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Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002260-ME
AND
NO. 2009-CA-002299-ME

AARON K. KIDD

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 07-CI-00379

JAMES COMBS

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, THOMPSON, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Aaron Kidd has appealed from the November 18, 2009, findings of fact, conclusion of law, and judgment entered by the Perry Circuit Court related to the custody of his minor daughter, Jaiden Combs. The circuit court awarded joint custody to Kidd and Jaiden's maternal great-grandparents,

James and Irene Combs, designated the Combses as the primary residential custodians, and ordered visitation for Kidd and Jaiden's mother, Shannon Combs. Kidd contests the circuit court's designation of the Combses as de facto custodians and the custody ruling in general. We have thoroughly reviewed the record on appeal, including the recordings of the temporary and permanent custody hearings. Finding no error in the circuit court's rulings, we affirm.

Jaiden Riley Combs is the biological daughter of Shannon Combs and Aaron Kidd, who have never married.¹ Jaiden was born on July 29, 2002, but Aaron was not listed as her father on the birth certificate. Aaron is a police officer with the Lexington Police Department. He met Shannon while she was working at a restaurant in Hazard, Kentucky, when Shannon was seventeen years old. They moved to Lexington together in October 2001, when Shannon was eighteen years old. Also living in the household were two of Aaron's daughters from a previous marriage. Aaron has three other children from another relationship who do not live with him.

In February 2003, when Jaiden was almost seven months old, Aaron sustained a gunshot wound to his face in the line of duty as a police officer. Aaron shot and killed his attacker during the incident. Because of the controversy this event caused and for the safety of his family, Aaron sent his two older daughters to stay in another location for a short time, and Shannon called her grandparents, the Combses, to take Jaiden to Hazard with them. The Combses had also raised

¹ For ease of understanding and to avoid undue confusion, we shall refer to the parents and child by their first names.

Shannon from the time she was five years old, when her father (their son) and her mother's marriage was dissolved. Aaron and Shannon only intended for the Combses to watch Jaiden for a short time until Aaron had recovered and the investigations had been completed. Time went by, and Aaron returned to work as a police officer. Shannon was also working and attending college in Lexington. They ultimately decided to leave Jaiden with the Combses until Shannon completed her education. During the ensuing years, Shannon would travel to Hazard on a regular basis to visit Jaiden and would take Jaiden back to Lexington to see Aaron. Aaron traveled to Hazard to visit Jaiden as well, although not as often as Shannon.

Aaron and Shannon ended their relationship in late 2006, when she returned to Hazard to stay with the Combses for a brief time. The record reflects Aaron suspected that he might not be Jaiden's father. A paternity test taken in December 2006 established that Aaron was Jaiden's father; Aaron did not learn of the results until the following June.

From the time Aaron was shot in 2003 and the break-up of her parents in 2006, Jaiden had been living with the Combses. James Combs, a pastor and a retired coal industry worker, was born in 1943 and reported that he had health issues related to his heart and had a defibrillator implanted. Irene Combs was born in 1945 and also had health issues related to her back and legs. James and Irene lived in a four-bedroom house, and Jaiden always slept in the bed with Irene. She also continued to drink from a bottle and only ate soft food such as mashed

potatoes. Jaiden eventually developed decay in her baby teeth. Shannon and the Combses took her to a dentist in London in 2006. Shannon would not consent to the procedure to extract Jaiden's teeth under a general anesthesia for fear that she would not wake up.

In June 2007, Aaron picked up Jaiden from the Combses' house and took her to Lexington. Once he discovered the extent of Jaiden's dental issues, he took her to his dentist for treatment. Jaiden's four front teeth were rotted to the gum line and had to be extracted. She also had fillings performed in six of her back teeth. Aaron did not take Jaiden back to Hazard.

On July 31, 2007, Shannon filed a petition against Aaron seeking a paternity test as well as custody of and child support for Jaiden. Aaron filed a counterclaim seeking custody of Jaiden, and also moved for temporary custody. The Combses were not named in the petition.

The circuit court held a temporary custody hearing on August 3, 2007. Both Aaron and Shannon requested temporary custody. The court heard testimony from the Combses, Aaron, and Shannon, and interviewed the then-five-year-old Jaiden in chambers with a social worker, Becky Bowling. Jaiden stated that she wanted to live with her great-grandmother. Other testimony established that Jaiden had lived with the Combses for the past four and one-half years, since Aaron had been shot. In addition, testimony was presented to establish that the Combses were Jaiden's primary caregivers and financial supporters during the time she was with them, although James testified that Shannon gave them money occasionally to pay

for some of Jaiden's expenses. Irene specifically testified that Shannon was a good mother to Jaiden and would be able to care for her.

