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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001819-ME

TAMARA D. GARVIN — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2018-SC-000154-DGE

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION THREE
v. HONORABLE DEBORAH DEWEESE, JUDGE
ACTION NO. 14-CI-503666

DONNA KRIEGER; TERRY GARVIN;
ASHLEY GARVIN; AND KURT KNIFKE — APPELLEES

AND

NO. 2015-CA-001820-ME

ASHLEY GARVIN — APPELLANT

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DONNA KRIEGER; TERRY GARVIN;
TAMARA GARVIN; AND KURT KNIFKE APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, JONES, AND TAYLOR, JUDGES.[1]

JONES, JUDGE: This matter is before the Court of Appeals upon remand from the Kentucky Supreme Court by an opinion rendered in *Krieger v. Garvin*, 584 S.W.3d 727 (Ky. 2019). The Court of Appeals had concluded that an unmarried couple could not qualify as a child's *de facto* custodian under Kentucky Revised Statute (KRS) 403.270(1). The Supreme Court reversed and held that the statutory language of KRS 403.270 is broad enough to simultaneously confer upon unmarried cohabitants the status of *de facto* custodian or custodians. The Supreme Court directed the Court of Appeals to address on remand any issues previously rendered moot and not addressed by our earlier opinion.

The only issue remaining on remand is whether Terry Garvin and Donna Krieger demonstrated by clear and convincing evidence that,

[1] The original panel of the Court of Appeals assigned to this case was Judge Taylor (presiding) and Judges Jones and D. Lambert. When this case was remanded by the Supreme Court, Judge D. Lambert had been elected to the higher court. The Chief Judge of the Court of Appeals assigned Judge Acree to substitute on the panel for Judge, now Justice, D. Lambert.

notwithstanding their unmarried status, they otherwise qualified as K.R.K.'s *de facto* custodians by having satisfied the statutory requirements of KRS 403.270(1). This Court concludes the statutorily required period of the child's residency with them, and dependency solely on Terry and Donna for support, was not satisfied.

The relevant facts are as follows. Terry Garvin's biological daughter, Ashley Garvin, gave birth to a daughter, K.R.K., on August 29, 2013. Thereafter, on April 30, 2014, a dependency, neglect, and abuse (DNA) petition was filed in the Jefferson Circuit Court, Family Court Division. In the DNA petition, it was alleged that Ashley had positive alcohol/drug screens and was not compliant with the case plan for her two older sons.[2] Following a temporary removal hearing, by order entered May 8, 2014, temporary custody of K.R.K. was granted simultaneously to her maternal grandfather, Terry Garvin, and his long-time girlfriend, Donna Krieger.

Several months later, on November 26, 2014, Tamara Garvin, K.R.K.'s maternal grandmother, filed a petition seeking custody of K.R.K. or, in the alternative, grandparent visitation. On December 12, 2014, Ashley filed a

[2] Ashley Garvin had two sons before K.R.K.'s birth. The Cabinet for Health and Family Services apparently had an ongoing dependency, neglect, and abuse case involving Ashley's two sons who were in the custody of their father, Joseph Miller. As a result of Ashley's positive drug/alcohol screens and failure to comply with the case plan for the boys, Ashley's visitation with the boys was suspended. The issues in this appeal are solely related to Ashley's daughter, K.R.K. K.R.K.'s putative father is Kurt Knifke; Kurt was named as a party but has not participated in these appeals.

response to Tamara's petition and requested that Tamara be granted temporary custody of K.R.K. rather than Terry and Donna. Following a hearing, the family court entered Findings of Fact, Conclusions of Law, and an Order on September 10, 2015, finding Terry and Donna qualified as *de facto* custodians of K.R.K. and awarding Terry and Donna permanent sole custody of K.R.K.

As stated, the issue now before this Court is whether Terry and Donna demonstrated by clear and convincing evidence in the family court that they satisfied all requirements of KRS 403.270(1)[3] governing qualification as *de facto* custodians of K.R.K. More specifically, we must determine whether Terry and Donna were K.R.K.'s custodians for the requisite time period and whether such time period was tolled by Ashley's pursuit of custody.

[3] Section (1) of KRS 403.270 states:

> (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.

