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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000306-MR

ROBERT SIMMS — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 15-CI-00339

ESTATE OF BRANDON MICHAEL BLAKE;
MELANIE GOSSER BLAKE, INDIVIDUALLY;
MELANIE GOSSER BLAKE, CO-ADMINISTRATOR
OF THE ESTATE OF BRANDON MICHAEL BLAKE;
DEREK BLAKE, INDIVIDUALLY; AND
DEREK BLAKE, CO-ADMINISTRATOR OF THE ESTATE
OF BRANDON MICHAEL BLAKE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES AND NICKELL, JUDGES.

JONES, JUDGE: The Appellant, Robert Simms ("Bobby")[1], appeals from the Scott Circuit Court's January 17, 2017, findings of fact, conclusions of law, and order. Therein, the Scott Circuit Court found that Bobby abandoned the care and maintenance of his son, Brandon Michael Blake ("Brandon"), during his minority. Based on its factual findings, the circuit court concluded that Bobby was foreclosed by Mandy Jo's Law, KRS[2] 391.033 and KRS 411.137, from receiving a distribution from Brandon's estate or any of the proceeds recovered for Brandon's wrongful death.

Bobby asserts that the circuit court's conclusion that he abandoned Brandon is at odds with the undisputed fact that he was never delinquent in paying his court-ordered child support for Brandon. Based on the evidence, he asks us to determine that he did not willfully abandon Brandon, and reverse the circuit court's conclusion that Mandy Jo's Law bars him from recovering from Brandon's estate and wrongful death proceeds. Alternatively, Bobby asks us to vacate the circuit court's order, and remand this matter for additional proceedings. Bobby asserts that a remand is necessary because the circuit court committed grave and injurious procedural errors with respect to the burden of proof, presentation of evidence, and its failure to appoint a neutral public administrator prior to the Mandy Jo's Law hearing.

[1] The individuals involved in this appeal share a surname and/or have changed their surnames during the relevant time periods at issue. For consistency and clarity, we refer to most of the individuals by first name only.

[2] Kentucky Revised Statutes.

We have carefully reviewed the record as well as the applicable legal authority. Having done so, we cannot agree with Bobby that the facts required the circuit court to make a finding in Bobby's favor. The circuit court made a reasoned factual determination after weighing the evidence and judging the credibility of the witnesses. While some of the evidence certainly supported Bobby's arguments, none of the evidence was determinative on the abandonment issue. Furthermore, we have not identified any procedural errors that warrant remand. Accordingly, for the reasons more fully explained below, we AFFIRM.

I. Factual and Procedural Background

Tragically, on August 9, 2014, Brandon Michael Blake ("Brandon") was killed in an automobile collision when a car crossed the centerline and hit the car Brandon was driving. Brandon was twenty-four years old at the time of his death. He did not leave a will, was unmarried, and had no children. The Appellant, Bobby, is Brandon's natural father. The Appellee, Melanie Gosser Blake ("Melanie"), is Brandon's natural mother.

Following Brandon's death, a dispute arose between Bobby and Melanie regarding the proper distribution of Brandon's estate, and the proceeds of a wrongful death settlement.[3] Bobby asserted that he was entitled to half of the

[3] The total value of Brandon's estate was estimated at $12,483.36. This consisted of a checking account valued at $701.29, a car "pay off" received from Farm Bureau of $9,782.07, and a Farm Bureau death benefit of $2,000. The following disbursements were made from the estate: (1) $3,786 for Brandon's burial and monument; (2) $4,000 for Brandon's funeral; (3) $72.86 for Brandon's final telephone bill; (4) $1,496.93 for Brandon's last month of rent; and (5) seven bank fees totaling $21.00. The wrongful death claim was settled for $150,000, which the parties appear to agree was the limit of insurance coverage available. Attorney Fred Peters, who was hired by Melanie and her husband, Derek Blake, to represent them as well as to represent the estate, claims a $50,000 attorney fee with respect to the settlement. Mr. Peters agreed to perform

estate as well as half of the settlement. Melanie disagreed. She maintained that Bobby had abandoned Brandon when he was a minor and, therefore, was barred by Mandy Jo's Law from receiving any portion of the estate and wrongful death settlement. The parties' dispute eventually culminated in Bobby filing a complaint in Scott Circuit Court against Brandon's estate, Melanie, and Brandon's stepfather, Derek Blake ("Derek").[4] Ultimately, the circuit court concluded that Mandy Jo's Law prevented Bobby from recovering anything.

A. Brandon's Birth and Childhood

Melanie and Bobby were never married, and they never cohabitated. At the time Brandon was conceived, Melanie was single; Bobby was married to another woman. Melanie gave birth to Brandon on August 28, 1989, in Louisville, Kentucky. No father is listed on Brandon's birth certificate. Melanie made Bobby aware of her pregnancy and Brandon's birth. However, Bobby did not take any steps to legally establish his paternity or obtain custody and/or visitation with Brandon. From 1989 until 1997, Brandon lived with Melanie in Louisville, the same city where Bobby resided with his wife. The parties disagree regarding the amount of support Bobby provided for Brandon as well as the amount of time he spent with his son during this time period.

Bobby testified that he provided Melanie with support whenever she requested it. He also testified that he regularly visited Brandon, approximately

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the probate work for free as part of the contingency fee agreement.

[4] Brandon's surname was legally changed from Gosser to Blake, but Derek never legally adopted Brandon.

once or twice a week. Bobby recalled riding bikes with Brandon as well as spending time with him at local parks. In addition to the financial support he gave Melanie, Bobby testified that he also purchased gifts for Brandon, including a television set, a bicycle, and golf clubs.

Melanie's account of the 1989 to 1997 time period is vastly different. She testified that Bobby gave her a total of $300 during this period, and that he rarely saw Brandon. Nevertheless, Melanie did agree that Bobby purchased the television set, bicycle, and golf clubs for Brandon. She also acknowledged that Brandon went to Bobby's mother's house on three occasions. Melanie testified that she never recalled Bobby taking Brandon on bike rides or to the park.

In the fall of 1996, when Brandon was seven years old, Melanie filed a petition with the Jefferson Family Court to establish paternity. An agreed order of paternity was entered by the family court on October 3, 1996. Pursuant to the order, Bobby was ordered to pay $281 a month for support until Brandon turned eighteen as well as to pay for 33.6% of any uninsured extraordinary medical expenses Brandon incurred.[5]

The form order used by the family court contained a default provision directing support "be paid to the Jefferson County Attorney, Child Support Division, for disbursement to the person . . . entitled thereto in accordance with state and federal law." The family court drew a line followed by an asterisk through this section of the order. At the end of this section, the family court

[5] There was no evidence presented that any such expenses were ever incurred by Brandon.

handwrote the following notation beside the corresponding asterisk: "Co. Atty. has no objection at this point to direct payment because the Defendant has been supporting child." During the bench trial before the circuit court, Bobby argued that this statement was an admission by Melanie that Bobby was fully supporting Brandon prior to entry of the child support order. Melanie vigorously disagreed that this statement was an agreement by her that Bobby had been providing adequate support to Brandon. She testified that Bobby's failure to provide adequate and consistent support caused her to file the paternity petition. Melanie testified that Bobby wanted the notation included because he wanted to make it clear that he was not agreeing to pay any back child support. The circuit court ultimately concluded that this statement was not conclusive regarding Bobby's support prior to entry of the paternity order. It found that while Bobby provided more support than the $300 Melanie recalled, his support was neither consistent nor adequate.

