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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000057-ME

J. M. D. APPELLANT

v.

APPEAL FROM WARREN FAMILY COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 10-J-00461-001

N. D.; E. S. H., A CHILD; D. H.; AND
COMMONWEALTH OF KENTUCKY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, J. LAMBERT, AND STUMBO, JUDGES.

LAMBERT, J., JUDGE: J.M.D. (the Mother) has appealed from the December 3, 2012, order of the Warren Family Court granting permanent custody of her daughter, E.S.H. (the Child), to N.D., the Child's *de facto* custodian and adult half-sister. Finding no error or abuse of discretion, we affirm the order on appeal.

This custody matter began in the family court with the filing of a Juvenile Dependency, Neglect and Abuse (DNA) Petition by N.D. on June 25,

2010, regarding the Child, who was born in 2005 and was five years old at the time the petition was filed. N.D. is the Child's older half-sister. N.D. was born in 1990 to the Mother by a different father. N.D. listed the Child's father as D.H. (the Father), who is a Colorado resident, and she stated that he paid child support but had not had any other contact with the Child.[1] In the affidavit, N.D. stated that the Child was dependent for the following reasons:

> Her mother [name omitted] left her in my care on June 8, 2010 when she went to Utah. [The Mother] was arrested on June 13, 2010, and has not contacted us directly since then. She has a hearing on the 28th of June. If they are going to sentence her, they will schedule another hearing. She was arrested for 3 class B misdemeanors. Requesting emergency custody.

In addition, N.D. filed a petition to obtain emergency custody of the Child. In that affidavit, N.D. stated:

> [The Mother] left to Utah on June 8, 2010 and left [the Child] in my custody. We were staying with family friends (Jane O. and Elizabeth S.).[2] [The Mother] was arrested on June 13, 2010 and has not directly contacted any of us since then. She has a hearing on the 28th of June. If she is to be sentenced they will reschedule another hearing. She was arrested for 3 Class B Misdemeanors.

The family court appointed a guardian *ad litem* (GAL) for the Child and issued a summons. The family court granted N.D. emergency custody the same day the petition was filed, finding that the Child was in immediate danger due to the

[1] Paternity was established by a Colorado court order entered in 2005 based upon the Father's written acknowledgement of paternity, and he was ordered to pay child support. The Father was named as an appellee in the present appeal, but he has not participated.

[2] We shall not include these individuals' respective last names to maintain privacy.

Mother's "failure or refusal to provide for the safety or need of the child." The Father appeared in court and was permitted to participate in future proceedings telephonically. The court also entered a treatment referral order requiring the Cabinet to investigate N.D.'s home as well as the Father's home through the state of Colorado.

The family court appointed attorney Stanford Obi to represent the Mother and attorney Casey Hixon to represent the Father, and following a temporary removal hearing on June 28, 2010, the family court placed the Child in the temporary custody of N.D. and granted the Father liberal visitation and telephonic contact. An adjudication hearing was scheduled for August 2, 2010.

Prior to the hearing, the Cabinet performed a Relative Home Evaluation of N.D. dated July 26, 2010, and concluded that "this is a loving and supportive home for [the Child] at this time." The report indicated that N.D. had been diagnosed with bipolar disorder in late 2008 or early 2009 but had not reported any symptoms since February 2009. She regularly visited a therapist in order to monitor her mood and any other symptoms she might experience. At the adjudication hearing, the Mother stipulated to dependency, and the family court found that the Child was dependent. The family court scheduled a disposition hearing for November 8, 2010, and ordered the Cabinet to complete a home evaluation of the Mother's home in Jackson Hole, Wyoming, where she was then residing.

The Cabinet filed a dispositional report prior to the hearing, noting that reports of the home evaluations of the Mother and the Father had not yet been

received from their respective states. Services had been put in place to help N.D. in her caretaker role, and the ensuing reports had been positive. The hearing was rescheduled twice in order to obtain the requested home evaluations.

The Wyoming Department of Family Services performed a home study on the Mother's home in late 2010, and it did not recommend the Mother as a placement option. The report detailed her individual history, her relationships and children (she had had two children with her former husband, including nineteen-year-old N.D. and another seventeen-year-old daughter), her employment, her physical and mental health, her parenting style, and her current home in Wyoming. Background checks revealed that in November, EMS had been dispatched to her address where the Mother was found unresponsive after trying to commit suicide by overdosing on Valium, Topomax, and Hydrocodone pills. She was evaluated and then sent to the State Mental Hospital in Wyoming. She fraudulently obtained the medication by calling in the prescriptions by identifying herself as being from a doctor's office. The Mother had been discharged by the time the social worker completing the report met with her, and the Mother set up an appointment at a counseling center pursuant to her discharge plan. Further investigation revealed a criminal history of theft, disorderly conduct, theft by unlawful taking, battery, and uttering a forged prescription. The report concluded as follows: "Based on the events that have occurred during the home study process, we are not confident that [the Mother] can provide a stable home for [the Child.] Therefore, we are unable to recommend [the Mother] as a placement at this time."

Colorado's Fremont Department of Social Services completed a placement evaluation of the Father in late 2010. The Father, who was married, stated that he wanted to have a relationship with his daughter. Based upon the results of the evaluation, the caseworker recommended that he and his wife be approved for placement of the Child.

The Cabinet filed an updated report prior to the hearing stating that N.D. had maintained a safe, stable environment for the Child and that it had obtained placement reports for both parents. The Cabinet recommended that the child should remain in N.D.'s custody until she transitioned to the Father's custody at the end of the current school year. In addition, the Father filed a motion for custody in February 2011, stating his belief that it was not in the Child's best interest to be raised by her young half-sister.

The family court held the disposition hearing on February 22, 2011, and it entered a disposition order on February 24, 2011, finding that the Child was dependent, that continuation in the Mother's home was contrary to her welfare, that reasonable efforts were made to prevent removal, and there were no less restrictive alternatives to removal. On the last finding, the court specifically found as follows: "Mother unfit. Mother [] stipulated to dependency. Mother's residence in Wilson, Wyoming not recommended as a stable placement for child, see Wyoming Department of Family Services reported filed herein on Jan. 5, 2011." By separate order, the Mother was ordered to pay child support in the amount of $424.00 per month beginning February 15, 2011. The court then

scheduled an evidentiary hearing on the Father's motion for custody on June 7, 2011. However, the Father later withdrew his motion for custody as set forth in the court's calendar order entered June 8, 2011.[3] The February 24, 2011, disposition order was to remain in effect, and the case was removed from the active docket.

