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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001819-ME

TAMARA D. GARVIN — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION THREE
v. HONORABLE DEBORAH DEWEESE, JUDGE
ACTION NO. 14-CI-503666

DONNA KRIEGER; TERRY GARVIN;
ASHLEY GARVIN; AND KURT KNIFKE — APPELLEES

AND

NO. 2015-CA-001820-ME

ASHLEY GARVIN — APPELLANT

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v. HONORABLE DEBORAH DEWEESE, JUDGE
ACTION NO. 14-CI-503666

DONNA KRIEGER; TERRY GARVIN;
TAMARA GARVIN; AND KURT KNIFKE APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Tamara D. Garvin brings Appeal No. 2015-CA-001819-ME from Findings of Fact, Conclusions of Law and Order of the Jefferson Circuit Court, Family Court Division, (family court) entered September 10, 2015, declaring Terry Garvin and Donna Krieger *de facto* custodians of K.R.K. and awarding them sole permanent custody of the minor child. Ashley Garvin brings Appeal No. 2015-CA-001820-ME from the same order. We reverse and remand Appeal No. 2015-CA-001819-ME and Appeal No. 2015-CA-001820-ME.

Ashley Garvin is the adult daughter of Terry Garvin and Tamara D. Garvin. Terry and Tamara are divorced. Ashley had two sons with Joseph Miller; the first son was born in 2008, and the second son was born in 2010. Joseph had custody of the two boys, and Ashley exercised visitation/time-sharing. In March of 2013, the Cabinet for Health and Family Services (Cabinet) received a referral alleging that Ashley was abusing substances while her two sons were in her care. Dependency, abuse and neglect petitions (Action Nos. 13-J-502383-001 and 13-J-502384-001) were filed in the family court on May 9, 2013. It was alleged that

Ashley's eldest son reported to a Cabinet worker that Ashley and her boyfriend argued over selling pills, there was very little food in the house, and that he would have bug bites on him when he visited. Ashley's visitation with her sons was subsequently suspended by the family court. In an attempt to regain visitation, Ashley was working with the Cabinet on a case plan that included drug and alcohol screens.

On August 29, 2013, Ashley gave birth to a third child, a daughter, K.R.K. The putative father of K.R.K. was Ashley's boyfriend, Kurt Knifke. On April 30, 2014, a dependency, neglect and abuse petition (Action No. 14-J-502179-1) was filed in the Jefferson Family Court as to K.R.K. In the petition, it was alleged that Ashley had a positive alcohol screen, a positive drug screen, and was not compliant with the Cabinet's previous case plan or the family court orders emanating from the actions involving her two sons. A temporary removal hearing was conducted. By order entered May 8, 2014, temporary custody of K.R.K. was granted to Terry Garvin, K.R.K.'s maternal grandfather, and Donna Krieger, Terry's girlfriend. On June 19, 2014, Ashley stipulated that K.R.K. was at risk of abuse or neglect, and temporary custody was ordered to remain with Terry and Donna.

On November 26, 2014, Tamara Garvin, the maternal grandmother of K.R.K., filed an action (Action No. 14-CI-503666) in the Jefferson Family Court

seeking custody of K.R.K. or in the alternative, grandparent visitation. Tamara named as respondents Ashley Garvin (mother of K.R.K.), Kurt Knifke (putative father of K.R.K.), Terry Wayne Garvin (maternal grandfather of K.R.K.), and Donna Krieger (Terry's girlfriend).[1] Tamara alleged that Terry and Donna had initially agreed to allow K.R.K. to visit with Tamara but were no longer cooperating. Tamara explained that she exercised grandparent visitation with Ashley's two sons through an agreement with their father and wanted K.R.K. to visit on the same weekends. As Terry and Donna did not have contact with Ashley's two sons, Tamara wanted to ensure that the three siblings could maintain contact by visiting at her home.

On December 17, 2014, Terry and Donna responded to Tamara's petition and also filed a cross-petition seeking a declaration that they were *de facto* custodians of K.R.K. Ashley also responded to Tamara's petition. In her response, Ashley stated that until she could regain custody of K.R.K. she believed it was in K.R.K.'s best interest that temporary custody be granted to Tamara.

On June 23, 2015, the family court conducted a trial on the pending issues relating to the custody of K.R.K. as well as Tamara's petition for grandparent visitation. Several witnesses testified at trial, in addition to the parties.

