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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001982-ME

JOEL COMBS — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 04-CI-00492

KATHY WAGERS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

SCHRODER, JUDGE: This is an appeal from an order adjudging the child's maternal grandmother to be *de facto* custodian and awarding the grandmother and father joint custody of the child. The father argues that the trial court erred in finding that the grandmother was primary caregiver and primary financial supporter of the child. Upon review of the evidence adduced in the case, we affirm the lower court.

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

Appellant, Joel Combs, and Tara Wagers were married in 1995 and one child was born of the marriage, Katlynn Combs, born September 9, 1995. On July 8, 1997, Joel and Tara were divorced by decree of dissolution which incorporated a separation agreement. The agreement provided that Joel and Tara would have joint custody of Katlynn, with Tara designated as primary residential custodian. Further, Joel was to have visitation with Katlynn one full week each month, as well as various other times set forth in the agreement, and he was to pay Tara $84 a week in child support.

After Joel and Tara divorced in Owen County, Tara and Katlynn moved in with Tara's mother, Kathy Wagers, in McCreary County, when Katlynn was not quite two years old. Joel also moved to McCreary County after the divorce and lived there within two miles of Katlynn for the next 7-8 years.

In October 2004, a report was made to the Cabinet for Families and Children (CFC) that Tara was using drugs and unable to care for Katlynn. Subsequently, an investigation was conducted and a petition was filed in the McCreary District Court to remove Katlynn from Tara's care and place her in the custody of Kathy. On October 25, 2004, the court entered a temporary custody order placing Katlynn with Kathy. Joel was not notified of this proceeding nor contacted initially by the social worker investigating the case. Upon learning of the

action, Joel filed a motion to alter, amend or vacate the McCreary District Court order granting temporary custody to Kathy. Following a hearing in that court, an order was entered awarding temporary custody of Katlynn to Kathy and Joel.

On November 17, 2004, Kathy filed a verified petition for custody of Katlynn against Joel and Tara in the McCreary Circuit Court. Kathy alleged that she was the *de facto* custodian of Katlynn and had been the primary caretaker of the child for 8 years. Tara never responded to the petition or appeared in the case. Joel's response to the petition denied that Kathy was the *de facto* custodian of Katlynn. On March 23, 2005, a hearing was held on custody and whether Kathy met the statutory criteria for *de facto* custodian status in KRS 403.270. Kathy presented the testimony of four witnesses at the hearing, including herself, and Joel presented the testimony of three witnesses, including himself. Katlynn, who was nine years old at the time of the hearing, asked to speak with the court to express her wishes regarding custody. Thereafter, the judge allowed Katlynn to speak to the court in chambers. On May 16, 2005, the court entered its judgment finding Kathy to be the *de facto* custodian of Katlynn and awarding Kathy and Joel joint custody with Kathy designated as primary residential custodian. This appeal by Joel followed.

We shall first address Joel's argument that the trial court's findings were not sufficient under KRS 403.270(1)(a). Specifically, Joel argues that the lower court failed to make a finding that Kathy was the primary financial supporter of Katlynn. We would note that Joel did not make a motion for more specific findings under CR 52.04, so the issue of the adequacy of the findings was waived. Whicker v. Whicker, 711 S.W.2d 857 (Ky.App. 1986). In any event, our review of the judgment reveals that the trial court did make the finding that Kathy was "the child's primary caretaker and financial support since the child, now age 9, was age 1." (Emphasis added).

Joel's main argument is that the trial court's finding that Kathy was the *de facto* custodian of Katlynn was not supported by substantial evidence. A trial court's finding of fact in a domestic case will not be reversed unless it is clearly erroneous. Ghali v. Ghali, 596 S.W.2d 31 (Ky.App. 1980). KRS 403.270(1) provides:

> (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 six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based

> Services. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.
>
> (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, 403.822, and 405.020.

The party seeking *de facto* custodian status has the burden of proving such. Vinson v. Sorrell, 136 S.W.3d 465 (Ky. 2004). Thus, the question in the instant case is whether Kathy proved by clear and convincing evidence that she was the primary caregiver and financial supporter of Katlynn for a period of a year or more.

Kathy testified that Katlynn had been living with her since she was one year old. According to Kathy, after Tara and Katlynn moved in with her, Tara would come and go on a regular basis and never spent much time in her home. Kathy testified that Tara essentially left Katlynn at her house, in her care, so Tara could run around, and that Katlynn has never known any home

but hers. Tara did not buy groceries, clothes for Katlynn, or take Katlynn to the doctor. Kathy testified that Katlynn learned to walk and talk in her care, that she has been the one to put Katlynn to bed, feed Katlynn, go to parent-teacher conferences, read to Katlynn, is on the school sign-out sheet (along with her other two daughters and Joel's aunt), and is the one who is there when Katlynn wakes up in the middle of the night. In addition, Kathy maintained that she is the one responsible for taking Katlynn to the doctor when she is sick, although she admitted that Joel had taken Katlynn to the doctor a couple times recently. Regarding Joel's relationship with Katlynn, Kathy testified that prior to this custody action, Joel saw Katlynn very little. Since he was granted joint custody, she stated that Joel has visitation with Katlynn Wednesday through Friday.

