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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-000142-ME
&
NO. 2008-CA-000143-ME

E.C., BIOLOGICAL FATHER — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 07-J-00023 & 07-J-00023-00

N.R.; D.E.; CABINET FOR HEALTH AND FAMILY SERVICES, DEPARTMENT OF COMMUNITY BASED SERVICES; COMMONWEALTH OF KENTUCKY; AND B.R., A MINOR CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

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

HENRY, SENIOR JUDGE: E.C. (hereinafter Father) appeals from an order of the Lewis Circuit Court which appointed D.E. as the primary residential custodian of Father's son. He argues that the trial court erred in determining that D.E. (hereinafter Grandmother), the child's maternal grandmother, qualified as a de facto custodian under KRS 403.270. He further argues that the trial court erred in ruling that it was in the child's best interest to remain with Grandmother.

Father had a two-month long relationship with N.R. (hereinafter Mother), who gave birth to a child on January 5, 2007. By that time, Mother's relationship with Father had ended, although Father was at the hospital when the child was born, and Mother told him that the child was his. Father was uncertain of the child's paternity, however, because Mother had become involved with another man.

On March 4, 2007, Mother was arrested for DUI and for driving on a suspended license. The child was in the car at the time of her arrest. He was not taken into custody by the Cabinet for Health and Family Services at that time because Mother voluntarily placed him with his maternal grandmother, Grandmother. As a result of that arrest and Mother's admission that she had a drug problem and was unable to provide a stable home for the baby, the Cabinet filed a juvenile dependency, neglect and abuse petition on March 9, 2007, in Lewis Family Court.

The court held a hearing on the petition on April 26, 2007. The court found Mother's child to be dependent, neglected or abused, and ordered continued

placement with Grandmother. On July 16, 2007, a dispositional hearing was held, and continued placement with Grandmother was ordered. A permanency hearing was also scheduled.

Meanwhile, Father, who was unaware of these proceedings, submitted a paternity test to the Fleming County Attorney's office on April 24, 2007. The test confirmed that Father is the biological father of Mother's baby, and about five months later, on October 12, 2007, the Mason District Court entered a declaration to that effect.

In early October, having had his paternity of the child confirmed, Father contacted the Cabinet to find out how to pursue custody. Felicia Smith, the Social Services clinician in charge of the case, told Father that he could attend the permanency hearing for the child's placement. Father appeared at the hearing on October 11, 2007, without counsel. The court placed the child permanently with Grandmother. The next day, Father retained counsel and on October 22, 2007, he filed a motion to alter, amend or vacate the judgment, a petition for custody and a motion for immediate custody. A hearing on the motions was held on November 29, 2007, and continued on December 20, 2007. On January 4, 2008, the trial court entered findings of fact, conclusions of law and order in which it ruled that Grandmother qualified as the child's de facto custodian. The court awarded joint custodianship of the child to Father and Grandmother, with Grandmother to serve as the primary residential custodian, and Father as the secondary residential

custodian. Father was granted visitation, and ordered to pay child support. This appeal by Father followed.

On appellate review,

> [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.

*Sherfey v. Sherfey*, 74 S.W.3d 777, 782-783 (Ky. App. 2002) (quotation marks and citations omitted) *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008).

Father argues that Grandmother did not serve as the child's "primary caregiver" and "financial provider" as required to qualify as a de facto custodian under KRS 403.270. Under KRS 403.270(1)(b), a person who meets the definition of de facto custodian shall be given the same standing in custody matters that is given to each parent; that is, custody will be determined under a "best interests of the child" standard. KRS 403.270(2). The statute defines de facto custodian as

> 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.

KRS 403.270(1)(a).

An individual who wishes to gain custody of a child, yet is neither the child's parent nor qualifies as a de facto custodian, must meet the far more stringent standard of proving that the parent "is unfit by clear and convincing evidence." *Diaz v. Morales*, 51 S.W.3d 451, 454 (Ky. App. 2001).

The trial court found that Grandmother had been the child's primary financial provider for seven and one-half months, dating from the time that he was voluntarily placed with Grandmother by his mother following her arrest on March 4, 2007, until Father filed his custody action on October 22, 2007. On these grounds, the trial court designated Grandmother as the child's de facto custodian.

