RENDERED: AUGUST 14, 2025
TO BE PUBLISHED

Supreme Court of Kentucky

2023-SC-0454-DG

DAVID LEMASTER — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2022-CA-0799
GREENUP CIRCUIT COURT NO. 15-CI-00542

KENDRA STILTNER; CHRISTOPHER CLAY STILTNER; AND COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES — APPELLEES

OPINION OF THE COURT BY JUSTICE THOMPSON

REVERSING AND REMANDING

Since M.S. (child) was born, she lived with Denise Stiltner[1] (child's paternal grandmother and legal custodian) and David Lemaster (Denise's fiancé and long-term cohabitating partner of three decades). Denise passed away in 2022, when child was nine years old.

Two days after Denise's death, Lemaster sought to intervene in an ongoing custody action that child's mother, Kendra Stiltner, had brought against Denise. Lemaster asserted that as a *de facto* custodian of child, he was entitled to petition for custody pursuant to Kentucky Revised Statutes (KRS) 403.270. Lemaster claimed he qualified as child's *de facto* custodian because

[1] We refer to all parties with the last name of Stiltner by their first names.

he participated in raising child the entire time Denise had custody. Kendra, who had gained visitation rights with child in the custody action, opposed Lemaster's motion. She argued, given her superior rights as child's parent, child should be placed in her custody.

The Greenup Family Court, without conducting a home investigation, granted emergency custody to Kendra and scheduled an evidentiary hearing on Lemaster's motions. Days later, the family court cancelled the scheduled evidentiary hearing and granted Kendra custody of child.

The Court of Appeals affirmed, concluding that Lemaster's motion to intervene was untimely and, in any event, he could not qualify as a *de facto* custodian of child given that he was co-parenting child with Denise, child's legal custodian. We accepted discretionary review.

We reverse as we disagree with the Court of Appeals that Lemaster cannot qualify as child's *de facto* custodian. Instead, Lemaster has sufficiently alleged that both he and Denise qualified as child's *de facto* custodians as they jointly parented child while cohabitating. As Lemaster and Denise were essentially functioning as one unit (akin to a married couple serving as father and mother to child), Lemaster's interest in maintaining physical custody of child was adequately protected by Denise's opposition to Kendra's pursuit of custody. Therefore, the family court should have granted Lemaster's motion to intervene as he timely filed it two days after Denise died; by doing so, he properly asserted his interest which could no longer be protected by Denise. The family court erred in both denying Lemaster's motion to intervene and

failing to allow Lemaster to present his evidence that he qualified as child's *de facto* custodian at an evidentiary hearing. If Lemaster can establish he has such status, the family court must then make a determination, considering the best interest of child, as to whether Lemaster should be granted custody or visitation of child.

I. FACTUAL AND PROCEDURAL BACKGROUND

In July 2012, child was born to Kendra and her husband, Christopher Clay Stiltner[2] (parents). Christoper is Denise's son. Kendra had two other children N.M. (brother) and G.M. (sister) (collectively siblings). Siblings are not Christopher's children. Prior to child's birth, siblings were placed in the custody of their maternal grandparents, David[3] and Renee Miller (the Millers). The Millers are Kendra's parents.

A. Dependency, Neglect, and Abuse (DNA) Case

Immediately following child's birth, the Cabinet for Health and Family Services (Cabinet) received a report that Kendra had criminal charges pending in Greenup County for first-degree child abuse of child's twenty-month-old brother and Kendra no longer had custody of siblings. Kendra informed the Cabinet that she did not want child placed with the Millers.

On July 19, 2012, parents, Denise, and Lemaster signed a Cabinet prevention plan which provided "Kendra/Clay allow [child] to stay with Denise

[2] Christopher Clay Stiltner is often referred to in court filings by his middle name of Clay. We refer to him by his legal first name.

[3] To avoid confusion, as both David Lemaster and David Miller share the same first name, any use of their first names shall be accompanied by their last names.

and Dave [Lemaster] until further notice" and "[child] will be released to Denise Stiltner/David Lemaster." In accordance with this plan, child went directly from the hospital to being cared for by Denise and Lemaster.

On August 22, 2012, the Cabinet filed a DNA petition against parents regarding child. *In Re: [Child]*, 12-J-00195-001 (Greenup Family Court) (DNA case). The Cabinet argued that child was neglected and at risk of harm. The Cabinet explained that parents had been indicted for first-degree child abuse of brother and were awaiting trial, Kendra no longer had custody of siblings as permanent custody was granted to their maternal grandmother, a finding of abuse had been made regarding brother, and a finding of neglect, risk of harm had been made regarding sister.

On August 27, 2012, the family court held a temporary removal hearing and issued an order. Parents' counsel was not present at the hearing due to a conflict but filed a notice asking that the status quo, which was agreed to under the prevention plan, be continued and requesting that child remain with "Clay Stiltner's parents and Kendra's in-laws." The family court's order placed child with Denise on the basis that the parents agreed to placement with her. Parents were ordered to cooperate with the Cabinet, call the Cabinet each day, submit to random drug screens, and cooperate with the SENTRY program.

The adjudication hearing was rescheduled multiple times while the family court waited for parents' criminal cases to be resolved. In the interim, child remained in Denise's temporary custody in the home they shared with Lemaster.

In the Cabinet's final adjudication report, filed April 28, 2014, after the parents pled guilty to the reduced charge of second-degree wanton endangerment of brother, the Cabinet "recommended that a finding of neglect be made due to risk of harm, and permanent custody of [child] be granted to Denise Stiltner[.]" The Cabinet failed to recommend that any visitation be granted to parents.

Also on April 28, 2014, the family court held a combined adjudication and disposition hearing and issued orders resolving the DNA case. The order on adjudication established that parents admitted to the petition, thus proving the allegations that child was neglected, and consented to child continuing in Denise's custody. The order on disposition granted permanent custody of child to Denise, finding Denise's continuing custody of child was in child's best interest. This resolved the DNA case.[4] No visitation with parents was provided for in this order.

It appears that the entire time that child lived with Denise and Lemaster (under the Cabinet safety plan, while Denise had temporary court ordered custody, and then after Denise received permanent custody), they freely allowed parents to exercise visitation with child in their home under the supervision of Denise and/or Lemaster.

Over one year later, on October 9, 2015, Kendra filed a verified motion to establish timesharing in the DNA case. Kendra explained she and Christopher

[4] *See* KRS 610.125(1)(c) (permanency goal is satisfied when a child is placed with a permanent custodian).

were now divorced, she had complied with the case plan, and she was gainfully employed. Kendra requested unsupervised visitation and alternatively noted that her parents (the Millers) were agreeable to supervising her timesharing.

On November 12, 2015, Denise objected to this motion and requested a hearing. On November 18, 2015, the family court denied Kendra's motion, indicating that a new action needed to be filed because the case was stricken from the docket on April 28, 2014.

B. Custody Case between Kendra and Denise

On December 18, 2015, Kendra filed a verified petition for custody against Christopher and Denise. *Stiltner v. Stiltner*, 15-CI-00542 (Greenup Family Court) (custody case). She requested joint legal custody or in the alternative that a visitation schedule be established.

That same day, Kendra also filed a verified motion for temporary joint legal custody and to establish immediate timesharing. Kendra stated she had previously been allowed to spend significant time with child until her divorce from Christopher and she was now being denied timesharing. She sought joint legal custody and immediate unsupervised visitation but alternatively indicated her parents, the Millers, were willing to supervise visitation.

On December 22, 2015, Denise responded and objected to such action being taken. Christopher did not respond. It appears that Christopher continued to exercise supervised visitation with child under the informal arrangement he had with Denise and Lemaster.

On March 22, 2016, the family court held a hearing on Kendra's motion for temporary custody and timesharing. During the hearing, Kendra admitted that contrary to her prior pleading, she was liberally allowed supervised visits with child at Denise's and Lemaster's home and admitted to past use of synthetic marijuana. David Miller testified he and his wife always supervised Kendra's time with siblings and were willing to supervise her time with child. Denise, Lemaster, and a family friend, all testified as to their suspicions that Kendra was still using synthetic marijuana or marijuana. A picture of Kendra smoking a pipe and pictures of synthetic marijuana in Kendra's vehicle were admitted into evidence.

