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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001541-ME

VERONICA E. CURLES AND
A. BRADLEY CURLES APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE STEPHEN M. JONES, JUDGE
ACTION NO. 16-CI-00777

JOSHUA PRATER AND
JESSICA SMITH APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND NICKELL, JUDGES.

CLAYTON, CHIEF JUDGE: Veronica E. Curles and A. Bradley Curles (collectively, "Appellants"), the non-relatives of a minor child, appeal the Laurel Family Court's order dismissing their petition for *de facto* custodian status for lack

of standing and awarding sole custody to the child's biological father, Joshua Prater. Finding no error, we affirm.

BACKGROUND

Joshua Prater and Jessica Smith are the biological parents of J.L.M.S. ("Child"), born in 2009. Pursuant to a Verified Petition for Custody (the "Custody Petition") filed on October 4, 2016, Appellants attempted to gain sole custody of Child through the *de facto* custodian statute set forth in Kentucky Revised Statutes (KRS) 403.270. In the Custody Petition, Appellants alleged that Smith had abandoned Child to a third party, who thereafter brought Child to Appellants for care. Appellants further alleged in the Custody Petition that, other than Smith, they were unaware of any other person who was not a party to the proceeding and who had claims to have visitation rights with Child.

Appellants contended at the family court level, as they do on appeal, that they were not aware that Prater was the biological father of Child at the time that they filed the Custody Petition. However, Prater's paternity was established in 2011 in a separate court case in Laurel Family Court. Moreover, at a hearing on May 8, 2018, Veronica Curles specifically testified that she knew that Prater could be Child's father, but still omitted him from the Custody Petition.

Prater filed a motion to intervene and a verified intervening petition for sole custody or equal joint custody, visitation, and child support on January 24,

2018. The motion to intervene was granted by the trial court. Prior to Prater's motion to intervene, he had filed a Dependency, Neglect or Abuse Petition ("DNA Petition") on May 22, 2017 against Smith, alleging that Smith had abandoned Child, had left Child with non-relatives, and was incarcerated due to numerous drug charges. Prater listed himself as the "Legal Father" on the DNA Petition and listed Veronica Curles as another person "exercising custodial control or supervision of [Child]."

Following Prater's motion to intervene, Appellants filed an Amended Petition for Custody (the "Amended Petition") adding Prater as a party to the custody action. In the Amended Petition, Appellants again alleged that they had been unaware of Prater's paternity, that Prater had never been involved in Child's life, and that Child did not know Prater. Thereafter, in March of 2018, Prater filed both a motion to dismiss the Appellants' Custody Petition arguing that the statutory time period for Appellants to be considered a *de facto* custodian had been tolled by Prater's filing of the DNA Petition, as well as a motion for temporary custody of Child. Appellants filed another motion for custody on April 16, 2018, incorporating their previous motions and again alleging that they were *de facto* custodians.

Meanwhile, on June 4, 2018, the family court entered an order enabling Prater to participate in reunification counseling with Child and granting

Prater supervised visitation with Child every other Saturday. Moreover, the family court ordered the parties to brief the issue of whether Prater's filing of the DNA Petition in May of 2017 tolled Appellants' statutory time period to become *de facto* custodians.

Ultimately, the family court ruled that Appellants did not have standing as *de facto* custodians, as it was undisputed by the parties that Appellants had obtained physical custody of Child on June 16, 2016, and that Prater had filed the DNA Petition - which the family court found to be an action commenced by a parent seeking to regain custody of Child tolling the statutory time period - on May 22, 2017. Consequently, the family court held that Prater's DNA Petition tolled Appellants' statutory time period to become *de facto* custodians. Additionally, on July 24, 2018, the family court entered an order awarding sole custody of Child to Prater.

Appellants then filed a motion to alter, amend, or vacate the family court's custody order, arguing that, because Prater did not "pursue" the DNA case, it should not have tolled the statutory time period. Appellants did not cite to any case law, and they did not raise any other issues as to why the family court's order was improper. On September 19, 2018, the family court entered an order denying Appellants' motion to alter, amend, or vacate.

