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NOTES

A Parent's Rights Under the Fourteenth Amendment: Does Kentucky's De Facto Custodian Statute Violate Due Process?

BY ELIZABETH ASHLEY BRUCE*

I. INTRODUCTION

This is a story about T.S. T.S. is a thirteen year-old boy who has an unhealthy relationship with his parents. One day T.S. becomes so dissatisfied, he walks from his parents' home to his grandparents' home. While living with his grandparents, T.S. thrives; he performs better in school, participates in extracurricular activities, and attends church. In fact, "[a]ccording to his teachers and coaches, T.S. is a well-adjusted and content teenager," a marked change from the unhappy boy they had known before.¹ After living in his grandparents' home for two months, T.S.'s parents move, leaving him behind. T.S. lives happily with his grandparents for two years, rarely communicating with his parents. T.S.'s grandparents provide for all of his needs, physically, financially, and emotionally. One day T.S.'s parents secretly arrange to have him taken to camp. T.S. is physically removed from his grandparents' home and transported to the camp, where he stays for one month. Greatly upset by the actions of T.S.'s parents, his grandparents petition for custody of him.² After granting standing, the court grants the grandparents' petition for full custody of T.S.³

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¹ *Sherfey v. Sherfey*, 74 S.W.3d 777, 779 (Ky. Ct. App. 2002), *cert. denied*, 537 U.S. 1110 (2003).

² *Id.*

³ *Id.* at 780.

The preceding paragraph relates the facts of *Sherfey v. Sherfey*,⁴ recently decided by the Kentucky Court of Appeals. Based on the facts presented, the result of this case seems both logical and in the best interest of the child; however, the outcome of the case is riddled with controversy.

In the United States, a parent's right to care for his or her child is a fundamental right guaranteed by the Constitution and is, and has been, fiercely protected by the judicial system.⁵ The Fourteenth Amendment authoritatively states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."⁶ In a series of cases, the Supreme Court interpreted "liberty" to include the right of parents to have control over the upbringing of their children.⁷ In *Prince v. Massachusetts*, the Supreme Court stated, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁸ Thus, parents have a constitutionally protected right to raise their children, and courts should interfere only when necessary.⁹

Despite parents' rights to raise their children as they see fit, some parents execute those rights in a manner that is not only questionable, but completely unsatisfactory. The Kentucky Court of Appeals stated in *Sherfey v. Sherfey*, "Over the past century, changing demographics have greatly altered traditional notions of the average American family."¹⁰ The court also noted that children having "parental-type relationships" with third parties have become increasingly common.¹¹ As a result, states are often required to confer nonparental custody or visitation rights upon persons other than a child's biological parents for the child's well-being.¹²

One type of nonparental status granted by courts is "de facto custodian." In Kentucky, a de facto custodian is defined as a person who has taken over the role of parent as caregiver, provider, and guardian.¹³

⁴ See *id.* at 777.

⁵ *Id.* at 781-82.

⁶ U.S. CONST. amend. XIV, § 1.

⁷ See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁸ *Prince*, 321 U.S. at 166.

⁹ *Id.*; *Sherfey*, 74 S.W.3d at 782.

¹⁰ *Sherfey*, 74 S.W.3d at 780.

¹¹ See *id.*

¹² *Id.*

¹³ KY. REV. STAT. ANN. [hereinafter K.R.S.] § 403.270(1) (Banks-Baldwin 2002). The statute provides in pertinent part that:

Kentucky Revised Statutes (“K.R.S.”) section 403.270(a)(1) confers upon de facto custodians the same status as a child’s biological parents in a custody proceeding.¹⁴ Not surprisingly, this statute has been attacked for permitting nonparents to have equal standing with parents in exercising the parental rights guaranteed under the Fourteenth Amendment of the United States Constitution.¹⁵ Although Kentucky permits nonparental third parties equal standing in this situation,¹⁶ some states do not, suggesting that granting equal standing to nonparents may infringe upon the parents’ Fourteenth Amendment rights.¹⁷

Kentucky must consider whether giving de facto custodians the same standing in custody matters as parents violates the Due Process Clause of the Constitution. If it is constitutional, is it appropriate? To analyze these issues, Part II of the Note will examine parental rights under the Fourteenth Amendment.¹⁸ Part III will discuss the Supreme Court’s current stance on parental rights under the Fourteenth Amendment,¹⁹ and Part IV will analyze the concept of de facto guardianship.²⁰ Standing will be discussed generally in Part V,²¹ and the Kentucky approach to standing will be evaluated in

(1)(a) As used in this chapter . . . “de facto custodian” means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services.

Id. § (1)(a).

¹⁴ *Id.* § (1)(b) (“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, 403.420, and 405.020.”).

¹⁵ *Sherfey*, 74 S.W.3d at 781.

¹⁶ K.R.S. § 403.270(1).

¹⁷ *See, e.g., In re Crystal J.*, 111 Cal. Rptr. 2d 646, 650 (Cal. Ct. App. 2001) (holding that although California law grants de facto custodians standing in custody matters, this does not confer to them rights equal to that of the natural parents); *Clifford v. Superior Court*, 45 Cal. Rptr. 2d 333, 335 (Cal. Ct. App. 1995); *Bradbury v. Charlebois (In re Guardianship of Mikrut)*, 858 P.2d 689, 692 (Ariz. Ct. App. 1993) (holding that to effect a de facto termination there must be proof of parental unfitness).

¹⁸ *See infra* notes 24–36 and accompanying text.

¹⁹ *See infra* notes 37–56 and accompanying text.

²⁰ *See infra* notes 57–64 and accompanying text.

²¹ *See infra* notes 65–77 and accompanying text.

