

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000344-MR

BONEVA MORRIS
AND WALTER MORRIS

APPELLANTS

v. APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NOS. 01-CI-00015 & 94-CI-00024

KENNETH KADLE
AND JESSICA KADLE, A MINOR

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: Boneva Morris and Walter Morris appeal from a judgment of the Estill Circuit Court dismissing their petition for custody of Mrs. Morris's granddaughter and granting Kenneth Kadle's motion for modification of custody.¹ We affirm.

Kenneth and Beverly Kadle are the parents of a child, Jessica Kadle, who was born on May 13, 1993. Jessica was born in Pennsylvania but moved with her mother to her grandmother's home in Estill County, Kentucky, shortly after her birth. Kenneth thereafter instituted divorce proceedings in Pennsylvania, and

¹ Mr. Morris is the child's step-grandfather.

the court there entered a judgment divorcing the parties and awarding custody of Jessica to Beverly. Kenneth was awarded visitation rights, and he has faithfully exercised such rights despite the distance between his residence and Jessica's residence. Kenneth now lives in Alexandria, Virginia, a suburb of Washington, D.C.

Although Beverly was awarded custody of Jessica, she is apparently not capable of taking care of her. In fact, Mrs. Morris alleges that Beverly "is believed to be incompetent." At any rate, Jessica continues to live with the Morrises although Beverly moved out of the household in late 1998. The Morrises have provided for all of Jessica's needs since that time, and, as found by the domestic relations commissioner, "they are her primary care givers."

In 2001, Mr. and Mrs. Morris filed a petition for custody of Jessica. As the Morrises alleged that they were the *de facto* custodians of the child, their petition was filed pursuant to KRS² 403.270. Kenneth then filed a motion for modification of custody in a separate action. See KRS 403.340. The two cases were consolidated by the court.

The domestic relations commissioner (DRC) heard the case, and she recommended that the Morrises' petition be dismissed and that Kenneth's motion for modification of custody be granted. Therein, the DRC found that the Morrises were not the *de facto* custodians of Jessica and that there was no credible evidence that Kenneth was unfit to have custody. After the

² Kentucky Revised Statutes.

Morrises filed exceptions to the DRC's report, the trial court overruled the exceptions and adopted the report. On December 1, 2001, the court entered a judgment which awarded Kenneth sole custody of Jessica and denied the Morrises' petition for custody.³ From that judgment, the Morrises filed this appeal.

The Morrises have raised two arguments in their appeal. First, they argue that the trial court erred in failing to determine that they were the *de facto* custodians of the child. They assert that the trial court erroneously held that Kenneth's payment of child support precluded a finding that they were the child's primary financial supporters. Second, they argue that Jessica's best interests mandated that custody be awarded to them.

KRS 403.270(1) (a) provides in pertinent part that 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.

KRS 403.270(1) (b) provides in pertinent part that a person who meets the definition of *de facto* custodian shall be given the same standing in custody matters that is given to each parent. Finally, KRS 403.270(2) states that custody shall be determined in accordance with the best interests of the child and that

³ The Morrises were awarded visitation.

"equal consideration shall be given to each parent and to any *de facto* custodian."

In order to be found to be a *de facto* custodian of a child, a person must demonstrate by clear and convincing evidence that he or she is the primary caregiver for the child and the child's primary financial supporter. Swiss v. Cabinet for Families and Children, Ky. App., 43 S.W.3d 796, 798 (2001). In the case *sub judice*, it is not disputed that the Morrises have been the child's primary caregivers. However, the court found that the Morrises did not show by clear and convincing evidence that they were the child's primary financial supporters.

There was evidence in the record that Kenneth paid \$182 every two weeks by wage assignment as child support for Jessica. These payments total \$4,732 per year. On the other hand, the Morrises have not cited to any portion of the record which indicates the amount of money that they have contributed for Jessica's financial support.⁴ Rather, they argue that the DRC and the court erroneously determined that they were not Jessica's primary financial supporters "simply on the fact that Kenneth Kadle was paying child support."

The Morrises argued to the trial court that they provided all of Jessica's financial support because Kenneth's child support payments were used by their daughter, Beverly, for herself and that none of the support money was turned over to

⁴ Mrs. Morris did testify that she spent at least \$2,500 annually on clothes for Jessica and \$300-\$400 for lunch money at school. She also testified that she paid all of Jessica's medical bills.

them to use for Jessica. In this regard, the DRC held as follows:

The fact that the money was not used for that purpose, particularly where those now claiming to have the same standing as a parent failed to disclose that information to Kenneth or take any action to secure those funds for Jessica's support, does not operate to elevate them to a status equal to that of Jessica's father for purposes of a custody action against him. It was within their power to take action to cause the support money to be paid to them. Failure to take that action will not result in a finding that Kenneth did not support Jessica or that the Morrises were the primary financial supporters of Jessica. The Morrises did not show by clear and convincing evidence that they were the primary financial supporters of Jessica for at least one year, as required by KRS 403.270 in order for "de facto custodian" status to be accorded them.

We do not read the language employed by the DRC as holding that the mere fact that the father paid child support precludes the Morrises from being *de facto* custodians. In fact, we offer no opinion on this issue. Rather, it appears that the trial court correctly held that the Morrises did not meet their burden of proving by clear and convincing evidence that they were Jessica's primary financial supporters.

The Morrises unsuccessfully attempted to convince the trial court that Kenneth did not contribute to Jessica's support because Beverly got the money and did not use it for that purpose. However, Kenneth faithfully paid his child support even though the child's mother may not have properly applied it. In the face of evidence that Kenneth paid \$4,732 a year for child support, the Morrises did not meet their burden of proving by

clear and convincing evidence that they were Jessica's primary financial supporters.

The second argument raised by the Morrises is that it was in Jessica's best interest that they be awarded custody of her. As we have noted, KRS 403.270(2) requires courts to determine custody in accordance with the best interests of the child and that equal consideration be given to each parent and to any *de facto* custodian. Since the Morrises were held not to be *de facto* custodians, they had no standing to assert custody under this statute.

Finally, Kenneth argues that KRS 403.270 as it relates to the rights of non-parents to assert custodial rights against a parent under a best interest standard without alleging unfitness is a violation of his constitutional rights. In support of his argument, Kenneth cites Troxell v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed 2d 49 (2000). Our previous determinations herein have rendered Kenneth's argument moot. Thus, we offer no opinion on whether his argument has merit or whether it was properly preserved for our review.

The judgment of the Estill Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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