

RENDERED: JANUARY 27, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001025-ME

BUSTER CLARK; AND  
JOY CLARK

APPELLANTS

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CYNTHIA E. SANDERSON, JUDGE  
ACTION NO. 09-J-00321

KATHLEEN BERRY; KAREN  
ALDERDICE; MICHAEL MURPHY;  
LYNDSAY BERRY; AND DANIEL  
RUDE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, CLAYTON AND VANMETER, JUDGES.

VANMETER, JUDGE: Buster and Joy Clark (“the Clarks”) appeal from the June 2, 2011, order of the McCracken Circuit Court, Family Division, awarding

permanent custody of L.B., a minor child, to L.B.'s maternal grandmother, Kathleen ("Kathy") Berry. For the following reasons, we affirm.

L.B. was born to Kathy's daughter, Lyndsay Berry, on March 29, 2009. In early August 2009, Lyndsay left L.B. with the Clarks, who at the time were thought to be L.B.'s paternal grandparents. Later that month, the Clarks filed a juvenile dependency petition against Lyndsay and requested temporary custody of L.B, which they received. At a hearing in October 2009, Lyndsay stipulated to dependency. The court ordered that L.B. remain with the Clarks and that the Clarks' son undergo DNA testing.

In November 2009, the court conducted a hearing at which time it confirmed that the Clarks' son was not L.B.'s father. At that hearing, a social worker with the Cabinet for Health and Family Services ("Cabinet"), Susan Carneal, recommended that L.B. remain with the Clarks. Kathy expressed interest in the chance to gain custody of L.B., but acknowledged that due to her work schedule, she thought L.B. should remain with the Clarks. Both Kathy and Joy Clark testified that they foresaw L.B. transitioning back into the Berrys' home in the future. The court ordered that the Clarks retain temporary custody of L.B. and granted Kathy visitation rights in the Clarks' home on her days off work.

On February 22, 2010, the Clarks moved to be adjudged de facto custodians of L.B., which the court denied. The court further ordered that L.B.'s maternal and paternal grandmothers' homes be evaluated by the Cabinet and that the

grandmothers submit to nicotine testing, since evidence showed that L.B.'s health issues were exacerbated by exposure to cigarette smoke.

Kathy passed the nicotine test and visitation with L.B. commenced in her home. On September 13, 2010, Kathy moved for custody of L.B. Ten days later, the Clarks moved for permanent custody, arguing that they were de facto custodians of L.B. The court conducted a hearing on permanent custody of L.B. in March 2011 and then conducted another hearing with counsel to express the court's concern with the honesty and professionalism of a Cabinet social worker, Marianna Durr, involved in the case. On April 1, 2011, the court awarded Kathy temporary custody of L.B. and conducted an evidentiary hearing thereafter to provide the parties an opportunity to present evidence following entry of the temporary order.

On June 2, 2011, the court awarded Kathy immediate, permanent custody of L.B. In its order, the court noted that it did not believe it was properly advised by Ms. Durr throughout the proceedings as to the suitability of placement with Kathy or other biological relatives. The court noted that Kathy had requested custody of L.B. some time before the December 16, 2009, case conference with the Cabinet, had appeared at all court dates concerning L.B., and had completed all of the requirements placed on her by the court and the Cabinet to receive custody. The court further noted that while smoking had been a concern because of L.B.'s health issues, that issue had been resolved.

The court observed that Ms. Durr had repeatedly objected to L.B.'s placement with Kathy by claiming smoking concerns, even though another Cabinet social worker had performed an evaluation of Kathy's home and approved it. The court found that it had erroneously prohibited Kathy from rightfully obtaining custody of L.B as a result of what it found to be fraudulent statements made by Ms. Durr. The court further found that the conduct and testimony of Ms. Durr represented a fraud perpetrated on the court and that the court was not bound by prior orders or time frames based on the fraudulent information. The court determined that L.B.'s best interests would be served if Kathy received permanent custody and so ordered. This appeal followed.

On appeal, the Clarks first argue that the court erred by not adjudging them to be de facto custodians of L.B. and by finding that placement with a blood relative was required. We disagree.

