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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000925-ME

ERNESTINE TILLEY — APPELLANT

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 07-CI-00153

MICHELLE R. KILGORE;
K.A.K.; AND K.L.K. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND MOORE, JUDGES; KNOPF,[1] SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a custody case arising from the dissolution of a nontraditional couple's relationship in which Ernestine Tilley (Tilley) sought joint custody of two children born to Michelle Kilgore during their relationship. The trial court dismissed Tilley's petition because she lacked

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

standing. She argues that she has standing to pursue the case. We disagree and affirm the dismissal of her case.

Tilley and Michelle Kilgore (Kilgore) began cohabitating as a lesbian couple sometime during the mid-1990's. During this relationship, the couple decided to start a family and twice utilized in vitro fertilization to do so. Kilgore underwent the procedure and gave birth to two children, now ages ten and six.

The relationship deteriorated and the couple separated. On May 31, 2007, Tilley filed a petition seeking joint custody of the two children. Kilgore responded with a motion to dismiss due to Tilley's lack of standing to seek custody. The trial court found Tilley did not have standing to seek custody and dismissed the case. Tilley then moved to amend her petition and seek a new trial. These motions were also dismissed. This appeal followed.

Kilgore gave birth to the two children and is the biological mother of them. Not being a biological or adoptive parent, Tilley is considered a nonparent for the purposes of a custody case. In order for a nonparent to have standing to gain custody of a child, one of three factors must be met: the nonparent must be deemed a "de facto custodian" as defined in KRS 403.270; the nonparent must prove the parent is unfit; or the nonparent must prove the parent has waived his or her right to superior custody. *Moore v. Asente*, 110 S.W.3d 336, 359-360 (Ky. 2003). Tilley alleges the first and third factors.

A determination of de facto custody requires the trial court to consider KRS 403.270, which states:

> (1) (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.

Here, the trial court found Tilley is not a de facto custodian. In order to be considered a de facto custodian, the nonparent must be the primary caregiver. There cannot be multiple primary caregivers. "[I]t is not enough that a person provide for a child alongside the parent" but rather he must '"literally stand in the place of the natural parent."' *Boone v. Ballinger*, 228 S.W.3d 1, 8 (Ky. App. 2007)(citing *Consalvi v. Cawood,* 63 S.W.3d 195 (Ky. App. 2001)). Since both Kilgore and Tilley raised these children, there was no single primary caregiver. Tilley cannot be a de facto custodian because she provided for the children next to the biological parent and not in place of the biological parent.

The case of *Moore v. Asente*, *supra*, discusses the other two options for standing.

> 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.
>
> Under the first exception, the nonparent must first show by clear and convincing evidence that the parent has engaged in conduct similar to activity that could result in the termination of parental rights by the state. Only after making such a threshold showing would the court determine custody in accordance with the child's best interest. Under the second exception, however, if a waiver has been shown by clear and convincing evidence, the trial court shall determine custody between the parent and nonparent based on the best interest of the child. "Waiver requires proof of a 'knowing and voluntary surrender or relinquishment of a known right.'" However, waiver may be implied "by a party's decisive, unequivocal conduct reasonably inferring the intent to waive," as long as "statements and supporting circumstances [are] equivalent to an express waiver." (citations omitted).

Id. at 359-60. In the case at bar, only waiver is being alleged.

"A waiver of the parent's superior right to custody requires statements and circumstances equivalent to an express waiver. . . . Waiver requires that there must be some statement or action that unequivocally waives the right to superior custody." *Diaz v. Morales*, 51 S.W.3d 451, 454 (Ky. App. 2001). Because a parent's superior right to custody is a right with "both constitutional and statutory

underpinnings, proof of waiver must be clear and convincing. As such, while no formal or written waiver is required, statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof." *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky. 2004).

"[A] reviewing court is entitled to set aside the trial court's findings when those findings are clearly erroneous. To determine whether findings are clearly erroneous, reviewing courts must focus on whether those findings are supported by substantial evidence." *Id.* at 470. (citations omitted).

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (citations omitted).

Moore, 110 S.W.3d at 354.

In *Moore v. Asente*, *supra*, the Kentucky Supreme Court set forth factors for courts to consider when determining whether parents have relinquished custody in such a manner as to give a nonparent standing.

