

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001720-ME

BETTY TAYLOR

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE JEFFREY L. PRESTON, JUDGE  
ACTION NO. 09-CI-00185

CHRISTOPHER AND LACY STAFFORD

APPELLEES

AND: NO. 2009-CA-001721-ME

JESSIE BRADLEY

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE JEFFREY L. PRESTON, JUDGE  
ACTION NO. 09-CI-00185

CHRISTOPHER AND LACY STAFFORD

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM, SENIOR  
JUDGE.

CLAYTON, JUDGE: Betty Taylor and Jessie Bradley both appeal from the

August 12, 2009 order of the Greenup Family Court, which determined that

Christopher and Lacy Stafford were de facto custodians, and further, that it was in the best interest of a child, Gemiah Marie Fenimore, that they be awarded custody. Betty Taylor is the maternal grandmother and Jessie Bradley is the biological mother. This appeal involves both of their appeals, which were consolidated. We reverse and remand.

### I. Factual and Procedural Background

Gemiah Marie Fenimore was born on April 1, 2008. For the first two months of her life, she was cared for by her mother, Jessie, and her maternal grandmother, Betty. On June 2, 2008, Jessie was incarcerated for approximately eight months on criminal charges related to the robbery of a local home improvement store. The robbery occurred prior to Gemiah's birth. Because of Jessie's incarceration, Betty, who was a resident of Portsmouth, Ohio, filed an ex parte motion for temporary, emergency custody of Gemiah in Ohio, which she was granted on May 29, 2008. Later, in October 2008, the Ohio court granted her custody of Gemiah.

During Jessie's incarceration, Betty needed child care for Gemiah while she worked. Betty's sister, Norma Knipp, introduced her to Chris and Lacy Stafford. At that time, Norma and Lacy were co-workers. The Staffords agreed to help Betty care for Gemiah. Beginning in June 2008, Betty brought Gemiah to the home of Lacy Stafford's mother. Chris, Lacy, and Lacy's mother, Darlene Hobson, were involved in Gemiah's child care. Darlene was the child's care giver while the Staffords worked. Chris worked full-time, and Lacy worked thirty-two

hours per week. At first, the Staffords took care of Gemiah every other weekend. Betty and her husband claim that they offered to pay the Staffords but they refused payment. Conversely, the Staffords claim that Betty indicated to them that they could eventually adopt Gemiah.

As time passed, Gemiah began spending more time with the Staffords. According to the Staffords' testimony, Gemiah was spending as much as twenty-six days a month with the Staffords. Betty admitted that Gemiah's time with the Staffords increased, particularly in January and February 2009, when she took a new job with longer hours. But Betty also said that during the relevant time period, she always considered herself and her husband Gemiah's primary caretakers. The Staffords, however, maintain that they provided a home for Gemiah; arranged care for her while they worked; gave her emotional, mental, and physical care; and, incorporated her into their family. And they contend that they received minimal financial contribution from Gemiah's biological family.

On February 26, 2009, Jessie was released from prison and the arrangement with the Staffords ended. Gemiah then lived solely with Jessie and her grandmother in Portsmouth, Ohio. Shortly after this occurrence, on March 6, 2009, the Staffords filed a petition for custody in the Greenup Family Court. They asserted that they were de facto custodians of Gemiah and that it would be in Gemiah's best interest for them to be awarded custody. Accompanying the petition for custody was a motion for temporary custody.

The Greenup Family Court set the hearing on the motion for temporary custody for March 12, 2009, but on March 17, 2009, ordered that Betty was to have custody of Gemiah until further orders of the Ohio court. During this time period, Gemiah's custody remained with Betty based on the Ohio order. Later, on June 19, 2009, Betty and Jessie entered into an agreed order in Ohio, which returned full custody of Gemiah to Jessie. In the order, the Ohio court explicitly retained jurisdiction despite the action filed in Greenup County. Meanwhile, Jessie and Betty had exclusive care of Gemiah for the next six months, and Gemiah had no contact with the Staffords.

Then, on April 2, 2009, Betty filed a motion to dismiss the Stafford's petition for custody for lack of jurisdiction based on the Ohio court's involvement with the situation. On April 7, 2009, a hearing was held on the motion to dismiss. Following the hearing, the court issued its order on May 29, 2009, which established under the Uniform Child Custody Jurisdiction and Enforcement Act, specifically, KRS 403.822, that Kentucky was the child's home state and Kentucky had jurisdiction since, according to the court, it was the child's home state on the day the action was commenced or within six months of the commencement of the action. The court based its decision on a log produced by Lacy and Chris, which purported to support that during the contested time period Gemiah spent the majority of her time with them. Further, the court said that its decision also relied on the fact that Betty had not notified the Ohio court about the Staffords' care for

Gemiah. The court also acknowledged that it must contact the Ohio court to see whether Ohio had an interest in continuing its jurisdiction.

