

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001945-MR

JANICE FRANKLIN AND GLEN FRANKLIN

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE REED RHORER, JUDGE  
ACTION NO. 96-CI-01295

TAMI SEGUIN AND BARRY FRANKLIN

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: KNOPF, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment finding that the paternal grandparents were not the de facto custodians of the child pursuant to KRS 403.270, and that because the mother had not relinquished her parental rights and was not an unfit parent, she was entitled to custody of the child. The grandparents argue that the trial court erred in finding that they were not the de facto custodians of the child and, thus, the best interest standard should have been applied in determining custody. In the alternative, the grandparents argue that the court erred in finding that the mother did not relinquish her parental rights and was fit to have custody. We adjudge that KRS 403.270(1) should not have been retroactively applied in this case. We

further adjudge that the trial court did not err in finding that the mother did not relinquish her parental rights and was not an unfit parent. Hence, we affirm.

Alex Franklin was born out of wedlock to Tami Seguin and Barry Franklin on September 6, 1993. After giving birth to Alex, Tami and Barry moved in with Barry's parents, Jan and Glen Franklin (the "Franklins"), who resided in Frankfort. From the time of Alex's birth until October 24, 1995, the evidence is disputed as how much time Alex spent in the Franklins' care and who was the primary caregiver to the child. The Franklins maintain that from the time of his birth, Alex had been in their care for at least six hours a day and that they were always the child's primary financial support. However, the Franklins do admit that there was a two-month period during this time that Alex was in Barry's and Tami's care. Conversely, Tami contends that during this time, although she lived on the Franklins' property and relied on them to help care for Alex, she was the primary caregiver to Alex. Tami claims that she tended to the child's daily needs during this time as well as helping to clean the Franklins' house and helping with their kennels.

On October 24, 1995, Barry left Tami and Alex and moved to New Orleans. The Franklins, however, allowed Tami and Alex to continue living on their property. From this date until March of 1999, the Franklins kept a journal regarding Tami's activities. The Franklins claim that during the period between October of 1995 and December of 1995, Tami was gone and Alex was left in their care for a total of 34 days. In January of 1996, they

maintain that Tami left and went to New Orleans to work as a stripper for sixteen days. After returning to Kentucky, they assert that Tami went back to New Orleans to work during Mardi Gras for twenty-six days in February and eight days in March. From April 12, 1996 until May 11, 1996, Tami admittedly went back to New Orleans to work during the Jazz Fest while Alex was in the Franklins' care. Even after Tami would return to live with them in Kentucky, the Franklins contend that Tami would sometimes not see Alex for days at a time while he was in their care. They allege that she would often go out drinking with friends and entertain boyfriends during this time, leaving Alex with them.

Tami claims that after Barry left, she went through a difficult period and was uncomfortable living with the Franklins. She concedes that during this period, she spent a good deal of time in Louisville. She also admits periodically going to New Orleans in 1996 to work as a topless waitress. She maintains that when she was living with Barry, they both would periodically go to New Orleans to work and the Franklins never objected thereto. However, Tami contends that whenever she returned to Kentucky, she would continue to care for Alex. She also maintains that although she did not have a steady job while she resided with the Franklins in Frankfort, she did contribute to Alex's expenses by working odd jobs and participating in WIC and other public support programs.

When Tami left on April 12, 1996, to go to New Orleans, she claims that she intended to bring Alex with her so that he could stay with her family in Louisiana while she worked. She

maintains that the purpose of this trip to New Orleans was to earn enough money so that she and Alex could move out of the Franklins' home and obtain their own living accommodations. According to Tami, when she told the Franklins that she intended to take Alex with her, they expressed concern that her car would not make it and encouraged her to leave Alex with them, which she did.

On April 12, 1996, the Franklins filed a motion for temporary custody, alleging that Tami had a severe alcohol problem and had abandoned Alex. Thereafter, on April 24, 1996, the Franklins obtained an emergency protective order awarding them temporary custody in the Franklin District Court. However, the District Court did not find the allegations regarding Tami sufficient to apply the provisions of KRS 620 or KRS 635. Although we do not have the full record of the district court proceedings, it appears to be undisputed that sometime after finding out about the emergency protective order, Tami filed a motion to dissolve the temporary custody order. Pursuant to this motion, a hearing was held on August 7, 1996. The district court apparently continued the temporary custody order for thirty days and ordered that the case be transferred to circuit court.

On September 4, 1996, the Franklins filed a petition for custody of Alex in the circuit court. In this petition, the Franklins alleged that they were the paternal grandparents of Alex and that he had resided with them since birth. (On August 19, 1996, a paternity order was entered pursuant to an uncontested affidavit establishing that Barry Franklin was the

father of Alex.) On September 19, 1996, Tami filed a response to the Franklins' petition for custody. An amended petition for custody was subsequently filed by the Franklins on March 19, 1997, in which they alleged specific incidents of abuse and neglect by Tami.

