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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000083-ME

B.F. APPELLANT

V.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE KEVIN L. GARVEY, JUDGE
CIVIL ACTION NO. 03-CI-503456

T.D. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.[1]

MINTON, JUDGE: B.F.[2] brings this appeal from the denial of her petition for de facto custodian status of a minor child, M.D. The family court concluded that B.F., as the child's primary financial supporter, was not the child's primary caregiver and,

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Because this is a child custody case, the parties will be identified by their initials.

therefore, did not meet the statutory definition of de facto custodian. The court also ruled that B.F. did not have standing to pursue custody of M.D. under KRS[3] 403.420. Finding no error, we affirm.

FACTUAL SUMMARY

In 1995, B.F. and T.D., both women, became involved in a committed relationship. Within weeks of meeting, T.D. moved into B.F.'s home in Indiana. They eventually bought and occupied a home together in Louisville.

After living together for some time, B.F. and T.D. decided they wanted to raise a child together. T.D.'s attempts at becoming pregnant, via artificial insemination, were not successful. So, in 1997, B.F. and T.D. decided to adopt a child. T.D., who was a social worker, found out that a client wished to give her child up for adoption. B.F. and T.D. arranged to adopt this child; and, on July 15, 1997, they brought a daughter, M.D., into their home.

Because Kentucky law does not permit joint adoption by same-sex couples, T.D., alone, adopted M.D. There is no question that upon M.D.'s adoption, T.D. became M.D.'s sole "natural parent."[4] But B.F. and T.D. both raised this child.

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[3] Kentucky Revised Statutes.

[4] *See*, KRS 199.520(2):

Both women contributed to M.D.'s financial, emotional, and physical care. The record reveals that B.F. provided the majority of the financial support for M.D., while T.D. was more involved with M.D.'s daily activities, such as school,[5] extracurricular interests, and doctor's visits. Although B.F. testified that she and T.D. discussed drafting an agreement granting B.F. custodial rights to M.D., no such agreement was ever written. T.D. did prepare a will naming B.F. as M.D.'s guardian; however, the will was later revoked, and T.D.'s new will was drafted without the guardianship provision.

After raising M.D. together for six years, the relationship between B.F. and T.D. dissolved bitterly. On July 17, 2003, T.D. left the home, taking M.D. with her. Upon leaving the home, T.D. refused to allow B.F. to have contact with M.D.

PROCEDURAL HISTORY

B.F. filed a petition in the family court seeking joint custody and visitation of M.D. She also filed a motion

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> Upon entry of the judgment of adoption, from and after the date of the filing of the petition, the child shall be deemed the child of petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting it the same as if born of their bodies.

[5] A copy of M.D.'s school roster indicates that T.D. was listed as the child's only parent.

for temporary visitation. Within a few days, the family court granted B.F. temporary, supervised visitation with M.D. At that time, the court also scheduled a hearing solely on the issue of whether B.F. qualified as a de facto custodian. Although counsel for B.F. requested a significant amount of time for the hearing, the court limited the hearing to two hours. Each side was given one hour in which to present a case for or against B.F.'s de facto custodian status.

Both sides presented testimony at the hearing. At the conclusion of the hearing, the court ruled that although B.F. established she was the primary financial supporter of M.D., she had failed to prove she was the primary caregiver. Therefore, the court concluded that B.F. had not met the statutory requirements for de facto custodian status.

One week later, B.F. filed a motion to alter, amend, or vacate this order. The court denied the motion, stating that its ruling was consistent with this Court's opinion in Consalvi v. Cawood.[6] This appeal follows.

B.F. brings three arguments: first, that the family court abused its discretion in limiting the de facto custodian hearing to two hours and refusing counsel's request for cross-examination; second, that the court erroneously found that B.F.

[6] 63 S.W.3d 195 (Ky.App. 2001).

did not satisfy the definition of de facto custodian and did not have standing to pursue custody; and, third, that the court erred by dismissing the action without allowing B.F. to present evidence of her custodial standing under several common law doctrines. On all three points, we disagree.

