RENDERED: DECEMBER 7, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001054-ME

AARON JEROME TUCKER — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 06-CI-00230

DONNA FROST AND TOM FROST — APPELLEES

OPINION
AFFIRMING IN PART,
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HOWARD,[1] JUDGE; GUIDUGLI,[2] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Aaron Jerome Tucker appeals from orders of the McCreary Circuit Court that awarded sole custody of his daughter, CSDT,[3] to her maternal great-

[1]Judge Howard concurred in this opinion prior to Judge Michael Caperton being sworn in on December 7, 2007, as Judge of the Third Appellate District, Division 1. Release of this opinion was delayed by administrative handling.

[2]Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[3]Because the child is a minor, we use her initials in order to protect her privacy.

grandparents, Tom and Donna Frost. After our review, we affirm in part and vacate and remand in part.

CSDT was born on March 18, 1996, to Tucker and Deborah Warman, a granddaughter of the Frosts. Tucker and Warman were never married and separated close to the time of CSDT's birth. CSDT initially resided with Warman and her husband, Brian, but she moved in with the Frosts sometime in 2000 or 2001. Although CSDT visited with Tucker on occasion, those visits were somewhat sporadic in nature. He did spend a number of birthdays and holidays with her. Warman died unexpectedly on March 29, 2006. Shortly after Warman's death and just after the end of CSDT's school year, Tucker visited the Frosts' home. He told them that he wanted to take CSDT to dinner. Instead, he took her to his home in Scott County, Tennessee, with the apparent intent to keep her there permanently.

On June 1, 2006, the Frosts filed a petition for custody of CSDT in the McCreary Circuit Court. The petition alleged that the Frosts had been CSDT's *de facto* custodians for more than five years and that Tucker was an unfit parent who had had merely minimal contact with CSDT since her birth. On June 12, 2006, Tucker filed a response challenging the allegations in the Frosts' petition and asking for sole custody of CSDT. On June 16, 2006, the Frosts filed a motion seeking temporary custody of CSDT. The trial court granted this motion in a temporary order entered on June 26, 2006, directing that CSDT be returned to the Frosts' custody. Tucker was granted visitation with CSDT on every other weekend. He subsequently filed a motion asking the court to

alter, amend, or vacate this temporary custody order, arguing that the court failed to comply with the provisions of Kentucky Revised Statutes (KRS) 403.270 and KRS 403.280 in reaching its decision. The court denied the motion.

On December 4, 2006, a permanent custody hearing was held during which extensive testimony and evidence were presented concerning CSDT's living arrangements and Tucker's prior involvement with the child. On February 8, 2007, the trial court entered findings of fact, conclusions of law, and a decree of custody awarding sole custody of CSDT to the Frosts. The final custody decree provided as follows:

FINDINGS OF FACT

> 1. The Petitioners, Donna and Tom Frost are the maternal great-grandparents of [CSDT], a minor, whose date of birth is March 18, 1996.
>
> 2. The Respondent, Aaron Jerome Tucker, is the natural father of [CSDT]. Paternity was determined by a DNA test, and a copy of same was attached to the Petition.
>
> 3. Deborah Warman was the natural mother of [CSDT]; she died on March 29, 2006.
>
> 4. [CSDT] has resided primarily with the Petitioners since the year 2001.
>
> 5. The Petitioners have been [CSDT's] primary caregivers since 2001, and have also been her primary financial providers.
>
> 6. The Respondent has had sporadic contact with the child since her birth.
>
> 7. The Petitioners were granted temporary custody of the child by this Court in an Order dated June 26, 2006.

CONCLUSIONS OF LAW

> Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. The Petitioners have established by clear and convincing evidence in accordance with KRS 403.270 that they are the de facto custodians of [CSDT];

2. The Petitioners have established that it would be in the best interests of [CSDT] for the Petitioners to be granted custody; and

3. The Petitioners are entitled to the entry of a Decree granting Petitioners sole custody of [CSDT].

DECREE

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court issues the following Decree:

The Petitioners are hereby granted the sole care, custody, and control of [CSDT], whose date of birth is March 18, 2006. The Respondent shall be granted visitation as described in the temporary Order issued by this Court on June 26, 2006.

This is a final and appealable Order and there is no just cause for delay.

Tucker subsequently filed a motion on February 16, 2007, for more specific findings as well as a motion to alter, amend, or vacate the trial court's February 8 order. On April 25, 2007, the court entered supplemental findings and an order that read as follows:

The Petitioners, Donna and Tom Frost are the maternal great-grandparents of [CSDT], a minor, whose date of birth is March 18, 1996.