Melanie testified at trial that after the family court entered the child support order, Bobby paid his child support each year in a lump sum until Brandon was either eleven or twelve years old, at which point Bobby's social security checks might have accounted for Brandon's child support. In any event, Melanie did not contest that Bobby fully complied with his child support obligation as ordered by the court.

In November of 1997, when Brandon was eight years old, Melanie and Brandon moved to Scott County, Kentucky, so that Melanie could be closer to

her job at Toyota. After the move, Bobby only saw Brandon on two occasions, both of which occurred in 1998. On the first occasion, Melanie took Brandon to Bobby's brother's farm to swim. The second occasion occurred later that year when Bobby met with Brandon for approximately twenty minutes at a truck stop off Interstate-64. This was the last time Bobby saw Brandon.

In March of 2000, Melanie married Derek, whom she met and began dating shortly after the move to Scott County. Later that same year, Melanie assisted Brandon in changing his surname from Gosser to Blake. Melanie testified that Brandon considered Derek to be his father, and referred to him as such. She testified that Derek did all the things a father would do for Brandon. Even though the family viewed Derek as Brandon's father, Derek never sought to legally adopt Brandon.

According to Bobby, Melanie asked him not to visit Brandon any more after she met Derek. Bobby testified that he complied with Melanie's wishes because he believed Derek was a good influence on Brandon, and he thought it would be best for Brandon if he did not interfere. Melanie denied ever asking Bobby not to visit Brandon. In any event, Bobby never saw Brandon in person after 1998, when Brandon was nine. Nevertheless, the testimony indicated that there was sporadic contact between the two. Bobby testified that Brandon sent him cards and photographs from time to time, and that Bobby sent Brandon a few cards and presents.

Brandon was killed on August 9, 2014. The following day, Bobby called Melanie to find out what had happened. The parties agree that Melanie asked Bobby not to attend Brandon's funeral, and Bobby complied with her request.

B. District Court Proceedings

On September 2, 2014, not quite a month after Brandon's death, Derek and Melanie filed a probate petition in Scott District Court seeking to be appointed as co-administrators of Brandon's estate. On the first section of the form, they checked a box indicating that Brandon died intestate. The second section of the form required them to list "the surviving spouse, heirs at law and next of kin." On this section of the form, they listed Melanie as Brandon's mother and Derek as Brandon's father. They did not name or otherwise mention Bobby. The form was sworn and notarized. Attorney Fred E. Peters, the attorney Melanie and Derek hired to pursue the wrongful death claim, assisted in preparing the probate petition. Thereafter, the district court entered an order appointing Derek and Melanie as co-administrators of Brandon's estate.

The next day, September 3, 2014, Attorney Peters received a letter from Attorney A. Neal Herrington. Attorney Herrington indicated that he had been hired by Bobby. The letter explained that Bobby was Brandon's natural father, and Bobby was making a claim on the wrongful death proceeds. The letter further provided:

> It appears that an Estate was set up, and an Order appointing an Executor entered yesterday (9/2/14). Mr. Simms was not put on notice of this proceeding. We would like to talk to you about the matter.
>
> ***While we may not ultimately contest the appointment***, we would like to be sure Mr. Simms receives his portion of any proceeds as a rightful heir in the wrongful death estate. Hopefully, we do not have to involve the Scott County Probate Court. Obviously, if your client has a different position regarding this issue, we would like to know that as well.

(Emphasis added.)

Attorney Peters responded by letter dated September 4, 2014. In that letter, Attorney Peters explained that "he had no knowledge of any claim to the estate by [Bobby] until [Melanie] called him on September 2, 2014, after Chris Morris, [Attorney] Herrington's partner had called her." Attorney Peters informed Attorney Herrington that he was moving forward on the wrongful death claim, but any proceeds would be retained in his escrow account until all matters were resolved. Attorney Peters requested proof of Bobby's paternity, past child support payments, and proof that Brandon drew Social Security benefits from Bobby's account. Attorney Herrington responded to Attorney Peters by letter dated September 11, 2014. The October 1996 Judgment of Paternity and Order of Support as well as a September 2014 letter from the Social Security Administration were enclosed. Attorney Herrington asked Attorney Peters to keep him advised regarding "the status of the claim."

Over the next couple of months, Attorney Herrington and Attorney Peters corresponded periodically about the status of the wrongful death claim. On January 5, 2015, Attorney Peters informed Attorney Herrington that he was waiting to receive a response to his demand from the liability insurance carrier. He indicated that he had given the carrier twenty days to respond, and that he was going to file suit if no response was forthcoming. His letter also included the following paragraph: "In the meantime, you and I need to have a discussion about Mandy Jo's Law as far as your client is concerned."

On February 10, 2015, Attorney Peters notified Attorney Herrington that he had procured settlements from both insurance companies involved in the wrongful death action: $100,000 from the tortfeasor's carrier, Kentucky National Insurance Company, and $50,000 from Brandon's underinsured carrier, State Farm. The letter also addressed Bobby's request to receive his portion of the settlement:

> You told me your client is claiming a part of Brandon's Estate because of a 1996 Judgment where he was ordered to pay $281.00 per month in child support payments. Further, according to the documents that you sent me, that Social Security acknowledges that a total of $5,916.00 was paid to Brandon Blake on behalf of [Bobby] Simms.
>
> According to my client, your client has not seen Brandon Blake since he was a youngster under five or six years of age. He was a month shy of his twenty-fifth birthday when he died, so your client had not seen him for almost twenty-years. My client does not recall your client ever sending him a birthday card or a Christmas card or ever sending a birthday present or Christmas present or ever

> having anything to do with his son until his son was tragically killed in an accident.
>
> ***I am sure you have explained to your client KRS 411.137 and KRS 393.033 respectively and Mandy Jo's Law . . . . Based upon the statute, and the case law, we do not feel as though [Bobby] is entitled to any portion of Brandon's estate***.
>
> Accordingly, I will hold these funds in my escrow account for thirty (30) days while you all decide what you want to do. Please notify me as soon as you have made that decision.

(Emphasis added.)

Over the next month, Attorney Herrington and Attorney Peters exchanged correspondence, but each remained steadfast with respect to Bobby's demand for his share of the wrongful death proceeds. Attorney Herrington wanted Attorney Peters to disburse the proceeds; Attorney Peters refused to do so until a determination was made regarding the Mandy Jo's Law issue.