At the conclusion of the hearing, the circuit court found that the Combses were Jaiden's primary caregivers and financial supporters during the four and one-half years she had lived with them, found them to be de facto custodians, and granted them temporary custody of Jaiden. The court then granted Aaron visitation with Jaiden every weekend. Shannon was granted visitation as well. An order memorializing the oral ruling was entered August 23, 2007. Following the entry of the order, the Combses moved to intervene and for de facto custody of Jaiden. The motion to intervene was granted in September and the petition was filed. The court also appointed a guardian ad litem (GAL) to represent Jaiden's interests.

On February 2, 2009, the matter proceeded to a final custody hearing before a Domestic Relations Commissioner (DRC). The DRC heard three days of testimony from the parties, friends of the parties, and Cabinet for Health and Family Services workers. Deposition testimony from medical providers was also introduced. The GAL filed a report in April 2009, recommending that the Combses and Aaron be awarded joint custody, with Aaron being named the primary residential custodian. In making this recommendation, the GAL considered the health of the parties as well as Jaiden's health and adjustment in school and at home. The DRC, on the other hand, recommended that sole custody be awarded to the Combses, with visitation to Aaron and Shannon. However, in its

findings of fact, conclusions of law, and judgment entered November 18, 2009, the circuit court chose not to follow either recommendation, but instead awarded the Combses and Aaron joint custody of Jaiden and designated the Combses as the primary residential custodians. Aaron was awarded three weekends of visitation per month, and Shannon was granted visitation at reasonable times. Aaron has directly appealed from the custody ruling, and the Combses cross-appealed from the award of joint custody, seeking sole custody of Jaiden.

On appeal, Aaron contends that the circuit court abused its discretion in both naming the Combses as de facto custodians and in awarding them custody. James disputes these arguments, and asserts that he should have been awarded sole custody of Jaiden.

Before we reach the merits of this action, we must address later developments following the filings of the notice of appeal and notice of cross-appeal in December 2009. We take judicial notice of the following events, all of which are reflected in filings in the appellate record: On April 5, 2010, during the pendency of these appeals, Irene passed away. Aaron then moved this Court to remand the case to the circuit court to consider his motion to modify custody based upon this change in circumstance. This Court granted the motion to remand and ordered the appeals to be held in abeyance to allow Aaron to file a properly supported motion to modify and for the circuit court to hold a hearing on whether custody should be modified in light of Irene's death. The circuit court held an evidentiary hearing in May 2011 and issued its findings of fact, conclusions of law,

and order on June 24, 2011. The court set forth the testimony from the parties, including Aaron and James, as well as other providers, and ultimately denied Aaron's motion to modify. The court again granted James and Aaron joint custody of Jaiden, with James continuing as the primary residential custodian and with Aaron and Shannon receiving visitation as previously ordered. No appeal was taken from this order, and the matter returned to the Court of Appeals for consideration of the original appeal and cross-appeal. Irene was also dismissed as a party to the appeals. Therefore, we shall now only refer to James as the appellee/cross-appellant in this case.

Specifically, we take judicial notice of the entry of the 2011 judgment that is now in effect addressing custody and that this new judgment supersedes the original 2009 judgment. Therefore, the 2009 joint custody award has been rendered moot, and the only issue we may consider is whether the Combses were properly named as de facto custodians and joined as parties following the temporary custody hearing.

In his first argument, Aaron contends that the Combses should not have been named de facto custodians because they did not petition the court for that status and were not original parties to the action. James has cited to KRS 403.280(4), related to temporary custody orders, which we find dispositive on this issue. KRS 403.280(4) provides that “[i]f a court determines by clear and convincing evidence that a person is a de facto custodian, the court shall join that person in the action, as a party needed for just adjudication under Rule 19 of the Kentucky Rules of Civil

Procedure.” In the present case, that is exactly what the circuit court did; once it found that the Combses met the definition of de facto custodians, the court joined them as parties to the custody action and permitted them to intervene and petition for custody. It makes no difference that the Combses were not originally named as parties to the custody action because the court had the statutory authority to add them as parties once it found they met the requirements to be de facto custodians.

