

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002376-MR

DONALD WILLETT

APPELLANT

v. APPEAL FROM HENDERSON FAMILY COURT
HONORABLE SHEILA N. FARRIS, JUDGE
ACTION NO. 07-CI-00155

EDDIE WILLIAMS AND
CATHY WILLIAMS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

MOORE, JUDGE: Donald Willett appeals from the Henderson Family Court's Amended Findings of Fact, Conclusions of Law and Order finding that Eddie and Cathy Williams are the *de facto* custodians of Willett's minor child, and awarding sole custody of the child to the Williamses. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Willett and Shannon Griffee had a daughter, N.W., in November 2004. In April 2006, Griffee drove her car while under the influence; N.W. was in the vehicle at the time. The incident caused the Cabinet for Health and Family Services to become involved with the parties, and the child was removed from the parent's custody.

Bethany Brazzell was the Cabinet employee assigned to the case. A case plan was opened for both Willett and Griffee. They were required to complete their individual plans to regain custody of N.W.

Willett's case plan for mental health provided that he was to continue with his appointments at River Valley and take his medication as prescribed. His case plan regarding drug abuse included submitting to random drug screens; discussing any issues concerning substances with someone named "James"; and providing proof of completion of a drug program at Pathways Counseling. Brazzell never received proof that Willett had completed the Pathways drug program.

The Cabinet did not recommend that the child be returned to Willett and Griffee. The Cabinet became aware that Willett was subsequently charged with driving under the influence. There was also a domestic violence incident between Willett and Griffee after the Cabinet's involvement. Following this domestic violence incident, Willett tested positive for substances.¹ The Cabinet

¹ The parties do not designate what the substances were.

was aware of several emergency protective orders that were issued between Willett and Griffiee. Due to the domestic violence problems between Willett and Griffiee, the Cabinet recommended that N.W. be placed in the care, custody, and control of Griffiee's mother and stepfather, the Williamses. The child began living with the Williamses in July 2006.

In February 2007, the Williamses filed a petition for custody of N.W. in the family court. A hearing was held concerning the petition. During the hearing, it was noted that N.W. remained in the Williamses' custody and control at that time. Brazzell testified that N.W. appeared to be doing very well with the Williamses and appeared very happy with them. Brazzell attested that for several months, the only requirement that Willett needed to complete before the Cabinet would recommend returning N.W. to him was proof that he had received drug treatment.

Cathy Williams also testified at the hearing. She testified that she gets N.W. up in the morning and helps her get ready for the day, that she and her husband provide all of N.W.'s financial needs, and that they received no financial support from Willett or Griffiee since the court's order placing N.W. in their home. Cathy attested that she was N.W.'s primary caregiver.

Griffiee testified at the hearing that she and N.W. moved in with the Williamses in July 2006, and that on August 3, 2006, Griffiee filed a petition stating that she wanted the Williamses to have temporary custody of N.W. because Griffiee was not stable at that time. Griffiee attested that Willett had never provided

financial support for the child, and that Griffiee had not provided financial support for N.W. since the child was placed in the care of the Williamses. She also testified that the Williamses were the primary caregivers for N.W. and that they had been so for the previous six months. Griffiee further attested that N.W. was under the age of three at the time of the hearing. Griffiee testified that Willett had gone to jail for failure to pay child support for N.W. The family court asked Griffiee if she agreed with, or wanted to contest, the Williamses' petition for custody of N.W., and Griffiee replied that she was in agreement with their petition.

Eddie Williams testified that he is the primary caregiver and primary financial provider for N.W. He attested that he and his wife had not been paid any child support or "K-Tap"² for N.W. He further testified that the child was under the age of three at the time of the hearing and that she had lived in the Williamses' home for the prior six months.

Willett also testified at the hearing. He attested he went to jail because he owed money to K-Tap; that he subsequently repaid \$1400 to K-Tap; that the last payment he made was in September 2006; and that when he made his payment in September 2006, he had paid all the money that he owed to K-Tap at that time. Willett testified that he completed drug training at Pathways, that he had written proof that he completed the training, and that he asked Pathways to fax such proof to the Cabinet. Willett attested that he completed everything that the Cabinet asked him to do in the case plan.

² Kentucky Transition Assistance Program.

When asked if any of the money that Willett paid to K-Tap through September 2006 had gone to the Williamses, Willett testified that he was unsure whether any of it went to them, but he thought some of it went “illegally” to Griffee because she received the payments from K-Tap even though N.W. was placed in the care of the Williamses in early August 2006. Willett acknowledged that the Williamses had been the primary caregivers for N.W. since August 2006 and that, if they had not received the K-Tap payments he made, they had also been the primary financial providers for N.W. during that time.

