

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002302-ME

J. B.

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 08-CI-00050

J. C.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON, AND STUMBO, JUDGES.

STUMBO, JUDGE: In this appeal, J.B.,¹ hereinafter referred to as Father, appeals from a judgment of the Whitley Circuit Court which deemed J.C., hereinafter referred to as Appellee, a de facto custodian of his infant child. Father argues that Appellee should not be considered a de facto custodian. We affirm the trial court's judgment.

¹ Since this case involves a minor child, the parties' names will not be used.

A.C., hereinafter referred to as Child, was born on January 22, 2007, to J.J.C., hereinafter referred to as Mother. The Cabinet For Families and Children removed Child from the custody of Mother seven days later after it was discovered Child was born with drugs in his system. Mother was not married to Father, but to another man, J.E.C., hereinafter referred to as Step-Father. Child was placed with Appellee, who is the mother of Step-Father, because it was believed at the time that Step-Father was Child's biological father.

On October 25, 2007, Father learned he could be Child's biological father. He immediately sought legal advice and filed a paternity action and a judgment of paternity was entered on January 23, 2008. A DNA test concluded Father was the biological father of Child. On January 16, 2008, Appellee filed a petition for custody claiming Child's biological parents were unfit and arguing she was Child's de facto custodian. On January 22, 2008, Father filed his response to the petition and a counter-petition for custody.

There were a number of delays in the trial court hearing the case, but a hearing was ultimately held on June 17, 2008. Further delays caused no findings of fact, conclusions of law and judgment to be entered until June 11, 2009. This judgment found Appellee to be a de facto custodian and granted her permanent custody of Child, with Father getting regularly scheduled timesharing.

Father filed a timely motion to vacate, amend or set aside the findings of fact, conclusions of law and judgment. On November 24, 2009, the trial court

amended its judgment to give Father and Appellee joint custody of Child, with Child to reside primarily with Appellee. This appeal followed

Kentucky Revised Statute(s) KRS 403.270(1)(a) states:

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.

Father argues that the time in which he did not know he was the father of Child should not count against him in determining whether Child resided with Appellee for the required amount of time, in this instance, six months.² Father argues that the required time limit should not have begun to run until he learned he was Child’s father in January of 2008.

We disagree. Father cites to no caselaw to support his argument and a plain reading of the statute states that Appellee must have been the primary caregiver and financial supporter of Child for six months (because the child was

² In this case, Child was placed with Appellee by the Department for Community Based Services, a department of the Cabinet For Families and Children. This would require the child to reside with the non-parent custodian for a period of one year before she could be deemed a de facto custodian. It would appear Child did not reside with Appellee for the required one year before Father brought his petition for custody. However, this issue was never raised in the trial court. Every party believed the six-month time limit applied. As such, we will only address the six-month time limit in this opinion.

under three years of age) to be deemed a de facto custodian. There was clear and convincing evidence that this was the case. Appellee provided for Child from January 29, 2007, until she filed her petition for custody in December of the same year. Father being unaware that he was Child's biological father has no bearing on Appellee's status as a de facto custodian.

We, therefore, affirm the judgment of the trial court.

DIXON, JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent. Our legislature chose to protect the constitutional right to raise one's own biological child by requiring those who claim de facto custodian status to prove it by clear and convincing evidence. KRS 403.270(1)(b). As noted by the majority, Appellee did not qualify as a de facto custodian *as a matter of law* because Child was placed with her by the Department for Community Based Services but resided with her for less than one (1) year. KRS 403.270(1)(a).

I recognize that in challenging Appellee's de facto custodian status Father never argued the applicability of the longer residency requirement based on the Department's placement. However, "palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." Kentucky Rule(s) of Civil Procedure (CR) 61.02.

This error was palpable in that it was readily determinable on the record. *Nichols v. Commonwealth*, 142 S.W.3d 683, 691 (Ky. 2004)(“a ‘palpable error’ is an error that is easily perceived or obvious”)(interpreting Kentucky Rule(s) of Criminal Procedure (RCr) 10.26)). Elevating Appellee to the status of a parent for custody purposes certainly affected Father’s substantial and constitutional parental rights. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972) (parental rights are “essential” and “basic” civil rights, “far more precious . . . than property rights.”). And requiring a biological parent to share custody of his child with a non-biological parent who failed to satisfy the statutory qualifications of a de facto custodian, in my opinion, qualifies as a manifest injustice resulting from that palpable error.

Therefore, I would remand this case with instructions to determine that Appellee did not qualify as a de facto custodian and to enter appropriate orders relating to custody and, if proper, visitation.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE:

Jane R. Butcher
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