

RENDERED: JULY 10, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2019-CA-000911-ME

E.S.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
FAMILY COURT DIVISION

v.

HONORABLE TARA HAGERTY, JUDGE  
ACTION NO. 16-J-502103-001

COMMONWEALTH OF KENTUCKY,  
OFFICE OF THE JEFFERSON COUNTY  
ATTORNEY; C.D., A MINOR CHILD; AND  
E.S.

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: DIXON, GOODWINE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: E.S., natural mother, brings this appeal from a May 16, 2019,

Order of the Jefferson Circuit Court, Family Court Division, denying her motion

for custody of her biological minor child, C.D., and awarding permanent custody to his maternal aunt, E.S.<sup>1</sup> We vacate and remand.

We will only recite those facts necessary to disposition of this appeal. In a dependency, neglect, and abuse (DNA) proceeding initiated under Kentucky Revised Statutes (KRS) 620.070 and initially filed on May 9, 2016, it was alleged C.D.'s natural mother abused or neglected her minor child.<sup>2</sup> Upon removal of the minor child from natural mother's care, the family court ordered that temporary custody of the minor child be given to maternal aunt, natural mother's sister, by order entered May 11, 2016. Thereafter, natural mother stipulated to the abuse or neglect of her minor child, and, in a September 7, 2016, order, the family court found that the minor child had been neglected or abused based upon the stipulated facts. The court also permitted the natural mother to have visitation with the minor child. Following a dispositional hearing and by order entered December 7, 2016, the family court determined that the minor child would stay in the custody of maternal aunt and natural mother would have visitation with the child.

Approximately ten months thereafter, natural mother, *pro se*, filed a motion for return of custody of the child on October 2, 2017. The family court denied the motion. Natural mother, *pro se*, then filed another motion for return of

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<sup>1</sup> For purposes of clarity and to avoid confusion, we shall refer to E.S., C.D.'s natural mother, as "natural mother" throughout this opinion, and E.S., his maternal aunt, as "maternal aunt."

<sup>2</sup> The record discloses that the minor child was born on February 28, 2015.

custody on August 21, 2018, and appointed counsel for natural mother filed a “supplement” to the motion on October 9, 2018. The family court denied the motion and stated that it “considers” maternal aunt as the minor child’s permanent custodian. October 17, 2018, Order at 3. The court also “advised [natural mother] to file custody action.” October 17, 2018, Order at 3. Natural mother subsequently filed a motion to vacate the October 17, 2018, Order and argued she was entitled to a custody hearing. By Order entered December 7, 2018, the circuit court determined that natural mother was entitled to a hearing upon the issue of custody. The court particularly stated “[b]ecause [natural mother] is entitled to a hearing on custody of her son, a hearing to determine whether it is in [minor child’s] best interest to be placed in the permanent custody of his [maternal] aunt or to be returned to the custody of his [natural] mother . . . shall be held on . . . .” December 7, 2018, Order at 2.

A hearing before the family court ensued. In a May 16, 2019, Order, the family court found that it was in C.D.’s best interest to remain in the maternal aunt’s custody and placed the minor child in the permanent custody of maternal aunt.<sup>3</sup> The court also expanded the natural mother’s visitation time with the minor child. This appeal follows.

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<sup>3</sup> The child was previously placed with maternal aunt, natural mother’s sister, as a qualified relative pursuant to Kentucky Revised Statutes (KRS) 620.090(1). For purposes of the custody

Natural mother initially contends that the family court lacked jurisdiction to award permanent custody of the minor child to maternal aunt as a motion requesting same had not been filed. In particular, natural mother argues that she:

[C]ould not properly prepare for a permanency hearing when no motions for permanency had been filed. The Family Court should not have denied [natural mother's] multiple motions for return of custody in the first place, nor repeatedly advised her to file on the circuit court docket when reunification is the entire point of a DNA action. But the primary point here is that the Family Court does not have the jurisdiction to *sua sponte* hold a permanency hearing *when no party has made a motion for it to do so*.

Natural mother's Brief at 10. Although filing a motion or petition for permanent custody is the preferable procedure, we cannot say that the family court proceeded without jurisdiction under the particular facts of this case.

Jurisdiction of a court is generally divided into three main categories – personal jurisdiction, subject matter jurisdiction, and particular case jurisdiction. *Hisle v Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 429 (Ky. App. 2008). In this case, natural mother fails to indicate the precise jurisdiction lacking by the family court. So, we shall discuss all three. It is clear that the family court obtained personal jurisdiction over the natural mother and child in the

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proceedings, presumably maternal aunt was treated as a person acting as a parent pursuant to KRS 403.800(13).

