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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000532-ME

RYAN CHARLES DECKER

APPELLANT

v. APPEAL FROM LAUREL FAMILY COURT
HONORABLE STEPHEN M. JONES, JUDGE
ACTION NO. 16-CI-00643

MELODY NOEL DECKER AND
MARSHA HAY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Ryan Decker (Ryan) appeals from an order of the Laurel Family Court designating Marsha Hay (Marsha) as a *de facto* custodian and granting her joint custody of his child. We conclude that the family court did not clearly err in finding that Marsha qualified as a *de facto* custodian and that the family court did not abuse its discretion in its custody or timesharing decisions. Hence, we affirm.

Ryan and Melody Decker (Melody) are the father and mother, respectively, of S.E.D. Marsha is the maternal grandmother of S.E.D. When S.E.D. was born in February 2013, Ryan and Melody were residing together in Davis, California. Marsha was residing in London, Kentucky. When S.E.D. was three weeks old, Marsha moved to California to be close to the family.

While in California, S.E.D. spent time at Marsha's house daily. In February 2014, Marsha and her husband moved back to Kentucky. S.E.D. stayed with them for three weeks while her parents went on an extended honeymoon. After the honeymoon, Melody and Ryan moved back to Kentucky as well.

From that point until August 2015, Marsha provided child care for S.E.D. on a regular basis. In August 2015, S.E.D. began staying overnight at Marsha's house seven days a week. This continued uninterrupted until September 2016. Ryan and Melody spent time with S.E.D. on the weekends.

On August 19, 2016, Melody filed a petition for dissolution of her marriage to Ryan. On September 28, 2016, Marsha filed a petition seeking to intervene in the dissolution action. Marsha's petition sought to establish her status as *de facto* custodian of S.E.D. While the petition was pending, the family court entered an agreed order allowing Marsha to continue to provide child care for S.E.D. every day while Ryan was at work.

The matter came before the family court for a hearing on February 28, 2017. On March 27, 2017, the family court entered findings of fact, conclusions of law and an order denying Marsha's petition to establish her *de facto* custodian status. The court found that, while Marsha was involved in a co-parenting arrangement of S.E.D. with Ryan and Melody, she was not the sole supporter of the child for the requisite period. Thereafter, Marsha filed a motion to set aside that order, arguing that KRS¹ 403.270 merely requires a finding that she was the primary caregiver and supporter of the child.

On May 26, 2017, the family court entered an order vacating its prior order and entering amended findings of fact and conclusions of law. The court found that, while Ryan provided some support and caregiving for the child from August 2015 through September 2016, Marsha was the child's primary caregiver and financial supporter during this period. Consequently, the family court found that Marsha qualified as S.E.D.'s *de facto* custodian.

Ryan filed a notice of appeal from this order. However, this Court dismissed that appeal, concluding that it was taken from a nonfinal order.² On remand, the parties submitted the pending custody matters to the family court for

¹ Kentucky Revised Statutes.

² *Ryan Charles Decker v. Marsha Hay*, No. 2017-CA-001013-ME (Order Dismissing, Ky. App. Oct. 16, 2017).

determination. In a combined order with the decree of dissolution, the family court granted joint custody of S.E.D. to Ryan and Marsha. The court designated Ryan as the primary residential custodian, with Marsha receiving parenting time in accord with the circuit's standard schedule. Ryan now appeals from that portion of the family court's final order.

Ryan first argues that Marsha failed to establish that she qualified as a *de facto* custodian of S.E.D. 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.” CR³ 52.01; *Sherfey v. Sherfey*, 74 S.W.3d

³ Kentucky Rules of Civil Procedure.

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 family court’s conclusion that Marsha qualified as the *de facto* custodian of S.E.D. *Jones-Swan v. Luther*, 478 S.W.3d 392 (Ky. App. 2015)

Ryan contends that Marsha cannot qualify as the primary caregiver for and financial supporter of S.E.D. because she never exclusively performed these functions. The phrase “the primary caregiver for, and financial supporter of” has been interpreted to mean a singular caregiver—someone who is the primary provider for a minor child. *Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky. App. 2001), *overruled on other grounds by Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). In some cases, this Court has suggested that the biological parent must have abdicated his or her role as a primary caretaker and financial supporter of the child for the required period of time. *Brunfield v. Stinson*, 368 S.W.3d 116, 118 (Ky. App. 2012) (citing *London v. Collins*, 242 S.W.3d 351, 358-59 (Ky. App. 2007)). But it is clear that a grandparent who co-parents a child with the natural mother or father does not meet the *de facto* custodian standard in KRS

403.270(1)(a). *Mullins v. Picklesimer*, 317 S.W.3d 569, 574 (Ky. 2010). *See also Chadwick v. Flora*, 488 S.W.3d 640, 644 (Ky. App. 2016).

