

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001566-ME

GREGORY WADE MCKENZIE AND
KRISTI DAWN MCKENZIE

APPELLANTS

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 14-CI-00099

DIANA WHITT

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: JONES, STUMBO AND VANMETER, JUDGES.

JONES, JUDGE: This appeal is before our Court following an order by the Rowan Circuit Court: (1) naming the Appellee, Diana Whitt, the *de facto* custodian of A.C.M., the biological daughter of Appellants Gregory Wade McKenzie and Kristi Dawn McKenzie; (2) awarding Whitt sole of custody of A.C.M.; (3) and vesting in

Whitt the "sole discretion" to determine any future visitation between A.C.M. and Greg and Kristi. For the reasons set forth below, we affirm in part, reverse in part, and remand to the trial court to set a visitation schedule in accordance with the best interests of the child standard.

I. Background

At all relevant times, Greg and Kristi¹ have been married.² In November of 2007, Kristi gave birth to A.C.M.³ A.C.M. resided with Greg and Kristi in their home for the first few months of her life. Whitt, Kristi's mother, first saw A.C.M. in the early part of 2008. Shortly thereafter, Greg and Kristi began leaving A.C.M. with Whitt for two or three days at a time most every week. This arrangement lasted for approximately two years with Whitt gradually having A.C.M. more and more of the time.

Sometime in 2010, Greg became incarcerated. Afterwards, A.C.M. began living with Whitt full-time.⁴ Greg served approximately six months in jail and an additional three months on house arrest. Sometime thereafter, Greg served approximately three months in Campbell County. Most recently, in early 2012,

¹ Because she has a direct interest in the outcome of this matter, Kristi was appropriately named by Greg in the notice of appeal. We note, however, that Kristi has not filed a brief or taken any other action in this Court with respect to this matter.

² For several years, Greg and Kristi have lived apart. However, they have not filed a petition for dissolution of their marriage.

³ A.C.M. is the third and youngest child born of this marriage. Greg and Kristi have not had custody of the other two children for several years.

⁴ During a couple of periods, Kristi also lived with Whitt. It is unclear exactly when and for how long she did so. However, it does not appear that Kristi has lived with Whitt since 2011.

Greg was arrested in Virginia and served three months in jail there. In total, the trial court determined that prior to 2013, Greg had spent eighteen of the prior twenty-four months in jail. When Greg was not in jail, he generally visited A.C.M. on the weekends at his home. Most of these visits involved A.C.M. staying overnight at Greg's home.

From 2010 up until the time Whitt filed for custody, Kristi rarely visited A.C.M. Whitt testified that Kristi would occasionally call and attended a few school events. However, according to Whitt, there were often large gaps of time when Kristi would go for several weeks or longer without calling or seeing A.C.M. Whitt also testified that Kristi signed an informal paper allowing Whitt to make medical decisions for A.C.M., which Whitt gave to A.C.M.'s pediatrician so that Whitt could continue to take A.C.M. to the doctor without Greg and Kristi being present. Whitt further testified that Kristi had never given her any money for A.C.M.'s care and that because Kristi was unemployed during most of the relevant time period, she did not provide any items for A.C.M.

Whitt testified that for most of A.C.M.'s life she has been solely responsible for seeing to A.C.M.'s medical and educational needs. She testified that she has taken A.C.M. to almost all of her medical appointments, been the sole person responsible for ensuring that A.C.M. received dental care, and set up all her other medical-related care such as eye examinations. Whitt testified that while Greg and Kristi sporadically attended some of A.C.M.'s school functions, Whitt is who enrolled A.C.M. in preschool and elementary school and the only one who

sees to it that A.C.M. goes to school each day. Whitt also testified that she buys all of A.C.M.'s food and most of her clothing. Whitt reported that since 2010, Greg has given her approximately \$500 in total for A.C.M.'s care. Whitt testified that she considered much of this gas money because Greg did not have a car and she drove A.C.M. to Greg's house so that he could see her on weekends. Whitt also testified that after Greg was released from jail in 2013, he obtained a job with health insurance so he added A.C.M. to the policy.

Whitt testified that A.C.M. loves her father and enjoys spending time with him on weekends. However, she explained that A.C.M. considers her home to be at Whitt's house. Whitt testified that she decided to seek *de facto* custodian status because every time Greg and Kristi got into an argument, one or the other of them would threaten to take A.C.M. away from Whitt if she did not do exactly as they wished. Whitt testified that she felt caught in the middle of Greg and Kristi's hostile relationship and that it caused A.C.M. a great deal of stress because she was continually worried that she would be taken away from Whitt.

Whitt also expressed concern about the care Greg provided to A.C.M. when she was with him. Whitt testified that A.C.M. would often return from Greg's house hungry and that she would tell Whitt that Greg did not have very much food to give her. During the hearing it was further revealed that in January of 2014, Greg was cited and pled guilty twice for not having A.C.M. in a booster seat when he had her for weekend visits. It was further revealed that on one occasion after returning A.C.M. to Whitt's home on Sunday evening at 10:30 p.m.,

Greg was arrested for DUI approximately five hours later after he was discovered unconscious in his vehicle in the middle of the road with his vehicle still in drive.

