

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001616-MR

DON DANIEL AND
LOUISE DANIEL, HIS WIFE;
AND JOSHUA DANIEL

APPELLANTS

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 02-CI-00076

JAMIE JONES, N/K/A
JAMIE GREGORY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Don Daniel and his wife, Louise Daniel, and their son, Joshua Daniel, have appealed from a judgment of the Muhlenberg Circuit Court entered on May 15, 2002, which awarded Jamie Gregory (formerly Jones), the appellee herein, sole custody of her daughter, Jasmine. Having concluded that all of the Daniels's claims of error are without merit, we affirm.

The parties have vastly differing accounts with respect to the factual history of this case; however, our review

of the record reveals the following. Joshua Daniel and Jamie Gregory are the biological parents of Jasmine, who was born on May 13, 1999.¹ Don and Louise Daniel are Joshua's parents and the paternal grandparents of Jasmine. Shortly after Jasmine was born, Don and Louise began to periodically care for her at their home in Belton, Muhlenberg County, Kentucky. From around the middle of May 1999, until April 2001, Jasmine would spend approximately two to three days per week at Don and Louise's home. In addition, Jamie's mother, Debbie Jones, would sometimes keep Jasmine for two to three days at a time. Jamie kept and cared for Jasmine when she was not staying with either Debbie or Don and Louise.

After Jasmine's birth, Joshua had very little contact with her for the first three years of her life.² According to Joshua, he did not want to get "involved" with Jasmine until paternity could be established.³ On February 6, 2002, an agreed judgment of paternity was entered by the Muhlenberg District Court establishing Joshua as the biological father of Jasmine.⁴

¹ Joshua and Jamie were never married. Jamie married Jim Gregory subsequent to Jasmine's birth.

² Joshua lives in Paducah, McCracken County, Kentucky, where he has resided for most of the time he has known Jamie.

³ Joshua testified that shortly after Jasmine was born, Jamie told him that Jasmine was not his child. Jamie denies ever making such a statement.

⁴ Jamie did not try to collect child support from Joshua. According to Joshua, he first began attempting to establish paternity in early-to-mid 2000. Jamie explained her failure to bring Jasmine in for DNA testing in a

Joshua testified that after paternity was established, he traveled approximately 90 miles to Muhlenberg County every weekend to see Jasmine.

At some point around April 2000, Jamie began seeing her current husband, Jim Gregory.⁵ Prior to the entry of the agreed judgment of paternity by the Muhlenberg District Court, Jim, Jamie, and Jasmine moved to California. According to Jamie, Jim wanted to move to California in order to be closer to his children from a prior marriage. On February 13, 2002, Don, Louise, and Joshua filed a petition in Muhlenberg Circuit Court seeking emergency, temporary custody of Jasmine. As the basis for their petition, the Daniels asserted that Jamie had neglected Jasmine by not seeking the appropriate medical care for a leg injury that Jasmine sustained in an automobile accident on November 30, 2001.⁶ In addition, Don and Louise claimed that they were de facto custodians as defined by KRS⁷ 403.270(1). On February 18, 2002, after an emergency hearing was held, the trial court entered an order granting the

timely manner by stating that her mail was not being delivered to her place of residence.

⁵ Jim and Jamie were married on March 1, 2002.

⁶ Jasmine suffered a fractured leg in the accident. The accident occurred when a vehicle driven by Jim slid into a tree that had fallen across the road. There have been no allegations that Jim was in any way at fault for the accident.

⁷ Kentucky Revised Statutes.

Daniels's petition for temporary custody. Thereafter, Don traveled to California and returned to Kentucky with Jasmine.

