

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000637-ME

RUBY STURGILL; and
RICKY STURGILL

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 02-CI-00131 & 02-CI-00165

LORIE STURGILL, A MINOR CHILD;
and MATTHEW RYAN BRYANT

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Ruby Sturgill and Ricky Sturgill appeal from an order entered by the Letcher Circuit Court finding that they are not de facto custodians of their deceased daughter's child, and awarding child custody to the child's father, appellee Matthew Bryant. For the reasons stated hereafter, we affirm.

Lorie Sturgill was born in Whitesburg in March 1999 to Bryant and appellant's daughter, Nadina Sturgill, who were never married. Nadina and Lorie lived in Kingsport, Tennessee until

October 2001, when they returned to Letcher County. Although Nadina and Lorie temporarily lived with appellants, Nadina obtained employment, enrolled Lorie in day care, and acquired separate housing prior to December 18, 2001, when Nadina died after suffering a severe asthmatic reaction to a household cleaner.

On December 26, 2001, the Letcher District Court granted appellants' motion seeking temporary emergency custody of Lorie. On March 28, 2002, appellants filed an action in the Letcher Circuit Court requesting both a determination of their status as Lorie's de facto custodians and an award of permanent custody. More specifically, appellants alleged that they had been the child's "primary financial supporters and primary caregivers . . . for a continuous period of not less than six months," and that the child had been placed with them "with the consent of the known natural parent." Bryant responded by seeking sole custody but requesting the court to award appellants grandparent visitation rights. On April 26, 2002, Bryant also filed a district court custody action which later was consolidated with the pending circuit court action. In response to Bryant's motion, appellants admitted that the child resided with Nadina in Kentucky and Tennessee from the time of her birth until Nadina's death.

After an investigation, hearings, and a report and recommendations from a domestic relations commissioner, the circuit court entered an order in March 2005 finding that appellants "do not meet the criteria as de facto custodians" of Lorie, that in the absence of any finding of unfitness Bryant was entitled to custody of Lorie, and that appellants were entitled to grandparent visitation rights. This appeal followed.

KRS 405.020(1) provides in part:

The father and mother shall have the joint custody, nurture, and education of their children who are under the age of eighteen (18). If either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture, and education of the children who are under the age of eighteen (18).

Notwithstanding those provisions, KRS 405.020(3) provides that

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)(a) in turn defines a de facto custodian as

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.

The determination of whether a person is a de facto custodian need not be addressed in a separate hearing so long as the issue is addressed as an initial step in the custody proceedings.¹ However, only after a party is found to be a de facto custodian may that party be given "the same standing in custody matters that is given to each parent[.]" Moreover, it is critical to note that

[t]he de facto custodian statute does not . . . intend that multiple persons be primary caregivers. The court's finding that he was "a primary caregiver" and "a financial supporter" is not sufficient to establish that he was indeed "the primary caregiver" within the meaning of the statute. It is not enough that a person provide for a child alongside the natural parent; the statute is clear that one must literally stand in the place of the natural parent to qualify as a de facto custodian.²

Here, the evidence clearly demonstrated and appellants admitted that Lorie resided with her mother from the time of her March 1999 birth until Nadina's untimely death on December 18,

¹ *French v. Barnett*, 43 S.W.3d 289, 291 (Ky.App. 2001).

² *Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky.App. 2001).

2001. Even though appellants undoubtedly assisted their daughter in caring for Lorie, there is nothing to suggest and appellants do not allege that, in place of Nadina, they were "the" primary caregivers for the child prior to Nadina's death. Further, even if we assume that Lorie resided with appellants after her mother's death, less than six months³ passed between Nadina's death and Bryant's April 2002 filing of a petition seeking custody. It is therefore clear as a matter of law that appellants did not satisfy the definition of de facto custodians because they were not "**the** primary caregiver[s] for, **and** financial supporter[s] of,"⁴ a child who had resided with them for at least six months prior to the filing of Bryant's petition for custody. Moreover, given the substantial evidence in the record to support the court's determination that Bryant was a fit parent, the court did not err by finding that Bryant had a superior right to custody of his child.⁵

The court's order is affirmed.

ALL CONCUR.

³ KRS 403.270(1)(a).

⁴ *Id.*

⁵ KRS 405.020(1).

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE MATTHEW
RYAN BRYANT:

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