In October 2011, the Mother filed a motion to place the case on the active docket and schedule a review hearing regarding what actions she needed to take in order for the Child to be returned to her. The family court set a hearing for November 22, 2011. The record reflects that the Mother had been having supervised visitations with the Child at the Family Enrichment Center in Bowling Green, Kentucky. These visitations had been held on a weekly basis since August 2011. The Cabinet filed a report on November 18, 2011, stating that the Child continued to live with N.D., who had continued to maintain a safe and stable environment for the Child. Cabinet social worker Myra Mattingly stated that the Cabinet had not had any contact from the Father since the last court date and had not had any contact with the Mother until she reached out at the end of September 2011 with concerns about the Child having contact with N.D.'s father. Ms. Mattingly also noted that the Mother had moved back to Kentucky without notifying the Cabinet and she had not contacted the Cabinet about case plan objectives and tasks or about regaining custody of the Child. The Cabinet recommended that the case be closed due to lack of cooperation and interest from the Mother.

[3] The recording of the hearing date of June 8, 2011, if there was one, was not included in the certified record.

At the November 22, 2011, hearing, the Mother requested that the case be put back on the active docket and for a review hearing to be scheduled. She wished to be reunified with the Child. The Mother also asked the court to order a home evaluation to establish her stability. Counsel stated he could provide copies of her mental health records if the court wanted to review them. The Mother stated that she had moved to Bowling Green in August. In response, N.D., through her counsel, stated that the Mother had not been paying any child support, despite the prior order that she do so. The arrearage was in excess of $4,000.00. Counsel further stated that there had been issues with the telephone contact between the Mother and the Child, which the court was requested to address. N.D. was monitoring the calls because the Mother was putting the Child in awkward situations and making inappropriate comments. Counsel had N.D. take notes of the some of the conversations. The court instructed counsel for the Mother to meet with counsel for N.D. regarding the inappropriate telephone conversations following the hearing, and directed the Mother to have appropriate conversations with the Child. N.D. was permitted to monitor the calls to ensure they were appropriate and was to let the court know if anything inappropriate happened. Counsel also stated that N.D. would be filing a motion to seek permanent custody of the child. Following the hearing, the family court entered an order authorizing a home evaluation of the Mother, including criminal background checks of the adults residing in the home. The matter was set for a hearing on January 24, 2012.

In December 2011, the family court ordered the Mother to show cause why she should not be held in contempt for failing to pay child support. By separate order, the court also ordered the Father to provide medical insurance for the Child.

The Cabinet filed an updated report dated January 20, 2012, in which Ms. Mattingly indicated that she had met with the Mother to negotiate objectives and tasks for her case plan. The Mother was to enroll in and complete parenting classes as well as maintain stable housing and finances. Following a January 24, 2012, hearing, the court scheduled the matter for additional review in early March. In February 2012, the Cabinet filed a home evaluation of the Mother.[4] Cabinet social worker Lucas Hall completed the report. Regarding the Mother's stability, the report referenced her multiple moves, both in the United States and internationally. Since 1989, the Mother had lived and worked in Taiwan, Croatia, South Carolina, Colorado, Kentucky, and Wyoming. She had been living in Bowling Green, Kentucky, since August 2011. Mr. Hall concluded: "Her history of transience makes this placement questionable." Regarding her mental health, Mr. Hall stated that the Mother had been diagnosed with Major Depression, had attempted suicide in November 2010, and had been hospitalized. She also had migraines.[5] Her home was very well kept, neat, and clean, and had adequate space for the Child. Mr. Hall stated his concerns as:

[4] The form included a notation that the Child was dependent due to the death of the parents, which was in fact a clerical error.

[5] This paragraph included the statement that the Mother "appears to have a history of pathological lying."

> This worker has concerns about the great deal of transiency reported. [The Child] needs to be in a stable and permenant [sic] living environment. There are several things that [the Mother] stated that are not consistent with the actual facts. For example, [the Mother] stated that her two youngest children were born in Taiwan when in fact [the Child] was born in Colorado. This worker is concerned about [the Mother's] pattern of lying and refusal to submit paperwork to the Cabinet. There are resources available to support this family but it is unknown if they will be utilized.

Based on these observations, the Cabinet did not recommend placement with the Mother, stating that "the Child has a stable living environment and is flourishing in it. The Cabinet recommends that [the Child] remain in her current placement."

Prior to the hearing date, the Mother's counsel moved to withdraw, citing a breakdown in the attorney-client relationship. The family court granted the motion on February 29, 2012. John David Cole, Jr., entered an appearance as the Mother's counsel the following month.

The Cabinet filed an updated report on March 1, 2012. The report indicated that the Mother had completed her parenting classes in January 2012 and that the Child was thriving in her placement with N.D., noting they had "forged a very strong bond over the past 20 months." The Cabinet did not recommend placement with the Mother and recommended that she remain in N.D.'s custody. At the March 5, 2012, court hearing, the family court denied the Mother's motion for a second home evaluation and set the matter for review in May.

In April, the court ordered the Mother to show cause why she should not be held in contempt for failure to pay child support.

On April 26, 2012, the Mother moved for unsupervised visitation with the Child, stating that she did not pose a risk of harm to her. The Cabinet filed another updated report on May 2, 2012. The Cabinet recommended that supervised visitations continue due to the Mother's mental health history and because she had not been the Child's caretaker for twenty-one months.

On May 4, 2012, N.D. filed a motion to establish child support, calculate the child support arrearage, and for wage assignment. She stated that the Mother had not provided any financial assistance since June of 2010, when the Child began living with her. The Mother was earning $400.00 per week through her employment.

Also on May 4, 2012, N.D. moved to be named as the Child's *de facto* custodian pursuant to Kentucky Revised Statutes (KRS) 403.270 and to be named as her permanent custodian. She also requested an evidentiary hearing. The Child had been in her custody since June 2010 when the Mother left for Utah. She stated that while the Father had provided some court-ordered child support and medical coverage for the Child, the Mother failed to provide any financial assistance. N.D. referred to the previous home evaluation in Wyoming as well as the Mother's suicide attempt and mental health issues to argue that she (N.D.) should be appointed as the Child's permanent custodian, citing the Cabinet's report on the Child's current status with her.

On May 16, 2012, the family court entered an agreed order holding the Mother in contempt for failing to pay child support. At that time, the Mother

appeared without counsel. No payments had been made since December 2011. The court sentenced the Mother to thirty days in jail, but held the sentence in abeyance on the conditions that she pay her support obligation every month, appear for a review on June 19, 2012, and pay $200.00 to AHM's office[6] on May 18, 2012. She was in arrears on her obligation in the amount of $6,008.00, which had accrued between February 15, 2011, and April 30, 2012. The court ordered her to pay an additional $106.00 per month for a total child support obligation of $530.00.

