

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002216-ME

CRAIG MATTHEW BAUMGARDNER

APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 03-CI-00313

CHARLOTTE RAE GUFFEY; AND
WANDA GUFFEY

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

BARBER, JUDGE: Appellant, Craig Matthew Baumgardner

(Baumgardner), appeals the decision of the Wayne Circuit Court granting custody of his minor child to the maternal grandmother, and overruling his exceptions to the Domestic Relations Commissioner's Report and Recommendation. We affirm.

The parties, Craig Matthew Baumgardner and Charlotte Rae Guffey, are the parents of a minor son born in 1998, and Wanda Guffey, the maternal grandmother, who was found to be the de facto custodian of the child. The child lived with Wanda for

most of his life. For a one month period of time, Charlotte Rae attempted to live in an apartment with the child by herself. Shortly thereafter, the child was removed from the home of Charlotte Rae by the Bourbon County Child Protective services on January 15, 2003. The child was returned to the home of Appellee, Wanda, the maternal grandmother, who had provided extensive care and support for the child since his birth. The child and his mother had lived with Wanda for most of his life, having moved out shortly before Protective Services was forced to take the child into foster care. The child did not reside with his father, Craig, after the parents separated in 1999.

On May 20, 2003, Craig, the father of the child, filed a motion for custody of the child. His motion was opposed by Charlotte Rae, the child's mother. Wanda filed a motion to intervene. The trial court found that Wanda was the de facto custodian of the child. Charlotte Rae admitted, in her First Amended Response to the custody petition, that Wanda, the maternal grandmother, had supported and cared for the minor child for most of his life. After a hearing, the Domestic Relations Commissioner found that Wanda had been the primary financial support and primary caregiver for the child for the required statutory period and thus should be considered the de facto custodian. The Domestic Relations Commissioner held a separate hearing to determine custody of the child. The

Domestic Relations Commissioner found that the best interests of the child would be served by continued custody with Wanda. The Craig and Charlotte Rae were granted visitation rights to the child. The Domestic Relations Commissioner's recommendations were approved by the circuit court.

Craig contends that the circuit court was in error in finding Wanda to be the de facto custodian of the child. KRS 403.270(1) requires that a de facto custodian must have been the primary financial supporter of the child for the statutory period. He argues that he has paid monthly child support of \$256.00 since the child was born. The bulk of these payments were made as back child support payments incepting in March, 2002. During the first four years of the child's life, Craig did not make child support payments.

Craig further contends that his payment of back and current child support shows that Wanda was not the primary financial custodian of the child. Wanda testified that she did not receive any of the child support monies paid by Craig to the child's mother from March, 2002, through November, 2003. These payments were made to Charlotte Rae, who did not have care or custody of the child. The record reflects that the Commonwealth of Kentucky did not provide any financial support for the minor child. Neither biological parent showed that they had contributed financial support to Wanda while she cared for the

child prior to her being named de facto custodian in November, 2003. It was not until October, 2004, that both Craig and Charlotte Rae were ordered to pay Wanda support for the care of the minor child and did so on a regular basis. Thus, it is uncontroverted that for at least three years Wanda was the sole financial support of the child.

Prior child support payments, including payment of all back child support, were given to the Charlotte Rae, who did not provide financial support for the child. None of this money was received by Wanda prior to her being named de facto custodian. Wanda testified that she has provided primary financial support for the child since 2000. The evidence supports her claim that she was the sole and primary financial supporter of the child. Swiss v. Cabinet for Families & Children, 43 S.W.3d 796, 798 (Ky.App. 2001). From the time the child was born until a child support order was entered on March 13, 2002, however, Craig made no child support payments at all. His fulfillment of the back child support debt at a later date shows that for a period of several years, neither he nor the Charlotte Rae was providing any financial support for the child. Late payment of back child support, to an individual not providing care to the child, cannot constitute being the primary financial support of the child.

Craig argues that there is no evidence in the record showing how much Wanda has spent caring for the child. He asserts that he is paying the statutorily required child support, and that this should prove that he was the primary financial support for the child. He does not controvert the factual showing that he paid no support whatsoever for the child between 1999 and 2002. It is clear from the record that Wanda was the only financial support for the child during this time. The child attends school, after school care, and summer daycare. We are mindful that food, shelter, clothing and daycare expenses for the child greatly exceed \$256.00 per month. Craig does not attempt to show this Court that the child support he pays provides for the majority of the child's financial needs. He has failed to prove that he pays the child's expenses or that he is the primary financial support of the child.

Craig argues that it was error for the trial court to award Wanda custody of the child, over the interests of the biological father. He contends that the trial court was required to prove him an unfit parent before finding the grandmother to be the best custodial choice. Where, as here, a third party is found to be the de facto custodian of the child, no showing of unfitness is required. Moore v. Asente, 110 S.W.3d 336, 359 (Ky. 2003).

Craig asserts that he maintained regular contact with the child, and has an ongoing relationship with him. The record shows that he had no contact with the child between 1999 and 2002. Craig contends that he could not locate the child during those years. Charlotte Rae placed the child with Wanda during this time, after she was diagnosed with cancer. The child remained in Wanda's home, a fixed and easily discoverable address, for a period of years. The child remained in the Commonwealth of Kentucky for this entire time. The record reflects that Craig made only limited attempts to locate the child, and made no attempt to request care and custody of the child during those years. Similarly, Craig made no attempt to provide financial support for the child during those years. He contends that he has had regular visitation with the child since 2002, when a child support order was entered. This visitation, while appropriate, cannot constitute full care and support of the child.

Mr. Tim Stockton, who has been providing counseling to the child since 2003, testified that the child had an adjustment disorder requiring stable, permanent surroundings. He testified that removing the child from the home of the maternal grandmother would cause him to regress. The social worker charged with the child's case testified that separation from his grandmother and his siblings in Kentucky would be detrimental to

his mental health and behavior. The child lives with his younger brother and his teenaged aunt in Wanda's home. The record and evidence before this Court support the findings of the Domestic Relations Commissioner and the rulings of the trial court. No reversible error is shown, and the trial court ruling must be affirmed. French v. Barnett, 43 S.W.3d 289, 292 (Ky.App. 2001).

Craig's claims that the fact that the Commissioner's report did not make specific findings as to KRS 403.270(2)(h) and (i) was error requiring reversal of the court's ruling. Wanda asserts that this omission was harmless error. This Court has previously held that specific findings as to each statutory subsection are not necessary where the court's opinion and related rulings show the statutory elements were considered. French v. Barnett, 43 S.W.3d 289, 291 (Ky.App. 2001). Craig claims that the statute providing for de facto custodians should not be applied in his case. The law finds the statute constitutional. Consalvi v. Cawood, 63 S.W.3d 195, 199 (Ky.App. 2001). The statute was created to provide stability and care for minor children. This Court has held that "the basic effect and most obvious intent of the statute is to give standing in a present custody matter to non-parents who have assumed a sufficiently parent-like role in the life of the child whose custody is being addressed." Sullivan v. Tucker, 29 S.W.3d 805,

807-808 (Ky.App. 2000). The statute was applied appropriately in the present case. Based on the foregoing, the Judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Matthew B. Dehart
Jamestown, Kentucky

BRIEF FOR APPELLEE:

Jesse M. Stockton, Jr.
Albany, Kentucky