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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000514-ME

EVAN MATTHEW FRY — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 16-CI-00172

APRIL DAWN CAUDILL — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, D., JUDGE: Evan Matthew Fry brings this appeal from the Carter Circuit Court's order denying his petition for visitation with his former stepchildren. After review, the circuit court's order is insufficient as to whether Fry has standing to even bring this petition. We therefore vacate the order and remand.

I. BACKGROUND

Fry and April Dawn Caudill married in 2013 and divorced roughly three and one-half years later. No children were born of the marriage. However, prior to the marriage, Caudill had had two children.

Caudill's two children, who resided with their mother and stepfather throughout the marriage, were ages five and six when their mother remarried. Shortly thereafter, their biological father's parental rights were legally terminated. Fry did not adopt the children, though, at any time. By Caudill's own admission in her brief before this Court, she feared adoption would result in the loss of her children's "medical card." Regardless, following the divorce, Fry brought the underlying petition for visitation with his former stepchildren.

Fry's visitation petition was the first time he had presented the issue to the circuit court. The divorce decree incorporated a settlement between the parties, and Fry's rights to visit the children were not decided in that agreement. Nonetheless, the circuit court held a hearing on the matter and heard extensive testimony regarding Fry's involvement in the children's lives. Saliently, Fry claimed that he had developed a close bond with the children during the marriage and that Caudill was contesting visitation out of spite. In support of these claims, Fry explained that he was the sole breadwinner for the family and that he often prepared the children's meals and generally entertained the children by playing video games, taking them hunting and fishing, and watching television with them.

Fry further relayed that the children referred to him as "Dad" and even bore his last name. Concerns were also raised regarding the children's hygiene and toileting skills while at school in the wake of the divorce. As for Caudill's motivations, Fry provided deposition testimony wherein she declared her hatred for him.

In rebuttal, Caudill disputed the nature of Fry's relationship with her children. She claimed the relationship was neither as close nor as loving as Fry contended. Caudill testified that she thought the children were afraid of Fry. She also revealed that she and Fry did not see eye to eye when it came to child discipline: she cited a few instances where Fry placed the children in timeout, facing a wall, for long periods of time.

After hearing this testimony, the circuit court ultimately determined that it was not in the children's best interests for Fry to visit them. The circuit court found that Caudill was a fit parent and evidently took her wishes into consideration before finding that the children would be fine without Fry in the picture. This appeal followed.

II. STANDARD OF REVIEW

A trial court's taking and weighing of evidence is reviewed under the deferential abuse of discretion standard; it will not be disturbed absent an unsound or unreasonable result. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). Substantial evidence from the record must support any factual determinations undergirding a child custody or visitation decision. CR[1] 52.01; *Reichle v. Reichle*,

[1] Kentucky Rules of Civil Procedure.

719 S.W.2d 442, 444 (Ky.1986). Conclusory statements—or statements which merely state a conclusion without justification—are not proper findings of fact or conclusions of law because, in addition to appearing arbitrary, they deprive the parties from obtaining meaningful appellate review. *See 500 Associates, Inc. v. Nat. Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006) (explaining that sufficient facts supporting conclusions must be set forth so the parties and reviewing courts understand the decision).

III. DISCUSSION

On appeal, Fry argues that the circuit court committed reversible error during its analysis of the children's best interests. Primarily, Fry argues that his relationship with the children was significant enough to effect a waiver of Caudill's superior custody rights. Relying on his testimony as to the quality of his relationship with the children, Fry cites several cases in which a non-parent had a unique relationship with a child, and based on the circumstances surrounding that relationship, overcame the parent's rejection of a prospective relationship between the child and the non-parent. From these cases, Fry attempts to argue the circuit court improperly weighed the evidence. We disagree with this characterization; however, we do find that the circuit court failed to adequately explain why Caudill did not waive her superior rights to custody.

