

RENDERED: October 8, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000355-MR

RICK PAUL

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 2003-CI-01052

KAREN ANN KIMMELL;
HAROLD RUSSELL HATTER;
HANNAH NANCY KIMMELL PAUL;
and ROSS SMITH

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from an order entered by the Franklin Circuit Court dismissing appellant Rick Paul's petition for joint custody for lack of standing, and denying his motion to enter a timesharing order. For the reasons stated hereafter, we affirm.

Zachary Tyler Smith Paul was born in 1997 to appellees Hannah Nancy Kimmell Paul and Ross Smith. Hannah and Ross never

married, and Ross has had minimal involvement in Zachary's life. Appellant is Hannah's father, while appellees Karen Ann Kimmel and Howard Russell Hatter are Hannah's mother and stepfather.

From the time of Zachary's birth, Hannah and her parents collaborated to physically and financially provide for him. The record indicates that the parties exercised great amounts of cooperation in providing a safe and loving environment for the child. At one point the parties agreed upon a schedule whereby Zachary spent most nights at Karen and Russell's home, one weekend a month with his mother in Georgetown, and the remaining weekends with appellant, who lived on the same street as Karen and Russell. Hannah took care of Zachary on Mondays and Tuesdays, while Rick took care of him on Thursdays and Fridays. Zachary's school breaks were divided between the parties.

Karen and Russell filed a petition in the Franklin Family Court on August 22, 2003, seeking custody of Zachary. The attached affidavit, which acknowledged Zachary's regular contacts with appellant, indicated that Hannah had "agreed to allow us to care for Zachary and we signed an agreement to that effect last October, 2002, after Zachary had been living with us . . . for about a year." Karen and Russell simultaneously sought temporary custody and designation as Zachary's de facto custodians, based on their assertion that he had continuously

lived with and received his primary care and financial support from them for more than a year.

Appellant responded by filing a motion to intervene in the action and by seeking joint custody, asserting that he had shared custody of Zachary with Karen, Russell and Hannah for more than one year. Appellant requested the court to "establish reasonable timesharing for each party consistent with the previously agreed upon timesharing or such other timesharing arrangements as may be in the child's best interest."

After a hearing, the court entered an order declaring Karen and Russell to be Zachary's de facto custodians, and noting that the parties' stated long term goal was to reunite Zachary and Hannah. The court directed that Hannah, Karen and Russell would share joint temporary custody, while Karen and Russell would be Zachary's temporary primary residential custodians. Although the court subsequently permitted appellant to intervene, it ultimately granted Karen and Russell's motion to dismiss appellant's joint custody petition for lack of standing. Further, the court denied appellant's motion to enter a tendered timesharing order. This appeal followed.

Appellant contends that the trial court erred by finding that he lacked standing to pursue his motion for joint custody. We disagree.

Although parents share joint custody of their minor children under KRS 405.020, KRS 405.020(3) states that

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.

KRS 403.270(1) in turn provides in pertinent part:

(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 . . . one (1) year or more if the child is three (3) years of age or older

(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.

Any custody determination must be made in accordance with a child's best interests, and a court must give equal consideration "to each parent and to any de facto custodian" in light of "all relevant factors" including those set out in the

statute. KRS 403.270(2). The modification of a custody decree must comply with the provisions set out in KRS 403.340.

Here, clear and convincing evidence was adduced to support the trial court's determination that Karen and Russell were Zachary's primary caregivers and financial supporters for at least one year, and Zachary's parents did not dispute Karen and Russell's assertions that they had become Zachary's de facto custodians. Once such a determination was made, Karen and Russell had equal standing with Zachary's parents for purposes of seeking custody. See KRS 403.270(1)(b).

Under KRS 405.020 and KRS 403.270, only Zachary's parents or de facto custodians possessed standing to petition the court for his legal custody. Since appellant was neither, the court clearly did not err by dismissing his petition for joint custody for lack of standing. Further, contrary to appellant's contention, the court did not err by failing to "adopt and apply the proper standards" for considering appellees' motion to dismiss his petition.

Next, appellant contends that the trial court erred by failing to find that by amending their claim for sole custody to one for temporary joint custody, Karen and Russell lost standing to object to his petition for joint custody. We disagree.