Following a hearing at which Whitt, Kristi and Greg testified, the trial court entered findings of fact, conclusions of law, and judgment. The trial court found that since 2010, Whitt has been A.C.M.'s primary financial provider. The court noted that aside from some clothing, toys, limited cash, and medical insurance in 2013, Greg and Kristi have provided no financial contributions to A.C.M.'s care. The trial court noted that while Greg made some minimal contributions, they have been "trivial compared to the overall cost of raising a child for four years." The trial court further found that Whitt has been A.C.M.'s primary caregiver since 2010.

The trial court also found that Greg and Kristi were unfit parents. Accordingly, the trial court found that it was in A.C.M.'s best interests to be in Whitt's sole custody. The trial court awarded Greg and Kristi visitation to be determined in Whitt's "sole discretion."

This appeal followed.

II. Standard of Review

The standard of review for matters of child custody and support is one of clear error/abuse of discretion. "The test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its

discretion." *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (quoting *B.C. v. B.T.*, 182 S.W.3d 213, 219–20 (Ky. App. 2005)).

A judgment is not “clearly erroneous” if it is “supported by substantial evidence.” *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id.* Our Supreme Court has defined “abuse of discretion” as a court's acting arbitrarily, unreasonably, unfairly, or in a manner “unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

III. Analysis

A. *De Facto Custodian Status*

Parents of a child have a fundamental, basic and constitutional right to raise, care for, and control their own children. *Vinson v. Sorrell*, 136 S.W.3d 465, 468 (Ky. 2004). For this reason, there are only very limited circumstances in which a non-parent has standing to seek custody on equal footing with a child's natural parents.

KRS 403.270 defines a *de facto* custodian as:

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.

"Kentucky's *de facto* custodian statute is confined to a narrow[] circumstance; when another person has acted as the primary caregiver of the child for a year or more, then that person may be found to be on an equal footing with the parent of the child." *Consalvi v. Cawood*, 63 S.W.3d 195, 200 (Ky. App. 2001). "The basic effect and most obvious intent of this statute is to give standing in a present custody matter to non-parents who have assumed a sufficiently parent-

like role in the life of the child whose custody is being addressed." *Sullivan v. Tucker*, 29 S.W.3d 805, 807-08 (Ky. App. 2000).

In *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), the parties disputed whether Mullins qualified as a *de facto* custodian of Picklesimer's biological child. Prior to and for some time after the child's birth, Mullins and Picklesimer were in a same-sex romantic relationship with one another. Even prior to conception, they jointly selected a sperm donor and made other decisions regarding the child Picklesimer eventually gave birth to. For some time following the child's birth, the parties lived with the child as a family. Each participated in caring and providing for the child. And, even after they separated, the parties continued to exercise timesharing on an equal basis with the child. When Picklesimer later refused to allow Mullins to see the child, Mullins sought custody on the basis that she qualified as a *de facto* custodian of the child. Turning to the statutory language, the Kentucky Supreme Court held that Mullins could not qualify as a *de facto* custodian because she was not the child's primary source of financial support or primary caregiver. Rather, the court determined that she was "co-parenting" the child alongside Picklesimer.

Greg reads *Picklesimer* as requiring almost complete abandonment by a parent before a nonparent caring for the child can obtain *de facto* custodian status. He states that because the record reflects that he provided some care and support for A.C.M., he has not abandoned her. He believes that the trial court

abused its discretion when it failed to find that he was co-parenting A.C.M. alongside Whitt during the relevant time period.

To the extent Greg reads *Picklesimer* as requiring a *de facto* custodian to exclusively provide for the child's care and support, he does so in error.

Picklesimer governs a unique situation where both the parent and nonparent can be said to have contributed *equally* to the child's care and support. The fact that a parent continues to provide *some* care and support to the child will not defeat a nonparent's claim for *de facto* custodian status if the trial court finds that the nonparent was the *primary* source of care and support during the relevant time period. *Bell v. Tatum*, 373 S.W.3d 458 (Ky. App. 2012). For the purposes of Kentucky Revised Statutes (KRS) 403.270, primary does not mean the sole, the only, or the exclusive provider. *Id.* Rather, it contemplates a comparison and a determination of which party is the "chief, dominant, first, greatest, highest, main, paramount, predominant and principal" source of care and support. *Id.*

Relying on this interpretation, in *Bell*, we determined that two nonparents (the child's maternal grandparents) qualified as *de facto* custodians, even though the mother continued to live with them and the child, during which time she provided some minimal care and support to the child. *Bell*, 373 S.W.3d at 459. Reviewing the record, we concluded that, overall, the care and support that the mother provided to the child was minimal compared to the support and care provided by the grandparents who were seeking *de facto* custodian status. *Id.* The court cited that the grandparents provided shelter to the child and her mother,

bought almost all the child's food and clothing, made sure the child, who had special needs, had her medicine and attended her medical appointments, and routinely cared for the child while the mother was engaged in her own social pursuits. *Id.*