Although the record contains several citations from cases such as *Troxell v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), *B.F. v.*

T.D., 194 S.W.3d 310 (Ky. 2006), and *Boone v. Ballinger*, 228 S.W.3d 1 (Ky. App. 2007), the following is the controlling law in this case:

> non-parents may attain standing to seek custody or visitation of a child only if they qualify as *de facto* custodians, if the parent has waived her superior right to custody, or if the parent is conclusively determined to be unfit.

Truman v. Lillard, 404 S.W.3d 863, 868 (Ky. App. 2012) (citing *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010)). *Truman* and *Picklesimer* are two cases resulting from a line of holdings addressing the rights of non-parents when seeking timesharing and/or custody with biologically unrelated children. For instance, *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979), first recognized a stepparent's standing to petition for visitation with his former stepchildren. KRS[2] 403.270 later abrogated *Simpson*, however, upon introducing the *de facto* custodian element into the analysis.[3] Thereafter, the non-parent seeking custody or visitation could demonstrate that he was the sole, primary caregiver of the child for a six-month period.

In addition to the *de facto* custodian element, *Troxell* held that parents had a superior right to control who could visit their child. *Troxell* then explained that parents could waive their superior right to custody if the challenging party could prove by clear and convincing evidence that his presence would serve the child's best interests. From there, Kentucky courts considered non-parent

[2] Kentucky Revised Statutes.

[3] *Simpson* relied on a determination that the stepparent acted *in loco parentis*.

visitation in the context of same-sex couples (*Truman* and *Picklesimer*) and in situations where paternity was at issue (*Ballinger*).

Here, Fry is correct that there is only one issue in dispute, *i.e.*, whether Caudill had indeed waived the *Troxell* presumption. From Fry's own testimony, the circuit court concluded that Caudill is a fit parent and that Fry does not qualify as a *de facto* custodian. However, a full reversal of the circuit court's findings as to the waiver issue is not warranted.

Based on our review of the record, we cannot find where the circuit court made any actual findings in support of its conclusion that Caudill did not waive her superior rights. Although *Picklesimer* relied on several factors listed in *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004), as a non-exhaustive guide to facilitate this kind of decision, the circuit court did not appear to take any of these factors into account. Rather than decide the issue based on the parties' testimony, the length of the marriage, the children's youth during that same duration, the children's ability to adjust going forward, or some combination thereof, the circuit court simply recited the parties' respective claims and contributed the following:

> The Court does find that Petitioner enjoyed a parental relationship with the minor children during his relationship and marriage to Respondent. He engaged them in various activities. However, the Court finds that there is a difference in opinion as to how the parties discipline the children and the mother believes it is in the children's best interest that they not have Court ordered timesharing with the Petitioner.

Whether in the context of child discipline, or any other decision concerning child-rearing, conflicts between divorcing parties will surely persist. The mere existence of which, without a clear finding of child endangerment, is not an appropriate basis to determine whether the non-parent has established a significant enough relationship with the children to overcome the parent's wishes. Instead, the focus is on the effect the parties have on the children. If the children do not respond well to Fry's discipline based on Caudill's testimony, and the court finds Caudill a credible witness, this is competent evidence to support a conclusion that Caudill did not waive her superior rights. Since that is not the case, however, we must vacate the judgment and remand for appropriate written findings as to whether Fry has standing to petition for visitation through Caudill's waiver of her superior custody rights.

ACREE, JUDGE, CONCURS AND FILES A SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I concur in the majority opinion. As opinions of this Court must, it faithfully follows established jurisprudence; specifically, it follows *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010). Seeing no way to distinguish *Mullins*, it became my duty to concur when Judge Thompson dissented; otherwise, I would cause my Court to violate SCR[4] 1.030(8)(a) ("Court

[4] Rules of the Supreme Court.

of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court . . . .")

However, while it is this Court's duty "to follow precedent established by [the] higher court," it is also this Court's duty to "set forth the reasons why, in its judgment, the established precedent should be overruled . . . ." *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). Doing so advances our jurisprudence, as when "'[w]e . . . encourage[d] our Supreme Court to revisit th[e] issue [of parental consortium] in the light of modern developments in this area of the law.'" *Giuliani v. Guiler*, 951 S.W.2d 318, 319 (Ky. 1997) (quoting the Court of Appeals opinion on review). I encourage the Supreme Court to revisit *Mullins*.