The requisite time period necessary to establish *de facto* custodian status depends upon two factors: (1) the age of the child, and (2) the source of custody. 16 LOUISE E. GRAHAM & JAMES E. KELLER, KENTUCKY PRACTICE – DOMESTIC RELATIONS Law § 21:29 (2019). K.R.K. was placed with Terry and Donna when she was nine months old and her placement was by court order entered May 8, 2014, and not by the Cabinet's Department for Community Based Services. Therefore, Terry and Donna were required to prove, "by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, [K.R.K.] who has resided with the[m] for a period of six (6) months or more[,]" provided that no "legal proceeding has been commenced by a parent seeking to regain custody of the child . . . ." KRS 403.270(1)(a).

It is unrefuted that May 8, 2014, marks the date the requisite six-month period began. According to the Supreme Court's new precedent established in this case, this unmarried couple could claim *de facto* custodian status six months later, on November 8, 2014. That is, they could make such a claim after that date *unless* Ashley tolled the running of the six-month period by asserting her right to custody. Ashley did that here.

On September 25, 2014, less than five months into the requisite six-month period, Ashley filed a motion for custody in the DNA action. This was the

first of three times the child's mother sought to regain custody. The first effort alone was sufficient to toll the six-month period. As the Supreme Court said:

> [A] parent's right to raise his or her child is a fundamental Constitutional right. And any process designed to take that right away should be fair and safeguard that right to the greatest extent possible. Therefore, we believe the process by which a parent may toll the *de facto* time period should be simple and easy.

Meinders v. Middleton, 572 S.W.3d 52, 59 (Ky. 2019).

The Supreme Court recognizes in *Meinders* that the *de facto* custodian statutes constitute a process designed to take away a parent's right to raise her child. Some of the fairness demanded by the Supreme Court in the *de facto* custodian process is found in KRS 403.270(1)(a) which says: "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 [claiming *de facto* custodian status] for the required minimum period." Therefore, until there is finality to the ruling on the mother's pursuit of custody, no time after September 25, 2014, can be counted toward the six-month period required by KRS 403.270(1)(a).

Regarding tolling, the family court held as follows:

> Tolling is a pause in the running of the statutory period. Where a statutory period is "paused" by legal action, it may be "unpaused" by final disposition thereof. Such is the case with Ashley's motions for return of custody. Although the statutory period for de facto custodianship

> was tolled during the pendency of Ashley's motions, there is sufficient time before and after the motions were ruled upon to satisfy the statutory period.

(Findings of Fact, Conclusions of Law, and Order, September 10, 2015, p. 6). The family court thus embraced and applied a theory that separate time periods could be aggregated to satisfy the six-month residency requirement. Following this rationale, the family court calculated the six-month period by aggregating:

1. the first period of the child's untolled residency (4 months, 17 days) between the court's placement order of May 8, 2014 and the mother's first motion for custody on September 25, 2014; plus

2. the second period of untolled residency (1 month, 4 days) between the court's October 9, 2014 denial of mother's first custody motion and her filing of a second custody motion on November 13, 2014; plus

3. the third period of untolled residency (22 days) between the court's November 20, 2014 denial of the mother's second custody motion and December 12, 2014, when the mother filed her third custody motion.

If Kentucky jurisprudence allowed such aggregation, these periods of untolled residency would total six months and 13 days – sufficient under the Supreme Court's new precedent to qualify the grandfather and his girlfriend as *de facto* custodians. But that is not the law.

Aggregation of non-continuous residency was one of the specific questions resolved in *Meinders*, identified as follows: "[m]ay the time period

required to gain *de facto* custodian status under KRS 403.270 be aggregated, or must it be continuous?" *Meinders*, 572 S.W.3d at 54. It was a question of statutory interpretation. The Court said:

> [A]scertaining the intention of the legislature is fairly simple. Within the phrase "a period of six months," the operative word is "a." The word "a" when used in this context means one single thing. Therefore, the statute could be reworded to say, "one single period of six months" and still retain its original meaning. Obviously, if one were to aggregate two or more periods of time it would not be one single time period. Therefore, we cannot hold that the legislature intended to allow the aggregation of different time periods when it passed the *de facto* custodian statute.

Id. at 57.

The Chief Justice did not agree with the reasoning and concurred in result only. "In my view," stated the Chief Justice, "that statute should be interpreted to allow for satisfaction of the six-month prong by combining the various times of the child's residency with the purported de facto custodian throughout the child's first three years of life." *Id.* at 61 (Minton, C.J., concurring in result only). But the periods of potential aggregation were qualitatively different in *Meinders* than in the case now before this Court, and those periods in *Meinders* were not interrupted by a parent's pursuit of custody in the courts as here.

