RENDERED: MARCH 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000309-ME

JAMES MURPHY, JR. APPELLANT

APPEAL FROM WAYNE CIRCUIT COURT
v. HONORABLE JENNIFER UPCHURCH EDWARDS, JUDGE
ACTION NO. 14-CI-00113

LINDSEY NEW AND MARY PEEK APPELLEES

AND NO. 2018-CA-000351-ME

LINDSEY NEW AND MARY KATHERYN PEEK CROSS-APPELLANTS

CROSS-APPEAL FROM WAYNE CIRCUIT COURT
v. HONORABLE JENNIFER UPCHURCH EDWARDS, JUDGE
ACTION NO. 14-CI-00113

JAMES MURPHY, JR. CROSS-APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: GOODWINE, JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: James Murphy, Jr., has appealed from the judgment of the Wayne Circuit Court, Family Division, awarding sole custody of his two minor sons to Lindsey New and Mary Peek. New and Peek have cross-appealed from the trial court's finding they did not qualify as *de facto* custodians for the boys. Following a careful review, we affirm in part and reverse in part.

James is the biological father of the two minor boys at the center of this controversy. Emily Coffey is the natural mother of the boys.[1] The two lived together for a time but never married. New is Emily's sister and Peek is Emily's mother. In 2007, a custody proceeding was commenced in Marion Circuit Court between James and Emily. The parties were awarded joint custody. Emily was named the primary residential custodian of the boys. James was awarded weekend timesharing. Under the terms of the custody award, James was not permitted to keep the boys overnight but had to deliver them to his sister's home for the overnight hours. This restriction was implemented because of James' guilty plea

[1] During the course of the proceedings, Emily filed an answer admitting the allegations contained in the complaint were true and correct, and waived her right to participate in the proceedings. She had no further involvement in the matter.

to endangering the welfare of a child following an incident where one of the boys, while a toddler, left James' home and was found unsupervised on a playground across the street. Between 2007 and 2012, James inconsistently exercised his timesharing rights to the boys, missing several times and often being late for pickup or return of the children. When the boys were "visiting" with James, his sister provided a majority of the care, including feeding, bathing, and transporting them, with little to no assistance from James. James never sought to amend the 2007 Marion Circuit Court custody order.

On December 3, 2012, New and Peek obtained physical custody of the children. Dependency, neglect and abuse ("DNA") actions were filed in the juvenile division of the Wayne Family Court alleging Emily was neglecting the boys; New and Peek were granted emergency custody of the boys. James was present and represented by counsel throughout the DNA proceedings. Following a temporary removal hearing in early 2013, the children were adjudicated as neglected and temporary custody was granted to New and Peek. Several months later, James filed a bare-bones and unsupported "motion to review custody." Although a hearing was scheduled on this motion, it appears no such hearing occurred, and no ruling exists in the record before us. James did not pursue a change of custody in the DNA actions beyond the filing of his motion, instead agreeing to continued timesharing pursuant to the parameters and limitations set in

2007 by the Marion Circuit Court. No further action was taken in the DNA proceedings.

On April 21, 2014, New and Peek filed the instant action seeking designation as *de facto* custodians and an award of permanent custody of the boys.[2] The initiating complaint alleged New and Peek had jointly been the primary caregivers and financial supporters of the boys for a period in excess of one year. No other basis for standing to bring the action was asserted. A lengthy hearing on the issue of *de facto* custodian status was convened on May 4, 2015. New and Peek testified regarding the living arrangements and financial support they had provided for the boys and urged the trial court to grant them *de facto* status. In opposition, James argued the statutory time limit had been tolled by his filing of the motion to review custody; he had provided more financial support than anyone else; and the plain language of KRS[3] 403.270 does not permit two unmarried parties who do not reside in the same household to qualify as *de facto* custodians.

In an order entered on August 28, 2015, the trial court concluded the time period necessary for New and Peek to qualify as *de facto* custodians had been

[2] The complaint also included similar requests related to Emily's third biological child fathered by another man. That child's father did not appear or participate in the proceedings. New and Peek were ultimately designated *de facto* custodians of that child and granted permanent custody of him. No appeal was taken from any orders related to the third child.

