

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001931-MR

MELISSA SUE DODSON
(NOW PAGE)

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 98-CI-00045

TERESA DODSON AND
TEDDY DODSON

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Melissa Sue Dodson (now Page) (hereinafter "Page") appeals from an order of the Monroe Circuit Court declaring Teddy Dodson and Teresa Dodson (hereinafter "the Dodsons") to be de facto custodians of Dylan Dodson (hereinafter "Dylan"). We affirm.

In November, 1996, Page and Chris Dodson (hereinafter "Chris") were married. Dylan was born thereafter on August 11,

1997. Page and Chris divorced in October, 1998. At that time, Chris was given sole custody of Dylan with Page being given reasonable visitations. In May, 2002, Chris committed suicide. Immediately thereafter, Page took physical custody of Dylan and he has resided with her since. On July 10, 2002, approximately two months after Page took physical custody of Dylan, the Dodsons, who are the paternal grandparents of Dylan, moved to intervene in the dissolution action claiming to be de facto custodians of Dylan and seeking custody of him. The trial court permitted the Dodsons to intervene and scheduled a hearing on the de facto custodian issue for August 2, 2002. At the conclusion of the hearing, the trial court entered the following hand-written ruling, in relevant part, on its court docket sheet:

Court heard a day's worth of testimony regarding the issue of whether the intervening parties were qualified for de facto custodian status. After hearing the evidence, the Court determines that the intervening parties were the primary caregivers of the child from the Summer of 2000 until May of this year. A hearing shall be scheduled in the future regarding custody of the child. In the meantime, the intervening parties shall have temporary visitation with the child....

Thereafter, on August 8, 2002, the trial judge rendered a written findings of fact and order in this matter. In the

written order, the court sets forth KRS 403.270(1)(a), the de facto custodian statute, and makes the following findings:

The Court finds it necessary to define the term *primary caregiver* in this context. The word *primary* is defined by the Webster's Collegiate Dictionary as "chief" or "principle." This Court also finds that a *caretaker* is the person who makes certain that the child is bathed, dressed, fed, has age appropriate friends to play with, has the opportunity for swimming in the summer and other such activities, and the person pursuing the child's spiritual training.

The Court finds that clear and convincing evidence must be presented to determine the primary caretaker. Clear and convincing testimony is such that this Court finds it is most likely true and that the person providing the testimony is most likely being truthful.

While this Court does not make the statement that any witness deliberately gave false testimony, it is found that the testimony of Boyce Blythe as to her daily presence in the Dodson home at which time she viewed the interaction of Intervenor's with their family is clear and convincing; likewise, the Court finds that Glenn Proffitt's testimony that he has often seen Dylan Dodson playing in the yard at the Intervenor's home to be clear and convincing; and that the Court finds the testimony of Rev. Loy Milam as to the Intervenor's regular church attendance with Dylan Dodson is clear and convincing. The Court finds that these individuals would have nothing to gain by falsely leading this Court. The Court finds that Intervenor's have been the primary caretakers of Dylan Dodson for more than one year.

Further, the Court finds that Intervenor's have been the primary financial

providers for Dylan Dodson for more than one year. Although Respondent testified that she is current on her child support obligation, those funds (if directed toward the child's care) would not have gone far in providing for his daily care

Intervenors meet the threshold requirements set forth in KRS 403.270(1)(a) and are the de facto custodians of Dylan Dodson.

Having determined that the Dodsons are de facto custodians, the court further ordered that Dylan would remain in the custody of Page, that the Dodsons would have specific visitation, and that a hearing would be "promptly scheduled to determine the custodial arrangement that is in the best interest of Dylan Dodson." Page filed a CR 59.05 motion to alter, amend or vacate, which the court denied on August 21, 2002. This appeal followed.