In mid-April 2015, Attorney Peters filed an amended probate petition listing Bobby as Brandon's natural father, and naming only Melanie as administrator.[6] At the same time, Attorney Peters filed a motion seeking a hearing before the *district court* on Bobby's claim that "he is an heir entitled to recover for the wrongful death of Brandon Michael Blake." Specifically, the motion stated

[6] It is unclear from the record before us whether the district court actually entered an order removing Derek as a co-administrator of Brandon's estate. To the extent no order was ever entered, Derek remains a co-administrator. "A duly appointed representative of an estate, even if he should not rightfully be in that office, serves with authority until he is removed; his appointment is voidable, not void." *Bennett v. Nicholas*, 250 S.W.3d 673, 679 (Ky. App. 2007).

that the district court had a right to determine whether Bobby had "standing to make a claim" to the wrongful death proceeds "under KRS 411.137."[7]

On May 15, 2015, Bobby filed an objection to the amended petition and a motion to name a public administrator with the district court. In the motion, Bobby recounted the facts leading up to his being omitted from the initial probate petition. He asserted that Melanie made false statements to the district court in an attempt to "divest [him] of his rightful statutory share to any wrongful death proceeds arising from [Brandon]'s death." He further explained that Melanie's intentional deceit made her unfit to serve as an administrator, and that a public administrator should be named fiduciary instead. Attorney Herrington sent the motion to Attorney Peters along with a letter requesting Attorney Peters to withdraw because he was a possible witness to Melanie's and Derek's alleged criminal conduct (perjury before the district court in falsely representing Derek to be Brandon's father), and because his joint representation of Melanie, Derek, and the Estate created an irreconcilable conflict.[8] On June 5, 2015, Bobby filed another motion before the district court. This motion is largely duplicative of the previous motion except that Bobby affirmatively requested that Melanie and Derek be

[7] As we discuss in more detail later in this Opinion, the district court never had jurisdiction to make a determination regarding the disposition of the wrongful death proceeds. While the administrator(s) appointed by the district court have the authority to pursue a wrongful death claim, the claim does not belong to the estate and never becomes part of the estate. Since a wrongful death claim falls outside of probate, the district court does not have jurisdiction over any part of the proceeds. The circuit court, not the district court, was the proper court to make the determination with respect to the wrongful death proceeds.

[8] Attorney Peters voluntarily withdrew sometime thereafter.

removed as co-administrators of Brandon's estate whereas in the previous motion, Bobby had asked only for a public administrator to be appointed.

C. Circuit Court Proceedings

On June 4, 2015, before the district court acted on any of the matters pending before it, Bobby filed a civil complaint in circuit court against Brandon's estate, Melanie in her individual capacity and in her official capacity as co-administrator of the estate, and Derek in his individual capacity and in his official capacity as co-administrator.[9] Bobby's complaint alleged that Melanie and Derek falsely swore that Derek was Brandon's father when they petitioned the district court to appoint them as co-administrators of Brandon's estate, and that they intentionally omitted Bobby when asked to list Brandon's kin. According to Bobby, their fraudulent statements and omissions allowed them to settle the wrongful death claims against the tortfeasor and the underinsured motorist carrier, which they carried out for the purpose of enriching Melanie and divesting Bobby. Based on this conduct, Bobby asserted claims for breach of fiduciary duty, negligence, and fraud. As relief, Bobby sought compensatory damages, punitive damages, and costs.[10]

On August 12, 2015, Melanie, Derek, and the estate filed a joint answer and counterclaim. Therein, they acknowledged that Bobby was Brandon's

[9] The district court refused to hold any further hearings or take up any of the motions pending before it during the pendency of the circuit court action.

[10] The complaint did not seek to have Derek and Melanie removed as administrators, and it did not specifically request for Bobby to be awarded any portion of the estate or the wrongful death proceeds.

natural father. However, they denied that Bobby was entitled to any portion of the estate or the wrongful death proceeds. They asserted in their counterclaim that Mandy Jo's Law prevented Bobby from receiving any benefit from the wrongful death settlement or the estate. As relief, they sought dismissal of Bobby's complaint, a determination that Bobby forfeited his rights to Brandon's estate and wrongful death proceeds, and their costs and attorneys' fees. Attorney Richard M. Rawdon, Jr. signed the answer and counterclaim on behalf of all defendants (the estate, Melanie, and Derek).[11]

Next, in early January of 2016, approximately seven months after Bobby first filed his complaint in circuit court, Bobby filed a motion with the circuit court seeking to remove Melanie and Derek as co-administrators of Brandon's estate, disqualify Attorney Rawdon, appoint a public administrator to oversee the estate, and place the wrongful death proceeds in a receivership. The circuit court held a hearing on Bobby's motions on February 24, 2016. During the hearing, the circuit court orally stated that it was not going to consider Bobby's motion to remove Melanie and Derek as co-administrators. The circuit court indicated that it was unnecessary to decide the motion to remove before taking up the Mandy Jo's Law issue because everyone agreed that the money at issue was a fixed sum being held in escrow by Attorney Peters. Additionally, the circuit court stated that because the conduct at issue occurred before the district court, it was the most appropriate court to consider whether removal was warranted. The circuit

[11] It appears that by this point Attorney Peters had withdrawn from representing any of the parties.

court also determined that the same counsel could not represent Melanie/Derek and the estate; however, the circuit court indicated that Attorney Rawdon could continue to represent Melanie/Derek in their individual capacities.[12] After the hearing, Attorney Joseph Wright entered an appearance on behalf of the estate.[13]

The next major development occurred in April of 2016 when Attorney Peters filed a motion to intervene as a cross-claiming defendant. The circuit court granted Attorney Peters leave to intervene. In his pleading, Attorney Peters requested that he be awarded his $50,000 contingency fee, and be allowed to pay the $100,000 net proceeds of the wrongful death settlement into the Circuit Court Clerk's account. Brandon's estate then filed an "intervening cross-claiming complaint" against Attorney Peters. The estate asserted that the contingency fee agreement contained a provision in which Attorney Peters agreed: "All probate work for the Estate is included in this contract at no charge." The estate's counterclaim against Attorney Peters asserted that the provision made Attorney Peters responsible for the estate's on-going legal expenses. It requested Attorney Peters be held responsible for the estate's on-going legal fees and that "any portion of the $50,000 be used to pay the fees."

[12] It is undisputed that Derek has no claim to either the estate or the wrongful death proceeds. Therefore, as a practical matter, he has no individual claim to assert. His role in this case is limited to his actions as a co-administrator.

[13] We have not been able to locate a written order memorializing the circuit court's oral pronouncement. However, the final judgment rendered by the circuit court indicated that its determination mooted all other pending matters, which necessarily included the motion to remove Melanie and Derek.

On August 4, 2016, Bobby filed a motion for summary judgment, but the circuit court took the motion under submission until the facts were fully presented to it at the Mandy Jo's Law hearing. On August 8, 2016, a bench trial was held. The circuit court issued its findings of fact and conclusions of law on January 17, 2017. The circuit court found that Bobby did not take much of a role in Brandon's life prior to his move to Scott County and that Bobby, other than paying child support, had virtually no role in Brandon's life after his move to Scott County. Therefore, the circuit court concluded, "[Bobby] is foreclosed by Mandy Jo's Law to receive funds from Brandon's estate or from his wrongful death case."

This appeal followed. [14]

II. Appellate Procedure

Before we analyze the merits of Bobby's claims on appeal, we must address a procedural issue. As pointed out by the estate in its brief, Bobby failed to comply with CR 76.12(4)(c)(v). That rule states, in pertinent part, that each argument on appeal "shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." The estate claims that Bobby did not follow this rule, which is mandatory. *See Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990).

[14] Clearly, the circuit court's order was not dispositive of the entire case because the estate's claim against Attorney Peters was never ruled on by the circuit court. However, we have jurisdiction because the circuit court complied with Kentucky Rule of Civil Procedure ("CR") 54.02(1).

