

RENDERED: OCTOBER 5, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000555-ME

JAMES M. WETHINGTON

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE JANET COLEMAN, SPECIAL JUDGE
ACTION NO. 10-CI-00022

MELISSA ANN COFFEY AND
SCOTT COFFEY

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: DIXON, KELLER, AND NICKELL, JUDGES.

NICKELL, JUDGE: James M. Wethington (Wethington) appeals from the March 1, 2011, findings of fact, conclusions of law and judgment of the Green Circuit Court, awarding him joint custody of his two minor twins along with Melissa Ann and Scott Coffey (the Coffeys). The judgment also ordered that the twins reside primarily with the Coffeys and further provided a visitation schedule for

Wethington. Because we hold that the Coffeys did not have standing to pursue the underlying action, we vacate and remand.

Wethington and his late wife, JoAnn, are the biological parents of twins¹, who are now sixteen years of age. The parties were divorced in 2001, and were awarded joint custody of the twins, with JoAnn being designated as primary residential custodian. Wethington was given visitation as set forth in the standard visitation schedule for the eleventh judicial district.

In 2004, JoAnn moved to suspend Wethington's visitation, following a social services action alleging he had sexually abused another child, the half-sister of the twins. Visitation was suspended until 2005, when the parties entered into an agreed order granting Wethington visitation one day a week for six hours. The same order provided that the parties would reevaluate the visitation schedule on January 1, 2006, and attempt to establish a long-term visitation schedule. Wethington testified that he failed to exercise his visitation pursuant to the court-ordered schedule, but blamed JoAnn for his inability to do so. The record, however, is devoid of any attempts by Wethington to rectify any alleged interference with court-ordered visitation. Additionally, Wethington failed to seek modification of the 2005 visitation schedule or otherwise establish a long-term schedule.

¹ Pursuant to Court policy, the children will be referred to only as the twins to protect their identity.

Testimony from Wethington and the twins indicated Wethington's visitation was sporadic; the twins only saw Wethington about four times a year; they had spent the night with him only twice since the divorce; and Wethington had not seen the twins since 2008. Testimony also indicated that Wethington was unfamiliar with the ages and grades of the twins, inactive in their school life, and uninvolved in their medical care.

Scott Coffey is JoAnn's nephew and the first cousin of the twins. He is married to Melissa Coffey. Testimony from the Coffeys and the twins indicated the parties shared a close relationship; the parties saw each other several times a week; and the twins often accompanied the Coffeys and their 15-year-old son on vacations and amusement park outings.

JoAnn died on January 23, 2010. That same day, the Coffeys petitioned the Green District Court for emergency custody of the twins. The petition indicated the mother of the twins was deceased and Wethington's whereabouts were unknown. The Coffeys were awarded emergency custody on January 23, 2010. Thereafter, Wethington and the Coffeys attended a temporary removal hearing on January 25, 2010. Following the hearing, the district court issued a temporary custody order granting temporary custody to the Coffeys. The order indicated the twins were dependent, due to the death of their mother and due to Wethington's whereabouts being unknown at the time of the emergency placement.

On February 17, 2010, the Coffeys filed a petition for custody with the Green Circuit Court in which they sought permanent custody of the twins. Following an agreement between the parties at a May 13, 2010, temporary custody hearing, Wethington was awarded generous visitation with the twins four days a week during the next two months. Wethington exercised visitation only one day during all but one week. A new custody order was entered on July 28, 2010, in which the trial court ordered temporary custody was to remain with the Coffeys and gave Wethington visitation every other weekend for twelve hours on Saturday and six hours on Sunday. Wethington again failed to exercise his visitation with the twins the weekend of August 28, 2010.

Following a final hearing, the trial court's findings of fact, conclusions of law, and judgment was entered on March 1, 2011. The trial court concluded the Coffeys had standing to pursue custody of the twins pursuant to KRS² 403.822(1)(b)1 and KRS 403.800(13). Applying the guidelines of *Davis v. Collinsworth*, 771 S.W.2d 329 (Ky. 1989), the trial court further concluded Wethington was not suited to the task of having custody of the twins because the Coffeys had successfully shown Wethington had inflicted, or allowed to be inflicted, emotional harm upon the twins; exhibited moral delinquency; and abandoned the twins. The trial court, concluding it would be in the best interests of the children to reside with the Coffeys, awarded joint custody to the parties but ordered the twins to primarily reside with the Coffeys. It was further ordered that

² Kentucky Revised Statutes.

Wethington receive visitation during set hours every other weekend, as well as Father's Day, Christmas Eve, and the children's birthdays. This appeal followed.

This Court will not disturb a trial court's award of custody absent an abuse of discretion. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). "Abuse of discretion implies that the family court's decision is unreasonable or unfair." *Id.* Additionally, we review a trial court's factual findings under the clearly erroneous standard. *Id.* A factual finding is clearly erroneous if it is unsupported by substantial evidence, or evidence sufficient to induce conviction in the mind of a reasonable person. *Id.* We will not substitute our opinion for that of the trial court with regard to the weight given to certain evidence, including testimony. *Id.* Legal conclusions are reviewed *de novo*. *L.D. v. J.H.*, 350 S.W.3d 828, 830 (Ky. App. 2011). Therefore, the decisive test is not whether we would have decided it differently, but whether the findings are clearly erroneous, whether the trial court applied the correct law, or whether it abused its discretion.