In *Meinders*, the *de facto* custody claimants wanted to aggregate "a two-week period . . . when [the mother] was in jail and they took care of [the child,

with] the period between November 5, 2015 [when the court awarded temporary custody to the *de facto* custody claimants] and April 29, 2016 [when the father] fil[ed] his motion to transfer custody, respectively." *Id.* at 56. The Chief Justice also thought these periods should be aggregated. Part of his rationale was that under the *Meinders* decision, "a deadbeat parent who has dumped his or her two-year-old child off on a loving caregiver could show up once every five months to comply with parental duties for a week, only to return the child in the care of that caregiver for another five months . . . ." *Id.* at 63 (Minton, C.J., concurring in result only). That concern is inapplicable in the case before us now.

Here, the family court demarcates the end of a tolling period as the date the family court denies a custody motion. However, such orders are non-final and interlocutory and should not have the effect of ending the tolling contemplated by KRS 403.270(1)(a). An order denying a motion for custody never means the parent has forsaken the claim for custody or, to use the Chief Justice's words, "dumped" off the child.

Furthermore, if this became the rule of law, parents would simply file a new motion for custody the same day the previous motion is denied until a frustrated court finds the parent's motion to be frivolous – hardly protective of a parent's constitutional right to raise her child.

In this case, prior to the filing of the petition, there was never a continuous, untolled period of six months in which the child resided with the grandfather and his girlfriend that was not tolled by the mother's efforts to regain custody. Because the court's orders denying Ashley's separate motions for custody were non-final, interlocutory orders, there never was an end to the tolling. In fact, her persistence is all the more reason to believe she never abandoned hope of recovering custody. The periods between the denials of Ashley's motions for custody and her renewals of those motions cannot be aggregated to satisfy the six-month requirement.

For the foregoing reasons, this Court must reverse the Jefferson Family Court's September 10, 2015 Findings of Fact, Conclusions of Law, and Order.

ACREE, JUDGE, CONCURS BY SEPARATE OPINION IN WHICH JONES, JUDGE, JOINS.

TAYLOR, JUDGE, DISSENTS WITHOUT OPINION.

ACREE, JUDGE, CONCURRING: In full concurrence with the majority opinion, I write separately to express concern that the Supreme Court's opinion in this case may have been improvidently decided.

The Supreme Court's remand requires this Court to affirm the family court's holding that two unmarried persons can attain *de facto* custodian status

together and simultaneously. That is now the law of the case, "an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been." *Commonwealth v. Hughes*, No. 2016-SC-000137-DG, 2017 WL 1536251, at *4 (Ky. Apr. 27, 2017) (quoting *Brooks v. Lexington-Fayette Urban Cty. Hous. Auth*., 244 S.W.3d 747, 751 (Ky. App. 2007) (internal citations and quotations omitted)). The Supreme Court's opinion in this case is also now part of our jurisprudence and, in accordance with Supreme Court Rule (SCR) 1.030(8)(a), "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court."

Notwithstanding the requirement of precedential obedience, these are not gag rules. The Supreme Court made clear its expectation that the lower courts' submission to its authority should be neither blind nor mute. The Supreme Court said the requirement of obedience to precedent "is not to say . . . that disagreement is prohibited or constructive criticism banned. Any court, though required to follow precedent established by a higher court, can set forth the reasons why, in its judgment, the established precedent should be overruled . . . ." *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986).

Such constructive criticism is not so much a right as it is a responsibility. And it is one shared by all jurists and all advocates, for it is the very means by which our jurisprudence evolves. The clear implication in *Special Fund* is that when a member of this Court believes the Supreme Court has erred in a substantial way, he or she has a duty to say so, and say why. I do believe the Supreme Court erred in a substantial way in this case, and here is why.

In two opinions last year – *Meinders v. Middleton*, 572 S.W.3d 52 (Ky. 2019), in April and in this very case, *Krieger v. Garvin*, 584 S.W.3d 727 (Ky. 2019), in September – the Supreme Court interpreted two similar but separate phrases appearing in the same sentence of the same statutory provision, KRS 403.270(1)(a). Each opinion addressed the legislative intent underlying one of the qualifications of a *de facto* custodian. Harmonizing the opinions is a challenge.