The Respondent, Aaron Jerome Tucker, is the natural father of [CSDT]. Paternity was determined by a DNA test, and a copy of same was attached to the Petition.

Deborah Warman was the natural mother of [CSDT]; she died on March 29, 2006.

This Court finds from the evidence that the child [CSDT] moved her belongings from her mother's house to the home of the Petitioners Donna Frost and her husband Tom in 2001. She clearly lived with them until the Respondent took

> her to Tennessee for a visit and did not return her until Ordered to do so by this Court.
>
> The evidence is unrefuted that Donna and Tom provided her clothing, food, school needs and her allowance.
>
> Though there was some evidence that the Respondent paid some child support to the child's mother, Petitioners did not receive any of this money.
>
> Further evidence showed that the Petitioners discipline the child as well. They provided her with her own room. She caught the school bus at Donna and Tom's and got off the bus at Donna and Tom's. If she wanted to go somewhere she asked the Petitioners for permission. Petitioners would discipline her by taking away TV and phone privileges. Petitioners also take her to the doctor. [CSDT] has been going to school in McCreary County. She has developed a network of friends in her classmates. She has family support in McCreary County.
>
> Her father only saw her sporadically over a number of years. He now wants her to leave everything she has known all her life and go to a new and different place.
>
> This Court does not believe it to be in the best interest of the child to move her.
>
> Therefore, Respondent's Motion to Alter, Amend or Vacate the previous Court Judgment is **OVERRULED**.

This appeal followed.

Tucker first challenges the temporary custody order. He argues that the court erred in failing to conduct a hearing on the Frosts' motion for temporary custody as required by KRS 403.280 and in failing to make the findings required by KRS 403.270 concerning CSDT's best interests. KRS 403.280(1) provides:

> A party to a custody proceeding may move for a temporary custody order. The motion must be supported by an affidavit as provided in KRS 403.350. The court may award temporary custody **under the standards of KRS 403.270 after a hearing**, or, if there is no objection, solely on the basis of the affidavits.

(Emphasis added). Thus, before granting a party's motion for temporary custody in a contested proceeding, a court must hold a hearing to consider the criteria of KRS 403.270. Although the trial court failed to comply with these requirements with respect to the temporary order, that order was later replaced with a permanent custody order. *Gladish v. Gladish*, 741 S.W.2d 658, 661-62 (Ky.App. 1987). "[U]nder our standard of review, we cannot set aside the final custody award because of irregularities in the temporary custody phase of the litigation." *Id.* at 662. If Tucker had wanted immediate relief from the court's temporary order, the proper course of action would have been to file a petition for a writ of prohibition with this court. *See id.* at 661. Since he did not, we may consider only the arguments made with respect to the trial court's subsequent order as to permanent custody.

With respect to that order, Tucker first argues that the Frosts failed to prove that they were CSDT's primary caregivers and financial supporters for one year or more; therefore, they failed to show by clear and convincing evidence that they were her *de facto* custodians for purposes of KRS 403.270(1)(a). Acknowledging that the Frosts provided a great deal of care for CSDT, Tucker contends that they did so in conjunction with her mother. Therefore, he believes that they failed to establish that they were the primary caregivers and financial supporters of CSDT as required by KRS 403.270(1)(a). That statute provides as follows:

> 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.

According to the statute, in order for the Frosts to be considered CSDT's *de facto* custodians, the trial court was required to find by "clear and convincing evidence" that they were "the primary caregiver for, and financial supporter of, a child who has resided with [them] for a period of ... one (1) year or more" since CSDT is older than three (3) years of age. *Id.* Case law has construed the statute as requiring putative *de facto* custodians to demonstrate "not only that they had 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*, 43 S.W.3d 796, 798 (Ky.App. 2001).

In reviewing a trial court's decision in a custody case, we are governed by a stringent standard and may set aside the court's findings of fact only if those findings are clearly erroneous (*i.e.*, unsupported by substantial evidence). *Allen v. Devine*, 178 S.W.3d 517, 523 (Ky.App. 2005); *see also Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is defined as evidence that "has sufficient probative value to induce conviction in the minds of reasonable men." *Moore*, 110 S.W.3d at 354, quoting BLACK'S LAW DICTIONARY 580 (7th ed. 1999) and *Blankenship v. Lloyd*

Blankenship Coal Company, Inc., 463 S.W.2d 62, 64 (Ky. 1970). Even if we were to dispute the correctness of the trial court's findings, we are not permitted to reverse the court if those findings are supported by substantial evidence. *Id.*, quoting 7 KURT A. PHILIPPS, JR., KENTUCKY PRACTICE, RULES OF CIVIL PROCEDURE ANNOTATED, Rule 52.01, comment 8 (5th ed. West Group 1995).

