

**Commonwealth of Kentucky
Court of Appeals**

NO. 2010-CA-001270-ME

JERRY SCOTT; AND
BARBARA SCOTT

APPELLANTS

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 09-CI-500918

DONALD C. MIHELIC

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND KELLER, Judges.

COMBS, JUDGE: Terry and Barbara Scott appeal from an order of the Jefferson Family Court that granted the petition of Donald Mihelic for custody of his son, Kyle. After reviewing the record, the applicable law, and the arguments of the parties, we affirm.

Kyle was born in Jefferson County in 2002. Mihelic and Michelle Johnson, Kyle's mother, were never married and did not cohabitate either before or after his

birth. Johnson ended her relationship with Mihelic shortly after learning that she was pregnant.

In 2004, Johnson moved with Kyle into the home of Barbara and Terry Scott, Johnson's mother and step-father. Barbara Scott cared for her grandson while Johnson worked. Johnson and Kyle lived together in a self-contained, finished basement, and the Scotts were thoroughly involved in Kyle's day-to-day activities.

Johnson lost her job in December 2007. In mid-February 2008, Johnson left the Scotts' residence at their urging. Kyle was enrolled in school, and he was to remain at the Scotts' house until Johnson could provide a home for him. On May 28, 2008, Johnson filed a paternity action against Mihelic.

By August 2008, Kyle had begun to reside again (at least intermittently) with his mother. Because she had some appointments to keep, Johnson left Kyle at the Scotts' residence on Tuesday, August 12, 2008. A few days later, she was arrested in Bullitt County; she was unable to make bail. Barbara Scott contacted the Department for Community Based Services and filed a child protective services report alleging neglect by Johnson.

At a hearing held September 18, 2008, the Scotts were awarded temporary custody of Kyle by the Jefferson Family Court. As Kyle's putative father, Mihelic was represented by counsel at this hearing. Johnson eventually hired counsel, appeared in the matter, and asserted her parental rights to custody. However, the matter was continued until October 16, 2008, and then again until January 2009.

In December 2008, after the results of genetic testing were obtained, a judgment of paternity was entered determining Mihelic to be Kyle's biological father. Mihelic agreed to pay child support for Kyle's benefit and to provide health insurance for him. Although Kyle continued to reside with the Scotts, the judgment designated Mihelic and Johnson as Kyle's joint legal custodians.

On March 3, 2009, Johnson died as a result of multiple drug intoxication. The neglect matter initiated by the Scotts had been set for a final hearing to be held on March 5, 2009. On March 18, 2009, Mihelic filed a petition for custody of his son. The neglect matter against Johnson was closed.

Kyle was introduced to Mihelic, and they began to work together with a family therapist. Over the course of frequent visits, Kyle gradually began to build relationships with his father, his step-mother, and the family's other children. Kyle continued to maintain a close relationship with his grandparents as well.

A trial was conducted before the Jefferson Family Court on March 16, 2010. In its order entered of June 3, 2010, the court rejected the Scotts' contention that they had standing to participate in the custody matter as Kyle's "de facto custodians" and concluded that Mihelic was entitled to sole custody of his son as a matter of law. This appeal followed.

The courts of the Commonwealth have consistently recognized the superior right of a parent to the care, custody, and control of his children and the constitutionally protected right of a parent to raise his or her own child. *See Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Kentucky Revised Statute(s) (KRS)

405.020(1) provides explicitly that a “father and mother *shall have* the joint custody” of their child. (Emphasis added). Moreover, “[i]f either of the parents dies, the **survivor**, if suited to the trust, **shall have** the custody” of the child. *Id.* (Emphases added).

Notwithstanding the provisions of KRS 405.020(1), however, the General Assembly has additionally addressed the issue of de facto custodians in this context:

if either parent dies and at the time of death a child **is in the custody of a de facto custodian**, as defined in KRS 403.270, the court shall award custody to the de facto custodian if the court determines that the best interests of the child will be served by that award of custody.

KRS 405.020(4). (Emphasis added).

A de facto custodian is defined by the provisions of KRS 403.270(1) as follows:

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. . . . 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.

(Emphasis added). *Clear and convincing evidence* is defined as evidence that is substantially more persuasive than a preponderance of the evidence but not

necessarily beyond a reasonable doubt. *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004).

In their brief, the Scotts argue that the family court misinterpreted the meaning of “primary caregiver and financial supporter” as that phrase is used in KRS 403.270. They also argue that some of the court’s findings of fact are clearly erroneous. The Scotts contend that they showed by clear and convincing evidence that they had been the primary caregiver for and the financial supporter of Kyle, who resided with them for at least a year, and that the family court erred by failing to find that they were Kyle’s de facto custodians having standing to participate in the custody proceedings. We disagree.

Following a lengthy hearing, the family court found, in part, as follows:

During the majority of the time that [Johnson] and Kyle lived [with the Scotts], [Johnson] was employed and it is clear that her parents played a major role in child care. However, she took Kyle to the pediatrician, as evidenced by the doctor’s records. She attended school conferences. She also enrolled Kyle in the preschool at Okolona Christian and paid the costs associated with the program. [Johnson] also engaged in a variety of normal parenting activities such as attending ballgames, going to special events and providing physical care for Kyle. She was employed by Humana until December of 2007. [Johnson] declared Kyle as a dependent for income tax purposes. Humana’s payroll records further show that [Johnson] provided health insurance coverage for Kyle as a “dependent child.” This coverage included health and dental coverage. These coverages ended on December 21, 2007. After that date, Kyle was not covered by insurance until [Mihelic] provided coverage beginning in December 2008.