With all due respect, *Krieger* is vulnerable to several, not inconsequential, criticisms: (1) its rationale for finding that the legislature's use in the statute of an expressly singular term also included the plural is diametrically opposed to the rationale applied to the same statute and same sentence in *Meinders*; (2) it violates the Supreme Court's jurisprudence for interpreting statutes; (3) it builds upon an erroneous reference in an unpublished opinion of the Court of Appeals; (4) it ascribes to cohabitation an equivalency to marriage in this context; and, most significantly, (5) granting a nonparent the rights of a parent

based on a child's best interests easily can be shown to constitute undue state interference with the actual parent's constitutional right to raise her child – a child whose custody she is actively pursuing.

Conflicting rationales

First, the rationales in *Meinders* and *Krieger* are diametrically opposed. With no explanation to distinguish one rationale from the other, one who reads both opinions is left with the impression that the decision to interpret a statute as written, or differently than written, is an arbitrary one.

When *Meinders* was decided last April, the Supreme Court said the word "'a' when used in this context means one single thing." *Meinders*, 572 S.W.3d at 57. Only five months later, in *Krieger*, the Supreme Court interpreted another part of the very same sentence. Justice Buckingham, in dissent, focused on the definition of "de facto custodian" as "*a* person . . . ." *Krieger*, 584 S.W.3d at 730 (Buckingham, J., dissenting) (emphasis added) (citing KRS 403.270(1)(a)). However, the *Kreiger* majority avoids a direct contradiction with its *Meinders* analysis of the indefinite article "a" by focusing on the definite article, "the," in another part of the same sentence that "refers to '*the* primary caregiver' and '*the* person[.]'" *Id.* at 729 (emphasis added).

The question in both *Meinders* and *Krieger* was whether the legislature intended the chosen article ("a" and "the," respectively) to include the

plural despite its obvious grammatical use to describe the singular. In *Meinders*, "a" meant the singular; but in *Krieger*, "the" meant the plural, despite preceding only singular nouns.

KRS 446.020(1), under proper circumstances, can free the Court from this particular rule of grammar governing whether a thing is singular or plural. *See Krieger*, 584 S.W.3d at 730 (quoting KRS 446.020(1) (singular can mean plural and vice versa)). Following grammar rules would limit use of the definite article "a" as an adjective describing only singular nouns. The indefinite article "the" can describe both singular and plural countable nouns, as well as noncountable nouns such as water or air. If "the" precedes a singular noun, it describes a specific single thing; if "the" precedes a plural noun, it describes specific multiple things. All the relevant nouns in KRS 403.270(1)(a) are singular nouns.

In *Meinders*, the Court found statutory interpretation "fairly simple" and simply applied these grammar rules. *Meinders*, 572 S.W.3d at 57. The Court concluded the legislature intended literally what it had expressly enacted. Said the Court, "Within the phrase 'a period of six months,' the operative word is 'a[,' so] the statute could be reworded to say, 'one single period of six months' and still retain its original meaning." *Id.* There was no need to resort to the artifice of KRS 446.020(1).

On the other hand, when the Court decided *Krieger*, KRS 446.020(1) was handy justification for its disregard of the legislature's use throughout the subsection of only singular nouns: "custodian"; "person"; "caregiver"; "supporter." KRS 403.270(1)(a). Taking a dramatically different approach than it took in *Meinders*, the Supreme Court in *Krieger* ruled, either directly or by necessary implication, that all these terms can be plural, and, in this case, they are.

The Court indicated KRS 446.020(1) was merely incidental to the real rationale, although supportive of it. The ruling had already been declared in the opinion when the Court said, "Our interpretation and holding today is in line with KRS 446.020(1)." *Krieger*, 584 S.W.3d at 730. The Court rationalized its holding by noting that the legislature knew courts could use KRS 446.020(1) to read a statute more broadly than written, then effectively rewrote its singular terms as plural terms. Had it so chosen, said the Court, the legislature could have compelled a different outcome in *Krieger*. The Court said that when the legislature enacted KRS 403.270(1)(a), it "used no language indicating it meant its singular language not to extend to more than one person . . . ." *Id.* This leads to the second vulnerability in the opinion.

