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**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-001280-ME

ELIZABETH SIMPSON (NOW EASON)

APPELLANT

APPEAL FROM CASEY CIRCUIT COURT  
v. HONORABLE SAMUEL TODD SPALDING, SPECIAL JUDGE  
ACTION NO. 11-CI-00220

DEBORAH JANE CLEMENTS

APPELLEE

AND

NO. 2015-CA-001319-ME

DERREK BRADLEY CLEMENTS AND  
ELIZABETH SIMPSON

APPELLANTS

APPEAL FROM CASEY CIRCUIT COURT  
v. HONORABLE SAMUEL TODD SPALDING, SPECIAL JUDGE  
ACTION NO. 11-CI-00220

DEBORAH JANE CLEMENTS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE, AND THOMPSON, JUDGES.

MAZE, JUDGE: Elizabeth Simpson (Elizabeth) and Derrek Clements (Derrek) appeal from orders of the Casey Circuit Court finding that Deborah Jane Clements (Deborah) is a *de facto* custodian of their child and awarding sole custody of the child to Deborah. Elizabeth and Derrek argue that they did not receive sufficient notice of the evidentiary hearing establishing Deborah’s *de facto* custodian status. While we agree that the notice was insufficient, we conclude that Elizabeth and Derrek waived their objections to the notice. We also conclude that there was substantial evidence to support the trial court’s conclusions regarding Deborah’s status as a *de facto* custodian, both at the initial hearing in 2011 and at the final hearing in 2014. Hence, we affirm.

This case has a long and involved history, but the record sets out the following facts. Elizabeth and Derrek are the mother and father, respectively, of K.J.C., born in January of 2010. Although they lived together at the time of the child’s birth and for some time thereafter, they have never married. Deborah is Derrek’s mother and the paternal grandmother of K.J.C.

On October 17, 2011, Deborah filed a “Verified Petition for *De Facto* Custody Status and Custody of Infant Under Three Years of Age.” Deborah signed the petition under oath, but the petition was not accompanied by a separate

affidavit. The petition alleged that K.J.C. had resided continuously with Deborah since February 12, 2011, and that Deborah was the primary caretaker and provided primary support for the child during that time. The petition concluded by requesting a finding that Deborah was the *de facto* custodian of K.J.C. and seeking sole custody of the child. Neither Derrek nor Elizabeth filed a response to the petition.

On October 20, 2011, Deborah's counsel filed a "Notice of Motion," which provided as follows:

The Respondents will hereby take notice that the Petitioner, Deborah Jane Clements, by counsel, will on the 14<sup>th</sup> day of November, 2011 at the hour of 9:30 a.m., or as soon thereafter as counsel may be heard, in the Casey Circuit Courtroom, Judicial Annex, Liberty, Kentucky, move this Court to set this matter for a status hearing on *de facto* custody and further, moves the court for temporary custody of the minor child during the pendency of this action on the grounds stated in the Petition heretofore filed in the record.

Both the Petition and the Certificate of Service on the motion listed Deborah's address as addresses for Derrek and Elizabeth. Nevertheless, both acknowledged service of the Petition and the Motion. The trial court called the matter during its motion docket on the morning of November 14. Derrek's counsel, Mr. Coffman, made an entry of appearance for Derrek and for Elizabeth "by default." Mr. Coffman explained that Derrek had contacted him early that morning and that he and Elizabeth were at the hospital. Mr. Coffman asked the court to schedule a custody hearing for a later date. Mr. Coffman also objected to

the sufficiency of the notice and to the absence of an affidavit supporting the petition for temporary custody. Deborah's counsel, Mr. Lavit, informed the court that he was ready to go forward with a hearing on *de facto* custodian status.

After considerable argument, the trial court advised Mr. Coffman that it would grant a continuance if Derrek provided documentation of Elizabeth's medical emergency. However, Mr. Coffman later advised the court that Derrek was on his way to Casey County. When the case was called at approximately 3:30 p.m., Derrek was present and Mr. Coffman advised the court that he was ready to go forward on the hearing to determine *de facto* custodian status.

