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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000548-MR

CAROLINE ENGLAND

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 99-CI-00395

CARRIE ANN MICHELLE JACKSON

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; AND MILLER, SENIOR
JUDGE.¹

JOHNSON, JUDGE: Caroline England has appealed from an order of the Clay Circuit Court entered on February 1, 2002, which found that she had failed to establish by clear and convincing evidence that she was a de facto custodian under KRS² 403.270(1), and therefore awarded custody of Tanner Blake Gregory to his

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Revised Statutes.

biological mother, Carrie Jackson, the appellee herein. Having concluded that the trial court's factual findings were not clearly erroneous, we affirm.

While the parties to this child custody dispute have somewhat differing accounts regarding the events following Tanner's birth, there is substantial evidence of record to support the following facts as found by the trial court. Jackson gave birth to Tanner on November 10, 1998, when she was 17 years old. England is the maternal grandmother of Chad Gregory, Tanner's biological father.³ During the first several months following Tanner's birth, Jackson and Gregory resided with the child in Whitehouse, Tennessee, at the home of Gregory's father.⁴

On or around March 7, 1999, England, while on a visit to Whitehouse, asked Jackson if she could take Tanner back to England's home in Manchester, Kentucky, for a short visit.⁵ Jackson agreed, and told England that she and Gregory would come to pick Tanner up in Kentucky on the following weekend. For

³ Jackson and Gregory were never married. Gregory's mother, Pat, is England's daughter.

⁴ Gregory's father Tommy and his mother Pat are divorced.

⁵ According to England's testimony, her daughter Pat and Pat's daughter (England's granddaughter) Miranda had been helping Jackson and Gregory care for Tanner in Tennessee. England testified that she wanted to give Jackson, Gregory, Pat, and Miranda a "break" by taking Tanner back to Kentucky for a short visit. Jackson testified that she allowed England to take Tanner to Kentucky out of her concern at that time for Tanner's safety. According to Jackson, Gregory had on occasion been violent toward her and Tanner and she wanted time to try and work things out between Gregory and herself.

reasons that are not entirely clear from the record, Jackson and Gregory were unable to travel to England's home until two weeks later, around March 20, 1999.

During the couple's visit to England's home in Kentucky, Tanner became ill, and Jackson and England took the child to the emergency room. After doctors at the emergency room advised Jackson to take Tanner to his pediatrician in Tennessee, Jackson and Gregory returned to Whitehouse with the child on March 21, 1999. The following day, Jackson attempted to take Tanner to his pediatrician in Tennessee, but she was unable to get an appointment because of an outstanding bill that Jackson had not paid. Thus, Jackson asked England if she could get Tanner an appointment with Dr. Edward Moynahan, who was the pediatrician for England's adopted grandson, Clay.⁶ Dr. Moynahan agreed to see Tanner, and on March 24, 1999, Pat (England's daughter) and Jackson traveled to Columbia, Kentucky, where they met England. England, Pat, and Jackson then took Tanner to Dr. Moynahan's office.

After Tanner's initial office visit, Dr. Moynahan told Jackson that he would like to have follow-up visits with Tanner in the upcoming weeks. Jackson and Tanner stayed at England's home until April 6, 1999, when Tanner was once again seen by Dr. Moynahan. Following this second appointment, Jackson and Tanner

⁶ Clay lived with England in her home in Manchester, Kentucky.

returned to Gregory's father's home in Whitehouse. A few days later, while England was visiting relatives in Tennessee, Jackson asked England if she would take Tanner to his next appointment with Dr. Moynahan on April 12, 1999. England agreed and returned to Kentucky with the child, but Jackson stayed behind in Tennessee.

During the next few weeks, England traveled back and forth between Kentucky and Tennessee visiting various family members. England testified that during her visits to Tennessee, she would drop Tanner off with Jackson, but that Tanner would always return with her to Kentucky at the end of her visits. Jackson stayed in Tennessee until the first part of May 1999, when she came to live with England in Kentucky for approximately three weeks. During this time period, Jackson was unsuccessful in her attempt to find a job in Kentucky, but she was able to apply for and receive food stamps and WIC benefits for Tanner.

Around May 22, 1999, after Jackson had expressed a desire to return to Tennessee, England took Jackson back to Gregory's father's house in Whitehouse. However, Tanner continued to live in Kentucky with England.⁷ During this same time period, the relationship between Jackson and Gregory soured

⁷ Jackson testified that because she did not at that time have a driver's license, she wanted to move back to Tennessee where she believed it would be easier to find a job where she could either walk to work, or have someone drive her.

and the couple "broke up." Shortly after returning to Tennessee, Jackson found a job at a gas station where England's daughter Pat was also employed.

According to Jackson, on approximately June 18, 1999, she phoned England from Tennessee and told England that she wanted Tanner to come and live with her in Tennessee permanently. Jackson testified that England gave her the "run around" and that England ultimately refused to turn Tanner over to her. Jackson further testified that she traveled to Kentucky to get Tanner, but that she was unable to locate England in order to do so.