On March 12, 2002, Jamie filed a motion seeking an evidentiary hearing on the issue of permanent custody of Jasmine. After a hearing was held on April 23, 2002, the trial court entered a judgment on May 14, 2002, awarding Jamie sole custody of Jasmine. The trial court found that Don and Louise had failed to establish that they were de facto custodians under KRS 403.270(1). The trial court further found that there had been no neglect by Jamie in her care for Jasmine. Finally, the trial court found that "Jamie is a fit and proper person to have the care of Jasmine," and that "it is in the best interests of Jasmine" to award custody to Jamie. On June 25, 2002, the trial court entered an order denying the Daniels's motion to alter, amend, or vacate its judgment awarding Jamie sole custody of Jasmine. This appeal followed.

Don and Louise first argue that the trial court erred by finding that they had failed to establish that they were de facto custodians of Jasmine. In support of this argument, Don and Louise point to numerous occasions in which they provided for Jasmine's various needs. However, while Don and Louise did play a significant role in caring for Jasmine during the first two years of her life, their relationship with Jasmine did not rise to the level of de facto custodians.

Under KRS 403.270(1), 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.

. . ."⁸ In Consalvi v. Cawood,⁹ this Court discussed what must be shown in order to establish de facto custodian status under KRS 403.270(1):

The de facto custodian statute does not, contrary to Cawood's position at oral argument, intend that multiple persons be primary caregivers. The court's finding that he was "a primary caregiver" and "a financial supporter" is not sufficient to establish that he was indeed "the primary caregiver" within the meaning of the statute. It is not enough that a person provide for a child alongside the natural parent; the statute is clear that one must literally stand in the place of the natural parent to qualify as a de facto custodian. To hold otherwise would serve to expand a narrowly drawn statute intended to protect grandparents and other persons who take care of a child in the absence of a parent into a broad sweeping statute placing all stepparents on an equal footing with natural parents. In light of both the legislative history and the common sense interpretation of the language of the statute, we do not believe that this result was contemplated by the General Assembly [emphases original].

⁸ Under KRS 403.270, if an individual can establish that he or she is a de facto custodian, that person is given equal consideration along with the child's parent(s) in determining custody issues pursuant to the "best interests of the child" standard.

⁹ Ky.App., 63 S.W.3d 195, 198 (2001).

In the case sub judice, Don and Louise have stated in their brief that Jasmine "lived with the Daniels two to three days per week over a one and one-half year period." Other than one occasion in which Jasmine purportedly stayed with Don and Louise for three straight weeks,¹⁰ Jasmine spent the rest of her time primarily in the care of Jamie and/or Jamie's mother, Debbie. Therefore, at most, Don and Louise provided for Jasmine's needs alongside Jamie. As Consalvi makes clear, this is not enough to establish a de facto custodian relationship. Accordingly, the trial court did not err by finding that Don and Louise failed to establish de facto custodian status as defined under KRS 403.270(1).

Don and Louise next argue that even if they are not found to be de facto custodians, they are nonetheless entitled to custody of Jasmine on the grounds that Jamie is "an unfit mother." In support of this allegation, Don and Louise point to several instances in which they claim Jamie neglected Jasmine. In particular, they allege (1) that Jamie continuously failed to seek medical treatment for the leg injury Jasmine sustained in an automobile accident on November 30, 2001; (2) that Jasmine has had recurring problems with hygiene, including head lice; (3) that Jamie purportedly admitted to using illegal drugs; (4) that Jim had been physically abusive toward Jamie and had thrown

¹⁰ Jamie testified that Jasmine was never left with Don and Louise for three straight weeks.

her and Jasmine out of their home in extremely cold weather conditions; and (5) that Jamie and her mother Debbie were involved in a dispute which culminated in Jamie throwing a plate of food on Debbie.

Unless a parent has waived his or her superior right to custody, a nonparent, who is not a de facto custodian, cannot prevail over a parent in a custody dispute, unless the nonparent can show by clear and convincing evidence that the parent is unfit.¹¹ Where there is conflicting evidence in the record regarding a parent's fitness as a parent, and the trial court resolves the issue in favor of the parent, this Court will not disturb the trial court's findings unless they are clearly erroneous.¹² In the case at bar, we conclude that the trial court's finding that Jamie is a fit parent was not clearly erroneous.