Deborah testified that Derrek and Elizabeth brought K.J.C. to her in early February of 2011 after returning from out of state. She further testified that Derrek and Elizabeth asked her to care for K.J.C. while they got on their feet in Lexington. Deborah added that Derrek had visited with K.J.C. a few times, but neither he nor Elizabeth had provided any support for the child. Deborah stated that, after August 13, Derrek and Elizabeth started keeping K.J.C. for more extended periods, but regularly returned the child to Deborah. Deborah also testified that Derrek and Elizabeth had moved at least five times during their stay in Lexington, and that she was concerned about their possible drug use. Several other family members confirmed Deborah's testimony.

Derrek denied that K.J.C. had been in Deborah's custody exclusively for at least six months. Rather, he stated that K.J.C. stayed with Deborah for no more than three months. He admitted that they had moved about five times, but

denied any drug use. Derrek also testified that he and Elizabeth had moved into a new apartment and they were arranging child care for K.J.C. Finally, Derrek stated Elizabeth had been treated for food poisoning early that morning, but she had not been admitted to the hospital. Consequently, he had no records documenting her treatment. A friend of Derrek's confirmed seeing K.J.C. earlier in the summer and testified that the parents appropriately cared for the child.

At the conclusion of the hearing, the trial court found that Deborah qualified as a *de facto* custodian of K.J.C. The court specifically stated that it found Deborah to be more credible than Derrek. The court also announced that it was granting temporary custody of K.J.C. to Deborah. The court granted "liberal" visitation to Derrek and Elizabeth, and directed the parties to work out a visitation schedule.

The trial court also directed Mr. Lavit to draft an order in accord with its oral ruling. However, that order, which the trial court signed on January 31, 2012, did not specify that it was only a temporary custody order. Derrek filed a motion to vacate the order based on insufficiency of notice and the lack of an affidavit supporting the motion. In an order entered on March 5, 2012, the trial

court referred the motion to the special judge handling cases in that circuit.<sup>1</sup> That order also set out the parties' agreement regarding visitation.

No further pleadings appear in the record until May 8, 2014, when Deborah filed a motion to terminate Derrek's visitation. The motion was accompanied by an affidavit alleging that Derrek "stays intoxicated and cannot be responsible for the care of the minor child...." The affidavit was signed by Mr. Lavit pursuant to CR<sup>2</sup> 43.13. The trial court scheduled a hearing on the motion and limited Derrek to supervised visitation until the hearing. Following that hearing, the trial court ordered a drug and alcohol assessment to be completed within thirty days. After considering the assessment, the trial court restored Derrek's unsupervised visitation.

Thereafter, on June 23, 2014, Derrek filed a motion seeking full custody of K.J.C. Elizabeth also appeared with separate counsel and filed her own motions for custody and visitation. In her affidavit, Elizabeth stated and she and Derrek separated shortly after the first custody hearing and that she was now in a

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<sup>1</sup> During the period at issue in 2011 and 2012, this matter was being heard before special judges. The elected judge for the 29th Judicial Circuit, Hon. James G. Weddle, was absent due to a protracted illness. The motions for *de facto* custodian status and temporary custody were heard and ruled upon by Hon. James L. Bowling, serving under the Senior Judge program. The motion to alter, amend or vacate was submitted to the Hon. Douglas M. George, Circuit Judge for the 11th Judicial Circuit. Following Judge Weddle's death, the Hon. Judy D. Vance was elected in November 2012 to fill the unexpired term. After Judge Vance recused in 2015, the Hon. Samuel Todd Spaulding, Circuit Judge for the 11th Judicial Circuit, was appointed as special judge to hear and rule on the matter.

<sup>2</sup> Kentucky Rules of Civil Procedure.

stable relationship with another person. On July 28, 2014, the trial court denied the motions to modify custody.