TIME ALLOTTED FOR HEARING AND RIGHT TO CROSS-EXAMINATION

B.F. first contends that the family court abused its discretion by limiting the de facto custodian hearing to two hours. She also claims her rights of due process and confrontation were violated by the court's refusal to allow her to cross-examine T.D.

It is within the sole discretion of the trial judge to decide how much time should be allotted for arguments.[7] In determining the proper amount of court time to be devoted to a matter, "the importance of the case, the legal questions involved . . . [and] the extent and character of the testimony, are all elements that must be considered."[8]

In setting the time for the de facto custodian hearing, the trial judge decided that two hours would be a sufficient amount of time in which to hear the de facto custodian matter. The judge noted that because the hearing was

[7] Asher v. Golden, 244 Ky. 56, 50 S.W.2d 3 (Ky. 1932); *see also*, Reed v. Craig, 244 S.W.2d 733 (Ky. 1951).

[8] Asher, *supra*, 50 S.W.2d at 4.

limited solely to the issue of B.F.'s de facto custodian status, the parties did not require a substantial amount of court time in which to present their evidence. This decision does not constitute an abuse of discretion. KRS 403.270 outlines the limited elements that must be proved in order to establish de facto custodianship. And the time allowed by the judge was sufficient for each party to present testimony to either establish or refute those elements.

B.F. also claims that she was denied her right to cross-examine opposing witnesses. Because the parties were limited to one hour each to present testimony, B.F. argues that the time set for the hearing expired before she could confront T.D. She claims the judge's refusal of her request for cross-examination violated her rights under the Sixth and Fourteenth Amendments of the United States Constitution, Sections Two and Eleven of the Kentucky Constitution, KRE[9] 611, and CR[10] 43.

We recognize that "the right of cross-examination is a substantial and vital one."[11] But we also recognize that "the trial court is vested with a sound judicial discretion as to the

[9] Kentucky Rules of Evidence.

[10] Kentucky Rules of Civil Procedure.

[11] Commonwealth, Dept. of Highways v. Smith, 390 S.W.2d 194, 195 (Ky. 1965).

scope and duration of cross-examination."[12] A court's discretion with regard to the scope of cross-examination may only be reversed "in cases of clear abuse of such discretion, resulting in manifest prejudice to the complaining party . . . ."[13] This Court will "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."[14]

Our review of the hearings confirms that the trial court's decision in this case did not result in injustice to either side. Although B.F. was precluded from cross-examination, this action was not prejudicial, nor did it violate B.F.'s constitutional rights. B.F. is correct in asserting that both the United States and Kentucky constitutions provide for a right to confrontation; however, that right is only guaranteed in criminal cases.[15] Moreover, CR 43 does not mention the right to cross-examination; and KRE 611 only states that a party "may be cross-examined." Therefore, we do not believe B.F.'s inability to cross-examine her opposing witnesses affected her

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[12] *Id.*

[13] *Id*.

[14] CR 61.01.

[15] U.S. CONST., amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"); *see also*, Ky. Const., sec. 11 ("In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face . . . .")

substantial rights, or resulted in manifest prejudice to either party.

The court acted within its discretion by limiting the de facto custodian hearing to two hours and precluding B.F. from cross-examination after that time had expired. We do not believe either of these decisions constitutes an abuse of that discretion. So we affirm.

B.F.'s DE FACTO CUSTODIAN STATUS AND STANDING TO PURSUE CUSTODY

B.F.'s second argument is that the trial court erred in finding that she did not qualify as the de facto custodian of M.D. In support of this contention, B.F. points to specific evidence in the record that she believes proves she was M.D.'s primary caregiver.

KRS 403.270 defines the requirements that are necessary to establish an individual as a de facto custodian. The statute reads:

> "[D]e facto custodian" means 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 . . . .[16]

[16] KRS 403.270(1)(a) (emphasis added).