During 2007, Kyle attended St. Nicholas Academy. [Johnson] paid his tuition of \$400 out of her paycheck

each month. . . . [Johnson] and the Scotts were jointly parenting and supporting Kyle while [Johnson] lived [at the Scotts' residence] and was employed although the Scotts were arguably doing a substantial amount of hands-on care.

* * * * *

[I]t is clear from the record that Kyle resided primarily with [the Scotts], without his mother, beginning February 11, 2008 until the end of the school year, the last of May.

[After February 2008, Johnson] had regular unsupervised parenting time at her home with Kyle.

* * * * *

It is unclear to the Court where Kyle primarily lived from the end of school until August. While the Scotts claim the child lived with them . . . that claim loses credibility due to Barbara's call to CPS on August 19, 2008. Barbara called CPS to report that [Johnson] had "dropped off" Kyle with the Scotts on August 12th and had not returned to pick him up. If Kyle had been living with the grandparents that summer and [Johnson] had little or no contact with him as claimed, there was no reason for Barbara to call CPS on August 19th. However, if Kyle had been living with the mother primarily or for substantial periods from the end of school until August 12th, was dropped off at the Scotts and his mother failed to come back to get him, then Barbara's call to CPS was reasonable. Therefore, any de facto status period may have run from February to the end of May but stopped at the beginning of June 2008.

* * * * *

[A]ny period of de facto custody would have began [sic] anew on August 12, 2008, but was extinguished, at the latest, when [Mihelic] asked for custody on March 5, 2009.

Findings of Fact and Conclusions of Law at 3 - 5.

Based on these findings, the court concluded, in part, as follows:

While there is substantial evidence on the de facto custody issue favorable to the Scotts, there is no clear and convincing evidence that they meet the statutory threshold as defined by KRS 403.270. Kentucky law is clear that even if the Scotts did more than their share of parenting and support for the child, the de facto period could not commence as long as they were co-parenting with [Johnson] which occurred while she lived with them until February 2008 and again during the summer of 2008.

* * * * *

[Mihelic] promptly entered into a judgment providing child support and health insurance coverage. Thus the Scotts received \$100.00 per week . . . to support Kyle by a judgment of this Court that granted [Mihelic] joint custody of Kyle. After [Johnson] died the Scotts began to receive \$966.00 per month from the Social Security Administration. These facts, along with the prior discussion, negate the Scotts [sic] clear and convincing evidence of being Kyle's primary financial supporter.

Findings of Fact and Conclusions of Law at 10 – 11.

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. Kentucky Rule(s) of Civil Procedure (CR) 52.01. Findings of fact are not clearly erroneous where there is substantial evidence in the record to support them. *Reichle v. Reichle*, 719 S.W.2d 442 (Ky.1986). If the findings are supported by substantial evidence, our review on appeal is limited to an assessment of the court's legal conclusions. Its legal conclusions are reviewed *de novo*. *Brewick v. Brewick*, 121 S.W.3d 524 (Ky.App. 2003).

Before the family court may find that a caregiver has become the “de facto custodian” entitled to be placed on the same footing as a biological parent in a custody proceeding, the court must determine that the biological parents have abdicated the role of primary caregiver and financial supporter of the child for the required period of time. *London v. Collins*, 242 S.W.3d 351 (Ky.App. 2007). “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.” *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky.App. 2001). If a nonparent provides care and financial support for a child in conjunction with a natural parent, the nonparent **will not qualify** as a de facto custodian. *Boone v. Ballinger*, 228 S.W.3d 1 (Ky.App. 2007). The family court did not misinterpret the requirements of KRS 403.270.

In this case, it is undisputed that Johnson and Kyle resided together in the Scotts’ basement until February 2008. The family court found that Johnson was providing substantial care and financial support for Kyle until that point and again during the summer months of 2008. Although the Scotts contended otherwise, these findings are supported by substantial evidence and are not clearly erroneous. The Scotts also argue that a contradiction exists between the court’s finding that “the Scotts were arguably doing a substantial amount of the hands-on care,” and its finding that the parties were engaged in a kind of “co-parenting” throughout these periods. However, the caselaw is clear that the Scotts cannot claim de facto custodian status during these periods of **shared** caregiving.

It is also undisputed that Mihelic began providing financial support (including health insurance) for Kyle after his paternity was established in November 2008. While the Scotts provided care and support for Kyle (sometimes without contribution from either of his parents), the family court did not err by concluding that the Scotts had not shown by clear and convincing evidence that Johnson and Mihelic had abdicated their roles as Kyle's primary caregivers and financial supporters for the required statutory period.

Therefore, we affirm the decision of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rocco J. Celebrezze
Jennifer S. Begley
Louisville, Kentucky

BRIEF FOR APPELLEE:

Dennis R. Carrithers
Louisville, Kentucky