Deborah countered with a motion to hold Derrek in contempt for failure to pay child support. After several months of the parties trying to reach an agreement concerning visitation, the trial court conducted a hearing on the custody and visitation motions on December 12, 2014. The trial court also appointed a guardian *ad litem* to represent the interests of K.J.C. and to make recommendations concerning custody and visitation. Following the hearing, the matter was submitted to the trial court for adjudication.

However, the parties discovered that Mr. Lavit was representing the trial judge in another matter.<sup>3</sup> Upon that judge's recusal, a special judge was appointed. At that point, the special judge asked if any of the parties wished to present additional evidence. The parties declined to present any additional evidence. Consequently, the trial court took all matters under submission, including the issues relating to the November 14, 2011 hearing and the January 31, 2012 custody order.

On June 1, 2015, the trial court entered findings of fact, conclusions of law, and an order on all issues. As an initial matter, the court found that Derrek and Elizabeth had notice of the November 14, 2011 hearing and that the trial court properly conducted a hearing on that day. The court also concluded that Deborah

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<sup>3</sup> The record is unclear about this point, and particularly, when the conflict of interest arose. It should go without saying that Judge Vance and Mr. Lavit had a duty to disclose this relationship to all the parties as soon as it arose.

had established her *de facto* custodian status based on the evidence presented at the hearing. The court acknowledged that the January 31, 2012 order did not properly reflect the court's oral ruling that the order only resolved the motion for temporary custody. But given Deborah's status as a *de facto* custodian, the court concluded that the current issues of custody and visitation must be decided based upon the best interests of the child.

Turning to those issues, the court reviewed the evidence from the December 12, 2014 hearing. The court found that K.J.C. had been doing well with Deborah and was well-adjusted to life in Casey County. The court stated that, while Derrek and Elizabeth had shown improvements in their life choices since K.J.C. was placed with Deborah, it had significant concerns about their respective decision-making and the stability which they could provide for the child. The court found that joint custody was not appropriate due to the contentious relationship of the parties and their inability to cooperate for the long term. Consequently, the trial court found that it was in the best interests of K.J.C. to remain in Deborah's sole custody, with Derrek and Elizabeth each having unsupervised visitation on a regular schedule.

Thereafter, Derrek and Elizabeth filed a motion to alter, amend, or vacate the order pursuant to CR 59.05. The trial court denied the motion on July 23, 2015. Derrek and Elizabeth each filed notices of appeal, and this Court directed that their appeals be heard together.



As an initial matter, we note that Deborah's original motion for temporary custody was not accompanied by an affidavit as required by KRS<sup>4</sup> 403.280. However, the Kentucky Supreme Court has held that the statutorily required affidavit is not a prerequisite for the trial court's jurisdiction in custody matters. *Masters v. Masters*, 415 S.W.3d 621, 624-25 (Ky. 2013). Furthermore, while Derrek objected to the lack of an affidavit at several points before the trial court, neither he nor Elizabeth raise that issue on appeal. Consequently, any error in this regard has been waived. *Id.* at 625.

Derrek and Elizabeth primarily argue that the notice of the November 14, 2011 hearing was inadequate. They point out that the notices were sent to Deborah's address. Furthermore, Deborah's motion advised that the motions for *de facto* custodian status and temporary custody would be "set for a status hearing" on that date. In addition, November 14 was a motion day on which substantive hearings were not generally scheduled. Finally, Mr. Coffman appeared and advised the trial court that Elizabeth was being treated for a medical condition and that neither she nor Derrek were available that day. Under these circumstances, Derrek and Elizabeth argue that the trial court's decision to hold a hearing that day denied them a meaningful right to be heard concerning their fundamental right to custody of their own daughter.

Against this result, Deborah points out that Derrek and Elizabeth both acknowledged receipt of the petition and notice of the hearing. Derrek retained

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<sup>4</sup> Kentucky Revised Statutes.

