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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001949-ME

J.B.
AND C.B.

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
CIVIL ACTION NO. 04-CI-02295

Z.S. AND
COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: In Swiss v. Cabinet for Families and Children,¹
we held that foster parents do not have standing to seek de
facto custodian status to challenge the Cabinet's custody of a
child whom the Cabinet placed and later removed from their home.

¹ 43 S.W.3d 796, 797 (Ky.App. 2001).

The Cabinet placed a child in foster care with J.B. and C.B., the Appellants. After the Cabinet removed the child from their home, the Appellants petitioned the family court for custody of this child and for de facto parent status. Relying upon the holding in Swiss, the family court dismissed the petition. On appeal, the Appellants argue that the rule in Swiss was misapplied to them because they contend that the Cabinet had something less than legal custody of this child since the parental rights of the biological mother had not been terminated. We do not agree that the application of Swiss should be so limited. So we affirm the family court's order dismissing the petition for lack of standing.

The facts of this case are not disputed. The Appellants were the adoptive parents of a daughter, T.B. Following T.B.'s adoption, the Appellants expressed to the Cabinet their desire to also adopt a male child. In February 2003, Z.S. gave birth to a male child, G.S. She contacted the Cabinet and informed them she wished to give the child up for adoption. So the Cabinet contacted the Appellants, who immediately agreed to adopt G.S. But within a few hours of the Appellants' acceptance, Z.S. decided she no longer wanted to give up the child for adoption. But she did agree to commit G.S. to the Cabinet on a temporary basis; and, on March 25, 2003, the district court ordered G.S. to be committed to the

custody of the Cabinet. The Cabinet asked the Appellants if they would serve as foster parents for G.S. The Appellants agreed and G.S. was placed in their home.

In December 2003, the Cabinet received a complaint that the Appellants had physically abused T.B. Allegedly, Appellant C.B. hit T.B. with a belt. Because the Appellants had signed a contract with the Cabinet promising that they would not use any form of corporal punishment, T.B. was removed from the Appellants' home. A week later, the Cabinet also removed G.S. Although T.B. was eventually returned to the Appellants, the Cabinet chose not to return G.S. Rather, the child was placed in a different foster home.

On June 4, 2004, the Appellants filed a Verified Petition for Custody and De Facto Custodian Status. In their petition, the Appellants claimed that they satisfied the definition of de facto custodians as defined by KRS² 403.270. They also argued that they met the necessary requirements to be deemed the legal custodians of G.S. Therefore, they argued that G.S. should be returned to them.

The Cabinet responded with a motion to dismiss, arguing that the Appellants had no standing to petition for custody of the child under this Court's mandate in Swiss. The Cabinet also pointed to the requirements of the foster home

² Kentucky Revised Statutes.

contract between it and the Appellants, which prohibited foster parents from seeking legal custody or de facto custodian status.

The family court agreed with the Cabinet and dismissed the Appellants' petition under the holding in Swiss. This appeal follows. The Appellants argue that the court erred by relying on Swiss; they also claim that the contract they signed with the Cabinet was null and void and, therefore, did not preclude them from seeking de facto custodian status.

The pertinent facts of Swiss are as follows: Fred and Doris Swiss were the foster parents of T.R.H, a child in the custody of the Cabinet who was placed with the Swisses in August 1997. In February 1998, the court terminated the parental rights of T.R.H.'s biological parents. The Swisses then filed an application to adopt T.R.H. But after T.R.H. made an allegation of sexual abuse, the Cabinet removed the child from the Swisses' home. One month later, the Swisses filed a petition for custody, claiming they were the de facto custodians of T.R.H. The family court dismissed their petition and the Swisses appealed.

This Court affirmed the family court's dismissal of the Swisses' petition. We stated that "foster parents such as the Swisses may not use the de facto custodian statutes to

challenge the cabinet's custody of the child where the child was placed with the foster parents by the cabinet."³

The Appellants argue that the family court misconstrued the holding in Swiss to preclude all foster parents from seeking de facto custodian status. They argue that Swiss is inapplicable to this case because the biological mother's parental rights had not been terminated. Therefore, the Appellants assert that the Cabinet did not have full, legal custody of the child; it merely had physical custody of the child. Consequently, the Cabinet could not prevent them from seeking de facto custodian status. We disagree.

The holding in Swiss is unequivocal: "foster parents . . . may not use the de facto custodian statutes to challenge the cabinet's custody of the child where the child was placed with the foster parents by the cabinet."⁴ The unmistakable facts of the present case are that the Cabinet had custody of G.S. The juvenile session of the district court entered an order on March 12, 2003, committing G.S. to the care of the Cabinet indefinitely because of parental neglect. This order conferred legal custody of G.S. upon the Cabinet, even though Z.S.'s parental rights had not been terminated.⁵

³ Swiss, *supra*, at 797.

⁴ *Id.*

⁵ KRS 620.140(1)(d) reads:

Therefore, under our holding in Swiss, the Appellants could not challenge the Cabinet's custody or petition for de facto custodian status.

Moreover, upon thorough review, we do not believe there is anything in the Swiss opinion that limits the holding to situations in which the biological parents' rights have been terminated. Rather, we have decided that foster parents cannot petition to be de facto custodians when a child is in the custody of the Cabinet regardless of the status of the biological parents' rights vis-à-vis the child. Since G.S. was in the custody of the Cabinet and the child was no longer physically in the Appellants' home, the family court properly dismissed the Appellants' petition for custody.

Because we have determined that the holding in Swiss precluded the Appellants' petition, we need not discuss the argument regarding the foster home contract between the Appellants and the Cabinet. Therefore, we affirm the decision of the Fayette Family Court dismissing the Appellants' petition for custody and de facto custodian status.

In determining the disposition of all cases brought on behalf of dependent, neglected, or abused children, the juvenile session of the District Court, in the best interest of the child, shall have, but shall not be limited to, the following dispositional alternatives:

- (d) **Commitment of the child to the custody of the cabinet** for placement for an indeterminate period of time not to exceed his attainment of the age eighteen (18). (Emphasis added).

ALL CONCUR.

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