Denise and Lemaster testified that parents were freely allowed to visit child under their supervision in their home. Denise and Lemaster expressed concern that Kendra was irresponsible and was not interested in being child's parent. Denise recounted an incident where Kendra let child run out of the house. Lemaster recounted Kendra declining to attend child's preschool play because she had other plans.

In an April 8, 2016, order[5] the family court concluded that it was in child's best interest to have Kendra's visitation be supervised and for child to develop a relationship with siblings. The family court ordered that Kendra's visits first be supervised by Denise, with the Millers joining Kendra for such

[5] Denise appealed from this order for reasons unrelated to the current dispute. The Court of Appeals affirmed in *Stiltner v. Stiltner*, No. 2016-CA-000679-ME, 2017 WL 1102978, at 3*-4 (Ky. App. 2017) (unpublished).

visits. Once child was comfortable with the Millers, visits would transition to the Millers supervising Kendra's visitation on the same schedule as siblings. A subsequent visitation order entered on June 28, 2016, set times for twice weekly three-hour visits, with child transitioning to the same Monday, Thursday, Friday schedule of 4 p.m. to 7 p.m. as siblings.

The case remained stagnant for more than two years. On October 5, 2018, in a verified motion Kendra requested primary or sole custody or in the alternative unsupervised shared parenting time. One of the grounds for this motion was "[t]he Petitioner states that Denise Stiltner never leaves the house and [child] is being raised by Denise Stiltner's boyfriend, Dave [Lemaster]."

On February 13, 2019, the parties resolved the matter through an agreed order[6] providing that Denise would continue to have custody of child, Kendra would have unsupervised visitation with child, and Kendra would attempt to have siblings be present when exercising visitation with child. The order maintained the current visitation schedule but gradually extended the visitation time to include overnights.

However, before overnight visitation began, on May 25, 2021, Denise filed a verified motion to modify Kendra's visitation "based upon an act of neglect committed by Kendra Stiltner wherein she exposed the young child to a risk of

[6] The parties have repeatedly used the term "timesharing" inappropriately, including in this agreed order. The family court never granted Kendra anything other than visitation in its orders.

harm." Denise explained that Kendra was not supervising the children when child was injured and broke her wrist. Denise alleged:

> Kendra Stiltner despite the child's broken bone did not take appropriate action to alert Denise Stiltner and David Lemaster of the issue nor did she take appropriate medical action on her own when child was in her care. Only upon learning of this action when the child was back in her care did Denise Stiltner immediately take the child to be treated by appropriate medical professionals.

Denise requested the immediate suspension of visitation or alternatively that visitation be supervised.

On May 28, 2021, Kendra countered by asserting that child's injury was an accident and child did not complain of an injury or exhibit swelling. She requested increased visitation. While it is not entirely clear from the record, it appears that following Denise's allegations, Kendra never began overnight visitation with child.

A flurry of motions and responses were filed by the parties, including Denise requesting on July 20, 2021, that Kendra's visitation schedule be modified because in addition to Kendra's time interfering with child's sports schedule, Kendra was missing visitation and rescheduling it for times other than specified in the previous order.

While a hearing on these and other motions was set for August 2, 2021, it was repeatedly rescheduled for a variety of reasons.[7] The hearing on the pending motions was never held.

---

[7] The hearing was rescheduled to October 5, 2021, and then to November 30, 2021 (due to Kendra's medical issue), and then that hearing was canceled (based on the guardian *ad litem* recusing). After the family court judge recused, the special judge held a status conference on November 16, 2021, resulting in the hearing on all issues

On October 18, 2021, the family court judge recused himself based on being a friend to the father of one of the parties' children and the matter was assigned to a special judge. On November 22, 2021, the special judge appointed a friend of the court.

C. Custody Case between Kendra and Lemaster

On May 21, 2022, Denise died. Two days later, on May 23, 2022, Lemaster filed a motion for intervention and emergency relief, explaining: his "wife" and legal custodian of child had passed away. He stated they were domestic partners, and he was the child's caretaker, although Denise was the person who had custody of child. Lemaster explained child had been in his care for nine years and he needed an order of emergency custody to make medical decisions for child and ensure adherence to court-ordered visitation.

On May 27, 2022, Kendra filed a verified motion for custody stating she was child's mother, Denise was child's sole custodian, and Kendra had regular unsupervised visitation with child. Kendra requested immediate restoration of her custody, pursuant to the presumption that the parent has a superior right to custody, and asserted it was in child's best interest to live with her. Kendra also responded to Lemaster's motion to intervene and objected based on lack of standing and lack of any legal theory entitling him to custody.

---

being set for January 20, 2022. Pursuant to an agreed order, the hearing was rescheduled for March 3, 2022 (due to Denise and Christopher having covid and Denise's father passing away). Pursuant to another agreed order, the hearing was rescheduled to April 28, 2022 (due to Denise's hospitalization and need for recovery time). On April 20, 2022, Denise filed for an order of continuance due to Denise's health related to severe heart problems and requested several months of delay in rescheduling the hearing.

The family court set the motion for an emergency hearing on May 31, 2022. During this ten-minute hearing, Lemaster explained he was a person acting as a parent, which gave him standing. He additionally stated that immediately after her birth, child was placed with both him and Denise, he was child's primary financial supporter, and he qualified as a *de facto* custodian.

Kendra asked that Lemaster's motion to intervene be dismissed because he was only the boyfriend of Denise and requested emergency custody of child.

The parties informed the family court that Kendra had unsupervised visitation with child, but since the previous summer there had been a pending motion to change Kendra's visitation back to supervised visitation. The family court stated that the motion to intervene failed to provide appropriate notice to the friend of the court, and that input was relevant as the friend of the court could investigate the underlying situation.

The family court granted Lemaster a continuance on his motion to intervene but stated the court was not going to grant him emergency custody as the court did not want to grant him standing. The family court concluded that the only reasonable action it could take at that time was to grant emergency custody to Kendra, noting that if Kendra was not an appropriate custodian, the Cabinet could do something (even though the Cabinet was not a party in the case).

The family court set a new hearing for June 23, 2022, to consider Lemaster's motion to intervene and motion for custody, and to allow him to make further filings to establish his standing.

On June 1, 2022, Lemaster filed: (1) a petition for custody (which contained as an exhibit many of the court filings from the DNA case); (2) a motion for immediate entitlement to custody; and (3) a renewed motion for intervention and emergency relief. Collectively, he argued through these filings: (1) he had standing as a *de facto* custodian pursuant to KRS 403.270, as child had been placed with him and Denise by the Cabinet and the family court and they qualified as child's *de facto* custodians as an unmarried couple that operated as a unit; (2) he was entitled to custody as being on equal legal footing as Kendra as because he was (a) a *de facto* custodian; (b) Kendra had waived her superior right to custody; and (c) Kendra was unfit to parent child; and (3) it was in child's best interest that Lemaster have custody because (a) he had cared for child her entire life (she was almost ten by this time); (b) Kendra was unfit to parent child; and (c) he believed child would want to live with him.

Regarding being child's *de facto* custodian, Lemaster argued he, along with Denise, was the primary financial support and primary caregiver of child for her whole life. He relied on the case of *Krieger v. Garvin*, 584 S.W. 727, 729-30 (Ky. 2019), for its ruling that unmarried cohabitants who both cared for a child could be ruled to be a child's *de facto* custodians despite the singular nature of *de facto* custodian in KRS 403.270 which allowed deviation from that definition "if the context requires otherwise."

As to standing, which would give him a right to intervene, Lemaster argued he was a *de facto* custodian of child, having taken on a parental role for

approximately ten years, with child having been placed with him at birth by the Cabinet.

Regarding custody with Lemaster being in child's best interest, Lemaster explained that child's community was in Greenup County, Kentucky, while Kendra alternated her time between Ohio and Florida. He argued that changing custody to Kendra would result in child being taken away from the only life she had ever known, including her sports and community. Lemaster also argued he "has a great and loving relationship with the minor child who she views as a grandfather" and taking child away from him would damage child's psychological health. Lemaster requested that the family court conduct an *in camera* interview of child as to her wishes.