On June 20, 2012, N.D. filed a second motion to be designated as the *de facto* custodian, this time including an affidavit pursuant to the court's direction. She stated that she was awarded temporary custody of the Child on June 28, 2010, that she had been the primary caregiver and financial supporter of the Child since that time, that the Father had withdrawn his request for custody, and that there had been no other requests for custody by either parent. She included her affidavit to establish evidence to meet the requirements of KRS 403.270(1). She explained:

> 2. In June 2010, Affiant was contacted by [Elizabeth S.] and told that her five-year-old sister had been left in Bowling Green while [the Mother] went to Utah. [Elizabeth S.] had been unable to contact [the Mother.] Affiant tried to contact [the Mother] but was unable to do so. Affiant later learned that [the Mother] had been arrested and incarcerated in Ogden, Utah on a retail theft charge.
>
> 3. Affiant contacted [the Father] to advise him of the situation. [The Father] did come to Bowling Green

[6] It is not apparent from the record what "AHM" stands for.

> and initially requested to be appointed guardian of [the Child] but later withdrew the request.
>
> 4. After [the Mother] was released from incarceration, she did not initially return to Bowling Green, Kentucky. [The Mother] advised Affiant that she was living in Jackson Hole, Wyoming.

N.D. went on to state that she had provided the Child with her daily needs, including a place to live, meals, medical care, and an education. She provided for appropriate childcare when necessary. She stated that the Father had provided some court-ordered child support and medical insurance, but these payments had not covered all of the Child's expenses. N.D. had paid for the other expenses. The Mother had provided less than $400.00 for the Child's support over the two-year period. Therefore, N.D. had been the primary financial supporter and sole caregiver for the Child for the past two years. The child was enrolled in the 2nd grade at a local elementary school, was well-adjusted, and had many friends. N.D. and the child had "developed a very close bond" and she believed this was the Child's first stable home during her lifetime. N.D. stated that it was in the Child's best interest for her to be appointed her permanent custodian.

By order entered June 21, 2012, the family court adjusted the Mother's child support obligation by agreement to $414.00 per month beginning July 1, 2012. The following day, the Mother's counsel moved to withdraw, citing a communication issue between them. The court granted the motion shortly thereafter.

On July 18, 2012, the Cabinet filed an updated report. The Mother had not yet provided documentation from her psychological testing and proof that she had been compliant with all of the recommendations. In addition, she had not provided documents showing her compliance with recommendations from her drug and alcohol assessment. However, she had continued with her individual counseling. Because of her mental health history, suicide attempt, and not having been in a caregiver role for the past twenty-three months, the Cabinet recommended family sessions between the Mother and the Child before recommending unsupervised visitation. The Child was continuing to do well in her placement with N.D.

On July 20, 2012, the Mother, proceeding *pro se*, filed a response to N.D.'s motion to be awarded permanent custody. In addition, she moved for termination of the temporary custody order pursuant to KRS 610.120 and to be reinstated as the primary residential custodian pursuant to KRS 620.023. She also requested an evidentiary hearing. The Mother stated that she relied upon "poor legal advice" of her appointed counsel to remain in Wyoming until after the August 2010 hearing. She also disputed being labeled as a compulsive liar and a transient. She said that she now had a stable job, a suitable and stable home, and a stable lifestyle. Therefore, the Child was no longer in need of placement.

The court held a hearing on July 24, 2012, regarding N.D.'s motion to be designated as the *de facto* custodian. The Mother appeared without an attorney. Her previous attorney had withdrawn, and she had sought a new attorney who was not able to attend the hearing date. N.D. was the first witness to testify. She was

twenty-one years old at the time. The Child had lived with her since June 2010, and she had been the primary caregiver and financial supporter since that time. N.D. began receiving child support from the Father in March 2011. Prior to that, she expressed some difficulty as she was a full-time student with a full-time job. She took a year off to take a full-time position. N.D. provided housing, food, and medical care, although the Child's father provided medical insurance and $563.00 per month in child support. The Mother had given the Child some hand-me-down clothes from family friends and had paid $350.00 in child support. The Father cut off all contact on March 1, 2011, after the child support order was entered. N.D. had complied with all of the Cabinet's requirements and stated she would continue to do so. The GAL and the Cabinet agreed that N.D. should be declared to be the *de facto* custodian. Following the testimony, the family court made several findings on the record, and found by clear and convincing evidence that N.D. had been the child's *de facto* custodian since June 2010.

By order entered August 7, 2012, the family court formally granted N.D.'s motion and designated her as the Child's *de facto* custodian. In so holding, the court determined that more than one year had elapsed between June 8, 2011, when the Father withdrew his motion for custody, and July 20, 2012, when the Mother sought to regain custody. Therefore, the minimum period of time for *de facto* custodian status had been met. The family court also found that N.D. had been the primary caregiver and financial supporter for the Child since June 2010. Accordingly, the court decided based on the clear and convincing evidence of

record that N.D. had satisfied the requirements to be designated as the Child's *de facto* custodian pursuant to KRS 403.270(1). By virtue of this designation, the family court gave N.D. the same standing in the pending custody action as the parents. The court set a permanent custody hearing for later in 2012.

The Cabinet filed an updated report dated August 21, 2012. The report notes that N.D. filed for and received an emergency protection order (EPO) against the Mother due to a recent incident. Therefore, supervised visits could no longer be facilitated between the Mother and the Child. The Cabinet recommended that the Child remain in the custody of N.D., that the Mother not have any contact with N.D. or the Child until ordered otherwise, that the Mother have a drug and alcohol assessment and follow any recommendations, that the Mother and the Child enroll in family counseling, and that the Mother pay child support as ordered.

The court held the custody hearing on two dates, September 14 and October 23, 2012. Prior to the first hearing date, attorney Matthew Baker entered an appearance for the Mother. Prior to hearing testimony on the first date, the court reminded the parties that in a previous ruling it named N.D. as the Child's *de facto* custodian and that as such she had the same standing as a parent in the proceedings. The first witness to testify was N.D., who was 21 years old at the time of the hearing. She worked as an administrative assistant and was attending Western Kentucky University, where she was a junior.

N.D. described her childhood as tumultuous and explained that the family moved around quite a bit. She was born in Taiwan, and her family had lived in

Texas, Virginia, Colorado, and several homes in South Carolina. She lived with her father in Louisiana for two years, and then she lived in Kentucky with her Mother, her sister, A.D., and the Child. When things were bad at home, N.D. said she would step in and take responsibility. She was very involved with caring for the Child. The Mother was arrested three times during N.D.'s senior year in high school, and she was out of town frequently. N.D. took care of the Child during these times, and she missed school as a result. She was able to graduate on time due to her grades. Initially after high school, she attended the University of Louisville on an academic scholarship and was in all honors classes.