Relying on Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777 (2002) and Consalvi v. Cawood, Ky. App., 63 S.W.3d 195 (2001), Page argues that the trial court erred in determining that the Dodsons be designated as de facto custodians. Specifically, Page contends on page 9 of her appellate brief that:

The holding in Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky. App. 2002), clearly states that, "[p]rior to the passage of 403.270, parents could not lose custody of their children to a third party absent a showing of unfitness by clear and convincing evidence" and that indicators of unfitness include such factors as (1) abandonment; and (2) failure, for reasons other than poverty

alone, to provide essential care for the children. Sherfey, at page 782, further stated that the passage of KRS 403.270(1) does not significantly alter the pre-existing law of custody and that while 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. Further, Sherfey seems to hold that proof of voluntary abandonment of the child is what is required in order to prove that a person is the primary care giver for and financial supporter of the child.

We do not agree with Page's statement that Sherfey seems to require voluntary abandonment in order for KRS 403.270(1)(a), the de facto custodian statute, to be triggered. In fact, Sherfey at 782 specifically states that "prior to the passage of KRS 403.270, parents could not lose custody of their children to a third party absent a showing of unfitness by clear and convincing evidence." However, since the passage of KRS 403.270(1)(a) (effective July 14, 2000), to be considered a de facto custodian one needs to show, by clear and convincing evidence, that he/she has been the primary caregiver for, and financial supporter of the child for a specific period of time (if the child is under three (3) years of age, the period is six months or more; if the child is three (3) years or older, the time period is one year or more). In the case before us, the time period is not the issue, rather the issue is whether or not

the Dodsons were the primary caregivers and financial supporters of Dylan.

At the hearing, the trial court was presented with conflicting evidence as to where Dylan resided. Some testified that Dylan resided with the father in his apartment, while others stated that Dylan lived with the Dodsons at their home. In addition the Dodsons provided the court with numerous photographs and a video depicting Dylan at their home. On appeal, we are asked to determine whether the trial court's findings were clearly erroneous and its finding that the Dodsons were de facto custodians an abuse of discretion. See Sherfey, Id.; Carnes v. Carnes, Ky., 704 S.W.2d 207 (1986); Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982). A factual finding is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglass Corp. v. Golightly, Ky., 976 S.W.2d 409 414 (1998). Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. Id. at 414. After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. Sherfey, supra, at 782-83 citing Bickel v. Bickel, Ky., 442 S.W.2d 575, 577 (1969); Carnes, supra.

Although there was conflicting evidence as to where Dylan resided, there was substantial evidence presented from which the trial court could base its decision that the Dodsons were the primary caregivers for a period of one year. Although, from the same evidence, a different trial judge might have found that Dylan resided with his father during the period of time in question, the Monroe Circuit Court's decision was supported by substantial evidence and the court did not abuse its discretion.

Page also argues that since she paid child support, the Dodsons could not be considered the primary financial providers for Dylan. Page relies on Consalvi v. Cawood, Ky. App., 63 S.W.3d 195 (2001), in arguing that "a person cannot become a de facto custodian by providing for the child alongside the natural parent. We disagree. In Consalvi, the mother of the children resided with her husband, who believed he was the father of the children, and the two each contributed financially and otherwise to raising the children. When it was discovered through paternity testing that Cawood (the husband) was not the natural father of the children, he sought custody of the children under the de facto custodian statute. In that opinion, the Court of Appeals panel refused to give the non-natural parent the same standing in a relationship as a biological parent. To have ruled otherwise would have given equal standing to anyone seeking custody who shared a living arrangement with a

biological parent. We do not believe the intent of the legislature in creating the de facto custodian statute was meant to apply to such circumstances or situations.

In the case before us, Page did contribute regular child support towards the financial support of Dylan. However, the trial court specifically found that the Dodsons "have been the primary financial providers for Dylan Dodson for more than one year. Although (Page) testified that she is current on her child support obligation, those funds (if directed toward the child's care) would not have gone far in providing for his daily care." Despite Page's payment of minimal child support, we believe the trial court's ruling that the Dodsons were the primary financial supporters of Dylan was supported by substantial evidence and the finding that the Dodsons were de facto custodians was not clearly erroneous.

For the foregoing reasons, the order of the Monroe Circuit Court is affirmed.

ALL CONCUR.

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