Mr. Coffman as counsel, who was present when the case was called on the morning of November 14. When Mr. Coffman advised the trial court of Elizabeth's medical emergency, the trial court delayed the hearing until later in the day. The court also advised Mr. Coffman that it would grant a longer continuance if Elizabeth could provide documentation of her medical treatment. Before the conclusion of the morning hearing, Mr. Coffman advised the court that Derrek was "on his way," and would be available for the 1:00 p.m. hearing.

When the case was called at 3:30 p.m., Derrek was present and Mr. Coffman advised the court that he was ready to proceed on the hearing to determine Deborah's status as a *de facto* custodian. Furthermore, Derrek did not present any documentation of Elizabeth's treatment and he testified that they did not obtain any such documentation. Given these facts, Deborah argues that Derrek and Elizabeth waived any objections to the sufficiency of their notice of the November 14, 2011 hearing.

We reluctantly agree. Fundamentally, the hallmarks of procedural due process are notice and a meaningful opportunity to be heard. *Lynch v. Lynch*, 737 S.W.2d 184, 186 (Ky. App. 1987). Although Derrek and Elizabeth object to the delivery of the notice to Deborah's address, they do not dispute that they actually received notice of the motion. And as the trial court found, Derrek and Elizabeth were aware of the court date in that Mr. Coffman appeared on behalf of Derrek and that Derrek and Elizabeth were still living together at the time.<sup>5</sup>

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<sup>5</sup> In its June 1, 2015 order, the trial court noted that Derrek and Elizabeth had failed to file a response to Deborah's petition and, thus, were technically in default at the time of the November

The more difficult question is whether they received adequate notice of the hearing date. The motion itself clearly did not provide notice that the matter was before the court for anything more than for scheduling a hearing at a later date. Indeed, the fact that it was scheduled for a regular motion docket suggested otherwise. Furthermore, Deborah's petition did not allege any emergency which would have suggested that an immediate evidentiary hearing would be held.

We also note that Deborah had all her witnesses ready for a hearing on November 14, but only Derrek and one other supporting witness could make it to court within the limited time the trial court allowed. The Family Court Rules of Practice and Procedure (FCRPP) require a party seeking permanent custody to provide a list of witnesses and a summary of their testimony "not less than fourteen (14) days prior to the day set for hearing...." FCRPP 7(1). While Deborah's motion was only for temporary custody, the purpose of the rule is to ensure adequate notice of hearings involving custody. Those considerations remain significant in a motion for temporary custody, at least in the absence of any allegations of an emergency or danger to the child.

Furthermore, there has been considerable confusion about what matters were before the court on November 14, 2011. At the beginning of the hearing on that day, the court stated that it was only addressing the issue of

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14, 2011 hearing. However, this Court has expressed a strong preference against the use of default judgments in custody matters. *Crews v. Shofner*, 425 S.W.3d 906, 911 (Ky. App. 2014). Therefore, a parent who is technically in default is still entitled to a full evidentiary hearing to adjudicate matters involving custody. *Id.*

Deborah's *de facto* custodian status. Nevertheless, the trial court ultimately removed K.J.C. from her parents' custody and granted custody of the child to Deborah. The January 31, 2012 order awarded Deborah sole custody of K.J.C., but did not indicate that it was only a temporary custody order. In subsequent proceedings, there has been confusion regarding whether the custody order was permanent or temporary. During several of the proceedings in 2014, Mr. Lavit represented to the court that the January 31, 2012 order awarded permanent custody of K.J.C. to Deborah. Mr. Coffman also indicated that he was under the impression that this order involved permanent custody.

The distinction between temporary and permanent custody orders is significant. Temporary custody orders are inherently interlocutory and without prejudice to the trial court's determination on permanent custody. *See Frances v. Frances*, 266 S.W.3d 754, 757 (Ky. 2008). If the order is for permanent custody, a party is required to make a showing for modification of custody under KRS 403.340. In this case, Derrek and Elizabeth have not had an opportunity to appeal from the initial *de facto* custody determination or from the order granting temporary custody to Deborah, but they have faced significant hurdles in modifying the original temporary custody order.

