

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001482-ME

EZRA LANHAM AND SHIRLEY LANHAM

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE GREGORY A. LAY, JUDGE  
ACTION NO. 04-CI-00445

EUGENE SANDERS; JOSEPHINE SANDERS;  
RHONDA RACHELLE MESSER; AND  
ROBIN STURDIVANT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DYCHE, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: This is an appeal from the trial court's determination that Eugene and Josephine Sanders were the de facto custodians of Rhonda Rachelle Messer. After the trial court determined that the Sanderses were Rhonda's de facto custodians, it then determined that they had not been shown to be unfit or to have relinquished their superior right to custody. The trial court awarded custody to the Sanderses. Because we conclude that the trial court's findings are

supported by substantial evidence and that the trial court correctly applied the law to the facts, we affirm.

Two couples, neither of whom is related to Rhonda, sought custody of her in their respective home counties. The first couple was Ezra and Shirley Lanham, who reside in Whitley County. They filed their petition for custody on September 20, 2004, after having been awarded temporary custody by the Whitley District Court on September 13, 2004. The second couple was Eugene and Josephine Sanders, who reside in Knox County. They filed their petition for custody on September 14, 2004.

Rhonda's date of birth is December 27, 2001. Her biological parents are Robin Sturdivant and David Messer. They were never married. David Messer is now deceased, and Robin is not seeking custody. Throughout the underlying proceedings, Robin and David made their wishes known that they wanted Rhonda to be with the Sanderses.

At birth, Rhonda tested positive for controlled substances. Consequently, custody of Rhonda was awarded to the Commonwealth of Kentucky, Cabinet for Families and Children. At the time, the Sanderses were state-certified foster parents.

When Rhonda was three days old, the Cabinet placed her with the Sanderses. Rhonda remained with the Sanderses until March of 2002, at which time the Cabinet returned her to her parents, Robin and David. Robin and David allowed the Sanderses

to visit Rhonda frequently. Then in November of 2002, Robin and David asked the Sanderses to take Rhonda again to live with them. The Sanderses did take Rhonda, but this time the Cabinet was not involved. In June of 2003, upon petition of the Sanderses, the Knox District Court granted limited guardianship for medical and educational purposes to the Sanderses.

The Sanderses have a large family. Their children are grown, and they occasionally helped the Sanderses with Rhonda's care by keeping her overnight. The Sanderses also maintained a relationship with their former son-in-law, Ezra Lanham, and his wife, Shirley. The Lanhams kept Rhonda on occasion for overnight visits.

In late April of 2004, Josephine Sanders's brother and sister died within three days of one another. The Sanderses asked the Lanhams if they could keep Rhonda while they attended the funerals and assisted Josephine's family. The Lanhams agreed to help and cared for Rhonda for a little over two weeks after the deaths.

After that two-week period in late April and early May of 2004, the Lanhams called the Sanderses frequently and asked if Rhonda could come and stay with them for a couple of days. The Sanderses typically allowed Rhonda to go. On September 11, 2004, the Lanhams picked up Rhonda for what was supposed to be a three-day visit; however, they refused to return her to the

Sanderses. In the week or two that followed, both families filed petitions for custody of Rhonda in their respective counties. During the pendency of the custody determination, Rhonda resided with the Lanhams and the Sanderses were allowed visitation.

By agreement of the parties, the custody actions in Whitley and Knox counties were consolidated in the Knox Circuit Court. After a number of hearings before a domestic relations commissioner (DRC), the DRC found that the Sanderses had shown by clear and convincing evidence that they had been the primary caregivers for and financial supporters of Rhonda for a period of six months or more. Thus, the DRC found that the Sanderses were Rhonda's de facto custodians. In addition, the DRC held that the Lanhams had not shown that Eugene and/or Josephine Sanders were unfit or had relinquished their superior right to custody. The DRC recommended that custody be awarded to the Sanderses and granted liberal visitation to the Lanhams.

The DRC filed a report of her findings, conclusions of law and judgment, and the Lanhams filed exceptions to that report, one of which was that the DRC used the wrong standard for determining custody. The Lanhams believed that the DRC should have applied the best interests of the child standard rather than the unfitness standard.

The trial court found no error in the DRC's findings, conclusions and recommendations. Accordingly, it overruled the Lanhams' exceptions, and confirmed and accepted the report and recommendation of the DRC. The Lanhams appealed.

In this appeal, the Lanhams first argue that KRS 405.020 mandates the best interests of the child standard in this case. Second, they assert that Rhonda has a constitutional right to the pursuit of happiness. Third, they argue that KRS 403.270 only applies to disputes involving the parents. Finally, the Lanhams argue that the Sanderses did not prove that they were de facto custodians by clear and convincing evidence because the evidence established that (1) the Lanhams provided at least half of Rhonda's care; (2) Rhonda called the Lanhams "Mommy and Daddy"; (3) she referred to her room at the Lanham's house as "my room;" and (4) the Lanhams had taken pictures of Rhonda at their home on 17 different days during February and September of 2004.