Ignoring prerequisite rule of statutory interpretation

Of course, the Supreme Court would have been more accurate had it said the legislature added no language to KRS 403.270(1) to limit its application to

individual persons, *other than* its exclusive and universal common usage of singular articles and nouns. I believe the Supreme Court was too quick to defend its rationale by resort to KRS 446.020(1). Doing so skipped over – actually, ignored completely – the more basic, legislatively enacted, prerequisite rule of statutory construction found in KRS 446.080(4), a rule firmly embraced by the Court.

In accordance with Kentucky jurisprudence, a court interpreting a statute cannot utilize KRS 446.020(1) without going through KRS 446.080(4) first. As the Supreme Court said just a few years ago, "it is fundamental that 'words of a statute shall be construed according to their common and approved usage. . . . [KRS 446.080(4)]. In addition, the courts have a duty to accord statutory language its literal meaning *unless to do so would lead to an absurd or wholly unreasonable result.*'" *Commonwealth v. Wright*, 415 S.W.3d 606, 608 (Ky. 2013) (emphasis added) (quoting *Johnson v. Branch Banking and Trust Co.*, 313 S.W.3d 557, 559 (Ky. 2010)).

I read *Commonwealth v. Wright* as holding that before a court can apply KRS 446.020(1) to read singular words as plural, there must be a finding that applying the literal words of a statute would be absurd. I conceive of no absurdity in applying KRS 403.270(1)(a) as written, limiting *de facto* custodian status to

only one of the cohabiting group who met the statutory requirements.[4] *Krieger* does not follow this jurisprudential rule of statutory construction.

As noted, however, the opinion makes it clear the Court did not rely on KRS 446.020(1). It had already decided the issue based on context, KRS 403.270(1)(a) ("unless the context requires otherwise") – *i.e.*, the relationship of the persons who would be *de facto* custodians, grandfather and his girlfriend. And, according to the Supreme Court, this Court of Appeals had already found that a cohabitating relationship provided the sufficient context to justify deviation from the express language of the statute. *Krieger*, 584 S.W.3d at 729 (citing *Chafer v. Vaughn*, No. 2006-CA-000887-ME, 2007 WL 1207135 (Ky. App. Apr. 6, 2007)). Unfortunately, this Court's unpublished opinion – *Chafer v. Vaughn* – erred by citing cases for principles that cannot be found in those cited cases. By relying on this Court's erroneous jurisprudence, the Supreme Court incorporated the error in *Krieger*.

[4] As addressed in the section, *infra*, captioned *Ascribes equivalency to marriage and cohabitation*, the "absurd-to-apply-as-written" criterion is certainly more applicable to a couple bound by government sanctioned matrimony than to a couple participating in transitory cohabitation. Given the significance of marriage in American life, it would be absurd <u>not</u> to treat a married couple as "a single unit for the purposes of de facto custodianship." *J.G. v. J.C.*, 285 S.W.3d 766, 768 (Ky. App. 2009).

Mistake in an unpublished opinion addressing context

Krieger's substantive rationale, set out before any mention of KRS 446.020(1), is based on an expediency built into KRS 403.270(1)(a). The expediency, said the Court, is "the phrase, '*unless the context requires otherwise*' before defining de facto custodian." *Krieger*, 584 S.W.3d at 729 (emphasis added). But what is that context?

Context played a role in both *Meinders* and *Krieger*. In the former opinion, the context was the measurement of time. In the latter, it was whether the number of unmarried nonparents who could be granted *de facto* custody was fixed at one or could be a greater number.

The Supreme Court in *Krieger* first cited an unpublished opinion of this Court, *Chafer v. Vaughn*, and then concluded that *de facto* custodian status can be conferred upon mere cohabitators. In *Chafer*, this Court said:

> [In] *Allen* [*v. Devine*, 178 S.W.3d 517 (Ky. App. 2005)] and *Diaz* [*v. Morales*, 51 S.W.3d 451 (Ky. App. 2001)] . . . the parties who sought parental and/or visitation rights were a married or *cohabitating couple* regarded by the trial court as a single entity for purposes of the KRS 403.270 analysis.

Krieger, 584 S.W.3d at 729 (quoting *Chafer*, 2007 WL 1207135, at *3 (emphasis added)). However, a careful reading of *Allen* and *Diaz* reveals the unpublished opinion of *Chafer* was wrong. In neither *Allen* nor *Diaz* did a court award *de facto* custodian status to a cohabitating couple. *Allen*, 178 S.W.3d at 519, 527; *Diaz*, 51

S.W.3d at 455. The Supreme Court's suggestion that this Court was first to recognize cohabitation as a basis for awarding joint *de facto* custodian status is thus in error.