As for financial support of Katlynn, Kathy testified that in the last eight years, she has been the one to buy Katlynn's food, clothes, shoes, school supplies, books, and school pictures. Kathy's answers to interrogatories in the case, which were admitted into evidence, indicated that Kathy also paid the rent on the home Katlynn lives in, the utility bill, for Katlynn's haircuts, and for her toys. Although Kathy did not have documentary proof of the amount of money she has expended in support of Katlynn, Kathy did offer into evidence a

sampling of recent receipts for purchases made for Katlynn for items such as food, clothing, toys, bedding, school supplies, and sundries. Additionally, Kathy stated that she has paid for Katlynn's medical bills and prescriptions since she lost her medical card, even though Joel was to provide medical insurance for Katlynn under the divorce decree. Kathy testified that her only source of income was $597 a month in social security disability. Kathy claimed that she never received any child support from Joel until October of 2004. It was estimated by Kathy that she provided for 90% of Katlynn's financial needs over the past eight years.

Susan Parsons, Joel's aunt who teaches at Katlynn's school, was called as a witness for Kathy. She testified that she sees Katlynn and Kathy a lot, takes Katlynn to church, and sometimes buys gifts, clothes and school supplies for Katlynn. According to Susan, prior to October of 2004, Joel rarely saw Katlynn. Susan testified that Tara has no involvement in Katlynn's life and that she (Susan) had not seen Tara in years. In her opinion, Katlynn is dependent on Kathy. Susan's husband, Norman Parsons, also testified for Kathy, and his testimony was consistent with and cumulative of Susan's testimony.

Joel testified that he had a normal father-daughter relationship with Katlynn and saw her as often as he could. He testified that he saw her from 1997 to 1998 two to seven times a

week. Contrary to Kathy's testimony, Joel claimed that he has always paid his child support payments. Joel maintained that since 1999, child support has been taken out of his paycheck. Prior to that, he stated that he would put a personal check or money order made out to Tara in Kathy's mailbox for Tara. In support of this claim, Joel offered into evidence cancelled checks made out to Tara for child support from 1998-1999. Joel also presented documentary evidence that he had child support deducted from his paycheck from 1999-2004 and, specifically, that he paid child support in the amount of $5,389 in 2002, $4,089 in 2003, and $3,384 so far in 2004. Joel testified that he has also given extra money to Katlynn for clothes, toys, and shoes. Joel stated that he has medical insurance on Katlynn through his job, but when he offered a copy of the insurance card to Kathy, she refused it because she wanted the original.

Barbara Combs, Joel's ex-wife with whom he has two other children and now lives with again, testified that Katlynn is at their house about 3 or 4 times a week and that they take her on family outings. Barbara stated that she and Joel have a joint checking account and that she wrote most of the child support checks to Tara until an incident wherein Tara got mad and made a scene at their house. After that, Joel began having the child support taken out of his paycheck to avoid having to deal with Tara.

The next witness for Joel was Jo Watson, the social worker with the Department of Protection and Permanency (DPP) who was assigned to investigate Katlynn's case. The initial report to DPP alleged that Tara was using drugs and that Katlynn and her sister were living with Tara. However, it was determined by DPP that Tara was living with her brother and that Katlynn was living with Kathy. Watson further testified that Kathy's and Joel's homes were both found by DPP to be appropriate placements.

The last witness was Katlynn who spoke to the court in chambers. She told the judge that she wanted to visit with her father, but she wanted to continue living with her grandma. Katlynn stated that did not like staying all night with her dad because she's used to staying with her mamaw. She also said that she had not seen her mom in a long while and hadn't seen her dad very much until the custody case.

As to the question of whether Kathy proved by clear and convincing evidence that she was the primary caregiver of Katlynn for a year or more, we believe that Kathy easily met her burden of proof. Joel's claim that Kathy simply worked alongside Tara in helping to care for Katlynn, see Consalvi v. Cawood, 63 S.W.3d 195 (Ky.App. 2001), was not supported by the evidence. The evidence established that Kathy was the one to

provide the consistent day to day care of Katlynn, while Tara came and went in and out Katlynn's life.

As for the question of whether Kathy proved by clear and convincing evidence that she was the primary financial supporter of Katlynn, Joel argues that since he presented undisputed evidence that he paid his child support payments, Kathy could not have been Katlynn's primary financial supporter. While Joel did present evidence that he paid child support from 1998-2004, unfortunately for Joel, Kathy, and Katlynn, there was no evidence that this money was ever put toward the support of Katlynn. The evidence revealed that the payments were made to Tara during this period, and Kathy, who was Katlynn's primary caregiver, testified she did not begin receiving child support from Joel until October 2004. In our view, Kathy presented clear and convincing evidence that she was the primary financial supporter of Katlynn for a year or more.

For the reasons stated above, the judgment of the McCreary Circuit Court is affirmed.

EMBERTON, SENIOR JUDGE, CONCURS.

HENRY, JUDGE, CONCURS AND FILES SEPARATE OPINION.

HENRY, JUDGE, CONCURRING: I must agree with the majority that nothing in KRS 403.270 prevents a finding that Kathy Wagers proved by clear and convincing evidence that she is a de facto custodian as defined in the statute, including having

proved that she was the child's primary financial supporter for the required period of time. I write separately because I find it troubling that the natural father in this case paid the child support that he was required to pay by law, to the person to whom he was required to pay it, and yet he did not receive the benefit of having paid it in our de facto custodian analysis. Because it pits the rights of natural parents against those of non-parents, the de facto custodian statute should be cautiously applied. I am sure that it is small comfort to the father that he could initiate separate legal proceedings against the mother for her misuse of thousands of dollars' worth of child support, presumably to support her drug habit at the expense of her child. Any fault, however, lies not with our reasoning or analysis but rather with the statute itself, because it does not specifically address this possibility. We are not permitted to add words to the statute. With this said, I concur.

BRIEF FOR APPELLANT:

Jane R. Butcher
Williamsburg, Kentucky

BRIEF FOR APPELLEE:

Bonnie M. Brown
Louisville, Kentucky