

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000723-ME

SARAH WILER SERGENT

APPELLANT¥

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN JUDGE
ACTION NO. 05-CI-00788

NORMA WILER; JAMES
WILER; and MARK TRAVIS
CORDLE

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

BUCKINGHAM, SENIOR JUDGE: Sarah Wiler Sergent appeals from an order of the Boyd Circuit Court determining that her grandparents, appellees Norma Wiler and James Wiler, are the de facto custodians of Sarah's twin sons, and awarding the Wilers primary residential custody of the children. For the reasons stated below, we affirm.

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

BACKGROUND AND PROCEDURAL HISTORY

Sarah is the mother of twin boys, born March 5, 1996. The father of the children is Mark Travis Cordle. The children were born out of wedlock. Sarah was 17 years old at the time of their birth.

Following the birth of the children, they and Sarah resided with the Wilers.² In November 1997, Sarah married her current husband, Steve Sergent, and left the Wiler home, leaving the children with her grandparents. While there was conflicting testimony concerning the level of involvement, in subsequent years Sarah was involved in the children's lives, had visitations with them, and participated in some decisions concerning their upbringing, particularly in the areas of schooling and medical treatment for one of the twins who has been diagnosed with ADHD.

Following a dispute involving Norma's taking the children to an amusement park on a day when they had a baseball game scheduled - which Norma thought was canceled but was not - in July 2005, Sarah removed the children from the Wiler home with the intent that they would then permanently reside with her.

On July 21, 2005, the Wilers filed a petition for custody in the Boyd Circuit Court. The petition requested that they be adjudged de facto custodians pursuant to Kentucky Revised Statute (KRS) 403.270(1) and granted sole custody of the children. The matter was assigned to a domestic relations commissioner (DRC). Following a

²The Wilers are the parents of Sarah's father.

hearing, the DRC entered a report recommending that the Wilers be adjudged de facto custodians of the children and awarded their sole custody.

Sarah filed exceptions to the DRC's report. Following a hearing, the circuit court entered an order determining that the Wilers were the de facto custodians of the children, awarding joint custody of the children to Sarah and the Wilers, and designating the Wilers as primary residential custodians. The order also set a visitation schedule for Sarah and ordered the parties to submit financial information for calculation of child support. Sarah filed a motion to alter, amend, or vacate, which was denied. This appeal followed.

DE FACTO CUSTODIAN ISSUES

Sarah first argues that the Wilers did not meet the burden of proof contained in KRS 403.270(1) for establishing de facto custodian status. KRS 403.270(1) provides:

(a) As used in this chapter and KRS 405.020, unless the context requires otherwise, “de facto custodian” means 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.

(b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person

meets the definition of de facto custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of 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, 403.822, and 405.020.

In its February 22, 2006, order the circuit court addressed the de facto custodian issue as follows:

The minor children resided in the home of the Petitioners [the Wilers] from their birth in March 1996 until the children were removed from the home by the Respondent [Sarah] in July 2005. While the children lived with the Petitioners, the Respondent visited with them during the week, and just after the children started the third grade, they began spending alternate weekends with her; however, the primary day-to-day care for the children clearly continued to be provided by the Petitioners. The Petitioners are the parties who had the day-to-day responsibility of caring for the children. The Respondent maintained a relationship with the children, but she did not perform the primary care for the children. The Respondent testified that the apartment she lived in was not appropriate for the children; however, the Respondent lived there with her infant daughter, who is not at issue in this action. The Respondent and her husband then purchased a larger home. Even after the Respondent and her husband purchased their home and had ample room to accommodate the twins, she left the children in the care of the Petitioners. Clearly, she was aware that the primary day-to-day care was being performed by the Petitioners. The Respondent did not sever contact with the children, and she did maintain a relationship with them, but the evidence is clear that the Respondent was not the primary day-to-day care provider for the children. The Petitioners maintained the role of the primary caregivers for the children since their birth, and therefore, they satisfy the first factor of being the primary caregiver.

