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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000622-ME

CHRISTOPHER LEACH

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 06-CI-00215

L.D. HARRISON; and
DEBRA L. HARRISON

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: NICKELL AND WINE, JUDGES; HARRIS, SENIOR JUDGE.

WINE, JUDGE: Christopher Leach (“Christopher”), a father, appeals an order of the Estill Circuit Court granting permanent sole custody of his minor children to L.D. and Debra Harrison, their maternal grandparents (the “Harrisons”). On appeal, he argues that the trial court erred in finding him to be an unfit parent and

finding that it was in the best interests of the children to be placed with the Harrisons.

Factual Background

Christopher married Emily Leach (“Emily”) on December 7, 2003, and three children were born of the marriage, J.L., H.L. and N.L. (hereinafter, “the children”). J.L. and H.L. are twins, both of whom were three years old at the commencement of this action. N.L. was less than a year old when this action arose. The sole question on appeal concerns Christopher’s fitness to have sole custody of the children as Emily stipulated to neglect in the Madison Circuit Court and does not appeal.¹

Before the eventual removal of the children from the home, over eight investigations were opened by the Department for Community Based Services (“DCBS”). These investigations turned on Emily’s abuse and neglect of the children, including excessive corporal punishment. Although Christopher was only personally named in one such investigation, he was implicated in each of them for his failure to prevent Emily from abusing and/or neglecting the children.

On August 8, 2006, H.L. was placed temporarily with the Harrisons through DCBS under a temporary voluntary family placement.² It appears that J.L.

¹ This action first arose in Madison Circuit Court before venue was determined to be improper and was transferred to Estill Circuit Court.

² Although not clear from the lower court file, it is presumed this placement was pursuant to Kentucky Revised Statute (“KRS”) 620.090(1) which provides that, “[i]f, after completion of the temporary removal hearing, the court finds there are reasonable grounds to believe [a] child is dependent, neglected or abused, the court shall issue an order for temporary removal and shall grant temporary custody to the cabinet or other appropriate person or agency. Preference shall be given to available and qualified relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision, if known. The order shall state the specific reasons for removal and show that alternative

was staying with his paternal grandparents at this time. On August 16, 2006, the Harrisons filed a petition for temporary emergency sole custody of J.L. The court granted emergency relief allowing the Harrisons to gain temporary custody of J.L. Thereafter, on August 21, 2006, the Harrisons filed verified petitions for the permanent sole custody of both J.L. and H.L.³

On September 19, 2006, after the two eldest children had been temporarily removed from the home and placed with the Harrisons, the children were returned to Christopher and Emily upon recommendation of the Domestic Relations Commissioner (“DRC”). The September 19, 2006 order directed that the Leaches were not to corporally punish the children. It further awarded weekly visitation to the Harrisons. Thereafter, the Leaches failed to produce the children for twenty-three regularly scheduled visitations.

In August of 2007, after Emily corporally punished J.L. and Christopher failed to prevent such corporal punishment, the two eldest children were again removed from the Leaches’ care and placed temporarily with the Harrisons. DCBS alleged that Christopher neglected his children by failing to protect them from physical abuse by Emily. On August 24, 2007, the Harrisons again moved for permanent sole custody of the children. J.L. and H.L. have lived

less restrictive placements and services have been considered. The court may recommend a placement for the child.”

³ It appears that the Harrisons did not seek custody of N.L. at this time as he was placed with the paternal grandparents where Emily resided while she was still breastfeeding N.L.

with the Harrisons since that time. N.L. was not placed with the Harrisons until December of 2007 but has also remained in their care since that time.

The final hearing concerning Christopher's fitness to be the sole custodian of the children was held on October 30, 2008. Thereafter, the DRC recommended awarding custody to Christopher, allowing the Harrisons visitation rights and allowing for Emily to regain visitation rights at some point in the future. However, the DRC also recommended that the children were not to immediately return to Christopher but were to be slowly reintroduced to their father over the course of the next few months. The Harrisons filed exceptions to the recommendation. Thereafter, the trial court entered an order rejecting the recommendations of the DRC on February 19, 2009, granting permanent sole custody of the children to the Harrisons and allowing Christopher unsupervised visitation with the children.

Christopher now appeals, arguing that there was insufficient evidence to support a finding that he was unfit to be the sole custodian to his three minor children.

