RENDERED: August 22, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001922-MR

HOLLIS HANCOCK — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 01-CI-00177

MABEL RAISOR MATT
and RHONDA DICKENS — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

EMBERTON, CHIEF JUDGE. This is a child custody dispute in which Hollis Hancock, the father of Mackenzie L. Dickens, born August 27, 1999, petitioned for her custody. The court denied the motion finding by clear and convincing evidence that Hancock had waived his superior right to custody and that it would be in the

best interest of the child to remain in the custody of Mabel Raisor Matt, the sister of the child's natural mother.[1]

Hancock and Mackenzie's mother, Rhonda Dickens, have never been married. On March 1, 2000, the Cabinet for Families and Children filed a paternity action on behalf of Rhonda, and on October 4, 2000, Hancock was named the child's biological father. Just prior to that date, on September 29, 2000, Mackenzie was placed with Mabel Raisor upon a neglect petition filed against Rhonda. The child has remained in Mabel's care since that date. Rhonda, who is incarcerated, desires that the child remain with Mabel.

Hollis contends that he is capable of caring for his daughter and lives in a four-bedroom house in Lebanon, Kentucky. He is a retired factory worker who, at the time of the hearing, was seventy years old and takes medication for what he states are his nerves but which his wife, Minnie, refers to as Alzheimer's. Prior to the custody hearing, Hancock had seen Mackenzie on one occasion.

Minnie, who is fifty-nine years of age and suffered a disabling injury in a car accident, has been appointed as attorney-in-fact for Hollis. She stated she would care for

[1] The videotape of the custody hearing is not included in the record on appeal. We therefore consider only the record available, the parties' briefs, and accept the trial court's findings as accurate.

Mackenzie and is the usual caretaker of the house. Without her, she admitted, Hollis would not be able to care for the child.

Mabel married Mike Matt in November 2001. Mike is retired from the military and Mabel, age forty-nine, works day shift. Mackenzie is in daycare while Mabel works and she has cared for the child since obtaining custody in September 2000.

Hollis contends that in a contest for custody between a third party and a natural parent, there must be a finding that the natural parent is unfit.[2] Hollis is correct that a parent has a constitutional right to custody of a child over a nonparent. However, just as any other constitutional right can be waived, so can a parent, through an intentional or voluntary relinquishment of the right to custody, waive that right:[3]

> Because this is a right with both constitutional and statutory underpinnings, proof of waiver must be clear and convincing. As such, while no formal or written waiver is required, statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof.

The trial court found, and we agree, that Hollis has waived any right to claim superior custody to Mackenzie. Although he contends that he did not know the child was his until October 2000, when paternity was established, he does not explain why, knowing that this was his child, he did not seek

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[2] Berry v. Berry, Ky., 386 S.W.2d 951 (1965).

[3] Greathouse v. Shreve, Ky., 891 S.W.2d 387, 391 (1995).

custody until May 17, 2001. Moreover, since that time he has seen the child only once. We agree with the trial court that Hollis waived any right he may have had to claim superior rights to custody.

Having determined that Hollis waived his rights, the trial court was not required to find him unfit nor that Mabel was a de facto custodian. It properly applied the best interest standard and the factors set forth in KRS[4] 403.270(2). Mackenzie, the court found, had been integrated into Mabel's family and was in a nurturing environment. To now uproot this young child and place her with her father with whom her bond is only biological would be disruptive and likely to result in irreparable harm.

The order of the Taylor Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel Todd Spalding
Lebanon, Kentucky

BRIEF FOR APPELLEE MABEL RAISOR MATT:

Gail Lyndon Williams
Columbia, Kentucky

[4] Kentucky Revised Statutes.