RENDERED: OCTOBER 9, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001311-DG

JERRY CALHOUN — APPELLANT

v.

ON DISCRETIONARY REVIEW FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NOS. 08-XX-00002 & 08-XX-00003

VIVIAN KEITH SELLERS, AS
MOTHER OF J.C., A MINOR;
AND VIVIAN KEITH SELLERS,
AS ADMINISTRATRIX OF THE
ESTATE OF J.C., A MINOR;
VIVAN KEITH SELLERS, AS
MOTHER OF S.C., A MINOR;
AND VIVIAN KEITH SELLERS,
AS ADMINISTRATRIX OF THE
ESTATE OF S.C., A MINOR — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND STUMBO, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

STUMBO, JUDGE: In February 2008, the Pulaski District Court determined that Jerry Calhoun willfully abandoned his two minor children. Based on this finding, it applied "Mandy Jo's Law" (KRS 391.033 and KRS 411.137), to conclude that he was not entitled to recover for the wrongful deaths of the two children and did not have a right to intestate succession. Calhoun appealed to the Pulaski Circuit Court, which affirmed. This appeal followed, in which Calhoun now argues that he did not willfully abandon his children and that the circuit court erred in failing to so rule. For the reasons stated below, we affirm the Order on appeal.

Appellant, Jerry Calhoun, Sr., and Appellee, Vivian Keith Sellers, were the biological parents of minor children, Sarena Calhoun and Jerry Calhoun, Jr. On January 22, 2006, the children died tragically at ages two and four respectively as a result of an automobile accident. The children's estates were administered in Pulaski District Court. On December 5, 2007, an evidentiary hearing was conducted for the purpose of determining whether Calhoun willfully abandoned the children prior to their deaths pursuant to KRS 391.033 and KRS 411.137, thus precluding him from receiving any distribution.

After considering the matter, on February 19, 2008, the district court rendered two Orders[2] finding in relevant part that Calhoun had abandoned the children by refusing to contribute to their care, maintenance and support. While noting that Calhoun was incarcerated for much of the children's lives, the court stated that it had not considered Calhoun's incarceration as a factor in concluding

[2] The Court rendered one Order for each estate.

that he had abandoned the children. The court went on to find that Calhoun was subject to a Domestic Violence Order (DVO), that the Order resulted in custody of the children being placed with Sellers, and that Calhoun did not exercise any opportunity to engage in supervised visitation with the children pursuant to the terms of the custody order. And finally, the court found as not credible Calhoun's testimony that he provided care to and maintenance of the children based on the court's finding that Calhoun "is lacking in personal knowledge of basic facts and general circumstances which a father, who provided care and maintenance as Mr. Calhoun testified he did, would know."

Based on these findings, the district court applied KRS 391.033 and KRS 411.137 to conclude that Calhoun had willfully abandoned the children, had failed to provide parental care to them for at least one year prior to their deaths, and therefore was not entitled to recover for the wrongful deaths of the children nor to possess a right to the intestate succession of their estates. Calhoun appealed to the Pulaski Circuit Court, which affirmed. The circuit court applied *Kimbler v. Arms*, 102 S.W.3d 517 (Ky. App. 2003), to conclude that the district court improperly failed to consider Calhoun's incarceration as one factor in determining whether Calhoun abandoned the children. The circuit court went on to conclude, however, that the district court properly determined that Calhoun had abandoned the children for purposes of Mandy Jo's Law. The circuit court noted that though Calhoun had filed *pro se* motions beginning on November 18, 2004, seeking

visitation of the children, the totality of the circumstances demonstrated that Calhoun abandoned the children *prior* to his incarceration.[3] Calhoun then sought and received discretionary review from this Court, and this appeal followed.

Calhoun now argues that the Pulaski Circuit Court erred in concluding that the Pulaski District Court properly determined that he had abandoned his children and therefore was not entitled to recovery from the wrongful death proceeds and/or the children's estates. He maintains that *Kimbler, supra*, upon which the circuit court relied in part, was not applicable to the instant facts because prior to the children's deaths, he tried to do "everything he possibly could" to have visitation and interaction with the children. He also argues that KRS 391.033 and KRS 411.137 should be applied in such a manner as to reach a determination that he did not willfully abandon the children but was prevented from seeing them by Sellers and the Pulaski Family Court. He also directs our attention to the fact that he filed *pro se* motions while incarcerated seeking visitation of the children, which demonstrated that he did not evince a desire to abandon them. And finally, Calhoun contends that from the date of his incarceration in September 2003, until the time of the children's deaths in January 2006, he was deprived of custody by a court of competent jurisdiction and was in substantial compliance with all court orders. Based on this last argument, he maintains that a determination of willful abandonment was improper. In sum, he seeks reversal of the Orders on appeal

[3] These motions were never ruled upon because they were subsumed by the DVO proceeding.

based on his contention that he did not willfully abandon the children and was in compliance with all applicable Orders relating to the children.

