RENDERED: December 13, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002289-MR

GEORGINA GOODMAN AND BEN GOODMAN — APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET COLEMAN, JUDGE
ACTION NO. 00-CI-00047

CAROLYN GOODMAN AND MARK GOODMAN — APPELLEES

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

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: Ben and Georgina Goodman, husband and wife, appeal from an order of the Hardin Circuit Court, entered September 21, 2001, awarding custody of their daughter, Briahnna Nickole Goodman, to Ben's parents, Mark and Carolyn Goodman. The trial court found that Mark and Carolyn were Briahnna's de facto custodians and that permanent custody by the grandparents was in the child's best interest. Ben and Georgina contest both of those findings. They also object to what they contend was an insufficient invocation of the circuit court's jurisdiction.

Persuaded that the circuit court duly acquired jurisdiction and that it neither erred nor abused its discretion, we affirm.

Ben and Georgina married in June 1998. Georgina had just turned eighteen, and Ben was a month shy of twenty-one. Briahnna Nickole was born September 8, 1999. The couple separated December 29, 1999, and two weeks later Georgina petitioned for divorce. A decree was entered dissolving the marriage on August 14, 2000. In the interim Georgina had reluctantly agreed that Ben should have custody of Briahnna, and that agreement was incorporated in the decree. Ben had begun a job with the post office and thus had some means of caring for the child, whereas Georgina apparently emerged from the divorce scarcely able to care for herself.

Notwithstanding the award of custody to Ben, Briahnna's real caretakers were Mark and Carolyn. Even before Ben and Georgina separated, before Briahnna was a month old, Ben's parents began keeping her five or six nights per week. At the time of the separation in December 1999, they took over her care completely. They provided her home, her food, and her clothing. Ben gave them a medical power of attorney, and they established a relationship with a pediatrician. They brought Briahnna's vaccinations up to date and attended her through a minor ear surgery. Under their care, Briahnna's weight increased from low to average for her age, and she began to make normal developmental progress. Because the grandparents both worked during the day, in February 2000, they placed Briahnna in day

care. They assumed the full expense of that care until June 2000, when Ben was able to begin paying for it.

The grandparents continued as Briahnna's primary caretakers through January 2001. For much of that period Ben visited Briahnna regularly after work, but he devoted himself primarily to "getting back on his feet." In August 2000 he attempted to establish a household with a woman he had known for two days. During their liaison, Ben and this girlfriend once kept Briahnna overnight. A similar relationship with another woman in October was even shorter lived, but again included Ben's trusting Briahnna to the care of someone he little knew. Although Mark and Carolyn hoped that they were caring for Briahnna only until Ben became capable of that trust, these seemingly ill-considered relationships disturbed them. They were further disturbed in December 2000 or January 2001 when they learned that Ben and Georgina had resumed living together and that Georgina was again pregnant.

Georgina had been largely absent from Briahnna's life. She had been obliged to resume working only three weeks after Briahnna was born, and the grandparents alleged that during those early days Briahnna was often found unwashed and unattended, propped on a couch with a bottle in her mouth. They also alleged that Georgina had seemed to them uncomfortable with the child and with motherhood. Carolyn testified that in December 1999, when Georgina had moved out, she, Carolyn, had helped Ben clean his home and had found Briahnna's bedding apparently unchanged since she had first come home from the hospital, and had found pet

feces throughout the house. She also testified that, although the divorce decree provided that Georgina could visit with Briahnna, she rarely did so. The few times she had, according to Carolyn, she had displayed little closeness for the baby. Georgina had provided nothing for Briahnna's support. And more recently, after she and Ben had reasserted responsibility for Briahnna's care, she had permitted a diaper rash to become infected and blistered without seeking medical attention.

Concerned that neither Ben nor Georgina was prepared to care for one child, let alone two, near the end of January 2001, Mark and Carolyn told Ben that they intended to seek legal custody of Briahnna. They had hoped that he would understand this as an attempt to protect Briahnna while his and Georgina's prospects remained uncertain, but Ben instead took deep offense at what he perceived to be his parents' lack of confidence in him and their desire to take away his child. Ben immediately removed Briahnna from his parents' home, and his relationship with them became increasingly adversarial. On January 31, 2001, Mark and Carolyn filed notice of their intention to intervene in Ben's divorce action. They alleged that they should be deemed Briahnna's de facto custodians and sought modification of the award of custody to Ben.

Ben and Georgina then remarried on Feburary 16, 2001, and proceeded to resist all attempts by Ben's parents to maintain contact with the little girl they had cared for for nearly all of her seventeen months. The parents denied the grandparents visitation until a court order gave the grandparents limited

access to the child, they revoked the medical power of attorney, they removed Briahanna from her settled daycare when they learned that Ben's parents visited her there during the day, and at the conclusion of the hearing on his parents' custody motion in July 2001, Ben announced during testimony that he had quit his job at the post office without having secured another job and intended the next morning to move his family to Indiana. When asked where they would live, he responded that they were to move in with Georgina's father, a man Ben believed, erroneously it seems, had sexually molested one of Georgina's sisters. "Mark and Carolyn were visibly stunned by this revelation," wrote the commissioner who heard the matter. "Even this Commissioner was moved by Ben's lack of consideration and heartless attitude toward his own parents."

