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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002136-ME
AND
NO. 2005-CA-001184-ME

TRACY FELDPAUSCH

APPELLANT

v. APPEALS FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 03-CI-01717

MARY ADAMS

APPELLEE

OPINION
AFFIRMING IN PART
AND
VACATING AND REMANDING IN PART

** **

BEFORE: DYCHE AND VANMETER, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

VANMETER, JUDGE: Tracy Feldpausch appeals from orders entered by the Daviess Circuit Court declaring appellee Mary Adams² to be a de facto custodian of Feldpausch's children, awarding custody of the children to Adams, and suspending Feldpausch's visitation rights. For the reasons stated hereafter, we affirm as to the

¹ Senior Judge David C. Buckingham 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.

² Formerly listed in court documents as Mary Wilson.

de facto and custody issues, but we vacate and remand for further proceedings as to the issue of visitation.

Feldpausch is Adams' former daughter-in-law³ and the mother of two children who were born in August 1999 and September 2002. In December 2003, Adams filed a verified petition seeking a determination that she is the children's de facto custodian. She also filed a motion requesting an award of child custody. According to Adams, she was awarded temporary custody of the children in December 2002, but the district court returned custody to the children's parents in January 2003 contingent on the parents obtaining housing. Feldpausch and the children then entered a shelter which they were asked to leave after ninety days due to Feldpausch's rule infractions. The children and both parents then returned to Adams' home, where they remained until July 2003, when they moved to Pennsylvania for a short time before returning to Adams' home. Adams eventually asked the parents to leave her home, and she was awarded temporary custody of the children in August 2003. Adams asserted that the older child had resided primarily with her for approximately four years beginning shortly after her birth, that the younger child had resided primarily with her for approximately fifteen months beginning shortly after his birth, and that she had been each child's primary caretaker and

³ Adams' son, who testified in her favor, is not a party to this proceeding.

financial supporter. Adams further asserted that she satisfied statutory requirements⁴ for seeking de facto custodian status and custody, as she had been the four-year-old child's caregiver for over one year, and the fifteen-month-old child's caregiver for over six months.

Feldpausch filed a verified response asserting that she was capable of properly providing for the children and that she should be awarded their sole custody. She requested the circuit court to dismiss Adams' petition or, alternatively, to award custody of the children to her even if Adams was determined to be a de facto custodian.

The parties agreed to bifurcate the issues of de facto status and custody. As to the de facto issue, the parties stipulated before a commissioner that Adams had been the children's primary caregiver since the district court awarded her temporary custody in August 2003.⁵ In his May 2004 recommendation to the trial court, the commissioner noted that the district court records indicated that Adams had temporary custody of the children between December 20, 2002, and January 10, 2003, but Feldpausch then regained custody. However, the district court modified custody again on May 23, 2003, by

⁴ KRS 403.270(1)(a).

⁵ Feldpausch's stipulation was subject to her contention that the time period described in KRS 403.270(1)(a) ceased to run once she attempted to regain custody of her children.

strictly providing that although the parents could remain with the children, the children must live with Adams because the parents were unable to properly provide for them. Adams was given temporary custody by agreement in August 2003, and she was given full custody of the children in September 2003 after the district court found that the parents were unable to care for them. The commissioner found that Adams had been the primary caregiver for each child for at least a year. He agreed with the district court's finding that the parents had been unable to provide care and support for the children, but that Adams had provided such care and support and had satisfied the statutory requirements. The circuit court subsequently adopted the commissioner's findings and declared Adams to be the children's de facto custodian. Appeal No. 2004-CA-002136-MR followed.

Subsequently, the commissioner recommended that the court should find that the evidence did not support Feldpausch's assertion that she was capable of raising the children and should be granted their custody. The commissioner noted Feldpausch's inconsistent statements, her many moves, her failure to provide adequate living arrangements or income, and her failure to comply with court orders relating to the children or to demonstrate her ability to provide for their basic needs. The commissioner concluded that returning the children to Feldpausch would not be in their best interests. He further

found that the children's needs had been met by Adams and recommended that she be granted custody of them.

Meanwhile, based on substantiated reports that Feldpausch had neglected or abused the children, Adams moved to suspend Feldpausch's visitation with the children until the Department for Community Based Services could determine that she no longer endangered them. On May 12, 2005, the trial court entered separate orders adopting the commissioner's recommendations, and suspending Feldpausch's visitation with the children. Appeal No. 2005-CA-001184-MR followed. As the two appeals now have been joined for this court's consideration, we will treat them as a single entity for purposes of review.

Feldpausch first contends that the trial court erred by finding that Adams is the children's de facto custodian. We disagree.

KRS 405.020(3) provides that although parents have joint custody over their minor children,

a person claiming to be a de facto custodian, as defined in KRS 403.270, may petition a court for legal custody of a child. The court shall grant legal custody to the person if the court determines that the person meets the definition of de facto custodian and that the best interests of the child will be served by awarding custody to the de facto custodian.