The estate is correct that Bobby's brief does not technically comply with CR 76.12(4)(c)(v). Bobby makes five main arguments in his brief. None of the arguments contains a statement at the beginning with reference to the record showing where the issue was properly preserved for review and, if so, in what manner. When a party has failed to comply with our appellate rules, we have three options: (1) ignore the deficiency and proceed with review; (2) strike the brief or its offending portions; or (3) review the issues for manifest injustice only. *K.M.J. v. Cabinet for Health and Family Services*, 503 S.W.3d 193, 196 (Ky. App. 2016) (quoting *Briggs v. Kreutztrager*, 433 S.W.3d 355, 361 (Ky. App. 2014)).

In choosing the appropriate course of action, it is important to consider the deficiency in light of the purpose of the rule at issue. The purpose of CR 76.12(4)(c)(v) "is not so much to ensure that opposing counsel can find the point at which the argument is preserved, it is so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration." *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012). The record in this case is not overly voluminous. Having reviewed it, we are confident that each error Bobby has raised on appeal was preserved below. Therefore, we will proceed with our review of the merits. *Asbury University v. Powell*, 486 S.W.3d 246, 257 (Ky. 2016) ("Because the appropriate procedural steps were taken below, we will address this issue.").

Nevertheless, we remind counsel that we could have stricken Bobby's brief or reviewed his claims under a standard far more deferential to the circuit

court. Counsel should not presume that if confronted with a similar delinquency in future, we will be so indulgent. *See Krugman v. CMI, Inc*., 437 S.W.3d 167, 171 (Ky. App. 2014) (striking brief and dismissing appeal for failure to comply with CR 76.12(4)(c)(v)).

III. Standard of Review

On appeal from a bench trial, the factual findings of the trial court shall not be set aside unless they are clearly erroneous; that is, not supported by substantial evidence. *Patmon v. Hobbs*, 280 S.W.3d 589, 593 (Ky. App. 2009); CR 52.01. Appellate review of legal determinations and conclusions from a bench trial is *de novo*. *Norwich v. Norwich*, 459 S.W.3d 889, 898 (Ky. App. 2015).

IV. Analysis

Mandy Jo's Law, which became effective in 2000, is comprised of two statutes, KRS 391.033 and KRS 411.137.

The first statute, KRS 391.033, applies to intestate property. It provides:

> (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.
>
> Wrongful death proceeds pass outside of the decedent's estate.

Therefore, a separate, but virtually identical, statute governs when wrongful death proceeds are at issue. KRS 411.137 states:

> (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.

A. The Circuit Court's Failure to Remove Melanie and Derek as Co-Administrators of Brandon's Estate Prior to the Mandy Jo's Law Hearing

Bobby's first assignment of error concerns a procedural issue, the circuit court's failure to remove Melanie and Derek as co-administrators of the estate prior to proceeding with the Mandy Jo's Law hearing. Ultimately, while we believe the circuit court had the authority to consider Brandon's motion, we do not believe that its failure to require the removal before the Mandy Jo's Law hearing prejudiced Bobby or altered the outcome of the dispositive issue before it.

The petition to probate Brandon's estate required the listing of the surviving spouse, heirs at law, and next of kin. Melanie and Derek knew that Derek was not Brandon's legal father. They also knew that Bobby was Brandon's natural father because Melanie had previously petitioned to have Bobby's paternity established. Likewise, Melanie accepted child support payments from Bobby for many years. Derek should not have been listed on the petition as Brandon's father. And, most importantly, the petition should have listed Bobby because he qualified as next of kin. As a potential heir, Bobby was entitled to notice of Melanie and Derek's application to be appointed as co-administrators. *See* KRS 395.015(2).

Melanie's failure to list and notice Bobby was the first misstep in this case. Had notice been properly given to Bobby, a hearing before the district court would have occurred before Melanie and Derek were appointed to administer the estate. *Id.* The hearing would have likely unearthed the potential Mandy Jo's Law issue, and Bobby and Melanie's conflicting position regarding his right to recover from the estate and wrongful death. This would have allowed the district court to consider the conflict *before* anyone was appointed to administer the estate, and

before the wrongful death action was settled. In this situation, the antagonism between Melanie and Bobby would have likely been sufficient ground to justify the denial of Melanie and Derek's motion to be appointed as co-administrators of Brandon's estate. *See Mullins v. Mullins*, 307 Ky. 748, 212 S.W.2d 272, 274 (1948).

Despite Melanie's omission, Bobby did receive notice of the probate proceedings. Bobby's counsel called Melanie the same day the petition was filed in probate court. By the following day, Bobby's counsel had spoken with Attorney Peters, and knew about the appointment. Likewise, within a short time of the appointment, Attorney Peters knew that Bobby, not Derek, was Brandon's natural father. Despite the fact that both the parties and their attorneys knew the petition filed with the district court contained a material misstatement of fact, no one took any action to correct it until mid-April 2015, some seven months later. We can neither understand nor condone the delay.[15]

As it relates to this dispute, however, both sides are equally at fault in allowing the omission and misstatement to go uncorrected. Melanie and her counsel filed the offending petition and, therefore, had the primary obligation to take action. It should be noted, however, that even though Bobby knew Melanie had failed to include him on the petition, his counsel affirmatively represented to Attorney Peters that Bobby might not object to Melanie's appointment. In January

[15] Our Rules of Professional Conduct require counsel act with candor toward the tribunal. This entails correcting any prior misstatements of material fact. *See* Rules of the Supreme Court ("SCR") 3.130-3.3(a)(1).

of 2015, Attorney Peters put Bobby and his counsel on notice that there was a potential Mandy Jo's Law issue. This was before Attorney Peters had settled the wrongful death claim. Had Bobby brought his concerns before the district court at that time, a new administrator could have been appointed before any adverse action was taken against Bobby. But, Bobby did not pursue this course. Instead, he waited another four months before he filed anything with the district court. Equally perplexing, Bobby waited over six months after filing his circuit court action before requesting the circuit court to remove Derek and Melanie.

According to Bobby, the circuit court's failure to rule on his motion to remove Derek and Melanie changed the litigation, posturing, and presentation of the evidence. He suggests that this error can only be remedied by vacating the judgment and remanding the case to the circuit court with instructions to grant his motion to replace Melanie and Derek with an impartial public administrator. We disagree.

By the time this matter was before the circuit court, there was nothing left for an administrator to do with respect to either the estate or the wrongful death claim. The Mandy Jo's Law issue had already been raised by both the estate and by Melanie in her individual capacity. Attorney Peters was holding all the proceeds of the estate in escrow until the Mandy Jo's Law issue was resolved, and the district court had abated the probate proceedings until conclusion of the circuit court action. It was clear that the outcome of the Mandy Jo's Law issue would determine Bobby's entitlement; the issue had to be decided by the circuit court;

and no money was going to be distributed until that issue was resolved. A public administrator would only have been able to sit idly by while Melanie and Bobby litigated the Mandy Jo's Law issue before the circuit court. Bobby's delay, not the circuit court's failure to act on the motion, caused the procedural irregularities he complains about on appeal.

We find *Wood v. Wingfield*, 816 S.W.2d 899, 901 (Ky. 1991), instructive with respect to whether a new administrator should have been appointed before the hearing. In *Wood*, Columbus Johnson, Jr., died intestate on May 27, 1977. On June 25, 1977, Curtis Wingfield was appointed administrator of the estate. Certain individuals were listed as heirs to the estate, which consisted of both real and personal property. Wingfield was among the heirs listed. Edith Wood, Johnson's illegitimate daughter, was not listed. The estate was settled and distributed. On July 31, 1985, eight years after Johnson's death, Edith Wood filed an action in the Butler Circuit Court claiming that she was an illegitimate child of Columbus Johnson, Jr., stating that she had received no interest in the estate, and requesting that the estate be reopened. The defendants were the heirs, their spouses, and Wingfield, who was named both as an heir and as the former administrator. A jury trial was held on the question of whether Wood was a child of the decedent. On August 21, 1987, the jury returned a verdict declaring that Wood was the child of the decedent. Judgment was ultimately entered upon this verdict. The case eventually made its way to the Supreme Court of Kentucky.

