

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002386-MR

JAMES ALLEN

APPELLANT

APPEAL FROM MONTGOMERY CIRCUIT COURT
v. HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 98-CI-00082

CANDACE ALLEN; ELZIE
PRATER; AND SANDY PRATER

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE: In this custody action, James Allen (hereinafter "James") has appealed from the Montgomery Circuit Court's October 28, 2003, Findings of Fact, Conclusions of Law and Judgment, in which his minor children's maternal grandparents were declared to be their de facto custodians and awarded sole custody. Having considered the parties' briefs, the record and the applicable case law, we must vacate the circuit court's judgment and remand.

James and Candace Allen (hereinafter "Candace") were married in Montgomery County, Kentucky, on February 24, 1996. Two children were born of the marriage: C.E.A. on September 18, 1996; and J.R.A. on January 19, 1998. James and Candace separated on April 1, 1998, and Candace filed a Petition for Dissolution of Marriage on May 22, 1998. In the petition, Candace requested dissolution of the marriage, sole custody of the minor children, child support, and liberal visitation for James. After a brief reconciliation, James and Candace again separated on April 1, 1999, after James had entered the military.

On March 17, 1999, Candace's parents, Elzie and Sandy Prater (hereinafter "the Praters") filed juvenile petitions in the Montgomery District Court alleging that Candace had been neglecting her minor children. The district court entered a juvenile emergency custody order for each child, removed the children from Candace's custody, and awarded the Praters temporary custody. At that time, James had entered the U.S. Army and was stationed in Ft. Knox. By order entered June 17, 1999, the district court ordered James to pay \$400 per month and Candace to pay \$150 per month in child support to the Praters. The district court held a hearing on July 28, 1999, at which time Candace admitted to neglecting her children. Dispositions were entered the same day, in which the district court ruled

that the Praters were to retain temporary custody and that the natural parents were to have liberal visitation to be set by the Praters. James and Candace were to continue to pay the same amount of child support as previously ordered. James sporadically paid his child support obligations during the first year, and then the payments were automatically deducted from his paychecks.

The divorce action languished in the circuit court until James filed an Amended Response to Petition for Dissolution of Marriage¹ on July 18, 2003. In this pleading, James requested sole custody of the minor children and reasonable child support from Candace. The same day, James filed a motion for temporary sole custody of the children and for the Praters, as the current custodians, to be joined as necessary parties. In an affidavit attached to the motion, James indicated that he was currently in a position to establish a stable permanent home for the children and that he still wanted the children to have close relationships with Candace and the Praters. On July 24, 2003, the Praters filed a pro se motion with the circuit court requesting that they be declared the children's de facto custodians and that they be awarded sole custody and child support. The Praters attached an affidavit to their motion, in which they stated that although James had been

¹ The record does not contain any previously filed response to the petition.

discharged from the U.S. Army in October 1999, he did not seek to regain custody until July 2003 and that his visitations prior to that time were sporadic. By letter dated July 30, 2003, Candace indicated to the circuit court that she wanted the children to remain in the custody of her parents, the Praters. James filed a response to the Praters' motion, again requesting that he be awarded sole custody of the children and that the Praters be awarded visitation rights.

Following a brief motion hour hearing on August 15, 2003, the circuit court joined the Praters as necessary parties and scheduled a hearing on custody for August 25, 2003. At the hearing, the circuit court heard testimony from several witnesses. James testified that he enlisted in the U.S. Army in January 1999 and was discharged on October 21, 1999. Following his discharge, he moved around, eventually moving in with a girlfriend, and obtained employment. At the time of the hearing, he was in a stable living environment and in a place big enough for the children, and wanted to regain custody. James's mother and cousin also testified as to the good living conditions James possessed. Candace testified that the children should remain with their grandparents. Sandy Prater testified that she and her husband received custody of the children on March 17, 1999, and had been flexible with them in relation to visitation with James and Candace. She indicated that she did

not keep track of the child support Candace was supposed to be paying through the state, but that she had been receiving child support payments from James out of his paycheck.