Appellants appealed from the family court's order overruling their *de facto* Custodian Petition entered on August 9, 2018, the family court's order granting Prater sole custody of Child entered on July 24, 2018, and the family court's order denying Appellants' motion to alter, amend, or vacate entered on September 19, 2018.

ANALYSIS

As a preliminary matter, Prater argues that the orders upon which Appellants based their appeals were interlocutory, as the orders did not recite the necessary "finality" language required under Kentucky Rules of Civil Procedure (CR) 54.02. Consequently, Prater argues that because the action involved multiple parties and supposedly did not adjudicate all the parties' claims, such finality language was required.

Kentucky courts have consistently held that the determination of a request for *de facto* custodian status is interlocutory and not appealable, as it does not deprive "a party of a right in such a manner as to remove from the court the power to return the parties to their original condition." *Druen v. Miller*, 357 S.W.3d 547, 549 (Ky. App. 2011) (citation omitted). Here, had Appellants attempted to appeal only from the family court's order overruling their *de facto* custodian status, we would have been required to dismiss the appeal for lack of

appellate jurisdiction, as Appellants would have been appealing only from an interlocutory order.

This case is properly before us, however, because it also challenges the family court's final judgment determining custody entered on July 24, 2018 and the family court's denial of Appellants' motion to alter, amend, or vacate such final judgment, from which Appellants properly appealed. As stated in *Cherry v. Carroll*, 507 S.W.3d 23, 27 (Ky. App. 2016), "[i]t just happens the primary basis of [the] challenge is [the issue of] standing to seek—and ultimately obtain—custody."

Further, we do not see how CR 54.02 is implicated in this situation. CR 54.01 states that "[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, *or* a judgment made final under [CR] 54.02." (Emphasis added). As explained above, Appellants appealed from the family court's final custody order, which adjudicated the rights of all of the parties as to Child's custody. Thus, "[t]he magic words required by CR 54.02 for finality [did] not apply because the result of the [custody] order left nothing to adjudicate regarding the rights and priorities of the parties." *Nunley v. Neuling*, 530 S.W.3d 476, 480 (Ky. App. 2017) (quoting *Security Federal Savings & Loan Association of Mayfield v. Nesler*, 697 S.W.2d 136, 138-39 (Ky. 1985)).

As another preliminary matter, Smith was included as a named party in this appeal. However, as custody was ultimately given to Prater alone, and Smith failed to challenge the custody order pursuant to CR 73.02 or to otherwise participate in the appeal, Smith's custody rights in regard to Child have been conclusively adjudicated and are final.

Turning to the applicable standard of review in this case, an appellate court reviews the family court's findings of fact for clear error, and such findings may only be set aside when they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "If, after review, this Court determines the factual findings do not present clear error, the analysis shifts to an examination of the trial court's legal conclusions, looking for abuse of discretion using a *de novo* standard." *Jones v. Jones*, 510 S.W.3d 845, 848 (Ky. App. 2017) (internal citations omitted). Abuse of discretion occurs when a ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Appellants primary argument on appeal is that they had standing to proceed in this matter as Child's *de facto* custodians. Pursuant to KRS 403.270(1)(a), to become a *de facto* custodian, a non-parent must prove by "clear and convincing evidence" that he or she was "the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of . . .

one (1) year or more if the child is three (3) years of age or older . . . [.]" Moreover, "[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 contend on appeal that Prater's DNA Petition did not toll the statutory time period required to establish *de facto* custodianship because he did not commence a "legal proceeding" under the language of the statute which evidenced action on the part of Prater to gain custody of Child. The recently-rendered Kentucky Supreme Court opinion *Meinders v. Middleton*, 572 S.W.3d 52 (Ky. 2019) is very much in line with the facts of the instant case. In *Meinders*, the family court granted temporary custody to the purported paternal aunt and grandmother of a minor child on November 5, 2015. *Id*. at 55. Thereafter, in January of 2016, DNA test results indicated that Keith Middleton was the biological father of the child. *Id*. On April 29, 2016, Middleton moved to transfer custody of the child, and the family court granted him visitation rights. *Id*. Thereafter, in September of 2016, Middleton filed a separate civil action seeking custody of the child, and the purported grandmother and aunt filed a counter petition for custody. *Id*. The family court found that Middleton had not commenced a separate action to regain custody of the child prior to the applicable

statutory tolling period, and the purported aunt was granted *de facto* custodian status and sole custody of the child. *Id*. at 55-56.