DNA action; likewise, it is equally clear that the family court possesses subject matter jurisdiction over DNA actions pursuant to KRS 23A.100(2)(c). And, the family court may determine permanent custody of a child in a DNA proceeding. KRS 620.027; *N.L. v. W.F.*, 368 S.W.3d 136, 148 (Ky. App. 2012); *London v. Collins*, 242 S.W.3d 351 (Ky. App. 2007).<sup>4</sup> As to particular case jurisdiction, the family court obtained jurisdiction over this specific action by the filing of a DNA petition alleging that the minor child was abused or neglected with proper service on all necessary parties. Consequently, the family court possessed jurisdiction to determine permanent custody of the minor child. And, through its December 7, 2018, Order, the family court informed the parties that “[b]ecause [natural mother] is entitled to a hearing on custody of her son, a hearing to determine whether it is in [minor child’s] best interest to be placed in the permanent custody of his [maternal] aunt or to be returned to the custody of his [natural] mother . . . shall be held on . . . .” December 7, 2018, Order at 2. Natural mother, thus, received notice and was given ample time to prepare for the hearing upon permanent custody. Upon the whole, we view this contention of error to be without merit.

Natural mother next asserts that the family court erred in its best interests analysis under KRS 403.270 in the award of permanent custody to

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<sup>4</sup> In *London v. Collins*, 242 S.W.3d 351, 356 (Ky. App. 2007), this Court held, “if a permanency order in a dependency action brought under Chapter 620 complies with KRS 403.270(2) and is based on the best interests of the child, . . . it would qualify as a ‘custody decree[.]’”

maternal aunt. Natural mother maintains that the family court did not apply the factors in KRS 403.270 and failed to make sufficient findings of fact as to the best interests of the minor child. The natural mother also believes that the family court placed too much emphasis on the length of time the minor child resided with maternal aunt and failed to adequately consider the goal of reunification with natural mother. Natural mother also stresses that she had been fully compliant with all the requirements set forth by the Cabinet for Health and Family Services.

As pointed out above, the family court may render a permanent custody order in a DNA proceeding if the requirements of KRS 403.270(2) are followed. KRS 620.027; *N.L.*, 368 S.W.3d at 147; *London*, 242 S.W.3d at 356.

KRS 403.270(2) reads:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. Subject to KRS 403.315, there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent with ensuring the child's welfare. The court shall consider all 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;
- (g) A finding by the court that domestic violence and abuse, as defined in KRS 403.720, has been committed by one (1) of the parties against a child of the parties or against another party. The court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to each party, with due consideration given to efforts made by a party toward the completion of any domestic violence treatment, counseling, or program;
- (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.

Of importance to this appeal, KRS 403.270(2) provides that custody of a child shall be determined “in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian.” This statute is in accord with Kentucky common law recognizing that a parent has a superior right to custody over a nonparent. The superior right to custody is grounded in parents’ fundamental and constitutional right to raise and care for their biological children. *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010). *See also* KRS 405.020.

However, in this case, maternal aunt is a nonparent, who has been awarded permanent custody, presumably by virtue of her being assigned temporary custody under KRS 620.090(1). As noted in footnote 3, her legal status in this custody proceeding would appear to be a person acting as a parent as defined in KRS 403.800(13). In deference to a parent’s superior right to custody, the best

interests analysis of KRS 403.270(2) is not initially utilized to determine custody between a parent and nonparent as a parent and nonparent are not on equal footing. *Mullins*, 317 S.W.3d at 578. So, before applying the best interests analysis, the family court below should have first determined if maternal aunt was a *de facto* custodian. KRS 403.270(2); *Moore v. Asente*, 110 S.W.3d 336, 360 (Ky. 2003). This did not occur. Had the family court determined she was not a *de facto* custodian, maternal aunt would not meet the statutory standard set out in KRS 403.270 to trigger the best interests analysis. In that case, maternal aunt, as a nonparent, would have to prove one of the following two exceptions to a parent's superior right of custody: (1) that natural mother is unfit as established by clear and convincing evidence,<sup>5</sup> or (2) that she has waived her superior right to custody of the child by clear and convincing evidence.<sup>6</sup> *Mullins*, 317 S.W.3d at 578. If maternal aunt establishes she is a *de facto* custodian, then she is legally placed on equal footing with natural mother and custody is decided by the best interests analysis set out in KRS 403.270. Otherwise, only upon proof of the exceptions noted above can maternal aunt be awarded custody over natural mother.

In this case, the family court simply utilized the best interests analysis to find that maternal aunt should have permanent custody of the minor child. The

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<sup>5</sup> See *Davis v. Collinsworth*, 771 S.W.2d 329 (Ky. 1989).

<sup>6</sup> See *Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995).

family court did not initially determine whether maternal aunt, as a nonparent, was a *de facto* custodian, to trigger the best interests analysis under KRS 403.270. If she is not a *de facto* custodian, then the family court must determine if maternal aunt can prove one of the two exceptions the Kentucky Supreme Court has outlined for a nonparent to obtain custody of a child in Kentucky. *Mullins*, 317 S.W.3d at 578.

We, therefore, vacate the family court's award of permanent custody to maternal aunt and remand for the family court to conduct a full evidentiary hearing to determine whether maternal aunt is a *de facto* custodian of the minor child, and if not, the family court shall determine by clear and convincing evidence whether natural mother is unfit to have custody or has waived her superior right to custody of the minor child. Thereupon, the family court shall award permanent custody of the minor child accordingly.

We view any remaining contentions of error as moot or without merit.

For the foregoing reasons, we vacate and remand the Order of the Jefferson Circuit Court, Family Court Division, for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT, E.S.,  
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ORAL ARGUMENT FOR  
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BRIEF AND ORAL ARGUMENT  
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