Father argues that the trial court should have used the one-year rather than the six-month period in determining whether Grandmother had attained de facto custodial status because the child was placed with her by the Cabinet. But Felicia Smith specifically testified that the Cabinet did not take custody of the infant on the day of Mother's arrest, explaining that Mother voluntarily placed him with her mother. There is no evidence in the record that the Cabinet ever "placed" the infant with Grandmother. At the later custody hearings, the court ordered the

infant to stay with Grandmother; there is simply no indication that the Cabinet made this placement. The trial court's finding that the six-month period applies in this case is therefore not clearly erroneous, and may not be set aside.

Father further contends that Grandmother did not assume the role of primary caregiver until April 26, 2007, the day that the neglect action was adjudicated, and that therefore the period between March 9, 2007 and April 26, 2007, should not have been included in the time accrued towards Grandmother's de facto custodian status. He argues that Mother, not Grandmother, was the child's primary caregiver during that period. As evidence to support this assertion, he points to the fact that Mother resided in Grandmother's home, and that a Cabinet record dated April 19, 2007, states that "[Mother] advises that she takes him [the child] to the health department for WIC[2] and that he has received his immunization shots there." Grandmother also admitted that Mother had a medical card for the infant. Father contends that taking the child to be vaccinated and receiving public assistance proves that Mother was actually the infant's primary caregiver, not Grandmother. He also points to Grandmother's testimony that her daughter had "never moved out from my home." He also argues that Grandmother was not the primary financial supporter of the child prior to April 26, 2007, because the

[2] WIC provides Federal grants to States for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk. *See* www.fns.usda.gov/wic/.

Commonwealth provided the major portion of financial support for the child in the form of WIC, food stamps and the medical card.

We note that the language of the statute requires that a de facto custodian serve as the "primary," not "sole" or "exclusive," caregiver and financial supporter. Evidence was provided that Mother was "virtually homeless," and drifted between residences during the relevant period. Furthermore, she was unemployed and incapable of serving as the child's primary financial supporter. Although her access to public assistance may have provided some sources of financial support and medical care for the child, substantial evidence supports the trial court's conclusion that Grandmother was his primary caregiver and financial supporter. Grandmother provided a home for him and cared for him on a consistent daily basis. When she was at work and could not look after him, she provided a babysitter (her sister-in-law) because the Cabinet required that he not be left alone with Mother. Again, the court did not commit clear error in determining that Grandmother was the child's de facto custodian.

Father next argues that the doctrine of waiver has not been superseded by the de facto custodian statute, and that the court should have considered whether he had relinquished or waived his superior parental right to custody. He asks that we take into consideration that he immediately began proceedings to gain custody once he knew he was the infant's father. Although we agree that the doctrine of waiver still exists, it only applies in situations between a parent and a non-parent who does not qualify as a de facto custodian. "[I]t is apparent that the

concept of waiver remains alive and well in a custody dispute between a non-parent and a parent in situations where the non-parent cannot qualify as a de facto custodian yet the parent's conduct warrants a finding of waiver, allowing the non-parent to then be considered for custody." *Boone v. Ballinger*, 228 S.W.3d 1, 10 (Ky. App. 2007). The doctrine of waiver is not applicable in this case because Grandmother did qualify as a de facto custodian under the terms of the statute.

Father further argues that his procedural due process rights were violated because he was not notified of the custodial proceedings. He contends that when he returned his application for a paternity determination to the Fleming County Attorney's office, his status as putative father and hence his right to notice of the juvenile proceedings arose. He asserts that such notice was mandated under the terms of KRS 205.730(4), which states that "The cabinet shall serve as a registry for the receipt of information which directly relates to the identity or location of absent parents[.]" He asserts that notice was also required under the holding in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

There is no indication that KRS 205.730(4) places a specific duty on the Cabinet to coordinate statewide requests for paternity tests with ongoing custody cases. Nor is the holding in *Lehr v. Robertson* applicable, because that case dealt exclusively with notice requirements in adoption proceedings.

