RENDERED: JULY 28, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000384-ME

PAUL ROBINSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 13-CI-03633

CHENOA JOIA BEARD;
DUSTIN CHAD BEARD; AND
CHRISTINA ENCARNACION — APPELLEES

OPINION
REVERSING AND
REMANDING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND NICKELL, JUDGES.

DIXON, JUDGE: Paul Robinson appeals a judgment of the Fayette Circuit Court granting sole custody of his daughter, B.G.E., to Chenoa and Dustin Beard. After careful review, we reverse and remand because the circuit court's judgment was based upon insufficient findings of fact and conclusions of law.

In January 2013, Christina Encarnacion notified two men, Paul Robinson and Patrick Presnell, she was pregnant and that one of them was the father of her child.[1] Christina further advised both men that she wanted Chenoa and Dustin Beard to adopt the baby, and Paul and Patrick verbally consented to the adoption after meeting with the Beards. A few weeks before Christina gave birth, Paul advised the Beards he wanted to revoke his consent to the adoption. When the baby was born, Christina did not name a father on the birth certificate, and she executed a written consent to the adoption. The Beards filed a petition for temporary custody and notice of intent to adopt B.G.E. The circuit court entered an ex parte order granting temporary custody to the Beards. Shortly thereafter, Paul filed a petition for custody of B.G.E. against the Beards and Christina. The court ordered DNA testing, and Paul was determined to be the father of B.G.E. The Beards filed a response to Paul's custody petition, arguing he had waived his superior right to custody of B.G.E. and was an unfit parent. The court held a hearing to address the issue of whether Christina and Paul had waived their superior rights to custody as the biological parents of B.G.E. The court issued an order in December 2013, finding waiver by both Christina and Paul and concluding the Beards, as non-parents, had standing to pursue custody of B.G.E.[2] On July 8-9, 2014, the court held a final custody hearing. The hearing addressed the issues of Paul's fitness to parent and the custody arrangement that would be in the best

[1] Christina has not participated in this appeal.
[2] Following the court's ruling, Paul filed a petition for writ of prohibition in this Court to prevent the lower court from enforcing the custody order. A panel of this Court denied the petition. *Robinson v. Masterton*, 2014-CA-000077-OA (Apr. 30, 2014).

interest of B.G.E.

The testimony indicated that, after Paul consented to the adoption, he experienced anxiety, panic attacks, and depression and was unable to work between April and August 2013. At the time of the hearing, Paul was employed as a manager at Hooters restaurant in Richmond, Kentucky, earning approximately $40,000 per year. Paul's work schedule changed each week, and he typically worked between 39 and 49 hours per week. Paul also acknowledged he had been a smoker for approximately twenty years and that he did not have health insurance at that time.

In its findings of fact and conclusions of law, the court determined Paul was an unfit custodian for B.G.E. pursuant to *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). The court addressed the custody arrangement that would be in the best interest of B.G.E., and awarded sole custody of B.G.E. to the Beards and granted visitation to Paul. The court subsequently denied Paul's post-judgment motion to alter, amend or vacate and for more specific findings, and this appeal followed.

At the outset, we must address the Beards' pending motion to strike Paul's appellate brief pursuant to CR 73.02(2). The Beards opine Paul previously sought and was denied permission to supplement the record on appeal with the circuit court's file in the Beard's adoption case. Nevertheless, Paul included four arguments in his appellate brief relating to alleged errors that occurred in the adoption proceeding. We have carefully considered the motion and response;

however, this case involves the custody of a child, and we decline to impose such a harsh sanction upon Paul. Although we are not inclined to strike Paul's brief, we agree with the Beards that alleged errors in the adoption proceeding are not properly before this Court; accordingly, we will not address those arguments in this opinion.

On appeal, we will not disturb the trial court's findings of fact unless they were clearly erroneous, bearing in mind that the lower court was in the best position to weigh the evidence and assess witness credibility. *Moore*, 110 S.W.3d at 354. We are entitled, however, to review *de novo* the court's application of the law to the facts. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

"Kentucky's appellate courts have recognized not only that parents of a child have a statutorily granted superior right to its care and custody, but also that parents have fundamental, basic and constitutionally protected rights to raise their own children." *Moore*, 110 S.W.3d at 358 (internal quotation marks and citations omitted). In a dispute between a parent and non-parents, KRS 403.270(1)(b) provides that non-parents who qualify as de facto custodians are entitled to the same standing that is given to each parent in the court's custody determination. However, if the non-parents do not qualify as de facto custodians, they must

> 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, 110 S.W.3d at 359 (internal quotation marks and citation omitted).