Parts VI and VII.²² Finally, the Note will evaluate how other jurisdictions approach the same issue in Part VIII.²³

II. PARENTAL RIGHTS UNDER THE FOURTEENTH AMENDMENT

The Due Process Clause of the United States Constitution provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”²⁴ Inherent within the liberties protected by the Due Process Clause is that of parents to participate in and control the raising of their children without state interference in this private area of family life.²⁵

In making this assertion, the Supreme Court of the United States has examined the depth and breadth of parental rights. In *Meyer v. Nebraska*, the Court explored a citizen’s rights under the Due Process Clause.²⁶ The Court stated,

Without doubt, [liberty under the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.²⁷

The Court clearly established that the right to “bring up children” is an essential liberty that is protected under the Fourteenth Amendment’s Due Process Clause.²⁸

The Supreme Court addressed the subject of parental rights under the Fourteenth Amendment again in *Pierce v. Society of the Sisters*, wherein the Court followed *Meyer*, and expounded on the meaning of “bring up children.”²⁹ In *Pierce*, the Court held that part of parents’ liberty in raising their children included making decisions regarding their children’s educa-

²² See *infra* notes 78–118 and accompanying text.

²³ See *infra* notes 119–41 and accompanying text.

²⁴ U.S. CONST. amend. XIV, § 1.

²⁵ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

²⁶ *Meyer*, 262 U.S. at 399.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Pierce*, 268 U.S. at 534.

tion.³⁰ Particularly, if a law passed by a state “unreasonably inter-fere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control,”³¹ then the law violated the Due Process Clause by depriving parents of a fundamental liberty guaranteed by the Fourteenth Amendment.³²

The Court, in explaining the definition of parental rights under the Constitution, stated that a child is a person, “not the mere creature of the state” and that “those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”³³ Therefore, parents or guardians not only have a right to care for their children, but also a right to control and direct their children in various aspects of life until they reach adulthood.³⁴

The Court focused on the personal identity of a child as a human being, rather than looking at the child in the objective terms of the law.³⁵ The Supreme Court has a responsibility to ensure that each child is protected by the Constitution. It achieves this objective by recognizing that parents have a fundamental right to raise their children in the manner in which the parents deem best.³⁶

III. THE SUPREME COURT’S CURRENT STANCE ON PARENTAL RIGHTS UNDER THE FOURTEENTH AMENDMENT

Today, the Supreme Court continues to protect the rights of parents in controlling the upbringing of their children, having changed little from the foundations set in *Prince*, *Meyer*, and *Pierce*. Recently, in *Troxel v. Granville*,³⁷ the Supreme Court reiterated its previous holding in *Washington v. Glucksberg*,³⁸ stating that “[t]he Fourteenth Amendment’s Due Process Clause has a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests,’ including parents’ fundamental right to make decisions

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 535.

³³ *Id.*

³⁴ *Id.* at 534–35.

³⁵ *Id.* at 535.

³⁶ *Id.*

³⁷ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

³⁸ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

concerning the care, custody and control of their children.”³⁹ The Court also held that as long as parents are “fit,” they have a right to care for and control their children, raising them as the parents choose, including limiting their children’s visitation with other parties.⁴⁰ These “other parties” include grandparents.⁴¹ As a result, third party visitation statutes will violate Due Process if they are applied in a manner that accords no weight to parents’ decisions regarding visitation. Such a statute would be unconstitutional because it would infringe upon a fit parent’s determination of what is in his or her child’s best interests.⁴²

Currently, the Court operates under a presumption that “fit parents act in their children’s best interests.”⁴³ As a result, a state may not interfere with familial matters as long as there is an adequate parent to care for the child. In *Reno v. Flores*, the Supreme Court held that parents are “presumed to be the preferred and primary custodians of their minor children,” to the exclusion of other parties who assert themselves as custodians.⁴⁴ In *Stanley v. Illinois*, the Supreme Court addressed the issue of whether a father, who has not been deemed an unfit parent, is denied due process rights under an Illinois statute that presumes unfitness for unwed fathers, but not for unwed mothers.⁴⁵ The Court wisely held that “[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.”⁴⁶ It reiterated its prior holdings concerning the importance of parental rights, and deemed the right to “conceive and to raise one’s children” to be of the utmost importance.⁴⁷ The Court also addressed the changing needs of society, and after a thorough analysis held that the law certainly did “recognize those family relationships unlegitimized by a marriage ceremony.”⁴⁸ As a result, parents—regardless of marital status—have a constitutionally protected

³⁹ *Troxel*, 530 U.S. at 57 (citing *Glucksberg*, 521 U.S. at 720).

⁴⁰ *Id.* at 68–70.

⁴¹ *Id.* at 72–73.

⁴² *Id.* The Court noted that “the Due Process Clause does not permit a state to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a ‘better’ decision would be made.” *Id.*

⁴³ *Id.* at 58.

⁴⁴ *Reno v. Flores*, 507 U.S. 292, 310 (1993).

⁴⁵ *Stanley v. Illinois*, 405 U.S. 645, 649–51 (1972).

⁴⁶ *Id.* at 651.

