

RENDERED: SEPTEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001287-ME

JULIE LOWERY

APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 06-CI-00213

CRYSTAL WHEELER; LARRY
EMORY SALYERS, JR.; AND
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

¹ Senior Judge Daniel T. Guidugli 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.

GUIDUGLI, SENIOR JUDGE: Julie Lowery appeals the judgment of the Fleming Circuit Court entered May 24, 2007, dismissing her petition for permanent custody of her grandson, M.A.G. Having thoroughly reviewed this matter, we reverse and remand.

On September 1, 2006, Lowery filed a petition for *de facto* custody of M.A.G., whose date of birth is October 3, 1997. She named the mother, the father, and the Cabinet for Health and Family Services as respondents. The Cabinet had been awarded temporary custody of the child by the Fleming District Court in Case No. 03-J-00003-001, on January 29, 2004. She also acknowledged that a pending termination of parental rights action was currently pending before the Fleming Circuit Court (Case No. 05-AD-00007) filed by the Cabinet against both natural parents. In her petition, she alleged that she was a *de facto* custodian based upon the fact that she had been the primary caregiver for, and financial supporter of, M.A.G. for a period in excess of 3½ years during the time period of October 1997 through April 2001. Thereafter, she stated that M.A.G. had lived with his mother occasionally and in the custody of the Cabinet until finally being placed in the custody of the Cabinet from January 29, 2004, until she filed her petition.

The Cabinet responded to the petition on September 15, 2006. The response referenced the other pending actions (03-J-00003-002 and 05-AD-00007) and prayed “that the best interest of the subject child be protected and that the Court consider the referenced Fleming District Court and Fleming Circuit Court proceedings in any determination which it may make in this matter.” Neither the

mother nor the father filed a response to the petition. It should also be noted that there is no order appointing a guardian *ad litem* (GAL) for the child in the record; however, a GAL for the child was involved and actively represented M.A.G.'s interests.²

The matter was scheduled for a hearing on the issue of *de facto* custodian for March 13, 2007. The GAL filed a trial brief on March 22, 2007, summarizing the evidence presented and arguing that Lowery had not proven by clear and convincing evidence that she was a *de facto* custodian or in the alternative that the lapse in time indicated a waiver or abandonment of her status as *de facto* custodian. On the following day, March 23, 2007, the Cabinet entered a stipulation of fact which stated:

Comes the Respondent, Cabinet for Health and Family Services, by counsel, and stipulates that the evidence offered and admitted into record at the hearing of the matter held on March 13, 2007 is clear and convincing that for a period of not less than six months, prior to the subject child, [M.A.G.], becoming three years of age, the subject child resided with the Petitioner, Julie Lowery, and during such time the Petitioner was the primary caregiver and primary financial supporter for the subject child, all before any proceeding was commenced by a parent seeking to regain custody of the subject child.

Thereafter, on March 26, 2007, the mother, through her attorney, filed her response to the petition requesting that Lowery be determined to be a *de facto* custodian of M.A.G.

² We assume that the GAL had been appointed in either or both of the other pending cases. However, the record on appeal does not contain those cases.

On March 27, 2007, the circuit court entered its findings of fact and conclusions of law as to Lowery's petition to be declared a *de facto* custodian. Based upon its findings, that court concluded that "Julie Lowery has shown by clear and convincing evidence that prior to approximately June of 2001, she qualified under Kentucky law (KRS 403.270) to be considered the *de facto* custodian for said child [M.A.G.]." Also on March 27, 2007, the trial court entered a separate order setting the termination of parental rights case (05-AD-00007) for a hearing on April 11, 2007. In this order, the court stated, "the Court shall make decisions regarding who shall have custody of [M.A.G.] if the parental rights of the mother, [C.W.] are terminated and whether the Petitioner Julie Lowery shall have visitation if she is not granted custody as either a *de facto custodian* or as an appropriate placement if the mother's parental rights are terminated." While the Cabinet objected to this combined hearing (termination of parental rights, Case No. 05-AD-00007, and custody petition of Lowery, Case No. 06-CI-00213), Lowery did not object but rather argued that the cases should be joined. Following the two-day hearing, the GAL filed a report requesting that the parental rights be terminated, that M.A.G. be placed with the Cabinet so that he could be adopted by the current foster parents, and that Lowery be granted visitation with her grandson.

On May 24, 2007, the Fleming Circuit Court entered its findings of fact, conclusions of law and judgment as set forth below:

[FINDINGS OF FACT]

- 1) [M.A.G.] was born on October 3, 1997.

2) At the time of [M.A.G.'s] birth, his mother, [C.W.] was fourteen years of age. During much of [M.A.G.'s] first several years of life, he lived with his mother, and both [M.A.G.] and [his mother] lived with [her] mother, Julie Gilbert (now Lowery), and Julie's husband. During the time [M.A.G., his mother] and Julie lived in the same house, Julie was the primary caregiver for both her daughter [] and her grandson []. During at least twelve months during the same time period and prior to [M.A.G.] turning four years of age, Julie was the primary financial provider for [M.A.G.]. Even though the Commonwealth of Kentucky provided money, food stamps and medical care for [M.A.G.], Julie Lowery was the primary caregiver and financial supporter for at least twelve months of said period. [C.W.] married Junior Wheeler on June 16, 2001 and within a month or so of said date brought [M.A.G.] to live with her and her new husband. Subsequently to approximately June, 2001, and until she filed this action on September 1, 2006 to be declared de facto custodian for [M.A.G.], Julie Lowery was not custodian for [M.A.G.]

