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JANUARY 14, 2009
(FILE NO. 2008-SC-0484-DE)

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-000086-ME
AND
NO. 2007-CA-000101-ME

PHYLLIS DIANNE PICKLESIMER — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 06-CI-00038

ARMINTA JANE MULLINS — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

WINE, JUDGE: Phyllis D. Picklesimer ("Picklesimer") appeals a judgment of the Garrard Circuit Court that awarded joint custody of her minor son, Zachary Alexander Picklesimer-Mullins ("Zachary"), to Arminta J. Mullins ("Mullins"). Picklesimer argues the trial court lacked jurisdiction and venue to issue orders regarding the custody of the minor child; Mullins lacked standing to pursue custody of the minor child; and the trial

court erred in determining Picklesimer had waived her superior right to custody of the child. Mullins cross-appeals arguing the trial court abused its discretion by invalidating the agreed judgment of custody that awarded joint custody of the child to her, entered February 3, 2006. After considering the issues raised by Picklesimer and Mullins on appeal, we are compelled to affirm in part and reverse in part.

Picklesimer works as a nurse. Mullins is a detective with the Danville Police Department. Picklesimer and Mullins were engaged in a five-year lesbian relationship during which time they lived together. During this time, they decided to parent a child together, with the agreement Picklesimer would be artificially inseminated. Together they selected a donor via the Internet and Picklesimer was impregnated on November 16, 2004. Picklesimer's pregnancy was difficult as she was hospitalized six weeks prior to Zachary's birth on May 31, 2005. Both parties agree that they made the decision to conceive and raise the child together.

Picklesimer alleges that Mullins had an affair with another woman during their relationship. Picklesimer states the affair occurred in November of 2004, resulting in a separation. Thereafter, the parties reconciled and decided to live together along with Zachary after his birth. The parties again separated in August of 2005 and yet again reconciled. But despite this reconciliation, Picklesimer contends Mullins was still seeing another woman, Brenda Rousey ("Rousey"), resulting in the parties' final separation in February 2006.

Picklesimer and Mullins essentially resided together off and on from the birth of Zachary until their final separation in February 2006. Although the residence, two vehicles, and a checking account primarily used to pay living expenses were all in Mullins' name, both parties concede Picklesimer participated in supporting Zachary financially. Also, both parties participated in raising and caring for Zachary. The child

was on a heart monitor so it was not uncommon for Mullins to awaken at night and care for him. At the same time, Picklesimer would care for Zachary when Mullins was at work. As Zachary grew, he began to refer to Picklesimer as "mommy" and to Mullins as "momma." Mullins states that between April 2006, and September 2006, the parties lived separate and apart but continued to exercise timesharing on an equal basis with Zachary.

During the time the parties were living together, Mullins became concerned that hospitals, schools, etc., would not view her as a legal parent of Zachary without some court determination declaring her as such. Mullins and Picklesimer agreed some legal action was necessary in case Picklesimer was ever unable to make decisions for Zachary due to her death. Thus, Mullins retained an attorney who petitioned the court to establish her as a *de facto* custodian. Even though Mullins' attorney only represented her, both parties went to Mullins' attorney's office on January 20, 2006. Mullins signed the verified petition alleging she was the *de facto* custodian of Zachary. The petition, as well as the Agreed Judgment of Custody and order, read that Mullins was the primary financial provider and the primary caregiver of Zachary for a period of time of not less than six months from the child's date of birth until January 20, 2006. At the same time, Picklesimer filed an entry of appearance and both parties signed an agreed order and judgment establishing Mullins as a *de facto* custodian.

Even though all of the parties were living in Lincoln County, the petition and entry of appearance were filed in the Garrard Circuit Clerk's office on January 25, 2006, in an effort to keep the proceedings from becoming public in their own community and in part to avoid review by the duly-elected family court judge. Thus, there was no objection by either party to filing the case in Garrard County.

Without an evidentiary hearing, depositions, or any other form of evidence taken prior thereto, the trial court signed the agreed judgment and entered same on February 3, 2006. Further, no summons was issued by the clerk of the court at the time the documents were filed. However, neither party challenged the lack of notice.

