COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
SUPREME ACTION NO. 2012-SC-000721-DE

MELISSA ANN COFFEY, ET. AL — APPELLANTS

v.

BRIEF FOR APPELLANTS

JAMES WETHINGTON — APPELLEE

****

ON DISCRETIONARY REVIEW FROM KENTUCKY COURT OF APPEALS
CASE NUMBER 2011-CA-00055-ME AND
GREEN CIRCUIT COURT CIVIL ACTION NUMBER 10-CI-00022

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CERTIFICATE

The undersigned hereby certifies that copies of this brief were served upon the following individuals by United States Postal Service first class mail, postage prepaid, on April 12, 2013: Hon. Elmer J. George, 105 W. Main Street, Lebanon, KY 40033, Counsel for Appellee; Hon. Janet Coleman, Special Judge, 420 Briarwood Circle, Elizabethtown, KY 42701; Judge Donna Dixon, Kentucky Court of Appeals, 423 South 28th Street, Suite B, Paducah, KY 42001; Judge Christopher Shea Nickell, Kentucky Court of Appeals, 3235 Olivet Church Road, Suite F, Paducah, KY 42001; and to Justice Michelle M. Keller, Supreme Court of Kentucky, Kenton County Justice Center, Covington, KY 41011. The record on appeal was not withdrawn.

JAMES L. AVRITT, JR.
103 West Main Street, P.O. Box 671
Lebanon, KY 40033
Phone (270) 692-4270/9530
COUNSEL FOR APPELLANTS

INTRODUCTION

The Green Circuit Court entered a judgment awarding Appellants custody of two minor children after finding that they had standing pursuant to the UCCJEA, as adopted by our legislature in KRS Chapter 403.800 et seq, and that Appellee was an unfit parent. The Court of Appeals vacated the trial court's judgment with instructions to dismiss Appellant's custody petition on the grounds that they lacked standing.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT CONCERNING ORAL ARGUMENT

Appellants request oral argument, which they believe will assist the Court in clarifying Kentucky law with regard to the issue of standing in custody cases between a parent and non-parent. Based on the Kentucky Court Appeals opinion, there appears to be confusion or uncertainty with regard to our statutory scheme and the application of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as adopted by the legislature in KRS 403.800 through 403.880.

STATEMENT OF THE CASE

Appellee and JoAnn Wethington [hereinafter referred to as "JoAnn"] were married and had two children, Lucas Wethington and Leah Wethington, [hereinafter referred to as "Lucas" and "Leah"] who were born on February 6, 1996. The couple divorced on April 17, 2001 by decree entered in Green Circuit Court Case No. 02-CI-0016. The terms of a separation agreement were incorporated into the decree, which provided for the parents to have joint custody of their children, with JoAnn designated as "primary residential custodian." Appellee received visitation as set forth in the Standard Visitation Schedule for the Eleventh Judicial District, which included every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m., four weeks during the summer months, as well as extended visits during Christmas, spring break and fall break.[1]

On July 28, 2004 JoAnn filed a motion to suspend Appellee's visitation with Lucas and Leah after social services filed an action in the Hardin Juvenile Court alleging that Appellee sexually abused his daughter, Kayla Wethington (Lucas and Leah's half-sister) who was 15 years old at the time.[2] The Green Circuit Court entered an order on August 20, 2004 suspending Appellee's visitation with Lucas and Leah pending the outcome of a scheduled hearing on September 16, 2004.[3] However, the hearing was rescheduled on multiple occasions and never occurred. The parties subsequently entered an Order fifteen months later on November 14, 2005 which provided:

> (1) That up until January 1, 2006, the Petitioner shall have visitation with the parties' infant children during one day of each

[1] Record on Appeal, Pages 79-86
[2] Id. at page 66-68.
[3] Id. at page 69-70.

> week from 9:00 a.m. until 3:00 p.m., said visitation alternating each week between Saturday and Sunday. On or about January 1, 2006, the parties shall review and status and progress of the aforesaid visitation schedule and shall attempt in good faith to agree upon a long term schedule of visitation for the Respondent. In the event the parties are unable to agree, the parties shall submit their concerns and wishes to a settlement conference involving both parties and their respective attorneys. If unsuccessful, the parties may hereafter petition the Court for guidance.[4]

During the next five years Appellee acknowledged that he did not visit with his children on a consistent basis. In fact, Appellee only saw Lucas and Leah once or twice each summer when he took them boating and for a few hours at Christmas and Thanksgiving.[5] He also did not maintain contact by telephone. Both children testified that Appellee only called them the day before he intended to pick them up.[6] Prior to JoAnn's death on January 23, 2010, Appellee acknowledged that he had not seen Lucas and Leah since Christmas of 2008 (a period of 13 months) when they were with him for approximately four hours.[7] Neither child nor Appellee could recall the last time when they stayed overnight with him.[8] Both children could only recall staying two nights with Appellee after the divorce in 2001.[9] They believe the visits occurred five or six years ago when they were 8 or 9 years old.[10] Leah testified that they spent most of their time sitting in the garage. "We just sat there the whole time. He would ask us questions that a father should know like what grade I'm in and how old I am."[11]

