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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000911-ME

JASON WELLS and
EMILY WELLS

APPELLANTS

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 15-CI-00108

JEFFREY TOYE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KRAMER AND STUMBO, JUDGES.

KRAMER, JUDGE: Appellants (and former foster parents) Jason Wells and Emily Wells appeal from an order of the Anderson Circuit Court dismissing their petition to qualify as de facto custodians of a child they fostered for approximately three years, beginning when the child was only eight days old. The Appellee,

Jeffrey Toye, is the child's biological father and now has custody of the child.

After careful review of the record and applicable authority, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We previously summarized the factual and procedural history of litigation related to Toye's child in his appeal from an order terminating his parental rights:¹

The child at the center of this action was born on January 24, 2012. The identity of Child's biological father was unknown. Approximately one week after Child's birth, Child was placed in the temporary custody of the Cabinet for Health and Family Services (the Cabinet), and a neglect action was instituted against Mother. Child remained in foster care [FN] while Mother attempted to work a case plan with the Cabinet and overcome substance abuse issues and criminal conduct. Ultimately, in May 2013, the Cabinet filed a petition to terminate Mother's parental rights to Child. At this time, Mother listed two possible putative fathers of Child, however, one failed to submit to paternity testing and the other could not be located. Mother then named J.A.T. (Father) as a putative father. He was tested, and the Woodford County Attorney's Office notified Father in a letter dated August 7, 2013, he was Child's biological father. Father was added to the termination action on September 4, 2013.

[FN] Child has resided with the same foster parents [the Wellses] since she was removed from Mother's custody on February 1, 2012. The foster parents wish to adopt Child if parental rights are terminated.

Father filed a motion for temporary and permanent custody on September 12, 2013, in Fayette Circuit Court. Father's action was transferred to Woodford Circuit

¹ *J.A.T. v. Cabinet for Health and Family Services*, 2014-CA-000969-ME, 2014 WL 7339021, *1-2 (Ky. App. December 24, 2014).

Court, and he was initially granted limited, supervised visitation with Child. However, on November 26, 2013, the visitation was suspended upon a motion filed by Child's guardian ad litem.

Hearings were held on the termination petition on December 13, 2013, January 21, 2014, and January 27, 2014. Mother and Father both testified that they had never been in a relationship. They had only engaged in sexual relations twice over the course of one week in May 2011. Father testified that he did not see Mother while she was pregnant. Father testified he did not know that he was Child's biological father until he received the August 7, 2013 letter. Father also testified that in early January 2013, a mutual friend of his and Mother told him that Mother had given birth to Child and that Child resembled him. This information prompted Father to go to the Fayette County Attorney's Office to get information on paternity testing on January 15, 2013. Father testified that he was turned away because another man was listed on Child's birth certificate. Father was then contacted by the Woodford County Child Support Office in June 2013 after Mother had named him as a putative father in the termination action. Father testified that as soon as his paternity was established he began working a case plan with the Cabinet. He completed a Fatherhood Initiative program, drug screens, and several assessments. Father began supervised visitation with Child for one hour every other week. He testified that at first Child was hesitant but that she had warmed up to him, and the visitation was going well up until it was discontinued. He stated that he would bring her snacks and toys to play with at each visit. Father also prepared a room for Child at his home.

Tonya Leathers, the social worker assigned to the case by the Cabinet, testified to Father's cooperation with the Cabinet and his case plan. Ms. Leathers observed some of the visits between Father and Child and stated they were going well. She testified that she was satisfied with Father's ability to parent Child, his residence, and stated that termination of Father's parental rights was not in Child's best interest.

The court allowed the preadoptive foster parents to submit to the court screen shots of Facebook posts by Father indicating that he had knowledge in January 2013 that he might have possibly fathered a child with Mother and that Child was in the State's custody. [FN]

[FN] The court allowed this evidence pursuant Kentucky Revised Statutes (KRS) 620.100(5), which provides: "Foster parents, preadoptive parents, or relatives providing care for the child shall receive notice of, and shall have a right to be heard in, any proceeding held with respect to the child. This subsection shall not be construed to require that a foster parent, preadoptive parent, or relative caring for the child be made a party to a proceeding solely on the basis of the notice and right to be heard."

A letter to the Cabinet from Christy Leaver, a child therapist at Slater & Associates, LLC, was also considered by the court. Ms. Leaver completed an assessment of Child and the foster parents. Ms. Leaver stated in her letter that Child has a secure attachment with the foster parents as her primary caregivers, and that the bond is vital to Child's continued development. She also stated that loss of this attachment could present a significant traumatic experience for Child.

We reversed the Woodford Circuit Court's order terminating Toye's parental rights, holding that the circuit court's finding that Toye abandoned his child was not supported by substantial evidence. After remanding the case to the Woodford Circuit Court, permanent custody was given to Toye on March 26, 2015.

On April 16, 2015, the Wellses filed their petition for de facto custody in the Anderson Circuit Court. In response Toye moved to dismiss the Wellses'

petition for lack of standing. The motion was called June 2, 2015, and after hearing argument by counsel, the Anderson Circuit Court dismissed the Wellses' petition. The Wellses now appeal.

