RENDERED: FEBRUARY 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001835-MR

KENNETH ROBERT ROGERS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 00-CI-00525

BARBARA BLAIR AND JENNIFER BLAIR — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

TACKETT, JUDGE: Kenneth Rogers (Rogers) appeals from a judgment of the McCracken Circuit Court challenging the constitutionality of the de facto custodian statute under which the trial awarded custody of Rogers' son to the maternal grandmother. Rogers' son was born on November 8, 1991, while he was in a dating relationship with Jennifer Blair (Blair), the child's mother. Rogers and Blair never married, and the child lived with Blair, although Rogers was obligated to pay child support pursuant to an order of the McCracken District Court. Blair subsequently

placed the child with her mother, Barbara Blair (Barbara), who was awarded temporary custody on June 3, 1993. There is some evidence that Blair continued to reside with her child in Barbara's home and Rogers exercised visitation rights.

Rogers claims that he did not become aware of the orders (one in 1993 and one in 1996) granting Barbara temporary custody until 2000. At that time, Rogers filed a petition with the McCracken Circuit Court seeking permanent custody of his son. Barbara filed a counter petition, alleging that she was the de facto custodian pursuant to Kentucky Revised Statute (KRS) 403.270(1)(a), and asking the court to award her custody. The trial court found that Barbara met the requirements to be considered a de facto custodian pursuant to the statute and that it was in the child's best interest to award custody to his grandmother and visitation to his father. Rogers appealed presenting as his sole argument a challenge to the constitutionality of KRS 403.270(1)(a).

Rogers argues that Kentucky's de facto custodian statute unconstitutionally infringes on the fundamental right of a natural parent to determine the care, custody and control of a minor child. He correctly points out that this right was recently upheld by the United States' Supreme Court which struck down a Washington statute allowing any third party to successfully petition for visitation against a parent's wishes

if such visitation could be shown to be in the best interest of the minor child. Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The Supreme Court's decision was based, in part, on the fact that the statute in question did not require a finding of parental unfitness before abridging the parent's fundamental right to determine who should be involved in a child's life. In other words, no action or inaction on the part of the parent was required to trigger a third party's right to visit the child. The Kentucky de facto custodian statute is quite different in this regard. KRS 430.270 (1) reads as follows:

> (a) 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.
>
> (b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this

> subsection. Once the court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.420, 405.202.

Unlike the statute in question in Troxel, which impermissibly infringed on the natural parent's rights without requiring a showing of unfitness, Kentucky's de facto custodian statute is not triggered unless the natural parent abdicates his or her role of primary caregiver by allowing another person to fulfill that function for a significant period of time.

This court has recently considered Kentucky's de facto custodian statute in the case of Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777 (2002). Sherfey involved a custody dispute between parents and grandparents where a teenaged boy had left his home after a dispute with his parents and gone to reside with his paternal grandparents. The parents moved to another state, leaving their son behind with his grandparents, and did not seek to regain custody of him for almost two years. We upheld the trial court's finding that the grandparents qualified as de facto custodians under KRS 403.270(1) and considered the constitutionality of the statute as applied only. In this instance, Rogers challenges the statute's constitutionality on its face; however, we believe our analysis in Sherfey is equally applicable here:

> Prior to the passage of KRS 403.270, parents could not lose custody of their children absent a showing of unfitness by clear and convincing evidence. Our courts have stated that indicators of unfitness include such factors as "(1) evidence of inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children." Thus, unless some or all of the above factors were demonstrated the custodial rights of a natural parent always prevailed over the rights of a non-parent.
> . . . Although a showing of "unfitness" is not specifically required by KRS 403.270(1), the prerequisites necessary to prove "de facto custodianship" directly implicate at least two of the former unfitness factors. To be a de facto custodian under KRS 403.270(1)(a) a person must be the primary caregiver for an financial supporter of the child.

Sherfey at 782. (Internal citations omitted.) Clearly, our de facto custodian statute provides substantial due process before allowing the state to infringe on a natural parent's fundamental right to child custody by requiring a determination that the natural parent has abdicated his or her role as primary caregiver for a substantial period of time.

Rogers also contends that KRS 403.270(1) is unconstitutional because it is not narrowly tailored to serve a legitimate state interest. Any statute which infringes on a fundamental right must survive strict scrutiny to determine

whether it is narrowly tailored to serve a compelling state interest. Washington v. Glucksburg, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). He claims that KRS 403.270(1) fails because the state has no legitimate interest in regulating child custody between natural parents and the third parties who have fulfilled the primary caregiver role because the natural parent has failed to do so. To say that a state has no compelling interest in the welfare of the minor children who reside therein is a specious argument. KRS 403.270(1) was designed to protect children from arbitrary separation from those with whom they have been allowed, by the inaction of their natural parents, to look upon as parental figures. In the case sub judice, Rogers has never had custody of his son. Although he was under a court order to pay child support and exercised visitation rights, he never sought a custody determination. From the child's birth in 1991 until Blair placed him in Barbara's custody in 1993, he lived only with his mother. For the next eleven years, Barbara was her grandson's primary caregiver and financial support.[1]

[1] In fact, Rogers does not argue on appeal that the trial court's determination that Barbara qualified as a de facto custodian under KRS 403.270(1) was incorrect. He does not even argue that the trial court erroneously determined that granting Barbara custody was in the child's best interest. Instead, Rogers relies entirely on the erroneous assumption that no statute which abrogates his rights as a parent, absent a finding of unfitness, can survive a constitutional challenge.

Rogers also contends that KRS 403.270(1) fails the strict scrutiny requirement because it is not the least restrictive alternative. According to Rogers' interpretation, the de facto custodian statute directs a court to look solely to a calendar to determine whether a third party qualifies as a de facto custodian. However this ignores the fact that, even after a third party has been determined to be the de facto custodian, that does not automatically abrogate the custodial rights of the natural parent since custody is determined between the parties according to the child's best interest. Unlike the Washington statute which the Supreme Court overturned in Troxel, KRS 430.270(1) allows only a third party who has been the **primary caregiver and financial supporter** of the child to gain equal standing with the natural parent in a custody determination. The Supreme Court specifically stated that its decision in Troxel rested on "the sweeping breadth of [the statute in question] and the application of that broad, unlimited power in his case. . . " Id at 73. Moreover, since KRS 403.270(1) is narrowly tailored to serve that state's compelling interest in protecting the welfare of its minor residents without impermissibly infringing on the natural parents fundamental right to child custody, it survives strict scrutiny.

For the forgoing reasons, the judgment of the McCracken Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

DYCHE, JUDGE, DISSENTING. I respectfully dissent. The appellee has filed no brief. Pursuant to CR 76.12(8)(c), we may "regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." This is the course we should take herein. An issue of this importance, with constitutional implications, should have the benefit of full briefing before a decision is made. I would summarily reverse.

BRIEF FOR APPELLANT:

Natalie Hope Moore
Cumberland Trace Legal Services, INC.
Paducah, Kentucky

NO BRIEFS FOR APPELLEES

ORAL ARGUMENT FOR APPELLANT:

Natalie G. Bash
Paducah, Kentucky