The issues presented in this appeal were recently addressed by this Court in Allen v. Devine, 178 S.W.3d 517 (Ky. App. 2005) (discretionary review denied by Kentucky Supreme Court December 14, 2005). In Allen, as in this case, the biological parents had voluntarily placed their infant children with non-relatives, the Allens. The mother's father and step-mother, the Devines, filed a petition for immediate and

permanent custody of the children. The Allens filed a response to the motion in which they requested that the Devines's motion be dismissed for lack of standing, or, in the alternative, that they be awarded custody of the children as their de facto custodians. After a number of evidentiary hearings, the trial court found that the biological parents had knowingly and voluntarily delegated the custody and control of their children to the Allens for nearly a year and a half, therefore they had lost their superior right to custody. Despite its finding that the Allens were the de facto custodians, the trial court concluded that it was in the best interests of the children that permanent custody be awarded to the Devines. The Allens appealed.

Upon review, this Court concluded that the trial court erred when it found the Allens to be de facto custodians, but failed to give them equal consideration as required under KRS 403.270(2) when applying the best interests standard. See id. at 522-523. This Court held that the trial court should have given the biological parents and the Allens -- the de facto custodians -- equal consideration, "and only upon finding that all of them were unfit to have custody of the children or that all of them had relinquished their superior parental or de facto custodial rights should it have considered the Devines or anyone else as custodians of the children." Id. at 523.

This Court reviewed the trial court's finding that the Allens were de facto custodians, and determined that it was supported by substantial evidence. See id. at 527. With that being established, this Court vacated the trial court's order and remanded the case to the trial court for a determination as to whether the Allens were unfit or had relinquished their superior right to custody. See id. If neither of those applied, then this Court instructed that the Allens must be awarded custody of the children since the trial court had already found that the biological parents had relinquished their superior right to custody. See id.

Guided by the Allen decision, we turn to the facts of this case. It is not contended that Robin Sturdivant, Rhonda's remaining biological parent, has not relinquished her superior right to custody. Indeed, she gave her written consent in the underlying proceedings to the Sanderses having permanent custody of Rhonda. So we begin our analysis with whether the trial court's determination that the Sanderses had established -- by clear and convincing evidence -- that they were Rhonda's de facto custodians is supported by substantial evidence. See id. at 524. The trial court found as follows:

- (1) Rhonda Rachelle Messer, a female child, was born on the 27<sup>th</sup> day of December, 2001.

- (2) Respondents, David Messer and Robin Sturdivant, are the parents of Rhonda Rachelle Messer.
- (3) Petitioners, Eugene Sanders and Josephine Sanders, acting pursuant to a placement made by the Commonwealth of Kentucky, Cabinet for Families and Children, took Rhonda Rachelle Messer home from the hospital when the child was two days old.
- (4) Rhonda Rachelle Messer remained in the home of Eugene and Josephine Sanders until March of 2002.
- (5) After the custody of Rhonda Rachelle Messer was returned to her parents, David Messer and Robin Sturdivant, they voluntarily placed her in the home of Eugene and Josephine Sanders.
- (6) By order entered in case number 03-P-00114 in the Knox District Court on the 24<sup>th</sup> day of June, 2003, Eugene and Josephine Sanders were appointed Guardians for Rhonda Rachelle Messer.
- (7) In April of 2004, Josephine Sanders had a sister and a brother to die within a few days of each other.
- (8) While mourning the death of her siblings, Josephine Sanders permitted Rhonda Rachelle Messer to spend approximately two weeks in the home of the Respondents, Ezra and Shirley Lanham.
- (9) At various times between April, 2004 and September of 2004, Rhonda Rachelle Messer visited for short periods of time in the Lanham home.
- (10) On the 11<sup>th</sup> day of September, 2004, Rhonda Rachelle Messer was picked up at the Sanders home for a visit with the Lanhams and with the understanding that she would be returned to the Sanders residence on Tuesday the 14<sup>th</sup> day of September, 2004.
- (11) On the 14<sup>th</sup> day of September, 2004 instead of returning Rhonda Rachelle to the Sanders home, the Lanhams filed a Petition for Emergency Custody of

Rhonda Rachelle and secured a Temporary Custody Order from the Whitely District Court.

- (12) On the issue of defacto guardianship the Court heard testimony from several employees of the Commonwealth of Kentucky, Cabinet for Families and Children, to wit; Kim Noel, Kay Middleton, Rhonda Clouse, Violet Owens, Carol McQueen, Tina Brown and Jamie Rose, and Bill Swafford, a school bus driver and director of pupil personnel with the Knox County Board of Education.
- (13) All witnesses called on behalf of Eugene and Josephine Sanders in support of their claim of defacto [sic] guardianship testified that they were acquainted with Rhonda Rachelle Messer and had, on several occasions between February, 2004 and September, 2004 been in the Sanders home and seen Rhonda Rachelle Messer present.
- (14) Eugene and Josephine Sanders had been the primary caregivers for, and financial support of, Rhonda Rachelle Messer who has resided with them for a period of time in excess of twelve months immediately prior to the filing of the Petition herein in September of 2004.
- (15) There has been no showing that Eugene and/or Josephine Sanders are unfit or have relinquished their superior right to custody of Rhonda Rachelle Messer.

Having read the depositions and reviewed the evidentiary hearings in their entirety, we conclude that the trial court's findings as to de facto custodianship and the Sanderses' fitness and superior right to custody are supported by substantial evidence. Once the trial court made those

determinations, then its custody award of Rhonda to the Sanderses was proper.

The judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

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