On June 2, 2022, Lemaster filed a motion pursuant to KRS 403.862. He requested that the family court issue an order to require child's physical presence at the June 23, 2022, hearing so that she could testify *in camera* to the family court. Lemaster explained he was concerned that Kendra would not accept a subpoena regarding child, who was presently in Florida. He requested a June 7, 2022, hearing on this matter.

On June 3, 2022, Lemaster filed Christopher's affidavit. Christopher indicated in relevant part:

> Denise Stiltner and David Lemaster were the primary caregivers and primary financial supporters of [child] since her birth. I believe it is in [child's] best interest if custody is to be placed with David Lemaster. I believe [child] would want to continue to live with David Lemaster as this is the only home she has known. My daughter views David Lemaster as a Grandpa and in reality her Dad.

(Numbering omitted).

On June 6, 2022, Kendra responded to Lemaster's motions, objecting to his intervention. Relying on *Burgess v. Chase*, 629 S.W.3d 826 (Ky. App. 2021), Kendra argued that *Krieger* could not apply where there was already a custody order awarding custody to Denise (rather than Lemaster and Denise seeking a custody order as joint *de facto* custodians). Kendra argued the law was clear that Lemaster could not qualify as a *de facto* custodian when he raised child alongside the natural parent and, ergo, Lemaster could not acquire *de facto* status next to Denise because as child's custodian Denise had the same legal standing as a natural parent. Kendra further argued that Lemaster's motion to intervene was not timely filed pursuant to the Kentucky Rules of Civil Procedure (CR) 24.01, as he failed to intervene earlier in either the 2012 DNA case or in the 2015 custody case, despite his awareness of these proceedings.

On June 7, 2022, a three-minute hearing was conducted via Zoom. The hearing was supposed to be about Lemaster's request for an order for child to appear at the June 23, 2022, hearing on his motion to intervene and for custody. Lemaster requested a court order requiring child to be in Kentucky for the scheduled evidentiary hearing.

The family court stated that initially Lemaster was given the June 23, 2022, hearing date to allow him an opportunity to file his substantive motion, but that after reviewing what he filed the court was overruling those motions

based on lack of standing and, therefore, there was no need for a hearing.[8] The family court made this summary ruling without having received any information from a third party such as the Cabinet (which is regularly ordered by our family courts to investigate and make reports as to the suitability of placement in a new home), the friend of court (even though the family court previously suggested that the friend of the court needed to be informed about the proceedings, ostensibly so that the friend of the court could investigate and make a report and/or testify at the evidentiary hearing), or a guardian *ad litem*. This is the type of situation in which the family court should appoint a guardian *ad litem* to protect child's interests and utilize all available resources when determining whether to place child in Kendra's custody.

The family court then proceeded to award custody of child to Kendra, despite past Cabinet involvement in the DNA case in which the family court made a finding of neglect regarding child and granted permanent custody of child to Denise, and failed to award Kendra visitation of any kind, apparently concluding pursuant to KRS 403.320(1) "that visitation would endanger seriously the child's physical, mental, moral, or emotional health." While the family court in the custody case subsequently concluded that reasonable visitation was appropriate, that does not mean that vesting custody exclusively in Kendra would be. At this juncture there was a complete lack of any objective evidence that child would now be safe in Kendra's sole care. The family court

[8] On June 9, 2022, an order formally canceling the June 23rd hearing was entered. This hearing was also cancelled by the June 21, 2022, order.

had not interviewed child to see if any "red flags" were raised. Lemaster was not even permitted to voice any argument about why such an award of custody was premature.

On June 13, 2022, Lemaster filed a CR 59.05 motion to alter, amend, or vacate. He requested adequate findings and argued that *Burgess* did not apply, explaining that his interests and Denise's interests had not been opposed and they should be treated as one unit for purposes of *de facto* custodian status. Lemaster also emphasized that it would be appropriate for the friend of the court to speak to child.

On June 21, 2022, the family court conducted a three-minute hearing on Lemaster's motion to alter, amend, or vacate. Lemaster requested specific findings of fact, a modification of the order and an evidentiary hearing, relying on *Krieger* for standing as a *de facto* custodian. He argued that him living with Denise did not stop him from becoming child's *de facto* custodian and it was a unique situation.

Later that day, an order making findings was entered. In relevant part the family court found: (1) Lemaster was Denise's former paramour, was not married to Denise, had no biological relationship with child, and Denise had custody of child; (2) Kendra was child's natural mother and has unsupervised visitation; (3) Lemaster's motion to intervene was untimely (this was the first time this ruling was made); (4) Lemaster was never granted custody in the DNA case; and (5) Lemaster could not qualify as a *de facto* custodian because he could not gain *de facto* status while Denise had custody pursuant to *Burgess*.

The family court also memorialized its previous oral ruling that awarded Kendra sole custody of child. On June 22, 2022, the family court denied Lemaster's motion to alter, amend, or vacate.

Lemaster timely appealed from all the family court's orders. Christopher did not participate in the appeal.

The Court of Appeals affirmed in *Lemaster v. Stiltner*, 2022-CA-0799-MR, 2023 WL 4535581, at *2-4 (Ky. App. July 14, 2023) (unpublished), ruling that the family court did not abuse its discretion in determining that Lemaster's motion to intervene was untimely under CR 24.01. Although the Court of Appeals concluded that its ruling regarding intervention being untimely was dispositive of the case, it proceeded to consider whether Lemaster qualified as a *de facto* custodian.

The Court of Appeals ruled that Denise would have qualified as a *de facto* custodian between the entry of the award of permanent custody on April 28, 2014, and when Kendra filed the custody case in December 2015. *Lemaster*, 2023 WL 4535581 at *5.

The Court of Appeals rejected Lemaster's argument that *Krieger* permitted him to acquire the status of a *de facto* custodian alongside Denise as her long-term partner. The Court of Appeals distinguished *Krieger*, 584 S.W.3d at 728, on the basis that "the appellants in *Krieger* pursued a custody action *together* after *both* were given temporary custody of the child in a DNA proceeding" and "both moved the circuit court to find them the child's *de facto* custodians." *Lemaster*, 2023 WL 4535581, at *5. The Court of Appeals also

indicated that because Lemaster could not establish *de facto* custodian status, it was also appropriate for the family court to deny his motion to intervene as futile. *Id.* at *6.

Lemaster filed a motion for discretionary review, which we granted. We also heard oral argument in this case. Lemaster argued that the only reason he was not granted custody of child along with Denise in the DNA case was because they were not married.

II. ANALYSIS

Lemaster argues that he has standing to intervene in this custody case either based on being "a person acting as a parent" pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[9] or because he was child's *de facto* custodian. We first consider whether Lemaster had standing to intervene and a valid basis for seeking custody, as resolving whether he adequately alleged that he was child's *de facto* custodian through a joint interest with Denise is key to resolving whether his motion to intervene after Denise died was timely.

A. Lemaster had Standing to Intervene.

Whether someone has standing is a pure question of law which we review *de novo*. *Link v. Link*, 704 S.W.3d 698, 703 (Ky. App. 2024).

Lemaster argues he had standing by being child's *de facto* custodian along with Denise, by having child placed in his custody by the Cabinet (with

[9] Kentucky adopted the UCCJEA through its enactment of KRS 403.800 to 403.880.

Denise), and by having child in his physical custody. He explains that along with Denise he was child's primary caregiver and primary financial supporter. Lemaster noted during oral argument that Kendra never paid child support.

While Lemaster did not cite to KRS 403.800 or use the phrase that he was a "person acting as a parent" in his motions below, he did state in the emergency hearing that he had standing as a "person acting as a parent." We are satisfied that the factual basis of his arguments was sufficient to encompass a legal basis for standing pursuant to the UCCJEA.

The UCCJEA provides the following definition:

> "Person acting as a parent" means a person, other than a parent, who:
>
> (a) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months, including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding; and
>
> (b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state[.]

KRS 403.800(13).

Lemaster had standing to intervene pursuant to being a "person acting as a parent" as defined in KRS 403.800(13). Lemaster qualified under KRS 403.800(13)(a) because along with Denise he had physical custody of child for a period of six consecutive months within one year of Kendra bringing her custody action. *Chadwick v. Flora*, 488 S.W.3d 640, 644 (Ky. App. 2016); *Lambert v. Lambert*, 475 S.W.3d 646, 650-51 (Ky. App. 2015). KRS 403.800(14) defines "physical custody" as meaning "physical care and supervision of a child." As explained in *Mullins v. Picklesimer*, 317 S.W.3d 569, 575 (Ky. 2010),

physical custody under this statute "does not require exclusive care and exclusive supervision" and can include performing traditional parenting responsibilities alongside another person (here Denise).

