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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-002205-MR

DUSTIN R. LEHMANN
AND MICHELLE L. GEORGE — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 97-CI-03880

DAVID WAGONER — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND TACKETT, JUDGES.

TACKETT, JUDGE: Appellants, Dustin Lehmann (Lehmann) and Michelle George (George), appeal from an order of the Fayette Circuit Court denying their motion to reconsider a previous order granting joint custody of a minor child, S.D.W., to them and appellee, David Wagoner (Wagoner). We affirm.

George is the biological mother of S.D.W., who was born in February 1992. Wagoner is listed as S.D.W.'s father on his birth certificate. Wagoner believed that he was S.D.W.'s father and voluntarily made child support payments to George, provided

health insurance coverage for the child, and took care of the child in his home on weekends and, often, during the week.

Some six years later, in 1997, Lehmann, who thought he was S.D.W.'s biological father, sought blood tests. The tests revealed that Lehmann was the actual biological father. Lehmann then filed an action in Fayette Circuit Court against George seeking to establish joint custody and visitation rights. An agreed order of paternity and order of child support was subsequently entered in Fayette District Court. That order adjudged Lehmann to be S.D.W.'s biological father and ordered him to pay seventy-two dollars per week in child support.

Wagoner was not a party to the original action in circuit court. However, he and his wife, along with Lehmann, were granted temporary custody of S.D.W. by the Fayette Circuit Court in January 1999. In June 1999, Lehmann filed a motion seeking "physical custody" of S.D.W. Wagoner subsequently filed a motion to be joined as a party to the action.

The court considered these motions at a final custody hearing held in July 1999. The trial court subsequently issued an order granting Wagoner's motion to be joined as a party and, furthermore, finding Wagoner to be the de facto custodian of S.D.W. The court further found that it was in S.D.W.'s best interest to award joint custody of him to Wagoner and Lehmann, with the child's primary residence to be with Wagoner. The court found that George's "lack of care and nurturing" of S.D.W. was sufficient to deny an award of custody to her. The court denied

Lehmann's motion to reconsider, after which Lehmann and George filed this appeal.

On appeal, Lehmann and George argue that the trial court erred by finding Wagoner to be S.D.W.'s de facto custodian. This argument revolves around Kentucky Revised Statute (KRS) 403.270. That statute provides 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 Social 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, 403.420, and 405.020.
>
> (2) 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.

Lehmann and George argue that the record does not contain clear and convincing evidence showing that Wagoner met the elements necessary to be deemed a de facto custodian. Specifically, they argue that Wagoner did not demonstrate that S.D.W. resided with him for a year or more, as required by KRS 403.270(1)(a). The trial court made a specific finding that Wagoner had met the elements necessary to be considered a de facto custodian under KRS 403.270(1). Thus, Lehmann and George's

burden on appeal is heavy as "[f]indings of fact in a domestic relations case shall not be set aside unless clearly erroneous." Dull v. George, Ky. App., 982 S.W.2d 227, 230 (1998). Furthermore, a person may have more than one residence. See e.g., Russell v. Hill, Ky., 256 S.W.2d 508, 509 (1953). Finally, although KRS 403.270 requires clear and convincing evidence to be adduced in order for a court to find a person to be a de facto custodian, it must be borne in mind that clear and convincing evidence does not mean uncontradicted evidence. See e.g., Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843, 850 (1999) (quoting Rowland v. Holt, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)).

We cannot hold that the trial court's finding is clearly erroneous. George testified that S.D.W. resided with Wagoner at least half of the time. S.D.W.'s teacher testified that S.D.W. considered Wagoner's residence to be his home. Wagoner testified that S.D.W. lived with him more than he did with anyone else. Although the parties have not cited evidence showing exactly how many days per week S.D.W. lived in Wagoner's home, all parties agree that the child lived with Wagoner a significant amount of time from birth. Although the child also resided with George's mother part of the time, the trial court's finding that the child resided with Wagoner for more than one year is supported by substantial evidence and therefore is not clearly erroneous. See Janakakis, supra at 852 ("Findings of fact are not clearly erroneous if supported by substantial evidence.").