Given these circumstances, we question the sufficiency of the notice of the evidentiary hearing. Parental rights are so fundamentally esteemed under our system that they are accorded due process protection under the Fourteenth Amendment of the United States Constitution. *Cabinet for Health & Family*

*Servs. v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006). 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. *Walker v. Blair*, 382 S.W.3d 862, 870 (Ky. 2012), citing *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Trial courts are entitled to a degree of flexibility in scheduling matters, particularly if some emergency or danger to the child is alleged. But, conversely, the court should jealously guard both the procedural and substantive due process rights of parents where such fundamental rights are at stake. In the absence of any verified allegation in this case suggesting that any emergency existed or that K.J.C. was in danger, we believe that that the trial court should have allowed Derrek and Elizabeth additional time to prepare.

Having said this, Derrek and Elizabeth have not been particularly vigilant in asserting their rights. As noted above, Mr. Coffman announced that he was ready to go forward on the hearing to determine *de facto* custodian status. Derrek does not indicate that he would have called any other witnesses if given more time to prepare. Elizabeth alleges that she would have testified. But while she claims that she received treatment for food poisoning early that morning, she does not explain why she was unavailable to appear in Casey County that afternoon. Furthermore, the trial court offered both Derrek and Elizabeth the opportunity to present additional evidence regarding Deborah’s *de facto* custodian status at the December 2014 hearing and in May of 2015. Both indicated that they

were willing to submit the matter to the court based on the record presented at the 2011 hearing.

Moreover, Derrek and Elizabeth failed to raise the issue again or to seek a determination of permanent custody until more than two years after the trial court entered its temporary custody order on January 31, 2012. After the trial court entered the temporary custody order, they raised the issues of service and notice in a CR 59.05 motion. However, that motion was passed to a new judge in March 2012, and no further pleadings appear in the record until May 2014. By that point, K.J.C. had developed strong ties to Deborah and to the Casey County area. Elizabeth did not separately appear in this case until 2014, nor has she ever indicated that Mr. Coffman was not representing her up to that point. Although the fundamental rights of parents are paramount, those rights must be timely asserted to protect the best interests of the child. Despite our misgivings about the trial court's initial decision to conduct the hearing on November 14, 2011, we must conclude that Derrek and Elizabeth waived their objections to the evidentiary hearing.

Derrek and Elizabeth next argue that the trial court erred in finding that Deborah was a *de facto* custodian of K.J.C. in 2011. In his appeal, Derrek separately argues that the trial court's factual findings on this issue were insufficient. KRS 403.270(1)(a) sets out the requirements for *de facto* custodian status:

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.

A trial court’s “[f]indings 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.” CR 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002), *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). “A factual finding is not clearly erroneous if it is supported by substantial evidence.” *Sherfey*, 74 S.W.3d at 782. “Substantial evidence” is “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* Based upon the trial court’s factual findings, we conduct a *de novo* review of the trial court’s conclusion that Deborah qualified as the *de facto* custodian of K.J.C. *Jones-Swan v. Luther*, 478 S.W.3d 392 (Ky. App. 2015)

As set out above, Deborah testified that Derrek and Elizabeth left K.J.C. in her care on February 12, 2011. Deborah stated that she cared for the child exclusively until August 13, 2011. Derrek testified that Deborah only had

exclusive care of K.J.C. until May or June of 2011, and that he and Elizabeth cared for the child during the summer of 2011. Deborah testified that after August 13, K.J.C. visited with her parents twice, for periods of ten and seven days, respectively. But on both occasions, K.J.C. returned to Deborah's care. In its order entered on January 31, 2012, the trial court found that Deborah had been the primary caregiver for and financial supporter of K.J.C. for a six-month period beginning February 12, 2011.