Both parties maintain that since the Clarks failed to preserve their claims of error for appeal, this court's review is for palpable error under CR<sup>1</sup> 61.02, which provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that *manifest injustice* has resulted from the error.

(Emphasis added).

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<sup>1</sup> Kentucky Rules of Civil Procedure.

KRS<sup>2</sup> 403.270 addresses de facto custodianship and provides, in relevant

part, as follows:

(1) (a) “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.

(b) Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section . . . [.]

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and any de facto custodian.

The Clarks assert that the court should have adjudged them to be de facto custodians of L.B. because they were the primary caregivers for, and financial supporters of, L.B. for a period of more than six months at a time when L.B. was under three years of age. Accordingly, they maintain that as de facto custodians, they stand in the place of a parent in custody matters and their standing as a parent prevails over that of Kathy as a grandparent.

However, the Clarks fail to direct this court to any authority establishing that the de facto custodian statute applies to a custody contest between two nonparents.

Rather, a plain reading of KRS 403.270 reveals that it applies only to custody

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<sup>2</sup> Kentucky Revised Statutes.

contests between a parent and a de facto custodian. *See Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425, 430 (Ky. 2005) (holding that the court’s “main objective is to construe the statute in accordance with its plain language and in order to effectuate the legislative intent.”). Indeed, this court has previously held that “the intent of [KRS 403.270] was to apply to situations where the de facto custodian was involved in a dispute with a parent or parents.” *Swiss v. Cabinet for Families and Children*, 43 S.W.3d 796, 798 (Ky.App. 2001) (holding that foster parents may not claim de facto custodian status as against the state). *See also McCary v. Mitchell*, 260 S.W.3d 362 (Ky.App. 2008) (holding that de facto custodian statute does not apply to a guardianship proceeding between two nonparents); *Child custody - De facto custodians*, 16 *Ky. Prac. Domestic Relations L.* § 21:29 (2011-2012) (“When a contest is not between a *de facto* custodian and the child's parent . . . no party can claim the parental preference or the parental constitutional liberty interest.”). *Cf. Williams v. Bittel*, 299 S.W.3d 284 (Ky.App. 2009) (declining to address trial court’s award of de facto custodian status to nonparent, when status was not challenged on appeal).

In the case at bar, L.B.’s parents relinquished their right to custody of L.B. Accordingly, the court did not err by declining to apply the de facto custodian statute to a custody dispute between two nonparents. Instead, it properly applied the best interests of the child test. *See Williams v. Phelps*, 961 S.W.2d 40 (Ky.App. 1998) (holding that when neither parent seeks custody and custody is

contested between two nonparents, the court is to apply the best interests test and has broad discretion in selecting the child's custodian).

The Clarks also assert that the court erred by finding that placement with a blood relative was preferred to placement with a nonrelative. The Clarks direct us to KRS 620.090, which addresses temporary custody and provides that “[p]reference shall be given to *available* and *qualified* relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision, if known.” KRS 620.090(1) (emphasis added). In this case, L.B.’s parents stated their desire for L.B. to be placed in Kathy’s custody. The court found Kathy to be a qualified and available relative due to her efforts to clean her house of smoke, stop smoking, and reduce her work hours. Further, the court determined that but for Ms. Durr’s fraudulent representations, Kathy would have been deemed qualified and available at an earlier date. The record does not suggest that the court only considered Kathy’s kinship to L.B. as a factor in making its custody determination. For these reasons, this claim of error fails.

Lastly, the Clarks contend that the court’s custody decision was not supported by the evidence and is clearly erroneous. The Clarks complain that Kathy’s home was not found to be suitable until March 2010 at the earliest, due to the smoking issue and her busy work schedule, and that Kathy waited until September 2010 to file for custody of L.B. However, even if we accept these facts as true, they do not support a finding that the court’s decision to grant permanent custody to Kathy was unsupported by the evidence or resulted in manifest

injustice. Our review of the record reveals ample evidence, notably evaluations of Cabinet workers, that Kathy's and the Clarks' homes were equally suitable for L.B. at the time the court made its permanent custody decision. As a result, the Clarks' claim that the court's findings were not supported by substantial evidence is without merit.

The order of the McCracken Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE  
KATHLEEN BERRY:

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