Lemaster argues he qualifies under KRS 403.800(13)(b) as having been "awarded legal custody by a court" because he was named as child's custodian in the DNA case. Having reviewed the record in the DNA case, we disagree that occurred. All formal orders exclusively stated that Denise was given custody. The two docket orders Lemaster referenced are written in a cursive hand where it is impossible to determine whether a claimed "s" was written at the end of "grandparent" or whether this was simply a flourish of such writing. Even if "grandparents" was written, we do not believe this would be sufficient to change the contrary formal orders. We uphold the family court's factual finding on this issue.

However, the fact that Lemaster was never awarded custody in the DNA case is not significant, and does not disqualify him from having standing because he qualifies under the second alternative basis provided in KRS 403.800(13)(b). He qualifies as having claimed "a right to legal custody under the law of this state" as a *de facto custodian*.

Lemaster also has standing more directly outside of the auspices of the UCCJEA if he qualifies as a *de facto* custodian of child. *Williams v. Bittel*, 299 S.W.3d 284, 289 (Ky. App. 2009). "[A] person claiming to be a de facto custodian, as defined in KRS 403.270, may petition a court for legal custody of child." KRS 405.020(3). We discuss whether Lemaster sufficiently alleged that

he qualified as a *de facto* custodian (and could qualify for that status under Kentucky law) *infra*.

B. Lemaster Established a Valid Basis for being Designated as Child's *De Facto* Custodian, thus Entitling him to an Evidentiary Hearing.

Lemaster argues he had a valid basis for asserting he was child's *de facto* custodian and could properly gain and maintain this status alongside Denise pursuant to *Krieger* as they were cohabitating members of an unmarried couple who were jointly raising child. Kendra focuses her argument on her assertion that Lemaster did not have the status of being child's *de facto* custodian and could not gain this status when Denise had custody pursuant to *Burgess*.

We disagree with the Court of Appeals' and the family court's interpretation of *Krieger* and *Burgess* as foreclosing Lemaster from qualifying as child's *de facto* custodian.

KRS 403.270(1)(a) provides as follows:

> 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 within the last two (2) years has resided with the person for an aggregate period of six (6) months or more if the child is under three (3) years of age and for an aggregate 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.

On April 28, 2014, parents consented to Denise's custody, resolving the DNA case. More than a year elapsed before Kendra filed the custody case on

December 18, 2015, and requested legal custody. Kendra never paid any child support for child.[10] Accordingly, there appears to be no real dispute that in addition to being child's legal custodian, Denise also qualified as child's *de facto* custodian pursuant to KRS 403.270(1)(a).

It is also undisputed, as stated at the oral argument by Lemaster's counsel and confirmed by Denise's counsel, that Lemaster and Denise had a long-term committed relationship of at least three decades.[11] It is further undisputed that Lemaster and Denise jointly cared for and financially supported child since child was placed in their home, with Lemaster being the primary source of the household income. The only question, then, is whether Lemaster also became child's *de facto* custodian alongside Denise.

This is not a case of Lemaster seeking to "tack on" the time child spent in Denise's legal or *de facto* custody to be credited to him. In *Cherry v. Carroll*, 507 S.W.3d 23, 27-28 (Ky. App. 2016), the Court of Appeals properly rejected that the seven months the children lived with the brother of a parent could be tacked on to the nearly five years the children lived in a separate residence with the sister of a parent to allow the brother to achieve *de facto* custodian status. Lemaster is instead seeking to establish his own status as child's *de*

[10] Kendra's counsel never challenged pleadings and testimony regarding this fact and did not contest argument to this effect by Lemaster's counsel at oral argument. In seeking custody, Kendra argued she could support child financially, not that she was or had supported child.

[11] At oral argument, Lemaster's counsel stated Lemaster was Denise's "partner of three decades." Denise's counsel's words on the matter were less clear but seemed to indicate that Lemaster and Denise spent thirty to forty years together. Whatever the exact length of their relationship, the time they spent as partners was substantial.

facto custodian based solely on the time in which he jointly parented child with Denise.

It is well established that a married couple can function as one unit for purposes of both being jointly a child's *de facto* custodian if they otherwise qualify for such status. *Id.* at 28; *S.S. v. Commonwealth*, 372 S.W.3d 445, 448 (Ky. App. 2012).

During oral argument, Lemaster's counsel stated that the only reason Lemaster was not granted custody in the DNA case along with Denise was that they were not a married couple. We observe the Cabinet must have concluded that Lemaster was an appropriate person to live in the same home with child and approved both Lemaster and Denise serving as child's temporary custodians under its prevention plan. Parents' counsel requested this status continue in his letter to the family court prior to the temporary removal hearing. It was also apparently well-known and pled by Kendra that Lemaster was taking care of child alongside Denise.

In *Krieger*, we expanded the concept that a married couple can jointly gain the status of *de facto* custodians by holding that an unmarried but cohabitating couple who were jointly caring for a child could also qualify as the child's *de facto* custodians. 584 S.W.3d at 729. This was based on the interpretation that a *de facto* custodian need not be a single person "if the context requires otherwise." KRS 403.270. Such a conclusion is also warranted by KRS 446.020(1), which states that "[a] word importing the singular number

only may extend and be applied to several persons or things, as well as to one (1) person or thing[.]"

However, as explained in *Diaz v. Moralez*, 51 S.W.3d 451, 455 (Ky. App. 2001), if two non-parents are caring for a child *and* living separately, they cannot both be the *de facto* custodian as one of them must be the primary caregiver over the other one. We also recognize that in a situation where two parties' positions are adverse to one another, only one of them could be *the de facto* custodian. Thus, the "*the*" in "the primary caregiver" cannot encompass people living separately.

Kendra fails to identify any facts which would make Lemaster's interests adverse to Denise's where they were cohabitating and jointly raising child. Kendra previously acknowledged in a pleading that Lemaster was the person actually raising child. Lemaster was never compelled to pursue any custody of child while Denise was living. Every indication is that he was co-parenting child alongside Denise.

It is a far different situation when a *natural parent* is living with another person and receiving help in raising a child. As explained in *Mullins*, 317 S.W.3d at 574 (citing *Chadwick*, 488 S.W.3d at 644), "parenting the child alongside the natural parent does not meet the de facto custodian standard." *Burgess* simply follows *Mullins* and *Chadwick* to conclude that a grandmother, who essentially took on father's primary residential custodian role but was jointly parenting a child alongside a mother who was exercising joint custody

and timesharing, could not become a *de facto* custodian.[12] *Burgess* does not apply at all to determining the status of someone jointly parenting a child alongside that child's legal custodian who is not the child's parent.

"Parents of a child have a fundamental, basic, and constitutional right to raise, care for, and control their own children." *Mullins*, 317 S.W.3d at 578. It should be obvious that a *de facto* custodian is never a natural parent, and instead is someone who has limited rights based on parents' failure to parent their child. In providing *de facto* custodians with legal status vis-à-vis parents, KRS 403.270 "is intended to protect someone who is the primary provider in the stead of a natural parent; if the parent is not the primary caregiver, then someone else must be." *Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky. App. 2001) (overruled on other grounds by *Boone v. Ballinger*, 228 S.W.3d 1 (Ky. App. 2007)). The status of *de facto* custodian is intended for one who "literally stand[s] in the place of the natural parent" and takes "care of a child in the absence of a parent[.]" *Id.* Similarly, as explained in *Williams*, 299 S.W.3d at 289, "the purpose of de facto custodianship is to provide standing in custody matters to non-parents who have taken on a parental role in the life of a child whose custody is in dispute."

