RENDERED: SEPTEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001717-ME

PAUL ROBINSON — APPELLANT

v.

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

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND NICKELL, JUDGES.

NICKELL, JUDGE: Paul Robinson appeals from the April 23, 2018, Findings of Fact on Remand entered by the Fayette Circuit Court, Family Division, and the subsequent denial of his motion to alter, amend or vacate those findings. Following a careful review, we affirm.

The pertinent historical facts and procedural background of this child custody action were set forth in a prior unpublished opinion of this Court in *Robinson v. Beard*, 2015-CA-000384-ME, 2017 WL 3498755 (Ky. App. July 28, 2017, reh'g denied Sept. 18, 2017). Accordingly, we will address only those facts most relevant to this appeal.

In 2013, Christina Encarnacion gave birth to a daughter, B.G.E.[1] It was originally contemplated that the child, when born, would be placed for adoption. After learning of the pregnancy, Paul, the child's biological father,[2] orally consented to the child being placed for adoption but revoked his consent a few weeks prior to the birth. Chenoa and Dustin Beard—non-relatives to Christina, Paul, or the child—were granted temporary custody of B.G.E. immediately after her birth. Paul sought custody shortly after the child was born, and an extended custody battle ensued. Christina moved out of state and had little involvement in the litigation after the initial stages; she has not participated in this appeal. In December 2013, the trial court found Paul and Christina had each waived their superior rights to custody and further concluded the Beards had

[1] In accordance with the policy of this Court, we identify children in custody actions by their initials.

[2] Christina notified another man that he too might be the father of the child. Presnell consented to adoption by the Beards. He has been excluded as the father by DNA testing and was not a party to the actions below.

standing to pursue custody. A hearing was held the following July to determine permanent custody. Issues of Paul's fitness to parent and what custody arrangement would be in the child's best interest were addressed. On January 15, 2015, the trial court determined Paul was unfit, reiterated its prior conclusions regarding waiver, awarded sole custody to the Beards, and granted visitation to Paul.

Paul appealed. A panel of this Court reversed and remanded the matter upon concluding the findings of fact relative to waiver and fitness were insufficient to support the trial court's conclusions of law. This Court instructed the trial court to make findings supporting its conclusion Paul waived his superior custody rights, specifically addressing Paul's efforts to assert his parental rights following the child's birth and the factors set forth in *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004). Further, regarding its conclusion Paul was unfit, the trial court was directed to address the "no reasonable expectation of significant improvement" prong of KRS[3] 625.090(2)(g).

On remand, the trial court performed its duty precisely as instructed and rendered additional findings of fact supportive of its prior conclusions of law in a ten-page order entered on April 23, 2018. This later order incorporated the

[3] Kentucky Revised Statutes.

2015 findings of fact and conclusions of law. Paul's subsequent motion to alter, amend, or vacate was denied. This appeal followed.

Paul asserts the trial court erred in its 2013 finding he waived his superior right to custody of his child and in reaffirming that finding in its 2015 order as well as in the 2018 order following remand. He further contends the trial court erred in finding he was unfit to parent his daughter, claiming such a finding was not supported by substantial evidence. Although we are inclined to agree with Paul that the issue of waiver was incorrectly decided, because the Beards presented sufficient evidence of Paul's unfitness, any error is harmless. Thus, we affirm.

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). "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 v. Asente*, 110 S.W.3d 336, 358 (Ky. 2003) (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

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). Thus, a non-parent has standing to seek custody or visitation of a child only if: 1) he or she qualifies as a *de facto* custodian; 2) the parent has waived his or her superior right to custody; or 3) the parent is conclusively determined to be unfit. *Truman v. Lillard*, 404 S.W.3d 863, 868 (Ky. App. 2012) (citing *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010)).

Paul, as the biological father, had a superior right to custody against the Beards, non-parents who were not *de facto* custodians. *Moore*, 110 S.W.3d at 359. 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*. The trial court concluded the Beards established both. We will address the trial court's findings in reverse order.

On appeal, we will not disturb the trial court's findings of fact unless they were clearly erroneous, bearing in mind the lower court was in the best

position to weigh the evidence and assess witness credibility. *Id*. at 354; CR[4] 52.01. We 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).

Initially, although their standing to seek custody has not been directly challenged in this appeal, it was contested below. Thus, we deem it important to note the record clearly reveals the Beards each qualified as a "person acting as a parent" pursuant to KRS 403.800(13) because they had physical custody of B.G.E. and had been awarded legal custody by the temporary custody order entered when the child was one-day old. The six-month residency requirement set forth in the statute was inapplicable under the clear guidance of *Coffey v. Wethington*, 421 S.W.3d 394, 398 (Ky. 2014). Thus, the Beards plainly had standing to seek custody of B.G.E.

Next, we turn to an analysis of the trial court's finding Paul was unfit to parent his child. When parental fitness is utilized as an avenue to defeat a parent's superior custody right, "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

[4] Kentucky Rules of Civil Procedure.

such a threshold showing would the court determine custody in accordance with the child's best interest." *Moore*, 110 S.W.3d at 360 (footnotes omitted).