> In determining whether parents have relinquished "physical custody" in a manner that confers standing

> upon a nonparent, Kentucky trial courts-like other courts that have addressed this issue-should consider, among other factors: (1) how possession of the child was acquired by the nonparent, especially the intent of the parents at the time of their relinquishment of the child to the nonparent; (2) the nature and duration of the possession by the nonparent; (3) the age of the child when possession was acquired by the nonparent and the child's age when the parents sought the child's return; (4) any visits by the parents during the nonparent's possession of the child; (5) any financial support by the parents during the child's stay with the nonparent; (6) the length of time between the relinquishment and the parent's efforts to secure the child's return; and (7) what efforts the parents made to secure the child's return. Although we recognize that these factors cannot be applied mechanically as a formula to generate a conclusive answer as to the nonparent's standing, we believe these factors are useful analytical tools. We further recognize that although factors (1) and (2) will usually have the most importance, the other factors may also impact upon the determination.

Id. at 358-59.

Here, Tilley argues that a power of attorney document signed by both parties was a waiver of Kilgore's superior right to custody. Additionally, she argues that because she was allowed to conduct herself as a custodian to the children and the world, Kilgore waived her superior right to custody.

The trial court found that the power of attorney the parties executed was not a waiver of superior right to custody, but merely a document allowing Tilley to make decisions for the child regarding medical treatment and that no where does the document waive Kilgore's superior right to custody. The document executed on August 22, 2000, when the parties still lived together states:

Power of Attorney
Delegating Parental Authority
(With Consent for Medical Care)

BE IT KNOWN, that Michelle R. Kilgore, of Hindman, KY, the undersigned parent or lawful guardian (Grantor) of [K.A.K.], a minor child (Child), does hereby grant to Ernestine Tilley, as Custodian of said Child, the following powers, authorities and consents:

1. Grantor consents to the temporary custody of said Child by the Custodian for the period and purpose as follows: 08-10-98 to child's eighteenth birthday. Custodian has the right to make decisions for the Child if medical problems or emergencies arise.

2. Grantor authorizes the Custodian to do and undertake all acts as are reasonable and necessary to protect the best interests and welfare of the Child while under the care of the Custodian. Without limiting the generality of the foregoing, the Custodian is further authorized to provide emergency and general medical care which the Custodian in his or her discretion deems necessary or advisable for any illness or injury sustained by the Child during this temporary custody.

3. Grantor consents to any reasonable discipline imposed upon Child by the Guardian provided that said discipline does not constitute unreasonable abuse.

4. Grantor agrees to exonerate and hold harmless the Custodian and its lawful agents and employees from any loss or liability arising during this custody, excepting for any acts of ordinary negligence, gross negligence or wanton, willful or reckless conduct. Grantor specifically agrees to reimburse Custodian for any reasonable expenditures required for the proper care of said Child.

Other: Notification of legal guardian of any action taken per this Power of Attorney[.]

Signed this 22nd day of August, 2000. . . .

A review of the document by this Court supports the trial court's finding and we cannot reverse that finding as clearly erroneous.

We also cannot apply the seven factors listed above to determine whether Kilgore waived her superior right to custody because these factors contemplate a relinquishing of physical custody, which did not happen here. *See Pickelsimer v. Mullins*, 2008 WL 820947 (Ky. App. 2008) (a case which has a factual situation similar to this one).[2] Up until the separation and filing of the custody petition, Kilgore did not relinquish physical custody to Tilley. In fact, they shared physical custody.

Tilley also argues that she should have standing because the biological father has waived his superior right to custody. However, since this was an in vitro fertilization, the father contractually had no rights from the very beginning. This means that there were no parental rights to waive in favor of Tilley. Because Tilley is not a de facto custodian and there is not clear and convincing evidence that Kilgore waived her superior right to custody, we find that Tilley's case was properly dismissed as she has no standing to bring a custody action.

For the foregoing reasons we affirm the dismissal of Tilley's case due to her lack of standing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank R. Riley, III.
Whitesburg, Kentucky

NO BRIEF FILED FOR APPELLEES.

[2] Kentucky Rules of Civil Procedure (CR) 76.28(4)(c) allows this Court to consider unpublished cases, when there is no published authority on the issue.