With respect to Don and Louise's allegations of inadequate medical care, Jamie testified that Jasmine's cast

¹¹ Moore v. Asente, Ky., 110 S.W.3d 336, 359 (2003) (quoting 16 Graham & Keller, Kentucky Practice, Domestic Relations Law 21.26 (2d ed. 1997 & 2003 Supp.)(stating that:

Custody contests between a parent and a nonparent who does not fall within the statutory rule on "de facto" custodians are determined under a standard requiring the nonparent to prove that the case falls within one of two exceptions to parental entitlement to custody. One exception to the parent's superior right to custody arises if the parent is shown to be "unfit" by clear and convincing evidence. A second exception arises if the parent has waived his or her superior right to custody).

¹² Bickel v. Bickel, Ky., 442 S.W.2d 575, 576 (1969).

came off after it got wet in the bathtub, and that she took Jasmine to the doctor two days later where it was discovered that the fracture had healed and that at that time only a bandage wrap was required. Medical records admitted into evidence support Jamie's testimony. Accordingly, the trial court's finding that Jamie did not neglect Jasmine's medical needs was not clearly erroneous.

As for Jasmine's alleged problems with hygiene, Jamie testified that social workers in both Kentucky and California visited Jamie's residences and that neither found deficiencies which would have warranted Jasmine's removal from the home. Therefore, the trial court's finding that Jamie did not neglect Jasmine in this manner was not clearly erroneous.

As to allegations of drug use, Jamie admitted in her testimony that she had used drugs prior to becoming pregnant with Jasmine, but she claimed that she ceased using drugs when she learned of her pregnancy. In addition, Jamie testified that the results of a voluntary drug test taken after Jasmine's birth were negative. Don and Louise did not introduce any evidence of drug use by Jamie after Jasmine's birth. Hence, although the trial court did not make specific factual findings with respect to Jamie's drug use, there was not "clear and convincing" evidence before the trial court which would have supported a

finding that any alleged drug use had rendered Jamie unfit as a parent.

Finally, with respect to the allegations of domestic violence, although there was evidence suggesting that Jim had physically abused Jamie,¹³ Jamie testified that she made Jasmine leave the room when she and Jim were engaged in arguments and that Jim had never forced her and Jasmine to stand outside in poor weather conditions. Further, Jamie stated that Jasmine was not in the home when she and Debbie had an altercation which resulted in the throwing of food. Although Louise did testify that Jasmine seemed to get nervous when around men and when she was told "no," the trial court found that there was "not sufficient proof" to indicate that any domestic violence had adversely affected Jasmine.¹⁴ Based on our review of the evidence presented by both parties, we cannot conclude that the trial court's finding was clearly erroneous. Accordingly, the trial court did not err by finding that Don and Louise had failed to show by clear and convincing evidence that Jamie was an unfit parent.

¹³ Jamie denies that Jim ever physically abused her. However, records from the Muhlenberg District Court indicate that Jamie filed a complaint against Jim for allegedly slapping her in the face and pulling her hair.

¹⁴ See KRS 403.270(3)(stating that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents").

Finally, Joshua argues that the trial court erred by not granting him joint custody of Jasmine with Jamie. However, our review of the record shows that Joshua failed to request that he be granted joint custody of Jasmine with Jamie until the motion to alter, amend, or vacate was filed on May 23, 2002. Throughout the proceedings, Joshua and his parents requested that they be granted joint custody of Jasmine. The purpose of a motion to alter, amend, or vacate is to bring to the trial court's attention an error in a prior order or judgment. The trial court did not err by not granting Joshua relief that he failed to timely request.

Based on the foregoing, the judgment of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Julie Shadoan
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Mike McCauley
Madisonville, Kentucky