

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000886-ME

KELLY LAWLER AND
EMILY LAWLER

APPELLANTS

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 06-CI-00447

JOSEPH PATRICK RIGGS;
ASHLEY WIMSATT;
ZACHARY NICHOLAS DOE; AND
THE CABINET FOR HEALTH AND
FAMILY SERVICES

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: WINE, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kelly Lawler and Emily Lawler (collectively referred to as the Lawlers) bring this appeal from an April 10, 2007, order of the Nelson Circuit Court dismissing their petition for custody of Zachary Nicholas Doe. We affirm.

Zachary was born on November 28, 2004. Shortly thereafter, Zachary was abandoned by his biological mother, Ashley Wimsatt,¹ at Flaget Memorial Hospital. *See* Kentucky Revised Statutes (KRS) 405.075; KRS 620.350. The Cabinet for Families and Children (Cabinet) obtained custody of Zachary and subsequently placed him with foster parents, the Lawlers. On December 28, 2004, Zachary's biological father, Joseph Patrick Riggs, signed a disclaimer of paternity.

In June 2005, the Cabinet filed a petition to terminate Wimsatt's parental rights in the Nelson Circuit Court (Action No. 05-AD-0009). Following a hearing on the Cabinet's petition, the court noted on its docket sheet that Wimsatt wished to terminate her parental rights but there were “new issues regarding paternity.” Wimsatt testified that Riggs was Zachary's father. Based upon Wimsatt's testimony, the Cabinet contacted Riggs to determine if he desired to pursue custody. After DNA test results confirmed that Riggs was Zachary's father, Riggs began exercising supervised visitation with Zachary in April 2006, pursuant to a case plan established by the Cabinet.

On July 14, 2006, Riggs filed a petition for custody of Zachary in the Nelson Circuit Court (Action No. 06-CI-00447). On February 1, 2007, the Lawlers filed a petition for custody of Zachary in the Nelson Circuit Court (Action No. 07-CI-00068). The Lawlers also filed a motion to intervene in the action initiated by Riggs (Action No.

¹ In the notice of appeal, Ashley Wimsatt's last name was mistakenly spelled “Wimpsatt.” We have used the correct spelling of Ashley's last name “Wimsatt” in our opinion.

06-CI-00447) and filed a motion to consolidate Action Nos. 06-CI-00447 and 07-CI-00068.

On April 10, 2007, an order was entered granting the Lawlers' motion to consolidate Action Nos. 06-CI-00447 and 07-CI-00068 and simultaneously dismissing the Lawlers' petition for custody. Therein, the court determined that the Lawlers lacked standing to intervene and did not meet the statutory requirements of a *de facto* custodian. This appeal follows.

We begin our analysis by determining the applicable standard of review to be applied in this appeal. On review of matters pertaining to child custody, this Court must determine whether the circuit court's findings of fact are clearly erroneous. Ky. R. Civ. P. 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). Issues that are strictly legal in nature and questions of law will be reviewed *de novo*. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002).

The Lawlers contend that the circuit court erred by denying them standing as *de facto* custodians under KRS 403.270. To qualify as a *de facto* custodian, it must be established by clear and convincing evidence that a person has “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” KRS 403.270; *Allen v. Devine*, 178 S.W.3d 517 (Ky.App. 2005).

In this case, the Lawlers were foster parents to Zachary for approximately two years. As foster parents, the Lawlers received compensation from the Cabinet. The

circuit court thoroughly analyzed the family expenses and financial support received and expended for Zachary. The circuit court concluded that the Cabinet was Zachary's primary financial supporter and the Lawlers have failed to demonstrate how this finding was clearly erroneous. Hence, we do not believe that the Lawlers have established that they provided the primary support for Zachary to be *de facto* custodians as required by KRS 403.270. *See Swiss v. Cabinet for Families and Children*, 43 S.W.3d 796 (Ky.App. 2001)(holding that foster parents did not qualify as *de facto* custodians as the Cabinet provided the primary support for the child). Accordingly, the circuit court properly concluded that the Lawlers did not qualify as *de facto* custodians under KRS 403.270.

Next, the Lawlers assert that Riggs waived his superior right to custody and that they have standing to seek custody of Zachary under *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). The Lawlers point out that Riggs signed a disclaimer of paternity. Therein, Riggs stated he was not the father of the child, possessed no legal claim to the child, did not object to adoption of the child and waived further notice of court proceedings concerning any possible rights in connection with the child. Relying upon the authority of *Moore*, the Lawlers argue that Riggs waived his superior right to custody, and that they have standing to file a petition for custody. *See Moore*, 110 S.W.3d 336.

The Lawlers make a compelling argument. However, in *Moore*, the Supreme Court concluded that the prospective adoptive parents had standing to seek

custody of the child under KRS 403.420(4)(b).² See *Moore*, 110 S.W.3d 336.

Specifically, the *Moore* Court held that a third party must initially demonstrate standing to commence the custody action under KRS 403.420(4)(b) and then must demonstrate unfitness of the biological parent or waiver of the parent's superior right to custody. *Id.*

Unfortunately for the Lawlers, KRS 403.420(4)(b) was repealed by the Kentucky General Assembly effective July 13, 2004, and was not re-enacted. Under that statute, a third party who was not a *de facto* custodian but who had physical custody of a child was given standing to commence a custody action.³ With the repeal of KRS 403.420, a third party who is not a *de facto* custodian but who has physical custody of a child no longer has standing to commence a custody action. It seems to this Court that the legislature may have unintentionally overlooked such third parties when it repealed KRS 403.420(4)(b). In any event, the effect of the repeal of KRS 403.420(4)(b) remains

² Kentucky Revised Statutes (KRS) 403.420(4)(b) read:

(4) A child custody proceeding is commenced in the Circuit Court:

.....

- (b) By a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one (1) of his parents[.]

³ In *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003), the Court interpreted the phrase “physical custody” in KRS 403.420(4)(b) to mean more than actual possession of the child. Rather, the Court held that physical custody “for the purposes of establishing standing requires . . . a showing 'that the parent has somehow voluntarily and indefinitely relinquished custody of the child.'” *Id.* at 358.

the same – third parties who do not qualify as *de facto* custodians but who have physical custody of a child are without standing to commence a custody action.

The Lawlers argue that KRS 403.420 was replaced by KRS 403.800 which is part of the Uniform Child Custody Jurisdiction and Enforcement Act (“Uniform Act”) that was passed by the Kentucky General Assembly in 2004 and became effective on July 14, 2004. However, those statutes set forth in the Uniform Act pertain specifically to child custody issues arising in interstate relationships involving the child, the parents, or persons acting as a parent. There is absolutely no legislative intent set forth in these statutes that would apply the same to situations arising from purely intrastate custodial relationships with a child. The Lawlers have also failed to cite any legal authority that would apply the Uniform Act to the issues raised in this appeal. We therefore must conclude that the Uniform Act is simply not applicable to this case.

Accordingly, we hold that the circuit court did not err in concluding that the Lawlers lacked standing to seek custody of Zachary under KRS 403.270.

For the foregoing reasons, the order of the Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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