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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001707-ME

JESSICA HARRIS AND ALBERT HARRIS

APPELLANTS

v. APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 17-CI-00038

SAMANTHA SPICER AND BRETT JARNAGIN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, MAZE AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Jessica and Albert Harris appeal from an order of the Caldwell Circuit Court which held that they were not *de facto* custodians of their grandchild. Appellants claim on appeal that the trial court erred in not including the time the child spent with them from prior placements in fulfilling the one-year requirement set out in Kentucky Revised Statute (KRS) 403.270(1). They also

claim the trial court should have included the time after their filing of the petition for *de facto* custodian status in fulfilling the one-year requirement. Finding no error, we affirm.

Appellants are the paternal grandparents of a minor grandson born in 2012. Samantha Spicer is the mother of the child and Brett Jarnagin is the father. Appellants were first given custody of the minor child by the Cabinet for Health and Family Services in December 2014. The child was found to be neglected by his mother in February 2015. The child was then returned to the mother on June 9, 2015. The Cabinet later placed the child with Appellants on September 15, 2015. The child was then returned to his mother in January 2016. The child was again placed with Appellants on June 1, 2016, due to neglect from the mother. The child thereafter remained with Appellants and on March 21, 2017, Appellants filed the underlying petition seeking to be declared *de facto* custodians of the child and asking for custody. The mother filed her response to the petition on June 13, 2017, and a hearing was held on August 15, 2017.

The trial court entered an order in September 2017 which found that Appellants had been the primary caregivers and financial supporters of the child since September 2015; however, the court held that Appellants could not be

declared *de facto* custodians because the child had not resided with them continuously for one year. This appeal followed.¹

KRS 403.270(1)(a) defines a *de facto* custodian as

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.

Here, the trial court found that although Appellants were the primary caregivers and financial supporters of the child, the child had not resided with them continuously for one year or more prior to the filing of the petition. Appellants argue that the court erred by requiring 12 consecutive months of custody of the child. They claim that they provided 24 months of care in the preceding 33 months which should satisfy the *de facto* custodian time requirement. Appellants concede that this 24 months was interrupted from time to time when the child was returned to his mother's care.

We find that the court did not err in this instance. Case law in Kentucky recognizes that physical possession of a child for the entire 12-month period is not necessary. *Sullivan v. Tucker*, 29 S.W.3d 805, 808 (Ky. App. 2000). In *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002), *overruled on other grounds*

¹ Appellees did not file a brief in this case.

by *Benet v. Commonwealth*, 253 S.W.3d 528, 533 (Ky. 2008), this Court found that a child's one-month stay at camp did not preclude grandparents from being deemed *de facto* custodians. On the other hand, in the unpublished case of *Gross v. Herrington*, No. 2016-CA-001132-ME, 2017 WL 1041229 (Ky. App. Mar. 17, 2017),² the Court found that interruption in care for one year or more was sufficient to destroy the *de facto* custodian status.

The status of a *de facto* custodian is not permanent and must be revisited on a case-by-case basis each time the status is asserted. *Sullivan*, 29 S.W.3d at 808. Appellants asserted their claim for *de facto* custodian status on March 21, 2017. The trial court found that Appellants were the primary caregivers and financial supporters of the child since September 15, 2015. Therefore, we will examine the timeframe between September 2015 and March 2017.

The child resided with Appellants from September 15, 2015, until January 2016.³ This is a period of approximately four months. Then the child was returned to his mother. The child was placed with Appellants again on June 1, 2016, and, was still there when Appellants filed their petition for *de facto* custodian status and custody on March 21, 2017. This is a period of approximately nine

² Cited pursuant to Kentucky Rule of Civil Procedure (CR) 76.28(4)(c).

³ Appellants claim that the child remained with them until May 2016, but evidence presented at the hearing in this case, in the form of the testimony of social worker Becky Ramey, supports the January date.

months. We must determine if the five months the child spent with his mother from January 2016 until June 2016 precludes Appellants from becoming *de facto* custodians. We find that it does.

Each time the child resided with Appellants, it was anticipated that the mother would work with the Cabinet and regain custody, which is what occurred each time. The Cabinet's case plan for the mother was always reunification. We find that this five-month length of time from January 2016 to June 1, 2016, was sufficiently long to extinguish Appellants' *de facto* custodian status especially since the child was returned to the mother by the Cabinet during this time and it was contemplated that the mother would maintain custody.

Appellants also argue on appeal that the trial court should have included the months after their filing of their petition in the one-year time period calculation. KRS 403.270(1)(a) states that "[a]ny 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." Appellants argue that the mother's response to their petition filed on June 13, 2017, was a legal proceeding commenced by a parent; therefore, any time before that date should be included in the 12-month *de facto* custodian time requirement.

Appellants are correct that if we include the time from March 21, 2017, until June 13, 2017, in the time calculation, they would meet the 12-month requirement. Unfortunately, this issue was not raised below and is therefore unpreserved. “The Court of Appeals is without authority to review issues not raised in or decided by the trial court.” *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989); *see also Shelton v. Commonwealth*, 928 S.W.2d 817, 818 (Ky. App. 1996). “[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court.” *Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citation omitted).

Arguendo, even if it were preserved, the trial court could not consider this time. In their petition, Appellants claimed that they already met all the *de facto* custodian requirements. Furthermore, the statute contemplates that the time requirement be met before the filing of the *de facto* custodian petition. *Jones-Swan v. Luther*, 478 S.W.3d 392, 395 (Ky. App. 2015).

Based on the foregoing, we affirm the judgment of the Caldwell Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

NO BRIEF FOR APPELLEE

Jennifer Sacharnoski Nelson
Princeton, Kentucky