Ascribes equivalency to marriage and cohabitation

But, to state the obvious, the Supreme Court was not relying on this Court's unpublished opinion as precedent anyway. It was *making* precedent that built upon existing case law that "a married couple is considered a single unit for the purposes of de facto custodianship." *Krieger*, 584 S.W.3d at 729 (quoting *J.G.*, 285 S.W.3d at 768 (internal quotation marks omitted)).

Under *Krieger*, cohabitation and marriage are functional equivalents. The formality of marriage is no longer a requirement or expectation for a cohabitating couple (or perhaps even more than two cohabitators) who seek to invoke the state's interference with the superior constitutional right of a child's parent. Whether intended or not, the effect of *Krieger* is to erode the institution of marriage at a time when the nation's highest court exalts it like never before.

> From their beginning *to their most recent page*, the annals of human history reveal the transcendent importance of marriage. . . . Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons.

Obergefell v. Hodges, 135 S. Ct. 2584, 2593-94, 192 L. Ed. 2d 609 (2015) (emphasis added). But in Kentucky, *Krieger* is the "most recent page" and it says

the institution of marriage is not an element necessary to the state's grant of joint *de facto* custody. *Krieger* thus debases marriage by authorizing courts to confer a status on two (and perhaps more) persons who are paramours at best and roommates at worst, that allows them to jointly challenge a fit parent's custody despite the fact their own relationship lacks the substantial ties ascribed by the law to married persons.

Surely, it was not the Kentucky Supreme Court's intention to demean the institution of marriage by granting to mere cohabitators the equivalent status for challenging a parent's constitutional right to raise her child. Still, we cannot ignore that *Krieger* is out of synch with *Obergefell*, a case certainly among the truly momentous decisions in American jurisprudence which more than sanctions, and all but sanctifies, marriage as our most venerable institution.

The Supreme Court of the United States makes it very clear that cohabitation does not bind a couple in the way marriage does. "Marriage responds to the universal fear that a lonely person might call out only to find no one there." *Obergefell*, 135 S. Ct. at 2600, 192 L. Ed. 2d 609. Can we possibly believe Garvin's cohabitation with his girlfriend frees K.R.K. from that same fear? Of course not. But marriage can assuage such fear in a child because "[m]arriage also affords the permanency and stability important to children's best interests." *Id.* "Without the recognition, stability, and predictability marriage offers, . . . children

[in the care of mere cohabitators] suffer . . . the significant material costs of being raised by unmarried p[ersons], relegated through no fault of their own to a more difficult and uncertain family life." *Id.* Furthermore, federal and state governments,

> throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. . . . Valid marriage under state law is also a significant status for over a thousand provisions of federal law. . . . The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

Id., 135 S. Ct. at 2601. This is why it would be absurd to read KRS 403.270(1)(a) as limiting *de facto* custodian status to only one of two married persons whose legal and emotional binds demand we treat them, collectively, as "the primary caregiver for, and financial supporter of, a child who has resided with the[m] . . . ." KRS 403.270(1)(a). For the very same reason, it would <u>*not*</u> be absurd to read the statute in a literal way to exclude any person merely living with the person who puts a roof over a child's head and otherwise qualifies as a *de facto* custodian. *See Talley v. Paisley*, 525 S.W.3d 523, 529 (Ky. 2017) (Keller, J., dissenting) (There is

good reason why "common law marriage which by expressed public policy is not recognized." (quoting *Murphy v. Bowen*, 756 S.W.2d 149, 150 (Ky. App. 1988) (citation omitted))).

Undue interference with constitutional rights of parents

These are, however, comparatively minor criticisms. *Krieger*'s greatest vulnerability is that its substantive rationale for awarding *de facto* custodian status to this grandfather and his cohabitating girlfriend unduly interferes with a parent's constitutionally protected right to parent her child. The operative and constitutionally-suspect language is the Court's statement that, "In using the phrase, 'unless the context requires otherwise,' the legislature left room for trial courts to act in the *best interests of the child* in determining which individual (or individuals in this case) qualify as the child's de facto custodian(s)." *Krieger*, 584 S.W.3d at 729 (emphasis added). But the best-interests rationale has been soundly rejected as a means to attack parental rights themselves.