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[4] Id at page 77
[5] Video recording at 9-23-10 at 1:23:08.
[6] Id at 9-23-10 at 10:06:13.
[7] Video recording, 10-18-10 at 2:26.
[8] Video recording, 10-18-10 at 2:28:34
[9] Id at 9-23-10 at 9:49:35, 1:25:33, 1:27:15,.
[10] Video recording, 9-23-10 at 1:27.
[11] Id at 1:30:08.

Appellee attempted to show that he was involved in the children's lives through a photo album that he introduced into evidence, which was prepared specifically for the hearing.[12] However, most of the pictures were taken from the time that the children were born up until June 18, 2006 when they were ten years old. There were also a few pictures of Appellee and Lucas that were taken in 2008 when they attended a car race. The rest of the pictures were taken during the summer of 2010 after this custody action was filed.[13] Appellee also introduced a diary that he kept in 2001 documenting his involvement in the lives of his children. However, he made no entries during the 9 years preceding the custody hearing in 2010.[14]

Furthermore, Appellee never attended any of the childrens' parent/teacher conferences, school activities or took them to the doctor either before or after JoAnn's death. Appellee was unaware of the subjects they were taking in high school or their grades in any class.[15] When Appellee was asked what interest he had shown in his children's education in the last ten years, Appellee responded: "I haven't."[16]

Appellee's relationship with his children could only be described as extremely poor. When Leah was asked to describe her communication with Appellee, she stated: "I wouldn't really call it communication."[17] Moreover, Leah was unable to provide any examples or describe any love and affection that Appellee had shown her in the past five years. [18]

When Leah was asked if her relationship with Appellee had improved since her mother's death on January 23, 2010, Leah replied:

No.

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[12] Video recording, 11-29-10 at 4:53:40
[13] Id at 11-29-10 at 4:53:46.
[14] Id at 10-18-10 at 4:53:30
[15] Id at 10-18-10 at 2:33:05-24; 9-23-10 at 1:33:15-26.
[16] Id at 10-18-10 at 2:33:50
[17] Id at 9-23-10 at 1:35:11-21
[18] Id at 9-23-10 at 1:37:07-22

Q. Can you tell us why you feel that way?

A. I don't think he wants to spend time with us, and we don't want to spend time with him.

Q. Alright. What—what makes you believe that he doesn't want to spend time with you?

A. He doesn't like us. He never wanted—before our mom died he never wanted to see us except on the major holidays... [19]

Lucas described his relationship with Appellee as "not good at all."[20] According to Lucas, Appellee hasn't shown him any love or affection since his parents divorced in 2001.[21] Lucas refers to Appellee as "Jimmy" instead of dad "because I don't consider him a dad. He doesn't act like one."[22]

The children have a close relationship with their maternal grandmother, as well as aunts, uncles and cousins on their mother's side. However, Lucas and Leah do not have a relationship with members of Appellee's extended family as a result of only seeing them for a few hours once or twice a year at Thanksgiving and/or Christmas. When Leah was asked to describe her relationship with her paternal aunts and uncles, she stated: "Not close. I don't know them."[23]

Appellant, Scott Coffey, is JoAnn's nephew and the first cousin of Lucas and Leah.[24] Appellants are married and have a son who is the same age as Lucas and Leah.[25] Having been raised together in Green County and attended the same schools, they consider him to be like a

[19] Id at 9-23-10 at 1:37:28-1:38:05
[20] Id at 9-23-10 at 10:32:21
[21] Id at 9-23-10 at 10:32:35
[22] Id at 9-23-10 at 10:39:41
[23] Id at 9-23-10 at 1:22:13
[24] Id at 10-18-10 at 10:13:37 and 10:14:24.
[25] Id at 10-18-10 at 10:11:07.

brother.[26] Appellants enjoyed a very close relationship with JoAnn prior to her death. Appellant, Scott Coffey, described JoAnn as more of a sister than an aunt.[27] As a result, he saw Lucas and Leah once or twice a week throughout their lives. Both children frequently accompanied Appellants on summer vacations, as well as went with them to go cart races, ball games and places like Kings Island amusement park. [28]

Since JoAnn and Appellee were divorced, he has resided in Hardin County with his girlfriend, who has provided the primary source of income for the family unit. Appellee did not file tax returns or maintain steady employment for over eight years prior to the final hearing in this case.[29] Lucas and Leah have been life-long residents of Green County and were in the ninth grade at Green County High School at the time of the hearing.[30] When Lucas was asked where he wanted to live, he testified:

