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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000428-ME

MICHAEL WAYNE HOSKINS — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 17-CI-00343

CHRISTY M. ELLIOTT AND
BRITTANY SMITH — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

ACREE, JUDGE: Michael Hoskins (Father) appeals the Bell Circuit Court's January 30, 2018, order granting Christy Elliott status as a *de facto* custodian of his biological child (Child), awarding sole custody to Elliott, and ordering supervised

visitation for Father. Father alleges the circuit court erroneously used KRS[1] 403.270's timeframe requirements in determining whether Elliott qualified as a *de facto* custodian. He also argues the circuit court erred by ordering him supervised visitation without a finding consistent with KRS 403.320(3). We reverse and remand for findings consistent with this opinion.

BACKGROUND

The Child's mother (Mother) is not a party to this appeal. However, her actions are at its core. On February 11, 2017, when Child was nine months old, Mother left Child with her friend, Elliott. She would testify eventually that she wanted Elliott to babysit Child for the weekend, and until she had made scheduled court appearances. (Video Record (VR) 6/11/2018 00:23:21-00:23:57). Intervening events thwarted that plan.

Father later showed up at Elliott's home believing he would find both Child and Mother.[2] Because Father seemed to be under the influence of methamphetamines, Elliott would not relinquish Child to his care. Three days later, Mother still had not returned. Child became sick and Elliott had no authority to arrange medical care. She was unable to locate Mother and did not have legal

[1] Kentucky Revised Statutes.

[2] The specific day Father arrived at Elliott's home is not apparent from the record.

custody enabling her to take Child to the doctor. The Cabinet for Health and Family Services then became involved.[3]

The Cabinet's investigation led to a dependency, neglect, or abuse (DNA) petition, naming Mother as the person believed to be responsible for the abuse or neglect. The Cabinet's petition for temporary removal of the Child from Mother's custody was filed on February 15, 2017, in Bell District Court, No. 17-J-00020-001 (the "Juvenile Case"). The petition states that DCBS, the Cabinet's Department for Community Based Services, allowed Elliott "to keep children at this time . . . ." (Juvenile Case, Record (R.) 4).

Father was not implicated by any claim of abuse or neglect of Child. Nevertheless, DCBS and the Cabinet did not consider him for placement because he had drug addiction and domestic violence issues. After an adjudication hearing on March 2, 2017, the circuit court found Child neglected or abused by Mother and ordered Child to remain with Elliott. The dispositional hearing on April 20, 2017, concluded similarly that Child was to remain with Elliott.

Throughout the entire DNA action, the Cabinet never indicated that Father violated the DNA statutes. Still, Father: (1) appeared at every hearing; (2) was appointed counsel to represent him; and (3) worked the case plan the Cabinet

[3] The Cabinet had previous involvement with the Child's mother at the time of Child's birth. The Cabinet received a referral regarding Child's suffering from drug withdrawal. Child has serious medical issues and delayed vocabulary and motor skills, including sitting up on his own.

provided to him. The case plan required Father to attend drug screens, anger management, and parenting classes. Eventually, Father completed his case plan despite, technically, not being before the circuit court in the DNA action.

Eight months after Mother abandoned Child, Elliott filed a petition in circuit court for custody claiming *de facto* custodian status. The circuit court found Elliott qualified as a *de facto* custodian and held a hearing on December 4, 2017, to determine custody. The court did not enter its findings until January 30, 2018, when it granted Elliott permanent custody of Child and awarded Father supervised visitation.

Father challenged the circuit court's findings and filed a motion to alter, amend, or vacate. He maintained that Mother only allowed Elliott to care for Child as a babysitter, and that DCBS and the Cabinet placed Child in Elliott's care. He argued, pursuant to KRS 403.270(1)(a), that the appropriate length of time required to establish *de facto* custodian status is one (1) year or more and not the six (6)-month period applied by the circuit court. The circuit court disagreed and denied his motion to alter, amend, or vacate. This appeal followed.

STANDARD OF REVIEW

Child custody matters involve two types of review. First, a circuit court's findings of fact are examined for clear error and will be set aside when they lack substantial evidence to support them. *Moore v. Asente*, 110 S.W.3d 336, 354

(Ky. 2003). Substantial evidence from the record must support any factual determinations regarding a child custody or visitation decision. CR[4] 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986).

Second, the analysis shifts to an examination of legal conclusions. Whether a nonparent is properly classified a *de facto* custodian is a question of law which we review *de novo*. *Heltsley v. Frogge*, 350 S.W.3d 807, 808 (Ky. App. 2011). "[W]e afford no deference to the trial court's application of the law to the facts[.]" *Laterza v. Commonwealth*, 244 S.W.3d 754, 756 (Ky. App. 2008).

ANALYSIS

In 2000, the United States Supreme Court affirmed longstanding, nationwide precedent that under the Fourteenth Amendment of the United States Constitution, a parent, who is not unfit, has the fundamental right to make decisions as to the care, custody, and control of his or her child. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000). The Court went so far as to say that "[t]he liberty interest at issue in th[at] 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."[5] *Id.* Father

[4] Kentucky Rules of Civil Procedure.

[5] Even Justice Kennedy pointed out in his dissent: "[T]here is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right

argues this right was trampled upon by the circuit court's finding that Elliott qualified as a *de facto* custodian. We agree.

