

RENDERED: FEBRUARY 27, 2009; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001129-ME

D.D.

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 07-CI-00843

A.S.; W.P.K.; J.D.;
AND A.D.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellant D.D. appeals from an order entered by the Campbell Circuit Court, Family Division, finding that he is not the de facto custodian of his two granddaughters. We affirm.

Appellant is the father of A.S., who was a teenager when she gave birth to J.D. in 1998. A second daughter, A.D., was born to A.S. in 2003. The

father of the older child allegedly has paid some child support but otherwise has not been involved in her life, while the father of the younger child is unknown.

The grandchildren resided with appellant in Chicago and Indiana until August 2006, and appellant claimed them as dependents for income tax purposes. A.S. resided with appellant and the children during much of this time, although at times she resided elsewhere for school and employment reasons. A.S. became employed as an over-the-road truck driver in July 2004, resulting in her absences from home for several weeks at a time. Appellant supported and cared for the children during A.S.'s absences, and he continued to claim them as dependents. In August 2006, against appellant's wishes, A.S. removed the children from his care and took them to Newport, Kentucky, where they now reside with A.S. and her husband. Appellant has provided no support or care for the children since their removal. In June 2007, appellant filed a petition alleging that he was the children's de facto custodian and seeking custody of them.

The trial court conducted a hearing regarding the issue of whether appellant was the children's de facto custodian. Based on clear and convincing evidence, the court found that appellant satisfied the criteria set out in KRS¹ 403.270(1) by providing the children with excellent care and support and acting as their de facto custodian until August 2006. However, based on the lapse of ten months between A.S.'s removal of the children and the filing of appellant's petition, the court concluded that appellant was not the children's de facto

¹ Kentucky Revised Statutes.

custodian for purposes of the underlying custody proceeding. Further, the court denied appellant's motion to alter, amend or vacate its decision. This appeal followed.

KRS 405.020(3) provides that notwithstanding the parental custody provisions set out in KRS 405.020(1) and (2),

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 403.270(1) in turn 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 . . . 405.020.

In *Sullivan v. Tucker*, 29 S.W.3d 805 (Ky.App. 2000), a panel of this court addressed a situation in which two grandchildren were in their paternal grandmother's court-ordered temporary custody for some ten months. After the grandmother petitioned the court for permanent custody, the temporary custody order was rescinded and the children were returned to their parents. The grandmother and her longtime companion thereafter petitioned to be named as the children's de facto custodians. The circuit court rejected the petition, finding that de facto custodianship requires actual possession of the child, and that such status lapsed with the children's return to the parents. On appeal, this court held that the language of the statute

suggests that the determination of de facto custodianship is a matter that must be addressed anew whenever the status is asserted. This is not to say that a prior finding of de facto custodianship has no bearing on a subsequent determination. Nor is it to say, as the trial court opined, that possession of the child is a necessary prerequisite to recognition of de facto custodian status. It is only to say that a finding of de facto custodianship does not thereafter have the exclusively presumptive effect [appellants] assert.

29 S.W.3d at 808. This court affirmed the trial court's refusal to find that the petitioners were the children's de facto custodians.

Subsequently, in *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002), *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008), a panel of this court addressed a situation in which a teen resided with his

paternal grandparents for some two years before the teen’s father filed a motion which eventually led to the court’s examination of the custody situation. The stay with the grandparents was interrupted only by a one-month stay at a camp, which the parents forced the unwilling teen to attend by having him forcibly removed and transported to the camp by a firm “specializing in the transportation of ‘difficult’ children.” 74 S.W.3d at 779. This court declined to find that the camp visit “disqualif[ied] the grandparents from achieving ‘de facto custodian’ status[,]” noting:

From the record, it is clear that T.S. [the teen] spent roughly two years under the care and custody of his grandparents prior to the filing of the current action. The nonconsensual transporting of T.S. to Florida was adjudged by the courts of Kentucky to be an act of domestic violence – not an abandonment of support by the grandparents. Further, T.S. never fully left the custody and control of his grandparents. He merely spent an unhappy month at a camp where he continued to maintain contact with his grandparents. Obviously, every parent who sends his or her child to a summer camp has not surrendered custody of the child.

Id. at 780 (footnote omitted). Moreover, the court clarified that “the plain language of” the final sentence of KRS 403.270(1)(a), relating to the tolling of “[a]ny period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child[,]” clearly and specifically requires both “that the action be ‘commenced’ by the parent – not merely defended[,]” and that the court appearance “be an action in which the parents seek to ‘regain custody.’”

Id. at 781.

Here, although the parties provided conflicting evidence regarding their respective roles in caring for and supporting the children prior to August 2006, they do not dispute that appellant has not been involved in the children's care since that date. Further, we do not disagree with the trial court's determination that "clear and convincing evidence" established that until August 2006, appellant was the children's primary caregiver and financial supporter, and that he met "the criteria as set forth in KRS 403.270(1)" to be the children's de facto custodian. Nevertheless, as noted in *Sullivan*, "the determination of de facto custodianship is a matter that must be addressed anew whenever the status is asserted." 29 S.W.3d at 808. Thus, regardless of whether appellant was the children's de facto custodian prior to August 2006, the court's determination below was necessarily based on the circumstances which existed when appellant filed his petition ten months later.

The undisputed evidence shows that appellant never had legal custody or guardianship of the children, and he provided no care or support of them during the ten months preceding the filing of his petition. Indeed, appellant had been prevented from having any contact with the children during that period, and nothing in the record reflected any expectation that contact would resume. Thus, unlike the situation in *Sherfey*, the children's nonconsensual removal from appellant's care amounted to a permanent interruption of his provision of care and support, rather than only a month-long interruption during summer camp attendance. Moreover, the tolling provisions of KRS 403.270(1)(a) do not compel

us to consider only the passage of time between August 2006 and the filing of the petition below, as this action was commenced by a nonparent who sought to be named the de facto custodian, rather than by a parent who sought to regain custody from a de facto custodian. *Sherfey*, 74 S.W.3d at 781. We conclude, therefore, that the trial court did not err by finding that appellant was not the children's de facto custodian for purposes of this proceeding. Further, absent a determination that appellant was the children's de facto custodian, the issues raised below regarding the children's best interests and custodial placement were rendered moot. *See* KRS 405.020(3).

The order of the Campbell Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR A.S.:

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