Paul, as the biological father, had a superior right to custody against the Beards, non-parents who were not de facto custodians. *Id*. To defeat Paul's right to custody, the Beards were obligated to prove Paul had either waived his superior right to custody or was an unfit parent. *Id*. Because we conclude the trial court's findings and conclusions were inadequate as to both waiver and fitness, we must reverse and remand this matter for further proceedings.

A. Waiver

In *Moore*, *supra*, the Court explained as follows:

> Waiver requires proof of a knowing and voluntary surrender or relinquishment of a known right. However, waiver may be implied by a party's decisive, unequivocal conduct reasonably inferring the intent to waive, as long as statements and supporting circumstances [are] equivalent to an express waiver.

Id. at 360 (internal citations and quotation marks omitted). Furthermore, in *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004), the Kentucky Supreme Court articulated factors relevant to the analysis of waiver by a parent, including:

> length of time the child has been away from the parent, circumstances of separation, age of the child when care was assumed by the non-parent, time elapsed before the parent sought to claim the child, and frequency and nature of contact, if any, between the parent and the child during the non-parent's custody.

Id. at 470.

In the case at bar, the court essentially determined that Paul waived his superior right to custody by consenting to the adoption (as a *potential* father)

during the pregnancy and then waiting "more than three months" before revoking his consent (prior to B.G.E.'s birth). The record clearly reflects this hearing was held, in part, because Paul filed a petition for custody of B.G.E., yet the court's conclusory determination focused solely on Paul's verbal consent to the adoption and his subsequent revocation of consent prior to B.G.E.'s birth. The court failed to make any findings of fact regarding Paul's efforts to assert his parental rights following B.G.E.'s birth; furthermore, the court did not make any factual findings indicating it considered any other factors, like those in *Vinson*, *supra*. We reiterate, "Waiver requires proof of a knowing and voluntary surrender or relinquishment of a known right." *Moore*, 110 S.W.3d at 360. Quite simply, the court's factual findings were insufficient to support its conclusion that Paul waived his superior right to custody of B.G.E.

B. Parental Unfitness

In *Moore*, the Court explained, to establish a parent is an unfit custodian,

> the nonparent must first show by clear and convincing evidence that the parent has engaged in conduct similar to activity that could result in the termination of parental rights by the state. Only after making such a threshold showing would the court determine custody in accordance with the child's best interest.

Id.

In this case, the trial court concluded that Paul was unfit because he had failed to provide financially for B.G.E. after paternity was established. The court

cited one of the statutory grounds for termination of parental rights, KRS 625.090(2)(g), which provides:

> That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child[.]

We acknowledge the court made numerous findings of fact; however, we must conclude the court failed to make sufficient findings to support its legal conclusion that Paul was unfit. Specifically, the court did not address the "no reasonable expectation of significant improvement" prong of KRS 625.090(2)(g). In *Forester v. Forester*, 979 S.W.2d 928, 930 (Ky. App. 1998), a panel of this Court explained,

> In order to protect the superior right of the parent where a third party seeks custody, the parent must prevail unless it can be demonstrated by clear and convincing evidence that the parent is unfit as required by the factors set forth in KRS 625.090.

Accordingly, this Court went on to hold that, before granting custody to non-parents, a court must find, by clear and convincing evidence, there is "no reasonable expectation" of future improvement as set forth in the statute. *Id*.

In the case at bar, the court's findings addressed Paul's actions prior to B.G.E.'s birth and his conduct during the custody litigation. The court did not make any factual findings regarding whether Paul's conduct would significantly

improve in the immediate future, considering B.G.E.'s young age, as required by KRS 625.090(2)(g) and *Forester*, *supra*.

After careful review, we conclude meaningful appellate review of this matter is impossible because the circuit court failed to make adequate findings of fact to support its legal conclusions regarding whether Paul waived his superior right to custody and his fitness to parent B.G.E. We reverse the Fayette Circuit Court's judgment granting sole custody of B.G.E. to the Beards and remand this matter for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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NO BRIEF FOR APPELLEE CHRISTINA ENCARNACION