During the pendency of the case, KRS 403.270 was amended effective July 14, 1998, to allow for a de facto custodian of a child to be given the same standing as a parent in a custody proceeding. KRS 403.270(1). In November of 1998, both parties submitted memoranda as to whether the Franklins were de facto custodians of Alex under said statute. On July 7, 1999, the domestic relations commissioner filed his report and recommendations regarding the applicability of the de facto provisions of the amended KRS 403.270. As to the issue of whether KRS 403.270(1) could be applied retroactively, the domestic relations commissioner determined that it could be applied retroactively because there was no substantive change in the law, since KRS 620.027 already allowed for grandparents to have the same consideration as the parents in custody matters if the child was residing with the grandparents. The Commissioner then found that since Alex was residing with the Franklins, the best interest standard should apply in determining custody.

On January 31, 2000, the circuit court entered an order adjudging that the Commissioner erred in determining that the best interest standard should apply. The court held that because KRS 620.027 applies solely to dependency cases (which this case was not), the Commissioner improperly relied upon said statute to

extend the de facto provisions of KRS 403.270(1) to the Franklins. The court then proceeded to nevertheless apply KRS 403.270(1) in finding that the Franklins did not meet the statutory criteria for de facto custodianship. On August 9, 2000, the circuit court entered its findings of fact, conclusions of law, and order in which it again found that the Franklins were not de facto custodians of Alex because they were not his primary caregiver from November of 1995 through April 1996. The court additionally found that "[a]lthough Ms. Seguin acted irresponsibly with regard to her own life after Alexandre was born and owes a large debt of gratitude to the Franklins for helping with Alexandre," Tami did not relinquish her parental rights such that she was estopped from obtaining custody. Finally, the court found that there was not clear and convincing evidence that Tami was unfit to have custody of Alex. From this order, the Franklins now appeal.

The Franklins first argue that the trial court erroneously failed to properly consider their claim of de facto custodianship. Specifically, the Franklins maintain that they were not afforded a separate hearing on the issue as required by KRS 403.270. KRS 403.270(1) provides as follows:

(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, 403.420, and 405.020.

KRS 403.270(2) provides in pertinent part that:

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.

From our reading of the above statute, we do not see that a separate hearing on the issue of de facto custodianship is required so long as the party alleging said status is given the opportunity to present evidence on the issue. More significantly, however, we agree with Tami's position that KRS 403.270 cannot be retroactively applied.

The child in this case was born in 1993 and the major time period during which the Franklins claim they assumed de facto custodianship was in 1995 and 1996. As noted earlier, the amended version of KRS 403.270(1) was not effective until July 14, 1998. KRS 446.080(3) prohibits retroactive application of a statute unless the statute expressly states that it is to be applied retroactively. KRS 403.270 makes no mention of

retroactive application. Nor do we believe that KRS 403.270(1) as amended is a remedial statute pursuant to Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991). Contrary to the Franklins' position, application of KRS 403.270(1) to the present case would create new rights on the part of the Franklins which did not previously exist. See Peabody Coal Co., 819 S.W.2d at 36.

Instead of applying the stricter unfitness standard reserved for parent versus nonparent situations, see Jones v. Jones, Ky. App., 577 S.W.2d 43 (1979), the best interest standard would apply, thereby impairing the rights of the parents. The earlier version of KRS 403.270 did not speak to the issue of de facto custody and there was no other statutory or case law provision for its allowance under the facts of this case. The Franklins cite to KRS 620.027 which provides:

The District 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.

Although the above statute allows a grandparent to have the same standing as a parent in determining custody where the child is residing with the grandparent, this allowance is limited to the situation where the District Court has jurisdiction in a dependency, neglect or abuse proceeding pursuant to KRS Chapter



620. Such is not the case here and, thus, we need not reach the issue of whether the Franklins were the de facto custodians of Alex. Accordingly, the trial court properly applied the unfitness standard.

The Franklins next argue that the trial court erred in finding that Tami did not waive her superior right to custody pursuant to Greathouse v. Shreve, Ky., 891 S.W.2d 387 (1995) and Shifflet v. Shifflet, Ky., 891 S.W.2d 392 (1995). In those cases, it was held that in order for a parent to waive his or her superior right to custody, there must be clear and convincing evidence that the parent knowingly, intentionally, and voluntarily surrendered that right. Id. Where the trial court's decision in a child custody case is based on a finding of fact, that finding will not be disturbed unless it is clearly erroneous. Barnes v. Barnes, Ky., 458 S.W.2d 772 (1970).

While it is true that Tami left Alex in the custody of the Franklins for extended periods in 1995 and 1996, it is undisputed that she always returned to her son in Kentucky. There was some evidence that even when Tami would return to Kentucky, she at times still left Alex in the care of the Franklins. However, Tami maintains that she always resumed being the primary caregiver to Alex whenever she returned to Kentucky, and there was no evidence that Tami terminated her relationship with Alex. After temporary custody was awarded to the Franklins, it is undisputed that Tami regularly exercised her visitation with Alex and repeatedly sought additional visits in court. From our review of the record, we cannot say the court was clearly

erroneous in finding there was not clear and convincing evidence that Tami intended, by her leaving Alex with the Franklins, to permanently relinquish custody to them.