In the summer of 2010, N.D. sought emergency custody of the Child. She was still attending college in Louisville, and she had gone to Bowling Green to spend some time with friends. She had been there a few weeks when the Mother came into town with the Child. The Mother had contacted Elizabeth S.'s mother, Jane O., who invited her to stay with them. The Mother went to Utah two weeks later to retrieve some of her belongs. After no one could get in contact with her for one week, N.D. discovered the Mother had been arrested and incarcerated in Utah for shoplifting, and at that time she sought emergency custody. At this time, the Child was with Elizabeth S. and Jane O., and N.D. went to stay with them. N.D.'s biggest concern was that neither Elizabeth nor Jane had the appropriate paperwork to care for the Child. N.D. described this time as hectic; she was still in college and had no money, so she got a loan to rent a U-Haul to move her belongings. She started working full-time and enrolled at Western Kentucky University while

raising the Child. The Child was attending kindergarten. She was laid off in January from her employment because it closed, so life became less hectic. During the summer of 2011, A.D. and her daughter moved in with them in a different residence, but A.D. later moved out. The Child did well in kindergarten and in the 1st grade. She was on target or ahead in all of her courses. In April 2012, N.D. had started a new job, and that summer the Child attended a summer program at Parks & Recreation. They also spent some time in Tennessee during the summer.

N.D. believed it was in the Child's best interest for her to be named her permanent custodian. She had been raising the Child for the last two years, and the Child had attended kindergarten and the 1st grade, and was then in the 2nd grade, where she was happy and strong. N.D. said she loved the Child and had tried hard to provide the most stable, loving environment she could. In contrast, she said her own childhood was very unstable. There was always drama or some sort of lawsuit involving her Mother. The Mother had been arrested multiple times, and she had sued a number of companies. N.D. stated that since the Child had been living with her, the Child was not as reserved or quiet as she had been before. The Child was excelling both socially and educationally, and she was constantly laughing, smiling, and playing. N.D. stated that the Child was doing amazingly well and that they had a great life together. She felt very optimistic about the Child's future with her.

N.D. went on to describe the problems associated with the Mother's telephonic visitation with the Child. The Mother would make promises to the

Child, including stating that she would take her on a balloon ride, to Disney World, or to the pool at her apartment complex, when she came to live with her. On one call, N.D. stated that the Mother had tried to induce jealousy in the Child by telling her that another little girl was playing with her toys at her apartment. This was difficult for the Child. N.D. began to put the calls on speaker based on the Child's behavior after the calls so that she could intervene or find a way to explain the information to the Child. She had to intervene a few times.

Supervised visitation was going fairly well. However, N.D. learned in August that the Mother had terminated visitation. There had not been any visitations since that time. N.D. had been receiving child support from the Father, and she had received child support from the Mother for the last couple of months. Before that, the Mother did not regularly pay her support obligation. Her arrearage was $4,115.00 the last time N.D. checked. N.D. received $653.00 per month in child support from the Father, and she was supposed to receive $414.00 per month from the Mother.

N.D.'s relationship with her Mother was limited. She tried to communicate in the beginning but there was no way to effectively do so. She began communicating through text messages, but she tried to limit all communication with her. She did not believe it would be in the Child's best interest to have unsupervised visitation with the Mother based upon the telephonic visitation. The Mother was extremely manipulative with the Child. Looking to her own childhood, she was concerned that the Mother would disappear with her. At the

beginning of August, she received a disturbing text message from the Mother about "flying through her apartment" and referenced N.D.'s visitors from Tennessee who had spent the night in the apartment the prior evening. Over the past few weeks, N.D. described other unusual occurrences, including the Mother telling the Child on two occasions that she would "see her tomorrow" when she was not scheduled to do so. Later, the police investigated an anonymous report that she (N.D.) had drugs in her car. The police searched her car and the apartment. The police were called a second time and searched her car again. She believed that the Mother had made the anonymous reports.

On cross-examination, N.D. described her relationship with the Mother in high school as positive, as long as she agreed with her. The Mother was fun and charismatic, and N.D. did not like to be confrontational. N.D. said she played the mediator between the Mother and A.D. She wanted to protect her sisters by keeping matters as non-confrontational as possible. N.D. began limiting communication with the Mother at the end of July or August 2010, after a phone conversation in which the Mother told her she hoped N.D. would die. She said she feared the Mother at times, and she was in fear for the Child.

The next witness to testify was Cabinet case worker Myra Mattingly. She was the Child's on-going case manager. On home visits, she noted the close relationship between N.D. and the Child. She said that N.D. was wise beyond her years, and she described her as patient and nurturing. She said it was obvious that they had a close bond. Ms. Mattingly had not performed a home visit for the

Mother. She first met the Mother in person in October 2011, and then went on maternity leave. There was some confusion about the Mother's address after Ms. Mattingly returned from leave. Furthermore, the Mother had made some threatening statements that caused her to not perform a home visit at that time. These threats were passed along to her by her supervisor. The Mother was upset with some of the recommendations Ms. Mattingly had made to the court regarding a drug and alcohol assessment and supervised visitation, among others. Ms. Mattingly was not sure if a drug and alcohol assessment had been completed, but she was aware a psychological assessment had been completed. However, Ms. Mattingly had not received the report of the evaluation because the Mother had not paid for it. This assessment had been recommended due to the results of the home evaluation in Wyoming. The suicide attempt was the biggest concern the Cabinet had with the Wyoming report. Ms. Mattingly described the Mother as very confident and assured, but her experience with her established that the Mother would deny saying things that she had said earlier.

Ms. Mattingly stated that it would be in the Child's best interest to stay with N.D. She had stability, her needs were being met, she had a loving and nurturing relationship with N.D., and N.D. had her best interest at heart.

Marci Huff was the next witness to testify. She is a mental health counselor. She began services with the Child in June 2012, and they had had six sessions. She noted increased anxiety in the last month, so they had worked on coping skills. She described the Child as very smart and that she took a little bit of time to warm

up to people, but was then very talkative, and she smiled and laughed often. The sources of the anxiety were a scary picture she accidentally saw on a friend's computer and fear of what the Mother might do. The Child was afraid the Mother was going to "do something bad," such as take her from school. She recommended that the Child stay with N.D. and that no change in placement take place. The Child was very comfortable with N.D., and N.D. worked to do the best she could do for her. The Mother was not included in any of the sessions with the Child.

