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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002373-ME

A.R.J. APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 07-CI-00162

DONALD H.; LINDA H.;
AND LISA D. APPELLEES

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: A.R.J. (Appellant) appeals from orders of the Graves Circuit Court which found Donald H, Linda H., and Lisa D. *de facto* custodians of his minor son, granted custody of the child to Donald H. and Linda

[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.

H., and ordered Appellant to pay child support. Having thoroughly reviewed this matter, we affirm.

D.J. was born on April 12, 2006. At the time of his birth, his mother, A.D. (Mother), was married to Joe D. However, Joe D. was not the father of the child. Following court action concerning the child's paternity, testing established that Appellant was D.J.'s father. D.J. lived with Mother, Appellant, and Appellant's mother, Irell A. (Grandmother), for approximately five months following his birth. Thereafter, both Mother and Appellant were incarcerated. Prior to incarceration, Mother contacted a friend, Lisa D., to take care of D.J. if she went to jail. Lisa D. then contacted Donald H. and Linda H. for help in caring for D.J.

On September 13, 2006, Lisa D. filed a juvenile petition in Graves District Court alleging that D.J. was dependent, neglected or abused, and asking that D.J. be placed in the custody of Linda H. and herself. On that same day, the Graves District Court entered an order granting emergency custody of D.J. to Lisa D. and Linda H. Following a hearing in the district court, Appellant admitted the child was dependent, Mother admitted to neglect, and the court continued custody to Lisa D. and Linda H. on October 17, 2006. At that time, the court also determined that Appellant had no standing as his paternity had not been established. Finally, on January 6, 2007, DNA testing determined that Appellant was D.J.'s father (99.99%), and thereafter the court granted Appellant visitation with D.J.

On March 15, 2007, Donald H., Linda H., and Lisa D. filed their petition for *de facto* custody in the Graves Circuit Court. The petition alleged that Appellant is the father of D.J., Mother is the mother, and Grandmother the paternal grandmother.[2] The petition alleged that D.J. had lived with Mother from birth until September 7, 2006, and then with the petitioners from that date to the present (March 15, 2007) and therefore they were his *de facto* custodians. The petitioners sought to be awarded sole custody and control of D.J. and that Mother and Appellant be ordered to pay child support, provide health insurance, and to allocate the costs of uninsured medical expenses. Mother was incarcerated and, as such, appointed a guardian *ad litem*. Mother filed an answer on April 9, 2007. Appellant filed his response and counter-petition on April 18, 2007. He sought to have the *de facto* custody petition dismissed and requested custody of his son. Grandmother filed a response and counter-petition for custody, as well as a petition for immediate entitlement to custody pursuant to KRS 620.100.

The parties each filed prehearing memoranda with the court as to the issues to be addressed at the hearing on the petitions/cross-petitions and their respective positions as to why or why not the petitioners were *de facto* custodians and who should be awarded custody of D.J. On June 21, 2007, the court entered an order which, in part, stated that:

> It was stipulated that there exist[] the requisite elements for the Petitioners to be de facto custodians

[2] Grandmother was named solely because she had filed a motion in the juvenile case (06-J-00220-1) seeking a modification of the temporary custody order to name herself as custodian.

> within the meaning of KRS 403.270(1)(a), excepting that the Respondents, [Appellant and Grandmother], argue that the request for a return of custody in the District Court proceeding constitutes a commencement of an action by a parent which would prohibit the running of the period necessary for de facto custodianship.

The parties were ordered to brief this issue, and the matter was set for a final hearing on August 21, 2007. The parties briefed this issue, and the court entered its order on July 6, 2007. In its order, the court held that *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)), was controlling and the petitioners "have the standing as de facto custodians of [D.J.] within the meaning of KRS 403.270(1)(a)." The court rejected the respondents' argument that *Stiffey v. Curtis*, 2004 WL 2486243 (Ky. App. Nov. 5, 2004), an unpublished opinion of this Court, would toll the period necessary to determine *de facto* custodianship. In *Stiffey*, this Court held that a "proceeding" is "more comprehensive than the word 'action,' but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including . . . all motions made in the action." *Id*. at *1. Based on *Stiffey*, the respondents had argued that their opposition to the district court's custody order tolled the ruling of the petitioners' time period (6 months) before they could be declared *de facto* custodians. The trial court held that Grandmother's written motion, since she is a grandparent, "would not stop the running of the requisite time period." And it ruled that Appellant failed to file a written motion, which is necessary "to toll the limitations period contained in the

relevant statute." Appellant filed a motion to alter, amend or vacate the court's order, which was denied on July 23, 2007.