The Court of Appeals and Supreme Court both disagreed with the family court, with the Supreme Court expressly holding 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" and that filing a separate custody action was not necessary to toll the required time period. *Id.* at 59. The Court further stated:

> a parent's right to raise his or her child is a fundamental Constitutional right. And any process designed to take that right away should be fair and safeguard that right to the greatest extent possible. Therefore, we believe the process by which a parent may toll the *de facto* time period should be simple and easy. In addition, we believe it would be counterintuitive to require a parent to file a separate custody action when an active custody case already exists. There are expenses associated with filing a new case, and those cases will most likely be joined for convenience anyway.

Id.

Based on the foregoing, we cannot find that the family court's conclusion that Prater's filing of the DNA Petition on May 22, 2017 tolled Appellants' statutory time period to become a *de facto* custodian was an abuse of discretion. In the DNA Petition, Prater asserted that he was the legal father of Child, that Smith had abandoned Child to "non-relatives," and that no custody

order had been set. Prater's DNA Petition was not merely a defensive maneuver but actively sought to directly participate in any custody determinations regarding Child. Prater's filing of the DNA Petition constituted "direct participation" in the overall child custody proceeding and demonstrated a desire to regain custody of Child sufficient to toll the *de facto* custodian time period.

Appellants next argue that, even if the DNA Petition was considered a legal proceeding under the statutory language, that a literal interpretation of the statute would require the period in which the DNA case was pending to be subtracted from the period of time that Appellants had Child, in which case Appellants argue that they would still meet the required one-year time period. As previously stated, KRS 403.270 requires that, to become a *de facto* custodian, a court must determine by "clear and convincing evidence" that "a child . . . has resided with the person for a period of . . . one (1) year or more . . . [.]" However, an additional holding in the *Meinders* case was that "the period of time required to qualify for *de facto* custodian status under KRS 403.270 *must be one continuous period of time*." *Meinders*, 572 S.W.3d at 57 (emphasis added).

In this case, the parties agree that Child resided with Appellants from June 16, 2016, and, as previously discussed, Appellants' time was tolled on May 22, 2017, the date upon which Prater filed the DNA Petition. *Meinders* makes clear that the time required to be a *de facto* custodian must be continuous, and

therefore Appellants have not proven by "clear and convincing evidence" that Child resided with them for one year.

Finally, Appellants argue that even if they are not *de facto* custodians, the trial court erred by failing to address other ways in which Appellants could have obtained standing, such as allowing Appellants to present evidence as to whether Prater was an unfit custodian or that Prater had waived his superior right to custody. Appellants further argue that they should be allowed some form of visitation or timesharing with Child. However, "[b]efore an argument may be raised at the appellate level, it must first be brought before the trial court." *Triplett v. Triplett*, 414 S.W.3d 11, 15 (Ky. App. 2013). As explained by a panel of this Court in *Triplett*, "[t]he Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court." *Id*. (quoting *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980)).

Appellants simply never requested to present evidence to the family court as to other ways in which they could prove standing or a right to visitation with Child, nor did they ever present the arguments to the family court. Appellants never alleged Prater's unfitness or waiver of parental rights in the Amended Petition, they never made a motion alleging Prater's unfitness or waiver of parental

rights, they did not raise Prater's unfitness or waiver in their motion to alter, amend, or vacate, nor did they ever make a motion for visitation or timesharing with Child. We therefore decline to address Appellants' unpreserved arguments.

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

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Amanda Hill
Corbin, Kentucky

BRIEF FOR APPELLEE, JOSHUA PRATER:

Sarah Tipton Reeves
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