

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001084-ME

JAMES and ROSEMARY WITT

APPELLANTS

v. APPEAL FROM HENRY FAMILY COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NOS. 01-J-00010-001 AND 01-J-00011-001

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH  
AND FAMILY SERVICES; JOHN CAROLL, CASEWORKER,  
COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH  
AND FAMILY SERVICES; THERESA POWELL, ASSISTANT  
COUNSEL, COMMONWEALTH OF KENTUCKY, CABINET FOR  
HEALTH AND FAMILY SERVICES; D.B.; JOHN COOMES,  
GUARDIAN AD LITEM FOR THE CHILDREN; ALAN ZARING,  
GUARDIAN AD LITEM FOR THE NATURAL MOTHER;  
and S.W., MOTHER OF CHILDREN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: James and Rosemary Witt (the Witts or Rosemary) appeal the order of the Henry Family Court that denied their motion for temporary custody of A.B. and H.W, who are half-sisters. Because we conclude the trial court did not abuse its discretion in determining that it was in A.B. and H.W.'s best interests to remain with their foster parents, we affirm.

Before setting out the facts of this case, we point out that even though John Carroll, Teresa Powell, D.B., John Coomes, Alan Zaring and S.W. were named in the Notice of Appeal, they did not participate in this action. Only the appellee, Commonwealth of Kentucky, Cabinet for Health and Family Services (the Cabinet), filed a brief. We further note that in order to protect the privacy of the children, we will use initials to identify the parents and the children.

We now move to the relationship of A.B. and H.W. to the Witts. H.W. is the daughter of James Witt's son, M.W., and S.W. A.B. is the daughter of S.W. and a different father, D.B. Rosemary is married to James Witt, but is not M.W.'s mother; she is M.W.'s stepmother. So Rosemary is H.W.'s step grandmother. But Rosemary has no connection to A.B., either by her marriage to James Witt or by blood.

S.W. and M.W. have one other child together, D.W., and the Witts do have custody of that child. In addition, the Witts have custody of M.W.'s two children from a prior relationship, A.W. and J.W. The Cabinet placed A.W. and J.W. with the Witts after allegations of physical abuse by their stepmother, S.W., and sexual abuse by their father. Because of the previous allegations of abuse against D.W.'s siblings, D.W. was removed from his parents' care shortly after his birth and has remained with the Witts ever since. The birth order -- starting with the

oldest -- of all the children is as follows: J.W., A.W., A.B., H.W. and D.W.

We turn to the story of the little girls, A.B. and H.W., and how they came to be placed in foster care, rather than with the Witts. In February of 2001, the Cabinet received the information that S.W. had physically abused A.W., breaking her collarbone. As a result, S.W. was arrested, but A.W. and J.W. were permitted to remain with their father. S.W. requested that her two natural children, A.B. and H.W., be placed with S.W.'s grandmother. At the time, A.B. was two years old and H.W. was one month old. The Cabinet complied with S.W.'s request.

After residing with S.W.'s grandmother for five months, she was no longer able to care for them. The Cabinet attempted to contact the Witts for placement of the girls, but was unable to reach them. As a result, the Cabinet placed A.B. and H.W. with a foster family in July of 2001. The girls remain in the care of that same family, and that family wishes to adopt the girls. In the meantime, the parental rights of both girls' parents were terminated.

On April 19, 2004, Rosemary Witt filed a motion to obtain temporary custody of A.B. and H.W. In her motion, she stated that A.B. and H.W. should live in the same household as their siblings. A few days later, the family court heard Rosemary's motion and conducted an evidentiary hearing. The

following individuals testified at the hearing: Stacy McClure, a social worker with the Cabinet who had assisted with the placement of A.B. and H.W.; Trish Woods, another social worker with the Cabinet who worked with the foster parents; and Rosemary Witt.

Two weeks after hearing the motion, the family court issued an order denying Rosemary's motion for custody of A.B. and H.W., precipitating this appeal. In so ruling, the court reasoned that A.B. and H.W. had been in the same foster home for two years and nine months, and the girls were bonded with each other. The court agreed with the Cabinet's refusal to place one of the children with a relative at the expense of the other child's emotional well being. Recognizing that the girls did have three other siblings that resided with the Witts, however, the court recommended that there be contact between the two younger girls, their siblings and the Witts.