A legal custodian is not necessarily also a *de facto* custodian. *See Diaz*, 51 S.W.3d at 453, 455. A person can acquire the status of a *de facto* custodian

[12] *Compare with Ball v. Tatum*, 373 S.W.3d 458, 464 (Ky. App. 2012) (a parent may physically be present but may fully give over financial and parenting duties to other people and in such a situation with a parent's minimal involvement, the third parties can become a child's *de facto* custodians).

without having any legal right to custody and someone who is awarded legal custody may have previously been a *de facto* custodian or may become a *de facto* custodian. These two statuses are not mutually exclusive. In contrast, while a natural parent may or may not have custody, natural parents do not cease to be natural parents unless their parental rights are terminated either with or without their consent (via a termination of parental rights, or voluntary or involuntary adoption).

We have never held that someone parenting a child alongside the *legal custodian* is prevented from becoming a *de facto* custodian or thereby loses a prior status as a *de facto* custodian. Therefore, cases stating that someone cannot become a *de facto* custodian while parenting a child alongside a parent simply do not apply in a situation involving a legal custodian who is not a parent.

We also reject the portion of the Court of Appeals' ruling below, which seems to conclude that *de facto* status can be lost through the passage of time alone.[13] While a third-party seeking custody may possibly waive any *de facto* custodian rights by failing to take any action during a prolonged period while parents raise child, *see, e.g., Turner*, 590 S.W.3d at 298-99, that is clearly

[13] *Lemaster*, 2023 WL 4535581, at *5:

> Ultimately, a determination of whether David qualified as a *de facto* custodian of M.S. in December 2015 is not required. This Court has determined that *de facto* custodian status is not necessarily a permanent status. It must be addressed each time the status is asserted. *See Sullivan v. Tucker*, 29 S.W.3d 805 (Ky. App. 2000); *Turner v. Hodge*, 590 S.W.3d 294 (Ky. App. 2019).

distinguishable from the situation involving Kendra, Denise, and Lemaster, where custody continued in Denise who was parenting child alongside Lemaster.

We cannot rule as a matter of law, of course, that Lemaster is child's *de facto* custodian. That would be a matter for the family court to determine, pursuant to KRS 403.270(1)(b) after holding an evidentiary hearing.[14]

We recognize that a person's status as a *de facto* custodian is not the only possible basis for a non-parent to gain custody; unfitness and waiver are other possible grounds. *See J.S.B. v. S.R.V.*, 630 S.W.3d 693, 701 (Ky. 2021); *Mullins*, 317 S.W.3d at 578. However, Lemaster has waived the other possible grounds for custody he raised below by failing to argue them before the Court of Appeals and our Court.

C. The Family Court Abused its Discretion in Denying Lemaster's Motion to Intervene.

Kendra argues that Lemaster's motion to intervene was not timely and instead should have been made when Kendra first filed her complaint seeking custody in 2015. Lemaster countered in his oral argument that his motion to

[14] KRS 403.270(1)(b) provides:

> 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.

intervene was timely where he filed it two days after Denise died. The parties do not argue regarding the other factors required to intervene as a matter of right.

We first consider whether Lemaster had a proper opportunity to challenge the family court's ruling that his motion to intervene was untimely while the matter was still pending before the family court. On June 6, 2022, Kendra filed her response objecting to Lemaster's motion to intervene on a variety of grounds, including that it was untimely. Lemaster did not have an opportunity to dispute her argument about untimeliness because his motions were summarily denied the next day.

The June 7, 2022, hearing was scheduled to address Lemaster's motion to require Kendra to return child to Kentucky so that child could be interviewed *in camera* for the June 23, 2022, hearing. Instead, the family court used that hearing to orally deny all of Lemaster's motions based on lack of standing. The family court's summary oral ruling did not state that the court was denying his motion to intervene as untimely.

On June 13, 2022, Lemaster properly filed a motion to alter, amend, or vacate, and a hearing was held on such a motion. It was only when the family court provided factual findings through a June 21, 2022, order that the family court first stated that one of its grounds for denying Lemaster's motions was that his motion to intervene was untimely.

At that juncture, Lemaster's only recourse was to appeal. We therefore conclude that Lemaster never had an opportunity to challenge the family

court's ruling that his motion to intervene was untimely before he had to file his notice of appeal.

Lemaster's appellant brief to the Court of Appeals focused on establishing that he had a right to an evidentiary hearing because he was child's *de facto* custodian. Kendra's appellee brief responded to that argument and did not argue for affirmance on the basis that his motion to intervene was untimely. It must have come as a surprise to both parties when the appeal was resolved not based on the "heart" of the dispute, whether Lemaster could become child's *de facto* custodian alongside Denise, but instead on a ground initially not even mentioned in the family court's oral resolution of the case, based on one paragraph of the family court's order providing factual findings which stated that Lemaster's motion to intervene was untimely.

In Lemaster's motion for discretionary review, he explained that *Krieger* permitted unmarried couples to jointly become *de facto* custodians and asked the Court to accept review to clarify whether *Krieger* "requires a court to have an evidentiary hearing before denying a request for custody intervention and determination of de facto custodian rights." During oral argument, Lemaster's counsel stated his motion to intervene was timely where he filed it two days after Denise died because there was no need to intervene until his interest was at risk. While Lemaster could have provided more analysis of why the Court of Appeals' opinion was incorrect, it is appropriate to review whether his motion to intervene was timely filed as resolution of this issue was key to resolving the

more substantive issues. *See Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011).

"We review the denial of a motion to intervene as a matter of right for clear error. However, a court's evaluation of the timeliness of a motion to intervene is reviewed under an abuse of discretion standard." *Hazel Enter. v. Cmty. Fin. Serv. Bank*, 382 S.W.3d 65, 67 (Ky. App. 2012) (internal citation omitted).

CR 24.01(1) provides:

> Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, *unless that interest is adequately represented by existing parties*.

(Emphasis added). Lemaster's request to intervene is pursuant to subsection (b).

Denise was adequately representing Lemaster's interest in custody of child until her death. Lemaster filed a motion to intervene two days after she died.

To determine whether a motion to intervene was timely filed, we consider the following factors:

> (1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of

> his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Carter v. Smith, 170 S.W.3d 402, 408 (Ky. App. 2004) (quoting *Grubbs v. Norris,* 870 F.2d 343, 345 (6th Cir.1989)).

In denying Lemaster's motion to alter, amend, or vacate, the family court entirely focused its analysis on the fact that the motion was untimely based on factor three. The court noted that the custody case began in 2015 and Lemaster did not seek to intervene until 2022, which was a substantive delay. The Court of Appeals similarly focused entirely on factor three. The other factors regarding timeliness, and the other considerations regarding intervention were ignored.

The relevant period of time, which should have been considered, hinged upon whether Lemaster could be considered to be a joint *de facto* custodian with Denise. While such a status could not be determined at the time intervention was sought, we conclude that where a perspective intervenor has sufficiently pled grounds for being a *de facto* custodian, and if such status were established it would make intervention timely, intervention must be granted.

As we discussed *supra*, there was no legal impediment to Lemaster becoming a *de facto* custodian along with Denise, and he had no reason to intervene in the litigation while Denise was alive, and they were continuing to co-parent child while living together. Every indication is that Lemaster, although not a party to either the DNA case or the custody case, was very involved in such litigation in aid of Denise maintaining her status as child's

legal custodian. He was repeatedly listed as being present for hearings in the DNA case and testified as a witness during the custody case. There is every indication that they shared the same interest the entire time that child was in their physical custody, that child would remain in their physical custody.

CR 24.01(1)(b) provides that upon "timely application" an applicant who "claims an interest shall be permitted to intervene . . . *unless that interest is adequately represented by existing parties*." (Emphasis added). While Denise was alive, she was representing their joint interest and the absence of any indication they had opposing interests, the relevant time period to consider for "(3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case" was whether Lemaster's motion to intervene was filed soon enough after Denise passed away when his interest was no longer being represented. There can be no doubt that moving to intervene two days after Denise passed away was sufficiently prompt to request that the family court consider his request for the protection of child.

The other factors for timeliness also support Lemaster's motion to intervene being timely. The suit for custody had not reached the point of a final evidentiary hearing. Instead, Kendra was exercising visitation pursuant to an agreed order, her request for custody had not yet been considered, and there were competing pending motions regarding visitation. Therefore, although the litigation had been in process for a long time, it was nowhere near being concluded.

