

RENDERED: April 15, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001734-ME

CLYDE D. CLEMENTS

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 96-CI-00105

STEPHANIE JEAN CLEMENTS (NOW BERNDT),
MICHAEL ATWOOD, AND LYLIA ATWOOD

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Clyde B. Clements brings this appeal from an April 8, 2003, Order of the Casey Circuit Court denying his motion to modify custody of his minor child, Raven Clements. We affirm.

Clyde and Stephanie Jean Clements (now Berndt) were married on July 3, 1993. On October 21, 1996, the marriage was

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

dissolved by a decree of dissolution entered in the Casey Circuit Court. The decree provided for joint custody of Raven. Stephanie was designated the primary residential custodian, and Clyde was to have reasonable visitation. Clyde was ordered to pay child support.

Following entry of the decree, there was no activity of record over the next four years. In October 2000, Stephanie filed a motion for contempt. Therein, Stephanie alleged Clyde had not paid child support as ordered. Clyde then filed a motion for a "specific visitation schedule." Clyde alleged he had "not had any significant visitation or telephone contact with the child for several months." On January 11, 2001, an order was entered finding Clyde to be \$110.00 in arrears in child support but not finding him in contempt. The order also specifically outlined Clyde's visitation schedule.

On January 13, 2003, Clyde filed a motion to modify custody. Clyde alleged that Stephanie was incarcerated and that he should be awarded sole custody of Raven. Stephanie's parents, Michael and Lylia Atwood (referred to collectively as the Atwoods), subsequently filed a motion to intervene in the custody action. The Atwoods asserted they were de facto custodians for the child pursuant to Kentucky Revised Statutes (KRS) 403.270 and, as such, were "entitled to assert their claim to a right of custody."

On April 8, 2003, an order was entered adjudicating all issues between the parties. The Atwoods' motion to intervene was granted, and they were designated de facto custodians for the child. The Atwoods' motion to modify custody was denied. Clyde's motion to modify custody and his motion to declare the de facto custodian statute unconstitutional as applied to this case were also both denied. The practical effect of the order was that Clyde and Stephanie retained joint custody of the child with Stephanie remaining as primary residential custodian.² This appeal follows.

Clyde contends the circuit court "committed an error in failing to grant primary custody to the natural father while granting custody and status of 'defacto [sic] custodians' to maternal grandparents." Appellant's Brief at 6. Clyde's argument focuses upon his assertion that by the circuit court granting the Atwoods de facto custodian status, he has been denied his custodial rights.³ Clyde devotes three (3) pages of his brief to this argument.

² Stephanie appeared at the February 13, 2003, evidentiary hearing and the circuit court's order of April 8, 2003, reflected that she was no longer incarcerated.

³ The gist of Clyde's argument is that he is being penalized for not maintaining "financial supervision" of his child support payment to Stephanie. We interpret the court's order to the contrary, finding that for the 27 months prior to Clyde's motion, the grandparents were the primary caregivers as well as financial supporter for the child, providing moral, religious and educational support.

We emphasize the circuit court did not grant custody of the child to the Atwoods; rather, the court designated the Atwoods' de facto custodians, but denied their motion to modify custody. The effect of the circuit court's order was to maintain the status quo. That being Stephanie and Clyde retained joint custody of the child and Stephanie remained the primary custodian. As such, we view Clyde's argument that the circuit court erred by denying his motion to modify custody while granting custody to the maternal grandparents to be without merit.

Clyde contends, in the alternative, that "application of KRS 403.270 in the present case would be unconstitutional."⁴ However, Clyde fails to set forth any facts to support this argument, nor does he present any legal authority for this position. We, thus, summarily reject Clyde's alternative argument.

For the foregoing reasons, the Order of the Casey Circuit Court is affirmed.

ALL CONCUR.

⁴ Clyde does not claim that the statute is unconstitutional. This argument would fail on its face for failure to comply with KRS 418.075 and Ky. R. Civ. P. 24.03.

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