In Consalvi v. Cawood,[17] this Court interpreted the KRS 403.270 definition of de facto custodian. The facts of Consalvi are, admittedly, highly unusual. However, we believe the holding is applicable to the current case.

Chris Cawood and Scarlett Consalvi were involved in an on-again, off-again relationship. They were married for a brief period, divorced, and then reunited again for a few years. During the time they were involved, Consalvi gave birth to two children, T.C. and S.C.[18] Although Consalvi claimed Cawood knew he was not the father of either child, Cawood argued that Consalvi led him to believe that he was. After the parties finally separated, a paternity test revealed that Cawood was not the father of either T.C. or S.C.[19]

Lacking this biological relationship, Cawood, nonetheless, filed a petition for de facto custodianship of the two children. The trial court found that Cawood had established a relationship with the children and determined that it would be in the children's best interest to permit joint custody between Cawood and Consalvi. The court held that Cawood was a de facto

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[17] *Supra*.

[18] *Id.* at 196.

[19] *Id.*

custodian under KRS 403.270 "and thus had the same standing as a natural parent."[20]

On appeal, this Court reversed the trial court's decision. We held:

> We are bound by the plain language of the statute, and words not defined must be given their ordinary meanings. In this case, it is clear that the statute is intended to protect someone who is the primary provider for a minor child in the stead of a natural parent; if the parent is not the primary caregiver, then someone else must be. The 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. To hold otherwise would serve to expand a narrowly drawn statute intended to protect grandparents and other persons who take care of a child in the absence of a parent into a broad sweeping statute placing all stepparents on an equal footing with natural parents.[21]

Our reasoning in Consalvi controls the outcome of the present case. It is clear from the record that both B.F. and T.D. raised M.D. for the first six years of her life. It is also evident, as the court found, that B.F. was the primary

[20] *Id.* at 197.

[21] *Id.* at 198 (emphasis in original).

financial supporter of M.D. However, we believe the evidence overwhelmingly indicates that T.D. was M.D.'s primary caregiver. Although it is undeniable that B.F. served as **a** caregiver for M.D., Consalvi plainly holds that to qualify as a de facto custodian, an individual must be **the** primary caregiver for a child. The court properly found that B.F. did not meet this standard. Therefore, since B.F. did not satisfy the elements required by KRS 403.270, she does not qualify as the de facto custodian for M.D.

B.F. also argues that the court improperly held that she did not have standing to pursue custody. The court determined that because B.F. was not M.D.'s de facto custodian and because she failed to satisfy the elements of KRS 403.420, she was without standing to petition for the custody of M.D. We agree with this assessment.

KRS 403.420(4)(b) and (c)[22] state that a child custody proceeding may be commenced in circuit court by a nonparent by filing a petition for custody, but only if the child is not in

[22] We recognize that the entirety of the former Uniform Child Custody Jurisdiction and Enforcement Act (UCCJA), including KRS 403.420, was repealed in July 2004. The UCCJA is now embodied in KRS 403.800 – 403.880. However, the transitional provision, KRS 403.878(1) states: "A motion or other request for relief made in a child custody proceeding . . . which was commenced before July 13, 2004, is governed by the law in effect at the time the motion or other request was made." B.F.'s original petition for custody was filed in September 2003. Therefore, although KRS 403.420 has since been repealed, it, nonetheless, controls in this case.

the physical custody of one of his parents; or by a de facto custodian of the child. In Moore v. Asente, this Court held that "'custody contests between a parent and a nonparent who does not fall within the statutory rule on 'de facto' custodians are determined under a standard requiring the nonparent to prove that the case falls within one of two exceptions to parental entitlement to custody.'"[23] Those two exceptions are first, "if the parent is shown to be 'unfit' by clear and convincing evidence[;]"[24] and, second, "if the parent has waived his or her superior right to custody."[25]

Because B.F. did not legally adopt M.D., she is a "nonparent" insofar as custody determinations are concerned. At no point during the proceedings did B.F. allege that M.D. was not in T.D.'s physical custody, that T.D. was an unfit parent, or that T.D. waived custody. Therefore, B.F. may not file a custody petition as a nonparent under KRS 403.420; and because B.F. is not a de facto custodian and does not qualify for custody under KRS 403.420, she does not have standing to seek custody of M.D.

