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(2007-SC-0450-DE)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000841-ME

ED ALLEN AND WIFE,
JUDY ALLEN — APPELLANTS

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 03-CI-00184

DANNY DEVINE AND WIFE,
LISA DEVINE; KRYSTAL VAN CLEAVE;
JASON VAN CLEAVE; KEVIN HIGHTOWER;
BURT WILKINSON; AND JACKIE SANDERS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,[1] SENIOR JUDGE.

NICKELL, JUDGE: Ed Allen and his wife, Judy Allen, bring this appeal from the April 11, 2006, order of the Logan Circuit Court finding they waived their superior right to

[1] Senior Judge Lewis G. Paisley 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.

permanent custody of two minor children as de facto custodians and awarding permanent custody of said children to the maternal grandfather and step-grandmother, Danny Devine and his wife, Lisa Devine. We affirm.

This appeal is our second review of this matter.[2] In *Allen v. Devine*, 178 S.W.3d 517 (Ky.App. 2005), a panel of this Court affirmed the trial court's finding that the Allens were de facto custodians, but remanded the matter to the Logan Circuit Court with directions that custody be determined in accordance with Kentucky Revised Statutes (KRS) 403.270 stating in the opinion:

> On remand, the trial court will need to determine whether the Allens are unfit or whether they relinquished their superior right to custody. If neither of these applies, then the Allens must be awarded custody of [the two minor children] since [the parents] were found to have relinquished their superior right to custody in the orders entered on September 8, 2003, and February 17, 2004, and they did not appeal those orders.

At the request of the Allens, the trial court heard additional testimony and argument of counsel beginning on March 31, 2006, and continuing on April 11, 2006. While the Devines presented extensive testimony in an attempt to show the Allens to be unfit, the trial court did not make such a ruling and focused instead on whether the Allens had waived their superior right to custody as de facto custodians. The trial court found the Allens had in fact relinquished their superior right to custody in 2003 and proceeded to find that permanent custody of the children should remain with the Devines based

[2] Krystal Van Cleave, Jason Van Cleave, Kevin Hightower, Burt Wilkinson and Jackie Sanders are listed as Appellees in the style of this case. They are the biological parents of the two children whose custody is being determined, as well as the paternal grandmother of one of the children. The rights of these individuals have already been determined or are not at issue in this appeal.

upon the best interests of the children after considering all the relevant facts. In reaching its decision, the trial court also considered extensive testimony elicited during the original custody trial held on August 21, 2003, August 26, 2003, and August 28, 2003.

The Supreme Court of Kentucky set forth the applicable standard of review for appellate courts in another custody case, *Moore v. Asente*, 110 S.W.3d 336, 353-4 (Ky. 2003). There it held a reviewing court may set aside a trial court's findings only if those findings are clearly erroneous, i.e., those findings are not supported by substantial evidence. The Supreme Court further held:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. [footnotes omitted].

Id. at 354. The sole issue raised by the Allens in this appeal is whether the trial court properly found they relinquished their superior right to permanent custody as de facto custodians. The Allens claim the trial court abused its discretion in reaching such a conclusion. KRS 403.270 entitles the Allens, as de facto custodians, to be considered as potential custodians and to receive the same consideration afforded parents unless they

are deemed unfit or there is proof they waived their superior right to custody. *Moore*, 110 S.W.3d at 359.

To be proven unfit requires clear and convincing evidence the parent or de facto custodian "has engaged in conduct similar to activity that could result in the termination of parental rights by the state." *Moore*, *supra*, at 360. Though the Devines attempted to prove the Allens unfit to serve as custodians, the trial court, having considered the totality of the evidence presented, made no such finding, and, its conclusion having been based on substantial evidence, we find no error and affirm its decision.

Since the Allens were not found to be unfit, we turn now to the question of whether the Allens waived their superior right to custody. "Waiver requires proof of a 'knowing and voluntary surrender or relinquishment of a known right.'" However, waiver may be implied "by a party's decisive, unequivocal conduct reasonably inferring the intent to waive," as long as "statements and supporting circumstances [are] equivalent to an express waiver." [footnotes omitted]. *Moore*, *supra*, at 360. Whether a de facto custodian has waived the superior right to custody depends upon the facts of each case and requires consideration of all relevant factors. *Moore*, *supra*, at 361.