Mullins was rendered in a different era of American jurisprudence – the pre-*Obergefell* era. *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (Fourteenth Amendment guarantees to same-sex couples fundamental right to marry). The movement to recognize a person's right to marry someone of his or her same sex did not occur in a vacuum; it was largely prompted by the ancillary prohibitions on the ability of same-sex couples to raise children together. We should be frank and admit that the state constitutional and statutory prohibition of same-sex marriage challenged judicial discipline as our jurists considered modern parent-child relationships. The challenge for many was to answer the objective question – what is the law? – rather than the subjective question – what seems the right thing to do? Which question *Mullins* answered is now irrelevant because of *Obergefell*.

But we cannot escape the fact that *Mullins* was decided as it was because of, and as a way of avoiding, the pre-*Obergefell* era prohibitions. Like them or not, and whether intentionally targeting the gay community, or not, the prohibitions were based either in our state constitution or were statutory. They prohibited same-sex marriage. KY. CONST. 233A. They prohibited adoption of a same-sex partner's biological or adopted child without terminating that partner's parental rights. *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 820 (Ky. App. 2008). And by the statutory creation of the *de facto* custodian, Kentucky courts lost the ability to apply the *in loco parentis* doctrine that might have allowed a same-sex partner the standing to seek custody or visitation with her non-biological child. *B.F. v. T.D.*, 194 S.W.3d 310, 311-12 (Ky. 2006). *Mullins* was a "hack"[5] to clear some of these blockages.

Granted, the solution required a little judicial contortion. The Court had to use Kentucky's Uniform Child Custody Jurisdiction and Enforcement Act in a way different than its intended fundamental purpose of resolving jurisdictional contests between states. *Wallace v. Wallace*, 224 S.W.3d 587, 589 (Ky. App.

[5] The original definition of the term "hack" is "to clear (a road, path, etc.) by cutting away vines, trees, brush or the like[.]" Random House Dictionary of the English Language 857 (2nd ed. 1987) (definition 3). In the modern vernacular it is often used to describe an inelegant but effective solution to a specific computing problem. The Urban Dictionary offers this definition: "A temporary, jury-rigged solution, especially in the fields of computer programming and engineering: the technical equivalent of chewing gum and duct tape." https://www.urbandictionary.com/define.php?term=hack (last visited April 14, 2018). Most recently, "life hack" is used to describe creative solutions to life problems without following the rules. https://www.merriam-webster.com/dictionary/life hack (Merriam-Webster online dictionary ("LIFE HACK . . . a usually simple and clever tip or technique for accomplishing some familiar task more easily and efficiently").

2007) ("the fundamental purpose of the UCCJEA remains the avoidance of jurisdictional competition and conflict with other states in child custody matters"). The truth about *Mullins* is there was no jurisdictional conflict. In fact, as the Court noted, the parties "forum shopped" to find a court that would not interfere with their plan to parent a child together despite the prohibition of their marriage.[6]

Perhaps the duplicitous efforts by the parties in *Mullins* are understandable. The same statutory scheme that allowed stepparent adoption without terminating the biological parent's parental rights did not allow the equivalent results in same-sex relationships. *S.J.L.S.*, 265 S.W.3d at 820 (citing KRS 199.500(1) and KRS 199.520(2)). Upon the separation of heterosexual parents, one of whom adopted the other's child, the adopting parent's rights to custody and visitation are enforceable equally with the biological parent. But when same-sex partnerships broke up, there was no such protection. *Mullins* fixed this consequence of the statutory impediment to adoption within same-sex

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[6] Summarizing how Mullins obtained *de facto* custodian status, the Court said:

> It is undisputed that the parties signed the following documents on January 20, 2006: petition for custody; entry of appearance and consent to custody; and agreed judgment of custody. The documents stated that Mullins was the de facto custodian of Zachary—that Mullins was his primary caregiver and primary financial supporter for a period of time not less than six months from the date of his birth.
>
> Even though the parties were living in Lincoln County, the petition and entry of appearance were filed in the Garrard Circuit Court without objection by either party. Without an evidentiary hearing, depositions, or any form of evidence taken prior thereto, the trial court signed the agreed judgment and entered the same on February 3, 2006. No appeal was filed from this judgment.

