

RENDERED: OCTOBER 22, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-002155-ME

LEEANN ADRIANNA-CASSANDRA PRESTON

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHNNY RAY HARRIS, JUDGE  
ACTION NO. 09-CI-00282

HERBERT PRESTON;  
MARIA PRESTON;  
ROBERT WESLEY PRESTON; AND  
FLOYD COUNTY DIVISION OF CHILD SUPPORT

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Leeann Adrianna-Cassandra Preston appeals from an order of the Floyd Circuit Court granting custody of her son to his paternal grandparents, Herbert and Maria Preston, as de facto custodians. We affirm.

The child at the center of this dispute was born November 24, 2006, in Nashville, Tennessee. Leeann and the child's father, Robert Wesley Preston, subsequently married in March 2008. Leeann and Robert resided in Nashville with their child and Leeann's child from a prior relationship, who is autistic. In September 2008, Robert's parents, Herbert and Maria, agreed to care for the child due to Robert and Leeann's financial difficulties. The child lived with Herbert and Maria in Floyd County, Kentucky from September 1, 2008 through November 23, 2008. On Thanksgiving, Robert and Leeann took the child back to Nashville for the holidays. On December 31, 2008, Robert and Leeann returned the child to the care of Herbert and Maria. Thereafter, Robert and Leeann separated in late January 2009.

On March 11, 2009, Herbert and Maria filed a motion in Floyd Circuit Court for ex parte temporary emergency custody and a petition seeking permanent custody of the child as de facto custodians. The petition asserted that the child had continuously been in the care of Herbert and Maria in Kentucky since September 1, 2008, except for the holiday time with Leeann and Robert in Nashville. Further, Herbert and Maria alleged that Leeann and Robert had engaged in acts of domestic violence, that Leeann abused drugs, and that Leeann had threatened to send the child to live with her family in Jamaica. The court granted the grandparents' motion for temporary emergency custody and set a date for an evidentiary hearing. Two days later, Leeann filed a motion to enforce an ex parte order of protection that she had obtained against Robert on March 10, 2009, in Davidson County,

Tennessee. The order also protected Leeann's older child, as well as the child living with Herbert and Maria. Upon receipt of Leeann's motion, the trial court conferred with Davidson Circuit Court, and the judges agreed the Floyd Circuit Court temporary custody order would remain in effect until the evidentiary hearing on the Davidson Circuit Court protection order. On March 23, 2009, Davidson Circuit Court dismissed the order of protection, and the two judges agreed that Floyd Circuit Court would retain jurisdiction over the custody matter. At a subsequent hearing, the trial court ordered drug screens for Robert and Leeann and set the case for a final hearing on June 30, 2009.

At the final hearing, the grandparents introduced exhibits including Leeann's positive drug screen and letters signed by Robert and Leeann, which stated Herbert and Maria were "in charge" of the child. Robert testified that he believed his parents were the best custodians for the child, and he testified regarding Leeann's habitual use of marijuana. Herbert testified that he and his wife had provided all necessities for the child, and he contended that it was in the child's best interest to continue living with them. Leeann testified that she stopped smoking marijuana when she realized it could be used against her, and she explained that her drug screen was positive for ecstasy and amphetamines because someone secretly slipped the substances in her drink during a party.

At the conclusion of the hearing, the court found that Herbert and Maria were de facto custodians of the child, and the court determined that granting them permanent custody was in the child's best interest. The court rendered

detailed findings in a written order and subsequently denied Leeann's motions for post-judgment relief. This appeal followed.

On appeal, we will not disturb the trial court's findings of fact unless they are clearly erroneous, bearing in mind that the lower court is in the best position to weigh the evidence and assess witness credibility. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). We are entitled, however, to review *de novo* the court's application of the law to the facts. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Leeann contends: 1) that the court lacked jurisdiction, 2) that the grandparents lacked standing, and 3) that the court's decision was not supported by substantial evidence.

First, we disagree with Leeann's contention that the Floyd Circuit Court lacked jurisdiction to entertain the grandparents' petition for custody. Despite Leeann's argument to the contrary, we conclude that "initial" child custody jurisdiction was conferred pursuant to KRS 403.822(1)(a), which states in pertinent part:

(1) Except as otherwise provided in KRS 403.828, a court of this state shall have jurisdiction to make an initial child custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding . . . [.]

