

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001735-MR

DOUGLAS M. WHITE

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE LINDA R. BRAMLAGE JUDGE
ACTION NO. 00-CI-01420

BRYAN GEMMER; AND
CARME NEUBAUER

APPELLEES

OPINION
REVERSING AND REMANDING

** **

BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant Douglas White appeals the decision of the Boone County Family Court denying his petition for declaration of de facto custodian of the minor child M.G.

The minor child is the daughter of Carme Neubauer and Appellee Bryan Gemmer. Bryan Gemmer did not have any prenatal or postnatal involvement in the child's financial, emotional or social life. During the first few months of the child's life,

the minor child and her mother resided with the maternal grandmother. Before the infant turned one, the mother and M.G. moved in with Glen Gemmer, the paternal grandfather, and his partner, Appellant Douglas White. The mother then moved out, leaving custody and care of the child with White and Glen Gemmer. At the request of Glen Gemmer, the trial court gave temporary custody of the child to him in 1996, when the child was under two years old. At that time, the child had been living with White and Gemmer for a year. Neither biological parent was involved in the child's life in any fashion.

Glen Gemmer was not the primary caretaker or support for the minor child during the time the child resided with him and White. The testimony in the record shows that White was the primary caregiver for the minor child from the age of 8 months onward. White provided some financial support for the child, and all caregiving duties and support. The paternal grandfather, Glen Gemmer, passed away in October, 2000. At that point the child was five years old. Bryan Gemmer had continually refused all contact with his daughter during her life, and did not provide financial support, care or custody for the child. The child's mother similarly had little or no contact with the child from the age of 8 months onward. The biological parents provided little or no emotional, financial or other support for the minor child.

Following Glen Gemmer's death, White filed a Petition for Custody of M.G. in December, 2000. The biological parents did not respond to that petition, and did not object to it. The trial court awarded temporary custody of the minor child to White in December, 2000. Neither biological parent contested this award or sought custody of the child. White continued to care for and support the child as he had done since she was less than a year old. The trial court took no further action in the case. In March, 2002, White filed an Amended Petition for Custody stating that he was the de facto custodian of M.G. In the Amended Petition for Custody White requested child support for the child, and a declaration that he was the de facto custodian of the minor child. Appellee Bryan Gemmer, the biological father of the minor child, responded to the Amended Petition, and demanded custody of the minor child, who was by this point eight years old. This was the first time that the record reflects any pleading filed by a biological parent.

KRS 403.270 provides guidelines for determining whether an individual is the de facto custodian of a minor child. A de facto custodian is the individual who:

[H]as 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 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 of Social Services.

Id., at subsection (1)(a). White asserts that as he became the primary custodian and caregiver of the minor child when she was under three years of age, the six month period should have been used to determine whether he was the de facto custodian of the minor child. The trial court stated that White only became custodian of the child when Glen Gemmer died, six months prior to the filing of the petition. The trial court held that White would have to have cared for the child for one year or more on his own to be considered a de facto custodian of the child.

The Boone County Family Court held that White was not the de facto custodian of the minor child. The trial court asserted that there was not clear and convincing evidence showing that White resided with the minor child and cared for her prior to Gemmer's death. Contrary to the trial court's assertion, the record shows that White did support and care for the child from the age of nine months onward, with little or no outside assistance from maternal or paternal relations.

Rather than finding that White was the primary caregiver for M.G. from the age of nine months onward, the trial court held that White had only cared for and supported M.G. since the death of Glen Gemmer in October 2000, when the child was six years old. White appeals the findings of the family

court and asserts that this finding is improper, and should be reversed. White provided evidence showing that he was the primary caretaker for the child for five years. White also argued that neither biological parent had requested custody until two years after Gemmer's death, at which time he had been the primary and sole caregiver and financial support for the child for over two years. White asserts that he had been the primary custodian and financial support of the minor child from October, 2000, through March, 2002. This period is longer than the year required by KRS 403.270 to provide de facto custodian status.

In its judgment, the trial court noted that neither parent had made a request for custody of the minor child after Glen Gemmer's death, but stated that "the Court surmises that the Respondents did not agree with the Petitioner's [White's] request for custody. . . ." No pleadings support the trial court's surmise. The record reflects that White had been the primary caregiver for the minor child for over a year. For this reason, he was legally entitled to be found a de facto custodian.

The parents did not object to White's temporary custody of the minor child until 2002 when White requested that they provide some financial support for the child. The proceeding initiated by White, in which neither parent took part, was not

sufficient to toll the period of time for determination of de facto custodian status. The statute at issue expressly provides that "any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of a child shall not be included in determining whether the child has resided with the person for a required minimum period." KRS 403.270(2). Because no proceeding for custody was commenced by either biological parent until 2002, White should properly have been found the de facto custodian of the minor child. The trial court's determination is reversed and the case remanded for proceedings consistent with this opinion.

Gemmer urges dismissal of this appeal, claiming that it is premature. Gemmer argues that the trial court's order was not final and appealable, as the trial court did not make a custody award with regard to the minor child. KRS 403.270 provides that where an individual is considered the de facto custodian of a child, that individual has standing to contest a request for custody by a biological parent. In the absence of a court's finding that an individual is a de facto custodian, a third party may not have standing to contest a biological parent's demand for custody. The case could not have continued had the trial court's determination not been appealed. Where the legal issue raised is answered, and a determination on the merits is made, the action is final and appealable. Whittaker

v. Morgan, Ky., 52 S.W.3d 567 (2001). For this reason, the trial court's determination was a final order, and was properly appealable.

Based upon the foregoing, the judgment of the Boone County Family Court is reversed and remanded for findings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, BRYAN
GEMMER:

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