

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000816-ME

J.L.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 16-J-00382

B.B.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND MAZE, JUDGES.

CLAYTON, JUDGE: J.L. (“Mother”) appeals from the Kenton Family Court’s Findings of Fact, Conclusions of Law and Judgment/Orders awarding joint custody and parenting time to B.B. (“Father”), the biological father of J.L.’s son. Mother argues that the trial court applied the wrong legal standard in awarding joint custody. The trial court found that Father had not waived his right to custody

through unfitness or waiver, but failed to make findings regarding the best interest of the child in its custody determination as required under Kentucky Revised Statutes (KRS) 403.270. Consequently, we reverse and remand for additional findings.

Mother began living with Father when she was sixteen years of age and he was twenty-four. According to Mother, she sought refuge with Father because her parents were drug addicts. Mother claims that Father was abusive and raped her repeatedly, although she did not realize it was rape until she became an adult. Father admitted having sexual relations with Mother and giving her illegal drugs and alcohol throughout her minor years. After living with Father for several years, Mother began a sexual relationship with D.M. (“Boyfriend”). When Mother was twenty-one, she became pregnant, left Father and moved in with Boyfriend. She did not tell Boyfriend that the child, who was born on August 27, 2007, could be his. Boyfriend treated the child as his own son, and fathered another child with Mother. Boyfriend’s parents also developed a very close relationship with the child. Boyfriend was serving a prison sentence at the time of the custody hearing.

On March 14, 2016, Father filed a paternity action, apparently after someone approached him and told him that Mother’s child was his “spitting image.” DNA testing determined that he was the biological father of the child. A

judgment of paternity was entered and he was ordered to pay child support and arrears, which he did.

Father filed a motion on November 29, 2016, seeking joint custody and visitation with the child. Following a hearing, the family court entered findings which set forth the factual background we have outlined. For its conclusions of law, the family court stated that Mother had failed to prove by clear and convincing evidence that Father had knowingly, voluntarily, and intentionally waived his right to parent the child, nor had she proven that Father is unfit as defined in KRS 625.090. The family court granted Father's motion for joint custody and for parenting time with no further explanation. This appeal followed.

As the trial court correctly observed, in Kentucky, biological parents "have a fundamental, basic, and constitutional right to raise, care for, and control their own children." *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010) (citing *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989)). Thus, if a non-parent who does not meet the statutory standard of *de facto* custodian wishes to assert custody, that individual bears the burden of demonstrating that the biological parent is unfit or has waived his or her superior right to custody. *Vinson v. Sorrell*, 136 S.W.3d 465, 468 (Ky. 2004). So, for instance, in *Boone v. Ballinger*, the husband to whom the mother was married when the child was born and who had been led to believe he was the child's father was allowed to assert the doctrine of

waiver against the child's biological father. 228 S.W.3d 1, 10 (Ky. App. 2007).

Similarly, in *Penticuff v. Miller*, a former husband seeking custody of a child claimed waiver of superior parental rights by both biological parents. 503 S.W.3d 198 (Ky. App. 2016).

Mother argues that the trial court mistakenly applied the standard applicable to custody disputes between third parties and a biological parent, and having determined that Father was neither unfit nor had waived his superior right to custody, made no further inquiry, defaulting instead to an award of joint custody. She contends that in custody cases involving two biological parents the trial court must apply the best interest of the child standard under KRS 403.270.

We agree. Although this argument was never raised before the trial court, either at the hearing or in the memoranda submitted by the parties at the trial court's request following the hearing, such findings are mandatory. Because the trial court's order includes no findings of fact to support its conclusion, a request for findings is not necessary for purposes of review under Kentucky Rules of Civil Procedure (CR) 52.01. *Anderson v. Johnson*, 350 S.W.3d 453, 459 (Ky. 2011).

“The overriding consideration in any custody determination is the best interests of the child. The best interests standard applies equally when the child is born out of wedlock.” *Dull v. George*, 982 S.W.2d 227, 230 (Ky. App. 1998) (internal citations omitted). Mother and Father both possess the superior right to

custody reserved to biological parents as against third parties, but they are not automatically entitled to enjoy joint custody.

Father argues that the family court did consider the best interest of the child as evidenced by various statements it made at the hearing. The trial court expressed concern about the effect a sudden introduction to Father would have on the child, and ordered the parties to consult with the Children's Law Center and a mental health professional. The trial court also considered Father's mental health, the wishes of the parents regarding custody, and at one point expressly stated that it was considering the child's best interests. But its written order evinces only the conclusion that joint custody is mandated by the fact that Father is the child's biological father and has not been shown to be unfit or waived his rights. "We remind the circuit court that it speaks only through written orders entered upon the official record. Thus, any findings of fact and conclusions of law made orally by the circuit court at an evidentiary hearing cannot be considered by this Court on appeal unless specifically incorporated into a written and properly entered order." *Kindred Nursing Centers Ltd. P'ship v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010) (internal citation omitted).

Mother also argues that Father's custody claim was improperly brought by motion after the entry of the judgment of paternity, rather than by a petition for custody. Mother provides no citation to the record to show how this

alleged error was preserved. Consequently, it will not be addressed here because “errors to be considered for appellate review must be precisely preserved and identified in the lower court.” *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986).

Because the trial court made no findings that joint custody was in the child’s best interest, the case must be reversed and remanded for further proceedings. Upon remand, the trial court shall reconsider its award of joint custody and shall make specific findings of fact and conclusions of law as to the best interests of the child in conformity with KRS 403.270.

ALL CONCUR.

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