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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001089-ME
&
NO. 2010-CA-001239-ME

DEZARAE FAITH WHITE
(NOW BLANKENSHIP) APPELLANT/APPELLEE

v.

APPEALS FROM SHELBY CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 06-CI-00021

JOBBY LENN HAWES APPELLEE/APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: In Case No. 2010-CA-001089-ME, Dezarae Faith White (Now Blankenship) appeals from an order entered on May 7, 2010, granting sole custody of her minor child to Jobby Lenn Hawes and awarding him child

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

support. She argues: (1) the trial court erred by designating Hawes as a de facto custodian and (2) her fundamental right to parent her child was violated. In Case No. 2010-CA-001239-ME, Hawes appeals an order entered June 23, 2010, setting the amount of child support. He argues the trial court erred by failing to enter a written finding explaining its reasons for refusing to allocate child care costs as required by Kentucky Revised Statute (KRS) 403.211(6). We affirm the orders of the trial court in both cases.

White is the mother of A.H. White was incarcerated when she gave birth to A.H. in December 2004. White and Hawes agreed that Hawes would care for the child during the incarceration. It is undisputed that Hawes is not the child's biological father, but he has continually cared for A.H. since his birth. White was released from prison in 2006. Since that time, she has been incarcerated again and is currently undergoing rehabilitation for drug addiction.

In January 2006, Hawes filed a petition for designation as de facto custodian and petition for custody in the Shelby Circuit Court. The trial court held two hearings at which both parties were represented by counsel. On March 1, 2006, the trial court entered an order designating Hawes as a de facto custodian and awarding him temporary custody. White was awarded reasonable visitation.

In November 2008, Hawes filed a motion for permanent sole custody. On July 14, 2009, White filed a motion for sole custody. On January 8, 2010, Hawes filed a motion for child support. Following a hearing, the trial court entered an order on May 7, 2010, granting sole custody to Hawes and reasonable visitation

to White. In a subsequent order entered on June 23, 2010, the trial court imputed a minimum wage income to White and awarded Hawes child support in the amount of $206.27 per month retroactive to January 8, 2010. These appeals followed.

White first argues that the trial court erred by designating Hawes as a de facto custodian. Hawes argues that White is barred from raising this issue because she did not appeal from the March 1, 2006 order designating him de facto custodian.

In *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008), the Supreme Court of Kentucky stated:

> Prior to entry of a decree, a court may enter temporary custody orders pursuant to KRS 403.280, and may determine timesharing/visitation pursuant to KRS 403.320, which may be modified whenever it is in the child's best interests to do so. Any such decisions are "pendente lite," "interlocutory" or "non-final." As we have determined in a case that was argued with this one and is being rendered at the same time, *Frances v. Frances*, 266 S.W.3d 754, (Ky.2008), when the court is making its final and appealable custody decree, it must do so based on KRS 403.270, the best interests standard.

KRS 405.020(3) provides that "a person claiming to be a de facto custodian, as defined in KRS 403.270, may petition a court for legal custody of a child. The court shall grant legal custody to the person if the court determines that the person meets the definition of de facto custodian and that the best interests of the child will be served by awarding custody to the de facto custodian." Thus, the determination of Hawes's status as a de facto custodian is an intermediate, ancillary issue to the parties' custody claims. *See* KRS 403.270(1). The March 1,

2006 order determined that Hawes qualified as de facto custodian, but did not ultimately adjudicate the custody issue pursuant to the best interest factors contained in KRS 403.270(2). The court did not resolve the custody issue until its May 7, 2010 order, which White properly appealed. Because the March 1, 2006 order only designated Hawes as de facto custodian and did not adjudicate the custody issue, it was by its very nature a nonappealable, interlocutory order. Therefore, we conclude that the de facto custodian issue is properly before this Court.

White argues that Hawes does not qualify as a de facto custodian because she never intended to relinquish custody and that incarceration alone cannot be used to support a finding of abandonment.

KRS 403.270 states in pertinent part:

> (1) (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.