3) Prior to approximately June of 2001, Julie Lowery qualified under Kentucky law (KRS 403.270) to be considered the de facto custodian for [M.A.G.]. Julie Lowery was adjudged to qualify as having been a de facto custodian for [M.A.G.] by judgment of Fleming Circuit Court entered herein on March 27, 2007, even though she was not de facto custodian in recent years.

4) [M.A.G.] has been in foster care under the responsibility of the Cabinet for Health and Family Services since January 29, 2004 and previously in foster care under the responsibility of the Cabinet for Health and Family Services from January 10, 2003 until December 11, 2003 pursuant to proceedings in Fleming District Court. The child was adjudged therein to be an abused or neglected child pursuant to KRS 600.020; after efforts were undertaken by the Cabinet for Health and Family Services to reunify the child with his biological parents, the Fleming District Court determined that no further efforts to reunify [M.A.G.] with his parents were

required and the permanency plan for the child was established by the court to be adoption. The Fleming District Court determined that it was not in the best interest of [M.A.G.] to be placed in the custody of his grandmother, Julie Lowery. [M.A.G.] is presently placed by the Cabinet for Health and Family Services in a state-approved foster home and the foster parents have expressed their desire to adopt the child if the parental rights of his parents are terminated.

5) Julie Lowery has expressed what the Court believes to be a sincere desire to care for [M.A.G.]. However, Julie Lowery's daughter [C.W.] the mother of [M.A.G.], has been shown to live an extraordinarily unstable life. The Court finds that it would be virtually impossible for Julie Lowery to be caretaker for [M.A.G.] without allowing [C.W.] to be in frequent contact with [M.A.G.]. This contact between [C.W.] and [M.A.G.], in the opinion of the Court, would prevent [M.A.G.] from even approaching a relatively normal childhood.

6) The child, [M.A.G.], has a close bond and attachment to the foster parents and has expressed to the Court his desire to be adopted by the foster parents.

7) It is not in the best interest of [M.A.G.] that his grandmother, Julie Lowery, be awarded permanent custody of [M.A.G.]. It was not until May of 2004 that Julie Lowery initiated any proceedings in the Fleming District Court proceeding seeking custody of [M.A.G.] and after the Fleming District Court determined in November of 2004 that it was not in the best interest of [M.A.G.] [to] be placed with his grandmother, there was no appeal of that judicial determination. In fact, Julie Lowery did not file this action for permanent custody herein until September 2006, a year after the Cabinet for Health and Family Services filed with the Fleming Circuit Court a petition seeking an involuntary termination of the parental rights of the biological parents of [M.A.G.] and requesting that [M.A.G.] be made a ward of the Commonwealth of Kentucky with his full care, custody and control vested in the Cabinet for Health and Family Services.

8) It is in the best interest of [M.A.G.] that he remain in the care, custody and control of the Cabinet for Health and Family Services.

CONCLUSIONS OF LAW

1. It is not in the best interest of [M.A.G.] that his grandmother, Julie Lowery be awarded permanent custody of [M.A.G.].
2. It is in the best interest of [M.A.G.] that he remains in the care, custody and control of the Cabinet for Health and Family Services.

JUDGMENT

It is the judgment of the Court that the petition by Julie Lowery for permanent custody of [M.A.G.] be

dismissed and that [M.A.G.] remain in the care, custody and control of the Cabinet for Health and Family Services.

This is a final judgment.

Lowery filed a motion to reconsider on June 6, 2007, and a notice of appeal on June 19, 2007. The GAL filed a response to Lowery's motion to reconsider on June 18, 2007, and the Cabinet filed a response on July 5, 2007. There is no order of the circuit court ruling on this motion in the file.

On appeal, Lowery argues that the Fleming Circuit Court erred when it dismissed her petition for custody after it had declared her to be a *de facto* custodian of M.A.G. by a prior court order. She also contends that the court erred by failing to treat her as equal to a parent in determining custody, by failing to grant her custody of M.A.G., by conducting the termination and custody hearings

simultaneously, and by considering the child's interview used in the termination case as evidence in the custody case. We believe the first issue is dispositive of this matter and thus only address that issue.

On March 27, 2007, the court entered its order that Lowery qualified under KRS 403.270 as a *de facto* custodian of M.A.G. This was based upon testimony given at a hearing on March 13, 2007, and following the Cabinet's stipulation that Lowery was a *de facto* custodian and the mother's written request that Lowery be so found. KRS 403.270(1) and (2), the statute dealing with custody, states as follows:

(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.

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the

parent now seeking custody to seek employment,
work, or attend school.

Once the court determined that Lowery was a *de facto* custodian of M.A.G., she had the same standing in custody matters as a parent. The Fleming Circuit Court erred by then dismissing her petition for custody of M.A.G. Therefore, the matter must be reversed and remanded for further proceedings. It should, however, be noted that this Court makes no comment on the court's original determination that Lowery was a *de facto* custodian of M.A.G. based upon the facts herein. And this Court is somewhat baffled by the Cabinet's stipulation to that finding based upon the facts herein. However, that issue is not before this Court and at this point is the law of the case, which the court and parties must now address upon remand.

For the foregoing reasons, the judgment of the Fleming Circuit Court entered May 24, 2007, is reversed and this matter is remanded for further action not inconsistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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