

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001339-MR

TROY COLLETT

APPELLANT

APPEAL FROM CLAY CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE GENE CLARK, JUDGE
ACTION NO. 97-CI-00012

JAMES ANTHONY WAYNE DAVIDSON,
An Infant Child Under the Age of 18,
SHERRILL DAVIDSON and
MILDRED GERALDINE DAVIDSON

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

BUCKINGHAM, JUDGE: Troy Collett appeals from a custody decree rendered by the Clay Circuit Court, wherein the maternal grandparents of Collett's son were granted custody of the child after having been found to be de facto custodians pursuant to KRS¹ 403.270. We conclude that the circuit court erred in applying that portion of the statute to this case and otherwise

¹ Kentucky Revised Statutes.

erred in granting custody to the maternal grandparents. Thus, we reverse and remand.

Troy Collett and Christina Davidson were the parents of James Anthony Wade Davidson, who was born on May 9, 1995. Troy and Christina were never married. For the first ten months following the child's birth, Christina and the child resided with her parents, Sherrill and Geraldine Davidson. Christina moved out of her parents' home on or about March 1996. From that time until December 1996, Christina lived with Troy. On December 27, 1996, Christina committed suicide.

Although Christina and Troy were never married, paternity was established by an order of the Clay District Court in September 1995. Troy voluntarily admitted to paternity, which led the district court to enter a judgment of paternity and an order for child support. There is no evidence that Troy failed to meet his child support obligations as set out in the court order.

Following Christina's death in December 1996, a dispute arose between Troy and the Davidsons over the custody of James. As a result, Troy filed a petition for custody in the Clay Circuit Court on January 15, 1997. The Davidsons responded to Troy's petition and sought custody in their own right. The court awarded temporary custody of James to the Davidsons, and Troy was allowed visitation.

In their response to Troy's petition, the Davidsons alleged that Christina had informed them before her death that Troy was not the father of the child. They sought a blood test to establish paternity, and the court ordered such a test pursuant to the Davidsons' motion despite the fact that the Clay District Court had previously entered a paternity order in September 1995. The results of the blood test indicated that Troy was the father with a result of 99.91%. This result ended the Davidsons' attempt to claim that Troy was not James's natural father.

While this case was pending, the legislature amended KRS 403.270 to add language creating the status of de facto custodian. Under the amended statute, a nonparent may obtain equal standing with a parent in a custody dispute if the nonparent establishes that he or she is a de facto custodian as that term is defined in KRS 403.270(1)(b). See KRS 403.270(2). Prior to the amendment, a nonparent could only obtain equal standing by demonstrating that the parent was either unfit or had voluntarily waived his or her superior right to custody. See Williams v. Phelps, Ky. App., 961 S.W.2d 40, 42 (1998).

The de facto custodian amendment became effective in July 1998, over one year after Troy filed his petition for custody. As a result of the statutory change to KRS 403.270, in August 1998 the Davidsons sought leave to amend their response

and add de facto custodian as a justification for their custody claim. Their motion to amend their response was granted by the court in November 1998.

Prior to the Davidsons' motion to amend their response, a final hearing had been held in the circuit court. Although that hearing was held on March 31, 1998, a number of years passed before the court finally ruled on the matter. On September 4, 1999, the court entered an order indicating that the case was submitted for decision. The record does not indicate what triggered this order.

On January 16, 2003, six years and a day after Troy filed his original petition for custody, the circuit court entered a custody decree awarding custody of the child to the Davidsons after finding that they were de facto custodians and that the best interest of the child would be served by an award of custody to them. The court made no findings as to whether Troy was an unfit parent or whether he had voluntarily waived his parental rights. Following the court's denial of his motion to vacate the decree, Troy's appeal followed.

"Parents of a child have a fundamental, basic and constitutional right to raise, care for, and control their own children." Vinson v. Sorrell, Ky., 136 S.W.3d 465, 468 (2004). Further, when one parent dies, the surviving parent is generally

entitled to the custody of any minor children. See KRS 405.020(1).

Troy argues that the Davidsons were not de facto custodians of his child and that they did not prove that he was either unfit or had waived his superior right to custody. Therefore, Troy contends that this court must reverse the circuit court and remand the case for the entry of an order awarding him custody. For the reasons set forth below, we agree that Troy is entitled to this relief.