The Ohio court declined jurisdiction and the Greenup Family Court issued an order on July 8, 2009, indicating that Ohio declined jurisdiction and that Kentucky had jurisdiction. A hearing was held on August 5, 2009, to ascertain the de facto custodian status of the Staffords and the best interest of the child. At this time, Gemiah was sixteen months old and had been in the exclusive care of her mother and grandmother since March 2009.

On August 12, 2009, the court entered an order that found that the Staffords were de facto custodians, and further, that it would be in Gemiah's best interest for the Staffords to have custody of her. In reaching this decision, the court relied on and incorporated findings that it had previously made in its May 29, 2009 order regarding the jurisdictional issue. On August 14, 2009, Gemiah, pursuant to court order, was given to the Staffords.

Thereafter, on August 14, 2009, Betty filed a motion to alter, amend or vacate the August 12, 2009 order and a motion for specific findings of fact. On August 19, 2009, the court entered an order denying these motions. Next, Jessie filed a motion to alter, amend, or vacate the order, or in the alternative, a motion for visitation under the Greenup County timesharing guidelines. The court denied Jessie's motion to alter, amend or vacate and granted supervised visitation every other Saturday and Sunday from 1:00 p.m. and 6:00 p.m. Jessie and Betty now appeal from these orders.

Both Jessie and Betty argue that the court abused its discretion when it determined that the Staffords were de facto custodians under KRS 403.270(1). And they maintain that it did not base its award of custody on the statutory factors enumerated in KRS 403.270(2), but rather, based its decision on factors barred from consideration under KRS 403.270(3). Furthermore, the statutory factors, which the court did consider, did not have substantial evidence to support them. Moreover, Jessie maintains that the court also abused its discretion when it restricted her visitation with Gemiah without making a finding that reasonable visitation would “seriously endanger” the child under KRS 403.320(1).

## II. Standard of Review

In reviewing a child custody award, the appellate standard of review includes a determination of whether the factual findings of the family court are clearly erroneous. Findings of fact may be set aside only if they are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). “Substantial evidence” is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002) (internal quotation marks omitted), *overruled on other grounds by Benet v. Com.*, 253 S.W.3d 528 (Ky. 2008). If the findings are supported by substantial evidence, then appellate review is limited to whether the facts support the legal conclusions made by the finder of fact. The legal conclusions are reviewed de novo. *Brewick*

*v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003). As a final point, we are guided by the proviso that the family court is in the best position to evaluate the testimony and to weigh the evidence, and the appellate court should not substitute its own opinion for that of the family court. *Reichle*, 719 S.W.2d at 444.

Finally, if the factual findings are not clearly erroneous and the legal conclusions are correct, the only remaining question on appeal is whether the trial court abused its discretion in applying the law to the facts. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). Abuse of discretion implies that the family court's decision is unreasonable or unfair. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). To summarize, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. Keeping this standard in mind, we now turn to the case at hand.

### III. Analysis

The first issue to be considered is whether the court correctly determined that sufficient evidence existed to give the Staffords the status of de facto custodians. Before addressing the de facto custodian status of the Staffords, we would be remiss if we did not note that the courts of the Commonwealth have consistently recognized parents' superior right to the care and custody of their biological children and that parents have a fundamental, basic and constitutionally

protected right to raise their own children. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003).

Nevertheless, the General Assembly passed the de facto custodian legislation, as highlighted in KRS 403.270(1), to give standing in custody matters to non-parents who have assumed a sufficiently “parental” role in the life of the child whose custody is being addressed. *Sullivan v. Tucker*, 29 S.W.3d 805, 808 (Ky. App. 2000).

De facto custodian is described in KRS 403.270(1)(a) as follows:

“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[.]

Hence, in order to be deemed de facto custodians, the Staffords must show by clear and convincing evidence that they acted as “the primary caregiver . . . and financial supporter” of Gemiah for a period of six months or more. The meaning of these statutory words has been subject to appellate interpretation.

Relevant case law instructs that the party claiming such status must be **the** primary caregiver and financial support for the child. *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky. App. 2001), *overruled on other grounds by Boone v. Ballinger*, 228 S.W.3d 1 (Ky. App. 2007). As explained therein:

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.

Support for *Consalvi* is found in *Boone v. Ballinger*, 228 S.W.3d at 8, wherein is stated:

Relying on this Court's previous decision in *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky. App. 2001), Melinda and Boone argue that the trial court should have denied Kelly de facto custodian status as a matter of law. They contend KRS 403.270 was unavailable to Kelly since he was not the sole caregiver for the two girls but rather provided for them “alongside the natural parent (Melinda).” *Id.* at 198. We agree.

Thus, for the Staffords to be designated as de facto custodians, they must establish by clear and convincing evidence that they provided **the** primary physical and financial support.

