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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001472-MR

DONALD WAYNE MORRISON — APPELLANT

v.

APPEAL FROM ROCKCASTLE FAMILY CIRCUIT COURT
HONORABLE DEBRA HEMBREE LAMBERT, JUDGE
ACTION NO. 2000-CI-00010

JULIE ANNE MCCLURE, MICHAEL LEE MCCLURE;
AND GINNE L. CARVER — APPELLEES

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

BEFORE: HUDDLESTON, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Donald Wayne Morrison (Donald) appeals from a child custody order of the Rockcastle Circuit Court. The trial court awarded joint custody of Donald's son to the child's mother, Ginnie L. Carver (Ginnie), and to the maternal aunt and uncle, Julie Anne and Michael Lee McClure (the McClures). The trial court further found that the child's interests would be best served by continuing to reside with the McClures. Donald argues that the trial court erred in finding that the McClures are the child's *de facto* custodians, and in applying the "best

interests of the child" standard in determining custody. Finding no error, we affirm.

B.M. was born out of wedlock to Ginnie Carver and Donald Morrison on March 4, 1991. Ginnie and Donald separated in August of 1992. After his parents' separation, B.M. lived with Ginnie. In December of 1997, Ginnie placed B.M. in the care of the McClures, who have continued to care for the child since then.

On January 21, 2000 the McClures filed a custody petition seeking permanent custody of their nephew B.M. Ginnie agreed that the McClures should have custody of B.M., and she requested reasonable visitation. In response, Donald filed a petition seeking custody of B.M.

On February 18, 2000, the trial court entered an interlocutory order which granted reasonable visitation rights to Donald and Ginnie, but further designated that the child would remain with the McClures until after a permanent custody hearing. Following a hearing on March 23, 2000, the court entered an order granting joint custody of B.M. to the McClures and Ginnie. The court also gave primary physical custody of B.M to the McClures. Donald was given reasonable visitation rights. The trial court found clear and convincing evidence that the McClures were *de facto* custodians of B.M as defined by KRS 403.270. Donald now appeals to this Court for review.

Donald argues that the court erred in applying the best interests standard of KRS 403.270. In addition to that argument, Donald claims that even if the court was correct in applying that

standard, the court still erred because it failed to give adequate consideration to one of the factors that determines custody. We hold that the trial court correctly found that the McClures are B.M.'s *de facto* custodians, and thus, the court properly applied the best interests standard. We also hold that the court adequately and fairly considered all of the applicable factors in determining the best interests of the child.

The standard of review on appeal of an order determining custody of a minor child is whether the trial court abused its discretion.[1] In selecting the child's primary caretaker, the court possesses broad discretion.[2] Plainly, these decisions impose on the trial court a profound duty to make careful judgments concerning the control, health, care and education of the child.[3]

In this case, the McClures, two non-parents, are seeking custody of B.M. Our Supreme Court has recognized that generally a parent has a superior right to custody of his or her child than does a non-parent.[4] Traditionally, a non-parent could only defeat a parent's superior right to custody by proving either: (1) that the natural parent is unfit to take custody of

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[1] Tinsley v. Boggs, Ky. App., 325 S.W.2d 335, 336 (1959); *citing* Conlan v. Conlan, Ky., 293 S.W.2d 710 (1956); and Youngblood v. Youngblood, Ky., 252 S.W.2d 21 (1952).

[2] Williams v. Phelps, Ky. App., 961 S.W.2d 40, 42 (1998).

[3] Tinsley, 325 S.W.2d at 336.

[4] Greathouse v. Shreve, Ky., 891 S.W.2d 387, 389 (1995); *citing* McNames v. Corum, Ky., 683 S.W.2d 246 (1985); Davis v. Collinsworth, Ky., 771 S.W.2d 329 (1989); and Fitch v. Burns, Ky., 782 S.W.2d 618 (1989).

the child;[5] or (2) that the natural parent has made a waiver of his or her superior right to custody by making an intentional or voluntary relinquishment of custody.[6] In the absence of such proof, the-best-interests-of-the-child test has traditionally not applied to custody disputes between a parent and a non-parent.[7]

In response to the occasional harshness of this rule and to the changing roles of parents, the General Assembly amended KRS 403.270 to give standing in custody matters to non-parents who have assumed a sufficiently parent-like role in the life of the child.[8] Such *de facto* custodians have the same standing in custody matters as do natural parents. However, a person seeking the status of *de facto* custodian must prove, by clear and convincing evidence, that he or she has

> 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.[9]

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[5] McNames, 683 S.W.2d at 247.