⁴⁷ *Id.*

⁴⁸ *Id.*

right under the Fourteenth Amendment to retain custody of their children absent a court determination of unfitness.⁴⁹

Not only must parents be deemed unfit before his or her parental rights can be relinquished, but—according to *Santosky v. Kramer*⁵⁰—unless it is proven by clear and convincing evidence that the parents violated the law regarding the care of his or her child, the parents' due process rights have been violated if the child is removed.⁵¹ *Santosky* involved a New York statute that allowed parental rights to be dissolved if the parents were found to have “permanently neglected” their children.⁵² The statute only required proof of neglect by a “fair preponderance of the evidence.”⁵³ In dealing with this issue, the Supreme Court stated that “[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”⁵⁴ This case is exemplary of the Supreme Court's highly protective attitude toward parental rights. By requiring a clear and convincing standard for removal statutes, the Supreme Court solidified its commitment to the fundamental nature of parents' rights to raise their children.⁵⁵

The Supreme Court's previous holdings illustrate that the rights of parents are not only fundamental under the Fourteenth Amendment, but that the Court will vigorously protect this fundamental right in almost all instances.

These Supreme Court cases all involved children who were adequately cared for in their parents' custody. In *Sherfey*, the facts are not as clear. Although there was no specific judicial hearing regarding the fitness of the parents in *Sherfey*, the court noted that as applied the statute “directly implicate[d] at least two of the former unfitness factors.”⁵⁶ The *Sherfey* case is difficult due to the facts that the natural parents in question did not display interest in their child and, although the parents would likely have

⁴⁹ *Id.* at 649; *see also* *May v. Anderson*, 345 U.S. 528, 533 (1953).

⁵⁰ *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁵¹ *Id.* at 747–48.

⁵² *Id.* at 747 (citing N.Y. SOC. SERV. LAW §§ 384-b.4.(d), 384-b.7(a) (McKinney Supp. 1981-1982)).

⁵³ *Id.* (quoting N.Y. FAM. CT. ACT § 622 (McKinney 1975 & Supp. 1981-1982)).

⁵⁴ *Id.* at 747–48.

⁵⁵ *Id.*

⁵⁶ *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. Ct. App. 2002), *cert. denied*, 539 U.S. 1110 (2003).

been deemed unfit, they still were not granted a hearing to specifically determine their overall fitness as parents.

IV. DE FACTO CUSTODIANSHIP

Courts have long recognized persons who act *in loco parentis*. This phrase refers to a person “[a]cting as a temporary guardian of a child.”⁵⁷ Thus, a person acting *in loco parentis* is acting as a parent would for a child.⁵⁸ A de facto custodian is not a legal parent, but his or her relationship with the child mirrors that of a natural parent; namely, a de facto custodian provides physical and psychological support for the child.⁵⁹ A de facto custodian “establishes his status by acting *in loco parentis*.”⁶⁰ Thus, a de facto custodian may be a stepparent, an extended family member, a family friend, a grandparent, or anyone who has a significant psychological relationship with a child, who provides essential physical and emotional support for that child.

Due to the melancholy circumstances of children who are unwanted by their parents, not properly cared for, left in another’s care for expansive amounts of time, or do not receive sufficient care from their parents, courts have been called upon to grant these custodians some form of rights.

Courts in the United States have taken vastly different approaches to the subject of de facto custodians and their rights. In some states like California, de facto custodians are not afforded many of the rights that biological parents enjoy, including the right to reunification services, custody, or visitation.⁶¹ On the other hand, after the Kentucky Legislature passed the De Facto Guardian Amendment in 1998, persons granted de facto custodian status were granted equal standing and rights similar to a biological parent concerning child custody proceedings.⁶² This situation has caused much debate, and the essential question is whether it is constitutional for a state to allow a person who is not a child’s parent to retain parental rights in regard to the child when there is a biological parent

⁵⁷ *In loco parentis* means “in the place of a parent.” BLACK’S LAW DICTIONARY 791 (7th ed. 1999).

⁵⁸ *Id.*

⁵⁹ Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 720–28 (2001).

⁶⁰ *Hall v. Indiana*, 346 N.E.2d 584, 586 n.2 (Ind. 1976).

⁶¹ *Clifford v. Superior Court*, 45 Cal. Rptr. 2d 333, 335 (Cal. Ct. App. 1995).

⁶² K.R.S. § 403.270 (Banks-Baldwin 2002).

willing to do so. Kentucky courts have held that it is constitutional,⁶³ whereas other states disagree.⁶⁴ The Supreme Court of the United States has yet to decide on this issue.

V. STANDING

Standing is closely related to the status of a de facto custodian. De facto custodianship may, depending on state law, confer upon parents and nonparents equal standing in a proceeding regarding the child. The primary issue in *Sherfey* was whether it was constitutional for the court to grant the grandparents standing equal to that of the child's parents in custody proceedings.⁶⁵ The Supreme Court of the United States has discussed the standing inquiry as involving a "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."⁶⁶ If a person does not possess standing in a matter, that person may not appear before the court concerning that matter.⁶⁷ In the case of a de facto custodian, if the custodian does not possess standing equal to a biological parent in a custody proceeding, then the de facto custodian will be unable to assert a petition for custody of the child if the parents also desire custody.⁶⁸ In *Sherfey v. Sherfey*, if the grandparents lacked standing in their capacity as de facto custodians, they would have been unable to participate in custody proceedings to obtain guardianship of their grandson.⁶⁹ As a result, the custody issue on behalf of the grandparents would never have been heard, and T.S.'s parents would have been able to assert custody over the child. There would have been no available remedy for the grandparents.

There are many cases regarding child custody in which standing issues arise. For example, in *Alfano v. Richardson*, foster parents were deemed to lack standing to assert custody rights over a mentally retarded child placed in their custody when the biological parents initiated custody proceedings.⁷⁰

⁶³ *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. Ct. App. 2002), *cert. denied*, 539 U.S. 1110 (2003).

⁶⁴ *See, e.g.*, *Froelich v. Clark (In re Guardianship of L.L. and J.L.)*, 745 N.E.2d 222, 230–31 (Ind. Ct. App. 2001); *Bradbury v. Charlebois (In re Guardianship of Mikrut)*, 858 P.2d 689, 692 (Ariz. Ct. App. 1993).

