

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002150-ME

LIZZIE KAY HUDSON

APPELLANT

v. APPEAL FROM BREATHITT FAMILY COURT
HONORABLE LARRY W. MILLER, JUDGE
ACTION NO. 04-J-00129

CLARINDA HUDSON

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

KELLER, JUDGE: Lizzie Kay Hudson (Lizzie) appeals from the family court's finding that she was not a *de facto* custodian of her niece, T.L.H. On appeal, Lizzie argues that the family court erred when it considered Social Security benefits paid on behalf of T.L.H. in determining that Lizzie had not been the

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

primary financial supporter of T.L.H. Having reviewed the record and the arguments of counsel, we affirm.

FACTS

T.L.H. was born November 1, 2003. In November 2004 T.L.H.'s mother placed T.L.H. with Lizzie, T.L.H.'s paternal aunt by marriage, and Lizzie's husband, Reed. In February 2005, Lizzie was granted permanent custody of T.L.H. In 2005, T.L.H.'s father, who was also Reed's brother, died. Thereafter, T.L.H. began receiving Social Security benefits in the amount of \$1,208.00 per month from her father's account. In 2008, Reed died.

On July 13, 2009, the Cabinet for Health and Family Services (the Cabinet) received allegations that a man living with Lizzie and T.L.H., Russell Perry (Perry), had inappropriately touched T.L.H. During her investigation of those allegations, Cabinet worker Lisa White (White) discovered that another Cabinet worker and the Kentucky State Police were investigating other unrelated allegations of sexual abuse against Perry. White contacted Lizzie about the allegations involving T.L.H. and Perry and interviewed her on September 11, 2009. Lizzie stated that Perry was moving from the home and that she would not permit Perry to have any further contact with T.L.H. Less than two weeks later, White received information from several sources that Perry continued to live in the home. White, on behalf of the Cabinet, filed a petition asking the family court to determine that T.L.H. was dependent and neglected because Lizzie had put her at

risk for sexual abuse.² The family court entered an emergency custody order placing T.L.H. with her paternal grandmother, Clarinda Hudson (Clarinda), and granting Lizzie supervised visitation. Lizzie then filed a motion seeking a determination that she was a *de facto* custodian of T.L.H.

The family court held a hearing on Lizzie's motion on October 28, 2009. During that hearing, Lizzie testified that, if she had to, she could provide for T.L.H.'s shelter, clothing, and food with \$200.00 per month. However, she actually spends \$500.00 to \$600.00 per month. In the event T.L.H.'s Social Security benefits do not cover her expenses, Lizzie pays the additional amount.

Following the hearing, the family court found that Lizzie spent \$500.00 to \$600.00 per month to care for T.L.H.; that T.L.H.'s mother paid \$96.00 a month in child support; and that T.L.H. receives \$1,208.00 per month in Social Security benefits. Based on these findings, the family court determined that Lizzie was not T.L.H.'s primary financial supporter and therefore, could not be T.L.H.'s *de facto* custodian. It is from this order that Lizzie appeals.

STANDARD OF REVIEW

This appeal presents mixed issues of fact and law. We may not disturb the family court's factual findings unless those findings are clearly erroneous. A finding of fact is only clearly erroneous if it is not supported by

² We note that, because she failed to follow the plan implemented by the Cabinet, Lizzie ultimately made an admission that T.L.H. was a dependent child under Kentucky Revised Statute (KRS) 600.020(19). The family court entered an order consistent with this admission and T.L.H. was removed from Lizzie's home.

“evidence sufficient to induce conviction in the mind of a reasonable person.”

B.C. v. B.T., 182 S.W.3d 213, 219-20 (Ky. App. 2005). However, we review the family court’s interpretation of the law *de novo*. *Smith v. Smith*, 235 S.W.3d 1, 6-7 (Ky. App. 2006). With these standards in mind, we address the issue raised by Lizzie on appeal.

ANALYSIS

KRS 403.270 provides that a *de facto* custodian is:

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 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.