A.D. was the next person to testify. She is N.D.'s younger sister and the Child's half-sister. A.D. and the Mother had had physical altercations in the past, the last being two years ago when they lived together. Prior to moving to Bowling Green, the Mother had asked A.D. to shoplift with her at various stores at a time when she was underage. On at least one occasion, they were caught shoplifting. A.D. had observed the interaction between N.D. and the Child, which she described as very happy. The Child was always happy to see N.D., and they were very affectionate with each other. They played and did homework together. She said N.D. was very patient, and she calmly addressed situations when they arose. A.D. and the Mother had not had a relationship with each other since July 2011. She thought it was the best thing for the Child to continue in N.D.'s custody.

Elizabeth S. was the next witness. N.D. was her best friend, and the Child was her daughter's best friend. The Child had been left with her mother at the beginning of these proceedings. She described the changes in the Child since she

had been left two years previously. She said the Child was introverted at the beginning. As time passed, she had turned into a playful, extroverted little girl. She had observed N.D.'s parenting skills and said she was very good at it. N.D. disciplined appropriately when necessary and discussed the issue with the Child. She was very patient. She thought it would be best if the Child stayed with N.D. At the conclusion of the testimony, the family court continued the hearing until the following month.

The hearing resumed on October 23, 2012. N.D. announced that her case was closed, and the family court permitted the Mother to call her witnesses. The first witness to testify was the Mother, who was fifty years old. She stated that she had four daughters; the oldest daughter was thirty-two years old, followed by twenty-one-year-old N.D., nineteen-year-old A.D., and the Child, who was seven years old. She had been employed at Alternatives in Treatment for fifteen months, where she earned $400.00 per week as a case manager and court liaison. She went on to detail past jobs in Wyoming as an office manager for a doctor, in Colorado as a recruiter for ITT Missile Defense Systems, and in Bowling Green as a program director at the International Center. She completed nearly two years of college credits in Utah.

The Mother described the Child's life since her birth in Colorado Springs. They moved in with the Father for a period of time until the Mother took a job in Dubrovnik, Croatia, and she, the Father, A.D., and the Child moved there. N.D. was living with her father in Louisiana during this time. The Mother handled

international translation work with her company's hotel and taught ESL classes. They then moved to Taiwan; the Father returned to the United States two months later. The Child was almost two years old when the rest of them returned to the United States. Upon their return, they stayed temporarily in Colorado Springs, went to visit N.D. in Louisiana, and returned to Colorado to pack up items left in storage there. The Mother, A.D., and the Child returned to Bowling Green, Kentucky, for about four years, where the Mother worked at the International Center. N.D. came to live with them a few months later. N.D. attended the University of Louisville after she graduated from high school. The Mother and the Child took an extended two-year trip to Jackson Hole, Wyoming, during this period of time, where the Mother worked for the doctor. N.D. and A.D. did not go with her.

The Mother explained how the Child came to be in N.D.'s temporary custody in June 2010. She stated that she and the Child had driven from out west to Louisiana for A.D.'s graduation. Next, they had driven to Kentucky where N.D. was finishing her first year at the University of Louisville. They were staying with a friend, Jane O., who was a neighbor and preschool assistant in the Child's class. The Mother had to drive to Spring Grove, Utah, to supervise the cleaning and painting of a townhouse where she occasionally stayed. She left the Child with Jane, along with her Medicaid and food stamp cards and a notarized letter giving her guardianship while she was gone. She did not want to take the Child with her because they had been on a long trek across the country. N.D. was there with Jane,

and the Mother trusted Jane to care for the Child. The plan was for her to be gone up to ten days. She began to work on the townhouse until she was arrested for shoplifting in Ogden, Utah. She was in custody for several days. She entered a guilty plea and paid a fine to resolve her case in Utah. However, she did not return to Kentucky at that point. She called to speak with N.D., who told her that she had received temporary custody of the Child and that she could not come to Kentucky. The Mother contacted her appointed counsel and went back to Jackson Hole, Wyoming, based on her attorney's advice. She was working for the doctor at that time, but would come back to Kentucky to participate in the legal proceedings. She spoke to the Child as often as she could and visited when she returned for court. The Mother quit her job in Wyoming and moved to Colorado Springs in April 2011, because it looked like the Father was interested in obtaining custody of the Child. She stayed there a couple of months before she moved back to Bowling Green, Kentucky, in July 2011. She had lived there since that time.

The Mother stated that she had some psychological issues during this time period and that she had suffered from depression her whole life. While she was in Jackson Hole, she experienced despair due to the loss of the Child and tried to commit suicide in November 2010. She was hospitalized locally and then went to a psychiatric hospital for four weeks. She was diagnosed with Major Depression. After she was discharged, she returned to her home in Jackson Hole, Wyoming. She contacted A.D. while she was in the mental hospital, and she stated that A.D. was the only person in whom she confided. She continued to receive follow up

treatment (counseling) after being discharged from the hospital. She remained in Wyoming for seven or eight months, although she did not work as much for the doctor. The Mother received counseling from Ginger VanMeter at LifeSkills in Kentucky, and she had met with her at least fifteen times. She was still taking anti-depressants, including Paxil, and Topomax for migraines. She received her medications from a free clinic.

The Mother testified that she had problems contacting N.D. They no longer spoke, but she did not know what happened. It started when N.D. received temporary custody of the Child. She and A.D. stopped speaking when A.D. moved in with N.D. The Mother moved back to Bowling Green so that she could see the Child. She knew that continuing to stay in Wyoming would not help her see her daughter or regain custody. She related that when she talked with the Child, the Child would ask the Mother when she was coming home. The Mother had been visiting with the Child once per week at Family Enrichment, and she described these visits as wonderful. She did not have telephone contact with the Child, because N.D. did not want them to talk on the phone.

The Mother testified that she wanted sole custody of Child. She said she had followed through with everything the Cabinet had asked her to do. Her goal was to reunify her family and for the Child to come home with her and she said she was willing to do whatever she needed to do to get the Child back in her custody. She did not believe she had any outstanding commitments for the Cabinet. She

was on medication, but there were no reasons that she could not raise the Child or attend to her education.

On cross-examination, the Mother addressed several police reports. She admitted that she had uttered a false prescription in 1987 in Reno, Nevada. In 2001, she had been arrested at the Atlanta airport and convicted of battery and obstruction of police officers. She said she had had an anxiety attack on an airplane after consuming a few alcoholic drinks and an officer had tried to restrain her. In September 2008, she was arrested in a Bowling Green Kroger for shoplifting, and she pled guilty to that charge. In October 2008, she was arrested for DUI. In January 2009, she was arrested for disorderly conduct at Kroger, after she had been banned from the store due to the first shoplifting incident. In May 2009, she was cited for driving on a suspended license. During her arrests and incarceration while in Bowling Green, N.D. would take care of the Child.