The family court read a portion of KRS 403.270(1)(a) aloud in court, then noted that Willett filed his response and a counterclaim on March 20, 2007, and that Cathy received custody of N.W. on August 3, 2006. Thus, the court found that this period was greater than six months. Accordingly, because N.W., who was under three years old, resided with the Williamses for greater than six months before Willett filed his claim for custody, the six-month time period element for the Williamses to be declared the *de facto* custodians under KRS 403.270(1)(a) was met.

Furthermore, the court determined that the Williamses did not receive K-Tap during the relevant six-month period. Thus, the court found that the Williamses were the *de facto* custodians of N.W. based upon the fact that N.W. resided in their home for greater than six months, they were the primary financial providers for N.W., and they were the primary caregivers for the child since August 3, 2006. Accordingly, the court held that the Williamses could continue

with their petition to be named primary custodians of N.W. Consequently, the hearing continued for the purpose of determining the best interests of the child.

Cathy was called to testify again. She attested to N.W.'s typical daily activities, where she attends day care, friends that N.W. had, and her good health. Cathy testified that when N.W. returns back to her house after spending a weekend with Willett, N.W. is grumpy and tired. Additionally, she testified that recently, N.W. would cry when she was told that she had to go to Willett's for the weekend, and N.W. would state that she did not want to go with Willett; rather, N.W. would say that she wanted to stay at the Williamses' house. Cathy attested that, if Willett was given custody of N.W., she would be concerned about Willett abusing drugs while N.W. was in his care, and about the friends he had, specifically, a woman named "Crystal." Crystal had lost custody of her own daughter and there was a court order stating that Willett could not be around when Crystal had visitation with her daughter. Cathy also testified that Willett did not have a job.

Griffie testified that Willett had issues with domestic violence not only with Griffie, but with other women. She also attested that Willett had pulled her down the hall and hit her while N.W., who was about six or seven months old at the time, was watching. Griffie testified that N.W.'s needs were cared for by the Williamses. She stated that Willett had been convicted after dragging her down the hall by her hair and pouring beer on her, and that another charge was pending against Willett for giving Griffie a black eye.

Cathy again testified that, as of July 1, 2007, N.W. would have her own room at the Williamses' home because Cathy's step-son was going to move out. She attested that they already had furniture for N.W.'s own room, as well as plans for it.

Willett testified that he currently lived with his mother and step-father. He planned to get his own home when he had enough money. He was employed at a place in Indiana at the time of the hearing. Willett attested that he had been charged with driving under the influence three times and, in addition to his conviction for dragging Griffiee down the hall by her hair, he had been convicted of fourth-degree assault for a fight he had with his cousin. He testified that N.W. has her own room at the house where he resides.

The family court entered its amended findings of fact, conclusions of law, and order, in which the court found that the Williamses were the *de facto* custodians of N.W. The court found that N.W., who was two and one-half years old, was too young to express her wishes with regard to custody. However, the court found that the child had a relationship both with the Williamses and with Willett. The family court stated that N.W. had adjusted well to the Williamses' home and to the daycare in which they placed her, and that the child was healthy and happy. The court expressed its concern about the fact that Willett was taking anti-anxiety medication and Lortab pain medication as needed, as well as high blood pressure medication, considering Willett's history of drug and alcohol use. Furthermore, the family court found that Willett and Griffiee had "a significant

domestic violence history,” and that “[t]hese altercations often occurred in the presence of the minor child.” The court stated that although Willett had “attempted to address his domestic violence and anger issues, the [court did] not have before it proof that he had completed his domestic violence and anger counseling or his drug/alcohol counseling.” The family court found that N.W. had “been cared for, nurtured and supported by the *de facto* custodians primarily since August 2006.” The court also found that Willett and Griffiee “did not intend to place the minor child with the [Williamses] to allow the parents to seek employment, work, or attend school,” and that “the parent’s circumstances ha[d] not changed since the child was placed with the [Williamses].”

The family court concluded that the Williamses had shown that they were N.W.’s *de facto* custodians “by being the primary financial providers and primary caregivers of the minor child.” The court held that the Williamses were to be the sole custodians of the child and that the visitation schedule that was then in place with Willett should continue. The court ordered that Willett was “not to exercise his overnight visitation with the minor child in the presence of other females.” Finally, the court ordered child support to be “set in accordance with the Kentucky Child Support Guidelines, with . . . Shannon Griffiee, imputed with minimum wage³ and Donald Willett through a wage assignment at his employment at Career Horizons.”

³ Griffiee was imputed with minimum wage because she still attended school.

Willett now appeals, claiming that the family court abused its discretion when it found that the Williamses were N.W.'s *de facto* custodians, thereby giving the Williamses the same standing as Willett in the custody action. Specifically, Willett contends that "the time period the child resided with the [Williamses] prior to their filing for custody should not be considered as qualifying for the six (6) month requirement of KRS 403.[2]70 since [Willett's] efforts in the juvenile action should be treated as commencement of an action to regain custody." Willett also alleges that the family court should not have found the Williamses to be the *de facto* custodians because Willett "repaid all child support arrearages owed to K-Tap paid on behalf of his daughter thru [sic] September, 2006, the six (6) month period prior to the [Williamses] filing for custody." Finally, Willett asserts that he did everything that he was told he had to do in order to get his child back, but she was not returned to him.

