RENDERED: OCTOBER 21, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000532-ME

WANDA CALDWELL
AND FRANK CALDWELL — APPELLANTS

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 04-CI-00557

NOAH KEITH MAY
AND SHARON ROSE MAY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.[1]

HENRY, JUDGE: Frank and Wanda Caldwell appeal from a February 8, 2005 Order of the Johnson Family Court denying their petition to be named as de facto custodians and for temporary custody of their grandchildren. On review, we affirm.

On December 7, 2004, the Caldwells filed a "Petition to Be Designated De Facto Custodian and for Custody" in the Johnson Family Court against their daughter, Sharon Rose May,

[1] Senior Judge John Woods Potter, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

and her husband, Noah Keith May. The Caldwells sought to be named as de facto custodians, and to be given temporary and permanent custody of, their two grandchildren: Alyssa Grace May, born March 7, 2001, and Layton Keith May, born December 29, 2001. The basis for the petition was that the Caldwells had "provided the primary financial, emotional, and physical care of the minor children" for the required period of time, as set forth in KRS[2] 403.270(1)(a).

An evidentiary hearing was conducted on February 3, 2005, and the family court issued an Order on February 8, 2005 denying the Caldwells' petition because they "failed to establish by clear and convincing evidence that they meet the requisites to qualify as the *de facto* custodians of Alyssa and Layton May." In reaching this conclusion, the family court set forth the following "Findings of Fact":

1. Noah May and Sharon May are the natural parents of minor children, Alyssa May, age four, and Layton May, age 3.
2. Frank and Wanda Caldwell are the parents of Respondent, Sharon May, and the maternal grandparents of Alyssa and Layton May.
3. Wanda Caldwell testified that she and her husband provided nearly exclusive care for Alyssa and

[2] Kentucky Revised Statutes.

Layton May between February 2003 and October 2004, with infrequent, weekly assistance from her daughter, Charlotte Caldwell, and occasional monthly visits from Sandy Crabtree. However, Charlotte Caldwell testified that she was at the home of Wanda Caldwell daily, with few exceptions, and provided daily assistance in caring for the children. Sandy Crabtree, friend of the family, testified that she cared for Layton almost five or six days each week while Sharon May worked.

4. Between February 2003 and October 2004, the Respondents were living separate and apart and Sharon May had custody of Alyssa and Layton May.

5. Between approximately February 2003 and July 2003, Sharon, Alyssa, and Layton May lived at the home of Frank and Wanda Caldwell. During July 2003, Sharon and her two children shared an apartment.

6. Between February 2003 and October 2004, numerous parties provided financial assistance for the care of Alyssa and Layton May, including, but not limited to, Frank and Wanda Caldwell, Sharon May, and the Commonwealth of Kentucky.

7. Between February 2003 and October 2004, numerous persons provided for the care of Alyssa and Layton May, including, but not limited to, Sharon May, Charlotte Caldwell, Sandy Crabtree, and Frank and Wanda Caldwell. The amount of care contributed by Frank and Wanda Caldwell did not exceed that provided by any other persons.

8. Since November 2004, Alyssa and Layton May have lived with their natural parents, Sharon and Noah May. The maternal grandparents have visited the children every other weekend since Christmas.

On March 9, 2005, the Caldwells filed a "Notice of Appeal" challenging the family court's decision. On appeal, they contend that: (1) the family court erred in admitting the testimony of Sandy Crabtree at the evidentiary hearing; and (2) the family court erred in failing to recognize them as the de facto custodians of Alyssa and Layton May.

