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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001369-ME

ROBERT SHELTON — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK A FLETCHER, JUDGE
ACTION NO. 05-CI-00139

CARRIE SHELTON, AND
RONALD OAKS AND
MELINDA OAKS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Robert Shelton appeals from the decree of dissolution of marriage granting permanent custody of his three minor children to their maternal grandparents. We affirm.

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

Robert and Carrie Shelton were married for eleven years and had three children. During the marriage, the couple and their children resided at the home of Ronald and Melinda Oaks, Carrie's parents, for significant periods of time. Robert filed for dissolution of marriage in April 2005. Carrie Shelton was indicted on four counts of drug trafficking. In November 2007, Robert filed a dependency and neglect petition in the Breathitt District Court. The district court ordered that joint custody be granted to Robert and the Oakses. The Oakses had custody of the children during the week and Robert having custody at other times.

In January 2006, the Breathitt Circuit Court incorporated the orders of the district court into the divorce action. Robert Shelton relocated to North Carolina in early 2006. The district court amended its order to allow Robert to have one weekend visitation per month because of the distance between the parties and ordered a home evaluation of Robert's residence in North Carolina. The court also ordered that Carrie Shelton have no unsupervised contact with the children. The domestic relations commissioner (DRC) held a hearing in April 2007. The DRC found that the Oakses were de facto custodians of the children and that Robert Shelton had waived his superior right to custody. The court adopted the recommendations in their entirety and entered a decree of dissolution. This appeal followed.

As a preliminary matter, Robert Shelton has filed a motion for summary reversal because the Oakses failed to file an appellee brief. Carrie Shelton filed an appellee brief. The Oakses, however, are represented by a

separate attorney of record. The Oakses also failed to respond to Robert's motion for summary reversal. When the appellee fails to file a brief, CR 76.12(8)(c) provides three options which this Court may apply in its discretion:

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Roberts v. Bucci, 218 S.W.3d 395, 397 (Ky.App. 2007). We decline to grant a summary reversal and believe that the circumstances of this child custody case warrant a decision on the merits.

Robert Shelton first argues that the trial court erred by failing to conduct a full hearing and evidentiary review of the DRC's findings. The hearing on Robert's exceptions was originally scheduled for June 22, 2007. Subsequently, opposing counsel filed a motion for a continuance. On June 10, 2007, the court heard the motion for continuance. At the same time, the court heard less than five minutes of argument from both parties at the bench on the exceptions to the DRC's findings. The court then denied the motion for continuance and denied the exceptions to the DRC's findings.

CR 53.06(2) Action on Report provides as follows:

> Except in pendente lite matters, within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and

> upon notice as prescribed in CR 6.04. The court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

While a full evidentiary hearing is not contemplated by CR 53.06(2), the rule requires that the trial court afford the parties an opportunity for oral argument. *Kelley v. Fedde*, 64 S.W.3d 812, 813 (Ky. 2002). In his brief, Robert concedes that he was afforded the opportunity for oral argument, albeit a brief one. He made no objection to the procedure used by the trial court and did not file a motion to alter, amend, or vacate. Consequently, he failed to preserve the issue.

Next, Robert argues that the trial court erred by concluding that the Oakses were de facto custodians of the children. KRS 403.270(1)(a) defines "de facto custodian" as follows:

> 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 of Social 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.

The three children were all over three years of age at the time of the proceedings. The DRC found that the Oakses were the primary caregivers and financial supporters of the children for over a year after the district court removed the

children in November 2005. This finding is supported by clear and convincing evidence in the record. Robert paid no court ordered child support and made only limited financial contributions such as school supplies and soccer fees. Robert did not attempt to regain primary physical custody of the children until January 2007.

Robert argues that the Oakses were not the primary financial supporters of the children because their household income was supported by federal supplemental security income for one of the children and by accepting a food stamp grant provided to Carrie Shelton. He cites *Swiss v. Cabinet for Families and Children,* 43 S.W.3d 796 (Ky.App. 2001) in support of this proposition. However, *Swiss* dealt with a situation where foster parents challenged the Cabinet's custody of a child. *Id.* This Court held that foster parents "may not use the de facto custodian statutes to challenge the cabinet's custody of the child where the child was placed with the foster parents by the cabinet." *Id.* at 797. The foster parents also acknowledged that the Cabinet provided the primary financial support of the child. *Id.* at 798. Therefore, this Court affirmed the trial court's finding the foster parents did not qualify as de facto custodians. *Id.* First, the factual circumstances in *Swiss* are distinguishable from the case at bar. More importantly, there was no evidence that the additional income was the primary source of income to support the children. The payments simply supplemented the Oakses' household income.