The Court must next consider who provided the primary financial support for the children. The evidence is clear that

the Petitioners provided all of the necessities for the children. The Respondent did provide limited extras, such as baseball equipment, game cards and items of clothing, but the Petitioners provided the necessities for the children, such as shelter, food and the bulk of their clothing and other needs. The Petitioners have been the primary financial supporters of the children since their birth.

Therefore, the Court finds that the Petitioners are the de facto custodians of the minor children. The Petitioners have proven by clear and convincing evidence that they have been the primary care givers and the primary financial supporters of the children for more than one year in accordance with KRS 403.270.

In custody matters tried by a court without a jury, the court's “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rule of Civil Procedure (CR) 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). “A factual finding is not clearly erroneous if it is supported by substantial evidence.” *Sherfey*, 74 S.W.3d at 782. “Substantial evidence” is “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* As stated in *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998), “when the testimony is conflicting we may not substitute our decision for the judgment of the trial court.” *Id.* at 39.

After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. *Sherfey*, 74 S.W.3d at 782-83. Broad discretion is vested in trial courts in matters concerning custody and visitation.

See Futrell v. Futrell, 346 S.W.2d 39 (Ky.1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000). *Id.* “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Sherfey*, 74 S.W.3d at 783. Essentially, while “[t]he exercise of discretion must be legally sound,” *id.*, in reviewing the decision of the circuit court, the test is not whether the appellate court would have decided it differently, but whether the findings of the trial court were clearly erroneous or an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Mere doubt as to the correctness of the trial court's decision is not enough to merit a reversal. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

The findings of the circuit court concerning whether the Wilers met the standards to qualify as de facto custodians were not clearly erroneous. While there is evidence in the record that Sarah participated in the children’s lives and was involved in various decisions concerning their upbringing, the evidence is clear and convincing that the Wilers were the primary caregivers and financial supporters for the children from the time of their birth in March 1996 until their removal from the Wilers' home by Sarah in July 2005. As such, we will not disturb the circuit court's determination that the Wilers were the de facto custodians of the children.

In connection with this argument, Sarah argues that the court failed to properly consider *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky.App. 2001), in its decision. In *Consalvi*, there is language to the effect that KRS 403.270(1) requires that a party

arguing for de facto custodian status must show that it “stood in the place of the natural parent” in caring for the child, not that they “stood alongside the natural parent.” *Id.* at 198. As we construe *Consalvi*, this language was intended as simply a restatement (not an expansion) of the statutory language that the party seeking qualification be the primary caregiver and the primary financial supporter of the children, just as a natural parent would normally be. As previously noted, the evidence in this case clearly and convincingly established that the Wilers were the primary caregivers and primary financial supporters of the children and “literally stood in the place of the natural parents.” Accordingly, even upon consideration of the *Consalvi* case, the court's determination that the Wilers were the de facto custodians of the children was not clearly erroneous.

CUSTODY DETERMINATION

Sarah argues that even if the circuit court was correct in adjudging that the Wilers were de facto custodians of the children, it erred in ruling it was in the children's best interest that the Wilers be awarded custody under the best interest factors contained in KRS 403.270(2). The following factors in KRS 403.270(2) are to be used by the court in determining the best interests of the child:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

The circuit court addressed best interest of the child issues under KRS 403.270 as follows:

The remaining question the Court must consider in determining custody is the best interests of the children. As the Petitioners have been granted the status of de facto custodians, consideration must be given to the factors set forth in KRS 403.270 in determining the best interests of the children.

The Respondent raises the age and health of the Petitioners as a concern, and the Court must take the health of all the parties into consideration pursuant to KRS 403.270(2). The Petitioners appear to be in very good health and their health should not interfere with their ability to parent the children. The Respondent has left the children in the home and care of the Petitioners with full knowledge of their age and health. The children thrived in the care of the Petitioners and their

age and health have not interfered in their ability to care for the children.