The purpose of Lemaster intervening in the litigation was for Lemaster to assert his competing right to custody of child. This was an appropriate purpose as child who was in his physical (if not legal) custody since her birth was now subject to being removed from the only home she had ever known following the death of her legal custodian and grandmother. In *A.H. v. W.R.L.*, 482 S.W.3d 372, 374 (Ky. 2016), we allowed a woman to intervene in an adoption proceeding as a decision in that case would impair the custody rights she was pursuing in a separate action. In making such a ruling, we explained that the intervention did not depend upon whether the woman would ultimately succeed in her custody petition. Similarly, Lemaster was seeking to maintain a relational connection with the child, which could be terminated should he not be granted intervention.

Lemaster pled he and Denise were jointly child's *de facto* custodians based on them functioning as a unit. For all practical purposes Denise functioned as child's mother and it appears Lemaster took on the role of child's father. Granting Lemaster's motion to intervene under these circumstances so he could receive an evidentiary hearing is minimally prejudicial to Kendra.

Finally, there are unusual circumstances favoring allowing intervention to protect the interests of a minor child who lost her custodian and who had no one besides Lemaster to represent her interests. This special judge was not familiar with the parties or their situation, the family court had not received any reports from the friend of the court, there was not an ongoing DNA case, and the family court had not appointed a guardian *ad litem* to represent child's

interests.[15] Having Lemaster intervene and participate in this process would allow the family court to learn more about the ongoing family dynamics (whether or not he was ultimately determined to be eligible to have custody of child) and would help to shed light on whether it was safe and appropriate for child to be in Kendra's custody. The family court transferred child's custody to Kendra without further consideration, despite the troubling DNA history.

Having resolved that all factors favored Lemaster's motion to intervene being timely, we proceed to consider the remaining factors which are required to be satisfied before Lemaster could properly be granted the right to intervene: "that he has an interest relating to the subject of the action, that his ability to protect his interest may be impaired or impeded, and that none of the existing parties could adequately represent his interests." *Carter*, 170 S.W.3d at 409–10. Lemaster clearly had an interest of maintaining physical custody of child, maintaining a role in child's life, and establishing the best interests of child as her *de facto* custodian. *A.H.*, 482 S.W.3d at 374. Lemaster could not protect these interests without participating in the custody case and there was no longer anyone else that was a party to the litigation who could protect his interests.

Therefore, we hold that the factors for timeliness all favor intervention, and the situation satisfied each of the remaining requirements necessary for

[15] Prior to the special judge being appointed, a guardian *ad litem* was appointed but was permitted to immediately withdraw based on having a conflict. *See generally Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (addressing the differences between a guardian *ad litem* and a friend of the court).

intervention. Accordingly, the family court abused its discretion in summarily resolving that Lemaster's motion to intervene was untimely and denying his motion to intervene.

III. CONCLUSION

Lemaster has sufficiently established he has standing to pursue custody of child and has pled a sufficient basis for custody or visitation based on being child's *de facto* custodian. Lemaster has also established that he should have been permitted to intervene in the ongoing custody case. We reverse and remand for the Greenup Family Court to grant Lemaster's motion to intervene and hold an evidentiary hearing to determine whether Lemaster can establish his status as child's *de facto* custodian. A guardian *ad litem* should be appointed to represent child and her interests. If Lemaster establishes that he qualifies as child's *de facto* custodian, the family court should then proceed to consider the type of custody, timesharing, or visitation arrangements are in the best interest of child. Child is old enough that her wishes should be considered.

We emphasize it is the family court's paramount duty to protect children. These short, summary hearings not only hurt Lemaster's ability to establish his rights to a continued relationship with child, they also permanently pulled child out of the only home she had ever known and removed her from contact with her father/grandfather figure, while she was grieving the death of her grandmother and custodian, and placed child in the hands of her biological mother who pled guilty to harming her brother. While parents normally have a

right to raise their own children, this right can be lost if they are unfit to parent. When children have been permanently removed from their parents, they should not summarily be returned into their custody because their legal guardian has died. This conclusion does not hinge on whether there is anyone else who may qualify as a *de facto* custodian. The family court needed to utilize all resources available to it to determine whether it was safe for child to be placed back with Kendra. These included seeking input from the Cabinet, a guardian *ad litem*, and the previously appointed friend of the court. The family court needed to hear from third parties who would consider child's welfare objectively. Even if placement with Kendra was appropriate, consideration should have been given as to how to make such a transition with as little emotional pain to a child who had endured the recent trauma of losing her grandmother and custodian. This is regardless of whether the family court thought Lemaster had standing or not.

We regret that three long years have elapsed in this appellate process and child is now almost thirteen years old. That is a substantial period of time in the life of a child, in which child has likely experienced substantial emotional turmoil that could have been avoided had more care been exercised in resolving matters below in a less summary fashion.

While we respect parents' fundamental right to raise their own children, our *de facto* custodian statutes recognize that sometimes the most important "family" for children are the people who stand in place of parents who have abdicated their role. Lemaster must be given the opportunity to establish his

status as child's *de facto* custodian. We reverse and remand for further proceedings consistent with this opinion.

Lambert, C.J.; Bisig, Goodwine, Keller, Nickell, and Thompson, JJ., sitting. Lambert, C.J.; Bisig and Goodwine, JJ., concur. Nickell, J., dissents with separate opinion in which Keller, J., joins. Conley, J., not sitting.

NICKELL, J., DISSENTING: Respectfully, I dissent. In my view, the lower courts properly determined LeMaster's motion to intervene was untimely and I would affirm the Court of Appeals on this basis as a threshold matter. Additionally, I am convinced the lower courts correctly rejected LeMaster's claim for standing as a de facto custodian, albeit for different reasons. Therefore, I dissent and would affirm the decision of the Court of Appeals in its entirety.

At the outset, I note LeMaster neglected to cite CR[16] 24 and the controlling Kentucky precedents governing the denial of intervention in his brief to this Court. Additionally, he did not address the Court of Appeals' analysis of this issue in his written argument. In effect, LeMaster merely contends the lower courts erred in denying intervention because he claims to have satisfied the statutory requirements for de facto custodian status.

We have previously refused to address such an undeveloped argument. *Harris v. Commonwealth*, 384 S.W.3d 117, 131 (Ky. 2012). Simply put, it "is not the function or responsibility of this Court" to pursue claims of error on

[16] Kentucky Rules of Civil Procedure.

behalf of a litigant. *Id.* Moreover, the majority has disregarded a fundamental tenet of appellate procedure by reversing upon an issue that was not adequately briefed. *Id.*; *Koester v. Koester*, 569 S.W.3d 412, 414 (Ky. App. 2019) ("Assertions of error devoid of any controlling authority do not merit relief."); RAP[17] 32(A)(4) (requiring argument section of briefs to contain "citations of authority pertinent to each issue of law."); *see also McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986) ("This court ordinarily will refuse to disturb judgments on the basis of claims not adequately briefed on appeal.").

Moreover, contrary to the majority, I would hold the relative merits of LeMaster's purported standing as a de facto custodian are simply not germane to this appeal from the denial of a motion to intervene. *A.H. v. W.R.L.*, 482 S.W.3d 372, 375 (Ky. 2016).[18] When a nonparty seeks to intervene in a pending lawsuit, the threshold question[19] is the right of intervention, and not

---

[17] Kentucky Rules of Appellate Procedure.

[18] Subsequent to our decision in *A.H.*, the Supreme Court of the United States held, "[f]or all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017). However, this rule only applies where "an intervenor of right . . . pursue[s] relief that is different from that which is sought by a party with standing." *Id.* at 440. Moreover, *Laroe Estates* deals strictly with constitutional standing as opposed to statutory standing. *Id.* Because the present de facto custodian issue implicates statutory standing and LeMaster's demand for relief merely amounts to a competing claim for custody of the same child, I would determine our holding in *A.H.* properly applies here.

[19] The timeliness rule presumes the trial court otherwise possesses subject-matter jurisdiction of the underlying suit. Generally, dissolution of marriage and other ancillary proceedings involving child custody terminate upon the death of either party as the rights involved are deemed to be "strictly personal." *Rhodes v. Pederson*, 229 S.W.3d 62, 65 (Ky. App. 2007) (collecting cases). However, in the present appeal, the modification proceedings did not abate upon Denise's death pursuant to CR

the issue of standing. *A.H.*, 482 S.W.3d at 374; *see also Arnold v. Commonwealth ex rel. Chandler*, 62 S.W.3d 366, 368 (Ky. 2001) ("Pursuant to both provisions of CR 24, a threshold requirement for intervention is that the motion be timely.").

