

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002453-MR

CHRISTOPHER MCDOWELL

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE KRISTI HOGG GOSSETT, JUDGE
ACTION NO. 03-CI-00031

BOBBY JO DAILY
AND DOROTHY GOODMAN

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: Christopher McDowell appeals from a September 9, 2003 order of the Carter Circuit Court awarding custody of his minor child, Briana Goodman, to Dorothy Goodman, the child's maternal grandmother. Upon review, we vacate and remand for further findings.

On January 30, 2003, McDowell filed a Petition for Custody of Minor Child in the Carter Circuit Court seeking to

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

obtain custody of Briana, who was then two years of age. At the time of the filing of the petition, Briana's mother, Bridgett Goodman,² had recently passed away, and temporary custody of Briana had been granted to Bobby Jo Daily, Briana's maternal aunt. Briana had been living with her mother, half-sister, and maternal grandmother, Dorothy Goodman, before her mother's death, and she, along with her half-sister and grandmother, moved in with Daily once the order of temporary custody was rendered.

Daily responded to McDowell's petition for custody on February 12, 2003 with a counter-petition for permanent custody. On April 15, 2003, Dorothy Goodman filed a motion to intervene and also asked for permanent custody of Briana. Following a hearing, the trial court requested an investigation and report on Briana's custodial arrangements from the Carter County Department for Community Based Services.

The report revealed that Briana, her half-sister, and her mother had spent a considerable amount of time in the Dailey household and that Goodman had lived with her daughter and two granddaughters for as long as the girls had been alive. It also indicated that Briana had a close relationship with her half-sister. The report also revealed that McDowell was injured in an automobile accident when Briana was a month old, and that he

² Goodman and McDowell were never married.

suffered a closed head injury and a stroke as a result of the accident. Afterward, McDowell began living with his mother, stepfather, and half-sister while attending a day treatment and workshop program. McDowell continues to be generally confined to a wheelchair and to suffer from memory loss, impaired short-term memory, and difficulty with balance. The report further indicated that McDowell relied upon his family for assistance in almost all of his activities of daily living and that S.S.I. benefits were his primary source of income. Among McDowell's expenditures were child support payments to Briana's mother. McDowell had spent little time with Briana prior to her mother's death, but at the time of the report, she had begun occasional overnight visits with her father and his family.

On September 9, 2003, the trial court entered Findings of Fact and Conclusions of Law and awarded custody of Briana to Dorothy Goodman pursuant to KRS 403.270(2), particularly noting that Briana has spent her entire life living with Goodman while spending little time with McDowell. The court further noted Briana's close relationship with her sister and the fact that McDowell's physical health limited his ability to interact with and take care of Briana. On September 19, 2003, McDowell filed a motion to alter, amend or vacate the judgment; however, this motion was overruled on October 6, 2003. This appeal followed.

McDowell raises the following contentions on appeal:

(1) the trial court erred in applying KRS 403.270 instead of KRS 405.020 to the custody determination; (2) the trial court erred in using the "best interests" standard to determine custody; and (3) the trial court erred in failing to determine whether Dorothy Goodman was a de facto custodian to Briana.

McDowell argues that KRS 405.020, not KRS 403.270, should have been applied by the trial court in determining who should have been awarded custody of Briana. In particular, McDowell cites to KRS 405.020(1), which reads:

The father and mother shall have the joint custody, nurture, and education of their children who are under the age of eighteen (18). If either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture, and education of the children who are under the age of eighteen (18). The father shall be primarily liable for the nurture and education of his children who are under the age of eighteen (18) and for any unmarried child over the age of eighteen (18) when the child is a full-time high school student, but not beyond completion of the school year during which the child reaches the age of nineteen (19) years.

What McDowell fails to acknowledge, however, is that KRS 405.020(3) goes on to read:

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.

KRS 405.020(4) further reads:

Notwithstanding the provisions of subsections (1) and (2) of this section, if either parent dies and at the time of death a child is in the custody of a de facto custodian, as defined in KRS 403.270, the court shall award custody to the de facto custodian if the court determines that the best interests of the child will be served by that award of custody.

Accordingly, it is clear from a reading of KRS 405.020 that KRS 403.270 is the statute that should have been applied by the trial court to the case at hand if Goodman was making a claim of being a de facto custodian of Briana. The trial court apparently believed that such a claim was being made, as it made reference to KRS 403.270 in its September 9, 2003 Conclusions of Law.

In a related argument, McDowell contends that the trial court erred in applying the "best interests" standard to determine custody of Briana. Again, however, KRS 405.020 and KRS 403.270 both explicitly state that the "best interests" standard is the one applicable to a situation where a de facto custodian is seeking custody of a child. Moreover, our case law has repeatedly made clear that the general overriding consideration in a dispute over custody of a minor child is the

best interests of said child. See Squires v. Squires, 854 S.W.2d 765, 768 (Ky. 1993); Dull v. George, 982 S.W.2d 227, 230 (Ky.App. 1998); Davis v. Davis, 619 S.W.2d 727, 730 (Ky.App. 1981). (Citations omitted). Accordingly, we agree with the trial court that the "best interests" standard was applicable here.

This having been established, we unfortunately must conclude that the trial court erred in failing to make specific and explicit factual findings and conclusions of law as to whether Goodman is, in fact, the de facto custodian of Briana, as defined by KRS 403.270(1)(a). Such a determination of de facto custodian status is required before a custody determination can be made under the "best interests" standard. See French v. Barnett, 43 S.W.3d 289, 291 (Ky.App. 2001). Consequently, we must vacate the custody decision of the trial court and remand this case for a determination as to whether Goodman qualifies as the de facto custodian of Briana.

For the trial court's guidance on remand, we note that "[a]lthough a showing of 'unfitness' is not specifically required by KRS 403.270(1), the prerequisites necessary to prove 'de facto custodianship' directly implicate at least two of the former unfitness factors. To be a de facto custodian under KRS 403.270(1)(a) a person must be the primary caregiver for and financial supporter of the child." Sherfey v. Sherfey, 74

S.W.3d 777, 782 (Ky.App. 2002), review denied, certiorari denied 537 U.S. 1110, 123 S.Ct. 892, 154 L.Ed.2d 782. We also note that a person's standing as a de facto custodian must be shown by clear and convincing evidence. Diaz v. Morales, 51 S.W.3d 451, 455 (Ky.App. 2001).

In the event that Goodman is not found to be a de facto custodian, the standard for determining whether she is still entitled to custody of Briana is generally set forth in Moore v. Asente, 110 S.W.3d 336, 359 (Ky. 2003):

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.

Id. at 359 (Citations omitted); see also Vinson v. Sorrell, 136 S.W.3d 465 (Ky. 2004). Accordingly, on remand, the trial court should first determine if Goodman is Briana's de facto custodian, applying the criteria set forth in KRS 403.270. If it is found that Goodman meets these criteria, the court should then determine if it would be within the best interests of the child to give custody to Goodman. If it is found that Goodman does not meet the criteria to be a de facto custodian, the court

should then determine the applicability of the exceptions to parental custody set forth in Moore, supra and Vinson, supra.

ALL CONCUR.

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