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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000777-ME

TIMOTHY NEWSOME — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DWIGHT S. MARSHALL, JUDGE
ACTION NO. 18-CI-00433

CINDY BRYANT AND
SUZANNE BLACKBURN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND JONES, JUDGES.

ACREE, JUDGE: Timothy Newsome (Father) appeals the Floyd Family Court's findings of fact and conclusions of law awarding sole custody of his minor child, Q.R.[1] (Child), to *de facto* custodian, Suzanne Blackburn (Grandmother), Child's

[1] We maintain the child's anonymity by using initials.

maternal grandmother. Although named in the notice of appeal, Cindy Bryant (Mother) was never a party to the action and is not a party to this appeal. After careful consideration, we affirm.

BACKGROUND

Father and Mother were never married. When Mother gave birth to Child, she gave him another man's last name as shown on the birth certificate. Child has resided with Grandmother since birth.[2] Grandmother believed Child was Father's offspring and, four days after Child's birth, told him so. Father acknowledges that Grandmother urged him to be a part of Child's life. He declined and denied paternity because he believed himself to be sterile, having been unable to impregnate his former wife. He never confirmed the fact medically.

Once Child was a little older, Grandmother again reached out to Father. This time, Father acknowledged the child resembled him and conceded he may be the father. Still, he failed to become involved in Child's life and did not act to determine paternity.

In 2018, the Floyd County Division of Child Support Enforcement initiated a successful paternity action against Father. With that, Father filed a petition for custody and a motion for emergency custody, naming both Mother and

[2] There is some debate as to how Child was placed with Grandmother. However, those circumstances do not impact our analysis.

Grandmother as respondents. Grandmother filed an answer and counterclaim seeking status as *de facto* custodian and sole custody of Child. Mother never appeared in the action.[3]

The family court denied Father's emergency motion and entered an order that Grandmother would remain Child's custodian during the proceedings. The court awarded Father visitation. Its subsequent order designated Grandmother *de facto* custodian, a ruling that is not in dispute.

A final custody hearing was held, and the family court analyzed the relevant custody factors in KRS[4] 403.270(2). It considered Father's denial of paternity and decision not to participate in Child's life, including failing to provide support or care for Child from the time of his birth. The court concluded the presumption of joint custody and equal timesharing had been rebutted and awarded Grandmother sole custody. Father was granted visitation. This appeal followed.

STANDARD OF REVIEW

On appellate review, much deference is accorded the family court. Because the family court:

> is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If

[3] Mother has not been involved in the child's life since birth. Both Father and Grandmother are of the opinion that Mother is unfit and should not have custody of Child.

[4] Kentucky Revised Statutes.

> the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Coffman v. Rankin, 260 S.W.3d 767, 770 (Ky. 2008) (quoting *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005)). With this standard in mind, we turn to Father's assignments of error.

ANALYSIS

Father alleges the family court committed reversible error by: (1) proceeding without first having served Mother with summons; (2) considering inappropriate factors in its custody analysis; and (3) entering a judgment inconsistent with the testimony of the parties. We address each in turn.

Service of process

During a hearing, the family court asked why Mother had not made an appearance. Grandmother's counsel mistakenly informed the court that Mother had been served. Neither Father's counsel nor the clerk corrected the erroneous representation to the contrary. The record is clear, however, that service on Mother was never accomplished. This error was made a part of the family court's findings of fact where it stated, "[Mother] was served and has filed no answer nor

has she made any appearance in regards to the current petition." (Record (R.) at 87.) Father seeks to make this error work to his advantage. Contrary to his arguments, this is not grounds for reversal.

First, Father did not raise this issue before the family court; therefore, it was never preserved for appellate review. Furthermore, Father initiated the action, and it was his obligation to serve all respondents. Father knew or should have known Grandmother's counsel's statement that Mother had been served was a mistake, but he elected not to correct it. He will not be heard to object now.

More substantively, however, the only issue decided by the family court that is under review involves Father's custody rights vis-à-vis Grandmother. Mother's participation in that aspect of the case was not necessary. Mother's non-participation below is a straw-man argument that does not impact the family court's custody award, or this Court's review of it.