Robert also argues that he sought custody of the children in his divorce petition which was filed in April 2005 and in the district court neglect

action in 2007. However, the divorce petition was not an attempt to "regain" custody as the tolling provision in KRS 403.270(1)(a) requires. Further, in the neglect proceeding against Carrie Shelton, Robert assented to the children being placed in the custody of the Oakses and then waited for over a year to attempt to regain physical custody. The evidence was sufficient to determine the Oakses' de facto custodian status. Because 403.270(1)(b) bestows upon de facto custodians the same standing in custody matters as natural parents, we need not address the issue of Robert's waiver of his superior right to custody.

Robert next argues that the DRC quashed a subpoena without adequate grounds. He argues that the testimony of the officer who investigated Carrie's drug trafficking charges was necessary to establish whether or not the trafficking had occurred in the presence of the children at the Oakses' residence. The officer moved to quash the subpoena on the grounds that it involved a pending investigation. The DRC found that KRS 61.878(1)(h) exempted the officer from testifying on the matter and quashed the subpoena. KRS 61.878(1)(h) deals with the exemption of certain law enforcement records from public inspection. It does not constitute an exception to witness testimony. However, we find that the officer's testimony regarding the case against Carrie Shelton to be irrelevant. The Oakses were not charged with any crime in relation to Carrie Shelton's activities. Further, Robert Shelton's assertion that the drug trafficking took place in the Oakses' residence is purely speculative. Interestingly, Robert never raised these

concerns when the Oakses were granted temporary custody. Reversal is unwarranted on this basis.

Shelton also argues that the trial court erred by allowing a modification of a prior custody order without requiring two affidavits as provided in KRS 403.340. However, the proceedings at issue were not a modification of a custody decree, but rather a custody determination pursuant to KRS 403.270 following a temporary custody order. Therefore, KRS 403.340 is inapplicable.

Shelton next argues that the trial court did not afford him a reasonable visitation schedule. KRS 403.320(1) provides:

> A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.

"Unfortunately, in custody proceedings it is seldom possible for a trial court to impose a visitation regime which makes both parties happy. For this reason, matters involving visitation rights are held to be peculiarly within the discretion of the trial court." *Drury v. Drury*, 32 S.W.3d 521, 526 (Ky.App. 2000).

The DRC set forth the visitation schedule as follows:

> That the biological father, Mr. Shelton, should have visitation as follows, once a favorable home evaluation by the Cabinet in North Carolina has been prepared and filed into the record, to wit: two weeks during the summer, holidays that fall on a Monday, extending the weekend, when Mr. Shelton can drive up and get the

> children and return them by 8:00 p.m. the night before school starts, and he should be able to visit with the children during any weekend that Mr. Shelton plans to come to Kentucky and stay, so long as he has a suitable place for them to spend the night as determined by Mr. and Mrs. Oaks, and if not, then Saturday from 10:00 a.m. until 8:00 p.m. and Sunday from 10:00 a.m. until 8:00 p.m., during Christmas, from Christmas Day at 1:00 p.m. until December 27th at 8:00 p.m., during Thanksgiving, from Thanksgiving Day at 4:00 p.m. until the day after at 8:00 p.m., Father's Day from 10:00 a.m. until 8:00 p.m. and at any other times as agreed to by the parties.

In light of Robert Shelton's distant residence and the other circumstances of this case, we find that the trial court provided reasonable visitation and did not abuse its discretion.

Finally, Robert argues that the trial court erred by allowing Carrie Shelton's alleged former counsel to act as counsel for the Oakses in the proceedings below. We find that this issue was not properly preserved for review. During argument concerning the testimony of the narcotics officer before the DRC, Shelton alleged that counsel for the Oakses may have inside information concerning the criminal case. The DRC went on to make a ruling concerning the exclusion of the officer's testimony. Shelton's objection, if indeed it was one, was never renewed and the issue was never ruled on. Therefore, there is nothing in the record for this Court to review.

Accordingly, the judgment of the Breathitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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