After Mullins moved out sometime in February to mid-March of 2006, she continued regular visitation with Zachary. However, in September 2006, Picklesimer stopped Mullins' contact with Zachary, alleging that Mullins violated the parties' verbal agreement that they were never to leave Zachary with anyone other than a family member. Picklesimer contends Mullins left Zachary with a man who was a friend of Mullins' current partner, Rousey, who had allegedly assaulted Rousey because he disapproved of her lesbian relationship with Mullins.

On September 3, 2006, Mullins filed her motion requesting the trial court grant her joint care, custody and control of Zachary and declare her as the primary residential custodian. Picklesimer retained counsel and filed a motion to dismiss arguing the Garrard Circuit Court lacked jurisdiction in the case because no summons was ever issued, the entry of appearance was invalid as it was signed prior to filing the petition for custody, and the venue was improper. In the alternative, Picklesimer filed a motion to set aside the agreed judgment of custody pursuant to Kentucky Rules of Civil Procedure ("CR") 60.02 on the grounds that it was based on mistake. Prior to the hearing of these issues, Mullins filed a motion to grant her the sole custody of Zachary because Picklesimer unilaterally withheld Zachary from Mullins and acted in a way detrimental to Zachary's best interests.

The trial court referred these issues to a domestic relations commissioner ("DRC"), who held a hearing on these issues on November 6, 2006. The DRC issued his findings of fact, conclusions of law, and recommendations on November 8, 2006.

The DRC recommended that: (1) the court deny Picklesimer's motion to set aside the judgment on the grounds of lack of a summons, insufficiency of entry of appearance, lack of venue and fraud as to the relationship between her and Mullins; (2) the court grant the motion to set aside the judgment as void on the grounds of failure of Mullins to qualify as a *de facto* custodian; (3) the court find that Picklesimer waived her superior right to custody in favor of Mullins as a joint custodian; (4) the parties be awarded joint custody of Zachary; (5) Picklesimer be designated as the primary residential custodian; (6) Mullins be granted parenting time pursuant to the schedule utilized by the parties in the summer of 2006 whereby Mullins received a minimum six out of fourteen days visitation; (7) the Garrard Circuit Court visitation guidelines govern any parenting time not agreed upon; and (8) neither party be required to pay child support. Both parties filed their exceptions to the DRC's report. The trial court denied all the exceptions and adopted the recommendations of the DRC on December 1, 2006.

On December 8, 2006, Mullins filed an emergency protective order ("EPO") on behalf of herself and Zachary in Lincoln County where she resides. CA# 06-D-139-001. Relying on the custody orders entered in Garrard Circuit Court to meet the "child in common" standard for an EPO, Mullins alleged an altercation occurred with Picklesimer during an exchange of Zachary on December 7. In an *ex parte* order, the Lincoln Family Court granted Mullins' request for sole custody of Zachary. The case was subsequently transferred to the Garrard Circuit Court to be heard December 21, 2006. Picklesimer was not allowed contact with her son during this time.

On December 20, 2006, Picklesimer petitioned this Court for a writ of prohibition and a motion for emergency relief. On December 21, 2006, the trial court held the EPO hearing and restored Picklesimer's timesharing rights with Zachary. On December 22, 2006, this Court denied Picklesimer's motion for emergency relief as her

timesharing with Zachary had been restored and an emergency no longer existed. This Court subsequently issued an order denying Picklesimer's motion for a writ of prohibition on January 29, 2007. This appeal and cross-appeal followed.

When reviewing matters regarding child custody, we focus on whether the trial court's findings of fact are clearly erroneous, CR 52.01, and such findings will not be set aside if they are supported by substantial evidence. *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky. App. 1999). We will not substitute our judgment for that of the trial court, as that court is given due regard to judge the credibility of the witnesses. CR 52.01. We review questions of law *de novo*, but we will not disturb a trial court's legal rulings unless they constitute an abuse of discretion. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002).

