

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002016-ME

KELLEA ELIZABETH HAGGARD

APPELLANT

v. APPEAL FROM BOONE FAMILY COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 95-CI-00220

JAMIE LEE HAGGARD; GLENN
HAGGARD; AND LENORA (KAY)
HAGGARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER,¹ SPECIAL JUDGE.

GUIDUGLI, JUDGE: Kellea Elizabeth Haggard (now Roeder) has appealed from the Boone Family Court's orders naming Glenn Haggard and Lenora (Kay) Haggard the de facto custodians of her natural child and their granddaughter, Kaitlin Nicole Haggard, and awarding custody to them. Kellea's arguments solely address the de facto custodian ruling, and relate to whether the statute

¹ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

applies in this case, as Glenn and Kay cared for Kaitlin alongside her natural father, and whether she waived her superior right to custody. Because we disagree with both arguments and hold that the family court's ruling on de facto custodianship was correct, we affirm.

Jamie Lee Haggard and Kellea were married on August 5, 1994, in Boone County, Kentucky, following the birth of their daughter, Kaitlin, on May 11, 1994. Less than a year later, Jamie filed a Verified Petition for Dissolution. After a few reconciliations, the marriage was dissolved by a decree entered in early 1997. The parties later entered into a property settlement agreement, by which Jamie and Kellea were to share joint custody of Kaitlin, with Jamie being awarded physical custody and Kellea being awarded visitation. The final decree incorporating the property settlement agreement was entered April 24, 1997. Although the property settlement agreement did not provide for an award of child support, the family court ordered Kellea to pay child support to Jamie in the amount of \$64.70 per week beginning in October 1999.

In order to fully comprehend this case, we must review its full factual background. At the time of Kaitlin's birth in May 1994, Kellea and Jamie were residing with his parents, Glenn and Kay. They all lived there until October 1994 when Kellea, Jamie and Kaitlin moved to an apartment. All three returned to

Glenn and Kay's residence in August 1995. Kellea moved out in July 1996, and later moved to Louisville, but Jamie and Kaitlin continued to live with Glenn and Kay until he purchased a house in August 2001. Although Jamie moved out, Kaitlin continued to have significant contact with Glenn and Kay, spending many weekends and every night during the week at their house. Jamie had little to do with Kaitlin's school or medical care.

In February 2003, Glenn and Kay learned that Jamie was using heroin. At that point, Kaitlin was at their house all of the time and Jamie had no responsibility for Kaitlin. When Jamie moved back in with his parents in November 2003, he refused to take any responsibility for Kaitlin. Glenn and Kay had Jamie arrested the following May on drug and theft charges. Jamie entered a guilty plea in Boone Circuit Court in June 2004 to those charges, and received a three-year probated sentence. He was released in order to be placed into a treatment facility in Florida. Upon his release from the treatment facility on December 15, 2004, Jamie returned to his parents' home until he moved in with a girlfriend in March 2005. For the entirety of the time they cared for Kaitlin, Glenn and Kay never received any financial support from Jamie.

Moving back to the family court action, the record reflects that Jamie and Kellea revisited the court on numerous occasions regarding custody, visitation, and support issues. In

2001, the family court appointed a guardian ad litem to represent Kaitlin's interests. In June 2002 on motion of the guardian and Jamie, the family court ordered that Kellea's visits with Kaitlin must be supervised and eventually ordered Level 1 supervision at the Holly Hill Visits Program in Northern Kentucky. These visits were originally set for 1.5 hours per week, and were then moved to two-hour visits every other Sunday. The family court also ordered Kellea to undergo a psychological evaluation, which she did in January 2003. In April, the family court denied Kellea's motion to reinstate the original visitation and ordered her to undergo intensive individual counseling. Kellea did not comply with this directive until the following year, just prior to the time she sought a change in custody.

On June 23, 2004, Kellea filed a motion to modify custody and to terminate supervised visitation. She argued that it would be in Kaitlin's best interest to transfer custody from Jamie to her, citing Jamie's admission to an in-patient drug rehabilitation program for his heroin abuse. Because of these circumstances, Jamie was no longer able to care for Kaitlin, and she had the ability to provide suitable housing and care. By this time, Kellea had remarried and had had another child, Kevin (born March 7, 1998). She later had another daughter by her

second husband who was ten months old at the time of the hearing in 2005.

On July 1, 2004, the guardian moved the family court to identify Glenn and Kay as Kaitlin's de facto custodians and to award them temporary custody. The guardian argued that Kaitlin had lived with her grandparents for all but ten months of her life, and that they had provided her with financial, educational, and emotional support. She noted that Kaitlin's father was in an in-patient drug rehabilitation program and that her mother had a history of domestic violence and reacting violently in front of Kaitlin. In contrast, she noted that during her time with her grandparents, Kaitlin had excelled in school (she earned straight-As during her 4th and 5th grade school levels), participated in local community and church activities, and established friends in the neighborhood.