A final hearing was held on August 21, 2007. Following the hearing, the court entered its Findings of Fact, Conclusions of Law and Judgment on August 24, 2007. The court made 27 specific findings of fact, the more relevant to this Court's review being the following:

> 20. When the child came into [Donald H. and Linda H.'s] home, all he had was a diaper bag full of clothes, most of which did not fit. He was in the fifth percentile as to his body weight, and was under-nourished. Presently he is just under the fiftieth percentile.
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> 21. [Donald H. and Linda H.'s] testimony is that the visits have gone poorly, [D.J.] is upset, he comes home crying, and wakes up crying after the visits. He acts aggressive. His clothes smell of cigarette smoke. [Donald H. and Linda H.] state that they have bagged the clothes to preserve the smell, called the social workers, but the social workers have not investigated further. The Court notes that one of the conditions of the District Court Order was that the child not be around cigarette smoke. It is noted, however, that [Appellant] states that no one smokes around the child, except outside the home.
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> 22. [Donald H. and Linda H.'s] testimony was further that [D.J.] was integrated into their family, and related well to their children, as well as the extended family and church. Lisa [D.] lives next door to [Donald H. and Linda H.], and the daycare that the child attends is attended by other relatives of the child.
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> 23. The house where [Donald H. and Linda H.] live appears to be adequate to house the child, as well as the rest of the family.

> 24. The social workers testified that they believe the child should be returned to the home of the father. However, that is the ultimate decision for the Court to make, pursuant to KRS 403.270, and the Court believes that the standards that the social workers were applying related to a return of custody to a parent in dependency proceedings.
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> 25. In reviewing the evidence presented, it appears that the wish of the natural mother, the crowding of the residence where [Appellant] lives, the child's health issues, including the possibility of smoking around the child (and the Court cannot say definitively that smoking takes place around the child), the improvement in his weight, the allegation of domestic violence by the natural mother, the connection to the use of illicit substances by residents of the home where [Appellant] lives, and the recommendation of the Guardian Ad Litem, favor [Donald H. and Linda H.] being granted custody.
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> 26. Further, the Court considers the fact that the child is well cared for in [Donald H. and Linda H.'s] home. It appears to be an appropriate home. The child is receiving care, nurture and support in a stable environment, and appears to be adjusted to his present home.
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> 27. The Court has considered those applicable factors contained in KRS 403.270(2), and it appears that the best interest of the child would be served by granting custody to [Donald H. and Linda H.].

Based upon its findings of fact, the court concluded that the best interest of the child would be served by granting custody to Donald H. and Linda H. The court then entered judgment granting Donald H. and Linda H. the care, custody and control of D.J., setting visitation times for Appellant, and reserving on the issues of child support and grandparent visitation. Appellant filed a motion to alter, amend or vacate, and Donald H. and Linda H. filed motions to address child

support and visitation. Following a hearing, the court denied Appellant's motion and ordered him to pay child support in the sum of $537.95 per month effective August 24, 2007. The court also ordered specific times and imposed certain conditions on Appellant's visitation with D.J. On November 7, 2007, the court entered an order amending the October 15, 2007, order to include final and appealable language. This appeal followed.

During the pendency of this appeal, Donald H. and Linda H. filed a motion to dismiss the appeal for failure to name indispensible parties and for being untimely filed. Appellant filed a response, and the motion was submitted to a motion panel of this Court. On February 11, 2008, the motion panel entered an order on the matter. The order denied Donald H. and Linda H.'s motion to dismiss for failing to file a timely appeal and granted Donald H. and Linda H.'s motion to strike a portion of Appellant's designation of record. This Court then ordered that the Graves District Court juvenile proceedings designated by Appellant shall not be made part of the record on appeal. And this Court determined that it was not sufficiently advised as to the argument that Appellant had failed to name indispensible parties to the appeal and therefore passed that portion of the motion to the three-judge panel assigned to review the merits of the case. This panel has reviewed Donald H. and Linda H.'s motion to dismiss for failure to name indispensible parties and being sufficiently advised hereby denies said motion. We will thus address the merits of the appeal.

On appeal, Appellant sets forth three arguments but essentially argues only one – that the trial court erred in determining that Donald H. and Linda H. should be classified as *de facto* custodians. Appellant also states that the trial court erred in granting custody to Donald H. and Linda H. and by ordering child support and specific visitation, but these arguments related back to the court's decision to find Donald H. and Linda H. *de facto* custodians as argued in his first claim of error.

KRS 403.270(1) addresses the *de facto* custodian requirements in the following manner:

> (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.
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> (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.