On appeal, Picklesimer first argues the trial court lacked jurisdiction and venue to issue orders regarding the custody of Zachary. Specifically, Picklesimer contends the agreed judgment of custody and all subsequent orders should be voided due to the failure of Mullins to have a summons issued upon the filing of the petition. We disagree. The purpose of a summons is to bring a party before the court so that the party may participate in the proceedings, raise appropriate defenses, and argue the case. "It is fundamental that no judgment is valid unless the defendant therein is brought before the court and given an opportunity to be heard." *Taylor v. Howard*, 306 Ky. 407, 208 S.W.2d 73, 76 (1948); *see also Rosenberg v. Bricken*, 302 Ky. 124, 194 S.W.2d 60 (1946).

Here, Picklesimer signed an entry of appearance that was filed simultaneously with the petition. She concedes to having full knowledge of the proceedings, understanding the documents she was signing, and understanding those documents would be submitted to a court. Further, once the petition was submitted and

entered in court, Picklesimer never filed a notice of appeal, asked for a review of the petition, or questioned its validity. In fact, Picklesimer acted as though the judgment was valid by providing parenting time to Mullins pursuant to the petition. Thus, Picklesimer was on notice of the action and properly before the trial court and the purpose of the summons was served by her entry of appearance.

We further reject Picklesimer's contention that the entry of appearance is invalid because it predates the filing date of the petition. As noted by the trial court, Picklesimer acknowledged that she reviewed the petition on the same day that she signed the entry of appearance. In addition, signatures on the petition and the entry of appearance were on the same date acknowledged by a common notary. "It is elementary law that a party who enters his appearance to any suit by filing an answer or otherwise responding waives the service of a summons." *Brock v. Saylor*, 300 Ky. 471, 189 S.W.2d 688, 690 (1945). Therefore, we will not set aside the trial court's orders due to lack of a summons in this case.

Picklesimer also argues the venue was improper in the Garrard Circuit Court. Specifically, Picklesimer points out that all of the parties to this action resided in Lincoln County at the time of the filing of the petition. This Court has held that the appropriate venue in custody actions lies in the county of the child's usual residence. *Ash v. Thompkins*, 914 S.W.2d 788 (Ky. App. 1996). However, venue can be waived as reflected in Kentucky Revised Statutes ("KRS") 452.050. As noted above, the parties agreed to file the petition in Garrard County to avoid any publicity that might result by filing in Lincoln County where they lived. KRS 452.050 provides that, "[a] change of venue shall be made to the Circuit Court of the adjacent county most convenient to the parties, their witnesses and their attorneys, and to which there is no valid objection. The order of change of venue may be made subject to any equitable terms and

conditions that safety to the rights of the parties requires and the court, in its discretion, prescribes." Here, venue was waived when both parties filed pleadings with no objection to the venue. Picklesimer signed documents that were clear and agreed upon by both parties that they were going to be filed in Garrard Circuit Court. Thus, the trial court properly found that Picklesimer had waived any objections to venue.

Picklesimer admittedly signed the agreed petition for custody, and the agreed judgment of custody, in which she agreed that Mullins is a *de facto* custodian and the parties' intent for joint custody of Zachary. The trial court entered the judgment of custody into the record on February 3, 2006. In her cross-appeal, Mullins argues the agreed judgment is valid for all legal purposes as Picklesimer signed it knowingly and voluntarily. She further argues that the trial court erred in finding that a hearing was necessary because the parties had stipulated the facts prior to entry of the order.

In her cross-appeal, Mullins argues the trial court abused its discretion by setting aside the agreed judgment of custody entered February 3, 2006. However, we agree with the trial court that Mullins did not qualify as a *de facto* custodian under KRS 403.270, thus invalidating the parties' agreed judgment. KRS 403.270 permits someone who has acted as a child's primary caregiver to be deemed the *de facto* custodian of the child, thereby allowing her to stand on an equal footing with the child's biological parents in matters such as a custody determination. *See, e.g.,* KRS 405.020(3). The statute defines *de facto* custodian as ". . . 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. . . ." KRS 403.270(1)(a). Once the court has determined *de facto* custodian status, then the court determines

custody in accordance with the best interests of the child, giving equal consideration to the parent and any *de facto* custodian. KRS 403.270(1)(b).