Having reviewed this relevant case law, we believe whether Whitt has standing to seek custody comes down to a very close factual determination with respect to A.C.M.'s care and support. Neither Kristi nor Greg totally abandoned A.C.M. This fact is clear. Kristi has visited A.C.M. sporadically since 2010 and has maintained some role in her life; when not in prison, Greg enjoyed regular weekend visitation and provided some limited financial support to Whitt for A.C.M. However, the question that must be answered is not whether Greg and Kristi provided *some* support for A.C.M. *See Bell*, 373 S.W.3d at 459. The question is whether there is substantial evidence to support the trial court's conclusion that Whitt served as A.C.M.'s *primary* source of care and support during the relevant time or whether she merely co-parented A.C.M. along with Greg and Kristi.

Whitt testified that since early 2008, she has taken A.C.M. to all her medical appointments, and that neither Greg nor Kristi has attended any appointment with her. Whitt also singlehandedly oversaw A.C.M.'s dental and eye care. Whitt also made sure A.C.M. was enrolled in preschool, had speech therapy, and was enrolled in elementary school. Each day, it was Whitt who made sure A.C.M. was awake and ready for school, and Whitt who made sure A.C.M. made it

to school each day. Aside from a few periodic visits to A.C.M.'s major school functions, neither Greg nor Kristi has been involved in A.C.M.'s schooling.

Furthermore, Kristi had provided almost no financial support to A.C.M. And, for his part, Greg has provided less than a thousand dollars in a four-year period. Additionally, while Greg has faithfully visited with A.C.M. while not in jail, his time in jail has been substantial such that there were many, many months when Whitt cared for A.C.M. twenty-four hours a day, seven days a week without any financial support or physical assistance from either Greg or Kristi. During this substantial time period, Whitt was not just the primary caregiver and source of financial support, she was the only person that cared for A.C.M. and made sure she had medical care, food, clothing, shelter, and an appropriate education.

Having reviewed the record, we believe that substantial evidence supports the trial court's factual finding that Whitt has been A.C.M.'s *primary* caregiver and *primary* source of financial support since at least 2010. Certainly, Greg has continued to provide some limited care and support, but we believe the record fully supports the trial court's finding that Greg has contributed far less than half of the care and support necessary to care for a child during a four-year period. Therefore, we believe the trial court correctly determined that Whitt had standing to seek custody of A.C.M.

We turn now to the question of whether placing A.C.M. in Whitt's sole custody was in the best interests of the child. KRS 403.270(2). Determining

custody is not an easy matter. KRS 403.270 requires a trial court to evaluate all relevant factors when deciding custody. *Jones v. Jones*, 577 S.W.2d 43, 45 (Ky. App. 1979). Here, the trial court considered A.C.M.'s relationship with Whitt and her development while in Whitt's care. The trial court found that A.C.M. "has thrived and flourished while living in Ms. Whitt's custody." In contrast, the trial court noted that Greg had twice been cited for endangering A.C.M. while she was in his care and had been arrested for DUI shortly after dropping A.C.M. off at Whitt's house. Specifically, the trial court disbelieved Greg's testimony that he was not intoxicated when he dropped off A.C.M. The trial court also considered the fact that Kristi played a minimal role in A.C.M.'s life up until the time Whitt filed the petition seeking custody. The trial court also considered Greg and Kristi's lengthy criminal records and prior substance abuse problems. The trial court also noted that Kristi was in a relationship with a convicted felon against whom she had filed domestic assault charges. The trial court also considered that Greg and Kristi lost custody of their other children on endangerment grounds. Having reviewed the record, we are persuaded the court considered all the relevant factors and discern no clear error or abuse of discretion with respect to the trial court's decision that awarding sole custody to Whitt was in A.C.M.'s best interests.

B. Visitation

Even though the trial court awarded Whitt sole custody, Greg and Kristi may be awarded visitation. *See* KRS 403.320. "In a sole custody arrangement, KRS 403.320 speaks clearly to visitation granted to a 'parent not

granted custody' and modification of that visitation based on the *best interests of the child.*" *Pennington v. Marcum*, 266 S.W.3d 759, 768 (Ky. 2008), *as modified* (Oct. 24, 2008) (emphasis added).

Here, the trial court made no findings regarding whether any visitation schedule would be in A.C.M.'s best interests. Instead, the trial court stated that any visitation was to be determined in Whitt's "sole discretion." While the trial court may have the utmost faith in Whitt's ability to judge what is in A.C.M.'s best interests, the statute clearly contemplates that the trial judge is to set a visitation standard that it believes will be in the child's best interests. It was an abuse of discretion for the trial court to abdicate its authority to set the visitation schedule, if any, to Whitt. Accordingly, we reverse the trial court's decision to allow Whitt to determine visitation with Greg and Kristi. On remand, the trial court should consider Greg's request for visitation according to the best interests of the child standard.

IV. Conclusion

For the reasons set forth above, we affirm in part, reverse in part, and remand for consideration of what visitation schedule, if any, is in A.C.M.'s best interests.

ALL CONCUR.

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