

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000765-ME

JAMES D. ALLEN

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 98-CI-00082

ELZIE PRATER, SANDY PRATER,
AND CANDACE ALLEN

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, DYCHE AND MINTON, JUDGES.

DYCHE, JUDGE: James and Candace Allen were married on February 24, 1996, in Montgomery County. The marriage produced two minor children, J.A. and C.A. Candace filed a petition for dissolution of marriage on May 22, 1998, but the divorce was not finalized until October 28, 2003. In the meantime, Candace's parents, Elzie and Sandy Prater, were awarded temporary custody of the two children after a determination of neglect by Candace while James was away with the military.

After being discharged from military service on October 21, 1999, James did not seek custody of the children until July 18, 2003, when he made a motion for sole custody. The Praters were joined as parties to the case and moved the trial court to establish them as the children's *de facto* custodians. Following a hearing on August 25, 2003, the trial court found that the Praters qualified for *de facto* custodian status pursuant to KRS 403.270(1) and that they should retain custody.

James appealed, and this Court vacated the judgment and remanded the case to the trial court for a determination of whether the Praters were the primary financial caretakers of the children for more than one year. Upon remand, the trial court did find that the Praters were the primary financial caretakers and awarded joint custody to the Praters and James, while the Praters retained primary residential custody. James now appeals from that judgment.

James argues that KRS 403.270(1) is unconstitutional because the statute allows third parties to acquire equivalent standing and consideration to that of natural parents in a custody dispute without a determination of parental unfitness. As the appellees noted, the mandatory notice of a constitutional challenge was not provided to the Attorney General, so we will only consider the "as applied" challenge. CR 24.03.

Before the adoption of KRS 403.270(1), parents would prevail over third parties in custody determinations absent a showing of unfitness. Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002), cert. denied, 537 U.S. 1110 (2003). Generally, unfitness could be demonstrated by abuse, moral delinquency, abandonment, mental illness, and failure to provide essential care for reasons other than poverty alone. Id. (citations omitted). The requirements necessary to prove *de facto* custodian status "directly implicate" parental unfitness factors despite the fact that KRS 403.270 does not specifically require a showing of unfitness. Id.

Nevertheless, James argues that there was no implication of unfitness because he was awarded joint custody with the Prathers. While James is correct that there was no explicit finding of unfitness, the judgment of the trial court set forth an extensive listing of choices James made that constituted a failure to provide essential care for reasons other than poverty alone. The evidence showed that James made no effort to secure custody of the children for almost four years after his discharge from the military and that his omission was not completely due to financial hardship.

In fact, James remained in steady employment for over three years and had little financial obligation other than child support payments and gasoline for his automobile. James also

purchased a home and fathered another child before seeking custody of his other children. This lapse of time also increased the children's social and emotional ties to life with the Praters. Therefore, KRS 403.270(1), as applied to James, does not "significantly alter[] the preexisting law of custody determination in Kentucky" and is constitutional under these circumstances. Sherfey, supra.

Finally, James argues that the trial court did not appropriately consider the best interest factors enumerated in KRS 403.270(2). Upon review of the record, we find that the trial court thoroughly considered the factors and the court's findings were supported by substantial evidence.

Therefore, the judgment of Montgomery Circuit Court is affirmed.

ALL CONCUR.

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