The trial court vacated the judgment of custody pursuant to CR 60.02, which, in pertinent part, allows a trial court to set aside a judgment based upon "perjury or falsified evidence." CR 60.02(c). In this case, the agreed judgment reads that, pursuant to KRS 403.270, "the court finds by clear and convincing evidence, based on the affidavit of [Mullins] and the response of [Picklesimer], that [Mullins] has been the primary caregiver for, and financial supporter of the infant child herein for a period of approximately eight months." Picklesimer established that the agreement contained false information on which the trial court relied in entering the agreed judgment.

Both parties contend that the purpose of the agreed judgment was to provide Mullins with legal authority to make health-related decisions regarding Zachary if at any time Picklesimer was unable to make those decisions. Picklesimer, unrepresented by counsel at the time she signed the agreement, testified that she took issue with the language of the agreement indicating that Mullins was the primary care-giver and financial supporter of Zachary but thought that it was the only way to ensure Mullins would be able to care for the child in her unfortunate absence. But both parties' testimony indicates that Mullins was never the primary caregiver and the primary financial provider for Zachary, as is necessary to be a *de facto* custodian. KRS 403.270(1). In fact, the record reflects that the care and support of the child has been a joint effort of Picklesimer and Mullins during the time they lived together and in separation. "It is not enough that a person provide for a child alongside the natural parent" but rather he must "literally stand in the place of the natural parent . . . ." *Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky. App. 2001). Therefore, we agree with the trial court that Mullins would have failed to meet her burden of proving that she was

a *de facto* custodian of Zachary absent the false information set out in the petition and agreed order. And while we agree with Mullins that agreed judgments and orders are routinely submitted by parties for entry by the court, custody matters are different. The court is not bound by the parties' agreement because the welfare of the child is involved. We are convinced, as the trial court concedes, that had the trial court made an effort to establish an evidentiary record or conduct a hearing in this case prior to its entry of *de facto* custodian status to Mullins, the trial court would not have signed the parties' agreed judgment.

Mullins' and Pickelsimer's conduct, regardless of its "noble" intent, was duplicitous and fraudulent. The documents they presented to the trial court were clearly designed to convince the court a hearing was not necessary. Such conduct and pleadings not only constitute perjured or falsified evidence under CR 60.02(c), but further constitute a fraud affecting the proceedings. CR 60.02(d).

A broad view of fraud upon the court has been held throughout our jurisprudence. In *Triplett v. Stanley*, 279 Ky. 148, 130 S.W.2d 45, 47 (1939), our former Court of Appeals opined that fraud upon the court "is not confined to vicious import of a wicked motive or deliberate deceit, etc., purposely conceived, but embraces merely leading astray, throwing off guard, or lulling to security and inaction, be its intention or motives good or bad."

Convincing Pickelsimer that she, Mullins, must be declared a "*de facto* custodian" to properly care for Zachary was accomplished by filing the Agreed Judgment of Custody with the trial court.

In *Burke v. Sexton*, 814 S.W.2d 290 (Ky. App. 1991), Mr. Burke's attorney drafted a marital settlement agreement which Mrs. Burke signed without the benefit of counsel. Included in the agreement were provisions which not only granted Mr. Burke

the lion's share of the joint assets but relieved him of any child support obligations. Apparently, then as in the case *sub judice*, without a hearing or testimony, the trial court signed the judgment incorporating the agreement.

As this Court opined:

> The behavior here amounts to "fraud affecting the proceedings." CR 60.02(d). While a judgment may be reopened only for reasons of an extraordinary nature, 7 W. Bertlesman and K. Philipps, *Kentucky Practice*, CR 60.02, Comment 2 (4th ed. 1984) . . . the ground of fraud is broad and flexible. 7 *Ky. Prac.*, Cr 60.02, Comment 6. "Courts should not take a narrow interpretation of 'fraud affecting the proceedings' where the net effect would cause an unjust judgment to stand."

*Id*. at 292.

The judgment declaring Mullins as *de facto* custodian was entered based on incorrect and misleading evidence presented to the court by both parties and should therefore be considered invalid. Therefore, we affirm the trial court's decision to set aside the agreed judgment.