[1] Both the juvenile action (DNA) filed under Kentucky Revised Statutes (KRS) Chapter 620 and the custody visitation petition, filed under KRS Chapter 403, were heard by the same family court division (Three) and judge in Jefferson County.

By Findings of Fact, Conclusions of Law, and Order entered September 10, 2015, Terry and Donna were adjudged *de facto* custodians of K.R.K. and were awarded sole permanent custody. Tamara was awarded grandparent visitation with K.R.K. pursuant to Kentucky Revised Statutes (KRS) 405.021. The order was amended by the family court on October 27, 2015.[2] These appeals follow. Tamara brings Appeal No. 2015-CA-001819-ME and Ashley brings Appeal No. 2015-CA-001820-ME.

STANDARD OF REVIEW

In Kentucky, child custody is determined by the family court in accordance with the best interests of the child as set out in KRS 403.270(2). *Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). To determine the best interest, custody proceedings necessarily require courts to conduct evidentiary hearings and make findings of fact pursuant to Kentucky Rules of Civil Procedure (CR) 52.01. *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). Upon review of child custody

[2] The dissenting opinion in this case states that a permanent custody order under KRS Chapter 620 had been entered in the juvenile DNA case prior to the court's Findings of Fact, Conclusions of Law, and Order entered September 10, 2015, thus implying that the custody issue had already been resolved by the family court before the trial on June 23, 2015. The judge, in her order of September 10, 2015, acknowledged that temporary custody had been granted in the DNA case but made no reference to a permanent custody order and proceeded to conduct the trial on the custody issue. Based on our review of the record, calendar orders were entered in March and April 2015, clearly indicating that the DNA case and custody petition were being heard together on June 23, 2015, to determine permanent custody of the child, which in fact occurred. And, we are mindful that for a custody order in a DNA case under KRS Chapter 620 to be deemed a custody decree under KRS Chapter 403, the order must be based on the standards set out in KRS 403.270(2). *London v. Collins*, 242 S.W.3d 351 (Ky. App. 2007); *see also* KRS 620.027. There is nothing in the juvenile record that remotely suggests these standards were met to support a permanent custody decree in the DNA case, prior to the June 23, 2015, trial.

proceedings, this Court must determine whether the circuit court's findings of fact are clearly erroneous. *Id.*; CR 52.01. Our review of related legal issues and questions of law is *de novo*. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002), *overruled on other grounds by Benet v. Com.*, 253 S.W.3d 528 (Ky. 2008).

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Tamara and Ashley contend that the family court erred by designating Terry and Donna as *de facto* custodians of K.R.K. Specifically, they argue that only one individual or a married couple may be considered a *de facto* custodian under KRS 403.270. As Terry and Donna are an unmarried couple, Tamara and Ashley assert that it was reversible error to designate Terry and Donna *de facto* custodians of K.R.K.

KRS 403.270 sets forth the statutory mandates necessary to be considered a *de facto* custodian:

> (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 [Cabinet]. . . .
>
> (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.

KRS 403.270(1) specifically provides that a *de facto* custodian is **a person** who has been the primary caregiver for and financial supporter of the child for the requisite time period. Our case law is clear that only one individual may qualify as a *de facto* custodian under the statute; however, a married couple may qualify, having been deemed a "single unit" under KRS 403.270(1). *J.G. v. J.C.*, 285 S.W.3d 766, 768 (Ky. App. 2009); *see also Cherry v. Carroll*, 507 S.W.3d 23 (Ky. App. 2016); Richard A. Revell, Diana L. Skaggs & Michelle Eisenmerger Mapes, *Kentucky Divorce* § 23.5 (2017).

Terry and Donna have not cited and we were unable to locate any authority recognizing an unmarried couple as a single unit for purposes of *de facto* custodian status pursuant to KRS 403.270.[3] And, we do not believe that an unmarried couple qualifies as a single unit under KRS 403.270. The dissent argues that the recent amendments to KRS Chapter 199 and KRS Chapter 620 in regards to "fictive kin" permits an unrelated adult to take "custody" of a child to whom that

[3] Contrary to the assertion in the dissent, the aunt and uncle in *J.G. v. J.C.*, 285 S.W.3d 766 (Ky. App. 2009), were a married couple. Their *de facto* custodial status was denied on different grounds under KRS 403.270.

adult has a significant emotional attachment. This argument is without merit for multiple reasons. First, the legislative enactments were not effective until June 29, 2017, and there was no legislative directive for retroactive application. Accordingly, these statutory changes had no legal effect over applicable law in this case when decided by the family court. Second, the amendments were only to KRS Chapter 199 and KRS Chapter 620, not KRS Chapter 403. The stated purpose of these amendments was to expand the state's options to place children who had been removed from homes for safety reasons into a safe, familiar environment. The legislation looked to enhance the foster care system in Kentucky. Whether the enactments would allow "fictive kin" to be considered for *de facto* custody is not addressed in the law nor is it properly before this Court at this time. Finally, to reach the conclusion suggested by the dissent, the requirements of KRS 403.270 must be met as previously discussed, which again were not considered by the family court as concerns "fictive kin." *London v. Collins*, 242 S.W.3d 351 (Ky. 2007).