Before the Supreme Court, Wingfield argued that the trial court should have appointed a replacement administrator because his dual role could have confused and prejudiced the jury against him. The Kentucky Supreme Court rejected this claim as follows:

> We cannot say upon this record whether Wingfield should or should not have been named in his capacity of former administrator. Suffice to say that Wingfield's presence in that capacity may have been necessary so that full relief could be accorded to the parties by the trial court after return of the jury's verdict. Since the trial court has yet to fashion that relief, it would be premature for us to comment upon this point further. ***In any event, the presence of Wingfield at trial both individually and as administrator could hardly have been of sufficient confusion to the jury, if any it was at all, to result in prejudice justifying reversal of this judgment.*** Last, a successor administrator did not need to be appointed for the issue of parenthood to be determined; whether one is required for complete relief remains to be determined and can be first left to the trial court.

Id. at 905 (emphasis added).

Since this was a bench trial, there was no concern that the trier of fact would be misled or prejudiced by a non-neutral administrator. The fact that Melanie was acting in a dual capacity throughout the bench trial did not hinder Bobby's ability to mount a defense. In fact, the estate did not even question the witnesses and made no opening remarks. The circuit court's decision not to appoint a replacement administrator before deciding the Mandy Jo's Law issue did not prejudice Bobby.

There were many procedural missteps in this case. The initial failure to list Bobby falls on Melanie. However, we cannot ignore the fact that Bobby received notice almost immediately after the appointment. Yet, he did nothing to object to it for months. He only took action after the Mandy Jo's Law issue had already been raised. By this time, it was too late for any court to take meaningful action. The prejudice Bobby complained about before the circuit court could not have been remedied by that point. Likewise, it would be futile for us to remand for the appointment of a new administrator. It would not meaningfully change either the posture or the outcome of this dispute.

B. Burden of Proof

The parties agree that Appellees had the burden of persuasion with respect to proving Bobby abandoned the care and maintenance of Brandon during his minority; however, they disagree on the level of that burden. Before the circuit court, Bobby argued that the Appellees had to prove abandonment by the same "clear and convincing standard" used in parental termination cases. *See* KRS 625.090. Appellees countered that the circuit court should apply a preponderance of the evidence standard.

The clear and convincing standard requires "the party with the burden of proof to produce evidence substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt." *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky. 1989). The circuit court ultimately utilized a preponderance of the evidence standard. It reasoned that this standard was more appropriate because

this case involved "the receipt of money, not the removal of a constitutionally protected right." We agree.

The statutes that comprise Mandy Jo's Law do not specify the standard of proof required. Thus, we begin by analyzing the nature of the case at issue. It is undeniably civil. "In civil actions, proof by a preponderance of the evidence normally 'determines the rights of the parties.'" *Woods v. Commonwealth*, 142 S.W.3d 24, 43 (Ky. 2004) (quoting *Aetna Ins. Co. v. Johnson*, 74 Ky. (11 Bush) 587, 593 (1874)). In a civil proceeding, Due Process requires a heightened standard of proof "when the individual interests at stake . . . are both 'particularly important' and 'more substantial than mere loss of money.'" *Woods*, 142 S.W.3d at 43 (quoting *Santosky v. Kramer*, 455 U.S. 745, 755, 102 S. Ct. 1388, 1395, 71 L. Ed. 2d 599 (1982)). In this Commonwealth, we have required proof by clear and convincing evidence in several categories of cases.

> Among the most common of cases which require proof by clear and convincing evidence are termination of parental rights (*Cabinet for Human Resources v. E.S.*, Ky., 730 S.W.2d 929 (1987)), illegitimacy of a child born in wedlock (*Bartlett v. Commonwealth, ex rel. Calloway*, Ky., 705 S.W.2d 470 (1986)), unfitness of a natural parent for custody of a child (*Davis v. Collinsworth*, Ky., 771 S.W.2d 329 (1989)), proof of a lost will (*Clemens v. Richards*, 304 Ky. 154, 200 S.W.2d 156 (1947)), and fraud (*Larmon v. Miller*, 195 Ky. 654, 243 S.W. 939 (1922); *Ferguson v. Cussins*, Ky.App., 713 S.W.2d 5 (1986)).

Hardin v. Savageau, 906 S.W.2d 356, 357 (Ky. 1995).

We do not agree that this case is the type of case that would justify a higher standard. Money is the only thing at stake between the parties. Normally, when only money is involved, we apply the preponderance of evidence standard. *See Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808, 60 L. Ed. 2d 323 (1979). Bobby contends, however, that this is a unique case because "it is a posthumous determination of parental rights." Therefore, he maintains that we should apply the higher standard used in termination of parental rights cases.

While this issue appears to be one of first impression in our Commonwealth, Kentucky is not the only state to have a law restricting a parent's right to recover from a deceased child's wrongful death and/or estate. North Carolina has a statute that is virtually identical to Mandy Jo's Law. *See* N.C.G.S.A. § 31A-2.[16] While acknowledging some interpretive similarities with respect to the type of conduct that constitutes abandonment, the North Carolina Supreme Court held that the heightened burden of proof required by the state to terminate parental rights was not the appropriate standard to apply when deciding

[16] North Carolina's statute provides:

> Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except--
>
> (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
>
> (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

N.C. Gen. Stat. Ann. § 31A-2.

abandonment with respect to a parent's right to receive a portion of the deceased child's estate or the wrongful death proceeds arising from the child's death. *See In re Estate of Lunsford*, 359 N.C. 382, 388, 610 S.E.2d 366, 370 (2005).[17]

While Mandy Jo's Law uses some of the same terminology as the termination of parental rights statute, KRS 625.090, the right at issue in a Mandy Jo's Law case, money, cannot be equated to the rights at stake in a termination of parental rights case. Critically, the state is the plaintiff in a termination of parental rights case. When the state acts to deprive a defendant of a right, especially one as fundamental as the right to parent one's own child, we must demand a higher level of due process. "Parental rights are so fundamentally esteemed under our system that they are accorded due process protection under the 14th Amendment to the United States Constitution, when sought to be severed at the instance of the state." *O.S. v. C.F.*, 655 S.W.2d 32, 33 (Ky. App. 1983). Another reason we demand heightened due process in parental termination actions is because termination permanently severs the relationship between parent and child. *See M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 850 (Ky. App. 2008). The consequences of the termination decision affect not only the parent whose rights the state seeks to terminate, but also the child of that parent.

[17] In Ohio, the legislature, apparently recognizing the lessened interests involved in making the abandonment decision after death, explicitly required use of a preponderance of the evidence standard. *See* Ohio Rev. Code Ann. § 2105.10 ("The administrator has the burden of proving, by *a preponderance of the evidence*, that the parent abandoned the child." (emphasis added)); *see also* S.C. Code Ann. § 62-2-114 ("[I]f the court determines, *by a preponderance of the evidence*, that the parent or parents failed to reasonably provide support for the decedent as defined in Section 63-5-20 and did not otherwise provide for the needs of the decedent during his or her minority." (emphasis added)).

