

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001071-ME

R.W. AND J.W.

APPELLANTS

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CI-00671

E.P.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

STUMBO, JUDGE: This is a custody case in which R.W. and J.W., maternal grandparents (hereinafter collectively referred to as Grandparents), appeal from an order of the Clark Family Court denying their motion for de facto custodian status and giving sole custody of B.P. (hereinafter Child) to E.P. (hereinafter Father).²

¹ Senior Judge William L. Knopf 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.

² This case involves a minor child, and as such we will not refer to the parties by name.

Grandparents argue that they should have been deemed Child's de facto custodians and that the trial court erred in not so finding. Father argues the trial court properly ruled Grandparents were not de facto custodians because he was always involved in Child's life, paid child support, and always exercised his court ordered visitation.³ We find that the court properly found Grandparents did not meet the requirements for de facto custodian status.

M.W. (hereinafter Mother) and Father are the biological parents of Child. Mother and Father were never married. Child was born in November of 1999. Father's paternity was established by a judgment of the Clark Family Court in October of 2001, and he then began paying child support. Father initiated the paternity action.

Later, in March of 2002, Mother and Father agreed to joint custody with Mother as the primary residential custodian. Father was given visitation every Thursday from 5PM to 8PM and every other weekend from Saturday at 10AM until Sunday at 10AM. Also, Father began coaching Child's sports teams.

For various reasons, Mother allowed Grandparents to begin caring for Child. Child began living with Grandparents in October of 2003. Father then began to deal with Grandparents regarding his visitation. This situation initially worked well, but later the relationship deteriorated. In September of 2008, Father filed a motion to be appointed primary custodian. A month later, Grandparents filed a motion to intervene and sought custody on the basis that they were Child's

³ Child's mother, while a party to the underlying custody action, is not a part of this appeal because she does not contest Grandparents' claim that they are the de facto custodians.

de facto custodians. Subsequent to the filing of the de facto custodian petition, Father sought custody of Child.

On March 31, 2009, a hearing was held to determine if Grandparents qualified as Child's de facto custodians. The court found that although Grandparents were caregivers and financial supporters of Child, they did not meet the requirements to be de facto custodians. Sole custody was granted to Father. This appeal followed.

When reviewing custody cases, our standard of review is based on whether the decision is clearly erroneous and/or an abuse of discretion.

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” A factual finding is not clearly erroneous if it is supported by substantial evidence. “Substantial evidence” is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” . . . “The exercise of discretion must be legally sound.” (Internal citations omitted).

Sherfey v. Sherfey, 74 S.W.3d 777, 782 -783 (Ky. App. 2002) (overruled on other grounds).

Kentucky Revised Statute (KRS) 403.270(1)-(2) states:

(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.

The trial court found that Grandparents had been caregivers for and financial supporters of Child, but that they did not meet the primary caregiver and primary financial supporter requirements.⁴ Our review of the recording of the hearing and the Order and Judgment of custody reveals that the trial court focused on Father’s involvement with Child. The trial court noted that Father was given joint custody of Child and utilized the time-sharing provided to him by the court, initiated a paternity action, paid child support, sought to have Child’s name legally

⁴ Previous panels of this Court have interpreted this statute to mean the de facto custodian must be the primary caregiver and primary financial supporter of the child. *See Swiss v. Cabinet for Families and Children*, 43 S.W.3d 796, 798 (Ky. App. 2001).

changed so he could carry Father's last name, and engaged in sporting activities with Child, including being Child's coach.

The trial court also relied on the cases of *Boone v. Ballinger*, 228 S.W.3d 1 (Ky. App. 2007), and *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky. App. 2001)(overruled on other grounds). KRS 403.270 and case law holds that one seeking de facto custodian status must be the primary caregiver, not a primary caregiver. *Consalvi* at 197-198.

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 . . . 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.

Id. at 198.

Because Father actively participated in Child's life and provided substantial support, we cannot say that the trial court's decision to deny Grandparents' motion for de facto custodian status was clearly erroneous. The test is not whether this Court would have decided differently, but whether the trial court's findings were clearly erroneous. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). There was substantial evidence to show Grandparents were primary caregivers alongside of Father. "A reversal may not be predicated on mere doubt

as to the correctness of the decision.” *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

For the foregoing reasons, the judgment of the Clark Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kimberly Carter Blair
Winchester, Kentucky

BRIEF FOR APPELLEE:

John H. Keeton
Winchester, Kentucky