STANDARD OF REVIEW

The issue of standing is an issue of law and, therefore, our standard of review is *de novo*. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the petitioner, all allegations being taken as true. *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009) (citation omitted).

ANALYSIS

On appeal the Wellses argue they have a right to seek custody of the child they fostered because they meet the requirements of a de facto custodian pursuant to KRS 403.270(1) and that the circuit court erred by concluding that they lack standing to qualify as de facto custodians. Although, our courts have consistently recognized the superior right of natural parents to the care, custody, and control of their children, as well as the constitutionally protected right of a parent to raise his or her own child, those rights can be abridged under limited circumstances. *See Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). One such circumstance arises if the child is cared for by a caretaker for an extended period. If the caregiver “literally stands in the place of the natural parent,”² and the court

² *Consalvi v. Caywood*, 63 S.W.3d 195, 198 (Ky. App 2001), *abrogated on other grounds by Moore*, 110 S.W.3d 336.

determines that the biological parents have abdicated their role as primary caregiver and financial supporter of the child for the period of time required by KRS 403.270,³ the caregiver can qualify as a de facto custodian and will have the same standing as a biological parent in a custody proceeding. *Brumfield v. Stinson*, 368 S.W.3d 116 (Ky. App. 2012) (citation omitted).

Here, the Wellses alleged in their petition to qualify as de facto custodians that they were the sole caretakers and provided financial support of the child for almost the entirety of the child's life although the child had been placed with them by the Cabinet through the foster care system. The Wellses alleged that the child bonded with them and knows no one other than Emily Wells as her mother. Further because of the bond between the Wellses and the child, they

³ KRS 403.270 provides in pertinent part:

- (a) 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.
- (b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this subsection. 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 and KRS 403.280, 403.340, 403.350, 403.822, and 405.020.

alleged that the child may suffer trauma and emotional injury if her primary residence is changed.

In response, Toye asserts that our interpretation of KRS 403.270 in *Swiss v. Cabinet for Families and Children*, 43 S.W.3d 796, 797 (Ky. App. 2001), denies standing to all foster parents seeking to qualify as de facto custodians if the child was placed with foster parents by the Cabinet and where there is no formal familial relationship between the child and the foster parents.

In *Swiss* the child was placed with the foster parents by the Cabinet. Thereafter the foster parents' application for adoption was denied and the child was removed from the foster parents' home due to allegations of sexual abuse, which were not substantiated. The foster parents then sought to qualify as de facto custodians and regain custody of the child from the Cabinet. The Cabinet subsequently filed a motion to dismiss the foster parents' petition for de facto custody. In granting the Cabinet's motion, the trial court found that the foster parents lacked standing to bring the petition against the Cabinet and failed to meet the statutory requirements to qualify as de facto custodians. On appeal we interpreted KRS 403.270(1) and limited its application "to situations where the de facto custodian was involved in a dispute with a parent or parents," holding that foster parents "may not use the de facto custodian statutes to challenge the cabinet's custody of the child where the child was placed with the foster parents by the cabinet." *Swiss*, 43 S.W.3d at 797-98.

While the Wellses allege that Toye's analysis of *Swiss* overlooks a crucial limitation to the holding, *i.e.*, it involved a custody dispute with the Cabinet rather than a dispute between a parent and non parent, under the facts of this case that distinction does not change the outcome. The Wellses' claims of de facto custodian status arise from their role and status as foster parents for the period of time they cared for the child. We conclude that *Swiss* is clear on this and, although unpublished and only persuasive authority, we agree with the decision in *Z.S. v. Commonwealth*, 2004-CA-001949-ME, 2005 WL 497197, at *2 (Ky. App. March 4, 2005), that "[t]he holding in *Swiss* is unequivocal: 'foster parents . . . may not use the de facto custodian statutes to challenge the cabinet's custody of the child where the child was placed with the foster parents by the cabinet.'" Consequently, the fact that the child is now with the biological father, rather than still in the care of Cabinet, does not impact the fact that whatever claims the Wellses are attempting to make regarding de facto custodian status arise out of the Cabinet's placing the child with them as foster parents. Pursuant to *Swiss*, the Wellses have no foundation on which to stand; accordingly, we affirm.

CONCLUSION

For the foregoing reasons we AFFIRM the decision of the Anderson Circuit Court. We pause to note that this Court ordered the parties to mediate in good faith upon a review of the record revealing that the Wellses and Mr. Toye have never engaged in any attempt to resolve this matter among themselves, for the benefit and best interests of the child, without Court intervention. Unfortunately,

efforts by a seasoned family law conferencing attorney of this Court did not avail a resolution of this matter by the parties. Mr. Toye's having prevailed on this matter holds the keys to his child's future. Hopefully, wisdom and unconditional love for his child dictate his decision making. No child can be loved, nurtured and cared for by too many people. Unfortunately, for everyone involved the biological mother created this messy situation and now the child is left without a biological mother and the only mother she knew for the first three years of her life, which were unquestionably very formative years.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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