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[23] 110 S.W.3d 336, 359 (Ky. 2003), *quoting*, 16 L. Graham & J. Keller, Kentucky Practice, Domestic Relations Law 21.26 (2nd ed. West Group 2003) (Pocket Part).

[24] Moore, *supra*, at 359.

[25] *Id.*

On a final note, B.F. contends that this case involves a matter of first impression in Kentucky because it involves the adjudication of custody rights of former same-sex partners. Although we recognize the difficulty that same-sex couples have with regard to issues such as child adoption and custody, we do not believe the outcome of this case is in any way predicated on the sexual orientation of the parties. B.F. points to case law from other jurisdictions that provides same-sex couples with "de facto parent" status when custody is at issue;[26] she argues that the same status should be afforded to same-sex couples in Kentucky. But B.F. fails to recognize that Kentucky's definition of "de facto custodian" is statutory, whereas other jurisdictions recognize the concept under the common law. Regardless of whether B.F. and T.D. were involved in a homosexual or a heterosexual relationship, the fact remains that B.F. did not meet the definition of de facto custodian; and she has not satisfied the necessary elements to pursue custody under KRS 403.420. Therefore, although we empathize with B.F.'s predicament, we are statutorily precluded from providing her

[26] *See*, E.N.O. v. L.M.M., 429 Mass. 824, 829, 711 N.E.2d 886, 891 (1999) (holding that "[a] child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent. A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family."); C.E.W. v. D.E.W., 845 A.2d 1146, 1148 (Me. 2004) (non-biological, same-sex parent had "functioned as the child's de facto parent throughout his life" and, therefore, was eligible for parental rights and responsibilities).

with any relief. So we affirm the decision of the Jefferson Family Court.

COMMON LAW RIGHTS TO CUSTODY/VISTATION

B.F.'s third argument is that she should have been given custody and/or visitation rights under the doctrines of *in loco parentis*, waiver and estoppel, equitable powers of the court, or exceptional circumstances.

We recognize that courts in other jurisdictions have applied these doctrines to provide relief for nonparents seeking custody.[27] And we note that the Kentucky Supreme Court has employed the doctrine of *in loco parentis* to allow visitation rights to nonparents.[28]

But it is clear from the record that B.F. failed to raise these issues before the family court. It is well settled that "a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court."[29] Because B.F. did not preserve these issues by a ruling

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[27] *See*, J.A.L. v. E.P.H., 453 Pa.Super. 78, 682 A.2d 1314 (1996) (common law doctrine of *in loco parentis* provided a non-biological parent in a same-sex relationship standing to pursue custody and visitation); T.B. v. L.R.M., 567 Pa. 222, 786 A.2d 913 (2001) (*in loco parentis* status imparts standing upon a third party seeking custody); V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539 (2000) (court granted visitation rights to non-biological, same-sex parent based upon the notion of the "psychological parent").

[28] *See*, Simpson v. Simpson, 586 S.W.2d 33 (Ky. 1979).

[29] Combs v. Knott County Fiscal Court, 141 S.W.2d 859, 860 (Ky. 1940).

in the court below, we decline to address the merits of this argument on appeal.

CONCLUSION

In sum, B.F. does not satisfy the statutory definition of de facto custodian; and because she has neither alleged, nor proved, that T.D. is unfit or has waived custody, she does not have statutory standing to pursue custody under KRS 403.420. Moreover, B.F. failed properly to preserve the issue of the applicability of the common law doctrines of *in loco parentis*, waiver and estoppel, equitable powers of the court, or extraordinary circumstances. Therefore, we affirm the decision of the Jefferson Family Court.

ALL CONCUR.

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