KRS 403.270(1) in turn defines "de facto custodian" as

(a) . . . 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.

A custody determination must be made in accordance with the child's best interests, and "equal consideration shall be given to each parent and to any de facto custodian"⁶ after the court's consideration of all relevant factors including those set out in KRS 403.270(2).

Here, although it was not undisputed, substantial evidence was adduced to support the trial court's determination that Adams was the primary caregiver and financial supporter of

⁶ KRS 403.270(2).

the older child for at least one year, and the younger child for at least six months. More specifically, evidence was adduced to show that the children lived in Adams' home for all but several months of their lives, and that Adams was their primary caregiver and financial supporter even when the children's parents also resided in her home with the children. Moreover, there is no merit to Feldpausch's assertion that the running of time for calculating the length of the children's residence with Adams was tolled by Feldpausch's response to Adams' petition, as KRS 403.270(1)(a) permits such a tolling of time only where a legal proceeding is "commenced," rather than merely defended as here, by a parent who seeks to regain child custody.⁷ It follows, therefore, that the trial court did not clearly err⁸ by finding that Adams qualified as a de facto custodian of the children.

Feldpausch next asserts that the trial court abused its discretion by failing to award custody of the children to her. However, once Adams was determined to be the children's de facto custodian, she and the parents were entitled to equal consideration for purposes of determining custody in accordance with the children's best interests.⁹ Given the substantial

⁷ *Sherfey v. Sherfey*, 74 S.W.3d 777, 781 (Ky.App. 2002).

⁸ CR 52.01.

⁹ KRS 403.270(2).

evidence adduced regarding the care provided by Feldpausch and by Adams, we cannot say that the trial court abused its discretion by determining that the children's best interests would be served by the award of custody to Adams.

Next, Feldpausch contends that the trial court abused its discretion by suspending her visitation with the children. For the reasons stated hereafter, the court's order as to visitation must be vacated and this matter must be remanded to the trial court for further proceedings.

KRS 403.320(3) provides that a noncustodial parent's visitation rights shall not be restricted unless the court "finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health." The record shows that on May 12, 2005, the trial court entered an order concluding that the ordered visitation "has not worked," and suspending visitation pending further orders. The court found

the testimony of social worker Jennifer Shelton and CASA worker Karen Pannell more credible than other witnesses, and thus finds that the environment in which the children are visiting with Respondent Tracy Feldpausch is a dysfunctional environment; that in the dwelling where the children visit, there are dog feces on the floor, there is urine throughout the dwelling, and the dwelling is filthy. At the mall visits, the court finds that the children are exposed to injury, the danger of being kidnapped, that the children are improperly supervised, and that incidents of abuse or neglect against the children have occurred.

However, the court did not find "that the visitation would endanger seriously the child's physical, mental, moral, or emotional health."¹⁰

Certainly the court's findings raised serious concerns and provided justification for modifying the venues and conditions of visitation. However, the court made no findings regarding the existence or absence of possible alternatives to the present venues and conditions of visitation, or regarding whether the children would be seriously endangered if visitation was conducted in a more appropriate setting. Pursuant to KRS 403.320, Feldpausch was entitled to exercise "reasonable visitation rights" with the children unless the court specifically determined that visitation would seriously endanger them. Absent such a finding, the trial court was prohibited from suspending her visitation with the children.

We recognize that more than one year now has passed since entry of the order suspending visitation. Obviously, in that time circumstances may have changed greatly, or not at all. On remand, therefore, the court's May 2005 order regarding visitation should be vacated and, after further proceedings are conducted, a new order concerning visitation should be entered in accordance with KRS 403.320.

¹⁰ KRS 403.320.

Finally, Feldpausch contends that the application of KRS 403.270 infringes upon her fundamental and constitutional rights as a parent to raise her children. However, this issue was not raised below, and it shall not be considered on appeal.

The court's orders are affirmed in part, and vacated and remanded in part for further proceedings consistent with the views stated in this opinion.

DYCHE, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART.

BUCKINGHAM, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in part and respectfully dissent in part. I concur with the portion of the majority opinion that holds the trial court did not err by finding that Adams was the children's de facto custodian. However, I dissent from the portion of the opinion that vacates the trial court's order regarding visitation.

As the majority notes, a noncustodial parent is entitled to reasonable visitation rights unless the court finds that visitation would seriously endanger the child's physical, mental, moral, or emotional health. See KRS 403.320(1). Although the trial court did not use those exact words in its order, I believe it clearly made such a finding. The court found that incidents of abuse or neglect against the children

have occurred and that the children are exposed to injury and the danger of being kidnapped on mall visits. The court also found that the children are in a dysfunctional environment while visiting with Feldpausch. I conclude that these findings are sufficient to comply with the requirements of the statute.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Misty Lee Miller
Owensboro, Kentucky