We first address the Caldwells' contention that the family court erred in allowing Sandy Crabtree to testify at the evidentiary hearing. They objected to Crabtree's testimony because she purportedly had not been named as a possible witness in the Mays' answers to interrogatories, and her testimony was therefore an unfair surprise. The Mays indicate in their brief, however, that the Caldwells actually included Crabtree on their

own witness list, and that they should have known of the likelihood that she would testify because of her friendship with Wanda and her appearance in court on the day of the evidentiary hearing.[3]

It is well-established that decisions as to the admission of evidence are left soundly to the discretion of the trial court and will not be reversed absent a showing of an abuse of discretion. Welsh v. Galen of Virginia, Inc., 128 S.W.3d 41, 51 (Ky.App. 2001) (Citation omitted). Moreover, and of particular relevance in this case, "the question of whether one party has put another at an unfair disadvantage through pretrial nondisclosures must be addressed to the sound discretion of the trial court." Collins v. Galbraith, 494 S.W.2d 527, 530 (Ky. 1973).

Here, the record does not contain the interrogatory answers in question, so we are unable to definitively determine whether Crabtree was actually disclosed as a witness by the Caldwells, as the Mays argue. We note, however, that there is no argument by the Caldwells that this is not the case. We also note that in Collins, supra, the Kentucky Supreme Court, in denying relief, found it significant that the party complaining

[3] The Mays originally attempted to include these discovery answers as an Appendix to their brief to show that Crabtree was disclosed as a witness by the Caldwells, but as these items were not included in the record on appeal, the Appendix was stricken in a July 14, 2005 Order and is unavailable for our consideration.

about the testimony of two witnesses whose names were not given in pre-trial disclosures failed to seek a continuance or recess on the grounds of unfair surprise or to conduct further investigation based upon what the witnesses said. Id. In reviewing the record, we see that the Caldwells similarly failed to seek this type of relief. The Supreme Court also deemed it important that no suggestion of bad faith was made by the complaining party. Id. Again, we see that no such claim is made here by the Caldwells. Accordingly, given these facts, we are not inclined to find that the family court abused its considerable discretion in admitting the testimony in question.

We next turn to the Caldwells' contention that the family court erred in failing to designate them as the de facto custodians of Alyssa and Layton May. In custody matters tried without a jury, the family 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) (Citations omitted). "A factual finding is not clearly erroneous if it is supported by substantial evidence." Sherfey, 74 S.W.3d at 782 (Citations omitted). "Substantial evidence" is "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." Id. (Citations omitted). "After a

trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion." Id. at 782-83. (Citations omitted). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Id. at 783 (Citation omitted). "The exercise of discretion must be legally sound." Id. (Citation omitted).

After reviewing the record, we believe that the family court's findings of fact are supported by substantial evidence, and that its application of the law to those facts does not constitute an abuse of discretion. KRS 403.270(1)(a) sets forth the statutory standards that a person must meet in order to be named as a "de facto custodian." That provision reads as follows:

> 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.

As further stated in KRS 403.270(1)(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." This means that a person claiming this status must demonstrate that he or she is the primary caregiver for, and the primary financial supporter of the child(ren) in question. Swiss v. Cabinet for Families and Children, 43 S.W.3d 796, 798 (Ky.App. 2001), citing KRS 403.270(1)(a). Furthermore, and of particular importance here, KRS 403.270(1)(a) does not intend that multiple persons be primary caregivers. Consalvi v. Cawood, 63 S.W.3d 195, 198 (Ky.App. 2001). "It is not enough that a person provide for a child alongside the natural parent; the statute is clear that one must literally stand in the place of the natural parent to qualify as a de facto custodian." Id.

We agree with the family court's findings of fact that the record here reflects a situation in which multiple persons, including the Caldwells and Sharon May, were providing care and financial support to Alyssa and Layton May between February 2003 and October 2004. While there is some conflict in the testimonial record as to specifically how much time the children

spent with particular persons each week, the question of which version of the facts to believe is left firmly to the family court's discretion. CR 52.01. Our statutory and case law is clear that the Caldwells were required to establish by clear and convincing evidence that they were the primary caregivers and the financial supporters of the children, and that they did more than simply provide care alongside Sharon May. See Swiss, supra, and Consalvi, supra. On the record before us we must conclude that the family court did not abuse its discretion in finding that the Caldwells failed to prove by clear and convincing evidence that they satisfied the requisite standards to qualify as de facto custodians.

The judgment of the Johnson Family Court is affirmed.

ALL CONCUR.

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