On appeal, Rosemary argues that the Cabinet violated its own standards of practice to use the least restrictive means in the placement of children who are removed from their parents. In addition, the family court erred in allowing the opinions and conclusions of the social worker to be admitted as one of the determinative factors that the Cabinet had used the least restrictive means in placing the children. Finally, the Cabinet has a duty to properly advise family members of their options

regarding placement of children that have been removed, but they did not do so in this case. Had it advised the Witts properly, the Witts would have obtained counsel sooner and intervened much earlier to obtain custody of A.B. and H.W.

In determining that custody should remain in the foster family, the family court concluded that this disposition was in the best interests of A.B. and H.W. The family court's determination rests within its broad discretion. See Futrell v. Futrell, 346 S.W.2d 39 (Ky. 1961). And this Court will not reverse that determination unless we conclude the trial court abused its discretion. See id. Despite the fact that the trial court's discretion is broad, it is not unchecked, and its exercise must have a substantial basis in the evidence. See Sherfey v. Sherfey, 74 S.W.3d 777, 783 (Ky.App. 2002).

The Witts allege that the Cabinet did not follow its standard of practice of using the least restrictive appropriate placement available and giving preference to available and qualified relatives of the child. See KRS 620.090(2). The Witts believe that the Cabinet has refused to consider them for placement with no credible explanation as to why.

The family court made extensive findings in its order as to the Cabinet's efforts to place A.B. and H.W. with relatives in compliance with the guidelines of KRS 620.090. These findings detail the steps the Cabinet took and explain why

A.B. and H.W. initially went to S.W.'s relatives instead of M.W.'s relatives. The reason is that A.B. and H.W. were S.W.'s natural children, and she wished that they be placed with her grandmother. See KRS 620.090(2) ("Preference shall be given to available and qualified relatives of the child considering the wishes of the parent . . .").

Once S.W.'s grandmother could no longer keep A.B. and H.W., the Cabinet did attempt to place them with the Witts, but the Cabinet could not reach them. The family court recognized the differences between the social worker's account and Rosemary's account on the Witt's availability to take the girls once the placement with S.W.'s grandmother fell through. The family court did not see it as a simple missed phone call resulting in A.B. and H.W. being placed in foster care.

As to the Witt's availability, the social worker testified that the Cabinet had concerns with (1) the sexually reactive behavior of the two children currently in the Witt's care; (2) the risks this behavior posed to A.B. and H.W.; (3) Rosemary's expression to the Cabinet that she was overwhelmed; and (4) Rosemary's request to only have H.W. and not A.B. On the other hand, Rosemary testified that she has repeatedly asked for custody of both H.W. and A.B.; but the Cabinet has refused stating that A.B. is not a blood relative and that A.B. and H.W. should not be separated. Faced with these conflicting accounts,

the family court was in the better position to judge the credibility of the witnesses. See 52.01. The only concrete expression of the Witt's desire to have custody of both A.B. and H.W. came two years and nine months after the children had been with the same foster family and were happy, attached and healthy in that environment. On this evidence, we conclude the trial court did not abuse its discretion in denying the Witt's motion for temporary custody as not being in the best interests of A.B. and H.W.

In further support of their first argument, the Witts rely on the case of Baker v. Webb, 127 S.W.3d 622 (Ky. 2004) for its interpretation of KRS 620.090(2). After setting out the language of the statutory phrase, the Baker court stated that "[t]he language of this statute clearly evidences a preference for relative placement in adoption proceedings." Id. at 625. But Baker goes on to state: "Although the statute and regulations do not mandate that the Cabinet choose a relative placement over other options, they at the very least, require that the Cabinet consider relatives in its determination of proper placement." Id. at 625.

As to the application of Baker to these facts, we agree with the family court that the Baker case -- under these circumstances -- does not mandate that A.B. and H.W. be placed with the Witts. Baker holds that under KRS 620.090(2), the

Cabinet must consider relatives in determining proper placement, which the Cabinet did in this case. At the time, no relatives were available or qualified to take A.B. and H.W. Consequently, the Cabinet placed them with foster parents.

The Witt's second argument pertains to the admissibility of the opinions and conclusions of Stacy McClure, the Cabinet's social worker, as to the best interests of A.B. and H.W. Because the Witts made no objection to Stacy McClure's testimony during the hearing, this argument is not preserved for our review.

The final argument raised by the Witts is that the Cabinet has a duty to properly advise family members of their options regarding placement of children that have been removed. We believe this argument builds on points raised in the Witt's primary argument on appeal, but offers no basis for reversing the trial court's judgment as to custody. In other words, it does not change our conclusion that the trial court did not abuse its discretion in this case.

We affirm the judgment of the Henry Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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