In its oral findings on November 14, 2011, the court stated that it found Deborah and her witnesses to be credible, and Derek's contrary testimony to be not credible. Although the evidence was conflicting, we conclude that there was substantial evidence supporting the trial court's credibility determination and its conclusion that Deborah was the primary caregiver and supporter of K.J.C. for a period of not less than six months. And while K.J.C. had several extended visits with her parents after August 13, 2011, the trial court found that Deborah continued to provide the primary financial support for the child during those visits. Consequently, we conclude that those brief periods did not disrupt the six months of exclusive care that Deborah provided prior to that date. The trial court's written findings, as supplemented by its oral findings on the record, were sufficient to support the trial court's legal conclusion that Deborah qualified as a *de facto* custodian under KRS 403.270. Therefore, the trial court's findings of fact and conclusions of law on this issue were not clearly erroneous.



Derrek also argues that, even if Deborah qualified as a *de facto* custodian in 2011, that status does not continue indefinitely. He points out that *de facto* custodian status is a statutorily created exception to the general rule that natural parents have a fundamental right to the care and custody of their children. *Vinson v. Sorrell*, 136 S.W.3d 465, 468 (Ky. 2004). Consequently, he asserts that *de facto* custodian status must be reevaluated at regular periods to protect the rights of the parents over a non-parent. Derrek argues that Deborah voluntarily relinquished her status as a *de facto* custodian by allowing him to spend more time with K.J.C. As a result, he maintains that Deborah has waived her status as a *de facto* custodian and that his superior right as a parent should control.

Under the circumstances presented in this case, we disagree. KRS 403.270 does not require that a non-parent who is granted custodial rights due to his or her designation as a *de facto* custodian must maintain that status in order to maintain standing as a joint custodian. *Williams v. Bittel*, 299 S.W.3d 284, 289 (Ky. App. 2009). At the very least, there must be a showing that the non-parent has waived her status as a *de facto* custodian for an extended period during which the parent has provided the primary care and support for the child. Mere acquiescence to visitation with the parent, even extended visits, is not sufficient to show such a waiver.

Derrek testified that, beginning in September 2013, Deborah voluntarily agreed to allow K.J.C. to spend up to four days a week with her parents. That schedule continued until May 2014, when Deborah moved to restrict

Derrek's visitation. However, Deborah testified that she continued to provide support for K.J.C. even when she was with her parents. Deborah also testified that Derrek failed to pay his court-ordered child support during much of that period. Under these circumstances, we agree with the trial court that Deborah did not waive her standing as a *de facto* custodian.

Finally, Derrek complains about Deborah's use of affidavits during the motions to modify custody and visitation in 2014. Deborah attached an affidavit to her July 24, 2014 response to Derrek's motion to modify custody. The affidavit was prepared and signed by Mr. Lavit on his client's behalf. Although Derrek concedes that CR 43.13(1) allows counsel to make the affidavit in the absence of the affiant, he argues that the routine use of such affidavits is improper.

The trial court commented that it is "common practice" for counsel to sign affidavits on behalf of a client in a multi-county circuit. However, we note that CR 56.05 requires supporting affidavits to be made upon the basis of "personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Affidavits based upon hearsay are generally not competent evidence. *Nelson v. Martin*, 552 S.W.2d 668, 670 (Ky. App. 1977). CR 43.13(1) provides an exception to this rule, allowing counsel to make the affidavit upon a showing that the affiant is absent from the county, or mentally incapable of taking an oath, or physically unable to attend before an officer,...." We do not believe that this rule

encourages the routine use of affidavits signed by a party's counsel on a client's behalf.

Nevertheless, Derrek does not identify any particular relief which he seeks in this case. The trial court temporarily suspended Derrek's unrestricted visitation and set the matter for an evidentiary hearing. Thereafter, the trial court conducted a hearing and ordered a drug and alcohol assessment done. Upon receipt of that assessment, the trial court restored Derrek's unsupervised visitation. While we can appreciate Derrek's frustration about the restrictions on his visitation during the two-month period, the trial court's temporary orders regarding visitation were interlocutory and thus are not subject to review. *See Frances*, 266 S.W.3d at 757. Since this issue does not affect any final order entered by the trial court, we decline to address the matter further.