II. STANDARD OF REVIEW

On appellate review, we may not set aside the family court's findings of fact unless they are clearly erroneous, and "due regard" is given to the family judge concerning the credibility of witnesses. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002) (internal quotation marks omitted), *overruled on other grounds by*, *Benet v. Com.*, _ S.W.3d _, 2008 WL 2165951 (Ky. May 22, 2008).

A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. 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. 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. The exercise of discretion must be legally sound.

Id. at 782-83 (internal quotation marks and citations omitted).

III. ANALYSIS

A. CLAIM CONCERNING THE TIME PERIOD THAT THE CHILD RESIDED WITH THE WILLIAMSES

In support of his claim that the Williamses should not have been declared N.W.'s *de facto* custodians, Willett first contends that "the time period the child resided with the [Williamses] prior to their filing for custody should not be considered as qualifying for the six (6) month requirement of KRS 403.[2]70 since [Willett's] efforts in the juvenile action should be treated as commencement of an action to regain custody." The family court noted that Willett filed his response to the Williamses' petition for custody and a counterclaim on March 20, 2007, and that Cathy Williams received custody of N.W. on August 3, 2006. Thus, the court found that this period was greater than six months. Accordingly, because N.W. had lived with the Williamses for greater than six months before Willett filed his claim for custody and because N.W. was less than three years old, the six month time period element for being a *de facto* custodian under KRS 403.270(1)(a) was met.

Kentucky Revised Statute 403.270(1)(a) provides in pertinent part that

“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. . . . 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.

On appeal, Willett asserts that “his efforts to regain custody in the juvenile action should be considered as commencing a custody proceeding” and, thus, the six month element of KRS 403.270 was not met. However, Willett fails to provide a date that he allegedly commenced a proceeding to regain custody in the juvenile court, and there is no evidence in the record before us showing that Willett initiated a proceeding in the juvenile court to regain custody of N.W. before the six month time period had elapsed from the time that the Williamses received custody of N.W.

We find no error in the family court’s determination that the Williamses met KRS 403.270’s six-month requirement for being declared the *de facto* custodians of N.W. was proper. Thus, we affirm on this issue.

B. CLAIM THAT THE WILLIAMSES WERE NOT THE PRIMARY FINANCIAL PROVIDERS

Willett next alleges that the Williamses should not have been declared the *de facto* custodians of N.W. because he “repaid all child support arrearages owed to K-Tap paid on behalf of his daughter thru [sic] September, 2006, the six (6) month period prior to the [Williamses] filing for custody.” At the family court

hearing, when Willett was asked if any of the money that he had paid to K-Tap through September 2006 had gone to the Williamses, Willett testified that he was unsure whether any of it had gone to them. Willett acknowledged that the Williamses had been the primary caregivers for N.W. since August 2006 and that, if they had not received the K-Tap payments he had made, they had also been the primary financial providers for N.W. during that time.

The family court concluded the Williamses did not receive K-Tap, so even if Willett paid K-Tap, the Williamses did not receive any of that money. Thus, the court found that the Williamses were the *de facto* custodians of N.W. based upon the fact that N.W. resided in their home for greater than six months, they were the primary financial providers for N.W., and they were the primary caregivers for the child since August 3, 2006. Because Willett failed to show that the Williamses received the K-Tap money that he allegedly paid through September 2006, and the Williamses denied having received any such money, the family court's determination that the Williamses were the primary financial providers for N.W. while they had custody of her was proper. Furthermore, because Willett does not contest the family court's determination that the Williamses were N.W.'s primary caregivers during the six months that she resided with them, the family court properly concluded that the Williamses were N.W.'s *de facto* custodians.

C. CLAIM THAT WILLETT MET ALL THE REQUIREMENTS SET FOR HIM TO HAVE N.W. RETURNED TO HIM

Finally, Willett asserts that he did everything that his case plan required him to do in order to get his child back, but she was not returned to him. However, Bethany Brazzell testified at the hearing that the Cabinet never received proof that Willett had completed the Pathways drug program required by his case plan. Additionally, Willett failed to provide proof to the family court that he completed the program. Consequently, this claim lacks merit.

We note that, on appeal, Willett does not challenge the family court's determination, pursuant to KRS 403.270(2), that it was in the child's best interests for her to be placed in the sole custody of the Williamses. Rather, Willett only challenges on appeal the family court's decision that the Williamses were N.W.'s *de facto* custodians. Therefore, because we have previously determined that the family court properly declared the Williamses to be the child's *de facto* custodians, and because Willett does not challenge the family court's "best interests of the child" determination, the family court properly awarded custody of N.W. to the Williamses.

D. CONCLUSION

Accordingly, the order of the Henderson Family Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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