Lehmann and George's reliance on Williams v. Phelps, Ky. App., 961 S.W.2d 40 (1998) is misplaced. Williams involved a custody dispute between a child's maternal aunt and the sister of the child's putative father. The Williams court discussed how other jurisdictions had resolved custody disputes between nonparents, and noted that Illinois required a nonparent to "show that the parent had relinquished legal custody of the child" in order for the nonparent to petition for custody. Id. at 41-42. Lehmann and George argue that Wagoner must additionally show that they had relinquished physical custody of S.D.W. before Wagoner was permitted to petition for custody of the child.

Williams is distinguishable from the case at hand. Williams was rendered prior to the amendments to KRS 403.270 which added new language concerning de facto custodians. That statute does not require a nonparent to show that a parent has relinquished legal custody of a child before the nonparent can file for custody of the child. Furthermore, Williams involves a custody dispute between two nonparents, whereas the case at hand involves a dispute between S.D.W.'s parents and a nonparent, Wagoner.

Lehmann and George argue that KRS 403.270 requires the residency to be for a continuous one-year period but that the trial court found that S.D.W. had cumulatively resided with Wagoner for more than one year. We note that the trial court did not mention specifically in its order whether its findings were based on a cumulative or continuous residency period. Lehmann and George failed to file a motion for more specific findings on

this issue, pursuant to Kentucky Rule of Civil Procedure (CR) 52.02. Hence, the issue is waived. CR 52.04.

Regardless, we note that KRS 403.270 does not specify whether the residency is to be for a continuous one-year period. In a similar situation, the General Assembly specifically stated that an adoption proceeding "shall not be filed until the child has resided continuously in the home of the petitioner for at least ninety (90) days immediately prior to the filing of the adoption petition." KRS 199.470(3) (Emphasis added). Thus, the General Assembly could have easily inserted a continuity requirement into KRS 403.270(3) if it had so desired. We may not insert a continuity requirement where none exists as we are constrained to interpret statutes by looking to the language utilized by the legislature and may not "breathe into the statute that which the Legislature has not put there." Gateway Construction Company v. Wallbaum, Ky., 356 S.W.2d 247, 249 (1962).

Finally, Lehmann and George argue that any time after Lehmann filed for custody in November 1997 should not be included in the computation of the one-year time period. This argument is based upon language in KRS 403.270(1)(a) stating that "[a]ny 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." However, Lehmann had not previously enjoyed custody of S.D.W., meaning that his petition for custody was not a "legal proceeding . . . commenced

by a parent seeking to regain custody of the child. . . ." (Emphasis added). Furthermore, it is undisputed that S.D.W. lived in Wagoner's home for varying periods of time each week since just shortly after the child's birth. Therefore, even if any period of time after Lehmann's petition was filed is excluded from the one-year computation, the record contains substantial evidence to support the trial court's decision.

The "overriding consideration in any custody determination is the best interests of the child." Dull, supra at 230. A trial court has "broad discretion in determining the child's best interests." Id. A trial court's findings regarding custody actions "will not be overturned unless clearly erroneous." Basham v. Wilkins, Ky. App., 851 S.W.2d 491, 493 (1993). In considering all of the evidence presented and the considerations set forth in KRS 403.270(2), we cannot find that the trial court abused its discretion in awarding joint custody of S.D.W. to Lehmann and Wagoner, with the child's primary residence being with Wagoner.[1]

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANTS: | BRIEF FOR APPELLEE: |
|---|---|
| Robert F. Ristaneo<br>Lexington, Kentucky | Don Cetrulo<br>Lexington, Kentucky |

[1] We are aware of Wagoner's argument that Lehmann and George's brief is not in compliance with CR 76.12. However, given the vital importance of this case to the parties and the child and Lehmann and George's attempt to correct any errors in their reply brief, we have considered the issues presented on their merits.