The Beards and Christina expressed their reservations about Paul's fitness from the beginning of the litigation below. Evidence of record at the time the trial court made its determination clearly indicated Paul had engaged in conduct "similar to activity that could result in the termination of parental rights by the state." The trial court made multiple findings in its initial order regarding Paul's unfitness to parent at the time of the child's birth and at the time of the custody hearing. Specifically, the trial court found Paul failed to exercise all visitation time offered; was mentally and emotionally unstable to the point he took a four-month leave of absence from his employment; and had multiple documented instances of disregarding court orders and placing his own interests above those of his child even when made aware of the dire consequences of doing so. Additionally, the trial court found, for reasons other than poverty alone, Paul had continuously and repeatedly failed and refused to provide essential care for his daughter in contravention of KRS 625.090(2)(g), noting Paul's own testimony he did not contribute to B.G.E.'s care because it appeared the Beards did not need financial assistance.

After making threshold finding of unfitness, the trial court properly undertook a best interest analysis to adjudicate the rival custody claims. *Id*. at 360.

Upon analyzing the pertinent factors set forth in KRS 403.270(2) and noting other concerns, the trial court concluded granting custody to the Beards was clearly in B.G.E.'s best interest.

On remand, the trial court made extensive additional findings as directed by this Court. Specifically, the trial court analyzed the factors set forth in *Forester v. Forester*, 979 S.W.2d 928 (Ky. App. 1998), and the likelihood of improvement by Paul in the immediately foreseeable future. It noted Paul was mentally and emotionally unfit to parent the child at the time of trial and discerned no indication of impending change, especially in light of Paul's unwillingness to recognize the need to adjust his lifestyle or attempt to address concerns raised by the trial court. Although noting the question of fitness is an ongoing inquiry and Paul could eventually alter his lifestyle sufficiently to be awarded custody of his daughter, the trial court concluded "[c]onsidering Paul's intransigence at the time of the hearing, the Court could not find that there was a 'reasonable expectation of significant improvement in [Paul's] conduct in the immediately foreseeable future.' KRS 625.090(2)(g)."

Before this Court, Paul vehemently contests the trial court's findings regarding his fitness, reciting multiple factual statements he believes contradict those findings. In essence, Paul contends the trial court should have accepted his evidence as true—rejecting all other proof—and the failure to do so was erroneous.

His challenge to the trial court's conclusions of law is based solely on his opposition to the trial court's factual findings, asserting the evidence cannot support the trial court's conclusions. We disagree.

Where testimony before a trial court is conflicting, as it was here, we may not substitute our decision in place of the judgment made by the trial court. *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky. App. 1998). Questions as to the weight and credibility of testimony are purely within the province of the court acting as fact-finder and due regard shall be given to the court's opportunity to judge the witness's credibility. CR 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002) (overruled on other grounds by *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)). The test is not whether we as an appellate court would have decided the matter differently, but whether the trial court's rulings were clearly erroneous or constituted an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). "Mere doubt as to the correctness of [a] finding [will] not justify [its] reversal[.]" *Moore*, 110 S.W.3d at 354 (footnotes omitted).

We discern no error in the choice of law utilized by the trial court nor the legal standards on which it based its decision. No challenge on these matters has been raised. Thus, further discussion related to legal standards is unwarranted.

Our review of the record reveals the trial court received substantial, though controverted, evidence which would support its decision Paul was presently unfit to parent B.G.E. and no reasonable expectation of improvement existed. Further, substantial evidence supports the trial court's conclusion B.G.E.'s best interests would be served by granting custody to the Beards. The trial court plainly and thoroughly set forth the testimony and evidence it believed supported its determinations. Paul plainly disagrees with the trial court's decision and the weight and credibility assigned by the trial court, but mere disagreement with the assessment of the evidence and the weight to be given thereto constitutes an insufficient basis upon which to find an abuse of discretion occurred or clear error warranting reversal. Sufficient probative evidence was presented supporting the trial court's rulings. Thus, no clear error exists and there has been no showing of an adequate basis to disturb the decision of the trial court. Paul is simply not entitled to the relief he seeks on this issue.

Finally, we are inclined to agree with Paul that the trial court's finding of waiver was erroneous. However, we do not believe this error rendered the trial court's final decision infirm. Significant time and effort were dedicated below to discussing, arguing and deciding the waiver issue, and a large portion of the briefing before this Court is likewise consumed with the same. Nevertheless, it is abundantly clear a non-parent may gain custody by showing either waiver *or*

unfitness of the biological parent; they need not prove both. *Moore*, 110 S.W.3d at 359. As we have rejected Paul's challenge to the trial court's finding he is unfit, it becomes plain the Beards presented sufficient evidence to defeat Paul's superior right to custody and the ultimate custody decision was adequately supported. The finding of waiver was therefore no more than mere surplusage even though it was made substantially prior in time to the finding of unfitness. Any error therein was harmless at best and again, does not entitle Paul to relief.

For the foregoing reasons, the judgment of the Fayette Circuit Court, Family Division, is AFFIRMED.

MAZE, JUDGE, CONCURS.

CLAYTON, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Ann D'Ambruoso Lexington, Kentucky	Mindy G. Wilson Lexington, Kentucky