Next, we shall consider whether the circuit court properly found the Combses to be de facto custodians. While there is a question regarding whether this issue was properly preserved, we shall nevertheless address the merits. Aaron contends that the Combses should not have been named de facto custodians because both James and Irene testified at the temporary custody hearing that Shannon should be granted temporary custody and because they did not have actual possession of Jaiden when they were named de facto custodians. We disagree with both arguments.

We shall begin our analysis by setting forth the statutory definition of de facto custodian. KRS 403.270 defines a de facto custodian as follows:

(1) (a) As used in this chapter and KRS 405.020, unless the context requires otherwise, “de 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 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.

(b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.822, and 405.020.

In *Swiss v. Cabinet for Families and Children*, 43 S.W.3d 796, 798 (Ky. App. 2001), this Court explained that in order to meet this status, a person is “required to show not only that [he or she] had been the primary caregiver for the child but also the primary financial supporter of the child in order to prove de facto custodian status.”

An appellate court may set aside a lower court’s findings made pursuant to Kentucky Rules of Civil Procedure (CR) 52.01 “only if those findings are clearly erroneous.” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). To determine whether findings of fact are clearly erroneous, we must decide whether the findings are supported by substantial evidence:

“[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.

Id. at 354 (footnotes omitted). “[W]ith regard to custody matters, ‘the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion.’ *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *see also Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).” *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010).

There is no dispute that the Combses raised Jaiden for four and one-half years of her life, from the time she was almost seven months old. Clearly, they met the first prong of the test because Jaiden was in their care for more than one year. Furthermore, the Combses were certainly her primary caregivers and financial supporters for the requisite time period. While there was some testimony that Aaron and Shannon both provided them with funds for Jaiden’s care, there is no evidence as to the amount that was provided to them over the years. The Combses provided food, clothes, and toys for Jaiden, and they provided the only real home Jaiden knew in her first five years.

We do not accept Aaron’s argument that the Combses waived their right to keep Jaiden permanently by testifying that they knew the arrangement was only temporary and that they wanted Shannon to be awarded custody. The Combses were not parties, but merely were witnesses, during the temporary

custody hearing. It was not until the conclusion of the hearing that the court declared them to be de facto custodians. Furthermore, while all parties agreed that the arrangement concerning Jaiden was temporary at the outset, neither Aaron nor Shannon ever attempted to return Jaiden to their own homes until five years later. Instead, they allowed Jaiden to remain with the Combses.

Likewise, we do not accept Aaron's argument that the six-week period that he had Jaiden in his possession worked to break the period time required to qualify as a de facto custodian. Aaron contends that when he took Jaiden to his home in June 2007, he took care of all of her needs, including her health, dental, dietary, and social needs. Therefore, he asserts that the Combses were no longer her caretakers. We disagree with this assertion because there was never any consent or agreement on the part of the Combses, or any of the involved parties, that Aaron was taking Jaiden for any more than a week's visit. In *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002), overruled on other grounds by *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008), this Court addressed a similar situation when the parents required their child to leave his grandparents' home to attend camp:

We hold that T.S.'s one-month stay at Camp Tracy did not disqualify the grandparents from achieving "de facto custodian" status. From the record, it is clear that T.S. spent roughly two years under the care and custody of his grandparents prior to the filing of the current action. The nonconsensual transporting of T.S. to Florida was adjudged by the courts of Kentucky to be an act of domestic violence—not an abandonment of support by the grandparents. Further, T.S. never fully left the

custody and control of his grandparents. He merely spent an unhappy month at a camp where he continued to maintain contact with his grandparents. Obviously, every parent who sends his or her child to a summer camp has not surrendered custody of the child.

Id. at 780-81 (footnote omitted). We find this case to be analogous. While Aaron certainly did not engage in any acts of domestic violence as in *Sherfey*, the Combses had no intention of abandoning their support of Jaiden while Aaron visited with her for a short period as they initially believed. Therefore, the six weeks Jaiden spent with Aaron did not disqualify the Combses from achieving de facto custodian status.

Accordingly, we hold that the circuit court did not abuse its discretion in declaring the Combses to be Jaiden's de facto custodians. Furthermore, for the reasons expressed above, we are precluded from reviewing the court's decision to award joint custody and to name the Combses as the primary residential custodians due to the entry of the superseding custody order in 2011, which neither party has appealed. Therefore, we must affirm the 2009 custody award.

For the foregoing reasons, the November 18, 2009, judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

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