Consequently, we are of the opinion that the family court committed reversible error as a matter of law by recognizing both Terry and Donna as *de facto* custodians of K.R.K., given that they are an unmarried couple. Accordingly, we must remand this matter back to the family court for additional proceedings in accordance with the legal authority cited in this Opinion.

We view any remaining contentions of error raised by Tamara and Ashley on appeal to be moot.

For the foregoing reasons, we reverse Appeal No. 2015-CA-001819-ME and Appeal No. 2015-CA-1820-ME and remand for proceedings consistent with this Opinion.

JONES, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

D. LAMBERT, JUDGE, DISSENTING: For the following reasons, I respectfully dissent. First, the family court placed K.R.K. directly into Terry and Donna's home, where the infant received continuous care and financial support for more than six months.[4] Accordingly, they each satisfy the KRS 403.270 requirements. Not only was there initial placement with Terry and Donna, but the Court ultimately granted permanent custody to them and that case has not been appealed. Thus, the issue of permanent custody has been fully litigated and established.

Second, the majority has, by its opinion, extended *Cherry v. Carroll*, 507 S.W.3d 23 (Ky. App. 2016), and *J.G. v. J.C.*, 285 S.W.3d 766 (Ky. App. 2009), and incorrectly applies both to the facts of this case. Neither of these cases

[4] K.R.K. was only seven months old at the time of the temporary custody order to Terry and Donna. She is now almost 4 and a half years old.

prevent unmarried couples from qualifying as *de facto* custodians under KRS 403.270. They especially do not prevent a biological grandparent, who has met the KRS 403.270 requirements, from becoming a *de facto* custodian simply because he is not married to his cohabitant, and here, also a court ordered custodian. On the contrary, *Cherry* and *J.G.* joined a long line of Kentucky cases which place child welfare above marital status, and all other considerations, in child custody cases. *See Morris v. Morris*, 439 S.W.2d 317, 318 (Ky. 1969) (describing child welfare as "the paramount consideration [in custody proceedings]"). *Cherry* merely prevented two unmarried individuals (a grandparent and his sibling) from combining their respective custodial times as a way of satisfying the minimum statutory period provided in KRS 403.270. This holding reinforced *J.G.*, which similarly kept an aunt and uncle, who were not married and thus were not a "single unit for the purposes of *de facto* custodianship[,]" from combining their respective custodial times to meet KRS 403.270. Both *Cherry* and *J.G.* were decided exclusively upon the statutory time requirement and cannot be reasonably interpreted to prohibit a cohabitating unmarried couple from ever being considered *de facto* custodians.

Third, even if the majority's "single unit" reasoning was relevant at the time this case was filed, in the more than two years that this case has been pending before the Court of Appeals, the law has undergone considerable change

as it relates to non-relatives caring for children. Kentucky now recognizes the concept of fictive kin (KRS 199.011(9), KRS 600.020(28) (effective June 29, 2017), and explicitly allows unrelated adults, such as Donna, with whom a child has a significant emotional attachment, to take custody. KRS 605.090(1)(b); KRS 610.125; KRS 620.140. Permitting such an individual to assume responsibility for a non-related child would also permit that individual acquire *de facto* custodian status.

In sum, the majority's holding would, but for the permanent custody order already established in the juvenile case, prevent a blood relative from maintaining his court ordered permanent custody status, and from ever attaining *de facto* custodian status, simply because he is not married to an individual who would now qualify as fictive kin. By placing marital status ahead of child welfare, and drafting a marital status requirement (where none has previously existed) into the *de facto* statute, the majority erodes the role of Kentucky's courts as "protector of the children" (*Morris* at 318), and, in this case, would disrupt this child's only recognized home. However, given the permanent custody order in the juvenile action, the trial court may choose to consider that order as a basis for not disrupting the child, should the custodial factors still remain as the trial court previously found.

I would affirm the Jefferson Family Court.

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