Consideration must also be given to the reasons for the extent that the child has been cared for by a de facto custodian, the intent of the parent when placing the child with a de facto custodian, and the circumstances under which the child was placed with the de facto custodian. KRS 403.270(2). In this case, the Respondent was approximately 17 years old when she gave birth; however, when she moved out of the Petitioners home, she remarried and had another child. She continued to allow the twins to live in the home of the Petitioners despite having the ability to take care of the children at that point. The Respondent testified that school would not have afforded her the opportunity to care for the twins; however, it afforded her the opportunity to care for the infant daughter living with her and her husband. Further, the Respondent was not a full time student, and did not work full time during this period. The Petitioners provided the home for the children, as well as providing their daily care.

The Court also takes note that the children's father, Respondent Mark Travis Cordell, has requested that the twins remain with the Petitioners, who have cared for the children since their birth.

After considering the factors set forth in KRS 403.270(2) with respect to the determination of custody, the Court finds that it would be in the best interests of the minor children that the parties share joint custody, with the Petitioners designated as the primary custodians of the children.

As we noted above, in child custody matters we will disturb the trial court's findings only if they are clearly erroneous. CR 52.01; *Sherfey, supra*. If its findings are supported by substantial evidence, its resulting custody award will not be disturbed unless it constitutes an abuse of discretion. *Id.*

Sarah argues for reversal based upon (1) the circuit court's findings that the appellees "appear to be in good health" when the circuit court did not have an opportunity to observe them; (2) the court's failure to address the wishes expressed by the children in their interview with the DRC concerning where they want to live; and (3) the court's failure to address KRS 403.270(2)(h), which concerns the parent's intent in placing a child with a de facto custodian.

As to the latter two issues, Sarah failed to preserve for our review the circuit court's failure to address them. Pursuant to CR 52.04 "[a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by written request for a finding on that issue or by a motion pursuant to Rule 52.02." Sarah failed to request the circuit court for specific findings of fact concerning the children's wishes and KRS 403.270(2)(h); thus, she waived these issues. *See Underwood v. Underwood*, 836 S.W.2d 439, 445 (Ky.App. 1992); *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982); *Whicker v. Whicker*, 711 S.W.2d 857, 860 (Ky.App. 1986).

With respect to the age and health of the Wilers, Sarah cites us to no specific evidence in support of her claim that the finding of the circuit court was clearly erroneous. At the September 23, 2005, hearing before the DRC, Norma testified that she was born March 11, 1932; that she drove a car and had no physical limitations such as difficulty in walking, climbing stairs, doing housework, etc.; that she was under no physical restrictions from her doctor; and that she was in generally good health. She

testified that she did have back surgery a little over one year prior, but that the surgery took care of the problem. Norma has also had surgery for diverticulitis and a hernia. Notwithstanding the foregoing, Norma's testimony was that she is in good health.

James testified that at the time of the hearing, he was 75 years old and that he suffered from no serious ailments or problems. He had had a malignant tumor removed from his right thigh about two months prior. However, James testified that “they got it all” and that he could walk and drive a car. He further testified that he had problems driving at night due to difficulty with his eyes adjusting to the dark. He suffers from glaucoma.

From the testimony presented by Norma and James as set forth above, the circuit court’s finding that “[t]he Petitioners appear³ to be in very good health and their health should not interfere with their ability to parent the children” is supported by substantial evidence and, accordingly, is not clearly erroneous.

In summary, the findings of the circuit court are supported by substantial evidence, and the court did not abuse its discretion in awarding joint custody of the children to the parties with the Wilers as the primary residential custodians.

CONCLUSION

For the foregoing reasons, the judgment of the Boyd Circuit Court is affirmed.

³ Sarah argues that because the matter was heard before the DRC, the circuit court did not have the opportunity to observe the Wilers and would have no basis to opine as to how they “appeared.” However, we construe the circuit court's use of the term “appear” to mean what “appears” from the record rather than how the Wilers “appeared” based upon personal observations.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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