

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000911-ME

H.K. (MOTHER)

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN M. GEORGE, JUDGE  
ACTION NO. 09-J-502232

COMMONWEALTH OF KENTUCKY;  
CABINET FOR HEALTH AND FAMILY  
SERVICES; M.S., SR. (FATHER); AND  
M.S., JR. (MINOR CHILD)

APPELLEES

OPINION  
AFFIRMING

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BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: H.K., hereinafter Mother, appeals from an order of the

Family Division of the Jefferson Circuit Court granting permanent custody of her

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<sup>1</sup> Senior Judge Ann O'Malley Shake, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

child to L.K., hereinafter Grandfather.<sup>2</sup> She argues that Grandfather did not have standing to pursue permanent custody. We find that Grandfather did have standing and affirm.

This case came before the trial court by a petition filed pursuant to KRS 600.020(1) alleging that M.S., JR., hereinafter Child, was neglected. Initially, custody remained with Mother; however, a second petition was filed and temporary custody was granted to Grandfather. Thereafter, Child's parents stipulated that Child was a neglected child. For purposes of time calculations, Child was removed from the care of M.S., SR., hereinafter Father, on May 13, 2009, while the removal from Mother's care occurred on June 17, 2009. Temporary custody was also granted to Grandfather on June 17, 2009.

On November 24, 2009, Grandfather filed a motion for permanent custody. After a hearing and submission of briefs by the parties, the trial court granted Grandfather's motion on April 8, 2010. This appeal followed.

The sole issue on appeal is whether a non-parent has standing to seek permanent custody of a minor child if the non-parent does not meet the statutory definition of a *de facto* custodian. A *de facto* custodian is

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.

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<sup>2</sup> Because this case involves a minor child, the names of the parties will not be used.

KRS 403.270(1). One who has been determined to be a *de facto* custodian is given the same standing in custody matters as the child's natural parents. In this case, Grandfather admits that he is not a *de facto* custodian because he did not meet the time requirement set forth in the statute.

The trial court found that even though Grandfather was not a *de facto* custodian, he still had standing to seek permanent custody based on KRS 403.822(1) and KRS 620.027. KRS 403.822(1) states that a court of Kentucky has jurisdiction to make a custody determination if the child and the child's parents, or the child and at least one parent, or a person acting as a parent, has a significant connection to the state. The trial court focused on the "person acting as a parent" language. KRS 403.800(13) defines person acting as a parent as:

- a person, other than a parent, who:
  - (a) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months, including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding; and
  - (b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

The court found that Grandfather met the definition of a person acting as a parent because he had temporary legal custody of Child for more than six months by an order of the court. This gave Grandfather standing to pursue his motion for custody. This reasoning was discussed in *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010). In that case, a biological mother and her former same-sex partner raised a child together. After the couple broke up, the non-biological

mother moved for joint custody. The trial court granted joint custody, but a panel of this Court reversed, in part, because the non-biological mother was not a *de facto* custodian. The case was appealed to the Kentucky Supreme Court which discussed KRS 403.822. That Court stated that KRS 403.822 gave standing to a person acting as a parent to seek custody if they met the definition of person acting as a parent.

The Court further stated:

[a]lthough KRS 403.822 directly addresses the issue of the court's jurisdiction to make an initial custody determination, by identifying the adult persons who must be present in the forum state for jurisdiction to arise (parent or person acting as a parent), the statute implicitly identifies those persons as parties who may bring an action seeking initial custody of the child. It would make little sense to confer jurisdiction to this state when only "a person acting as a parent" resides here, and not at the same time confer standing upon that person to assert initial custody of the child. Otherwise, the state would have jurisdiction of the matter without any resident of the state having standing to bring an action to assert initial custody in the forum. That would clearly be an unreasonable interpretation of the statute, and is one which we believe our legislature did not intend. Moreover, it would make little sense for a person acting as a parent to have standing only if there is a jurisdictional dispute about which is the proper forum state, but not to have standing when there is not a jurisdictional dispute. Again, this would produce an unreasonable result.

*Mullins* at 575. In the case at hand, Grandfather meets the statutory definition of a person acting as a parent and according to *Mullins*, that gives him standing to seek custody.

Grandfather also has standing to seek custody under KRS 620.027

which specifically states that

[t]he District Court [or Family Court] has jurisdiction, concurrent with that of the Circuit Court, to determine matters of child custody and visitation in cases that come before the District Court where the need for a permanent placement and custody order is established as set forth in this chapter. The District Court, in making these determinations, shall utilize the provisions of KRS Chapter 403 relating to child custody and visitation. In any case where the child is actually residing with a grandparent in a stable relationship, the court may recognize the grandparent as having the same standing as a parent for evaluating what custody arrangements are in the best interest of the child. (Emphasis added).

KRS Chapter 620, et seq., specifically deals with dependency, neglect, and abuse actions. The underlying case was initiated based on allegations of abuse and neglect. Also, Child was residing with Grandfather at the time he moved for custody and the trial court found it was a stable relationship.

The trial court found that Grandfather had standing to seek custody under two different statutes. It further found that it would be in the best interest of Child to remain with Grandfather. We agree and based on the above, affirm the order of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John H. Helmers, Jr.  
Louisville, Kentucky

BRIEF FOR APPELLEE,  
M.S., JR., (MINOR CHILD):

Christopher Harrell  
Louisville, Kentucky