Troy's first argument is that the de facto custodian amendment to the statute was not applicable to this case because it was not enacted until more than one year after he filed his petition and because it contains no language making it retroactive. He notes that KRS 446.080(3) states that "[n]o statute shall be construed to be retroactive unless expressly so declared." By further noting that KRS 403.270 does not expressly declare the de facto custodian provision to be retroactive, Troy argues that the amended provision has no applicability in this case.

On the other hand, while the Davidsons acknowledge that the statute does not contain a provision declaring it retroactive, they nevertheless argue that it should be so designated because it constitutes "remedial legislation." As this court noted in Miracle v. Riggs, Ky. App., 918 S.W.2d 745,

747 (1996), without retroactive language clearly expressed, the issue then becomes one of "whether the amendment provides a remedial versus a substantive change." See also Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109, 112 (1995).

In the Miracle case this court addressed the nature of a remedial statute. The court noted that a remedial statute "does not violate a vested right, but operates to further a remedy or confirm a right[.]" 918 S.W.2d at 747. Further, in Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991), the Kentucky Supreme Court noted that remedial statutes are not normally within the concept of a retrospective law because they "do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights[.]" Id. at 36, quoting 73 Am. Jur. 2d Statutes § 354 (1974).

The Davidsons' argument, that the de facto custodian amendment to KRS 403.270 was merely remedial, is without merit. Prior to the amendment, a nonparent could gain equal standing in a custody challenge with a parent only by showing clear and convincing evidence of unfitness or voluntary waiver. After the amendment, a nonparent could reach equal standing with a parent in a custody dispute through a third means. Because the change in the statute created a new right, the amended provision was

substantive and not remedial. Thus, the de facto custodian amendment provision does not operate retroactively.²

Because the Davidsons did not qualify as de facto custodians of the child, they were required to prove either that Troy was unfit or that he had waived his superior right to custody. See Moore v. Asente, Ky., 110 S.W.3d 336, 359 (2003). The circuit court did not make a finding concerning either unfitness or waiver of parental rights. Further, the Davidsons did not ask the court to enter additional findings on either of these issues.

In Vinson v. Sorrell the Kentucky Supreme Court stated as follows:

It is fundamental that a party who asserts a claim must prove that claim to the satisfaction of the trier of fact, and on failure of the fact-finder to rule on the contention, the pleading party must seek a ruling from the trial court by means of a request for additional findings of fact.

136 S.W.3d at 471. In the Vinson case, as in this case, the maternal grandparents alleged that the child's father was unfit. However, no findings were made by the trial court in that regard. Because the trial court did not find the father to be unfit, our supreme court stated that the issue was not preserved

² Citing Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777 (2002), the Davidsons maintain that the amendment provision "did not significantly alter the pre-existing law of custody determination." That is simply not the case, and the Davidsons' reliance on the Sherfey case is misplaced.

for appellate review and that there was no basis to remand the question to the trial court. Id.

As was the case with the grandparents in the Vinson case, the Davidsons' failure to bring the issues of fitness and waiver to the attention of the trial court for ruling precludes their ability to raise it on appeal. Likewise, we are precluded from remanding the issues to the trial court for a second opportunity to consider them.

Finally, Troy argues that the circuit court's reliance on KRS 620.027 was erroneous. The relevant portion of KRS 620.027 states that "[i]n any case where the child is actually residing with a grandparent in a stable relationship, the court may recognize the grandparent as having the same standing as a parent for evaluating what custody arrangements are in the best interest of the child." In this case the circuit court found that the child resided with his grandparents in a stable relationship from birth until this case was initiated and that the best interest standard was therefore applicable.

Troy argues that the provisions of KRS Chapter 620 are only applicable in cases involving the treatment of dependent, neglected, or abused children. See KRS 620.010. We agree with Troy that the provisions of KRS Chapter 620 are applicable only to district court dependency, neglect, or abuse cases and have

no applicability herein. The circuit court erred in finding that they did.

The custody decree rendered by the Clay Circuit Court in favor of the Davidsons is reversed, and this case is remanded to the circuit court with instructions to the court to enter a custody order in favor of Troy.

ALL CONCUR.

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