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NO. COA01-1215

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

JOHN DAVIS HAYES, JR.
Plaintiff-appellee,

v.

Davidson County
No. 00CVD 1885

BAMBI JEAN TORRENCE,
Defendant-appellant.

Appeal by defendant from order entered 23 April 2001 by Judge Wayne L. Michael in Davidson County District Court. Heard in the Court of Appeals 15 August 2002.

Jon W. Meyers, for plaintiff-appellee.

James E. Snyder, for defendant-appellant.

BIGGS, Judge.

Defendant (Bambi Torrence) appeals from an order awarding plaintiff (John Hayes) custody of Brittany Hayes (the child). For the reasons that follow, we remand for further consideration by the trial court.

Evidence presented at the custody hearing tended to show the following: Defendant and plaintiff, who are second cousins, began dating when defendant was 15 or 16 years old and plaintiff was 25. They were romantically involved for several years and lived together after defendant turned 16, but they never married. Defendant gave birth to the child in July, 1998. Plaintiff was in

prison when the child was born, but after his release the two resumed their relationship for several months before splitting up.

Plaintiff filed an action seeking custody of the child and child support on 17 July 2000, and the case was heard on 23 April 2001. At the time of the hearing, both parties were employed, and both had family support in the community. Plaintiff had married, and lived with his wife and stepdaughter. Defendant had not married or had other children. She lived with her parents in a three bedroom house, and her parents watched the child during the trial court for consideration. Defendant had several misdemeanor criminal charges pending at the time of the hearing.

On 24 April 2001, following the hearing, the trial court awarded custody to plaintiff. The court found that "each party [was] equally fit to provide the basic needs of the minor[,] but concluded that "it would be in the best interests of the child that her care and custody be placed with the Plaintiff[.]" The order granted full custody to plaintiff, and awarded defendant limited visitation rights. From this order defendant appeals.

Defendant argues on appeal that the trial court abused its discretion by awarding plaintiff custody of the child, and by granting her only "minimal" visitation. We do not reach this issue, however, and remand to the trial court to consider its custody determination in light of this Court's recent decision in

Rosero v. Blake.

The parties did not raise the issue of the standard employed by the trial court in awarding custody to plaintiff. However, "[i]n a child custody case, . . . the findings and conclusions of the trial court must comport with our case law regarding child custody matters." *Seyboth v. Seyboth*, 147 N.C. App. 63, 65, 554 S.E.2d 378, 380 (2001) (citation omitted). The general rule regarding child custody determinations is found in N.C.G.S. § 50-13.2(a) (2001) which provides that:

An order for custody of a minor child . . . shall award the custody of such child to such person . . . as will best promote the interest and welfare of the child. . . . An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. . . .

However, in the instant case, it is undisputed that the parties were never married, and that the child was born out of wedlock. Therefore, the trial court was required to apply the appropriate standard for the determination of custody of an illegitimate child.

The rule at common law is that "the mother of an illegitimate child is presumed to have a superior right to custody of her child as against all others, including the child's putative father." *Rosero v. Blake*, 150 N.C. App. 251, 254, 563 S.E.2d 248, 252, *disc. review allowed*, 356 N.C. 166 S.E.2d (2002) (citing *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965)). Thus, the court applies a presumption in favor of awarding custody to the mother of an

illegitimate child, unless she "is unfit, has neglected the welfare of the child, or has exhibited other conduct inconsistent with the parent's constitutionally protected status," *Rosero, id.* (citing *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994)), and "only after the trier of fact has found the parent has acted in a manner inconsistent with [her] protected status may application of the best interest of the child test be appropriate." *Seyboth v. Seyboth*, 147 N.C. App. 63, 67, 554 S.E.2d 378, 381 (2001).

The presumption in favor of awarding custody to the illegitimate child's mother may be dissolved by the child's putative father pursuant to several statutes. Of these, the following are relevant in the present case:

1. N.C.G.S. § 49-10: Legitimation of illegitimate child is effected under this statute. Trial court may legitimate child when 'it appears to the court that the petitioner is the father of the child[.]'
2. N.C.G.S. § 49-14: Civil action to establish the paternity of an illegitimate child upon 'clear, cogent, and convincing evidence.'