We next move to the issue of whether Mullins had standing to seek custody of Zachary. The trial court correctly concluded that the legal effect of setting aside the agreed judgment would be to deny Mullins standing to seek custody. The court was concerned that such a result was unjust and unreasonable. Therefore, the trial court concluded by clear and convincing evidence that Picklesimer waived her superior right of custody to Zachary by acknowledging that Mullins is a parent of the child and by permitting, on a continuous basis, extensive visitation and timesharing with Mullins and by co-parenting the child along with Mullins until the parties' separation. Then, after determining it was in the best interests of the child, the trial court awarded joint custody of Zachary to Mullins.

On appeal, Picklesimer asserts Mullins lacked standing to seek custody of Zachary. Further, Picklesimer contends that the trial court erred in finding that she waived her superior right to custody as the issue was not before the court. As an initial matter, we acknowledge that Mullins did not raise the issue of waiver before the trial court. However, since the trial court made findings based on the evidence of record, we do not consider this omission controlling.

In addressing the circumstance in which a nonparent may seek custody of a child, the Supreme Court stated:

> Custody contests between a parent and a nonparent who does not fall within the statutory rule on "de facto" custodians are determined under a standard requiring the nonparent to prove that the case falls within one of two exceptions to parental entitlement to custody. One exception to the parent's superior right to custody arises if the parent is shown to be "unfit" by clear and convincing evidence. A second exception arises if the parent has waived his or her superior right to custody.

*Moore v. Asente*, 110 S.W.3d 336, 359 (Ky. 2003), *quoting* 16 Louise E. Graham & James E. Keller, *Kentucky Practice - Domestic Relations Law* § 21.26 (2d. ed. West Group 2003 Pocket Part). At issue in this case is whether the second exception applies. The factors relevant to determining generally whether a parent has waived his or her superior custody right were set forth in *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004). These factors include:

> [the] length of time the child has been away from the parent, circumstances of separation, age of the child when care was assumed by the non-parent, time elapsed before the parent sought to claim the child, and frequency and nature of contact, if any, between the parent and the child during the non-parent's custody.

*Id*. at 470; *see also Shifflet v. Shifflet*, 891 S.W.2d 392 (Ky. 1995) (Spain, J., concurring opinion).

The trial court's findings in this case do not justify the conclusion that Picklesimer waived her superior right to custody of Zachary. The fact that Picklesimer acknowledged that Mullins is a parent of the child by allowing her to assist in his daily life is not one of the factors to be considered in concluding waiver. Furthermore, *Sorrell* contemplates "circumstances of separation" between the parent and the child while the child is in the care of the nonparent. In this case, there was no separation as intended by *Sorrell*. The child has always been in Picklesimer's care throughout his entire life. There has been no period of time, short of the approximately two weeks which Mullins had the child until the hearing for a DVO, that Picklesimer has been separated from Zachary.

Moreover, a finding of waiver requires a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon. *Sorrell*, 136 S.W.3d at 469, *citing Greathouse v. Shreve*, 891 S.W.2d 387, 390 (Ky. 1995). After the parties separated and Mullins filed for visitation, the trial court ordered that Mullins was to receive visitation a minimum of six out of every fourteen days. A court order granting a nonparent visitation does not constitute a waiver of superior right to custody on the part of the parent. Therefore, the trial court clearly erred in finding that Picklesimer waived her superior right to custody of Zachary.

A court may grant custody to a parent or a *de facto* custodian. KRS 403.270. The nonparent may commence a custody action, but the parent will prevail unless the nonparent proves that she is a *de facto* custodian. Since Mullins is neither a biological nor adoptive parent of Zachary, and has not established that she is a *de facto* custodian, she must prove either that Picklesimer is unfit or has waived a superior right

to custody. KRS 405.020. As Mullins has failed to prove waiver by clear and convincing evidence, she lacks standing to assert custody of Zachary.

Accordingly, the Order entered by the Garrard Circuit Court on December 1, 2006, is affirmed in part, reversed in part and remanded for entry of an amended order as set forth in this opinion, which would deny Mullins' motion for joint custody of Zachary.

ALL CONCUR.

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