There is no dispute that Lizzie was T.L.H.’s primary caregiver for more than one year. Thus, Lizzie met the first requirement to be declared T.L.H.’s *de facto* custodian. However, the parties dispute whether Lizzie was the primary financial supporter of T.L.H. As noted above, the family court found that the combined child support and Social Security benefits of \$1,306.00 Lizzie received on behalf of T.L.H. were more than sufficient to meet T.L.H.’s monthly expenses of \$500.00 to \$600.00 per month. Lizzie argues that she spent \$500.00 to \$600.00 per month of her own money to care for T.L.H. However, that was not Lizzie’s testimony, and after reviewing the record, we conclude that the family court’s findings of fact regarding T.L.H.’s income and needs and Lizzie’s expenditures are

supported by substantial evidence and are not clearly erroneous. Therefore, we affirm the family court's findings regarding those facts.

Having accepted those facts as true, we must determine if the family court correctly determined that Lizzie was not T.L.H.'s primary financial supporter. As noted by the parties, the published case most nearly on point is *Swiss v. Cabinet for Families and Children*, 43 S.W.3d 796 (Ky. App. 2001).³ In *Swiss*, the child's foster parents, the Swisses, sought to adopt the child. However, when the child made an allegation of sexual abuse, the Cabinet removed the child from the Swisses' home. The Swisses then filed a petition seeking custody and alleging that they were *de facto* custodians of the child. The trial court dismissed the Swisses' petition, finding that the Swisses lacked standing to bring the petition and that they did not qualify as *de facto* custodians under KRS 403.270. As to standing, this Court affirmed the trial court's holding that KRS 403.270 applies only to disputes between a parent or parents and the putative *de facto* custodian. It does not apply to foster parents who have custody of the child by virtue of placement by the Cabinet.

This Court also affirmed the trial court's finding that the Swisses did not qualify to be *de facto* custodians under the statute. In doing so, this Court first held that the word "primary" in KRS 403.270 modifies both caregiver and

³ We note that the parties also cite to *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky. App. 2001); however, that case dealt with the issue of whether a step-parent could be a primary caregiver. There is no dispute that Lizzie was the primary caregiver for T.L.H.; therefore, *Consalvi* is of limited application.

financial supporter. Therefore, a person seeking the status of *de facto* custodian must establish that she was the primary financial supporter of the child. This Court held that, because the Swisses acknowledged that the Cabinet was the primary financial supporter of the child, the trial court correctly determined that the Swisses could not qualify to be *de facto* custodians.

The Court did not address the situation herein, where the majority of the funds to support the child come not from the Cabinet but from the Social Security Administration. However, we believe that is a distinction without a difference. In this case, as in *Swiss*, Lizzie was not the primary financial supporter of T.L.H. T.L.H.'s primary financial supporter was, and is, the Social Security Administration. Lizzie, like the Swisses, was merely the conduit through which the financial support passed. Therefore, we agree with the family court's finding that Lizzie was not the primary financial supporter of T.L.H. and therefore not her *de facto* custodian.

As to Lizzie's argument that this holding means that no one can be T.L.H.'s *de facto* custodian, we agree that may be the case. However, we note that a different panel of this Court held in an unpublished opinion that if food stamps and federal supplemental security income benefits are not the primary source of support, the custodian may qualify for *de facto* status. *See Shelton v. Shelton*, 2008 WL 2696902 (Ky. App. 2008)(2007-CA-001369-ME), which is cited for its reasoning, not for its precedential value. Therefore, if T.L.H.'s custodian, whoever that may be, can prove that the primary source of support is not from her Social

Security benefits and/or child support, that custodian could qualify for *de facto* status.

CONCLUSION

Because Lizzie failed to prove that she was the primary financial supporter of T.L.H., we affirm the family court's finding that she was not T.L.H.'s *de facto* custodian.

ALL CONCUR.

BRIEF FOR APPELLANT:

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