KRS 403.800(7) defines "home state" as:

[T]he state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive

months immediately before the commencement of a child custody proceeding. A period of temporary absence of any of the mentioned persons is part of the period[.]

KRS 403.800(13) defines “person acting as a parent” as:

[A] person, other than a parent, who:

(a) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months, including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding; and

(b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state;

In the case at bar, Herbert and Maria had physical custody of the child in Kentucky for over six months (including the time the child was absent during the holidays), and they claimed a legal right to custody as de facto custodians pursuant to KRS 403.270. As to the child’s temporary absence from Kentucky, the grandparents’ petition asserted that the parties had intended for the child to return to Floyd County at the conclusion of the holiday visit. After careful review, we conclude Kentucky was the child’s home state at the time the grandparents’ filed their petition; consequently, we find no error in the Floyd Circuit Court’s exercise of jurisdiction.

Next, Leeann contends that Herbert and Maria lacked standing to pursue custody because they were not de facto custodians within the meaning of the statute.

To qualify as de facto custodians, Herbert and Maria were required to establish by clear and convincing evidence that they were “the primary caregiver[s] for, and financial supporter[s] of, a child who has resided with [them] for a period of six (6) months.” KRS 403.270(1). As Leeann points out, the statute also advises, “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.” *Id.* Accordingly, Leeann asserts that Herbert and Maria failed to establish the six-month residency requirement at the time they filed their petition because the child had been in Tennessee with Leeann and Robert during the holidays.

The trial court, relying on *Sherfey v. Sherfey*, 74 S.W.3d 777, 780-81 (Ky. App. 2002) (*overruled* on other grounds by *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)), concluded that the holiday visit did not interrupt the grandparents’ status as de facto custodians. In *Sherfey*, parents had their son forcibly removed from his grandparents’ home and taken to a youth camp for one month. *Id.* at 779. This Court held that the child’s time at the camp did not defeat the grandparents’ status as de facto custodians, noting that there was no “abandonment of support by the grandparents.” *Id.* at 780.

In the case at bar, Leeann contends that Herbert and Maria agreed to let the child stay in Tennessee for the holidays, essentially acquiescing in the interruption of the residency requirement for de facto custodian status. At the hearing, Robert testified that the holiday visit was temporary because he and

Leeann were still unable to care for the child on a regular basis. Herbert likewise testified that he understood the holiday visit would be for a limited duration and the child would return to live with the grandparents after Christmas. While Leeann's testimony conflicted with that of Robert and Herbert, the trial court was in the best position to weigh the credibility of the testimony and evidence presented. We find no error in the court's decision.

Furthermore, we note that *Sherfey* also provides the following interpretation of the tolling provision of KRS 403.270(1):

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.'

*Id.* at 781.

In the case at bar, in light of *Sherfey* and the plain statutory language, the grandparents' residency period continued to accrue because Leeann never commenced an action to regain custody of the child, which would have tolled the period of residency. *See Id.* Even if the holiday visit had extinguished the child's residency with the grandparents, the child had resumed living with Herbert and Maria on December 31, 2008, and he had resided with them continuously for six months at the time of the June 30, 2009, hearing.

Finally, Leeann challenges the sufficiency of the evidence supporting the trial court's decision to award custody to Herbert and Maria.

Once the trial court determined Herbert and Maria were de facto custodians, the court was then required to give them equal consideration with Leeann in its determination of permanent custody, pursuant to the child's best interests. KRS 430.270(2). The trial court found that Herbert and Maria had been providing substantially all of the child's emotional and financial support. The court found that Leeann had been unemployed for four months and lived on "her older son's SSI, food stamps and child support paid by the father of her older child." The court's findings also addressed Leeann's drug use, and the episodes of domestic violence between Robert and Leeann.

Although Leeann argues the trial court misinterpreted the testimony and evidence, we are mindful of our standard of review:

A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

*Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007). After careful review, we conclude that substantial evidence supported the court's findings.<sup>1</sup>

For the reasons stated herein, we affirm the judgment of the Floyd Circuit Court.

ALL CONCUR.

---

<sup>1</sup> We decline to address a fourth issue raised by Leeann regarding unsupervised visitation, as it appears the trial court did not address that issue.



BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

Jack W. Flynn  
Frankfort, Kentucky