With the circuit court's concurrence, the commissioner found that Mark and Carolyn met the statutory definition of de facto custodians and thus had standing to seek custody of Briahnna. Again with the court's concurrence, the commissioner further found that Briahnna's best interest would be served by giving Mark and Carolyn custody. The commissioner noted the strong bond of affection and dependence that had grown between grandparents and granddaughter, the good care the grandparents had provided, their eager desire to assure her continued care, and Ben and Georgina's undeniable record of immature judgments, however well intentioned, exposing the child to the risk of serious harms. It is from these findings, adopted by the court, that Ben and Georgina appeal.

They contend first that Mark and Carolyn failed to invoke the circuit court's jurisdiction. We disagree.

As Ben and Georgina correctly point out, KRS 403.420 provides how, where, and under what circumstances a custody proceeding may be commenced by a parent, by a non-parent, and by a de facto custodian. Under the statute, such a proceeding may be commenced by a non-parent only if the child is not in the physical custody of either parent. Ben and Georgina contend that because Mark and Carolyn are not Briahnna's parents, because Briahnna was in her parents' physical custody when Mark and Carolyn filed their motion, and because Mark and Carolyn had not yet been deemed de facto custodians, they lacked standing under either prong of the statute to commence a custody proceeding. In French v. Barnett,[1] however, this Court ruled that jurisdiction does not hinge on de facto custodianship being predetermined. The circuit court's custody jurisdiction may be invoked, rather, by an allegation in the petition of some statutory basis for standing, such as de facto custodianship, and thereafter jurisdiction survives provided a basis for standing is established in the course of the proceeding. Mark and Carolyn alleged in their motion that they should be deemed Briahnna's de facto custodians. This was a proper assertion of standing and permitted the court to consider the motion.

Ben and Georgina next point out that under KRS 403.340 circuit court jurisdiction to modify a custody order may not be invoked earlier than two years after the order was made unless

[1]Ky. App., 43 S.W.3d 289 (2001).

the motion to modify is accompanied by at least two affidavits giving reason to believe "that . . . [t]he custodian appointed under the prior decree has placed the child with a de facto custodian."[2] Here, Mark and Carolyn both averred, in an affidavit they both signed and attached to their motion to intervene, facts that gave reason to believe that they had become Briahnna's de facto custodians. We agree with the appellees that although it was printed only once, this affidavit was in effect two affidavits and thus satisfied the statutory requirement.

Acknowledging the fact that in our modern society children are often raised by persons other than their biological parents, in 1998 the General Assembly created the status of de facto custodian to protect children from being unreasonably deprived of the love and concern of their non-parental caretakers. As defined in KRS 403.270, 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. . . .

Ben and Georgina raise two objections to the trial court's determination that Mark and Carolyn were Briahnna's de facto custodians. They first contend that Mark and Carolyn did not really provide primary care or support. Rather, according to the appellants, Mark and Carolyn merely transported the child to and from day care and gave her a place to sleep. Ben provided the day care, he claims, at least after June 2000; he provided

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[2]KRS 403.340(1)(b). *See* Petrey v. Cain, Ky., 987 S.W.2d 786 (1999).

her medical insurance; and he was present most evenings until his daughter went to bed. He, not his parents, should thus be deemed Briahnna's primary caretaker and supporter.

Mark and Carolyn testified, without contradiction, that for more than a year they were the persons on call for Briahnna twenty-four hours each day. She lived with them and they provided for her daily needs. They fed her, housed her, clothed her, bathed her, visited her at the day care, took her to the doctor, played with her, and loved her. The trial court did not err by deeming Mark and Carolyn Briahnna's primary caretakers and supporters.

Ben and Georgina also contend that because Mark and Carolyn did not have physical custody of Briahnna when they filed their motion to intervene, they cannot be deemed de facto custodians. They assume that the statute requires a continuous six-month period of care and support, and they contend that any gap in physical custody restarts the statutory six-month requirement. We disagree.

