

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001169-ME

BRANDON FORD

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 06-CI-00107

JAY NICHOLAS CHAPPEL, SARAH
NICOLE HOLMES, AND G.B.H. (NOW
G.B.C.), AN INFANT¹

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

NICKELL, JUDGE: Brandon Ford (“Ford”) has appealed from the Taylor Circuit Court’s March 5, 2007, order denying his intervening petition for custody of G.B.C., his biological minor child, and instead granting joint custody of the child to Sarah Holmes

¹ Pursuant to the policy of the Court of Appeals, in matters concerning the rights or interest of minor children, and in order to protect the privacy of such individuals, such infants shall be referred to only by his or her initials.

(“Holmes”), the biological mother, and Jay Chappel (“Chappel”), the putative father. For the following reasons, we affirm.

The minor child was born to Holmes on January 12, 2002, but no father was listed on the birth certificate. Ford and Chappel were each present at the hospital following the child’s birth, with each believing himself to be the child’s biological father. Ford had little or no contact with the child following this initial visit and made no legal attempt to determine paternity. Chappel treated the child as his own from birth forward.

Holmes and Chappel have never been married to each other, and the pair terminated their romantic relationship at some point during 2003. They agreed to share custody of the child, with each of them having the child on an approximately fifty-fifty basis. On June 12, 2006, the birth certificate was amended to reflect Chappel as the father.

On March 3, 2006, Chappel filed a petition in the Taylor Circuit Court for custody of the child. On April 13, 2006, Ford filed an amended² motion to intervene in the custody action, alleging he was potentially the father of the minor child as he and Holmes had engaged in a romantic relationship which terminated in July 2001. On April 18, 2006, the court entered an Agreed Order awarding Holmes and Chappel joint custody

² Ford’s initial motion to intervene was filed on April 12, 2006, but contained an error in the child’s name. The amended petition merely corrected this typographical error.

of the child.³ On April 20, 2006, the court granted Ford's motion to intervene.

Subsequent genetic testing revealed Ford was, in fact, the biological father of the child.

Based on the results of the genetic testing, on September 13, 2006, Chappel filed a motion to be named *de facto* custodian of the child, while still persisting in his petition for custody. The court conducted hearings on the various issues presented, allowed the parties to conduct discovery and to file supplemental briefs. On March 5, 2007, the court entered an order (1) denying Chappel's motion to be named *de facto* custodian, finding he did not qualify for such status under statutory and case law mandates; (2) denying Ford's motion for custody or visitation, finding he had waived his superior rights to custody and the child's best interest militated against visitation; and (3) keeping the Agreed Order of joint custody in force. Ford's subsequent motion to alter, amend or vacate the March 5, 2007, order was denied by order entered May 8, 2007. This appeal followed.

Ford contends the trial court erred in (1) finding Chappel had standing in the matter and awarding him joint custody of the child as he was neither the biological father nor a *de facto* custodian; (2) in awarding Chappel joint custody in the absence of clear and convincing evidence Ford was unfit or that he waived his superior right to custody; and (3) in refusing Ford's motion for visitation when no proof was presented that such visitation would seriously endanger the child's physical, mental or emotional health.

After a careful review of the record before us, we disagree with all of Ford's contentions.

³ The child's last name was changed by order of the Taylor District Court entered on April 19, 2006.

I. STANDARD OF REVIEW

When reviewing matters regarding child custody, we focus on whether the trial court's finding of fact are clearly erroneous, CR⁴ 52.01, and such findings will not be set aside if they are supported by substantial evidence. *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d. 36 (Ky.App. 1998). Substantial evidence does not necessarily mean uncontradicted evidence, but merely “proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (Ky. 1934). We will not substitute our judgment for that of the trial court, as that court is given due regard to judge the credibility of the witnesses. CR 52.01. We review questions of law *de novo*, but we will not disturb a trial court's legal rulings unless they constitute an abuse of discretion. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002).

II. ANALYSIS

Ford first contends the trial court erred in granting custody to Chappel, a non-parent who failed to qualify as a *de facto* custodian. Thus, Ford contends Chappel had no standing to petition the court for custody. We disagree.

In *S.R.D. v. T.L.B.*, 174 S.W.3d 502, 508 (Ky.App. 2005) this Court specifically held “there is no doubt a man can be a child's ‘legal father’ without being [his] ‘biological father.’” A child's “legal father” is the one “recognized by law as the

⁴ Kentucky Rules of Civil Procedure.

male parent. . . .” *Id.* (citation omitted). As the trial court correctly found, Chappel is the child’s legal father.