> The United States Supreme Court has repeatedly held that the parental rights at stake in adoption proceedings are the sort of fundamental liberty interest protected by

> the Due Process Clause. *See Lehr v. Robertson*, 463 U.S. 248, 257-58, 103 S.Ct. 2985, 2991-92, 77 L.Ed.2d 614 (1983).

*Storm v. Mullins*, 199 S.W.3d 156, 162 (Ky. 2006). In this case, Father's parental rights were not being terminated. At no time was he was denied the opportunity to obtain custody of his child. Father waited for two months after the birth of his child before taking any action to confirm that he was the father. After he requested a paternity application on March 14, 2007, he waited over one month, until April 24, 2007, before returning it to the county attorney's office. He testified that he received the results of his paternity test on September 4 or September 10, 2007 (the record indicates that the results were mailed to him on September 7). Father then did nothing until early October, when he attended the permanency hearing. During this period, Grandmother had attained de facto custodian status by serving as the child's primary caregiver and financial supporter. "[T]he basic effect and most obvious intent of [KRS 403.270] is to give 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." *Sullivan v. Tucker*, 29 S.W.3d 805, 807-808 (Ky. App. 2000).

Finally, Father argues that the trial court erred in its ruling that it was in the child's best interests for Grandmother to serve as the primary residential custodian, based on "the history of the care given by the grandmother, the criminal history of [Father], and his history of violence[.]" He contends that the court improperly considered conduct in contravention of KRS 403.270(3) which states

that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."

The conduct in question includes two episodes: in the first incident, which occurred years before the hearing, Father arrived at his home after being warned that his stepdaughter was throwing a party there without his consent. Father, who was intoxicated, became involved in a fistfight with some of the guests. His stepdaughter jumped on his back during the fight. He flipped her over his shoulder onto the sofa and broke her arm. Father maintains that this "accidental occurrence" would hardly suggest that he is a threat to any child. Although the incident took place some years ago, and Father testified that he no longer drinks alcohol or takes drugs, the incident is troubling, as is the fact that an infant was present during the altercation.

In the second incident, allegations were made by an individual that she had been assaulted by Father and his current girlfriend, C.C. In her complaint, the victim claimed that during the assault, Father was "on top" of her and struck her in the face. This altercation resulted in fourth degree assault charges against Father. Father downplays the significance of the incident by asserting that neither he nor his girlfriend was the aggressor, that charges were also filed against the third party, and that the case was to be dismissed if the parties stayed away from each other. Father also argues that other, alcohol-related charges occurred years earlier, and should not have been considered by the court, since alcohol and drug abuse is only significant if it "results in an incapacity by the parent or caretaker to

provide essential care and protection for the child." KRS 620.0239(c). We note that the latter provision applies only to proceedings pursuant to KRS Chapter 620. Furthermore, although Father maintained at the hearing that his earlier problems with violence and alcohol had been resolved, the assault episode involving Father and his girlfriend occurred a relatively short time before, on August 6, 2007. The trial court did not abuse its discretion in giving considerable weight to these episodes in its decision that it was in the best interest of the child to be placed with Grandmother, nor was the consideration of these episodes beyond the scope of what is permissible under KRS 403.270(3).

Father argues that the trial court gave insufficient weight to the positive evidence that he rents a six-bedroom home, is employed in a managerial position, and no longer uses drugs or alcohol, and also gave insufficient weight to the evidence that Grandmother was unaware that her daughter was an addict who had been using drugs since the age of fifteen, had allowed her daughter to drive drunk, and had permitted her daughter's boyfriend, a convicted felon, to stay at her home. But evidence was also presented that Father resides in his home with his girlfriend and her four children, one of whom is a teenaged expectant father. Father testified that he works forty to sixty hours per week, and that he assumed that his girlfriend (who has an extensive criminal record) would care for the baby during these times. In the light of this evidence, the trial court did not commit clear error in deciding that it was in the child's best interests that Grandmother serve as his primary residential custodian.

The findings of fact, conclusions of law and order of the Lewis Circuit Court are hereby affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Shauna A. Rhodes
Greenup, Kentucky

BRIEF FOR APPELLEE:

Delores Woods Baker
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