As noted above, the family court found that S.E.D. stayed overnight at Marsha's house for seven days a week from August 2015 through September 2016. Ryan testified that he allowed S.E.D. to spend so much time at Marsha's house because he believed she was dying of liver cancer. Marsha denies that she made this representation, although she admits that she has suffered from cirrhosis. Ryan and Melody spent time with S.E.D. on weekends with some overnight stays. But particularly in 2016, Ryan states that he often had to ask Marsha's permission to visit S.E.D.

With respect to financial support, Ryan testified that he gave money to Melody to give to Marsha to help with S.E.D.'s expenses. But due to Melody's issues with alcoholism, he did not know whether the money made it to Marsha. Marsha testified that she never received any money, although she agreed that Ryan paid S.E.D.'s medical insurance premiums. Ryan also provided receipts for items which he purchased for S.E.D. while she was in Marsha's care. Marsha disputes this, stating that she provided all of S.E.D.'s food, clothes, diapers and toys without any assistance from Ryan or Melody. Ryan also admitted that Marsha paid his and Melody's rent during this period.

We find substantial evidence to support the family court's findings that Marsha was the primary, although not the exclusive, caretaker and financial supporter of S.E.D. Although this is a close case, we conclude that the parties' circumstances went beyond a typical co-parenting arrangement. Ryan and Melody did not entirely abdicate their roles as primary caretakers and financial supporters of S.E.D., but Marsha took on the overwhelming majority of these responsibilities for more than one year. Therefore, the trial court did not err in finding that Marsha qualified as a *de facto* custodian of S.E.D.

Ryan next argues that the family court abused its discretion by awarding joint custody of S.E.D. to Marsha with substantial parenting time. Since Marsha qualified as a *de facto* custodian, the family court was required to give equal consideration to her and Ryan based on the best interests of the child. KRS 403.270(2). In making this determination, the statute directs the court to consider relevant factors, including:

- (a) The wishes of the child's parent or parents, and any *de facto* custodian, as to his or her custody;
- (b) The wishes of the child as to his or her custodian, with due consideration given to the influence a parent or *de facto* custodian may have over the child's wishes;
- (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interests;
- (d) The motivation of the adults participating in the custody proceeding;

- (e) The child’s adjustment and continuing proximity to his or her home, school, and community;
- (f) The mental and physical health of all individuals involved;
- ...
- (h) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (i) The intent of the parent or parents in placing the child with a de facto custodian;
- (j) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school; and
- (k) The likelihood a party will allow the child frequent, meaningful, and continuing contact with the other parent or de facto custodian, except that the court shall not consider this likelihood if there is a finding that the other parent or de facto custodian engaged in domestic violence and abuse, as defined in KRS 403.720, against the party or a child and that a continuing relationship with the other parent will endanger the health or safety of either that party or the child.

Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008). If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court’s ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. *Id.* To amount to an abuse of discretion, the family court’s decision must be “arbitrary, unreasonable, unfair, or unsupported by sound

legal principles.” *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001) (citing *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). Thus, in reviewing the decision of the family court, 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*, 260 S.W.3d at 770.

Upon review of the record, we cannot find that the family court abused its discretion by awarding joint custody of S.E.D. to Ryan and Marsha. Although Ryan has some significant concerns about Marsha’s prior behavior, there was no evidence that her actions had ever adversely affected the child. To the contrary, the family court found that S.E.D. has a close relationship with both Ryan and Marsha. The court also found that neither Ryan nor Marsha have any mental or physical health issues that would affect his or her ability to care for the child.

The family court noted “great concern” about Marsha’s liver disease and apparent alcohol abuse in the past. “However, based upon Ryan allowing Marsha to care for S.E.D. and hearing no other issues concerning alcohol, the Court finds that Marsha is capable of providing a safe home and adequate care for S.E.D.” We are convinced that the family court properly considered all relevant factors in designating Ryan as primary residential custodian and granting Marsha

“standard” parenting time. Therefore, we find no basis to disturb the family court’s conclusion.

Accordingly, we affirm the judgment of the Laurel Family Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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