After a trial court makes its findings of fact, it is required to apply the law to those facts. Our review of its application of the law to the facts as found is governed by a *de novo* standard. *Allen*, 178 S.W.3d at 524. Even under the *de novo* standard, we may not reverse the trial court unless it has committed an abuse of its broad discretion. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782-83 (Ky.App. 2002); *Allen*, 178 S.W.3d at 524. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Our review of the record reveals that the trial court's findings of fact are supported by substantial evidence and that they support the court's ultimate conclusion that the Frosts are the *de facto* custodians of CSDT. Multiple witnesses testified that CSDT spent almost every night with the Frosts after moving in with them. Some evidence was offered to refute this testimony; however, issues of witness credibility and the weight of the evidence are left to the exclusive province of the trial court. *See* CR 52.01; *Moore*, 110 S.W.3d at 354. There was also testimony that the Frosts provided the vast majority of CSDT's food, clothing, discipline, and financial support. Tucker argues

that the Frosts failed to produce financial records supporting their testimony. However, this argument goes to the weight of the evidence and remained properly a matter for the trial court to determine. We also note that while Tucker did pay child support to CSDT's mother after CSDT moved in with the Frosts, it appears that none of this support was ever given to the Frosts. It is correct that evidence was introduced reflecting that CSDT's mother handled some aspects of her education and medical care -- and that Tucker purchased clothing and other items for CSDT on occasion. Nonetheless, these facts do not refute the trial court's conclusion that the Frosts were CSDT's primary caretakers and financial supporters. *Primary* does not equate with *sole*. Thus, substantial evidence was presented to support the trial court's conclusion that the Frosts were CSDT's *de facto* custodians.

Next, the court was obligated to render a custody decision based upon the best interests of the child as set forth by KRS 403.270(2). Because the Frosts were found to be CSDT's *de facto* custodians, they were entitled to the same standing afforded to Tucker under KRS 403.270 and were required to receive equal consideration in the trial court's custody determination. KRS 403.270(1)(b). It appears from the record that the court complied with these requirements. KRS 403.270(2) provides as follows:

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> (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.

Tucker contends that the trial court based its decision as to best interests on **only one** of the factors enumerated in KRS 403.270(2) - KRS 403.270(2)(d): "[t]he child's adjustment to his home, school, and community...." Therefore, he argues that reversal is required. We disagree. Undoubtedly, an ideal order would have contained factual findings specifically referencing and addressing each portion of KRS 403.270(2). However, the court was not required to do so as courts are only obligated to **consider** the factors set forth in that provision in their decision-making. *See McFarland v.*

McFarland, 804 S.W.2d 17, 18 (Ky.App. 1991). After reviewing the record, we conclude that the court's orders clearly reflect that it carefully pondered and considered all of the elements of KRS 403.270(2). For example, the parties expressed their wishes as to who should have custody of CSDT – which is a factor under KRS 403.270(2)(a)). The court also interviewed CSDT about her own wishes as to who should be her custodian. She expressed her desire to live with the Frosts – another critical criterion under KRS 403.270(2)(b). We are satisfied from the record that the court's findings of fact also clearly reflect consideration of KRS 403.270(2)(c), (d), (g), and (i). Therefore, regardless of an explicit recitation of each factor, we are persuaded that the trial court gave proper consideration to all of the elements set forth in KRS 403.270(2) in reaching its decision as to the best interests of CSDT.

We are also satisfied that the trial court did not err in awarding sole custody of CSDT to the Frosts pursuant to the standard of the best interests of the child. Ample evidence was presented supporting this decision. CSDT enjoyed an established home and relationship with the Frosts and expressed her clear preference that she remain in their custody. Although Tucker persuasively presented evidence and arguments that might have supported a different decision, we nevertheless cannot decree that the trial court's ultimate determination was erroneous based on the standards governing our review.

Tucker last contends that the trial court did not give proper consideration to the question of visitation because it failed to explain why it neglected to provide a

visitation schedule for holidays, birthdays, and summer. When a party requests specific findings with respect to visitation, a court is required to make "a de novo determination of what amount of visitation is appropriate, and enter a visitation order accordingly." *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000). KRS 403.320(1) provides:

> [u]pon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.

We agree that Tucker made an adequate request for specific rulings on the question of holiday, birthday, and summer visitation in his motion of February 16, 2006, asking for specific findings. Consequently, we vacate and remand solely that portion of the court's order as to the visitation issue and direct that it make specific findings as requested by Tucker.

The decision of the McCreary Circuit Court is affirmed in part and is vacated and remanded in part for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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