Wethington's first argument is that the trial court erred in finding the Coffeys had standing to prosecute the underlying action. He further alleges the Coffeys engaged in fraudulent, illegal, and unconscionable conduct in obtaining the emergency custody order; that they do not qualify as *de facto* custodians; and the trial court incorrectly concluded they meet the requirements of "a person acting as a parent" under KRS 403.800(13). After a thorough review of the record and relevant statutory and case law, we agree that the Coffeys did not have standing to pursue the underlying action.

The trial court concluded the Coffeys had standing under KRS 403.822(1)(b)1 and KRS 403.800(13). KRS 403.822(1) grants the Commonwealth jurisdiction over initial child custody issues when:

...

(b) A court of another state does not have jurisdiction under paragraph (a) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under KRS 403.834 or 403.836; and

1. The child and the child's parents, or the child and at least one (1) parent **or a person acting as a parent**, have a significant connection with this state other than mere physical presence . . .

(emphasis added). “A person acting as a parent” is defined by KRS 403.800(13) 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[.]

(emphasis added). Furthermore, “physical custody” is defined as “physical care and supervision of a child[.]” KRS 403.800(14).

Although KRS 403.822 relates to the Commonwealth’s jurisdictional requirements to make custody determinations under the UCCJEA,³ the Supreme Court of Kentucky has extended the language to recognize standing by those

³ Uniform Child Custody Jurisdiction and Enforcement Act.

parties who satisfy the requirements of KRS 403.800(13). *Mullins v. Picklesimer*, 317 S.W.3d 569, 575 (Ky. 2010).

Although KRS 403.822 directly addresses the issue of the court's jurisdiction to make an initial custody determination, by identifying the adult persons who must be present in the forum state for jurisdiction to arise (parent or person acting as a parent), **the statute implicitly identifies those persons as parties who may bring an action seeking initial custody of the child.** It would make little sense to confer jurisdiction to this state when only “a person acting as a parent” resides here, and not at the same time confer standing upon that person to assert initial custody of the child. Otherwise, the state would have jurisdiction of the matter without any resident of the state having standing to bring an action to assert initial custody in the forum. That would clearly be an unreasonable interpretation of the statute, and is one which we believe our legislature did not intend. Moreover, it would make little sense for a person acting as a parent to have standing only if there is a jurisdictional dispute about which is the proper forum state, but not to have standing when there is not a jurisdictional dispute. Again, this would produce an unreasonable result.

Id. (emphasis added). Additionally, although KRS 403.800, as part of the UCCJEA, primarily pertains to interstate cases, the Court in *Mullins* has made clear that it is applicable to intrastate cases as well. *Id.* Thus, we agree with the trial court’s use of KRS 403.822 in its analysis of standing. However, we disagree with the trial court’s interpretation and application of KRS 403.800(13).

In support of its finding that the Coffeys had standing, the trial court stated:

KRS 403.800 (13) defines “a person acting as a parent” as: “A person, other than a parent, who has been awarded

legal custody by a court or claims a right to legal custody under the law in this state.”

In this case, [the Coffeys] became *de jure* custodians after they were granted emergency custody pursuant to an Order signed by Green District Judge Connie Phillips on January 23, 2010.

The trial court’s definition of a “person acting as a parent” fails to encompass the entire definition of KRS 403.800(13), which requires: 1) a party be awarded legal custody or claim a right to legal custody; **and** 2) have or have had physical custody of the child **for six consecutive months** within the year preceding the custody action. Here, the Coffeys had physical custody of the twins for less than a month prior to filing their petition with the circuit court. They argue, however, that they satisfy both requirements of the statute because the six month requirement only applies in situations where the children are no longer in the physical custody of the party seeking custody. Thus, because they had physical custody at the time the action was filed, they argue they were not subject to the six month requirement. Interpretation of KRS 403.822(13) appears to be a matter of first impression. Our reading of the statute, however, reveals that the six month requirement applies to any party seeking custody, whether he or she currently has or previously had physical custody. Accordingly, the Coffeys did not meet the definition of “person acting as parent” and consequently did not possess standing under KRS 403.822(1)(b)1.

It is unnecessary for us to address Wethington’s argument regarding *de facto* custodian status because the Coffeys have conceded that they do not

satisfy *de facto* status as defined by KRS 403.270. No other means of standing was implemented by the trial court nor argued by the Coffeys. Accordingly, we hold the Coffeys did not have standing and the trial court therefore did not possess the requisite jurisdiction, making all court orders in this action void *ab initio*. KRS 403.822. We are not unsympathetic to the trial court for the time and resources it utilized in reaching its final decision in this matter. Because the trial court's March 1, 2011, judgment is hereby declared void, it is unnecessary for us to address Wethington's remaining arguments as they pertain to the merits of the trial court's judgment.⁴ We further note our holding in no way affects the validity of previously entered district court orders.⁵

For the foregoing reasons, the March 1, 2011, findings of fact, conclusions of law, and judgment of the Green Circuit Court is vacated and remanded with instructions to dismiss the Coffey's custody petition for lack of standing. Any district court order in effect prior to the circuit court's order which we vacate herein remains in effect until further proceedings, if any.

ALL CONCUR.

⁴ We note, however, that we are troubled with the trial court's conflicting resolution which found Wethington to be unfit but awarded him joint custody nonetheless.

⁵ The district court record is not currently before us. Several purported district court orders were improperly attached as exhibits to Wethington's brief. *See* Kentucky Rules of Civil Procedure 76.12 (4)(c)(vii). We cannot consider items appended to a brief that were not designated for our consideration.

BRIEF FOR APPELLANT:

Elmer J. George
Lebanon, Kentucky

BRIEF FOR APPELLEES:

James L. Avritt
Lebanon, Kentucky