

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002165-ME

JOHNNELL DENTON

APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
FAMILY COURT DIVISION

v. HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 06-J-01010

ABBEY MULLIGAN, DE FACTO
CUSTODIAN; MEGGI MULLIGAN,
MOTHER; J.G.D., CHILD; AND THE
CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,
SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Johnnell Denton brings this appeal from July 8, 2009,
and October 13, 2009, orders of the Campbell Circuit Court, Family Court

Division, (family court) granting *de facto* custodian status of his son, J.G.D., to Abbey Mulligan, the child's maternal aunt. We affirm.

J.G.D. was born to Meggi Mulligan on November 20, 2004. On November 25, 2006, Meggi was incarcerated for a probation violation.¹ A few days later, a judgment of paternity was entered adjudicating Johnnell Denton the father of J.G.D. As a result of Meggi's incarceration, J.G.D. lived briefly with Johnnell during part of November and part of December 2006. Johnnell was also incarcerated in December 2006.²

On December 15, 2006, J.G.D.'s maternal aunt, Abbey Mulligan, petitioned the family court for emergency custody of J.G.D. The family court granted temporary custody of J.G.D. to Abbey on December 15, 2006. In May 2007, Abbey petitioned the court for permanent custody of J.G.D. By order entered May 22, 2007, Abbey was granted permanent custody of J.G.D.

In August 2007, Meggi petitioned the court to return custody of J.G.D. to her, and Meggi began exercising visitation. By order entered October 30, 2007, custody of J.G.D. was returned to Meggi per a "graduated schedule." J.G.D. began spending one or two nights per week with Meggi but remained primarily with Abbey. In January 2008, Meggi was again incarcerated for a probation violation. By order entered March 4, 2008, temporary custody of J.G.D. was again

¹ Meggi Mulligan was incarcerated for violating her probation from an earlier conviction by testing positive for cocaine.

² Johnnell Denton was incarcerated for possession of cocaine. Johnnell has an extensive criminal history in Kentucky and Ohio – including trafficking in cocaine, tampering with evidence and possession of cocaine.

awarded to Abbey. Two days later, Johnnell petitioned the court for custody of J.G.D. At the time of his petition, Johnnell was on parole and was residing at a halfway house where he was receiving substance abuse treatment.

By agreed order entered April 22, 2008, Johnnell was granted supervised visitation with J.G.D. In May 2008, Meggi was released from jail and resided in Abbey's home for approximately three weeks. On June 23, 2008, the family court denied Johnnell's motion for custody and ordered that custody of J.G.D. would remain with Abbey.

In March 2009, Meggi petitioned the family court for custody of J.G.D., who was now over four years of age. Shortly thereafter, Johnnell also petitioned the court for custody of J.G.D. In May 2009, Abbey filed a motion seeking to be declared *de facto* custodian of J.G.D. By order entered July 8, 2009, the court determined that Abbey qualified as J.G.D.'s *de facto* custodian.

Specifically, the court stated:

[Abbey] was first granted temporary custody 12/5/06 when child was 2 yrs. old, and was granted permanent custody on 5/22/07 until October, 2007, which is greater than 6 mos. as primary caregiver & financial supporter and therefore [Abbey] was *de facto* custodian during that time.

Johnnell subsequently filed a motion for additional findings of fact pursuant to Kentucky Rules of Civil Procedure (CR) 52 and a motion to alter, amend or vacate pursuant to CR 59. The court denied Johnnell's motion to alter, amend or vacate but took the motion for additional findings of fact under

submission. By eighteen-page order entered October 13, 2009, the court made extensive additional findings and reiterated that Abbey was J.G.D.'s *de facto* custodian. The family court ultimately designated Abbey "the primary residential custodian with joint custody to [Johnnell and Meggi] for parenting time only." Johnnell and Meggi were also awarded visitation/parenting time. This appeal follows.

Johnnell contends the family court erred by determining that Abbey qualified as a *de facto* custodian of J.G.D. In support thereof, Johnnell asserts that J.G.D. did not reside with Abbey for the requisite period of time pursuant to Kentucky Revised Statutes (KRS) 403.270(1).

KRS 403.270(1) defines "*de facto* custodian" 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](#).

Johnnell asserts that Abbey must have been the primary caregiver and financial supporter of J.G.D. for one year or more to qualify as a *de facto* custodian under KRS 403.270(1)(a) because J.D.G. was placed with Abbey by the Department of Community Based Services.

KRS 403.270 governs *de facto* custodian status. Essentially, KRS 403.270 defines a *de facto* custodian as one shown by clear and convincing evidence to be the primary caregiver and primary financial supporter of a particular child for a specified period of time. The requisite amount of time necessary to establish *de facto* custodian status is dependent upon two factors – (1) age of the child and (2) source of custody. 16 Louise E. Graham & James E. Keller, *Kentucky Practice – Domestic Relations* § 21:29 (3rd ed. 2008).

If the child is under the age of three, a party can become the de facto custodian by providing primary care and support for six months. However, if the child is over age three or has been placed in the de facto custodian's home by the Department for Social Services, a party becomes a de facto custodian only after one year or more.

Id.

In the case *sub judice*, as to the first factor – age of the child, J.G.D. was two years old when Abbey was initially awarded custody on December 15, 2006. As to the second factor – source of custody, Abbey petitioned the court, and

the court subsequently awarded custody to her. This was not a situation where J.G.D. was in the custody of the Department for Community Based Services and subsequently placed with Abbey by the Department. Rather, custody of J.G.D. was directly awarded to Abbey by the family court upon Abbey's petition. Thus, we disagree with Johnnell's contention that the statutory requisite amount of time was one year. Rather, as J.G.D. was less than three years of age when Abbey obtained custody directly from a court order, we believe the statutory requisite of time was six months under KRS 403.270(1)(a).

In sum, Abbey was the primary caregiver and financial supporter of J.G.D. from December 15, 2006, until August 31, 2007, (when Meggi filed her petition for custody) which exceeds the requisite six-month time period. Indeed, the circuit court found that Abbey had custody of J.G.D. from December 2006 until October 2007 "which is greater than six months as primary caregiver and supporter." As such, we conclude the family court correctly determined that Abbey qualified as J.G.D.'s *de facto* custodian by clear and convincing evidence.

We view Johnnell's other contentions to be either moot or without merit.

For the foregoing reasons, the orders of the Campbell Circuit Court, Family Court Division, are affirmed.

HENRY, SENIOR JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Cynthia A. Millay
Covington, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE,
ABBEY MULLIGAN:

Rene Heinrich
Newport, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE, J.G.D., CHILD:

Donna M. Bloemer
Guardian ad Litem
Covington, Kentucky