At the conclusion of the hearing, the circuit court indicated that it would be making a decision on the de facto custodian status as well as on the issue of custody without holding a further hearing, over the objection of James, as no further information regarding custody would be necessary in order to make that determination. James stated that he had only prepared for a hearing on temporary custody as opposed to permanent custody, and that he had planned on calling more witnesses regarding his current living situation. The circuit court first noted that although James could have moved for custody of his children upon his discharge in 1999 and had been employed since 2000, he waited until 2003 to petition the circuit court for custody. The circuit court ruled that the statutory period for de facto custodianship began to run in November 1999 when James was discharged and that the Praters had been the children's custodians from that time. The circuit court then declared that the Praters were the de facto custodians of the minor children and awarded them sole custody as it would be too traumatic to move the children from their grandparents' stable home in which they had been living for over four years. On October 28, 2003, the circuit court entered a

written judgment memorializing its oral rulings regarding custody and dissolving the marriage between James and Candace. This appeal followed.

On appeal, James argues that the Praters are not entitled to the status of de facto custodians, as they had not been acting as the children's primary financial supporter for more than one year; James had been paying child support to the Praters and the Praters had been receiving K-TAP² benefits for the children. Furthermore, James asserts that the circuit court did not consider all of the relevant factors set forth in KRS 403.270(2) and failed to conduct a final hearing before deciding upon a permanent custody award. On the other hand, in their brief, the Praters³ argue that clear and convincing evidence exists to support the circuit court's decision. Candace did not file a brief in this matter.

In Moore v. Asente, Ky., 110 S.W.3d 336 (2003), the Supreme Court of Kentucky addressed the standard of review for appellate courts in this type of case, and held that a reviewing court may set aside findings of fact,

[O]nly if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial

² Kentucky transitional assistance program. See KRS 205.200.

³ Attorney Stephen E. Neal entered an appearance in the circuit court on behalf of the Praters on December 4, 2003.

evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

Id. at 354. With this standard in mind, we shall review the trial court's decision.

We shall first address the issue as to whether the Praters were entitled to be deemed de facto custodians. KRS 403.270(1)(a) defines a de facto custodian as:

[A] person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided

with the person for the required minimum period.

KRS 403.270(1)(b) provides that once the court determines that a person is a de facto custodian, "the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.420, and 403.020." See Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777 (2002). It is undisputed in this case that the Praters had been the primary caregivers for the children for more than one year. The issue in this case is whether they were also the primary financial supporters for that time. Because we cannot hold that clear and convincing evidence exists to support the circuit court's decision that the Praters were the primary financial supporters at the time when the status was raised, we must vacate that ruling.

Although the question was somewhat disputed, it is now settled that a person must have "been the primary caregiver for the child but also the primary financial supporter of the child in order to prove de facto custodian status." Swiss v. Cabinet for Families and Children, Ky.App., 43 S.W.3d 796, 798 (2001). In Swiss, this Court affirmed the trial court's ruling that the Swisses were not de facto custodians because the cabinet, rather than the Swisses, provided the primary support. Furthermore, in Sullivan v. Tucker, Ky.App., 29 S.W.3d 805 (2000), this Court

stated, "[t]his language ("the court, not "every court thereafter") . . . suggests that the determination of de facto custodianship is a matter that must be addressed anew whenever the status is asserted." Id. at 808. The Praters did not assert the status of de facto custodian until July 24, 2003.