In finding the Allens relinquished their superior right to permanent custody as de facto custodians, the trial court's order, dated April 11, 2006, scrutinized their testimony during both the 2003 trial and the 2006 hearing. In 2003 Ed Allen admitted his

desire for the parents to remain central in the lives of the children. Specifically, he testified:

> Question: Do you have any intention of keeping the kids permanently?
>
> Answer: No.
>
> Question: As soon as, or if it has already occurred, Krystal and Kevin [the parents] are able to take care of the kids you are going to give them back, is that right?
>
> Answer: That is the plan, yeah. . . .

He further testified:

> Question: Okay… you're asking the Court to declare you and your wife as de facto custodians, so you are seeking permanent custody of these two children?
>
> Answer: Well, I think what we are asking the Court to do is not take away the parent's rights and to leave things sort of status quo. Now if the Court sees fit to take away those parental rights then we feel at this point in time that the children would be better in our home than it would be in a different home.
>
> Question: So that would be permanent custody?
>
> Answer: So that would be permanent custody, yeah.

Judy Allen testified in 2003 that it was always their intention that the children go back to live with their biological mother. She asked for "permanent" custody "for right now," but indicated her desire to return the children to their mother in the future, even if significant time elapsed prior to the mother becoming fit for such

responsibility. She acknowledged the mother had never been willing or able to care for the children at any point during the Allen's association with the mother. Judy Allen had even struck deals with the children's mother in an attempt to encourage her to become more responsible for their well-being and to move forward with her life. These deals were both verbal and written, and included agreements for the mother to get a job, go to school, and obtain a suitable residence for the children.

The temporary nature of the Allen's commitment to custody of the children was evidenced by the terms of these agreements. One such written agreement, dated January 9, 2003, specifically said the Allens were to have temporary custody of the children until the mother could "provide a secure and stable home." Another written agreement, dated February 14, 2003, said the mother and father transferred "all custody to Ed and Judy Allen temporarily in anticipation of [the mother] completing school with a degree or diploma" and acquiring "the capabilities to take care of" the children, at which time "Solitary Custody" was to be restored to the mother.

In short, the 2003 trial clearly indicated the Allen's desire for the trial court to maintain the status quo and not terminate the parental rights of the biological mother and father. The Allens wanted the trial court to award custody to them only if the trial court elected to terminate such parental rights, but in that event, it was their intent that such custody would be only temporary with the children being returned to the parents if and when they could get their lives together.

During the lengthy trial in 2003, the Allens never evinced a desire for permanent custody of the children even though the trial court made no secret of its goal of permanent placement. At a bench conference that transpired a short time into Judy Allen's testimony, the trial court indicated to counsel it would not consider granting custody of the children to anyone who did not fully intend to keep them permanently, particularly in light of evidence that the children had never had a stable home, needed a stable home, and did not need to be uprooted again and again.[3] Even so, Ed Allen never refuted or recanted his 2003 testimony and Judy Allen's testimony supported her husband's statements concerning their intent.

The Allen's testimony during the 2006 hearing was similarly equivocal in regard to their intent to assert any superior right to permanent custody of the children. During the 2006 hearing, Ed Allen reaffirmed his 2003 testimony. He again stated that in 2003 the Allens wanted the court to maintain the "status quo" by not disturbing the parental rights to custody, thereby simply allowing the Allens to continue making deals with the parents for the living arrangements of the children until the parents became capable of taking responsibility for the children. He admitted the Allens asked for custody of the children in 2003 only if the trial court determined the parents unfit and terminated their custodial rights. But even if the trial court had awarded the Allens custody, Ed Allen reiterated it was still their intention to return custody to the parents if the parents ever became emotionally and financially capable of caring for the children. In

[3]We note that the trial court's quest for a permanent placement for these children is a laudable goal in determining custody but it is not a requirement.

his 2006 testimony, Ed Allen further stated he would now adopt the children if given the opportunity, and expressed his belief that the children would be better off in the Allen home rather than being with their maternal grandfather and step-grandmother, even though he admittedly could not say which living arrangement would be best for the children at the present time because he had not seen them in two years. He also expressed doubt that the parents would ever mature and gain sufficient emotional or financial capabilities to resume responsibility for the children.