"[A]fter the putative father legitimates his child according to statutory provision, or submits to a judicial determination of paternity, the child's parents stand on an equal footing as regards to custody." *Rosero* at 256, 563 S.E.2d at 253. See N.C.G.S. § 49-11 (2001) (after father legitimates his child, he is entitled to "all of the lawful parental privileges and rights, . . . to the same extent as if said child had been born in wedlock"); N.C.G.S. § 49-15 (2001) (after judicial "upon establishing paternity under

G.S. § 49-14, of an illegitimate child pursuant to G.S. § 49-14, the rights, duties, and obligations of the mother and the father . . . with regard to support and custody of the child, shall be the same"); *Conley v. Johnson*, 24 N.C. App. 122, 210 S.E.2d 88 (1974) (father of illegitimate child entitled to visitation rights after judicial determination of paternity).

However, if the putative father has neither legitimated his child, nor had a judicial determination of paternity, the trial court errs by determining custody without regard to the common law presumption in favor of the mother. *Rosero, id.* In *Rosero*, the putative father had executed an acknowledgment of paternity pursuant to N.C.G.S. § 110-132 (2001), governing child support; had provided financial support to the child; and had established a bond with the child. This Court concluded that "the General Assembly, by specifying certain procedures to confer parental status upon the putative father of an illegitimate child, necessarily excluded other procedures[,]" and held that because the father "neither legitimated [the child] as provided by statute, nor . . . [sought] a judicial determination of paternity under N.C.G.S. § 49-14[,]" his involvement with the child "did not dissolve the presumption in favor of [the mother]." *Rosero, id.* See also *Smith v. Barbour*, __ N.C. App. __, __, 571 S.E.2d 872, __ (2002) (citing *Rosero v. Blake*, 150 N.C. App. 251, 255-56, 563 S.E.2d 248, 252-53 (2002)) ("The father of a child born out of wedlock will be treated as a third party unless he has either legitimated the child pursuant to N.C.G.S. § § 49-10, 49-12, or 49-12.1 or had his paternity

adjudicated under § 49-14."); *David v. Ferguson*, __ N.C. App. __, __, 571 S.E.2d 230, __ (2002) ("Based on binding authority established in *Rosero v. Blake*, we find that the trial court committed error in applying the best interest test").

It appears that *Rosero* may be applicable to the instant case. There is no evidence in the record that plaintiff either legitimated the child, or sought a judicial determination of paternity. We conclude that in the present case it is unclear whether the trial court applied the common law presumption in determining what was in the best interest of the child. Because the trial court's order in the case *sub judice* was entered prior to this Court's ruling in *Rosero*, we reverse the order and remand for the court to reconsider its order in light of *Rosero*.

In addition, upon remand the court should ensure that its findings are supported by the evidence. The custody order includes findings regarding unnamed members of defendant's family that are not supported by record evidence:

. . . .

7. That it would be detrimental to the minor child where there is constant conflict and Court battles between the Defendant and extended family and other people. . . .

. . . .

12. That Defendant's pattern of life style from generation to generation has not changed.

. . . .

26. That it would be in the best interests of the child to have a chance to grow up in an environment where the child's custodial parent

and family are not constantly using the Court system themselves or being defendants in criminal actions.

No evidence was introduced regarding "Court battles" between "defendant's extended family" and unnamed "other people." Nor does the record contain evidence to support the global allegation that defendant's family were "constantly" "being defendants in criminal actions" or evidence as to what "life style" was being perpetuated down through the generations of defendant's family. Regarding the plaintiff, the court found that "the Plaintiff's criminal record ceased in 1995" notwithstanding undisputed evidence, including plaintiff's own testimony, that he was in prison on felony charges in 1998. We conclude that these findings of fact were not supported by competent evidence. Moreover, the custody order states as a basis for the court's conclusion, that defendant was unfit to have custody, only that it was based on "the acts and behavior as set out above[.]" Thus, this Court cannot determine to what extent the trial court relied on improper or unproven findings of fact.

For the reasons discussed above, we remand for the trial court to consider its custody determination in light of our Court's recent decision in *Rosero v. Blake*, and to review its finding to ensure that they are supported by evidence in the record.

Reversed and remanded.

Chief Judge EAGLES and Judge WALKER concur.

Report per Rule 30(e).