Chappel held himself out to be the child’s father and conducted himself as such for over five years. He has continuously provided support, physically, financially and emotionally, throughout that time. He caused his name to be placed upon the child’s birth certificate, and never questioned or attempted to repudiate his paternal relationship. He believes himself to be vitally important in the child’s life. By all accounts, Chappel is the only father the child knows.

Under these circumstances, there is substantial evidence in the record supporting the trial court’s determination that Chappel is the child’s legal father. As such, we hold Chappel had adequate standing to petition the court for custody and the trial court was not clearly erroneous in so finding.

Ford’s second contention is that the trial court erred in awarding Chappel joint custody in the absence of clear and convincing evidence Ford was unfit or that he waived his superior right to custody. There was no allegation raised before the trial court that Ford was unfit, and that issue is undisputed on appeal.⁵ Thus, we limit our discussion to whether the trial court correctly found Ford waived his superior right to custody. As stated earlier, a trial court’s factual findings will only be set aside if clearly erroneous.

CR 52.01.

⁵ Although Chappel makes a passing reference in his brief to Ford’s fitness as a parent, such reference is not central to his argument and we have treated it accordingly. Further, the trial court did not rule on the issue and we will not entertain arguments for the first time on appeal.

In the case *sub judice* there was testimony that Ford made no effort to see the child or to provide financial support for the child, and that Ford only visited the child one time at the hospital immediately following the child's birth. Ford's mother visited the child two additional times, both of which occurred before the child was eight months old. Ford testified he believed the child was his when he visited the hospital but he was not actually aware he was the child's father until August 2006 upon completion of the genetic testing. Ford testified Holmes had informed him following the birth that Chappel was the child's father. Ford further claimed Holmes refused to allow him or his family to see the child. He did not deny he had not provided financial support for the child or taken any substantial steps toward establishing paternity of the child prior to filing his petition to intervene in the instant action.

Based upon the testimony elicited, the trial court determined Ford had, in fact, waived his superior right to custody. Specifically, the trial court found Ford knew he was the child's biological father in 2002 but failed to seek custody, visitation or to have his name placed upon the birth certificate. Citing *Shifflet v. Shifflet*, 891 S.W.2d 392 (Ky. 1995), the trial court determined Ford's inactions to be sufficient to find he had waived his rights as a parent.

The evidence presented to the trial court was conflicting and could have produced a result in favor of either party. As the evidence presented was substantial, we must defer to the ruling of the trial court, as we will not substitute our judgment for that of the finder of fact. *R.C.R., supra*, 988 S.W.2d at 39 (citing *Wells v. Wells*, 412 S.W.2d

568, 571 (Ky. 1967)). The trial court had the opportunity to view the witnesses and judge their credibility, and was in a much better position than this appellate court to do so. The trial court obviously found Ford's testimony less credible than the other testimony received. We cannot say the decision constituted clear error. Accordingly, we reject Ford's argument the trial court's decision was not based upon substantial evidence.

Finally, Ford contends the trial court erred in denying him visitation with the child. He argues there was no proof submitted that allowing such visitation would seriously endanger the child's physical, mental or emotional health. We again disagree.

In considering all of the conflicting evidence presented, the trial court specifically found that ordering visitation would be harmful to the child and would thus not be in his best interest. In so finding, the court held that the child knew only one father and the introduction of a new father in the child's life would "cause confusion and severe emotional distress for the child." The court considered all of the testimony presented, and made its determination based upon the best interest of the child as required by KRS⁶ 403.320 (stating visitation may be denied if the court finds it would seriously endanger the child's physical, mental, moral or emotional health).

In its order, the trial court specifically stated it had "considered the wishes of the child's parents, the child's adjustment to his home, school and community, and the mental and physical health of all individuals involved." Further, the trial court's ruling was based in part upon its specific finding that Ford had admitted "it would hurt [the

⁶ Kentucky Revised Statutes.

child] to know Chappel is not his father, but he thinks the child should be told now even though he does not know what damage it would cause.” Our review of the record indicates the trial court’s findings were supported by substantial evidence and were therefore not clearly erroneous. Ford’s unsupported contention that expert testimony was required to prove serious endangerment to the child’s well-being is without merit.

Therefore, for the foregoing reasons, the order of the Taylor Circuit Court is affirmed.

ALL CONCUR.

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