring the custody action. Kentucky Revised Statutes (KRS) 403.822 provides standing to parties in a co-parenting situation if the party can meet one of the requirements of KRS 403.800(13). *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010). In this case, David met the requirement of KRS 403.800(13)(b) as he claimed a legal right to custody under the law of the Commonwealth. We now turn to the contested issue – whether Tina waived her superior right to custody of the child thus allowing application of a best interests analysis resulting in an award of custody to David.

It is a deeply entrenched concept of American jurisprudence that a biological parent has a "superior right to custody" and that such right is paramount to that of any third party. *Diaz v. Morales*, 51 S.W.3d 451, 454 (Ky. App. 2001). And, the best interests of the child are not considered in a custody determination involving a third party, unless that third party can demonstrate by clear and convincing evidence that the biological parent is either unfit or has waived his/her

superior right to custody. *Id.* Waiver is demonstrated by a showing that a "voluntary and intentional surrender or relinquishment of a known right" has occurred or there has been an "election to forego an advantage which the party at his option might have demanded or insisted upon." *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010) (quoting *Greathouse v. Shreve*, 891 S.W.2d 387, 390 (Ky. 1995)). Proof of waiver must be by clear and convincing evidence and the credibility of any witness is for the court to determine. *Mullins*, 317 S.W.3d 569. And, although a formal or written waiver is not required, there must be "statements and supporting circumstances . . . equivalent to an express waiver to meet the burden of proof." *Id.* at 578 (quoting *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky. 2004)).

In the case *sub judice*, Tina testified that she and David did agree that Tina would give birth to the child and that they would co-parent the child. Tina further testified, however, that the agreement to co-parent was never intended to extend beyond the parties' marriage. In support thereof, Tina asserted that a paternity action was initiated against the child's biological father and as a result the child receives social security benefits based upon her biological father's death. Tina also testified that the child has had contact with the other children of her biological father. The circuit court apparently found Tina's testimony credible.

Based upon our review of the record, we are constrained to conclude there was clear and convincing evidence to support the trial court's finding that Tina did not waive her superior right to custody. Therefore, we affirm the circuit

court's decision that Tina did not waive her superior right to custody and, thus, David is not entitled to custody.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Jarrod H. Jackson
Princeton, Kentucky

BRIEF FOR APPELLEE:

Jill L. Giordano
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