The Mother testified that she relied upon legal advice not to return to Kentucky, although she later returned for court hearings in August 2010 and January 2011. She reported that she saw the Child in January, but she did not visit with the Child again until June. She moved back to Bowling Green in July 2011. She had not taken any action to get the Child back. The Mother paid $950.00 in rent for a three-bedroom apartment. She explained that she needed the extra bedroom so that the Child could have a playroom. She said it had been two months since she had last visited with the Child. She had suspended her visitations at Family Enrichment, but she had not been able to reschedule visitations because

the facility did not have any available time on Saturdays when N.D. permitted visitations to take place.

The Mother questioned whether the Child had been well cared for by N.D., although she had not observed anything. She did not approve that N.D. had a man and his children spend the night at her house or that N.D. and the Child had spent the night at his home in Tennessee. She also did not approve that N.D. had left the door unlocked. She denied that she had threatened anyone at social services.

The Mother said the doctor took care of her and the Child in Wyoming when she was seeking treatment for cancer. At that time, she and the Child lived in a house that the doctor owned. She received radiation treatment at an institute in Utah for her cancer diagnosis, but she did not pay for any of the treatment. She said the founder of the institute was her mission leader. She would drive from Wyoming to get her treatment, but she had a townhouse in Utah in case she was too sick to drive back. She provided the doctor with a notarized letter to take care of the Child when she was in Utah being treated.

The court inquired whether the Mother had read the Wyoming home evaluation report. She said that she had, and she did not dispute any of the findings in the report.

Attorney Stanford Obi testified telephonically. He was appointed to represent the Mother in 2010 when she was incarcerated and lived in the western part of the country. He advised her to stay where she was in Wyoming and better herself before coming back to Kentucky. Given the family dynamics and her need

to rehabilitate herself, he thought she should stay where she was, seek a job, and stabilize herself until she could have a home visit performed. Furthermore, the environment was difficult in Kentucky because she and N.D. were not getting along. On cross-examination, Mr. Obi stated that he told her that if telephonic visitation created issues, she should not continue with the visitation but instead contact him so that he could intervene, either with the court or otherwise. He never told her not to participate in supervised visitation at Family Enrichment. Regarding her work in Wyoming, she told him she was paid minimally, but part of her compensation was to live in a nice home. He told her to get another job where she would be paid directly. He never told her it was against her best interest to pay child support. He stopped representing the Mother in early 2011.

Ginger VanMeter was the next witness to testify. She is a therapist and certified social worker at LifeSkills. She started therapy with the Mother in September 2011. She has been seeing, and continues to see, the Mother for depression three to four times per month. When she first saw the Mother, the Mother reported difficulty sleeping at night, had thoughts of harming herself, exhibited an inability to focus, had weight gain, and appeared sad, which were all symptoms of depression. The Mother had made significant progress throughout the treatment. She was sleeping through the night, had a full time job, did not have a sad affect, and seemed to be doing very well. She had not spoken with the Mother's physician or any of the Mother's daughters. She recommended family therapy for the Mother to be able to have sessions with all of her daughters. She

did not have any reservations or hesitation with the Mother having a relationship with the Child, noting that she had these reservations in the past due to instability and mistakes. She would not recommend extended visitations between the Mother and the Child until family therapy took place. On cross-examination, Ms. VanMeter stated that she relied upon the Mother's truthfulness during the therapy sessions and that she had no reason not to believe her. The Mother had provided her with documents to back up everything she said. Ms. VanMeter went on to testify about the Mother's past suicide attempt and criminal history.

Sheila LeGrand was the last witness to testify. She testified solely about her positive observations of the Mother and the Child at Community Action Head Start, where the Child attended school from August 2008 through July 2009.

On October 25, 2012, the Child's GAL filed an answer and report recommending that the family court grant N.D.'s motion for permanent custody. In a post-hearing position statement filed October 30, 2012, the Mother requested that the court grant joint custody to her and N.D. as well as order family counseling. She stressed that "[o]ne of the most fundamental rights that any person has is the right to raise his/her children." She stated that she was working, maintained her own home, and was meeting her financial obligations. She argued that she should not lose custody of her daughter because of her shoplifting and DUI convictions, or her diagnosis of depression.

On December 3, 2012, the family court entered its findings of fact, conclusions of law, and decree of custody finding that it was in the Child's best

interest to award sole and permanent custody to N.D.[7] In reaching this conclusion, the family court addressed each of the statutory factors set forth in KRS 403.270(2) and specifically relied upon the testimony of N.D., A.D., and Cabinet case manager Myra Mattingly. This appeal by the Mother now follows.[8]

On appeal, the Mother raises several issues; namely, that the family court failed to apply the parental rights doctrine, that the family court's order contained factual errors, and that the Mother and her attorney were denied access to the record. She also addresses a further issue related to fifty-six pages of documents she filed *ex parte* with the family court that were the subject of a motion to supplement the record below during the pendency of this appeal. N.D. disputes these arguments and contends that the family court's order should be affirmed.[9]

In her first argument, the Mother appears to argue that the family court did not apply the parental rights doctrine in awarding custody to N.D. rather than to her, as the Child's parent. N.D. contends that the Mother failed to preserve this argument by first raising it in the family court, and she goes on to argue that

[7] This Court is aware that by order entered October 30, 2013, the family court permitted N.D. to relocate to Idaho with the Child, over the Mother's objection. The Mother sought emergency and intermediate relief from this Court to contest this ruling, both of which were denied, and the Mother did not seek to appeal the family court's order.

[8] The Mother filed the notice of appeal *pro se*, and the family court permitted her attorney to withdraw. We note that she is represented by new counsel on appeal.

[9] The Mother argues in her reply brief that N.D.'s brief contains procedural errors, including an introduction in excess of two sentences and by referencing and attaching a scientific treatise. While we do not perceive any serious problem with the length of the introduction, we agree that N.D. impermissibly cited to and attached a document that was not submitted to or considered by the family court in making its decision in the matter. Therefore, the Court shall not consider the attached document in reaching a decision in this case. We note that both the Mother and N.D. have cited to psychiatric publication articles in their respective briefs.

the parental rights doctrine does not apply as between parents and *de facto* custodians. We believe that the Mother adequately preserved this issue in her position statement filed below when she stated as follows: "One of the most fundamental rights that any person has is the right to raise his/her children." Of course, the Mother could have expanded upon this statement with citations to case law as she did in her brief to this Court. However, we find no merit in the Mother's argument on this issue.

There is no dispute that the parental rights doctrine applies in Kentucky. In *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982), a case addressing the termination of parental rights, the United States Supreme Court emphasized the fundamental nature of the liberty interest natural parents have in raising their child:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. [Footnote omitted.]