During the 2006 hearing, Judy Allen also reiterated her 2003 testimony. She said it had been her intention to convince the children's mother to seek assistance for her problems and to return the children to the mother when she was capable of caring for them. She admitted it might take some time for the mother to reach an acceptable level of fitness to care for the children, but believed it was possible. She further admitted on cross-examination that the Allens had sought custody only "for right now," and that they had hoped to return the children to the mother in the future. When asked by the trial court whether she and her husband were truthful when they testified about their custody desires in 2003, Judy Allen said they had been truthful in their 2003 testimony, including her admission that if awarded custody she would return the children to the mother even after the passage of two years. If the Allen's 2003 testimony was truthful, it is clearly contrary to their 2006 statements regarding their current desire to adopt the children and raise them as their own.

As stated in *Moore*, 110 S.W.3d at 353-4, great deference is given to the trial court in evaluating witness credibility. While there may have been some conflicting testimony, we find there was clear and convincing evidence of a substantial nature upon which the trial court could, and did, find the Allens waived their superior right to custody as de facto custodians. We therefore find the trial court committed no error and affirm its conclusion.

The Allens rely heavily upon *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004) in claiming they never waived their superior right to custody. We find *Vinson* to be factually distinct and therefore not controlling. The Vinsons, maternal grandparents, asked the trial court to find their daughter unfit to be a parent and to give custody of their granddaughter to them. The child's father, Sorrell, was not named in the original action. However, Sorrell was allowed to intervene and he moved the trial court to grant him visitation and custody. The Vinsons responded by alleging Sorrell was also an unfit parent. The trial court adopted the report of the Domestic Relations Commissioner (DRC) in full and found that custody should be awarded to the Vinsons because Sorrell had only limited contact with his daughter for six years and had therefore waived his superior right to custody. The DRC's report also noted the child was already living with the grandparents, she was now in a stable home and it was in her best interests to remain with the Vinsons.

The Kentucky Court of Appeals disagreed, finding proof of infrequent visits was not clear and convincing evidence of waiver, and remanded the case to the trial court

for further proceedings including granting custody of the child to Sorrell. The Supreme Court of Kentucky granted discretionary review and affirmed the Court of Appeals opinion, noting Sorrell's contact with his daughter was not limited to just three or four visits a year between 1996 and 2001. Sorrell tried to visit his daughter more often but the Vinsons and the child's mother made it difficult for him to do so. He also paid child support without a court order for about four years, and had a motion for visitation pending when the Vinsons filed for custody. Sorrell's actions clearly demonstrated his desire to develop a relationship with and provide for his daughter which was wholly inconsistent with the trial court's finding that Sorrell waived his superior right of custody. Thus, the Court of Appeals had rightly reversed and remanded the case to the trial court for further proceedings including granting custody of the child to Sorrell.

The situation sub judice is clearly distinguishable from that found in *Vinson*. Throughout the present litigation, the Allens have maintained they wanted at most temporary custody of the children. Their goal was to keep the children in a holding pattern until the biological mother could care for them herself. Again, based upon a review of all the evidence elicited at the 2003 custody trial and at the hearing on remand in 2006, we cannot say the trial court was clearly erroneous in finding the Allens relinquished their superior right to custody. To the contrary, we find the trial court's April 11, 2006, order was supported by substantial evidence that the Allens did not intend to assert or exercise any right to permanent custody of the children, and we affirm its decision.

Finally, counsel for the Devines has referred to her clients as de facto custodians. We disagree with such a characterization. While the Devines have had permanent custody of the children since 2004, the children are with them only because of the trial court's orders giving them temporary custody in 2003 and then permanent custody in February, 2004. To qualify for de facto custodian status, a person must clearly and convincingly prove he was the "primary caregiver for, and financial supporter of" the child for whom he seeks de facto custodian status for a specified period of time (a minimum of six months or one year depending upon the child's age). KRS 403.270(1). However, KRS 403.270(1)(a) expressly directs, "[a]ny 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." Thus, while the Devines have cared for and supported the children for well over a year, none of that time counts toward establishing them as de facto custodians since it occurred pursuant to a court order. Therefore, the Devines cannot qualify as de facto custodians and it is improper to characterize them as such. Moreover, had we concluded the trial court abused its discretion in finding the Allens waived their superior right to custody, the Devines should not be permitted to benefit by characterizing themselves as de facto custodians pursuant to the requirements of KRS 403.270, and thereby allow them to assert a superior right of custody simply because of the trial court's error in awarding them custody in 2003.

For the foregoing reasons, the February 11, 2006 order of the Logan Circuit Court is affirmed.

PAISLEY, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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