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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000120-ME

TERRANCE COGER II — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 17-CI-00297

MISTY DAWN RHODES and
JENNIFER MALLARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Terrance Coger II (the Father) appeals from the Warren Circuit Court determination of joint custody of K.L.R. (the Child), born in June 2015, with Jennifer Mallard, *de facto* custodian (DFC). The Father argues that the circuit court erred in denying him sole custody of the Child. We disagree and affirm.

We have examined the record in its entirety and borrow from the circuit court's following summary of testimony given by Misty Dawn Rhodes (the Mother) and other facts and procedural history from the custody decree issued in this matter:

> [The Mother] testified that when she became pregnant she had had sexual relations with [the Father] and another male, but she was completely convinced that the other male was the [biological] father. She told [the Father] that the other male was the father during and after her pregnancy. However, in June 2016, DNA test results excluded the other male as the father. [The Mother] testified credibly that she believes that she made [the Father] aware that he was actually the father in June 2016, however, [the Father] claims that he did not learn that he was the father until February 2017. The Child was age 1 at the time (June 2016) that [the Father] became aware that the other male's DNA results excluded him as the father and he knew that [the Father] was therefore believed by [the Mother] to be the biological father. [The Mother's] credible testimony that [the Father] was aware that he was the father in June 2016 is further supported by the fact that [the Father] began visiting with [the Child] by agreement of all involved beginning in June 2016, which continues to present.
>
> [The Child] first came into [the DFC's] care in November of 2015. [The Mother], who was on probation for a prior criminal conviction, failed a drug test, her probation was revoked, and she was incarcerated for approximately 17 months. At that time [the Mother] left [the Child] and [the Child's] 12-year old brother in [the DFC's] care. The Court granted [the DFC] guardianship status of [the Child] on December 29, 2015, . . . and she has had physical custody of [the Child] since that time. The Court named [the DFC] of [the Child] in the July 10,

> 2017 Bifurcated Judgment of De Facto Custodian Designation.
>
> In March 2017, [the Father] filed this action to establish custody, and in April 2017, [the Father] filed a paternity action . . . . The DNA results in that action conclusively established that he is the father of [the Child]. [The DFC] credibly testified that between June 2016 and March 2017, [the Father] visited with [the Child] approximately once per month.
>
> On April 12, 2017, the Court entered an order granting temporary time-sharing to [the Father], permitting him visitation with [the Child] for nine (9) hours every Saturday. On August 16, 2017, the Court entered its Order Regarding Visitation upon [the Father's] request to modify temporary time-sharing, granting [the Father] additional visitation with [the Child]. Pursuant to that Order, [the Father] has had visitation on alternating Wednesday afternoons from 5:00 p.m. until 8:00 p.m., and on alternating weekends beginning on Friday at 5:00 p.m. until Sunday at 5:00 p.m. [The Father] now seeks permanent, sole custody of [the Child].

The circuit court made additional findings of fact in its analysis pursuant to Kentucky Revised Statute (KRS) 403.270(2), which controls child custody determinations. The circuit court ultimately awarded joint legal custody to the Father and the DFC, with the DFC as primary residential custodian. The Mother was to have supervised visitation with the Child. The parties were further ordered to complete co-parenting counseling "to improve parenting, communication, and coping skills."

Kentucky Rules of Civil Procedure (CR) 52.01 provides the general framework for the circuit (family) court as well as review in the Court of Appeals:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.] . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

See Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted) (An appellate court may set aside a lower court's findings made pursuant to CR 52.01 "only if those findings are clearly erroneous."). The *Asente* Court went on to address substantial evidence:

> "[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. at 354 (footnotes omitted). *See also McVicker v. McVicker*, 461 S.W.3d 404, 415 (Ky. App. 2015).

Furthermore, we note that neither the Mother nor the DFC have filed appellee briefs in this Court. Kentucky Rule of Civil Procedure (CR) 76.12(8)(c) states: "If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case."

"The decision as to how to proceed in imposing such penalties is a matter committed to our discretion. *Kupper v. Kentucky Bd. of Pharmacy*, 666 S.W.2d 729, 730 (Ky. 1983); *Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.3d 762, 766 (Ky. App. 2005)." *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). *See also Hallis v. Hallis*, 328 S.W.3d 694 (Ky. App. 2010). We elect to "accept the appellant's statement of the facts and issues as correct." CR 76.12(8)(c)(i).

With these standards in mind, we address the specific issues brought on appeal. The Father presents three reasons why the circuit court should have granted him sole custody. He insists that the circuit court "ignored significant evidence that would have virtually mandated sole custody be granted to [him]."

The Father first contends that it was the Mother's wish that the Father be granted sole custody, and that the circuit court erred in failing to give weight to that factor. KRS 403.270(2)(a). Our review of the parties' testimony and the

record indicates that the circuit court considered, as mandated by the statute, the wishes of both parents and the DFC as one of the determining factors in the custody award. The circuit court specifically noted in its conclusions of law that the Mother "testified that she wants [the Father] to have sole custody of the minor child." We thus find no error in that the court did consider the wishes of the Mother but did not opt to follow them in awarding custody. "This determination is supported by the extensive findings of fact and was not an abuse of discretion. The trial court is in the best position to judge the credibility of the evidence, and we will not substitute our judgment on appeal." *Burton v. Burton*, 355 S.W.3d 489, 494 (Ky. App. 2011).

The Father next argues that the award to the DCF was not appropriate, that she "has not proven herself a fit custodian." In this vein, the Father cites the DCF's unmarried status (even though he himself was unmarried at the time of the hearing and had fathered the Child while in a relationship with another woman), her social media activity, work schedule, ownership of a nightclub, and what he deemed insufficient efforts at communication with the Father. Instead he touts his newly married status (which was not evidence at the hearing), his regular child support payments, and the Child's integration into the Father's household as factors the court should have considered in its custody determination.

We disagree. In awarding joint custody, the circuit court correctly focused on the best interests of the Child. It noted that the Child has been in the DFC's care since the Child was five months old. The circuit court emphasized that the DFC and her partner "have obviously been the psychological parents" to the Child and have provided for his every need since he was placed with the DFC. The circuit court did not err in including the DFC as a joint custodian of the Child. *Asente*, 110 S.W.3d at 354.

The Father lastly asserts that the circuit court reprimanded him for not acting sooner in establishing paternity and seeking custody of the Child. The Father argues that the circuit court improperly directed its attention on the delay between June 2016 (when the Father began to exercise visitation with the Child) and March 2017 (when the Father filed his petition) as evidence that the Father lacked interest in the Child.

Again, we cannot agree with the Father that the circuit court erred. The circuit court would have been remiss to ignore the facts before it. Furthermore, it did not use the Father's delay to punish him but rather to evaluate the impact on the Child if he were to be placed in the Father's sole custody.

The court concluded that "[the Child] has spent two of his important formative years with [the DFC] and has become greatly attached to her family, his

half-sibling, and her home. . . . [The Child] is not a piece of property to be picked up and moved without any adverse effect on [the Child] and his feelings."

When reviewing the propriety of a custody award, the test is not whether some other court may have reached a different decision but, rather, whether the circuit court abused its discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). To prove abuse of discretion, a party must show that the circuit court that decided the case acted arbitrarily, unreasonably, or unfairly. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). The Father has not shown that the award of joint custody was arbitrary, unreasonable, or unfair. The circuit court's decision comports with Kentucky statutory and case law. KRS 403.270; *Burton*, 355 S.W.3d at 493-94.

The award of joint custody is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven O. Thornton
Bowling Green, Kentucky

NO BRIEF FOR APPELLEES