The *Santosky* Court went on to recognize that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id*., 455 U.S. at 760, 102 S.Ct. at 1398

(footnote omitted). In *Troxel v. Granville*, 530 U.S. 57, 72-73, 120 S.Ct. 2054, 2064, 147 L.Ed. 2d 49 (2000), addressing grandparent visitation, the Supreme Court stated, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

The Mother relies upon these statements of law to assert that the family court should have expressed a preference for her, as the Child's natural mother, rather than awarding permanent custody to N.D., the Child's half-sister. N.D. had not established that the Mother was unfit and therefore had not met her burden of proof to support the award of custody to her. We disagree.

> KRS 403.270(1) defines a *de facto* custodian as follows:
>
> > (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.

Here, the family court found by clear and convincing evidence that N.D. was the Child's *de facto* custodian. That ruling has not been appealed by the Mother and constitutes the law of the case. Because the court granted N.D. *de facto* custodian status, she had the same standing as the Mother in seeking permanent custody of the Child. KRS 403.270(1)(b). *See also Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010), as modified on denial of reh'g (Aug. 26, 2010) (footnote omitted) ("When a non-parent does not meet the statutory standard of *de facto* custodian in KRS 403.270, the non-parent pursuing custody must prove either of the following two exceptions to a parent's superior right or entitlement to custody: (1) that the parent is shown by clear and convincing evidence to be an unfit custodian, or (2) that the parent has waived his or her superior right to custody by clear and convincing evidence."). If N.D. had not been designated as the *de facto* custodian, the parental rights (or preference) doctrine would have required her to establish that the Mother was either unfit or had waived her right to superior custody in order to obtain custody. But because N.D. had been granted this designation, the family court properly applied KRS 403.270(2) to determine custody as between the Mother and N.D. in the Child's best interest after considering the relevant factors. Accordingly, we disagree with the Mother that N.D. had the burden to establish that she (the Mother) was unfit before being granted custody.

We shall next consider the Mother's arguments related to the record and access thereto. The Mother apparently tendered fifty-six pages of documents to the court *ex parte* in July 2012 while she was proceeding *pro se*. We agree with the family court that these documents are not properly a part of the court record because they were never introduced into evidence at the custody hearing when the Mother and her then-counsel of record had the opportunity to do so.

Regarding the Mother's and her appellate counsel's access to the record, this Court is unable to locate the Mother's August 18, 2014, motion to obtain the videotaped record or the August 19, 2014, order ruling on that motion mentioned by the Mother in her brief. That order purportedly permitted the Mother to review the DVDs in the circuit clerk's office, but would not permit her to take a copy with her, citing confidentiality concerns. N.D. included a copy of the September 5, 2014, order denying the Mother's motion to alter, amend or vacate that order, so we are aware that the order existed. However, our ability to review the Mother's original motion and the August 2014 order does not affect our review of this issue.

The certified appellate record does contain a *pro se* motion by the Mother dated January 30, 2013, seeking the written and videotaped record of the case. The family court granted this motion on February 1, 2013, and ordered that the Mother "shall be permitted to obtain copies of all written and videotaped recordings of the above case as requested in the Motion filed." The court ordered the circuit court clerk to prepare the copies and charge the Mother for the costs incurred in doing so. The court required the Mother to "maintain the confidential integrity" of the

copies and would only permit distribution to the Mother's legal counsel of record. There is a handwritten notation at the bottom right hand corner of the document signed by the Mother stating that she picked up a copy of the case file and two copies of CDs on February 22, 2013. Based upon this order and the notation, the Mother should have in her possession, subject to review by her attorney of record, the entire record of the case, including the videotaped recordings. Therefore, we hold that the Mother's claim that she and her attorney were denied access to the record to be without merit.

Finally, we shall address the Mother's argument that the family court's order contains factual errors. In other words, she contends that the family court's factual findings were not supported by the record. Again, we disagree.

Kentucky Rules of Civil Procedure (CR) 52.01 provides the general framework for the family court as well as review in the Court of Appeals: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.] . . . 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." *See also Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (An appellate court may set aside a lower court's findings made pursuant to CR 52.01 "only if those findings are clearly erroneous." (Footnote omitted)). In order to determine whether findings of fact are clearly

erroneous, the reviewing court must decide whether the findings are supported by substantial evidence:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted). CR 52.01 also provides that a reviewing court must afford "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses." It has long been held that "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court." *R.C.R. v. Com. Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998), citing *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). *See Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008) ("When an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous or that he abused his discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974).").

KRS 403.270(2) sets forth the family court's considerations in deciding custody matters:

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> > (a) The wishes of the child's parent or parents, and any *de facto* custodian, as to his custody;
> >
> > (b) The wishes of the child as to his custodian;
> >
> > (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> >
> > (d) The child's adjustment to his home, school, and community;
> >
> > (e) The mental and physical health of all individuals involved;
> >
> > (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
> >
> > (g) The extent to which the child has been cared for, nurtured, and supported by any *de facto* custodian;
> >
> > (h) The intent of the parent or parents in placing the child with a *de facto* custodian; and
> >
> > (i) The circumstances under which the child was placed or allowed to remain in the custody of a *de facto* custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

The family court addressed each of these considerations in its ruling.

In her brief, the Mother contends that "the proceedings in the trial court are replete with reversible errors, which give at least the appearance of bias." We agree with N.D. that the factual disputes the Mother raises lack merit, and many of the factual matters were not considered by the family court in the order on appeal.

First, the Mother disputes N.D.'s statement in the 2010 DNA petition that she (the Mother) had left the Child with her (N.D.) when she went to Utah, and she uses this to dispute N.D.'s ability to seek custody of the child by arguing that "a non-parent cannot seek custody unless both parents have abandoned the child[.]" We agree with N.D. that this allegation is irrelevant. As N.D. states in her brief, the family court was well aware of the situation – that the Mother had not left the Child in N.D.'s care when she went to Utah, but rather left her with family friends who contacted N.D. – when it designated N.D. as the *de facto* custodian. Again, the Mother has not challenged that ruling on appeal, and it has absolutely no bearing on the family court's custody ruling.

Second, the Mother states that an incident of child abuse by N.D. occurring in September 2011 was not mentioned by the case worker in a subsequent report. However, as N.D. states in her brief, the Mother never elicited any testimony or sought to introduce any evidence regarding this alleged incident at the custody hearing. Therefore, she cannot raise this as an issue in her appeal.

Third, the Mother argues that the family court could not rely upon N.D.'s testimony regarding the inappropriate telephone conversations first discussed during the November 2011 hearing. During that hearing, N.D.'s counsel stated

that N.D. had been monitoring and taking notes of the conversations. The Mother contends that these notes should have been introduced pursuant to the best evidence rule and that the family court could not use N.D.'s testimony without the notes to support its finding.

