

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002088-MR

ERIN STEPHENS

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 03-CI-01042

JIMMIE STEPHENS;
ANN STEPHENS; AND
CRAIG STEPHENS

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order granting custody to the paternal grandparents who were found to be *de facto* custodians under KRS 403.270(1). Upon review of the record, we believe the trial court properly found the paternal grandparents to be *de facto* custodians and that it was in the best interest of the child for the grandparents to have custody. Hence, we affirm.

The appellant, Erin Stephens, and Craig Stephens were married on November 1, 1997. At the time of the marriage, Craig was twenty-three (23) years of age and Erin was eighteen (18) years old. On April 13, 1998, the minor child, Kendall Stephens, was born to Craig and Erin. During the marriage, Erin, Craig and Kendall lived on the same street as Craig's parents, Ann and Jimmie Stephens. At first they lived across the street from Ann and Jimmie, and during the latter part of the marriage, they lived two houses down from Ann and Jimmie. After almost six years of marriage, Erin filed for divorce on October 3, 2003.

On October 7, 2003, Ann and Jimmie filed a verified motion to intervene in the dissolution action, seeking custody of Kendall as *de facto* custodians under KRS 403.270(1). The trial court awarded temporary custody to Erin on December 9, 2003. A final hearing on custody, *de facto* custodian status, visitation, and child support was held on February 10, 2004. Craig did not seek custody of the child in the proceeding, but supported his parents' efforts to obtain custody. On July 13, 2004, the domestic relations commissioner filed her recommendations and report finding that Ann and Jimmie were *de facto* custodians of Kendall and that it was in the best interest of the child that Ann and Jimmie be awarded custody. The commissioner recommended that Ann and Jimmie be awarded custody

of Kendall subject to Erin having visitation with the child per the Boyd County Visitation Guidelines. The commissioner also recommended that Craig have visitation at Ann and Jimmie's discretion. Erin thereafter filed exceptions to the commissioner's recommendations and report. On September 13, 2004, the circuit court entered its order overruling Erin's exceptions as to custody and confirming the award of custody to Ann and Jimmie. This appeal by Erin followed.

Erin first argues that Ann and Jimmie did not meet the burden of proof in KRS 403.270(1) for establishing *de facto* custody of Kendall. KRS 403.270(1) provides:

- (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.

Kendall was over the age of three at the time of the custody hearing in this case, so Ann and Jimmie had to show by clear and convincing evidence that they were the primary caregivers and financial supporters for Kendall for one year or more, and that he resided with them during that time. Specifically, Erin argues that Ann and Jimmie failed to prove by clear and convincing evidence they were the primary caregivers and financial supporters of Kendall.

It was undisputed that Ann has been retired since Kendall's birth and that Jimmie retired shortly after his birth. At the custody hearing, Ann Stephens testified that since Kendall was three months old, she and Jimmie have been caring for Kendall. She stated that she fed him breakfast, got him ready for school when he began attending preschool, packed his lunch, took him and picked him up from school, fed him dinner, bathed him, and put him to bed. According to Ann, she and Jimmie cared for Kendall most of the time, even during periods when Erin was not working or going to school. It was undisputed that Ann and Jimmie were the ones who enrolled Kendall in and

paid for his preschool. Ann also testified that she took Kendall to the doctor most every time he went, paid for his medications and doctor bills, was responsible for giving him his asthma medication, and was the one who purchased the air cleaners and humidifiers necessary for his medical condition. According to both Ann and Jimmie's testimony, they routinely took Kendall on recreational outings (swimming, the park) and tried to give him cultural exposure (museums, the aquarium, the library). As for involvement with Kendall's school, Ann testified that she regularly inquired about Kendall's progress and that, to her knowledge, Erin had never even met Kendall's teacher.

Jimmie Stephens testified that at some point during Craig's marriage, he and Ann began taking care of Erin and Craig's finances because they were behind on their bills and could not handle their finances. It was undisputed that Erin and Craig would willingly turn over their paychecks to them and they (Ann and Jimmie) would pay their household bills for them. According to Jimmie, Erin and Craig never had enough money to cover Kendall's medical and preschool expenses because they spent their money on beer, cigarettes and pot. Ann testified that there were times when Erin and Craig could have paid expenses for Kendall's care, but did not. During Erin's testimony, she admitted that she and Craig were always behind on

their bills and had to constantly borrow money from Ann and Jimmie. Craig stated that the couple turned their finances over to his parents because they were simply lazy.

Craig Stephens testified that during most of the marriage Erin worked or went to school, but there was a period of nine months during which she was on unemployment and did not go to school. Craig stated that during this period, Erin could have cared for Kendall, but instead she still allowed his parents to care for him. Craig admitted to an incident of domestic violence against Erin and that he subsequently violated the resulting DVO when he slashed Erin's tires.

June Carter, a friend and neighbor of Ann and Jimmie, testified that when she would see Ann and Jimmie, Kendall was always with them. She stated that she could remember seeing Erin with Kendall only once.

Imogene McGuire, the director of Kendall's preschool, confirmed that Kendall was enrolled in her preschool program by Ann and Jimmie and that they were the only ones who would inquire about Kendall's progress. McGuire stated that Ann or Jimmie normally brought Kendall to school and picked him up after school. She further stated that if there was a special activity at the school, Ann or Jimmie would be the ones who came. In the two-year period that Kendall was at the preschool,

McGuire stated that she could recall only one or two times seeing Erin at the school.