[3] Kentucky Revised Statutes.

interrupted because James had moved for review of the custody determination in the DNA case, citing *Robison v. Theele*, 461 S.W.3d 772 (Ky. App. 2015). Therefore, the trial court concluded New and Peek could not satisfy the statutory requirements for *de facto* custodian status. Nevertheless, the case was allowed to proceed,[4] ultimately resulting in the convening of a hearing on September 26, 2016, on the issue of permanent custody based on whether James was unfit or had waived his superior right to custody of his children. At the conclusion of the hearing, the trial court requested briefing from the parties and a report from the Friend of the Court.

Nearly fourteen months later, on November 15, 2017, the trial court ruled James had waived his superior right to custody and awarded permanent custody of the boys to New and Peek. A motion to alter, amend, or vacate was denied and James appealed. Peek and New filed a cross-appeal challenging denial of their motion seeking *de facto* custodian status.

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530

[4] The August 28, 2015, order was originally designated as final and appealable. However, in a subsequent order partially granting New and Peek's joint motion to alter, amend, or vacate, the trial court removed the finality language as it pertained to the *de facto* custodianship status determination.

U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). "Kentucky's appellate courts have recognized not only that parents of a child have a statutorily granted superior right to its care and custody, but also that parents have fundamental, basic and constitutionally protected rights to raise their own children." *Moore v. Asente*, 110 S.W.3d 336, 358 (Ky. 2003) (internal citations and quotation marks omitted). In a dispute between a parent and non-parents, KRS 403.270(1)(b) provides that non-parents who qualify as *de facto* custodians are entitled to the same standing given to each parent in the court's custody determination. However, if the non-parents do not qualify as *de facto* custodians, they must

> prove that the case falls within one of two exceptions to parental entitlement to custody. One exception to the parent's superior right to custody arises if the parent is shown to be unfit by clear and convincing evidence. A second exception arises if the parent has waived his or her superior right to custody.

Moore, 110 S.W.3d at 359 (internal citation and quotation marks omitted). Thus, a non-parent has standing to seek custody or visitation of a child only if: 1) he or she qualifies as a *de facto* custodian; 2) the parent has waived his or her superior right to custody; or 3) the parent is conclusively determined to be unfit. *Truman v. Lillard*, 404 S.W.3d 863, 868 (Ky. App. 2012) (citing *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010)). Here, there having been no substantive evidence presented of James being unfit, our review will be limited to the trial court's denial of *de facto* custodian status and the finding James had waived his superior right to

custody. Although presented as an issue on cross-appeal, we believe it appropriate to begin our analysis with the trial court's decision related to *de facto* custodian status before reaching James' arguments on appeal regarding waiver of his superior custody rights.

"[T]he purpose of de facto custodianship is to provide standing in custody matters to non-parents who have a [sic] taken on a parental role in the life of a child whose custody is in dispute." *Williams v. Bittel*, 299 S.W.3d 284, 289 (Ky. App. 2009). KRS 403.270(1)(a) sets out the requirements for obtaining *de facto* custodian status:

> 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.

The trial court and the parties primarily focused on tolling language contained in the latter portion of the statute. Likewise, the bulk of the arguments on appeal related to *de facto* custodian status pertain to whether James acted sufficiently to toll the running of the statutory clock. However, we believe these arguments stray

from the mark as a more fundamental issue—as plainly pointed out by James—doomed New and Peek's request from the beginning.

In defining who may qualify as a child's *de facto* custodian, KRS 403.270(1)(a) uses the singular "person," yet here there are two individuals seeking to become *de facto* custodians. Our Court has previously allowed married persons to seek *de facto* custodian status reasoning they are considered a single unit for the purposes of *de facto* custodianship. *J.G. v. J.C.*, 285 S.W.3d 766, 768 (Ky. App. 2009); *Cherry v. Carroll*, 507 S.W.3d 23, 28 (Ky. App. 2016). New and Peek cite no authority for considering two unmarried persons living apart as a single unit. We are convinced none exists, especially where, as here, New and Peek are mother and daughter who admittedly do not live in the same residence. Thus, based on a plain reading of the statutory language, it would be impossible for both New and Peek to prove by clear and convincing evidence they were *the* primary caregiver and financial supporter of the boys. Their positions would clearly be adverse to one another. We therefore affirm the trial court's determination New and Peek do not qualify as *de facto* custodians, albeit on a different basis than set out by the trial court in its order.[5]

[5] "Even if a lower court reaches its judgment for the wrong reason, we may affirm a correct result upon any ground supported by the record." *Wells v. Commonwealth*, 512 S.W.3d 720, 721-22 (Ky. 2017).