[6] Greathouse, 891 S.W.2d at 391.

[7] Shifflet v. Shifflet, Ky., 891 S.W.2d 392, 393 (1995).

[8] *See* Sullivan v. Tucker, Ky. App., 29 S.W.3d 805 (2000).

[9] KRS 403.270(1)(a).

In this case, the McClures successfully argued to the trial court that they had satisfied these requirements and so were entitled to the status of B.M.'s *de facto* custodians. The trial court found that B.M. resided with the McClures since December of 1997, thereby satisfying the statute's time requirement. The trial court also concluded that the McClures were the primary caretakers, as well as the financial supporters of B.M. The evidence showed that the McClures have given B.M. his own room in their home and medical attention for his special needs, such as professional counseling and therapy for his mild mental retardation. The McClures have helped B.M. with his schooling by meeting with his teachers almost on a daily basis. They are also his primary financial supporters, going so far as to place B.M. on their health insurance policies. They have clearly provided for all of his basic needs. Consequently, we find that the evidence supports the trial court's findings that the McClures were *de facto* custodians of B.M.

Since they are *de facto* custodians, the McClures have the same standing to seek custody as the child's natural parents.[10] Therefore, the next step in our discussion of this matter is to see if the court abused its discretion in awarding custody to the McClures using the best interest standard. This standard requires the court to make a decision concerning custody in accordance with the child's best interest. Each parent, as well as all *de facto* custodians, will be given equal

[10] Posey v. Powell, Ky. App., 965 S.W.2d 836, 840 (1998).

consideration.[11] In determining the best interests of the child, the court shall consider all factors, including:

> (a) The wishes of the child's parent or parents; and any *de facto* custodians, 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 circumstance 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.[12]

Donald argues that the trial court failed to give sufficient weight to the last of these factors in assigning custody of B.M. to the McClures. Custody decisions should be based upon a consideration of all of the relevant factors set out

[11] KRS 403.270(2).

[12] KRS 403.270(2).

in KRS 402.270(2).[13] Nevertheless, the trial court's factual findings regarding custody may not be set aside unless they are clearly erroneous.[14]

As previously noted, the McClures have been B.M.'s primary caretakers and financial supporters since 1997. Furthermore, both Donald and Ginnie agree that B.M. should remain with the McClures, at least for the near future. The evidence established that B.M. is well adjusted to his life with the McClures. The McClures have amply cared for and nurtured B.M., and the McClures have worked hard to help B.M. with his educational and emotional problems.

Donald asserts that he agreed to place B.M. with the McClures because he was in the military and could not take care of the child. He claims that he has always intended to become B.M.'s custodial parent after he retires in 2002. Donald further claims that an agreement was made between the McClures, Ginnie and himself to return B.M. to Donald as soon as Donald was better able to care for him. The trial court found no evidence of such an agreement.

Indeed, the trial court found that Donald had only infrequent contact with B.M. from December 1997 through June 1999. Although Donald had an adequate opportunity to spend his weekend and vacation leave with B.M., the trial court found that Donald did not take an active part in his son's life until the McClures and Ginnie initiated this proceeding. Such conduct on

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[13] Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

[14] CR 52.01; Riechle, *supra*.

Donald's part belies his stated intent to become B.M.'s custodial parent upon his retirement.

When viewing the record as a whole, we cannot find that the trial court failed to give adequate consideration to all of the relevant factors before it accorded custody of B.M. to the McClures. The trial court's finding that B.M.'s interests would be best served by remaining with the McClures was supported by substantial evidence. Thus, we find no clear error in any of the court's factual findings and no abuse of discretion in its custody decision.

Accordingly, the order of the Rockcastle Circuit Court is affirmed.

ALL CONCUR.

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