As noted in *Sullivan v. Tucker*, Ky. App., 29 S.W.3d 805, 808 (2000), KRS 403.270 provides "standing in a present

custody matter to non-parents who have assumed a sufficiently parent-like role in the life of the child whose custody is being addressed." Further, KRS 403.270(1)(b) specifically indicates that de facto custodians have the same standing as parents in custody modification matters, including those brought to modify custody pursuant to KRS 403.340. Certainly, once Karen and Russell were declared de facto custodians they had standing, some five weeks later in the same family court proceeding, to challenge appellant's standing to pursue joint custody. The court clearly did not err by failing to find otherwise.

Finally, appellant contends that the trial court erred by failing to order the parties to adhere to a timesharing agreement which reflected the prior arrangement between them. We disagree. Contrary to appellant's argument, this arrangement simply did not constitute a "binding agreement which precludes any one of them from being released therefrom."

The court's order is affirmed.

JOHNSON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: I respectfully dissent.

Appellant, Rick Paul, is the maternal grandfather of Zachary. For over two years prior to the September 29, 2003, hearing, the unrefuted evidence establishes that Zachary stayed with Rick at least three weekends per month and on most Thursday and Friday

afternoons after school. The child stayed with his mother, Hannah, one weekend per month and the remainder of the time with Karen, Zachary's maternal grandmother. Apparently, this arrangement was agreeable to Hannah and her parents (Rick and Karen) and was working in the best interest of Zachary.

For unstated reasons, Karen and her new husband, Russell, filed on or about August 22, 2003, a petition and motion to obtain de facto custodian status and temporary custody of Zachary. Rick was not made a party to this proceeding, although he was present at the initial hearing on September 2, 2003. At Rick's request the hearing was continued to September 29, 2003.

On September 26, 2003, Rick filed a motion to intervene and a petition for joint custody of Zachary. At the hearing on September 29, 2003, the court did not rule on Rick's motion or petition, but conducted an evidentiary hearing on Karen's pending petition and motions. Given the circumstances of this case, I believe this was error by the trial court. The court then entered its order on October 6, 2003, "declaring" Karen and Russell to be de facto custodians and granting them joint temporary custody of Zachary with Hannah.

The circuit court's order of October 6, 2003, fails to state the specific findings upon which the court's ruling is based. Specific findings are required under Ky. R. Civ. P.

52.01 and may not be set aside unless clearly erroneous. The majority concludes that evidence was presented to sustain the ruling even though no findings were made. However, the requirement for making specific findings of fact is mandatory on the circuit court. Stafford v. Stafford, Ky. App., 618 S.W.2d 578 (1981)(overruled in part on other grounds in Largent v. Largent, Ky., 643 S.W.2d 261 (1982)). Without specific findings, I do not believe this Court is in a position to adequately evaluate the evidence. Equally important is the lack of a finding which supports the required analysis by the court as to whether the best interest of the child has been considered as required by Kentucky Revised Statutes (KRS) 403.270.

As noted, I believe the court should have considered Rick's motions at the September 29, hearing, rather than defer the motions to a later date and then deny same. Rick's motion should have been considered as one for de facto custodian status and heard simultaneously with Karen's motion. French v. Barnett, Ky. App., 43 S.W.3d 289 (2001). Similarly, I believe that Rick's petition for joint custody should have been considered in conjunction with Karen's motion pursuant to KRS 403.420(4)(b).

Finally, I am equally troubled by the circuit court's granting de facto custodian status to Russell, whose only relationship with the child arises from his recent marriage to

Karen. The court's ruling essentially elevates Russell's status with the child above that of a maternal grandparent (Rick) who has actively participated with Karen and Hannah in providing for the child since birth. Absent specific findings to support the Court's position, this does not appear to be in the best interest of the child. If joint de facto custodians are warranted in this case, they should be Karen and Rick, not Karen and Russell.

For the foregoing reasons, I would reverse the trial court and remand this matter for another hearing.

BRIEF FOR APPELLANT:

Michael L. Judy
Frankfort, Kentucky

BRIEF FOR APPELLEES:

J. Scott Mello
Frankfort, Kentucky