It is undisputed that Hawes satisfied the requirements of the statute with respect to the amount of time spent as the child's primary caretaker and financial provider. White cites *Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky.App. 2001), overruled on other grounds by *Boone v. Ballinger*, 228 S.W.3d 1 (Ky.App. 2007), for the proposition that parenting the child alongside the natural parent does not meet the de facto custodian standard. While this is a correct statement of the holding, *Consalvi* does not apply to the facts of this case. In *Consalvi,* this Court stated:

> the statute is intended to protect someone who is the primary provider for a minor child in the stead of a natural parent; if the parent is not the primary caregiver, then someone else must be. The de facto custodian statute does not . . . intend that multiple persons be primary caregivers. . . . It is not enough that a person provide for a child alongside the natural parent; the statute is clear that one must literally stand in the place of the natural parent to qualify as a de facto custodian.

Id. at 198.

In the present case, it is clear that Hawes stood in the place of White while she was incarcerated. White admitted that Hawes was the sole financial provider for the child and has neither challenged that he was the primary caretaker nor alleged that she or anyone else provided primary care from the child's birth on December 17, 2004, until January 14, 2006. White has not cited any authority to

support her argument that either parties' subjective intent weighs upon the de facto custodian analysis under KRS 403.270(1).

White also argues that incarceration alone cannot support a finding of abandonment. *See J. H. v. Cabinet for Human Resources,* 704 S.W.2d 661, 663 (Ky.App. 1985). Again, this is a correct statement of the law, but inapplicable to the circumstances of this case. White conflates the concepts of custody determination and termination of parental rights. *J.H.* simply held that incarceration alone could not support a finding of abandonment in the context of a termination of parental rights case. *Id.* Such is not the case here. The trial court did not make a finding of abandonment, as such is not required by KRS 403.270(1), nor did it terminate White's parental rights. We conclude that the trial court did not err by designating Hawes as de facto custodian.

White next argues that the application of KRS 403.270(1) in these circumstances is unconstitutional. White has not cited to the record where she notified the Attorney General of her constitutional challenge. KRS 418.075(1) provides, in relevant part, that "[i]n any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard . . . ." The Supreme Court recently held that KRS 418.075(1) does not contain an exception for "as applied" challenges. *Benet v. Commonwealth,* 253 S.W.3d 528, 533 (Ky. 2008). The Court explained:

> we reject the Court of Appeals' undoubtedly well-intentioned conclusion that an appellate court may rule on an "as applied" challenge to a statute's constitutionality, even if a party's failure to comply with KRS 418.075 meant that the same court could not consider a constitutional challenge to the facial validity of a statute. Although the Court of Appeals' novel approach may have some superficial appeal, it cannot withstand close scrutiny because KRS 418.075 contains no exceptions for "as applied" challenges. When no exceptions exist in a statute, there is a presumption that the lack of exceptions reflects a conscious decision by the General Assembly; and a court lacks authority to graft an exception onto a statute by fiat. Rather, a reviewing court must interpret a statute as written, without adding to or subtracting from the legislative enactment. Therefore, the Court of Appeals' statement in *Sherfey* that a reviewing court has the power to review improperly preserved "as applied" constitutional challenges must be overruled as being inconsistent with the plain, unambiguous language of KRS 418.075.

Id. at 532-33 (footnotes omitted). Because White failed to notify the Attorney General of her challenge to the application of KRS 403.270(1), we cannot entertain the claim.

Hawes argues that the trial court erred by failing to make a written finding explaining the reason for its deviation from the requirements of KRS 403.211(6). The trial court determined that child support was calculated without the cost of child care expenses included. The court did not specify its reason for so finding. CR 52.04 states:

> 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 a

> written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Hawes did not request any additional findings as required by CR 52.04. Therefore, the issue is waived.

White attempts to raise an additional issue in her appellee brief regarding an alleged deficiency in the trial court's findings concerning the imputation of income to her. This claim is not properly before us as White has not cross-appealed from the June 23, 2010 order. *Mullins v. Bullens,* 383 S.W.2d 130, 134 (Ky. 1964).

Accordingly, the orders of the Shelby Circuit Court are affirmed in their entirety.

ALL CONCUR.

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