We are aware in the present case that James's child support payments for at least the first year were somewhat sporadic and that he most likely did not pay the entire amount he owed. However, that is not the issue in this case. It is undisputed that, at least for the year previous to and at the time of the hearing, he had been making his regular \$400 per month child support payments through deductions from his paycheck. At the time the Praters moved for a determination of de facto custodian status, there is no evidence to support their assertion that James was not, or that the Praters were, the primary financial supporter of the children. The Praters did not produce any evidence regarding money they expended for support of the children over and above that provided by James and Candace as well as through the K-TAP benefits they collected. Although we recognize that the full amount needed to raise a child is not necessarily provided for by the child support scale, we are not persuaded by the Praters' argument that they were the primary financial supporter because they were responsible for paying the mortgage or rent, the taxes, and for

clothing and entertainment expenses. There is no clear and convincing evidence as to what the Praters expended of their own money in support of the children over that which they received from other sources. Therefore, we must hold that the circuit court erred in declaring the Praters to be de facto custodians of the minor children and vacate that decision as well as the resulting custody award. We remand this matter for further proceedings regarding the Praters' financial contribution to the children's upbringing to allow for a proper determination as to whether the Praters should be afforded de facto custodian status.

As a result of our decision on this issue, the remaining issues regarding consideration of the factors of KRS 403.270(2) and the failure to hold a final hearing are moot.

For the foregoing reasons, we must reverse the circuit court's decision declaring the Praters to be de facto custodians and awarding them sole custody, and remand this matter for further proceedings regarding custody.

COMBS, CHIEF JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I agree with the reasoning and the result of the majority opinion, but I write separately to emphasize that the Praters' receipt of child support from James Allen does not necessarily disqualify them from being considered

de facto custodians of the Allen children. In enacting KRS 403.270(1), the legislature recognized that a third party who has assumed the role of a parent should be recognized as such. Thus, a person established to be a *de facto* custodian has the same standing as a natural parent in a custody dispute.

As the majority correctly notes, a person claiming *de facto* custodian status must show by clear and convincing evidence that he or she has been the primary caregiver for, and primary financial supporter of the child. Swiss v. Cabinet for Families and Children, Ky. App., 43 S.W.3d 796, 798 (2001); *citing* KRS 403.270(1)(a). It is not enough that a person provide for the child alongside the natural parent. Rather, "the statute is clear that one must literally stand in the place of the natural parent to qualify as a *de facto* custodian." Consalvi v. Cawood, Ky. App. 63 S.W.3d 195, 198 (2001).

In this case, the Praters obtained legal custody of the children in 1999. Neither James nor Candace objected to that award of custody. However, this custody order did not extinguish James's or Candace's obligation to support their children. To this end, the district court properly ordered James and Candace to pay child-support to the Praters. James's payment of this court-ordered support was sporadic until a wage assignment order was entered.

The majority correctly holds that a person's status as a *de facto* custodian must be addressed as of the time the status is asserted. Furthermore, the Praters' legal custody of the children since 1999 is clearly relevant to determine their status. The proper standard to determine whether the Praters are *de facto* custodians is whether they have been the primary caregivers for and primary financial supporters of the children. The trial court clearly erred by failing to make a finding on the extent of the Praters' financial support of the children.

But as of July 24, 2003, when the Praters asserted the status, they had been the primary caretakers of the children for nearly four years. Although they had been receiving some child support from James Allen, I would not presume that \$400.00 a month for two children would constitute the primary means of support of these children. Rather, their receipt of child support payments or state benefits should only be a factor in determining whether they have been the primary financial supporters of the children for the past four years.

As correctly noted by the majority, there was no evidence concerning the amounts that the Praters have spent to support the Allen children, as opposed to what they received from other sources. Therefore, I agree that the trial court erred in finding them to be *de facto* custodians of the Allen children. Furthermore, the majority properly remands this case to the trial

court for an additional hearing and findings in accord with the proper standard. Although I agree that the Praters bear the burden of proving that they have provided the primary means of support for the children, I strongly disagree with any suggestion that *de facto* custodian status could be defeated merely because the custodial non-parents are receiving support payments that the parents are lawfully obligated to pay. The result would be to discourage the *de facto* custodian from seeking support from the parents for fear of losing the status.

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