

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001581-ME

AMANDA SMITH AND
MICHAEL SMITH

APPELLANTS

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 05-J-00013

THERESA YOUNGER AND
D.B., A JUVENILE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,¹ SENIOR JUDGE.

WHITE, SENIOR JUDGE: This appeal concerns the custody of a minor child,

Son. Father and paternal Grandmother appeal from a Campbell Family Court

order, entered on July 20, 2009, designating maternal Grandmother as the *de facto*

¹ Senior Judge Edwin M. White 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.

custodian of Son. Father and paternal Grandmother claim that on appeal that maternal Grandmother was not the sole “primary caregiver” and was, thus, erroneously designated as a *de facto* custodian. After a careful review of the briefs and record, we conclude that sufficient evidence existed to support the trial court’s conclusion. Therefore, we affirm the Campbell Family Court order.

Father and Mother are the natural parents of Son. On January 11, 2005, Son was removed from his parents’ custody based upon their individual drug addictions and inability to care for him. On January 25, 2005, the Campbell Family Court awarded temporary joint custody of Son to paternal Grandmother and maternal Grandmother. In June 2006, paternal Grandmother suffered serious health problems which rendered her unable to care for Son. Thereafter, Son began residing primarily with his maternal Grandmother.

In March 2009, Father and paternal Grandmother petitioned the court to reinstate Father’s custody rights. On April 22, 2009, maternal Grandmother moved to be designated as Son’s *de facto* custodian. On May 15, 2009, Mother moved the court to grant her joint custody of Son to be shared with maternal Grandmother.

On April 24, 2009, the court heard Father and Mother’s motions but did not rule on the motions immediately. On May 29, 2009, the court heard maternal Grandmother’s motion to be designated as Son’s *de facto* custodian.

During the hearing, maternal Grandmother testified that she was the primary custodian of Son. She testified that she bought his clothes, assured that he

went to school, oversaw his medical treatment, and provided him with a place to live. Maternal Grandmother admitted that Mother provides substantial child care for Son. However, she claimed that Mother did not live in her home and only acted as an assistant in Son's care.

In her testimony, Mother also claimed that she did not live with maternal Grandmother and Son. Instead, Mother claimed that she went to maternal Grandmother's house to get Son ready for school and would stay there for the entire day. Mother testified that she helped Son with his homework, bathed him, read to him, and dressed him for bed each night. Mother also testified that she cared for Son on the weekends and took him to his basketball games. She claimed that she performed these tasks every day for a period of three years and claimed to be Son's primary caregiver. Maternal Grandmother denied that Mother cared for Son daily.

On July 20, 2009, the Campbell Family Court issued a handwritten note on a docket sheet designating maternal Grandmother as Son's *de facto* custodian. The order provided:

Court finds that [maternal Grandmother] qualifies as "de facto" custodian pursuant to KRS 403.270. Continue joint custody with [maternal Grandmother] and [paternal Grandmother], with [maternal Grandmother] as primary residential custodian.

This appeal follows from that designation and does not involve the court's ruling on any other motions filed by the parties.

KRS 403.270 provides a basis for *de facto* custodianship in Kentucky.

The statute provides in pertinent part:

(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 Social 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 matter that is given to each parent under this section and KRS 403.280, KRS 403.340, 403.350, 403.420, and 405.020.

Acting within its vast discretion to weigh the evidence, the court found that maternal Grandmother met the *de facto* custodial requirements.

A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decision regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

Bailey v. Bailey, 231 S.W.3d 793, 796 (Ky. App. 2007). Although the court's findings are sparse at best, no party moved for more specific findings pursuant to Kentucky Rules of Civil Procedure (CR) 52.04. Therefore, we shall review the order despite its lack of findings.

A family court's decision must remain intact absent an abuse of discretion. *Young v. Holmes*, 295 S.W.3d 144, 146 (Ky. App. 2009). "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." *Sherfey v. Sherfey*, 74 S.W.3d 777, 783 (Ky. App. 2002) (*overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)) (internal quotations omitted).

While we recognize that KRS 403.270 requires that a nonparent be the primary caregiver and not simply a primary caregiver, we conclude that sufficient evidence existed that indicates that maternal Grandmother was the primary caregiver. *See Boone v. Ballinger*, 228 S.W.3d 1, 8 (Ky. App. 2007). Maternal Grandmother bought Son's necessities, assured that Son went to school, oversaw his medical needs, and provided him with care. Admittedly, Mother often cared for Son. However, testimony indicated that she did not live in the home and any care that she gave was subject to the approval and delegation of maternal Grandmother. Mother could be most adequately described as an assistant or secondary caregiver. The family court was in the best position to observe and draw conclusions from the evidence presented. Our review indicates that ample

evidence existed in the record to support the family court's determination that maternal Grandmother was the primary caregiver. We conclude that the decision was reasonable and sound.

Further, we must note that maternal Grandmother is not required to prove that she is a *de facto* custodian in order to have standing in custody proceedings, under *Williams v. Bittel*, 299 S.W.3d 284 (Ky. App. 2009). In *Williams*, our Court concluded that a custodian must not continuously maintain the threshold required to be designated as a *de facto* custodian in order to maintain standing in custody proceedings. *Id.* at 288. The fact cannot be ignored that the maternal Grandmother had custody of the child pursuant to a valid court order.

Maternal Grandmother and paternal Grandmother rescued this child. The Cabinet for Families and Children approved the placement. The biological parents acknowledged that could not they care for the child. To jerk the rug from under this child now could be devastating. Finding sufficient evidence in the record to support the trial court's conclusion, we affirm the Campbell Family Court order allowing the maternal Grandmother standing in custody matters as a *de facto* custodian.

STUMBO, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS.

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