The Franklins' final argument is that the court erred in finding that Tami was fit to have custody of Alex. The unfitness of a natural parent for custody must be shown by clear and convincing evidence. Davis v. Collinsworth, Ky., 771 S.W.2d 329 (1989). This requires the party with the burden of proof to produce evidence of unfitness more persuasive than a mere preponderance, but less than beyond a reasonable doubt. Fitch v. Burns, Ky., 782 S.W.2d 618 (1989). Our Supreme Court has listed the following examples of what constitutes unfitness for purposes of child custody:

(1) evidence of inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children.

Davis, 771 S.W.2d at 330.

As to inflicting physical and emotional harm, the Franklins cite to an incident in which Tami was bathing Alex and they heard Alex screaming for nearly thirty minutes. When the Franklins went to check to see what was wrong, Tami was carrying Alex out of the bathroom as his head was flopping, he was trembling, his veins were protruding, and his eyes were rolled back in his head. Tami's explanation of the incident was that when she was finished bathing Alex that evening and told him it was time to get out of the bathtub, he had a temper tantrum

because he did not want to get out. When she made him get out of the tub, he began violently struggling with her. Tami cites the Franklins' reaction to the incident as an example of how the Franklins' parenting style differs from her own in that she does not always give in to what Alex wants.

As to moral delinquency, the Franklins argue that Tami's drinking and the fact that she has worked as a stripper render her unfit to be a parent. While Tami admits that she drank alcohol when she was with Barry, she claims she no longer drinks because she is too busy. While there is evidence that Tami drank socially, the Franklins cite to no evidence that Tami has a problem with alcohol or that Alex's safety or welfare has been threatened by her drinking. Further, the results of Tami's Substance Abuse Subtle Screening Inventory test reveal that she has a low probability of having a substance dependence disorder.

Regarding her working as a stripper, the fact that Tami has in the past worked as a stripper does not alone render her unfit to be a parent. Tami testified that she was uncomfortable with the job and would never do it again. There was also no evidence that Alex ever witnessed any behavior associated with her work as a stripper. Moreover, Tami currently rents a house in Louisville, where she has been for two years, and works as a waitress at a Cracker Barrel restaurant. In addition, she attends Jefferson Community College where she is to obtain a degree in commercial art in May of 2001. Tami testified that she intends to remain in Louisville after she graduates and get a job in the field of commercial art.

Relative to the Franklins' allegation that Tami abandoned Alex by leaving him in their care, we have already addressed this contention in the context of their claim that she relinquished custody to them. Hence, the issue merits no further discussion.

There are no claims as to any emotional or mental illness on the part of Tami. Dr. James Shields, a psychologist Tami went to see for counseling regarding the custody proceedings, testified that the results of her MMPI-2 reveal that Tami is well-adjusted and in control of her life. He further testified that she did not have any tendency toward physical or emotional abuse. It was Dr. Shields's opinion that Tami was not an unfit mother and that there was no reason that she could not be Alex's custodial parent.

The Franklins claim that Tami has consistently failed to provide for Alex's essential needs. They assert that they have been responsible for his food, clothing, shelter, medical care, and schooling. They also maintain that they have been responsible for bathing him, arranging for his speech therapy, obtaining alternative daycare, and putting him to bed. While it is true that the Franklins provided for all of the above needs after they got temporary custody of Alex, Tami disputes that the Franklins were responsible for all of these needs when Alex was in her possession. She claims that when Alex was with her, she contributed financially what she could to his needs and that she provided his daily care such as feeding, bathing, and putting him

to bed. It should also be noted that Tami has had a steady job with benefits such as health insurance and retirement since 1996.

The Franklins point to the testimony of Dr. John Kravic, a psychologist they were referred to by social workers on the temporary custody case. The Franklins took Alex to Dr. Kravic for counseling and a psychological evaluation because of some developmental concerns they had. Dr. Kravic reported in 1996 that Alex suffered from an adjustment disorder and a general anxiety disorder. He attributed these disorders to the changes in his custody and visitation. He testified that Alex saw the Franklins as his primary caretakers and that he seemed to be more attached to the Franklins. It was Dr. Kravic's recommendation that the Franklins be awarded custody of Alex with structured supervised visitation by Tami.

Tami also saw Dr. Kravic two or three times in early 1997, but discontinued seeing him when she became suspicious of his loyalties because the Franklins had always compensated him. Dr. Kravic admitted that Alex loves his mother and acknowledged that Alex's problems and his attachment to the Franklins could be the result of the restricted visitation Tami has had with Alex. Dr. Kravic stated that if that was the case, Alex needed to see more of his mother. Most importantly, Dr. Kravic testified that he was aware of nothing which would indicate that Tami was an unfit parent.

In sum, we would agree with the trial court that Tami has acted irresponsibly in the past, and that, fortunately for Alex and Tami, the Franklins have been there to love and care for

Alex during Tami's absences. However, we cannot say that the trial court erred in finding that Tami was not unfit to be a parent as there was not clear and convincing evidence of that fact.

For the reasons stated above, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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