⁶⁵ *Sherfey*, 74 S.W.3d at 780.

⁶⁶ *Allen v. Wright*, 468 U.S. 737, 752 (1984).

⁶⁷ *Id.* at 750–51.

⁶⁸ *Id.*

⁶⁹ *Sherfey*, 74 S.W.3d at 780.

⁷⁰ *Alfano v. Richardson*, No. CV94 053 9266, 1995 WL 534232, *11 (Conn. Super. Ct. Aug. 23, 1995).

In Kentucky, there are certain situations in which nonparents have standing as well as parents, such as in de facto custodian cases.⁷¹

Kentucky is not alone in this respect.⁷² Other states also allow nonparents to have standing in cases regarding the child.⁷³ In Colorado, a person who has custody of a child for more than six months is held to have standing, mirroring the approach taken in Kentucky.⁷⁴ Also, in Illinois, a nonparent has standing to petition for custody as long as the child is not in the physical custody of a parent.⁷⁵ These courts have determined that a nonparent, in certain instances, may be afforded standing to assert either their rights or a child's rights regarding custodial matters.

On the other hand, there are jurisdictions that disagree. In *Bowie v. Arder*, the Michigan Supreme Court held that de facto custodianship by a nonparent is not a sufficient relationship to merit standing, unless the de facto custodians have been deemed the child's legal guardians.⁷⁶ As a result, unless the nonparent has been appointed as the sole guardian of the child, he or she does not have standing to assert custody of the child.⁷⁷ It is clear that there is a definite conflict regarding the status of a de facto custodian and whether a de facto custodian is able to obtain standing in court regarding custody of the child at issue.

VI. THE KENTUCKY APPROACH

As discussed earlier, the Supreme Court of the United States held that absent a showing of unfitness, courts should generally refrain from interfering in family matters.⁷⁸ Historically, Kentucky has followed the

⁷¹ *Williams v. Phelps*, 961 S.W.2d 40, 41–42 (Ky. Ct. App. 1998).

⁷² *In re Custody of C.C.R.S.*, 892 P.2d 246, 251–52 (Colo. 1995); *In re Marriage of Siegel*, 648 N.E.2d 607, 610–11 (Ill. App. Ct. 1995).

⁷³ *See, e.g., C.C.R.S.*, 892 P.2d at 251; *Siegel*, 648 N.E.2d at 610–11.

⁷⁴ *C.C.R.S.*, 892 P.2d at 251.

⁷⁵ *Siegel*, 648 N.E.2d at 610.

⁷⁶ *Bowie v. Arder*, 490 N.W.2d 568, 577 (Mich. 1992). In *Bowie*, the child's natural parents were not married. The child, Ashlee and her mother, Carolyn, lived with Carolyn's mother. The child's father did not reside with them. Eleven months after Ashlee's birth, Carolyn died. Ashlee continued to live with her grandmother until her father, Milton Arder, took custody of her a year after Carolyn's death. The grandmother petitioned for custody and the court denied her request, stating that the grandmother lacked standing, even though the child had lived with her grandmother for the first two years of her life. *Id.* at 570–71.

⁷⁷ *Id.*

⁷⁸ *See supra* Part III and accompanying notes.

Supreme Court in this regard, holding in *McNames v. Corum* that “before any court even considers the best interest of the child in an action involving parent and non-parent . . . there must first be a showing that the parent is not a fit person to have custody.”⁷⁹ Later, in *Davis v. Collinsworth*, the Kentucky Supreme Court reiterated the *McNames* holding and set forth guidelines for a showing of parental unfitness, including “(1) evidence of inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children.”⁸⁰ The evidence standard to establish unfitness is clear and convincing evidence.⁸¹ If the burden is met, the parent may be deemed unfit and custody may be granted to a party other than the child’s biological parents.⁸²

Nevertheless, in *Wynn v. Wynn*, a case decided prior to the passage of K.R.S. section 403.270(1), the Kentucky Court of Appeals permitted a nonparent to gain custody of a child when one parent was alive, without a specific finding of unfitness.⁸³ In *Wynn*, the child resided with his father and grandparents in the same home. When the father died unexpectedly, the grandparents petitioned for full custody of the child.⁸⁴ Although the trial court examined factors pertinent to parental unfitness, the court affirmed the trial court’s award of full custody to the grandparents without a specific court determination that the child’s mother was unfit.⁸⁵

In *Lewis v. Lewis*, a mother left her child at the grandparents’ home, where the child lived happily for eleven years.⁸⁶ The Kentucky Supreme Court upheld an award of custody to the grandparents over the mother’s petition.⁸⁷ The mother was not found to be an unfit parent, but rather the court bypassed the issue of unfitness and decided the case on the basis of the child’s best interests.⁸⁸ Therefore, in limited instances, the formerly required showing of unfitness was not always implemented, even prior to the passage of K.R.S. section 403.270.⁸⁹

⁷⁹ *McNames v. Corum*, 683 S.W.2d 246, 247 (Ky. 1985).

⁸⁰ *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Wynn v. Wynn*, 689 S.W.2d 608, 609–10 (Ky. Ct. App. 1985).

⁸⁴ *Id.* at 609.

⁸⁵ *Id.* at 609–10.

⁸⁶ *Lewis v. Lewis*, 343 S.W.2d 146, 148 (Ky. 1961).

⁸⁷ *Id.* at 148–49.

⁸⁸ *Id.* at 149.

⁸⁹ *See id.*; *Wynn*, 689 S.W.2d at 609–10.