In *A.H.*, we explained "that standing and intervention are two distinct concepts, and that standing to seek adoption **is *not* a condition** for intervening in an adoption proceeding." 482 S.W.3d 372, 374 (Ky. 2016) (emphasis added). When a nonparty seeks to intervene in pending litigation, "we need look no further than CR 24.01" to resolve the question. *Id.* While *A.H.* involved the right to intervene in an adoption proceeding, I would apply the same reasoning to the present custody matter.

Moreover, the law of standing generally refers to the ability of parties in a lawsuit to make specific claims while the rules of intervention govern the procedure by which a nonparty may become a party to pending litigation. *Compare City of Pikeville v. Kentucky Concealed Carry Coaltion, Inc.*, 671 S.W.3d 258, 267 (Ky. 2023) ("A party demonstrates statutory standing by satisfying the requirements of the statute[.]") *with A.H.*, 482 S.W.3d at 374 ("In resolving this question, we need look no further than CR 24.01."). Additionally, our predecessor Court has refused to allow a nonparty to rely upon the

25.01(2) because multiple parties remained in the case with competing claims to similar relief. *See* David V. Kramer, 6 *Ky. Prac. R. Civ. Proc. Ann.* Rule 25.01 cmt.4 (2024) (observing provisions of CR 25.01(2) "relate[] to causes that survive to or against the remaining parties, rather than to or against the representative of the deceased.").

provisions of the Declaratory Judgment Act and the Civil Rules on joinder in support of a motion to intervene because such statutes and rules "can be invoked only by parties, not by a person who seeks to become a party."[20] *Murphy v. Lexington-Fayette County Airport Board*, 472 S.W.2d 688, 690 (Ky. 1971).

In other words, disputes over statutory standing and the merits of any potential claims are secondary to the resolution of the primary inquiry into the right of intervention. *A.H.*, 482 S.W.3d at 374; *Murphy*, 472 S.W.2d at 690. It is further well-established "that, until a movant for intervention is made a party to an action, it cannot appeal any orders entered in the case other than an order denying intervention." *United States v. City of Milwaukee*, 144 F.3d 524, 531 (7th Cir. 1998). Thus, I perceive the majority's preliminary focus on LeMaster's alleged de facto custodian status to be inconsistent with longstanding precedent and, instead, would treat the timeliness issue as the dispositive threshold question.

"Irrespective of whether intervention is claimed as a matter of right or as a matter of permission, the thread of life in either event is timeliness of the application to intervene." *Ambassador College v. Combs*, 636 S.W.2d 305, 307 (Ky. 1982). Indeed, "[i]t is clearly shown, both under CR 24.01 and 24.02, that timeliness in attempting to intervene is required." *Id.* at 306. To determine

[20] This rule presumes the statute or rule in question does not provide an explicit right to intervene.

whether a motion to intervene was timely filed, Kentucky courts apply the following five-factor test:

> (1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Carter v. Smith, 170 S.W.3d 402, 408 (Ky. App. 2004) (quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)). "The propriety of intervention in any given case, however, must be measured under 'all the circumstances' of that *particular* case." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000) (citing *NAACP v. New York*, 413 U.S. 345, 366 (1973)).

"Timeliness is a question of fact, the determination of which should usually be left" to the trial court. *Ambassador*, 636 S.W.2d at 307. We review such a finding for abuse of discretion. *Arnold*, 62 S.W.3d at 369. "Moreover, because the timely and efficient administration of justice is often impeded by considering arguments advanced by non-parties asserting an interest in a pending action, great deference must be afforded a trial court's decision to allow such parties and their claims to be heard." *A.H.*, 482 S.W.3d at 375.

In other words, relative to intervention, "[t]he proper application and utilization of the Civil Rules should be left largely to the supervision of the trial judge and we must respect his exercise of sound judicial discretion in their enforcement." *Dairyland Ins. Co. v. Clark*, 476 S.W.2d 202, 203 (Ky. 1972).

The "test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Further, the law is well-established that an untimely motion to intervene "must be denied." *NAACP*, 413 U.S. at 365. Assuming *arguendo*, that the timeliness issue has been adequately developed for review, I would conclude the application of the *Carter* factors to the present facts plainly demonstrates the propriety of the lower courts' rulings.

First, the present custody matter had progressed to an advanced stage, having remained ongoing for more than six years of litigation. The underlying dispute between Kendra and Denise commenced on December 18, 2015. On April 8, 2016, the family court entered a final order resolving the claims in Kendra's original petition. The Court of Appeals affirmed the final order in an unpublished decision. *Stiltner v. Stiltner*, 2016-CA-000679-ME, 2017 WL 1102978 (Ky. App. March 24, 2017). On October 5, 2018, Kendra filed a renewed motion for custody and increased timesharing or, alternatively, increased visitation. The parties settled Kendra's renewed claims through the entry of an agreed order on February 13, 2019. Thus, at the time of LeMaster's attempted intervention, the trial court was conducting post-judgment modification proceedings.[21]

[21] Moreover, the fact that the family court had yet to rule on Denise's pending motion for modification does not undermine the finality of the prior orders on custody and visitation or otherwise relieve LeMaster from the special burden of justifying post-judgment intervention. *See Wilcher v. Wilcher*, 566 S.W.2d 173, 175 (Ky. App. 1978) (observing the requirements of the custody modification statute "reflect[] a strong

Ordinarily, when intervention is sought post-judgment, our precedents impose "'a special burden' to justify the untimeliness." *Arnold*, 62 S.W.3d at 369 (quoting *Monticello Elec. Plant Bd. v. Board of Educ. of Wayne Cnty.*, 310 S.W.2d 272, 274 (Ky. 1958)). CR 24.01 was not intended to allow a nonparty to sit back under his or her own "vine" and shift the burdens of litigation to others. *Pearman v. Schlak*, 575 S.W.2d 462, 463 (Ky. 1978). If the law were otherwise, "a nonparty could simply lie back and await the result of the action in circuit court and then, if not satisfied with the judgment, compel a retrial by the device of intervening after judgment." *Id.* (quoting *Murphy*, 472 S.W.2d at 690). The logic of *Pearman* applies equally to the present appeal and supports the lower courts' rulings on untimeliness under the first factor.

Second, I agree with the Court of Appeals that LeMaster's purpose in seeking intervention was appropriate. His competing claim to custody was related to the subject-matter of the dispute and would not otherwise interject ancillary or collateral issues into the proceedings. Thus, this factor does not weigh against intervention.

Third, LeMaster knew or reasonably should have known his purported interest in the custody of the child could be adversely affected by this litigation from the outset of proceedings in 2015. "A critical issue in allowing intervention after judgment is whether the intervenor had notice of the litigation before the judgment." Kramer, 6 *Ky. Prac. R. Civ. Proc. Ann.* Rule

---

legislative policy to maximize the finality of custody decrees without jeopardizing the health and welfare of the child.").

24.01, at cmt.4. Here, LeMaster has failed to allege, much less demonstrate, that he lacked the requisite notice and opportunity to pursue invention at an earlier phase of this litigation. If the fact that LeMaster resided with Denise and the child could arguably be deemed insufficient to impute actual notice of the custody dispute, then certainly the fact that LeMaster appeared as a witness should suffice in this regard. *See Murphy*, 472 S.W.2d at 690 ("Avis was fully aware of the lawsuit from its inception. . . [because its] proprietor . . . was a witness in the lawsuit.").

Undoubtedly, LeMaster possessed sufficient knowledge and ability to intervene and seek custody at a much earlier time. These undisputed facts, coupled with the lack of any cogent explanation for such an extended delay, amply supports the decision of the family court. *Id.* Thus, I perceive this third factor to weigh heavily against intervention.

Although LeMaster has failed to articulate any explanation for waiting until 2022 to intervene, the majority excuses LeMaster's blatant untimeliness on the dubious and unsupported premise that he had no reason to intervene at an earlier time because Denise was adequately representing his interests in the custody dispute until her death. Notably, however, our predecessor Court rejected a similar argument where a nonparty sought to rely on adequate representation to excuse an untimely intervention. *Murphy*, 472 S.W.2d at 690.