We next consider the assertion James raises in his direct appeal. The pivotal inquiry is whether the trial court correctly concluded James waived his superior right to custody. We are persuaded it did not.

On appeal, we will not disturb the trial court's findings of fact unless they were clearly erroneous, bearing in mind the lower court was in the best position to weigh the evidence and assess witness credibility. *Moore*, 110 S.W.3d at 354. We 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).

James, as the biological father, had a superior right to custody against New and Peek, non-parents who were not *de facto* custodians. *Moore*, 110 S.W.3d at 359. To defeat James' right to custody, New and Peek were obligated to prove James had either waived his superior right to custody or was an unfit parent. *Id*. We agree with the trial court's determination there was a failure to adequately assert and prove unfitness. However, because we conclude the trial court's findings and conclusions were inadequate as to waiver, we must reverse and remand this matter for further proceedings.

In *Moore*, the Supreme Court explained

> Waiver requires proof of a knowing and voluntary surrender or relinquishment of a known right. However, waiver may be implied by a party's decisive, unequivocal conduct reasonably inferring the intent to waive, as long as statements and supporting circumstances [are] equivalent to an express waiver.

Id. at 360 (internal citations and quotation marks omitted). Our Supreme Court reiterated a legal waiver "is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon." *Mullins*, 317 S.W.3d at 578 (citations omitted). The Supreme Court also emphasized that although there need not be a written or formal waiver, "statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof." *Id*. (quoting *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky 2004)). Further, *Vinson* articulated a non-exhaustive set of factors relevant to the analysis of waiver by a parent, including:

> length of time the child has been away from the parent, circumstances of separation, age of the child when care was assumed by the non-parent, time elapsed before the parent sought to claim the child, and frequency and nature of contact, if any, between the parent and the child during the non-parent's custody.

136 S.W.3d at 470. In *London v. Collins*, 242 S.W.3d 351 (Ky. App. 2007), a panel of this Court restated and slightly expanded this list of factors to include consideration of parental financial support of the child and any efforts of a parent to secure return of the child. Regardless of the factors considered, to waive the superior right to custody, the biological parent must have intended to voluntarily

and indefinitely relinquish custody of the child, *Moore*, 110 S.W.3d at 358, and such intent must be conclusively shown by clear and convincing evidence.

Applying these standards to the facts as found by the family court, we are convinced its conclusion regarding James' waiver is erroneous as a matter of law. While it is indisputable some of the factors set out in *Mullins* and *Vinson* are present in this case, we are persuaded that those factors fall short of the clear and convincing proof required to establish waiver.

Uncontradicted testimony and evidence showed James has exercised his visitation rights with the boys since entry of the 2007 custody order, has remained current on his child support obligation, made known to the court on several occasions his desire to obtain sole custody, and actively participated in all legal proceedings related to custody of the children. His words and actions are a far cry from the surrender or relinquishment of the superior right to custody required under current Kentucky law. Although the trial court clearly believed James was not a model parent, could have done more to be a part of his sons' lives, and should have acted more purposefully and consistently in seeking to secure return of his children, the record does not contain clear and convincing proof James voluntarily and indefinitely relinquished custody of his children; nor does it show any intent to confer parental rights on New and/or Peek. The mere fact James could have been a better parent does not mean he has waived his

fundamental liberty interest in raising his children. Thus, we are constrained to reverse the trial court's determination James waived his superior right to custody.[6]

For the foregoing reasons, the judgment of the Wayne Circuit Court, Family Division, is affirmed in part and reversed in part with instructions to enter a new judgment consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:	BRIEFS FOR APPELLEES/CROSS-APPELLANTS:
Derrick G. Helm Jamestown, Kentucky	John Paul Jones II Monticello, Kentucky

[6] Although our decision today effectively voids the trial court's grant of permanent custody to New and Peek, nothing in this Opinion should be read to infer James is in any way entitled to an immediate return of the children. Rather, rendition of this Opinion, once final, acts to revert the parties to the *status quo* as it existed under the 2007 Marion Circuit Court and the 2013 Wayne Family Court orders. Further proceedings will be necessary to determine a permanency plan for the children. We make no comment on the appropriate venue for such proceedings as we are loathe to practice a case for the litigants. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).