In contrast, the parties in a Mandy Jo's Law action are private parties; the state is not a party. Equally important, no constitutional rights are at issue. The child's death permanently severed the parent-child relationship. The matter is purely a financial one, not unlike any other civil action. Given the nature of action and the rights at stake, we agree with the circuit court that a preponderance of evidence standard, the default standard in ordinary civil actions, is the appropriate standard of proof in a Mandy Jo's Law proceeding.

C. Order of Proof

This brings us to Bobby's next argument. Bobby argues that the circuit court erred because the estate was essentially passive during the presentation of evidence, allowing Melanie to question all the witnesses. The parties and the circuit court agreed that the estate bore the burden of proof on the Mandy Jo's Law issue. Bobby attempted to argue that, because of this, Melanie had no right to present a case before the circuit court. While the circuit court determined that the estate bore the burden, it allowed Melanie's individual counsel to take part in the hearing. Based on this ruling, the estate called the witnesses, but immediately passed them to Melanie's counsel for questioning. Bobby asserts that because the estate did not present its own evidence, he should have prevailed on the Mandy Jo's Law issue.

To properly analyze this issue, it is essential to recognize that we are dealing with two distinct assets: (1) Brandon's estate; and (2) the wrongful death proceeds. The circuit court as well as the parties treated the wrongful death

proceeds as part of the estate. They are not. A wrongful death action does not belong to the estate. *Pete v. Anderson*, 413 S.W.3d 291, 300 (Ky. 2013). Even though KRS 411.130 provides that only the personal representative of the deceased can bring a wrongful death action, the statute does not accord any benefit of the recovery to either the estate or to the personal representative. Recovery by the personal representative under KRS 411.130 "does not inure to the decedent or his estate. It is for and goes directly to the kindred of the deceased in the order in the statute." *Rhodes v. Rhodes*, 764 S.W.2d 641, 643 (Ky. App. 1988).

Because the wrongful death proceeds never belonged to the estate, it was improper to place any burden on the estate with respect to the distribution of those funds. Additionally, once those funds were recovered, the personal representative had no cognizable interest in their ultimate distribution. "With no interest in the recovery, the personal representative is a 'nominal' party, as the 'real parties in interest are the beneficiaries whom [the personal representative] represents.'" *Pete*, 413 S.W.3d at 299 (quoting *Vaughn's Adm'r v. Louisville & N.R. Co.*, 297 Ky. 309, 179 S.W.2d 441 (1944)). While Melanie could not have filed a wrongful death action in her individual capacity, as a real party in interest to the proceeds of that recovery, she actually bore the burden of proving that Bobby was precluded from recovering his statutory share of the funds under Mandy Jo's Law.[18]

[18] While there are no Kentucky cases that deal with this exact issue, after having consulted other jurisdictions, we are confident that it was actually more appropriate for Melanie to have put on the proof in her individual capacity than for her to do so in her official capacity as administrator A review of the facts in *Hixson v. Krebs*, 136 N.C. App. 183, 185, 523 S.E.2d 684, 685 (1999), is

As Bobby points out in his brief, Melanie put on all the proof in her individual capacity, which Bobby was able to counter with his own proof. In the end, the error in stating that the estate bore the burden of proof with respect to the wrongful death proceeds was one of terminology only. It did not hinder Bobby's ability to mount a defense, and it had no impact on the trial court's ultimate decision.

With respect to the assets within the estate, KRS 391.035 allows any party claiming a right to the intestate's property to bring and pursue a claim. Melanie was claiming a right to the proceeds of the estate and, therefore, had the right to pursue a Mandy Jo's Law action. Given Bobby's complaints regarding the conflict between the estate and Melanie, it was actually more proper for Melanie, acting in her individual capacity, to put on the evidence than for the estate to do so.

D. Lack of Custody Order

One of Bobby's main contentions as to why the trial court erred centers on the fact that no court order granting him custody and/or visitation was ever entered. He argues that since there was not a custody or visitation order in place allowing him to visit Brandon, his failure to visit more regularly cannot be held against him in a Mandy Jo Law's proceeding. We disagree.

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illustrative of this point. Therein, the personal representative of the decedent recovered a substantial sum of money in a wrongful death action. The representative was also the decedent's father. After the money had been recovered, he filed a declaratory judgment action seeking to bar the decedent's mother from recovery based on a statute virtually identical to Mandy Jo's Law. However, the father instituted the action in his official capacity only. After the trial court entered a judgment in favor of the mother, the father appealed. That appeal was dismissed on the basis that "the estate was not an aggrieved party entitled to appeal the summary judgment in the declaratory judgment action to determine division of the wrongful death proceeds." *Hixson*, 136 N.C. App. at 185, 523 S.E.2d at 685.

Under proper circumstances, a court can restrict a parent's opportunity to provide companionship and care by curtailing or eliminating the parent's right to see the child. If a court has entered an order limiting or barring the parent from seeing the child, Mandy Jo's Law cannot be used to prevent the parent from sharing in the estate or wrongful death proceeds so long as the parent has complied with all orders requiring contribution to the support of the child. *See* KRS 391.033(1)(b) and KRS 411.137(1)(b). This does not mean, however, that a parent has no obligation to provide love and support until a court has entered an order. The obligation automatically arises when a child is born. For the purposes of Mandy Jo's Law, a court order is necessary to remove the obligation; it is not necessary to create it.

It is undisputed that Bobby was Brandon's father. Bobby could have established paternity at any time after Brandon's birth. *See* KRS 406.021 ("Paternity may be determined upon the complaint of the mother, *putative father*, child, person, or agency substantially contributing to the support of the child." (emphasis added)). This would have allowed Bobby to seek custody or visitation. *See Phillips v. Horlander*, 535 S.W.2d 72 (Ky. 1975) (holding that the father of a child born out of wedlock has a constitutional right to visit the child, notwithstanding the natural mother's opposition to visitation by the father).

However, Bobby did not take any action to assert his parental rights. He waited for Melanie to establish paternity. Even when that occurred, Bobby did nothing to assert his legal right to see Brandon. While Melanie may have preferred

for Bobby not to see Brandon, Bobby had a constitutional right to visit his son. The fact that Bobby chose not to exercise his constitutional and statutory rights did not relieve him of his parental obligation to care for Brandon. As a father, Bobby had an obligation to care for Brandon, and a right to visit with him. Bobby cannot rely on the absence of an order he voluntarily chose not to request to escape Mandy Jo's Law.

E. Abandonment

Mandy Jo's Law provides that a parent who has "willfully abandoned the care and maintenance of his or her child" shall not have a right to intestate succession from the child's estate or the right to recover any proceeds from the child's wrongful death. There is scant published authority applying Mandy Jo's Law in Kentucky. In 2003, three years following the enactment of Mandy Jo's Law, this Court confronted it for the first time. *See Kimbler v. Arms*, 102 S.W.3d 517, 525 (Ky. App. 2003). After considering the statutory terms and examining authority from other jurisdictions, we determined that a factually intensive, case-by-case inquiry was necessary to determine whether a parent abandoned his or her child.