On July 2, 1999, England filed a petition for temporary custody in Clay District Court, alleging that Jackson had abandoned Tanner. England's motion for temporary custody was eventually granted.⁸ As part of its order granting England temporary custody, Jackson was granted visitation rights on every other weekend. On November 5, 1999, Jackson filed a petition for custody in Clay Circuit Court. In her answer, England filed a counter-petition for custody on November 15, 1999. A final hearing on this matter was held before the Domestic Relations Commissioner on May 7, 2001, after which the Commissioner made recommended findings of fact and conclusions of law. On February 1, 2002, after reviewing the Commissioner's

⁸ The exact date of the entry of the order granting England temporary custody is not clear from the record.

recommendations, the trial court found that England had failed to meet her burden of proof to show that she was a de facto custodian under KRS 403.270. Therefore, the trial court awarded Jackson custody of Tanner. This appeal followed.

England's sole claim of error on this appeal is that the trial court erred in finding that she had failed to establish her status as a de facto custodian for Tanner by clear and convincing evidence. We disagree.

We begin our analysis by noting the appropriate standard of review on appeal. In Sherfey v. Sherfey,⁹ this Court stated:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people [footnotes omitted].

The statute in question states, in pertinent part, as follows:

(1) (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... Any period of time

⁹ Ky.App., 74 S.W.3d 777, 782 (2002).

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.¹⁰

In the case sub judice, we conclude that the trial court's finding that England failed to establish herself as a de facto custodian by clear and convincing evidence was supported by substantial evidence and therefore not clearly erroneous.

In Consalvi v. Cawood,¹¹ this Court previously explained the meaning of the term "primary caregiver" under KRS 403.270:

The de facto custodian statute does not, contrary to Cawood's position at oral argument, intend that multiple persons be primary caregivers. The court's finding that he was "a primary caregiver" and "a financial supporter" is not sufficient to establish that he was indeed "the primary caregiver" within the meaning of the statute. It is not enough that a person provide for a child alongside the natural parent; the statute is clear that one must literally stand in the place of the natural parent to qualify as a de facto custodian [emphases original].

In the case at bar, England first began periodically taking care of Tanner in early March 1999. It is not disputed that from around March 7, 1999, through early May 1999, Tanner

¹⁰ KRS 403.270; see also Diaz v. Morales, Ky.App., 51 S.W.3d 451, 455 (2001)(stating that "[a]lthough there is yet little case law interpreting KRS 403.270, the standard of proof required to establish a de facto custodial relationship is high -to wit- it must be demonstrated by clear and convincing evidence that the third party is the primary care giver and financial supporter for the stated time period [footnote omitted]).

¹¹ Ky.App., 63 S.W.3d 195, 198 (2001).

spent part of his time in the exclusive care of Jackson in Tennessee, part of his time in the exclusive care of England in Kentucky, and part of his time in the care of Jackson and England in Kentucky. It is also not disputed that beginning in early May 1999, Jackson and Tanner resided with England for approximately three weeks until around May 22, 1999. The parties disagreed with respect to the extent of Jackson's "caregiver" activities during these three weeks. For example, England testified that Jackson offered little to no assistance in caring for Tanner. On the other hand, Jackson testified that she played with, fed, cleaned, and generally took care of Tanner while she was living in England's home. Hence, due to the fact that both England and Jackson had periods of exclusive custody of Tanner from early March 1999 through early May 1999, and because of the parties' conflicting testimony regarding the three weeks in May when Jackson and Tanner lived with England, the trial court found that England had failed to establish by clear and convincing evidence that she was "the primary caregiver" for these time periods. Since this factual finding is supported by substantial evidence in the record, we cannot say that this finding was "clearly erroneous."¹²

¹² See Black Motor Co. v. Greene, Ky., 385 S.W.2d 954, 956 (1964)(holding that "[i]f supported by substantial evidence, [a trial] court's finding of fact is not clearly erroneous").

Thus, the earliest possible date that England could have become Tanner's "primary caregiver" would have been when Jackson left Tanner with England on or around May 22, 1999. Assuming, arguendo, that England did in fact become Tanner's "primary caregiver" after Jackson returned to Tennessee in late May 1999, England still cannot establish herself as a de facto custodian under KRS 403.270. The statute specifically states that the time period after a parent has commenced legal proceedings to regain custody "shall not be included" in determining whether the requisite time period element has been satisfied. Jackson filed her petition seeking to regain custody of Tanner on November 5, 1999. Hence, even if England became Tanner's "primary caregiver" after Jackson returned to Tennessee on or around May 22, 1999, six months had not yet elapsed when Jackson filed her petition for custody on November 5, 1999. Therefore, we cannot conclude the trial court "clearly erred" in finding that England had failed to establish by clear and convincing evidence that she met the definition of a de facto custodian under KRS 403.270.

Based on the foregoing, the order of the Clay Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John T. Aubrey
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BRIEF FOR APPELLEE:

Robert Stivers
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