Mullins, 317 S.W.3d at 572; *see also S.J.L.S.*, 265 S.W.3d at 809 (describing a different same-sex couple's similar legal approach to a "long-term plan [for] raising a child together").

partnerships by vesting in the non-biological parent the possibility of claiming custody and visitation rights when such a partnership goes south.

In this post-*Obergefell* era, some informed commentators[7] would say it is unfortunate that *Mullins* also had the effect of weakening the biological parent's parental rights protections against attack by her children's stepfather or even her live-in boyfriend. That is because *Mullins* provides a "back door" to the requirement in KRS 199.500(1) that the biological parent consent to adoption; *Mullins* provides a "work around" protection that parenting the child alongside the natural parent does not meet the *de facto* custodian standard. *Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky. App. 2001), *abrogated on other grounds by Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). These non-statutory shortcuts are what I believe this case highlights – the unintended consequences of *Mullins*.

The *Mullins* solution to the pre-*Obergefell* prohibitions is simply unnecessary today. Same-sex partners can marry and, if one is a biological or adoptive parent, he or she may allow his or her spouse to adopt the child pursuant to KRS 199.500(1) and KRS 199.520(2). Yet *Mullins* remains good law and an open door through which to assault the constitutionally protected right of a person to parent his or her biological or adopted child. The case before us demands an answer to the following question: is *Mullins* applicable only "when the child was conceived by artificial insemination with the intent that the child would be co-parented by the parent and her [same-sex] partner . . ."? *Mullins*, 317 S.W.3d at

[7] I would venture to identify Judge Thompson as such an informed commentator, based on his dissent.

575. Such an interpretation would tacitly admit *Mullins* is the hack I assert it is and, as the dissent in *Mullins* said, "writ[ten] with a wide legislative brush[.]" *Id.* at 581 (Cunningham, J., concurring in part and dissenting in part).

If *Mullins* is to maintain its viability, it must be applicable to heterosexual relationships like the one created when Caudill married Fry, and to the family the marriage created to include the boys who call Fry their "Dad." The Supreme Court of the United States would hold that when these parties married, a family was created providing fertile ground for unique bonds all around. *Obergefell*, 135 S. Ct. at 2601 ("marriage is the foundation of the family" (internal quotation marks and cite omitted)). For as long as it lasted (and certainly longer), their marriage, like every marriage, "safeguard[ed these] children and [this] famil[y] and thus dr[ew] meaning from related rights of childrearing . . . ." *Id.* at 2600. The parties' marriage "allow[ed these] children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* (internal quotation marks and citation omitted).

In *Mullins*, the Supreme Court of Kentucky strived to honor and protect the bond between Mullins and her partner's child – a bond previously recognized as founded only in a marriage. Supporters of same-sex marriage staked a claim to that foundation, advocating mightily for the right to marry, not frivolously, but for the very qualities of marriage and family described in *Obergefell*, and more. *Obergefell*, 135 S. Ct. at 2608 (these advocates "respect it

[the idea of marriage] so deeply that they seek to find its fulfillment for themselves"). How can we ignore what this means? – it means that marriage itself is significant evidence of a biological parent's intention to waive her superior parental rights in favor of her new spouse.

If the evidence in *Mullins* was enough to show waiver, how disingenuous would we appear if we said the evidence here, starting with Caudill's momentous decision to marry Fry, is lacking? How inconsistent would we appear if we failed to say a divorce "does not diminish the strong parental bond that has been allowed to develop between the child[ren] and the nonparent"? *Mullins*, 317 S.W.3d at 577.