We have closely examined Calhoun's arguments and find no error in the Pulaski Circuit Court's Order affirming the Orders of the Pulaski District Court. KRS 391.033 states that,

> (1) A parent who has willfully abandoned the care and maintenance of his or her child shall not have a right to intestate succession in any part of the estate and shall not have a right to administer the estate of the child, unless:
>
> > (a) The abandoning parent had resumed the care and maintenance at least one (1) year prior to the death of the child and had continued the care and maintenance until the child's death; or
> >
> > (b) The parent had been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent had substantially complied with all orders of the court requiring contribution to the support of the child.
>
> (2) Any part of a decedent child's estate prevented from passing to a parent, under the provisions of subsection (1) of this section, shall pass through intestate succession as if that parent has failed to survive the decedent child.
>
> (3) This section may be cited as Mandy Jo's Law.

Similarly, a parent may not recover for the wrongful death of his child if he has willfully abandoned the child. KRS 411.137 states that,

> (1) A parent who has willfully abandoned the care and maintenance of his or her child shall not have a right to maintain a wrongful death action for that child and shall not have a right otherwise to recover for the wrongful death of that child, unless:

> (a) The abandoning parent had resumed the care and maintenance at least one (1) year prior to the death of the child and had continued the care and maintenance until the child's death; or
>
> (b) The parent had been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent had substantially complied with all orders of the court requiring contribution to the support of the child.

(2) This section may be cited as Mandy Jo's Law.

Under Mandy Jo's Law, then, a parent may not recover proceeds of a child's estate, nor proceeds of a wrongful death proceeding, if he has willfully abandoned the child unless he resumed the care and maintenance of the child at least one year prior to his or her death, or was deprived of custody by a court of competent jurisdiction and substantially complied with Orders requiring contribution to the support of the child.

Calhoun directs our attention to *Kimbler*, *supra*, which he states is the only Kentucky case that has given an in-depth analysis of KRS 391.033 and KRS 411.137, and which he maintains is distinguishable from the instant facts in that the abandoning party in *Kimbler* was not incarcerated. We cannot conclude that *Kimbler* operates to demonstrate the existence of error in the district court's conclusions. The dispositive holding in *Kimbler*, and which is applicable to the instant facts, is that there is no objective rule to determine what parental acts or omissions constitute abandonment, but rather that any analysis under Mandy Jo's Law must be conducted on a case-by-case basis. "[G]enerally, abandonment is

demonstrated by facts or circumstances that evince a settled purpose to forgo all parental duties and relinquish all parental claims to the child." *Kimbler* at 523, quoting *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1986).

The essence of the circuit court's conclusion of law on this issue was that 1) Calhoun abandoned his children *prior to* his incarceration, and 2) that Calhoun's motions seeking visitation made while incarcerated were insufficient to establish he had resumed the care and maintenance at least one (1) year prior to the death of the children for purposes of Mandy Jo's Law. We find no error in these conclusions. In examining these conclusions, it is helpful to consider the timeline of events. Jerry, Jr. was born on February 14, 2001, while Calhoun was incarcerated. Calhoun was released from incarceration on August 14, 2001, and began living with Sellers and Jerry, Jr., until the Pulaski Circuit Court rendered a DVO on January 22, 2003. Sarena was born on May 9, 2003, and Calhoun was again incarcerated around September 2003, where he remained at the time of the children's deaths in 2006.

The record reveals that at the time of Sarena's death in January 2006, Calhoun had never contributed to her care, maintenance or support. Similarly, at the time of the children's deaths, Calhoun was approximately six months in arrears on his child support obligation for Jerry, Jr., which was calculated prior to the time of his incarceration in 2003. Furthermore, the district court found as not credible

Calhoun's testimony that he provided care and maintenance for the children. This conclusion was based on the court's conclusion that Calhoun lacked the personal knowledge of basic facts and general circumstances which a father, who was providing care and maintenance as Calhoun testified he did, would know. Calhoun did not know the children's favorite foods, the names of their child care providers or their diaper sizes despite stating that he had changed "too many to count." This point aside, Jerry's incarceration may be considered as one factor - though not the deciding factor - in finding abandonment.

Calhoun also contends that he was in compliance with all court orders for purposes of proving that he had re-established care for the children for purposes of Mandy Jo's Law. This claim is refuted by the record. Calhoun was ordered to pay $180 per month in child support for Jerry, Jr. pursuant to DVO. At the time of his incarceration, he had paid only $80 despite being employed and able to provide for his own needs. While non-payment of child support is not by itself dispositive of a finding of abandonment, it is a factor which may be considered. *Kimbler* at 523. And non-payment does demonstrate non-compliance with court orders for purposes of Mandy Jo's Law. Furthermore, Calhoun admitted violating the "no contact" provision of the DVO on two occasions.

Substantial evidence exists in the record to support the circuit court's conclusion that the district court properly made a finding of abandonment for purposes of Mandy Jo's Law. In so doing, the circuit court also properly

considered Calhoun's incarceration as one factor in finding abandonment, and it correctly applied the holding in *Kimbler* that there is no bright line rule to establish a finding of abandonment, but rather that all of the facts must be considered on a case-by-case basis. And lastly, while Calhoun's reference to his *pro se* motions seeking visitation made while incarcerated are compelling, it does not alter the district court's proper determination that Calhoun had not resumed the care and maintenance of the children at least one year prior to their deaths nor substantially complied with all orders requiring contribution to the support of the children. We find no error.

For the foregoing reasons, we affirm the Order of the Pulaski Circuit Court

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEES:
Robert E. Norfleet Somerset, Kentucky	Bruce R. Bentley London, Kentucky