Stephanie Mullins, Kendall's teacher at Ponderosa Elementary School, testified that Kendall is a smart, happy, well-adjusted, and well-groomed child. She stated that Ann and Jimmie were the only people she had ever met associated with Kendall, that they checked on his progress every week, and that they would come get Kendall when he was sick.

Erin Stephens testified that she spent a lot of time with Kendall and that Ann and Jimmie did not raise Kendall. Erin maintained that Ann and Jimmie watched Kendall frequently when she and Craig were working or going to school because they were financially unable to pay a babysitter and Ann and Jimmie wanted to watch him. Erin admitted there were times when Ann and Jimmie cared for Kendall when she and Craig were not working or going to school, but insisted it was because Ann and Jimmie had asked to see Kendall. Erin also admitted that during the nine months she was on unemployment and not going to school, Ann and Jimmie continued to take Kendall and pick him up from preschool.

According to Erin, since she left the marriage with Kendall in October of 2003, she has been financially supporting and caring for Kendall. Melinda Fields, Erin's mother, testified that when Erin left Craig, she and Kendall moved in

with her. Melinda stated that Erin works nights and she and her husband watch Kendall during that time. She testified that either she or her husband picks Kendall up from school, but Erin is the one who feeds, bathes, and clothes Kendall. Melinda confirmed that Erin has been financially supporting Kendall, although she admitted that she had helped them out financially a couple of times. It was undisputed that Kendall was doing well medically and in school during the time he was in Erin's custody.

Erin argues that the evidence established at best that Ann and Jimmie assisted her in caring for Kendall, not that they acted as parents to Kendall, citing Consalvi v. Cawood, 63 S.W.3d 195 (Ky.App. 2001). In Consalvi, this Court interpreted KRS 403.270(1) such that the parties arguing for *de facto* custody status must show that they stood in the place of the natural parent in caring for the child, not that they stood alongside the natural parent. Id. at 198. The evidence in this case established that Ann and Jimmie were more than grandparents who merely assisted the parents in caring for the child. From our review of the record, we agree with the trial court that Ann and Jimmie presented clear and convincing evidence that they stood in the place of Erin and Craig in providing care and financial support for Kendall on a daily basis for at least one

year. Accordingly, they were properly found to be *de facto* custodians of Kendall.

Erin next argues that even if the trial court was correct in adjudging that Ann and Jimmie were *de facto* custodians of Kendall, the trial court erred in ruling it was in the best interest of Kendall that Ann and Jimmie be awarded custody. Erin correctly asserts that even though Ann and Jimmie were adjudged to be *de facto* custodians, the trial court still had to make a best interest determination under KRS 403.270(2) to make the ultimate custody decision. The following factors in KRS 403.270(2) are to be used by the trial court in determining the best interests of the child:

- (a) The wishes of the child's parent or parents, and any *de facto* custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any *de facto* custodian;

- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Findings of fact relative to custody will not be overturned unless they are clearly erroneous. Sherfey v. Sherfey, 74 S.W.3d 777 (Ky.App. 2002), cert. denied, 537 U.S. 1110, 123 S. Ct. 892, 154 L. Ed. 2d 782 (2003). In applying the law to those findings of fact, the court's ultimate award of custody will not be disturbed unless it constitutes an abuse of discretion. Id. at 782. The trial court found that based on the fact that Erin and Craig abdicated their parental responsibilities to Ann and Jimmie, even during periods when they could have cared for Kendall, it was in the best interest of Kendall for Ann and Jimmie to have custody.

Under KRS 403.270(h) and (i), the court was properly allowed to consider the parent's motives in placing the child in the care of the *de facto* custodian. Here, although Ann and Jimmie cared for Kendall when Erin worked and went to school, Erin admittedly allowed them to care for Kendall when she was

available to provide that care. The trial court found that the relinquishment of parental responsibilities was due to either immaturity on the part of Erin and Craig, that neither was ready to parent, or because it was simply easier to allow Craig's parents to care for Kendall. This finding was supported by substantial evidence in the record. Sherfey, 74 S.W.3d at 782.

The evidence further established that Erin took no part or interest in Kendall's schooling. Ann and Jimmie were the ones who enrolled him in school and regularly inquired about his progress. KRS 403.270(2)(g). Erin rarely took him or picked him up from school and had never even met his teacher. According to the evidence, Ann and Jimmie also tried to make sure Kendall had social and cultural exposure, as well as recreational outlets. KRS 403.270(2)(g). There was no evidence that Erin made any such efforts with Kendall. Finally, the evidence was uncontroverted that Kendall did very well in Ann and Jimmie's care, physically and emotionally. KRS 403.270(2)(e). Ann and Jimmie were the ones who took Kendall to the doctor most often and made sure he received the proper treatment for his asthma. KRS 403.270(2)(g). Kendall's teacher testified that Kendall was always well-groomed and well-rested, and that he was happy, well-rounded and well-adjusted. KRS 403.270(2)(d). Accordingly, the trial court did not abuse its

discretion in concluding it was in the best interest of Kendall that Ann and Jimmie be awarded custody.

For the reasons stated above, the order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Rhonda M. Copley
Ashland, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEES JIMMIE AND ANN
STEPHENS:

Mary Hall Sergent
Ashland, Kentucky

NO BRIEF FOR APPELLEE CRAIG
STEPHENS