Here, the Staffords argue that their actions in caring for Gemiah reached this level of care. We cannot agree. First, the proffered evidence never clearly delineated that the Staffords had the constant custody and care of Gemiah over a six month period. The “log” presented by Lacy was disputed by Betty and Jesse as to its accuracy. In fact, during the August 5, 2009 hearing, Lacy admitted that although she used the “log” to indicate the days she kept Gemiah, some indicated days were drop-off and/or pick-up days for Gemiah rather than full-days of care. Furthermore, Chris and Lacy both worked full-time, so that it was Darlene

who was Gemiah's caretaker during a significant portion of the week. In addition, at times, Lacy's cousin also provided child care for Gemiah. Lastly, even though, the Staffords, using the log, show that Gemiah spent numerous days with them, they do not establish that she spent six continuous months in their home. KRS 403.270(1)(a) requires that in order to qualify for de facto custodian status, the parties must establish that a child lived with them "for a period of six (6) months or more if the child is under three (3) years." The plain meaning of the statute must not be extrapolated to allow intermittent child care by third parties to substitute for a continuous, six month time period. Courts have a tremendous responsibility in allowing third parties to have status equal to parents in custody determinations. The weight of this duty mandates cautious and strict interpretation by courts of this statutory language.

Second, Chris and Lacy never demonstrated that Betty relinquished control over Gemiah's schedule. Indeed, while Gemiah spent a significant amount of time in the Stafford household, Betty always decided when to leave Gemiah with the Staffords. Additionally, she initially offered to pay the Staffords for their care of Gemiah, but they refused payment. Bolstering the fact that Betty was the decision-maker for Gemiah's daily activities, it is undisputed that she always took care of Gemiah's medical needs. It was Betty who took Gemiah to all medical appointments. As Betty testified, she thought the Staffords were people who wanted to help out in a difficult situation. Notably, she always considered herself and her husband Gemiah's custodians while Jessie was incarcerated.

Financially, Chris and Lacy must present evidence to show that they were **the** primary financial support for Gemiah. Again, this fact is not clear from the evidence. Testimony at the hearing showed that multiple parties provided for Gemiah's needs. During the time Gemiah was with the Staffords, she did not live in Chris and Lacy's home but lived with them at Darlene's residence (Lacy's mother). Therefore, Darlene provided Gemiah's housing. Further, Betty received \$98.00 per month in support for Gemiah from the State of Ohio. With the money, she claims that she purchased toys, car seats, walkers, and strollers for Gemiah. It is uncontroverted that she purchased clothes, diapers, and formula for Gemiah, which she dropped off for the Staffords' use when taking Gemiah to stay with them and Darlene. What is unmistakable from the evidence is that multiple parties, including relatives and third parties, provided for Gemiah's needs.

Returning to the language of *Consalvi*, we reiterated that courts have interpreted KRS 403.270(1) to require a party arguing for de facto custodian status to show that it stood "in the place of the natural parent" in caring for the child, not that they stood "alongside the natural parent." *Consalvi*, 63 S.W.3d at 198. As we construe *Consalvi*, this language was merely a restatement of the statutory language that a party seeking de facto custodian status must be the primary caregiver and financial supporter of the children, just as a natural parent would normally be. But the de facto custodian statute does not intend that multiple persons be primary caregivers nor is it enough for a person to provide for a child alongside the natural parent. The statute unambiguously provides that "one must

literally stand in the place of the natural parent to qualify as a de facto custodian.”

*Consalvi*, 63 S.W.3d at 198.

Furthermore, we point out that the statutory standard of evidence to establish de facto custodian status is “clear and convincing.” Here, we find that the Staffords did not meet the requisite burden to show that they were de facto custodians. The evidence does not prove that they were **the** primary caretakers for Gemiah. Therefore, the court’s decision finding them to be de facto custodians is not supported by substantial evidence, and thus, is clearly erroneous.

Since we have found that the court’s decision concerning the de facto custodian status of the Staffords is clearly erroneous, it is not necessary for us to review the issues concerning whether Gemiah’s best interest was served by giving the Staffords’ custody, nor will we address the issue whether Jessie’s visitation with Gemiah was unreasonably restricted.

Although, as noted, it is not necessary in this situation to reach this level of legal analysis, we observe that Jessie’s incarceration required her to place Gemiah with someone else. Lacy and Chris never showed that Jessie permanently intended to place her daughter with Betty or not resume care of Gemiah. Under the circumstances, we do not consider Jessie’s decision to place Gemiah with her grandmother to be ill-advised. Parents, for many reasons, are often required to find someone to care for their children. Grandparents are a logical and routine choice for many.

Similarly, we observe that we have some difficulty in differentiating between the logic of Betty's need for childcare and the Staffords' need for childcare. In a world full of working parents, people with children certainly must find appropriate child care during their employment. When parents find such child care, it is a positive qualifier of their parenting skills. Both Betty and the Staffords sought child care for Gemiah when they could not take care of her.

#### IV. Conclusion

A finding of fact is clearly erroneous if it is not supported by substantial evidence. Substantial evidence is sufficient to induce conviction in the mind of a reasonable person. *Moore*, 110 S.W.3d at 354. The family court's finding that the Staffords were de facto custodian is not supported by substantial evidence, particularly in light of the requisite "clear and convincing" evidentiary standard. Therefore, we hold that it was clearly erroneous for the trial court to find that the Staffords were de facto custodians.

For the foregoing reasons, the order of the Greenup Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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