In conclusion, the most difficult issue in this case concerns the trial court's decision to hold the evidentiary hearing on November 14, 2011. The record shows that the trial court made this decision reluctantly. In retrospect, we do not believe that there was any necessity to hold the hearing that day. Moreover, that decision was made without adequate notice to the parents, who lost custody of their child as a result. Nevertheless, Derrek clearly waived his objection to the hearing on that date. And while it is not clear that Elizabeth agreed to the hearing on that date, she did not assert a separate interest until more than two years later. Moreover, neither Derrek nor Elizabeth took the opportunity to present additional evidence regarding Deborah's status as a *de facto* custodian. Thus, we must

conclude that Derrek and Elizabeth waived their objections to the sufficiency of their notice of the evidentiary hearing.

Based on the evidence presented, the trial court's factual findings regarding Deborah's status as a *de facto* custodian were supported by substantial evidence and were not clearly erroneous. Likewise, the trial court did not abuse its discretion in its award of temporary custody to Deborah. Unfortunately, the trial court allowed Mr. Lavit to draft the temporary custody order, and that order did not entirely reflect the court's oral ruling. As a result, subsequent judges may have been misled into believing that the order awarded permanent custody of K.J.C. But again, Derrek and Elizabeth failed to bring the discrepancy to the trial court's attention for an extended period, which suggested that they agreed with Mr. Lavit's interpretation.

By the time this matter was presented for a determination of permanent custody in late 2014 and early 2015, K.J.C. had been with Deborah for most of the prior four years. While the parties had attempted to work out expanded visitation, Deborah remained the child's primary caretaker. The trial court had no desire to disrupt the child's stability. As a result, we cannot find that the trial court abused its discretion in awarding permanent custody of K.J.C. to Deborah.

However, we must emphasize that the primary focus needs to remain on the best interests of the child. The purpose of *de facto* custodian status is "to protect someone who is the primary provider for a minor child in the stead of a natural parent; if the parent is not the primary caregiver, then someone else must

be.” *Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky. App. 2001), *abrogated on other grounds by Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). A trial court should not find *de facto* custodian status simply because it believes that a non-parent, such as Deborah, would do a better job raising the child than the parents. Likewise, the status is not intended as a basis to challenge the life choices of natural parents, at least to the extent that those choices do not adversely affect the best interests of the child.

And finally, an award of custody to a *de facto* custodian should not be used as a means of excluding the parents from the child’s life. There is clearly a great deal of family history underlying the dispute between Derrek and Deborah. Deborah has also expressed disapproval of Elizabeth’s life choices. Unfortunately, the family dispute has been compounded by actions of counsel. But there is no dispute that Deborah, Derrek, and Elizabeth each love K.J.C. Deborah has provided a loving and supportive home for most of the past five years. Derrek and Elizabeth have made great efforts to remain involved in their child’s life despite their unsettled living circumstances. Furthermore, there is nothing in the record to suggest that either parent is unfit to have custody or extended unsupervised visitation with K.J.C.

Going forward, Derrek and Elizabeth are entitled to bring motions to modify custody and visitation. Indeed, nothing in the trial court’s orders or in this opinion should be interpreted as preventing them from doing so. We urge the

parties and counsel to work together to allow K.J.C. to have a healthy relationship with both of her parents as well as with her grandmother.

Accordingly, the orders and judgment of the Casey Circuit Court are affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT  
FOR APPELLANT,  
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Mt. Vernon, Kentucky

BRIEF AND ORAL ARGUMENT  
FOR APPELLANT, DERREK  
BRADLEY CLEMENTS:

Christopher Lee Coffman  
Louisville, Kentucky

BRIEF FOR APPELLEE,  
DEBORAH JANE CLEMENTS:

Theodore H. Lavit  
Cameron C. Griffith  
Lebanon, Kentucky

ORAL ARGUMENT FOR  
APPELLEE:

Cameron C. Griffith  
Lebanon, Kentucky