The passage of K.R.S. section 403.270 dramatically changed the state of de facto parenthood in Kentucky. Now, rather than requiring a showing of unfitness or a waiver of parental rights, a person who meets the de facto custodian requirements possesses standing equal to a biological parent in a custody proceeding without a specific showing of unfitness.⁹⁰ This allows a court to bypass a separate fitness determination, expediting the determination of the best interests of the child once de facto custodian status has been established.

In *Sherfey*, the parents argued that the passage of K.R.S. section 403.270(1) upset the former constitutional standard by no longer specifically requiring a showing of parental unfitness by clear and convincing evidence, and by eliminating the factors required by *McNames*.⁹¹ At first glance, this would seem to directly conflict with the Supreme Court standard that a parent must be deemed unfit in order for the parent's Due Process rights to be protected.⁹² The Kentucky Court of Appeals, however, reasoned that K.R.S. section 403.270(1) did not violate the Sherfey's constitutional rights because the court did "not believe that the passage of K.R.S. 403.270(1) significantly alter[ed] the preexisting law of custody determination in Kentucky."⁹³

Kentucky defines the requirements and limits upon de facto custodians in K.R.S. section 403.270(1).⁹⁴ The statute provides:

(1)(a) As used in this chapter and KRS 405.020, unless the context requires otherwise, "de facto custodian" means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.⁹⁵

⁹⁰ *Sherfey v. Sherfey*, 74 S.W.3d 777, 780, 782 (Ky. Ct. App. 2002), *cert. denied*, 537 U.S. 1110 (2003).

⁹¹ *Id.* at 780.

⁹² *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

⁹³ *Sherfey*, 74 S.W.3d at 782.

⁹⁴ K.R.S. § 403.270(1) (Banks-Baldwin 2002).

⁹⁵ *Id.*

The statute goes on to state that “[o]nce 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.”⁹⁶ Thus, if a person is found to be a child’s de facto custodian, that person will have standing identical to that of a parent in certain matters, including a suit for child custody. Importantly, this statute only applies to persons with sole physical custody over a child, who are essentially stepping into the parents’ positions.⁹⁷ This operates to the exclusion of relationships like those of stepparents and other live-in arrangements.

In *Sherfey*, the court reasoned that K.R.S. section 403.270, while not requiring any specific showing of unfitness, still implicates two of the most important factors regarding parental fitness included in the former statute.⁹⁸ Specifically, the statute asserts that in order to be a de facto custodian a person must be the “primary caregiver for, and financial supporter, of [the] child.”⁹⁹ In addition, the statute requires a showing of “clear and convincing evidence” regarding the criteria for a nonparent to be conferred with de facto custodian status.¹⁰⁰

Therefore, the statute still incorporates the fitness factors and, in doing so, allows the court to consider parental fitness in making their custodial determination. The court concluded that because of the Sherfeys’ poor behavior in abandoning their child and their failure to provide any care, financial, or emotional support for the child—all factors under the former statute regarding the determination of parental fitness—the parents would have been deemed unfit under the prior statute as well.¹⁰¹ Thus, their constitutional rights under the Fourteenth Amendment were not violated because they were unfit parents under either version of the statute.¹⁰² A separate determination of their unfitness was not required; rather, the parents’ right to raise their child and provide care for him ended when they did not perform their parental duties satisfactorily.¹⁰³

Although *Sherfey* is the most recent case addressing Kentucky’s approach to de facto custody, Kentucky has a history of cases that also

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Sherfey*, 74 S.W.3d at 782.

⁹⁹ K.R.S. § 403.270(1)(a).

¹⁰⁰ *Id.*

¹⁰¹ *Sherfey*, 74 S.W.3d at 782.

¹⁰² *Id.*

¹⁰³ *Id.*

support the result in *Sherfey*. In *Williams v. Phelps*, the Kentucky Court of Appeals stated, "A party must have a real, direct, present and substantial right in the subject matter of the controversy. Standing is the right to appear and seek relief in a particular proceeding."¹⁰⁴ In *Williams*, the court granted standing to a nonparent in a custody battle.¹⁰⁵ In *French v. Barnett*, the Court of Appeals held that a grandmother was not required to have a separate hearing to determine her de facto status regarding her grandchild. Even though the child's natural mother was not deemed unfit, the grandmother was granted de facto status using similar reasoning as the court in *Sherfey*.¹⁰⁶

Thus, in Kentucky, the approach taken to confer de facto custodian status upon a nonparent has several requirements. First, the child must be in the sole custody of the person for a specific amount of time. Second, the person must supply all of the child's physical and financial needs. Third, these factors must be proven by a standard of clear and convincing evidence.¹⁰⁷ There is no specific requirement that a parent be subjected to a separate fitness determination in order to conform with the purposes of the statute.¹⁰⁸

VII. CONSTITUTIONALITY OF THE KENTUCKY APPROACH

Although from the specific facts of *Sherfey* it seems that K.R.S. section 403.270 achieved the correct result for T.S., one must consider whether the statute will provide the best result in a majority of cases without infringing upon parents' due process rights under the Constitution. The Supreme Court's modern pro-natural parent approach to custody disputes suggest

¹⁰⁴ *Williams v. Phelps*, 961 S.W.2d 40, 41 (Ky. Ct. App. 1998) (citing *Winn v. First Bank of Irvington*, 581 S.W.2d 21, 23 (Ky. Ct. App. 1978)).

¹⁰⁵ *Id.* at 42.