In so doing, we implicitly recognized that care and maintenance are interrelated components of a parent's overall responsibilities for his or her minor children. The ultimate question is whether the parent abandoned his or her child, and no one factor is determinative of the that issue. We explained:

> [F]or the purposes of applying Mandy Jo's Law, abandon means "neglect and refusal to perform natural and legal obligations to care and support, withholding of parental care, presence, opportunity to display voluntary affection and neglect to lend support and maintenance . . . It means also the failure to fulfill responsibility of care, training and guidance during the child's formative years." Further, as correctly observed by the circuit court, the differing factual situations that are likely to appear in this context make a bright line rule impossible, and, as such, analysis under Mandy Jo's Law must be done on a case-by-case basis.

Id. (footnote omitted).

When the *Kimbler* Court applied its definition of "abandonment" to the facts before it, it affirmed the circuit court's conclusion that Kimbler willfully abandoned his son "[b]ased on Kimbler's undisputed failure to satisfy his child support obligation with isolated exceptions, the questionable nature of his visitation with Justin and general lack of involvement in fundamental areas of Justin's life such as education . . . ." *Id.* Therefore, in accordance with Mandy Jo's Law, the *Kimbler* Court precluded Kimbler from receiving proceeds from his son's wrongful death settlement.

Bobby would have us apply Mandy Jo's Law in a more disjunctive manner such that care and maintenance must be considered separately. He maintains that because he paid his court-ordered child support, he did not abandon Brandon. He also argues that the trial court erred when it concluded that he had failed to maintain Brandon prior to the paternity action because Melanie signed the petition of paternity in which the judge noted that "County Attorney has no

objection at this point to direct payment because the Defendant has been supporting child."

In the same way that the nonpayment of child support is not a controlling factor in a court's decision regarding abandonment,[19] we hold that the payment of child support is likewise not dispositive. The words "care and maintenance" must be combined to define a parent's overall responsibilities. This is evident from the phrasing of the statute. If abandonment of both care and maintenance were required to terminate a parent's right to share in the estate or wrongful death proceeds, the renewed assumption of either care or maintenance would be sufficient to rehabilitate. The language of Mandy Jo's Law, however, requires that, in order to rehabilitate, a parent must resume the "care and maintenance" of the child, not just one or the other. This signifies that the words are indivisible, representing a single concept. Consequently, the analysis of whether a parent has "willfully abandoned the care and maintenance" of a child requires the consideration of numerous factors, including the parent's display of love, care, and affection for the child and the parent's financial support and maintenance of the child. As we held in *Kimbler*, no one factor is controlling. Accordingly, we reject Bobby's argument that a parent is not precluded from inheriting under Mandy Jo's Law if that parent abandons the "care" but not the "maintenance" of his or her child.

[19] *Kimbler*, 102 S.W.3d at 519 ("[T]he nonpayment of child support, while relevant and material under the applicable legal principles, was not the controlling in the [circuit court's] decision.") (internal quotation marks and citation omitted).

Here, the circuit court found that Bobby did not take much of a role in Brandon's life prior to his move to Scott County and that Bobby, other than paying child support, had virtually no role in Brandon's life after his move to Scott County. The circuit court based its findings on evidence in the record that Bobby did not know the name of Brandon's elementary school in Louisville, that Bobby only visited Brandon twice after his move to Scott County despite Bobby being just an hour away from Brandon, and that Bobby only sent a few cards and gifts to Brandon despite Brandon's Christmas and birthday cards reaching out to Bobby. The record supports the circuit court's conclusions.

Likewise, the record supports the circuit court's conclusion that Bobby failed to provide adequate support for Brandon before entry of the child support order. Melanie testified that she petitioned for paternity because Bobby was not providing her with support. While the circuit court determined that Bobby likely gave Melanie more than $300, as she had testified, it found Melanie's testimony that Bobby failed to provide enough to support Brandon's essential needs credible. We do not believe that the evidence dictated a different finding.

Bobby could not point to any direct evidence of having supported Brandon prior to the paternity order. He relied primarily on the portion of the order stating that he had been voluntarily supporting Brandon. While Bobby was free to introduce this language to support his position, the circuit court was not bound to accord it any particular weight.[20]

[20] The Jefferson Family Court was not tasked with determining whether any past support was adequate because Melanie was not entitled to seek any back child support for the period that

While Bobby provided Brandon with financial support after entry of the child support order, he failed to perform virtually every other obligation as a parent. There were 6,570 days between Brandon's birth and his eighteenth birthday. Bobby could not recall seeing Brandon on more than a few of those days, and none after Brandon turned nine. By his own testimony, Bobby was content knowing that Brandon's stepfather was doing a good job parenting Brandon. The only thing Bobby ever did was pay regular child support after the family court ordered it. While monetary support is important, it is not determinative. The evidence was sufficient to support the circuit court's conclusion that Bobby abandoned Brandon, notwithstanding Bobby's child support payments.

F. Estoppel

Bobby contends that Melanie cannot claim abandonment under the doctrine of equitable estoppel because she asked Bobby to abandon their child. Essentially, Bobby argues that his absence from Brandon's life was requested by Melanie and that his acquiescence to her request/demand should not be held against him under Mandy Jo's Law. Because Kentucky courts have yet to apply the doctrine of equitable estoppel to Mandy Jo's Law, we believe the matter presents an important issue of first impression.

The doctrine of equitable estoppel is based upon the following theory:

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predated the filing of her paternity petition. KRS 406.031(1), which became effective in July of 1990, approximately seven years before Melanie filed the paternity action, provides that "liability for child support shall not predate the initiation of action taken to determine paternity as set forth in KRS 406.021 if the action is taken four (4) years or more from the date of birth."

> [w]here one has, by a course of conduct, with a full knowledge of the facts with reference to a particular right or title, induced another, in reliance upon such course of conduct, to act to his detriment, [s]he will not thereafter be permitted in equity to assume a position or assert a title inconsistent with such course of conduct, and if [s]he does [s]he will be estopped to thus take advantage of [her] own wrong.

Farmer v. Gipson, 201 Ky. 477, 257 S.W. 1, 2 (Ky. 1923). More recently, in *Fluke Corp. v. LeMaster*, 306 S.W.3d 55 (Ky. 2010), the Supreme Court of Kentucky noted that the doctrine of equitable estoppel under current Kentucky law "requires both a material misrepresentation by one party and reliance by the other party . . . ." *Id.* at 62.

Melanie, even if she did tell Bobby to stay away from Brandon, did not materially misrepresent anything. *See id.* Both Bobby and Melanie knew that Bobby was Brandon's biological father. Bobby had a right to see Brandon even if Melanie objected to it. The fact that she voiced her objection to Bobby, did not prevent him from taking action to see Brandon, if he so desired. Therefore, Bobby cannot establish the essential elements of an equitable estoppel claim.

V. CONCLUSION

After a careful review of the record, we AFFIRM the judgment of the Scott County Circuit Court.

NICKELL, JUDGE, CONCURS IN RESULT ONLY AND FILES A SEPARATE OPINION.

COMBS, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING IN RESULT ONLY: Respectfully, I concur in result only. Though fully concurring with the majority, I concur in result only and write separately to address the matter of abandonment under Mandy Jo's Law and to comment on the well-articulated concerns voiced by the dissent.