In the intervention context, adequate representation pertains to a legal relationship in which the judgment upon a party would be binding on the

nonparty "in the sense employed in the doctrine of res judicata." *Id.* For example, the Supreme Court has explained:

> "[I]n certain limited circumstances," a nonparty may be bound by a judgment because she was "adequately represented by someone with the same interests who [wa]s a party" to the suit. [*Richards v. Jefferson Cnty.*, 517 U.S. 793, 797, (1996)] (internal quotation marks omitted). **Representative suits** with preclusive effect on nonparties include properly conducted **class actions**, see [*Martin* v. *Wilks*, 490 U.S. 755, 762, n. 2 (1989)] (citing Fed. Rule Civ. Proc. 23), and **suits brought by trustees, guardians, and other fiduciaries**, see *Sea–Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 . . . (1974). See also 1 Restatement § 41.

Taylor v. Sturgell, 553 U.S. 880, 894-95 (2008) (emphasis added). By contrast, mere "gratuitous" arrangements "arising out of mutual desires as to the outcome of the suit" do not constitute representation for the purpose of intervention under CR 24. *Murphy*, 472 S.W.2d at 690.

As a nonparty and legal stranger to these proceedings, there is no indication that LeMaster would have been personally bound, in the sense of res judicata, by any orders of the family court in the dispute between Kendra and Denise. Simply put, Denise did not pursue LeMaster's interests in a representative capacity similar to that of a class action, trustee, guardian, or fiduciary. *Taylor*, 553 U.S. at 894-95.

Thus, at most, LeMaster and Denise shared "mutual desires as to the outcome of the suit" and did not pursue any formal legal claims relative to custody under a purported joint or identical interest while Denise was alive.[22]

[22] Moreover, I am deeply troubled by LeMaster's casual assertion of patent factual inaccuracies throughout these proceedings relative to the nature of his relationship with Denise and the child. For example, in his motion to intervene, LeMaster misleadingly referred to "the tragic passing of his wife . . . Denise Stiltner."

Murphy, 472 S.W.2d at 690. In *Murphy*, our predecessor Court deemed a similar argument based on such "mutual desires" to be invalid, and I would hold the same reasoning should prevail here. *Id.*

Fourth, I cannot accept the majority's conclusory assertion that Kendra would be "minimally prejudiced" by intervention at this late stage of the proceedings. "[I]ntervention attempts after final judgments are 'ordinarily looked upon with a jaundiced eye'" because of the "strong tendency to prejudice existing parties to the litigation or to interfere substantially with the orderly process of the court." *United States v. U.S. Steel Corp.*, 548 F.2d 1232, 1235 (5th Cir. 1977) (quoting *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1072 (5th Cir. 1970)). Where, as here, a nonparty "has offered no excuse for waiting until 30 days after judgment before moving to intervene[,]" our predecessor Court has refused to allow intervention. *Monticello Elec.*, 310 S.W.2d at 274. In my view, the dictates of logic and consistency compel the same result in the present appeal.

Under the fifth and final factor, I would conclude the present facts, while regrettable and unfortunate, are not unusual in the legal sense of mitigation in favor of intervention. When a nonparty relies on unusual circumstances to

---

Similarly, he incorrectly referred to himself, without qualification, as the child's "paternal grandfather" in his petition for custody. Additionally, LeMaster's repeated claims to have been granted custody in the prior DNA action are refuted by the record, as the majority appropriately recognized, *ante*, at *20. In pursuit of zealous representation on behalf of a client, counsel must not lose sight of the duty of candor to the courts.

excuse an untimely motion to intervene, he or she must typically "advance a convincing justification for . . . tardiness, such as that for reasons other than lack of knowledge [the nonparty] was unable to intervene sooner[.]" *Stallworth v. Monsanto Co.*, 558 F.2d 257, 266 (5th Cir. 1977).

Examples of unusual circumstances which have been held to justify a nonparty's delay in filing a motion to intervene include "the applicant's wrongful incarceration in a mental institution, the applicant's being prevented from acquiring information about the lawsuit, or his or her delaying intervention at the plaintiff's request." James Buchwalter, et al., 25 *Fed. Proc., L. Ed.* § 59:395 (footnotes omitted). By contrast, in the present appeal, the inescapable fact remains that Denise's untimely passing did not impede LeMaster's ability to seek intervention at an earlier time, and LeMaster has not argued otherwise. Thus, I would determine the absence of unusual circumstances weighs against intervention.

In conclusion, I detect "no hint of abuse of discretion" in the family court's denial of LeMaster's motion to intervene. *Arnold*, 62 S.W.3d at 369. Specifically, I would hold the application of the five *Carter* factors clearly supports the family court's determination that LeMaster's motion was untimely. Moreover, because the motion to intervene was untimely, I would affirm the lower courts on this basis and decline to address the de facto custodian issue as moot.

Although I am convinced our review should end at this point, I must further express my disagreement with the majority's analysis of the de facto

custodian statute. Contrary to the majority, I would conclude the lower courts properly rejected LeMaster's claim to de facto custodian status, albeit for different reasons.

KRE 403.270(1)(a) establishes the requirement for de facto custodian status and provides as follows:

> 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 **within the last two (2) years has resided** with the person for an aggregate period of six (6) months or more if the child is under three (3) years of age and for an aggregate 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.**

(Emphasis added). The time requirement under this provision must be satisfied before the filing of the de facto custodian petition. *Jones-Swan v. Luther*, 478 S.W.3d 392, 395 (Ky. App. 2015). In other words, "the determination of de facto custodianship is a matter that must be addressed anew *whenever the status is asserted*." *Sullivan v. Tucker*, 29 S.W.3d 805, 808 (Ky. App. 2000) (emphasis added).

In the present matter, Kendra instituted legal proceedings to regain custody of the child in 2015 which remained ongoing until 2022.[23] By the

[23] Specifically, Kendra filed a motion for increased "timesharing" on May 21, 2021, which remained pending at the time LeMaster filed his petition for custody as a de facto custodian on June 1, 2022. Further, the agreed order of February 13, 2019, directed the Kendra and Denise "to address additional timesharing" after July 31, 2019. Under the liberal standard established by *Meinders*, I am convinced Kendra

plain language of KRS 403.270(1)(a), this time period cannot be counted against the minimum residency requirement. *Meiners v. Middleton*, 572 S.W.3d 52, 59 (Ky. 2019) ("[T]he process by which a parent may toll the *de facto* time period should be simple and easy."). Thus, LeMaster could not obtain de facto custodian status because, *at the time he filed* in 2022, the child did not, within the meaning of the statute, reside with him for a minimum aggregate period of one year *within the last two years*.

In my estimation, the time requirement under KRS 403.270(1)(a) imposes a duty upon a nonparent claiming de facto custodian status to promptly assert his or his rights whenever a custody dispute with the natural parent arises. Inexplicably, LeMaster sat idle for years despite actual knowledge of the custody dispute and uncertain legal status of the child. Under the circumstances, I would deem LeMaster's inaction to be unreasonable, and do not believe the plain language of the de facto custodian statute may be contorted or ignored to accommodate the indolence of a litigant.

Based on the foregoing analysis, I am convinced the majority has misapplied the longstanding rules of intervention established by our precedents and compounded its error by ignoring the tolling provision and

---

was actively litigating the issue of custody for over two years prior to LeMaster's petition for custody as a de facto custodian. 572 S.W.3d at 59. ("[A]ny direct participation in a child custody proceeding that demonstrates a parent's desire to regain custody of their child is sufficient to toll the de facto time requirement under KRS 403.270.").

time-limitations set forth in KRS 403.270(1)(a). Therefore, I respectfully dissent and would affirm the decision of the Court of Appeals in its entirety.

Keller, J., joins.

COUNSEL FOR APPELLANT:

Brandon M. Music

COUNSEL FOR APPELLEE,
KENDRA STILTNER:

Robert T. Renfroe
McGinnis Leslie

APPELLEE, COMMONWEALTH OF
KENTUCKY, CABINET FOR HEALTH AND
FAMILY SERVICES:

Pro se

APPELLEE, CHRISTOPHER CLAY
STILTNER:

Pro se