Kentucky Rules of Evidence (KRE) 1002 is Kentucky's version of the best evidence rule, and it provides as follows: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute." The Mother cites to *Commonwealth v. Willis*, 719 S.W.2d 440, 441 (Ky. 1986), as support for her position: "The 'best evidence' rule requires that 'if you would prove the contents of a writing, you must produce the writing itself.' McCormick, *Law of Evidence* § 229 (2d ed. 1972)." However, as N.D. points out, it was not the contents of the notes that she was seeking to introduce, but rather the substance of the conversations themselves as N.D. heard them. KRE 1002 applies to writings, not to conversations, and therefore has no relevance to this issue.

Fourth, the Mother raises several challenges to the Relative Home Evaluation dated February 6, 2012, completed by social service worker Lucas Hall. She first disputes that family court's designation of this case as a dependency action based on the mistaken notation in the evaluation that both parents were deceased. Because both parents were still living, the Mother contends that N.D. was required to allege and prove another ground of dependency, such as that the

Child had been abandoned. Because the Mother stipulated to dependency in the action below, she cannot raise this as an issue in the appeal from the family court's permanent custody order. As an aside, we note that the errors were corrected on this document as it appears in the certified record.

Next, the Mother disputes any allegation that she is a pathological liar. She contends that evaluator Lucas Hall's description as an intern for Western Kentucky University[10] makes his qualification to make such a diagnosis questionable. The family court, however, did not rely upon this diagnosis in its order. Rather, the family court's findings related to the Mother's mental health were as follows:

> [The Mother] has a history of depression, suicidal ideation, an overdose suicide attempt, conviction for driving under the influence, and convictions for shoplifting. Ginger Van Meter is currently [the Mother's] counselor for depression. She testified that [the Mother] has progressed positively since her suicidal ideations, no longer maintains a sad affect, sleeps consistently through the nights, and that her depressive symptoms generally have remained under control and well managed. At this point, Ginger Van Meter would recommend family therapy prior to any order of visitation between the child and [the Mother.] The Court has considerable concerns regarding [the Mother's] mental and physical health as relates to the best interests of this child.

As N.D. points out, the family court did not rely upon Mr. Hall's statement that the Mother was a pathological liar in the order being reviewed. Therefore, this argument is irrelevant and has no merit.

[10] The Mother cites to the supplemental record to support this description of Mr. Hall. The family court denied her motion to supplement the record to include those documents, although they were included as a supplemental record on appeal.

Next, the Mother raises issues of religious discrimination, citing to two pages of the supplemental record detailing a conversation between her and Ms. Mattingly. Again, these documents are not before the Court as part of the official appellate record, and we shall not consider them in our review. Regardless, the family court did not base its decision on her religion, and therefore the Mother's argument lacks merit.

Next, the Mother points out that Mr. Hall failed to provide answers for questions 4, 5, 6, and 8 of the section regarding the potential caregiver's (the Mother's) kinship and emotional relationship with the Child. This is most likely because Mr. Hall listed the parents as deceased, but Mr. Hall went on to discuss the Mother extensively in other parts of the evaluation. We perceive no issues with the lack of responses as it pertains to the custody order on appeal.

For her final argument related to the Relative Home Evaluation, the Mother disputes the statement in the evaluation related to her "history of transience." Again, the family court did not rely upon this statement in reaching its decision on permanent custody and did not address the Mother's relocations over the course of several years. The closest the court came to addressing this issue was in describing the testimony of N.D. and A.D. as to the Mother's parenting ability. The court summarized their testimony related to their childhoods, which they described as "tumultuous and rife with uncertainty, instability, and manipulation." Nowhere did the family court reference Mr. Hall's observation regarding her alleged transience.

Accordingly, we find no merit in any of the Mother's arguments related to the February 6, 2012, Relative Home Evaluation.

Fifth, the Mother disputes the family court's statement in its custody order that she had requested an award of joint custody. While the Mother testified at the custody hearing that she wanted to regain full custody of the Child, in her memorandum filed by her counsel, she stated that she was requesting joint custody. We perceive no error in the family court's statement in the custody order.

Sixth, the Mother contests the family court's findings related to N.D.'s mental competence. She contends that the family court's finding that there were no relevant concerns as to N.D.'s mental health and ability to care for the Child was not supported by the record, which established that she "had been diagnosed with bipolar disorder, had refused medication, and has been described as 'a self-cutter.'" The Mother cited the November 22, 2011, hearing and page 42 of the record, which is the second page of the Relative Home Evaluation dated July 26, 2010, in support of this statement. The hearing and the Relative Home Evaluation only support the Mother's statement that N.D. had been diagnosed with bipolar disorder in late 2008 or early 2009. Neither the hearing nor the report establishes that N.D. had refused medication or had been described as a self-cutter. Furthermore, the evaluation established that N.D. had not reported any symptoms since February 2008, that she regularly visited her therapist, and that she planned to take medication if she became symptomatic. The record certainly supports the

family court's finding that there were no relevant concerns regarding N.D.'s mental health that would prevent her from caring for the Child.

Seventh, the Mother contends that the family court did not properly consider the testimony of her appointed counsel, Stanford Obi. In discussing the circumstances in which the child was allowed to remain in the custody of the *de facto* custodian, the family court specifically found:

> [T]his Court does not find [the Mother's] claim that Hon. Stanford Obi counseled her to remain separated from the child to be credible. Hon. Stanford Obi testified to the specific advice given to [the Mother] as her court-appointed attorney. He advised her to remain out west and better herself but he never advised her not to participate in supervised visitation with the child.

The Mother again cites to pages in the supplemental record, which is not properly before this Court for review on appeal. Attorney Obi's testimony supports the family court's findings, and we find no error in the court's reliance upon his testimony.

Eighth, and finally, the Mother addresses statements in Ms. Mattingly's reports that she had failed to provide documentation from a psychological evaluation as well as proof that she was compliant with recommendations from her drug and alcohol assessment. The Mother contends that she had emailed these documents to Cabinet workers in March 2012, stating that these were included in the 56 pages of record removed from the family court's record. Again, as N.D. states, the family court did not mention any failure on the Mother's part to

cooperate with the Cabinet or to provide requested documentation in the custody order. Therefore, this argument is irrelevant to this Court's determination.

In reviewing the findings of fact, conclusions of law, and decree of custody entered in December 2012, the family court thoroughly considered the relevant factors as set forth in KRS 403.270(2) and determined custody in the best interest of the Child. Its findings of fact were not clearly erroneous, as they were all supported by substantial evidence of record. Therefore, we shall not disturb the family court's decision to award permanent custody of the Child to N.D., the *de facto* custodian.

For the foregoing reasons, the December 3, 2012, order of the Warren Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE, N. D.:

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