¹⁰⁶ *French v. Barnett*, 43 S.W.3d 289, 291 (Ky. Ct. App. 2001). In *French*, a couple with two children divorced and the mother was granted custody of both children. Nevertheless, the children moved in with their paternal grandmother two years after the divorce. Shortly thereafter, the parents entered into an agreement giving the father full custody of one child and temporary custody of the other. The children, however, remained in the care of their paternal grandmother. The grandmother petitioned the court for custody. Although there was not a hearing regarding whether the grandmother was a de facto custodian or whether the parents were unfit, the court nonetheless granted the grandmother's petition for custody of both children. *Id.* at 290.

¹⁰⁷ K.R.S. § 403.270(1) (Banks-Baldwin 2002).

¹⁰⁸ *Id.*

that Kentucky’s statute may violate the United States Constitution by not requiring a specific showing of parental unfitness or a waiver of parental rights.¹⁰⁹ Even the Kentucky Court of Appeals, in *Consalvi v. Cawood*, expressed that “[o]n its face, our statute is not unconstitutional; however, the question of whether the statute may be applied unconstitutionally is expressly reserved.”¹¹⁰ The fact that the court mentioned the issue of an “as applied” challenge to the statute creates the possibility for the statute to be unconstitutionally applied.

Perhaps Kentucky has taken the best approach. By not requiring a specific determination of parental unfitness, yet retaining the most important unfitness factors, K.R.S. section 403.270 allows courts to focus upon the best interests of the child. However, the statute also protects a natural parent’s right to custody of his or her child unless that parent has not fulfilled the most significant aspects of his or her parental duties. In addition, the statute imposes a burden of “clear and convincing evidence” upon the de facto custodian to prove that they have met the requirements of the statute.¹¹¹

These limitations provide additional protection to biological parents. In *Consalvi v. Cawood*, the Kentucky Court of Appeals discussed the narrow interpretation that the statute should be given.¹¹² In *Consalvi*, a couple married shortly after the birth of their first child.¹¹³ After separating and reuniting a number of times, and following the birth of another child, the couple divorced.¹¹⁴ Although the wife told her husband that he was the father of both of the children, paternity tests subsequently revealed that he was the father of neither child.¹¹⁵ The trial court ordered joint custody to the husband regarding both children, relying on K.R.S. section 403.270 for its ruling, stating that he was a de facto custodian.¹¹⁶ The Kentucky Court of Appeals reversed, holding that the husband did not fall within the purview of K.R.S. section 403.270 because the husband was not the sole caregiver for the children; rather, both he and the children’s mother cared for the children.¹¹⁷ The court stated, “It is not enough that a person provide for a

¹⁰⁹ See *supra* Part II and accompanying notes.

¹¹⁰ *Consalvi v. Cawood*, 63 S.W.3d 195, 199 (Ky. Ct. App. 2001).

¹¹¹ K.R.S. § 403.270(1)(b).

¹¹² *Consalvi*, 63 S.W.3d at 200.

¹¹³ *Id.* at 196.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 197.

¹¹⁷ *Id.* at 198.

child alongside the natural parent; the statute is clear that one must literally stand in the place of the natural parent to qualify as a de facto custodian."¹¹⁸ Such an interpretation of the statute allows the courts some degree of flexibility regarding the best interests of the child, while also allowing the court to exclude persons who fall outside the statute's strict boundaries. Thus, while the statute protects a parent's fundamental constitutional rights under the Fourteenth Amendment, it does not confine the courts to a strict determination of unfitness before the court is allowed to consider what is in a child's best interests.

K.R.S. section 403.270 promotes the best outcome for all parties involved. Parents who are clearly not assisting in their child's physical, mental, and emotional development will stand before the court on equal ground with the people in the child's life who do provide those things. Importantly, however, the statute does not automatically confer custody on the de facto custodian. The statute simply allows courts to consider both the parents' and de facto custodian's positions in determining the child's best interests. As a result, the well-being of the child, rather than the parents' wishes, are of primary import. Consequently, the child will be placed in the home that will better nurture the child's physical, intellectual, and emotional development.

VIII. OTHER JURISDICTIONS

Other states have adopted different approaches to the determination of de facto custodian status and the rights of de facto custodians. These approaches range from liberal to highly conservative, creating a marked lack of uniformity across the United States. A comparison of these different approaches is helpful in defining the current constitutional debate regarding Kentucky's de facto custodian statute.

Indiana's de facto custodian statute is much like the one found in Kentucky. Indiana defines the term "de facto custodian" in a manner identical to K.R.S. section 403.270(1), implementing the same time and care requirements.¹¹⁹ Although the Indiana statute grants de facto custodi-

¹¹⁸ *Id.*

¹¹⁹ IND. CODE § 31-9-2-35.5 (2003). Section 35.5 provides:

"De facto custodian" . . . means a person who has been the primary caregiver for, and the financial support of, a child who has resided with the person for at least:

- (1) six (6) months if the child is less than three (3) years of age; or
- (2) one (1) year if the child is at least three (3) years of age.

ans standing in custody disputes, it does not automatically treat parents and de facto custodians equally or subsequently base the custody decision on the best interests of the child. Rather, the court must consider a variety of factors in addition to the traditional best interest factors, including the de facto custodian’s wishes, the parent’s intent in placing the child with the de facto custodian, and the circumstances in which the child was allowed to remain with the custodian.¹²⁰ Only after these additional factors are considered is the de facto custodian permitted to be a party in the custody proceeding.¹²¹

One recent case, *Froelich v. Clark*,¹²² is particularly helpful in explaining Indiana’s treatment of de facto custodians. In that case, the mother of a nine-year-old boy petitioned to regain custody of her son from his paternal grandmother, who had been the child’s sole caretaker for an extended period and had been deemed the child’s de facto custodian by the court as the child’s guardian.¹²³ The grandmother argued that she was the

Any period after a child custody proceeding has been commenced may not be included in determining whether the child has resided with the person for the required period.