Two weeks later, Glenn and Kay moved to intervene, to be declared de facto custodians, and for sole custody. By affidavit, Jamie agreed that it would be in Kaitlin's best interest for his parents to be granted custody. In response, Kellea argued that Glenn and Kay did not meet the statutory definition of de facto custodians because they were caring for Kaitlin alongside her natural father, and that she should be granted custody as the natural father was enrolled in an in-patient program and would be for several months.

Prior to ruling on custody, the family court held a hearing solely on Glenn and Kay's motion to intervene and to be declared de facto custodians on June 7, 2005. At the conclusion of the hearing, Judge Bramlage orally granted the motion to intervene and declared that Glenn and Kay were de facto custodians. On June 13, 2005, the following Findings of Fact and Conclusions of Law were entered, in which the family court made several findings regarding Kaitlin's care and financial support during her life:

. . . .

2. [Jamie] and [Kellea] were divorced April 24, 1997. Pursuant to their separation agreement filed March 25, 1997, [Jamie] and [Kellea] were awarded joint care, custody, and control of the parties' minor child, Kaitlin Haggard. [Jamie] was awarded physical custody of the minor child with [Kellea] having specific visitation. That particular order has never been modified but the parties have modified the order by their actions. Since the minor child's birth, the minor child has resided almost exclusively with the Movants, Glen[n] and Lenora Kay Haggard. From May 11, 1994, the date of the minor child's birth, the minor child, [Jamie], and [Kellea] lived at 6190 Ridgewood Court, Florence, Kentucky with the Movants. In October, 1994, [Jamie] and [Kellea] moved with the minor child to an apartment on Circle Drive. In August of 1995, [Jamie], [Kellea] and the minor child moved back in with the Movants at 6190 Ridgewood Court, Florence, Kentucky. In July of 1996, [Kellea] moved from the Movants' residence into an apartment and then subsequently moved to Louisville, Kentucky. In September of 2001 [Jamie]

moved from the Movants' residence to a house on Pheasant Drive in Florence, Kentucky. The minor child, Kaitlin Haggard, remained with the Movants in their home at 6190 Ridgewood Court, Florence, Kentucky. There was a bedroom at [Jamie's] home for the minor child, but the minor child spent 90 to 95 percent of her time with the Movants in their home. The minor child's belongings remained with the Movants as well. From September, 2001 to the present, the Movants, the paternal grandparents, provided the primary care for the minor child.

3. On June 23, 2004, [Kellea] filed a Motion to Reallocate Custody, Care and Control of the minor child, Kaitlin Haggard. . . .

4. Since September 2001, the Movants have proven, by clear and convincing evidence, that they have been the primary caregiver for, and financial supporter of, Kaitlin Haggard. Even though [Kellea] was paying child support to [Jamie] for support of the minor child in the amount of \$64.70 a week, the minor child's expenses far exceeded \$64.70 per week. [Jamie] paid nothing to the Movants for the care and support of the minor child, Kaitlin Haggard. In addition to being the primary financial supporter of the minor child, the Movants performed all the duties as if they were the parents of the minor child including, feeding and clothing the child, taking the child to the library, transporting the child for extracurricular activities, making sure the child got up and went to school and got home from school, providing love and attention for the minor child, cooking her meals and basically providing all necessities as if they were the parents of the minor child. This activity occurred from September, 2001 to the present. . . .

5. [Kellea] was ordered in October of 1999 to pay child support in the amount of \$64.70

a week but was never current in her child support payments. There would be times when she would go months without paying any child support. In 2003, [Kellea] went 4 consecutive months without paying child support and once again 3 consecutive months without paying child support. For the year 2003, she was in arrears approximately \$750.00. In the year 2004, she was in arrears approximately \$1800.00.

6. In the winter of 2002, [Kellea] was ordered to have only supervised visitation with the minor child. This visitation occurred only 2 hours 2 times a week at Holly Hill and then subsequently was reduced to an even lesser amount of time. This supervised visitation continues to occur to date. Taking into consideration the short amount of time that [Kellea] spent with the minor child, it would be impossible for her to be considered the primary caregiver for the minor child.

7. In early 2002, [Jamie] began using heroin and subsequently lost his job in December of 2003. From February 2003 to the present, [Jamie] has had almost no contact with the minor child, Kaitlin Haggard. [Jamie] has allowed the [p]aternal grandparents, the Movants, to provide the care and support for the minor child. [Kellea] was aware of [Jamie's] drug problem in March of 2002 but did nothing to try to regain custody of the minor child at that time. It appears to the Court that [Kellea] knew that the Movants were providing the care for the minor child and allowed them to do so.

By separate order entered the same day, the family court granted Glenn and Kay's motion to intervene. The order also named Glenn and Kay as Kaitlin's de facto custodians:

The Court finds, by clear and convincing evidence that the paternal grandparents were, for over 1 year prior to [Kellea] filing her Motion to Reallocate Custody, the primary physical and financial supporters of the minor child, Kaitlin Haggard. The Intervenor, are de facto custodians of the minor child, Kaitlin Haggard, date of birth May 11, 1994.