The facts presented in this case establish that D.J. was placed with Donald H. and Linda H. on September 7, 2006, and they filed a dependency, neglect and abuse petition in Graves District Court on September 13, 2006.[3] At that time, emergency custody of D.J. was given to Donald H. and Linda H. The district court found D.J. to be a dependent and neglected child on October 17, 2006. Thereafter, Appellant established his paternity of the child and entered into an Agreed Visitation Order. On March 15, 2007, Donald H. and Linda H. filed their petition for *de facto* custody. On July 6, 2007, following briefs being filed by the parties on the issue, the court entered an order determining and ordering that Donald H. and Linda H. "have the standing as de facto custodians of [D.J.] within the meaning of KRS 403.270(1)(a)." According to the order, "the parties stipulated that all elements for the existence of de facto custodianship on the part of [Donald H. and Linda H.] existed. The time period was agreed to have been six (6) months."

The only issue raised before the circuit court and on appeal is whether or not Appellant's participation and actions in the district court case tolled the running of the six-month period necessary for *de facto* custodianship. The court relied on *Sherfey v. Sherfey*, *supra*, while Appellant argues that the unpublished case of *Stiffey v. Curtis*, *supra*, applies. We agree with the trial court that *Sherfey* is controlling on this issue.

[3] As previously stated, a motion panel of this Court ruled on several motions on February 11, 2008. Specifically, the motion panel ordered that the Graves District Court juvenile proceedings designated by Appellant shall not be a part of the record of this appeal.

In *Sherfey*, the parents made a similar argument as that advanced by Appellant – that their defense of a juvenile petition constituted a suspension of the running of the time period necessary to become a *de facto* custodian. Interpreting the language of KRS 403.270(1)(a), the *Sherfey* court held:

> The pertinent provision of KRS 403.270(1)(a) specifies that "[a]ny 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" [emphasis added]. We believe that this language is clearly stated and specific in its terms. In order to suspend a period of residency with a "de facto custodian," the statute sets forth two requirements. First, the statute requires that the action be "commenced" by the parent-not merely defended. Second, the statute requires the court appearance to be an action in which the parents seek to "regain custody." From the plain language of the statute, it is clear that Mark and Laurie satisfied neither of these requirements. Not once during the two years T.S. spent with his grandparents did Mark and Laurie initiate a legal action to regain custody of T.S.

Sherfey, 74 S.W.3d at 781. This case is on point and controls the outcome of this case. Appellant's reliance on *Stiffey* is misplaced. In *Stiffey*, this Court stated:

> Because [the natural mother] had three times (twice prior to the Stiffeys' petition and once while the petition was pending) moved the family court in her dependency action to terminate the temporary custody order and return [her child] to her care, the trial court ruled that she had, for the purposes of KRS 403.270, commenced legal proceedings seeking to regain custody, and thus had tolled the period of the Stiffeys' care.

Id. at *1. The Court went on to confirm that *Sherfey* was not contrary to its holding but "clearly distinguishable."

Whether we agree or not with the rationale set forth in *Stiffey* is not important because we find the facts before us in this case are distinguishable from those in *Stiffey*, but essentially the same as in *Sherfey*. Appellant took no affirmative action to contest Donald H. and Linda H.'s custody of D.J. until *after* they had filed their petition in March 2007. He had commenced no legal proceeding as required by KRS 403.270(1)(a), which would toll the required minimum period for a *de facto* custodian determination. Despite his arguments to the contrary, the trial court did not err in relying upon *Sherfey* and finding that Donald H. and Linda H. met the statutory requirements to be *de facto* custodians.

Appellant next argues that the court erred in determining that Donald H. and Linda H. should be awarded the care, custody and control of D.J. His argument basically contends that the trial court erred by determining Donald H. and Linda H. to be *de facto* custodians and thus placing them on the same level as natural parents. He contends that if the court had not made the *de facto* finding, *then* Donald H. and Linda H. would have to prove he was either unfit or had waived his superior right of custody of the child. We have already determined that the trial court did not err in the *de facto* custodian determination and need not address it again. Further, this Court believes that the findings of fact, conclusions of law and judgment entered August 24, 2007, clearly complies with KRS 403.270(2). The Court's finding that the best interest of the child would be served by granting custody to Donald H. and Linda H. is not clearly erroneous or an abuse of its discretion.

Similarly, Appellant's last argument as to child support and visitation does not address those issues but rather continues to argue the *de facto* custodian issue. Since Appellant puts forth no relevant argument as to the alleged issue, there is nothing for this Court to address.

For the foregoing reasons, the findings of fact, conclusions of law and judgment entered by the Graves Circuit Court on August 24, 2007, and the orders entered October 22, 2007, and November 8, 2007, are affirmed.

ALL CONCUR.

ENTERED: September 18, 2009

/s/ Daniel T. Guidugli
SENIOR JUDGE,
COURT OF APPEALS

BRIEF FOR APPELLANT:

Bethany A. Leonard
Mayfield, Kentucky

BRIEF FOR APPELLEES:

Tom Blankenship
Benton, Kentucky