I agree *Kimbler, supra*, is both dispositive and compulsory regarding any abandonment by the father, Bobby, of his son, Brandon. The Legislature enacted Mandy Jo's Law to specifically address ignoble parental conduct, and we are compelled to apply its exclusionary provisions. Pursuant to the expansive definition of natural and legal parental obligations announced in *Kimbler* regarding abandonment *vis-a-vis* Mandy Jo's Law, our analysis must focus solely on whether Bobby willfully abandoned Brandon by failing to provide sustained or renewed "care *and* maintenance." *Kimbler*, 102 S.W.3d at 525 (emphasis added); KRS 391.033 and KRS 411.137. Bobby clearly provided child support payments for the maintenance of Brandon. However, it is axiomatic that "care" demands a parent's presence, affection, training, and guidance "during the child's formative years." *Id*.

I also agree proper statutory construction of the "care and maintenance" required under Mandy Jo's Law necessitates performance of these two parental obligations be weighed in tandem, rather than disjointedly. Abdicating one's parental duty to provide either essential obligation can be

devastating to a child, and because the Legislature deemed a parent must provide both "care" *and* "maintenance," failure to provide either is sufficient to kindle the exclusionary provisions of Mandy Jo's Law.

Here, the circuit court barred Bobby from receiving money from Brandon's estate and the wrongful death settlement pursuant to Mandy Jo's Law because it found, as trier, that he had willfully abandoned—without resuming—the "care and maintenance" of his son. In support, the circuit court found Bobby "failed to adequately support the child or play much of a role in his upbringing until the child was almost seven (7) years of age," and thereafter continued to have no role in the child's life other than paying regular court-ordered child support. This finding was supported by substantive evidence establishing Bobby had failed to initiate—much less resume—parental care obligations even after being forced to commence child support payments. Particularly, the circuit court noted Bobby only saw Brandon twice after the boy turned eight years old, knew little or nothing about the boy's education or activities, and did not attend his son's funeral or contribute to payment of burial costs. Bobby's failings as a parent may not mirror the severity of those of the father in *Kimbler*, who failed to provide both "care" and "maintenance," but his singular failure to provide "care" sufficiently offends required fundamental parental obligations to spark exclusion from his son's estate and the wrongful death settlement under Mandy Jo's Law. Thus, I concur with the majority.

In so holding, I am not oblivious to the dissent's concern that the

mother, Melanie, may arguably appear to gain an unjust windfall by having accepted the benefit of Bobby's child support payments during their son's minority, while now excluding Bobby from any share of their son's estate and the wrongful death settlement due to his asserted acquiescence to her request that he pursue no visitation during that period, and thereafter. However, based on trial testimony, the circuit court found Bobby "[m]ore likely" elected to pay child support and not pursue court-ordered visitation with Brandon because he "was trying to maintain a relationship with his wife after Brandon was born" and simply "found it more convenient to stay absent." If so, it might also be argued Bobby received the "benefit of his bargain"—intentionally abandoning Brandon while deserting Melanie to singularly provide a genuine nurturing relationship for their son throughout minority and adulthood—even if she apparently did so gladly and later with the loving assistance of her husband, Derek. By forsaking his full statutory parental duty to provide Brandon both "care and maintenance," Bobby shirked essential obligations, thereby forfeiting inheritance or recovery rights as Brandon's father pursuant to Mandy Jo's Law.

Finally, I concur in result only because I share the dissent's extreme displeasure regarding Melanie and Derek's intentional and deceptive omission of Bobby as Brandon's natural father on the probate petition. Instead, they clandestinely and deceitfully listed Derek as Bobby's father. The dissent's characterization of the egregious nature of this calculated misrepresentation cannot be overstated. I am likewise confounded by counsel's inexplicable delay in

correcting the misinformation, which was discovered soon after the order was entered by the district court. Nonetheless, I cannot agree with the dissent's assessment that these exasperating misadventures compel imposition of the equitable doctrine of "unclean hands" to stifle the Legislature's specific intent in enacting Mandy Jo's Law to preclude unjust enrichment of natural fathers and mothers who are found to have willfully abandoned their fundamental parental obligations to provide "care and maintenance" to their children. Here, *all* hands were "unclean," and though I share the dissent's irritation with the tangled deceptive web woven by the parties in words and actions, I am persuaded the circuit court benefited from a better perspective for weighing credibility and discerning the truth. For this reason, I concur in result only.

COMBS, JUDGE, DISSENTING: Respectfully, I must dissent from the majority opinion. I am soundly persuaded that the facts of this case do not support a finding of "willful abandonment" pursuant to the clear statutory language. Although Bobby did not qualify as participating, active parent in Brandon's life, he nonetheless complied with the court order that he pay child support when at last he was so ordered. His paternity had been legally established by Melanie's petition. As the majority opinion accurately points out, Bobby should have been listed on the petition to probate the estate. His omission, coupled with the naming of Derek as the natural father, was certainly not an oversight. Rather, it was a deliberate and knowing deception in light of Melanie's previous petition to establish paternity. It was, in essence, a fraud perpetrated on the court.

This case conjures up the equitable doctrine of "unclean hands," which, in a nutshell, dictates that a party who comes before a tribunal seeking justice must come without having engaged in fraudulent, deceitful, or unconscionable conduct. It is true that our courts have held that the rule is not so absolute as to "repel all sinners" from relief. *Dunscombe v. Amfot Oil Co*., 201 Ky. 290, 256 S.W. 427, 429 (1923). *See also Suter v. Mazyck*, 226 S.W.3d 837, 843 (Ky. App. 2007), *as modified* (July 13, 2007). But it is nonetheless a factor that must be weighted in the balance. In the case before us, I am persuaded that it weighs adversely to Melanie.

Although it perhaps would have been both distasteful and painful for Melanie to comply with the law under the tragic circumstances of this case, the law nonetheless required – at a minimum – the truth. The dishonest action taken by Melanie in petitioning for probate is tantamount to an attempt belatedly to terminate parental rights. Instead of invoking the jurisdiction of a court to terminate Bobby's parental rights, she sought a legal determination of his paternity – and then accepted the benefit of the payments of child support that flowed from that decree. She simply cannot have it both ways – either in law or in equity.

The majority opinion (at page 22) correctly lists a virtual litany (could have, should have, would have) of what was required procedurally to comport with the law. The multiple failures to comply with those procedural requirements simply cannot be overlooked. They constitute far more than harmless error. And arguable failure of counsel to comply with the technical requirements of CR 76.12

(4)(c)(v) pales in comparison to the egregiousness of the series of so-called "missteps" flowing from the deceptive omission of Bobby's designation as the natural father on the petition for probate.

With respect to Mandy Jo's law, I agree that a case-by-case analysis is required. The literal wording of the statute contemplates "willful abandonment" – a sweeping, all encompassing, and devastating abdication of parental responsibility and duty. The facts in this case simply do not equate with such a finding pursuant to Mandy Jo's law. It was Melanie who asked Bobby to refrain from visitation with Brandon after she married Derek. Bobby agreed to her request "because he believed Derek was a good influence on Brandon" and because "he thought it would be best for Brandon if he did not interfere." (Majority opinion, page 8). His explanation simply cannot be held to equate with the willful abandonment contemplated by Mandy Jo's law. And regardless of which standard of proof should apply (be it "clear and convincing" or "preponderance"), willful abandonment cannot be shown.

We do not need to address the relevance of equitable estoppel. The facts alone suffice to indicate that willful abandonment did not occur.

Consequently, I would vacate and remand this case for further action by the circuit court.

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BRIEF AND ORAL ARGUMENT
FOR APPELLEES, MELANIE AND
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