So long as the door to custodial and visitation rights based on waiver remains open, it must be open to heterosexual and homosexual relationships equally, whether a marriage is involved or not. The fact is, the reason for opening that door in the first place is now behind us. Only the Supreme Court can close the door, and only the Supreme Court should determine whether it is best to do so.

For these reasons, I encourage our Supreme Court to revisit this issue of the waiver of parental rights in the light of modern developments in this area of the law. And, for these reasons, I concur.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I would affirm the trial court.

As their biological mother, Caudill has "a fundamental, basic, and constitutional right to raise, care for, and control" her children. *Mullins*

v. Picklesimer, 317 S.W.3d 569, 578 (Ky. 2010). Regardless of his emotional bonding with the children, Fry, as a stepparent, does not enjoy that same right and, generally, has no standing to seek custody or visitation. However, under Kentucky law, standing may be conferred by statute or case law.

Kentucky Revised Statutes (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 him to stand on an equal footing with the child's biological parents in matters such as custody determinations." *Boone v. Ballinger*, 228 S.W.3d 1, 7 (Ky.App. 2007). I agree with the majority that the evidence does not support *de facto* standing.

By case law, a non-parent can have standing if the biological parent is unfit or waived his or her superior right to raise, care for, and control his or her children. *Id*. at 10. There is no evidence that Caudill is unfit, so the only issue is whether she waived her superior right.

In *Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995), the Court extensively addressed the issue of the waiver of a parent's superior right to raise, care for, and control his or her child when challenged by a non-parent. It began by reciting the common definition of a legal waiver. It requires proof of a "knowing and voluntary surrender or relinquishment of a known right." *Id*. at 391. The Court then held:

> Because this is a right with both constitutional and statutory underpinnings, proof of waiver must be clear and convincing. As such, while no formal or written

> waiver is required, statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof.

Id. at 391. 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 trial court expressly found that Caudill did not waive her superior right to raise, care for, and control her children. In fact, there was no evidence that Caudill knowingly and voluntarily waived her superior right. The evidence focused only on Fry's relationship with the children during the marriage, which if Fry's testimony is credible, created an emotional bond. While that evidence may go to the best interest of the children, before the best interest of the children became the relevant standard, the trial court was required to find that Caudill intentionally or voluntarily relinquished her superior right as the children's biological mother. *Greathouse*, 891 S.W.2d at 390. Given the lack of clear and convincing evidence of waiver, the trial court did not abuse its discretion.

I respectfully submit the majority's opinion ignores the waiver issue and, instead, applies a best interest standard to the issue of standing. This is clearly contrary to the law. In other words, the issue of standing does not depend on the "effect the parties have on the children" as stated by the majority but depends exclusively on whether Caudill knowingly and voluntarily relinquished her parental rights so that Fry has standing to seek visitation against her wishes.

Even if evidence regarding the children's reaction to Fry's discipline and their emotional bond with Fry is somehow relevant to the waiver issue, other than his self-serving testimony, Fry completely failed to introduce any evidence regarding the children's emotional bonding with him. He did not request the appointment of a Guardian Ad Litem for the children, did not request independent psychological evaluations of the children, and did not subpoena school counselors or other parties who may have provided insight into the alleged emotional bond with their stepfather.

I conclude by noting that it is not uncommon for children to bond with a stepparent and a divorce in such situations is no less potentially traumatic than when biological parents divorce. However, aside from the constitutional rights of the biological parent that are implicated by stepparent visitation, I am concerned that the majority permits a stepparent to have standing based on his or her bond with a child. In situations where a child has more than one stepparent, there is at least the possibility that multiple non-parents could have visitation with the child, a situation that is not necessarily practical nor beneficial to the child.

I would affirm the trial court's finding that Caudill did not waive her superior right to raise, care for, and control her children, including refusing Fry visitation.

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BRIEF AND ORAL ARGUMENT
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