Surely no one doubts both *Meinders* and *Krieger* must be interpreted in context of the grand overarching concept – the constitutionally protected right of a parent to parent – thoughtfully expressed in *Meinders*, as follows:

> Granting someone *de facto* custodian status gives that person "the same standing in custody matters that is given to each parent." KRS 403.270(1)(b). "[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their

> children." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Therefore, a process that puts a third party on equal footing with a parent is not one to be taken lightly.

Meinders, 572 S.W.3d at 57. Unfortunately, nothing like this expression of judicial circumspection appears in *Krieger*.

Kreiger contradicts, without overruling, its prior precedent that "the 'best interests of the child' standard, does not apply in deciding custody between a parent and a non-parent[.]" *Greathouse v. Shreve*, 891 S.W.2d 387, 389 (Ky. 1995). Make no mistake. The decision to confer *de facto* custodian status (*i.e.*, parental rights to claim custody) on a nonparent certainly is a custody decision, and *Greathouse* holds that the best-interests standard should not determine it. Now, under *Krieger*, the best-interests standard can determine it.

Candidly, it is beyond my ability to reconcile *Krieger* with Kentucky's long history of refraining from considering the best interests of the child until *after* determining that the rights of two parties seeking custody are equal. *See, e.g., id.* at 390 ("[B]efore applying the best interests of the child standard in deciding custody in this case, the trial court must first find the father has made a waiver of his superior right to custody."); *Rice v. Hatfield*, 638 S.W.2d 712, 713 (Ky. App. 1982) ("[T]he 'best interest' test applies to custody disputes between natural parents[.]"); *Boone v. Ballinger*, 228 S.W.3d 1, 13 (Ky. App. 2007) ("[O]nce a non-biological parent is deemed to have standing to seek custody

vis-a-vis the biological parents, the ultimate decision by the trial court as to who will be awarded physical custody of a child is dependent upon the best interests of that child." (citations omitted)). *Krieger* ignores that precedent and undermines Ashley's ability to exercise her superior constitutional right to parent K.R.K. Now and hereafter, under *Krieger*, best interests will decide who gets to stand toe-to-toe with a parent.

A parent's superior rights to raise her child are guaranteed by the Due Process Clause of the Constitution and are not based on her fitness as a parent. *Troxel*, 530 U.S. at 66, 120 S. Ct. at 2060 ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). Quite the opposite, until a parent is adjudged unfit (or its equivalent), the state cannot infringe upon those rights against the parent's will. By assuring compliance with KRS 403.270(1)(a) as enacted and expressly written, the courts protected those rights. But *Krieger* constructed a detour around the protections, not by assailing the parent's rights, but by using the best-interests analysis to grant the equivalent of parental rights to multiple nonparents. Thus, the state, though its judiciary, decides who gets parental rights based on what the state believes is in a child's interest.

Ironically, *Krieger* means the mere fitness of multiple *nonparents*, measured by the best interests of the child, will be enough to grant sufficient parental rights to place them in parity with an actual parent who has neither waived her superior rights nor been found unfit to claim them. In this way, the *Krieger* rationale is indistinguishable from the rationale rejected in *Troxel* where the Supreme Court of the United States held a statute unconstitutional because it "authorizes [a] court to grant . . . visitation rights whenever 'visitation may serve the best interest of the child . . .'" and thereby "interferes with the fundamental right of parents to rear their children." *Troxel*, 530 U.S. at 60, 120 S. Ct. at 2057. *Krieger* effectively allows the parent's superior constitutional rights to be swallowed by what Justice Souter called the "free-ranging best-interests-of-the-child standard . . . ." *Id.*, 530 U.S. at 76, 120 S. Ct. at 2066 (Souter, J., concurring). Application of the *Krieger* precedent brings about the same result.

Interpretation of a statute to allow a nonparent *de facto* custodian status based on what is in a child's best interests, like the statute in *Troxell* allowing nonparent visitation on the same basis, infringes on a parent's custody rights, and for the same reasons. The statute in Troxell was unconstitutional on its face; KRS 403.270(1)(a) would be unconstitutional as applied through *Krieger*'s interpretation. Allowing the state, through its judges, to determine whether that

kind of infringement would "serve the best interest of the child . . . sweeps too broadly." *Id.*, 530 U.S. at 63, 120 S. Ct. at 2059.