If Mother's rights had been adjudicated in her absence, she would have standing to object, but they were not. Mother's right to challenge custody or seek visitation has not been extinguished. But even if it had been, Father has no standing to object on Mother's behalf. Nor can he co-opt Mother's (to this point non-existent) argument for his own benefit. The failure to serve Mother with summons was his own failure, not a failure of the family court. Mother's non-

participation has no impact on our review. We discern no reversible error by the family court and we are unpersuaded by Father's argument to the contrary.

Proper factors considered

"[D]e facto custodians have the same right to seek custody as the father and mother, KRS 403.270." *Pennington v. Marcum*, 266 S.W.3d 759, 763 (Ky. 2008). This right of *de facto* custodians is a creation of government intended to be the equivalent in all respects to the constitutionally protected natural right of a parent, "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). Under Kentucky law, the equivalency of the *de facto* custodian's right with the parent's right does not depend on first finding the parent unfit or that he has waived his natural right. *See Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 524, 102 S. Ct. 3231, 3244, 73 L. Ed. 2d 928 (1982) (Blackmun, J., dissenting) (citation omitted) (regarding "natural right of parent . . . he is liable to be defeated by his own wrongdoing or unfitness and by the demands and requirements of society that the well-being of the child shall be deemed paramount to the natural rights of an unworthy parent"). Once a person challenging a biological parent for custody achieves *de facto* custodian status, the analysis focuses solely on the best interest of the child.

Additionally, KRS 403.270(2) presumes that, as between or among equally poised custody seekers, joint custody and equally shared parenting time is in the best interest of the child. This presumption can be overcome. In accordance with the statute, "[i]f a deviation from equal parenting time is warranted, the court" can consider "all relevant factors" in order to "construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent with ensuring the child's welfare." KRS 403.270(2). The statute itself lists numerous factors for the court to consider. The family court here considered them all and, in addition to the parties' wishes, it especially focused on those factors listed in subsection (2) at (c), (d), (e), (h), and (i).

Father contends the family court gave too much consideration to his lack of involvement in Child's life and his failure to pay child support prior to the establishment of his paternity. He asserts this was error. We disagree.

We first note the list of factors in KRS 403.270(2) is not exclusive. Then, of course, there is the fact that Father was made aware of the very real, and obviously credible, possibility he had a son, but showed no interest in the prospect. He showed no desire to resolve the question in a way that might initiate a bond between himself and his son. That evidence is probative of Father's feelings for children in general if not for Child in particular. This was properly considered by the family court.

Father also argues that the family court unfairly faulted him for failing to pay child support prior to the results of the paternity testing. This argument also fails.

The family court found as fact that Father, "prior to the legal finding of paternity, had provided no financial support for the minor child. Further, that after the paternity finding, [Father] has declined to assist in the support of the minor child." (R. at 89.) Clearly, the family court made the finding but the pre-paternity-test failure to support Child does not appear to have been a factor in the custody analysis. Father's post-paternity-test failure certainly should have been.

The court seemed more concerned that Father's attitude toward Child resulted in "leaving only [Grandmother] to provide care . . . [and] that neither [Father] nor [Mother] has ***attempted*** to help provide or care . . . ." (R. at 92-93 (emphasis added)). The family court took into consideration Father's failure to make any effort to establish paternity which would have legally prompted his support obligation. If there is any error here, it can only be harmless error given the other factors weighing against awarding joint custody.

Substantial evidence supports custody award

Father asserts the family court erred by entering a judgment inconsistent with the testimony of the parties. In effect, this is an argument that the custody award is not supported by substantial evidence. We disagree.

Father points out that Grandmother posted a comment on social media that "it's the right thing for a Child to be with one of their parents . . . ." Given the task of the family court, this comment is not inconsistent with the best-interests finding in this case. Grandmother does not seek to remove Father from Child's life. She is the one who most vigorously pursued Father's participation.

Father also points to Grandmother's use of the word "custody" in her testimony and interprets it as Grandmother's support for joint custody. He disregards, however, Grandmother's testimony that she wanted the family court to determine whether joint custody was appropriate. That is more than appropriate.

The real question is whether the custody award is so lacking in substantial evidence to support it that the ruling is an abuse of discretion. The obvious answer in this case is that it is not.

CONCLUSION

We affirm the Floyd Family Court's March 18, 2019, findings of fact and conclusions of law.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE SUZANNE BLACKBURN:

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