Argument

Christopher's sole argument on appeal is that the trial court's finding that he was an unfit parent was unsupported by substantial evidence. For the reasons set forth below, we do not reach this issue but vacate and remand with instructions for the trial court to dismiss the case for lack of jurisdiction.

Although the court undertook a “best interest of the child” analysis in its order granting the Harrisons permanent sole custody of the children, it never explained how the Harrisons had standing as *de facto* custodians to challenge the superior constitutional right of the Leaches to the care and supervision of their minor children.⁴ There is indication that the court believed the Harrisons had standing as non-parents,⁵ despite the fact that they were not *de facto* custodians.

The right of a non-parent, other than a *de facto* custodian, to initiate a custody action was formerly set forth in KRS 403.420. Under KRS 403.420(4)(b), a non-parent could commence a custody action in circuit court “by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one (1) of his parents[.]” After this initial showing was made, the non-parent had the burden of proving that one of two exceptions applied to the parent’s superior right to custody: that the parent was unfit or that the parent had waived his or her superior right to custody. *Moore v. Asente, supra* at 359. However, KRS 403.420 was part of the Uniform Child Custody Jurisdiction Act (“UCCJA”), which was repealed by the Kentucky General Assembly in 2004. *See* 2004 Kentucky Acts ch. 133 § 46 (repealing the UCCJA, effective July 13, 2004).

⁴ Both parties stipulated before the hearing that the Harrisons did not qualify as *de facto* custodians under Kentucky Revised Statute (“KRS”) 403.270.

⁵ In the initial DRC recommendation, the DRC cites the former KRS 403.420 for the right of a non-parent to institute a custody proceeding. Further, the trial court cites a portion of *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003), concerning custody contests between parents and non-parents, which relies on the former KRS 403.420.

Unfortunately, KRS 403.420 was not reenacted. This case was filed on August 21, 2006, more than two years after the repeal became effective. We can find no other statute which would allow a third party, who is not a *de facto* custodian, to have standing to petition for custody. We echo the sentiment set forth by this Court in an unpublished opinion in 2007:

It seems to this Court that the legislature may have unintentionally overlooked such third parties when it repealed KRS 403.420(4)(b). In any event, the effect of the repeal . . . remains the same –third parties who do not qualify as *de facto* custodians but who have physical custody of a child are without standing to commence a custody action.”

Lawler v. Riggs, 2007 WL 4465548 (Ky. App. 2007) (This case is not cited as binding precedent. See CR 76.28(4)(c)).

Kentucky’s child custody statutes do not grant subject-matter jurisdiction to our courts to determine the custody rights of a non-parent who has not been found to be a *de facto* custodian or to provide non-parents standing to bring such actions. It is the place of the legislature to enact statutes to provide standing to non-parents, and we cannot “create” jurisdiction where there is none. While neither Christopher nor the Harrisons raised this issue on appeal, subject matter jurisdiction may be raised *sua sponte* by the Court. *Kentucky Employers Mutual Insurance v. Coleman*, 236 S.W.3d 9, 15 (Ky. 2007). As a court without subject matter jurisdiction has no “power to do anything at all[,]” we have no choice but to vacate and direct the circuit court to dismiss the action.⁶ *Duncan v.*

⁶ We note that the concept of “particular jurisdiction” is not applicable here, as this case does not turn on the sort of non-compliance with statutory requirements or so-called jurisdictional facts that would allow

O’Nan, 451 S.W.2d 626, 631 (Ky. 1970), quoting *In re Rougeron’s Estate*, 217 N.E.2d 639, 643 (NY 1966).

Accordingly, we vacate and remand with instructions to the Estill Circuit Court to dismiss the case. The children will remain in the temporary custody of the Harrisons pursuant to the previous order of the Estill Circuit Court, which removed the children pursuant to KRS 620.090, as if the herein action had never been commenced and until any further order of the Estill Circuit Court. The appropriate adjudicatory hearing shall be held in accordance with KRS 620.090(5). We note that if the children remain in the temporary custody of the Harrisons for a continuous period of one year’s time from the conclusion of this action,⁷ the Harrisons may seek sole custody as *de facto* custodians under KRS 403.270.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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this court the power to decide this specific case. See *Nordike v. Nordike*, 231 S.W.3d 733 (Ky. 2007), and *Milby v. Wright*, 952 S.W.2d 202 (Ky. 1997).

⁷ The Harrisons would not be immediately entitled to such status as the statute has not continued to run during the pendency of this action pursuant to KRS 403.270(1)(a).