¹²⁰ *Id.* § 31-14-13-2.5. Section 2.5(b) states in pertinent part:

(b) In addition to the factors listed in section 2 of this chapter, the court shall consider the following factors in determining custody:

- (1) The wishes of the child’s de facto custodian.
- (2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.
- (3) The intent of the child’s parent in placing the child with the de facto custodian.
- (4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent seeking custody to:
 - (A) seek employment;
 - (B) work; or
 - (C) attend school.

Id.

¹²¹ *Id.* § 2.5(c).

¹²² *Froelich v. Clark (In re Guardianship of L.L. and J.L.)*, 745 N.E.2d 222 (Ind. Ct. App. 2001).

¹²³ *Id.* at 225. The boy’s mother and father had one son born prior to their marriage and one son born following their marriage. Shortly after the mother and father were married, due to an inappropriate lifestyle for raising children, the parents left the boys with the paternal grandmother, who later obtained permanent guardianship of the boys. After divorcing the boys’ father and multiple prior

child's de facto custodian and as such, the "statutory amendments removed any presumption favoring the natural parent in a third party child custody dispute."¹²⁴ However, the court held that even when a third party is deemed a de facto custodian, the presumption favoring parental custody remains.¹²⁵ The court defined the proper standard to apply in such a dispute as follows:

First, there is a presumption in all cases that the natural parent should have custody of his or her child. The third party bears the burden of overcoming this presumption by clear and cogent evidence. Evidence sufficient to rebut the presumption may, but need not necessarily, consist of the parent's present unfitness, or past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. However, a general finding that it would be in the child's "best interest" to be placed in the third party's custody is not sufficient to rebut the presumption. If the presumption is rebutted, then the court engages in a general "best interests" analysis.¹²⁶

Thus, Indiana, while defining de facto custodian identically to Kentucky, takes a different approach to determine the custody between a de facto custodian and a natural parent. Rather than treating the de facto custodian and parent equally in a custody dispute and determining custody of the "best interests" standard, Indiana requires an additional safeguard by maintaining the pro-parent presumption and a heightened showing of "best interests."¹²⁷ As a result, the Indiana court notes that "[i]f the 'best interest rule' was the only standard needed without anything else, to deprive the natural parent of custody of his own child, then what is to keep the government or third parties from passing judgment with little, if any, care for the natural parents."¹²⁸ The court implied that any other standard would violate the Due Process Clause under the Supreme Court's holding in *Troxel v. Granville*.¹²⁹

attempts to regain permanent custody of the children, the mother presented evidence of a reformed, stable, lifestyle. *Id.* at 226–26.

¹²⁴ *Id.* at 229–30.

¹²⁵ *Id.* at 230.

¹²⁶ *Id.* at 230–31.

¹²⁷ *Id.*

¹²⁸ *Id.* at 231 (quoting *In re Marriage of Huber*, 723 N.E.2d 973, 976 (Ind. Ct. App. 2000)).

¹²⁹ *See id.* The court notes that

[t]his observation is entirely consistent with the views of the Supreme Court, which has stated that "the Due Process Clause does not permit a

Under the Indiana court's analysis, it appears that the Kentucky statute would be found unconstitutional, as Kentucky bypasses additional protections and allows the court to evaluate a person deemed a de facto custodian and a natural parent purely on the traditional "best interests of the child" standard.

While Indiana adopted a similar approach to Kentucky, Arizona's approach is notably different: Absent a showing of unfitness, if a parent voluntarily relinquishes custody to another person and subsequently wants the child back, the custodian may not retain custody of the child.¹³⁰ In *Bradbury v. Charlebois*, the Arizona Court of Appeals stated that "[t]he parent-child relationship cannot be terminated merely because termination may be in the best interests of the child." Rather, the parent's unfitness must be proven for the custodian to be eligible to retain custody of the child.¹³¹ Although the Arizona court has failed to explicitly state that a grant of custody without a fitness determination would be unconstitutional, it may reasonably be inferred. By contrast, in Kentucky, if a person meets the de facto custodian requirements, the custodian has equal standing with the parents, absent a specific showing of parental unfitness.¹³² Consequently, the court is able to base its custody decision on the child's best interests.¹³³

California, while permitting de facto custodians standing in custody proceedings, does not equate a de facto custodian with a natural parent in many respects. In *Clifford v. Superior Court*, the California Court of Appeals stated that "de facto parenthood does not give de facto parents the rights and responsibilities of parents or guardians."¹³⁴ More specifically, a de facto custodian in the state of California has no right to "reunification services, custody, or visitation,"¹³⁵ whereas in Kentucky, a de facto custo-

State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."

Id. (quoting *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000)).

¹³⁰ *Bradbury v. Charlebois* (*In re Guardianship of Mikrut*), 858 P.2d 689, 692 (Ariz. Ct. App. 1993); see also *Stewart v. Superior Court ex rel. County of Maricopa*, 787 P.2d 126, 128–30 (Ariz. Ct. App. 1989) (stating that "a state may not presume the unfitness of a parent, but instead must provide individualized procedural safeguards (notice, hearing and proof of unfitness) before the state can terminate parental rights" (citing *Stanley v. Illinois*, 405 U.S. 645 (1972))).

¹³¹ *Bradbury*, 858 P.2d at 692.

¹³² K.R.S. § 403.270(1) (Banks-Baldwin 2002).

¹³³ *Id.* § 403.270(2).

¹³⁴ *Clifford v. Superior Court*, 45 Cal. Rptr. 2d 333, 335 (Cal. Ct. App. 1995).