We briefly note that this case could be resolved easily by applying the tolling rule adopted earlier this year by our Supreme Court which held that "any direct participation in a child custody proceeding that demonstrates a parent's desire to regain custody of their child is sufficient to toll the *de facto* time requirement under KRS 403.270." *Meinders v. Middleton*, 572 S.W.3d 52, 59 (Ky. 2019). Therefore, just as in *Meinders*, Father's active participation throughout the entire DNA case would be sufficient to toll the *de facto* custodian time requirements. However, because neither party addressed this issue, this Court will not dispense with the case in this most obvious way. Instead, we limit our analysis to the arguments presented in the briefs.

From the inception of this case, Mother was the only individual accused of abuse or neglect. The Cabinet only filed a DNA petition against Mother – not Father. Yet, Father voluntarily participated in the proceedings. From our review of the record, Father never missed a court appearance, asserted he was the father of the child, and verbally moved to be considered for placement. The Cabinet's hesitancy to place the child with Father is understandable. He has a

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stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment." *Troxel*, 530 U.S. at 95, 120 S. Ct. at 2076 (Kennedy, J., dissenting).

history of drug abuse, domestic violence, and does not have custody of his other children.

However, the Cabinet must keep focus on the case at hand. Father actively participated in these proceedings in the hopes of reunification with Child. Regardless, the DNA action did not close until *after* the circuit court determined Elliot was a *de facto* custodian, thereby thwarting the priority goal in DNA actions – reunification of a child with his or her parent or parents.

The question squarely presented to this Court is whether Elliott qualified as a *de facto* custodian. To so qualify, a person must be the primary caregiver and financial supporter of a child who has resided with that 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.

KRS 403.270(1)(a) (emphasis added).

Elliott contends, and the circuit court found, that DCBS did not place Child with Elliott because Mother did so. That conclusion is clearly erroneous.

If parents could lawfully "place" their children with nonrelatives as Mother is found to have done, what would distinguish that placement from

abandonment? It is an untenable concept. Even in the context of adoption, a parent wishing to "place" his or her child must seek and obtain Cabinet approval unless an exception applies. KRS 199.473(1) ("All persons other than a child-placing agency or institution, the department, or persons excepted by KRS 199.470(4) who wish to place or receive a child shall make written application to the secretary for permission to place or receive a child."). No such exception applies here. Mother did not and could not "place" Child with Elliott.

On the other hand, when DCBS became involved in the case, Child was legally in the custody of Mother, but physically in the custody of Elliott. DCBS had the authority to remove Child from Mother's legal custody for placement pursuant to KRS 620.060. It would have been pointless to remove Child from Elliott's physical custody only to return Child to Elliott imbuing her with Child's legal custody. Such a meaningless ceremony is unnecessary to "remove" Child from Mother's legal custody and "place" Child with Elliott as those terms are understood. Leaving Child in place is the legal equivalent of removing Child from Mother's legal custody and placing Child with Elliott.

The Juvenile Case record shows that on February 16, 2017, Child was "[*p*]*laced* in temporary custody of . . . appropriate person . . . named below[,]" followed by Elliott's name and address. (Juvenile Case, R. 6) (emphasis added). Again, on March 2, 2017, an order was entered stating, "this child, having been

found to be dependent, or neglected or abused shall . . . continue to remain, out of home of removal with . . . appropriate person(s) . . . as follows[,]" and, again, Elliott's name and address are given. Additionally, the district court ordered that "DCBS [is] to conduct home eval[uation]s on paternal relative for placement options." (Juvenile Case, R. 19).[6]

When DCBS places a child with a nonparent, as occurred here, that nonparent cannot qualify as a *de facto* custodian unless a year has elapsed from the date of such placement. KRS 403.270(1)(a). Elliott filed her petition to be declared a *de facto* custodian on October 4, 2017, just eight months after DCBS placed Child with her. That is not long enough to attain such status under these circumstances and the circuit court's order finding that Elliott qualified as a *de facto* custodian must be reversed.

This Court has said before that the longer timeframe reveals an "obvious intent of the legislature to allow the department time to resolve the family issues with the ultimate goal of reunification before permitting a non-parent to seek custody of a placed child." *Collins v. Blevins*, No. 2004-CA-001341-ME and No.

[6] Mother also testified that she simply allowed Elliott to babysit Child for the weekend but did not "place" the Child with her intending that Child reside with her permanently. (VR 6/11/2018; 00:23:21-00:23:57). Mother also testified that but for the Cabinet telling her not to pick up the child, she would have returned for him. (VR 6/11/2018; 00:27:31-00:27:56).

2004-CA-001474-ME, 2005 WL 2323273, at *2 (Ky. App. Sept. 23, 2005). Even the DCBS worker testified, and the circuit court found, that Father:

> completed a class in anger management, NA/AA meetings, and passed several drug tests. She further testified that he complied with the case plan. She further testified that but for a methamphetamine allegation, **the child could have been returned to him**. She further testified that he maintained sobriety at all times during which she worked the case.

(Custody Case Record (R.) 572) (emphasis added). Although Elliott may qualify as the primary caregiver of the child, she failed to meet the timeframe required under KRS 403.270(1)(a). The entire eight months she had the child was, essentially, shielded by the DNA action, so of course she would be the primary provider. Father was unable to gain custody during the pendency of the action but actively sought reunification. Elliott lacked the proper standing to seek custody because she did not qualify as a *de facto* custodian when she filed her petition.

Additionally, the circuit court erred in awarding Father supervised visitation without an appropriate finding under KRS 403.320(3) ("[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health."). Absent this finding, the circuit court cannot limit Father's visitation.

CONCLUSION

We reverse the Bell Circuit Court's January 30, 2018, order and remand the matter for reconsideration of the issues of custody and visitation.

ALL CONCUR.

BRIEF FOR APPELLANT:

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