

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001619-ME

ROBERT DEARDORFF

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 03-CI-01857

CONNIE A. MANZI AND MONA A. MOORE

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.¹

DYCHE, JUDGE: C. Y. was born on January 5, 1999. The Kentucky Cabinet for Families and Children (now known as the Cabinet for Health and Family Services) took custody of C. Y. when she was two days old. C. Y. was placed in foster care upon her release from the hospital. Although the original plan was to reunite the child with her mother, Connie Manzi, the Cabinet later decided to attempt a family placement. Appellee Mona Moore, a

¹ Senior Judge Lewis G. Paisley 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.

maternal cousin of Manzi, agreed to assume care of C. Y.; the Cabinet placed C. Y. in Moore's care when the baby was ten months old.

Manzi listed Joseph Pangallo as father of C. Y. Paternity tests proved negative. Robert Deardorff, who had earlier expressed concern that the child was his but was told repeatedly otherwise by Manzi, contacted the Cabinet. He scheduled a paternity test, and on March 21, 2000, a judgment of paternity and order of support was entered.

Deardorff's efforts to deal with the Cabinet were frustrating at best. He thought the better approach would be to deal with Moore directly. The two were able to work out a visitation plan. However, Deardorff was prevented by Moore from telling C. Y. that he was her father. He had to refer to himself as "Uncle Robert," and his son (C. Y.'s half brother) was "Cousin Joey." Further complications arose when C. Y. got ready to enter kindergarten. Deardorff, who had custody of C. Y. at the time, refused to return her to Moore. She was forced to travel to Ohio in order to secure C. Y.'s return.

Deardorff filed a Verified Petition for Custody of C. Y. on July 17, 2003. Moore counter- and cross-claimed for C. Y.'s custody, asserting that she was the de facto custodian of C. Y. The Kenton Circuit Court held a hearing on January 16, 2004. It ruled in Moore's favor on May 20, 2004. A further

hearing was held on July 20 of that year to determine Deardorff's motion pursuant to CR 59.01. That motion was denied the following week, and Deardorff appeals.

Appellant first argues that the trial court erred in granting Moore de facto custodian status. Deardorff's attack is twofold: (1) He asserts that custody was not released to Moore until September 2002, thus she fell short of the statute's (KRS 403.270) requirement of a minimum of one year as custodian; and (2) He continues that Moore did not establish that she was the primary caregiver or financial supporter of C. Y.

The statute in question reads, in pertinent part, thus:

(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 (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 a 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, 403.822, and 405.020.

KRS 403.270. There is no dispute that C. Y. lived with Moore since 1999; this was not a foster parent situation, but rather a "family placement." However, the record reflects that the Cabinet retained legal custody of the child until September 2002. Although there is no case law directly addressing the factual situation before this Court, we believe, as did the Kenton Circuit Court, that there was clear and convincing evidence that Moore was the primary caregiver of C. Y. since 1999. The one year statutory requirement was satisfied.

However, given the fact that the Cabinet retained legal custody of C. Y. until September 2002, necessarily implying that Moore received financial assistance from the Cabinet, and the further fact that Deardorff had been making regular child support payments on behalf of C. Y., the record does not support the trial court's finding that Moore was C. Y.'s "primary financial supporter." It was incumbent upon Moore, as the one claiming de facto custodian status, to demonstrate by clear and convincing evidence that she satisfied this statutory aspect of C. Y.'s care. Swiss v. Cabinet for

Families and Children, 43 S.W.3d 796, 798 (Ky.App. 2001). We therefore remand this matter to the trial court for further findings regarding Moore's financial contribution to C. Y.'s care. The trial court's award to Moore of de facto custodian status is vacated pending further proceedings consistent with this opinion.

We need not at this time address Deardorff's remaining issues with the exception of his argument regarding the constitutionality of the statute: That argument was not preserved for appellate review (trial counsel having abandoned same during the hearing, there was no notice to the Attorney General pursuant to KRS 418.075 nor CR 24.03, and no mention of this issue was made in the prehearing statement as required by CR 76.03(8)). The constitutionality issue is affirmed.

The order of the Kenton Circuit Court is vacated and this matter is remanded for further findings regarding the issue of C. Y.'s primary financial supporter.

GUIDUGLI, JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

PAISLEY, SENIOR JUDGE, DISSENTING. I respectfully dissent. I fully agree with the majority that there was clear and convincing evidence that Moore was the primary caregiver of C. Y. for more than the one year period required by statute to

establish de facto custodian status. Appellant's reliance on Swiss v. Cabinet for Families and Children, 43 S.W.3d 796 (Ky.App. 2001) is misplaced. That case applies only to a situation where a non-parent is contesting custody with the Cabinet, not where a natural parent is contesting custody with a non-parent, as in the case before us.

I dissent because I disagree with the majority's conclusion that there was insufficient evidence before the trial court to support its decision that Moore was the primary financial supporter of C. Y. While there were certainly factual disputes before the trial court, there was evidence that indicated Moore was the person who provided all food, clothing and shelter to C. Y. for a period of well in excess of one year. I find no support for the proposition that because she received state funds to assist her or that Deardorff paid some child support, which Moore testified did not come to her, she could not be found to be the primary financial supporter of the child.

Because I believe there was sufficient evidence to support the trial court's findings in all respects, I would affirm the judgment of the Kenton Circuit Court.

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