There is no question that Mark and Carolyn cared for Briahnna continuously for more than six months. That aspect of the continuity issue is thus not before us. KRS 403.270 fails to specify, however, how soon after six months of care and support de-facto-custodian status must be asserted. This is a significant gap in the statute. Courts generally fill such gaps cautiously, case by case. They try to discern, from the legislature's expressed intentions, how the legislature would have resolved the matter presently before the court had it been

asked to do so.[3] The General Assembly cannot have been unmindful that custody disputes between de facto custodians and parents are apt to arise precisely when long-absent parents reappear and assert their parental rights. If a parent could defeat the de facto custodian's claim merely by removing the child from the custodian's home, the protection afforded children by the statute would be seriously compromised. We are persuaded that such an undermining of the statute was not the General Assembly's intent. Rather, a de facto custodian must assert a custody claim while the child is in his or her care or within a reasonable time thereafter. We need not define "reasonable time" for present purposes beyond saying that Mark and Carolyn's claim, initiated within twenty-four hours of Briahnna's removal from their home, was timely. There was no delay here to be accounted for, nor any possibility of undue harm to the child, nor prejudice to Ben and Georgina. Briahnna was not in Mark and Carolyn's care at the time they first filed notice of their motion to intervene only because they sought to spare Ben's feelings by warning him of their intentions. The statute should not be construed so as to punish such basic decency.

A parent's right to the custody of his or her child is one of the most cherished rights of our society. In Kentucky, this right is embodied statutorily in KRS 405.020(1) and (2), which provide in part that

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[3]Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575 (1994); Board of Barbers & Beautician Examiners v. Mayo State Vocational School, Ky., 259 S.W.2d 452 (1953).

> [t]he father and mother shall have the joint custody, nurture, and education or their children who are under the age of eighteen (18).

As amended in 1998, however, this statute clearly intends that the parent's right be limited:

> Notwithstanding the provisions of subsections (1) and (2) of this section, a person claiming to be a de facto custodian, as defined in KRS 403.270, may petition a court for legal custody of a child. The court shall grant legal custody to the person if the court determines that the person meets the definition of de facto custodian and that the best interests of the child will be served by awarding custody to the de facto custodian.[4]

Ben and Georgina contend that the trial court abused its discretion when it ruled that giving custody to Mark and Carolyn served Briahnna's best interests. They correctly note that KRS 403.270 (2) lists several factors potentially relevant to a best-interest determination and argue that the trial court gave insufficient consideration to some of them. In particular, Ben and Georgina point out that the parents' wishes and their reasons for having left the child with a de facto custodian figure prominently among the statutory factors. They strongly desire Briahnna's custody, and they maintain that Ben gratefully accepted Mark and Carolyn's temporary assistance, but only with the understanding that it was given freely to him. He would not have accepted it, they suggest, had he thought it might be used to challenge his right to Briahnna's custody.

[4]KRS 405.020(3).

We agree with Ben and Georgina that fit parents who were forced by economic necessity to relinquish the care of their child have a compelling claim to be reunited with the child once their circumstances permit them to meet the child's needs for stability, nurture, and training. Our law has long presumed that it is in the best interest of a child to be raised by its parents whenever the parents are reasonably capable of the trust.[5] As recently amended, KRS 405.020 and KRS 403.270 qualify that presumption in disputes involving a de facto custodian, but they do not do away with it.[6] Were Ben and Georgina plainly capable of meeting Briahnna's needs, this would be a very difficult case indeed.

In fact, however, at the time of the evidentiary hearings Ben and Georgina were not plainly capable of meeting Briahnna's needs. Doubts on that score arose not so much from the evidence indicating the inexperienced couple's lack of parenting and housekeeping skills (those skills can be acquired) but from their immature judgment (painfully demonstrated by their hostile response to Mark and Carolyn's concern for their daughter), and from the simple facts that they were without a permanent abode and that neither of them was employed. Perhaps their move to Indiana was successful and they quickly became established there. The obvious risk, however, which the trial court was obliged to assay, was that Briahnna was to be wrenched

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[5]Shifflet v. Shifflet, Ky., 891 S.W.2d 392 (1995); Kantorowicz v. Reams, Ky., 332 S.W.2d 269 (1959); Setser v. Caldwell, 300 Ky. 356, 188 S.W.2d 451 (1945); Stapleton v. Poynter, 111 Ky. 264, 62 S.W. 730 (1901).

[6]Troxel v. Granville, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000).

from stable caretakers, who had, for most of her life, provided very well for her, and given over to a situation of domestic instability and financial want merely to satisfy her parents' spitefulness. The trial court did not clearly err or abuse its discretion[7] by deeming this risk substantial and contrary to Briahnna's best interest.[8]

Few situations are as painful as those in which people love at cross purposes. There was much of such pain in this case. We hope that the love for this little girl, apparent in all the parties, will by now have provided them with sufficient common ground to give them a wise perspective on their differences. We commend both the domestic relations commissioner, D. Michael Coyle, and the trial judge, Janet Coleman, for their sensitive handling of this case, and we affirm the September 21, 2001, order of the Hardin Circuit Court.

ALL CONCUR.

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[7]Dudgeon v. Dudgeon, Ky., 458 S.W.2d 159 (1970); Bickel v. Bickel, Ky., 442 S.W.2d 575 (1969).

[8]*Cf.* Shaw v. Graham, Ky., 310 S.W.2d 522 (1958) (mother denied custody where child had long resided with grandparents and mother's new situation was not yet established).