Furthermore, a best-interests-of-the-child determination that a nonparent should be granted these parental rights will make the family court's ultimate decision regarding who actually gets custody a foregone conclusion in most cases, if not all. That is why, in my view, this new precedent constitutes undue interference by the state with the parent's superior constitutional right.

Before *Krieger*, a parent who chose to challenge a nonparent's claim of *de facto* custodian status did so by showing the nonparent failed to meet the statute's criteria. That is no longer enough. *Krieger* places on the parent a new burden of proof. She must now establish to the family court's satisfaction that bestowing upon a nonparent custodial rights equal to her own is not in her child's best interests. That is, she must convince the court that its notion of her child's best interests is inferior to her own. That directly contravenes the Constitution-based "presumption that a fit parent will act in the best interest of his or her child." *Id.*, 530 U.S. at 69, 120 S. Ct. at 2062. *Krieger* does not evince this level of respect for the parent's superior right, at least not expressly. Prior case law did.

When the *de facto* custody statute was new, the Supreme Court addressed the role of the best-interests standard when a parent and nonparent competed for custody. In *Moore v. Asente*, by close analogy, the Supreme Court

recognized again "not only that parents of a child have a statutorily granted superior right to its care and custody, but also that parents have fundamental, basic and constitutionally protected rights to raise their own children." 110 S.W.3d 336, 358 (Ky. 2003) (footnotes and internal quotation marks omitted). Relevant to this case, the Court then said, "[W]e would necessarily abrogate those rights if we were to resolve custody disputes [between a parent and nonparent] on a 'best interest of the child' standard . . . ." *Id.* Whether to afford someone what amounts to parental rights so as to compete with the actual parent presents a custody dispute. No less abrogation occurs when a court eliminates the superiority of a fit parent's constitutional right to raise her child simply because the court believes it is in a child's best interests to allow a nonparent equal footing to challenge the parent for custody. In other words, the "best interests of the child" concept cannot justify state suppression of a mother's constitutional right to parent her child by assisting a nonparent in eliminating the superiority of a parent's rights to parent a child *vis-à-vis* a nonparent, even a well-fit nonparent. *Krieger* should be overruled.

It is not too soon to urge overruling *Krieger*, nor too soon to overrule it. As the Supreme Court itself said:

> [W]hile judicial economy, stability, and legitimacy—values promoted by the *stare decisis* principle—are all of key importance, *no* less important is the assurance that the law not "be[ ] shackled to past folly." (Cunningham, J., dissenting). *See also*, *Allen v. Commonwealth*, 395 S.W.3d 451 (Ky. 2013) ("[T]he doctrine of *stare decisis*

> does not commit us to the sanctification of . . . fallacy.") (quoting *Morrow v. Commonwealth*, 77 S.W.3d 558, 559 (Ky. 2002)).

Jenkins v. Commonwealth, 496 S.W.3d 435, 451 (Ky. 2016). One of the cases cited in the foregoing quote, *Allen v. Commonwealth*, demonstrates that our Supreme Court has the integrity to stop a bad opinion from entrenching itself in our jurisprudence, no matter how recent its vintage.

Allen, *supra*, was the last of three cases decided between 2008 and 2013 that repeatedly endeavored to satisfactorily interpret two Kentucky Rules of Evidence (KRE). Each was at odds with the other.

Fields v. Commonwealth was the first opinion to interpret KRE 608 and 609, but *Fields* was precedent for only two years. *See Fields v. Commonwealth*, 274 S.W.3d 375, 399 (Ky. 2008), *overruled by Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010).

In *Childers v. Commonwealth*, after reinterpreting the same rules of evidence, the Supreme Court said, "To the extent *Fields* may be read to imply otherwise, it is overruled." 332 S.W.3d at 72, *as modified on denial of reh'g* (Mar. 24, 2011), *abrogated by Allen*, 395 S.W.3d 451. Like *Fields*, *Childers* was precedent for only two years.

Finally, in *Allen*, the Court abrogated *Childers*, stating "*Childers* allows [an] absurd result . . . ." *Allen*, 395 S.W.3d at 463. *Allen* appears to have

finally settled the interpretation of KRE 608 and 609. This series of opinions demonstrates it is never too soon for a court to correct its own mistakes.

So, although I concur in the majority opinion, I implore the Supreme Court to consider reversing *Krieger*, and consider doing so soon.

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