Having ruled on the de facto custodianship issue, the family court proceeded with a custody hearing on August 22, 2005. At that point, Jamie was residing in the Boone County Jail for violating the terms of his probation for his June 2004 conviction by moving out of his parents' house and using heroin. At the conclusion of the hearing, Judge Bramlage orally granted custody to Glenn and Kay and ordered Jamie and Kellea to pay support. She ordered supervised visitation for Jamie and indicated that Kellea's visitation would shift from supervised to unsupervised. A written order, including findings of fact and conclusions of law, memorializing the oral ruling was entered August 29, 2005. This appeal followed.

On appeal, Kellea presents two arguments: 1) that pursuant to Consalvi v. Cawood,² the de facto custodian statute does not apply in situations where a person provides for a child alongside a natural parent; and 2) that pursuant to Greathouse v. Shreve,³ the opposing parties should be required to prove by

² 63 S.W.3d 195 (Ky.App. 2001).

³ 891 S.W.2d 387 (Ky. 1995).

clear and convincing evidence that she waived her superior rights to the child before being designated as de facto custodians. Glenn and Kay dispute both of Kellea's arguments in their responsive brief, and further argue that they should have been awarded custody based upon Kellea's unfitness as a parent and because it was in Kaitlin's best interest. We shall limit our review to the issues Kellea raised in her brief.

The Supreme Court of Kentucky set out the applicable standard of review in Moore v. Asente,⁴ and held that a reviewing court may set aside findings of fact,

[O]nly if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those 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

⁴ 110 S.W.3d 336, 354 (Ky. 2003).

disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

With this standard in mind, we shall review the family court's order that afforded Glenn and Kay de facto custodian status.

The law in Kentucky regarding de facto custodian status appears to be settled. The Supreme Court recently stated in B.F. v. T.D.⁵ that, "[w]ith respect to who may be a de facto custodian, Kentucky statutory law is comprehensive. The General Assembly has legislated fully in this area and this court is bound to apply those statutes." A "de facto custodian" is statutorily defined 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.⁶

Once the court determines that a person is a de facto custodian, KRS 403.270(1)(b) provides that "the court shall give the person the same standing in custody matters that is given to each

⁵ ___ S.W.3d ___, 2006 WL 1650568, *1 (Ky. 2006).

⁶ KRS 403.270(1)(a).

parent under this section and KRS 403.280, 403.340, 403.350, 403.822, and 403.020.”⁷

In Kentucky, a person must have “been the primary caregiver for the child but also the primary financial supporter of the child in order to prove de facto custodian status.”⁸

Likewise, in Consalvi, this Court held:

We are bound by the plain language of the statute, and words not defined must be given their ordinary meanings. In this case it is clear that the statute is intended 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. . . . 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. To hold otherwise would serve to expand a narrowly drawn statute intended to protect grandparents and other persons who take care of a child in the absence of a parent into a broad sweeping statute placing all stepparents on an equal footing with natural parents.⁹

We now turn to the first of Kellea’s two arguments. Kellea argues that Glenn and Kay cannot be named de facto custodians because they were providing for Kaitlin along with her natural father, Jamie, citing Consalvi. We disagree with

⁷ See Sherfey v. Sherfey, 74 S.W.3d 777 (Ky.App. 2002).

⁸ Swiss v. Cabinet for Families and Children, 43 S.W.3d 796, 798 (Ky.App. 2001).

⁹ Consalvi, 63 S.W.3d at 198.

this argument, and hold that there is substantial evidence to support the family court's finding that Jamie had very little, and at times nothing, to do with Kaitlin's care or support. While Jamie technically was the parent with physical custody, the record is clear that he did not assume that role, and that Glenn and Kay did; they literally stood in the natural father's place. Therefore, the facts of this case do not run afoul of Consalvi, as Kellea would have this Court hold.

We also agree with the family court in recognizing that Glenn and Kay established by clear and convincing evidence that they were the primary caregivers and financial supporters of Kaitlin for the required statutory period, and were properly named as de facto custodians. This is true despite Kellea's payment of child support for Kaitlin, as Glenn and Kay were able to establish that the amount of money necessary to support Kaitlin far exceeded the support Kellea actually paid. We perceive no error in this ruling.

For her second argument, Kellea relies upon the Supreme Court's opinion in Greathouse for the proposition that Glenn and Kay needed to establish that she, the non-custodial parent, waived her superior custodial rights for their claim for custody to succeed. As this Court pointed out in Consalvi, Greathouse was superseded by the amendments to KRS 403.270(1) and "[t]he de facto custodian statute is at present the

governing law in this and similar cases."¹⁰ Again, we find no basis in the law supporting Kellea's argument for reversal.

For the foregoing reasons, the judgment of the Boone Family Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEES, GLENN
HAGGARD AND LENORA (KAY)

HAGGARD:

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¹⁰ Id.