¹³⁵ *Id.*

dian is equivalent to a biological parent in these respects.¹³⁶ As for standing, California courts makes it clear that de facto custodians are not equal to a child's natural parents.¹³⁷ In fact, one California court held that "[d]e facto parents are not equated with biological parents or guardians for purposes of dependency proceedings and standing to participate does not give them all of the rights and preferences accorded such persons."¹³⁸ As a result, the California approach to de facto custodianship is more conservative than the Kentucky approach.

While many states have adopted conservative approaches to de facto custodianship, other states have adopted approaches even more liberal than Kentucky's statute. In fact, the Kentucky statute has been criticized as not being liberal enough, especially concerning the rights of stepparents.¹³⁹ Critics of the statute propose that Kentucky should adopt provisions similar to those of Connecticut and Oregon, where any person who has a significant relationship with the child is permitted to intervene in child custody proceedings.¹⁴⁰ In these states, little emphasis is placed on the child being solely in the care of the third party seeking custody for a specific length of time.¹⁴¹

It is clear that different jurisdictions approach the rights and responsibilities of de facto custodians in a variety of ways. It is difficult to determine which approach is correct due to the individual facts of each case. In *Sherfey*, there should be no question as to the appropriateness of the Court's grant of equal standing to the grandparents in a custody proceeding. When one takes into consideration the view of the Supreme Court and other jurisdictions as to the fundamental rights of parents and the different requirements for de facto custodians, however, the line is much less clear.

¹³⁶ K.R.S. § 403.270(2); see also *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. Ct. App. 2002), cert. denied, 537 U.S. 1110 (2003).

¹³⁷ *In re Crystal J.*, 111 Cal. Rptr. 2d 646, 650 (Cal. Ct. App. 2001); Clifford v. Superior Court, 45 Cal. Rptr. 2d 333, 335 (Cal. Ct. App. 1995).

¹³⁸ *In re Crystal J.*, 111 Cal. Rptr. 2d at 650 (quoting *In re Rachel C.*, 1 Cal. Rptr. 2d 473 (Cal. Ct. App. 1991)).

¹³⁹ Lawrence Schlam, *Third-Party Standing in Child Custody Disputes: Will Kentucky's New "De Facto" Guardian Provision Help?*, 27 N. KY. L. REV. 368, 409 (2000). This author asserts that Kentucky should consider revising its statute to include a broader perception of the word "parent." He writes that such a revision would "allow for greater judicial flexibility in choosing custodians in the best interests of children." *Id.*

¹⁴⁰ *Id.* at 402-03.

¹⁴¹ *Id.*

IX. CONCLUSION

Sherfey v. Sherfey is without doubt a controversial case. Depriving a child's natural parents of custody in favor of another party is a serious matter that evokes both emotion and criticism. T.S. was voluntarily abandoned by his parents and was obviously happy living with his grandparents, who provided all of his care.¹⁴² Perhaps the particular facts in *Sherfey* leave one with the impression that the court made the right decision. The more difficult question is, in spite of the individual facts of *Sherfey*, will K.R.S. section 403.270(1) reach a proper, constitutionally sound outcome in *most* cases? As admitted by the court in *Sherfey*, the natural parents would have been deemed unfit had the previous factors for unfitness been applied. Based on this rationale, it is easy to constitutionally justify the court's decision. A case may arise, however, where a person meets the statutory requirements of a de facto custodian and the natural parents are also fit. In this situation, it appears that the statute comes much closer to violating the parents' constitutional right to raise his or her child as they see fit.

However, other jurisdictions, by the requirements they set forth for de facto custodians, would hold that the standing rights granted to the grandparents in *Sherfey* would be a constitutional violation, greatly infringing on the rights of parents. There are states, on the other hand, that do not require a strict showing of parental unfitness to confer equal standing upon nonparents in custody cases.¹⁴³ It is a difficult situation anytime the natural parents' actions are detrimental to the child and in whose custody the child does not wish to remain with his or her parents because parents' rights and the best interest of child conflict. If deemed to be fit, a parents' rights under the Fourteenth Amendment will prevail over the wishes of the child or the persons who care for the child.

If narrowly construed, Kentucky's statute reaches a desirable compromise between two extremes, allowing a nonparent who adequately cares for a child's physical and financial needs, with whom the child has lived for at least six months, to have equal standing with the child's parents, whose actions may be less than exemplary.¹⁴⁴ In reaching this compromise, the court may examine the totality of the circumstances and determine the best result for the child.

¹⁴² *Sherfey v. Sherfey*, 74 S.W.3d 777, 779 (Ky. Ct. App. 2002), *cert. denied*, 537 U.S. 1110 (2003).

¹⁴³ Schlamm, *supra* note 139, at 403–05.

¹⁴⁴ K.R.S. § 403.270 (Banks-Baldwin 2002).

Although the statute may raise questions of constitutionality, the end result is sound: A child is placed in the custody of the person who cares for him the best, whether it be the biological parent or the de facto custodian. Because Kentucky's statute is not overly broad as to include persons who may have an interest in the child, but who do not provide the every day care and control over the child's life like that of a parent, the statute comes to an admirable compromise. It allows only those persons who act in loco parentis to seek custody of the child. No specific finding of the fitness of a parent is required, but K.R.S. section 403.270(1) does take into consideration the most important of the former fitness factors and in doing so, enables the court to determine what is best for each particular child. The decision in *Sherfey v. Sherfey* is an excellent example of how K.R.S. section 403.270(1) can work to the advantage of the child. It allows the court to weigh the propriety of each party in a custody case, and reach a decision that is in the child's best interests.