

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA10-1010

LATROY HAMILTON

APPELLANT

V.

OFFICE OF CHILD SUPPORT
ENFORCEMENT AND JANET
EASTER

APPELLEES

Opinion Delivered June 1, 2011

APPEAL FROM THE OUACHITA
COUNTY CIRCUIT COURT
[NO. DR-2003-291-1]

HONORABLE HAMILTON H.
SINGLETON, JUDGE

REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Judge

In a paternity action brought by appellee Office of Child Support Enforcement, appellant LaTroy Hamilton was found to be the natural father of the minor child D.D. D.D., a seven-year-old girl, has been in the care of her maternal aunt, appellee Janet Easter, since birth. Appellant filed a motion for change of custody that was denied. The trial court found that appellant had established paternity in a court of competent jurisdiction, was a fit parent to raise the child, and had undertaken his parental responsibilities, but that an award of custody to appellant would not be in D.D.'s best interest. On appeal, appellant contends that the trial court clearly erred in finding that a change of custody would be contrary to the child's best interest, in failing to give sufficient weight to the law's preference for placing a child in the custody of a fit parent rather than a third party, in improperly considering the sex

of the parent in making the custody determination, and in failing to grant his request for the appointment of a guardian ad litem. We reverse and remand.

We agree that the trial court improperly considered the sex of the parent in awarding custody. The trial court found that appellant satisfied all of the statutory criteria set out in Ark. Code Ann. § 9-10-113 (Repl. 2009) except for best interest. The determination that it would not be in the child's best interest for custody to be awarded to her father was based expressly on the finding that appellant is a man and the child is a girl, the court stating:

This . . . is so important because while [appellant's] grandmother is in his home, there is no mother figure with whom D.D. is familiar to answer the questions her body will be asking her in the near future. There is only the one to whom she has looked up to as mother and custodian, her aunt, [appellee] Ms. Easter.

Arkansas Code Annotated section 9-13-101 (Repl. 2009) abolished any gender-based presumption or legal preference with respect to child custody in actions for divorce, mandating that a child custody award be made without regard to the sex of the parent but solely in accordance with the welfare and best interests of the children. This principle equally applies in cases where a father petitions for custody in a paternity action. *See Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993).

Here, while the gender of the father was not the sole basis for the trial court's custody award, the court expressly considered it to be a very important factor. Although our review of equity cases is de novo, because of the unparalleled importance of the trial judge's observations in child-custody cases, we remand for the trial judge to determine the best

Cite as 2011 Ark. App. 399

interest of the child without regard to the sex of the parent. *See Fox v. Fox*, 31 Ark. App. 122, 788 S.W.2d 743 (1990).

Because we reverse and remand for further findings, it is unnecessary to decide the remaining issues advanced by appellant. For the guidance of the trial court, however, we note that parental preference does not apply with equal strength in cases where a child has been entrusted to the custody of another and familial bonds have been allowed to develop. *See Tidwell v. Tidwell*, 224 Ark. 819, 276 S.W.2d 697 (1955). Finally, given the trial judge's statement that the interests of the child would be best served by appointment of a guardian ad litem, we encourage him to appoint one should further proceedings be required to resolve the issue of the child's best interest.

Reversed and remanded.

ROBBINS and GLOVER, JJ., agree.