> I want to live with the Coffeys because I've always—they have been like a family. They are family to me. Whenever we needed them, if our mom was at work and we were sick or something, they would always take us to the doctor. When we were with them and we were hungry, they would buy us something to eat. I feel safe with them and I don't—I feel like there's—I just feel real safe with them, and I feel like nothing would happen to me. And if I get taken away from them, I don't know what I'd do. I'd rather be put in a foster home than to go with him. [31]

Following JoAnn's death on January 23, 2010, at approximately 1:30 a.m.[32], social worker Christie Huddelston filed a petition alleging that the children were dependent "due to the sudden death of their mother and due to their father's whereabouts being unknown at this

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[26] Id at 10-18-10 at 1:16:39
[27] Id at 10-18-10 at 10:26:50.
[28] Id at 10-18-10 at 1:16:32-45
[29] Id at 1:58:40 and 2:01

[30] Id at 9-23-10 at
[31] Id at 9-23-10 at 10:38:59 and 10:39:33
[32] Video Recording, 10-18-10 at 1:00:17.

time".[33] Appellants had not spoken with Appellee since he and JoAnn divorced in 2001.[34] Lucas and Leah knew that their father lived in Elizabethtown, but had not seen him in over 13 months and had not been to his residence in over five years. They also did not have his telephone number, which was in the name of Appellee's brother.[35] The cell phone records provided by Appellee show that the first time he contacted Appellants was on January 23, 2010, at 7:30 p.m.[36], which was approximately eight hours after the Green District Court awarded emergency custody of the children to Appellants.[37]

Although Appellee acknowledged that he appeared on January 25, 2010 for a temporary removal hearing, the Court entered a "Temporary Custody Order" and continued custody of Lucas and Leah with Appellants.[38] The Department for Community Based Services [DCBS] was also ordered to perform a "Relative Home Evaluation" for both parties. The evaluation for Appellants was favorable. However, the evaluation for Appellant was unfavorable, and DCBS did not recommend placement with him. More specifically, DCBS supervisor Tony Helm testified that he approved the report which stated:

> Mr. Wethington has a substantiated CPS history:
>
> 10-12-2000 Child is being left home alone from 2:30 a.m. until she gets on school bus around 7:00 a.m. Father is at work during this time. The father uses alcohol excessively. His wife (the child's step-mother) and their children just left the home a few days ago because of his alcohol abuse.
>
> Substantiated neglect.

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[33] Appendix C
[34] Id at 10-18-10 at 10:41:29.
[35] Id. at 10-18-10 at 10:41:18.
[36] Record on Appeal, Exhibit 7.
[37] Id. at 10-18-10 at 10:40:24.; Appendix D
[38] Appendix E

> 09-15-2003 According to a referral source child has bruises on her arm from where her father hit her with a 2x4 last Wednesday. Child is afraid of her father.
>
> Substantiated physical.
>
> 06-30-2004 Victim is a 15-year-old runaway who turned self into EPD. Victim states she has been sexually abused by her biological father for the last 7 or 8 years.
>
> Substantiated sex abuse.[39]

Appellants filed a petition for custody in the Green Circuit Court on February 17, 2010 seeking permanent custody of Lucas and Leah.[40] Both parties subsequently filed motions for temporary custody. The trial court ruled in Appellants favor and awarded them temporary custody of the children. Appellee was initially given limited supervised visitation. [41]

The trial court subsequently extended Appellee's visitation with Lucas and Leah every Sunday from 12:00 p.m. until 7:00 p.m. while school was in session. During the summer months Appellee was given visitation every Sunday from 1:00 p.m. until 7:00 p.m., as well as every Monday, Tuesday and Wednesday from 6:45 a.m. until 7:00 p.m.[42] Although Appellee exercised visitation on Sundays, he concedes making no effort to see the children during the week.[43] According to Appellee, the children didn't want to go with him and he didn't want to force the issue.[44] Lucas and Leah acknowledged that they did not want to go with their father, but denied communicating their wishes to him.[45] Appellee also did not seek the court's intervention or make any effort to arrange counseling with his estranged children.

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[39] Record on appeal, Plaintiff's Exhibit 2.
[40] Record on Appeal, pgs. 1-4.
[41] Record on Appeal, pgs. 27-30.
[42] Video Recording, 10-18-10 at 1:19:46; Record on Appeal, pgs. 38-42.
[43] Video Recording, 10-18-10 at 2:40
[44] Id
[45] Id. at 2:40:49.

Appellee also failed to exercise visitation with his children on Sunday, July 4, 2010. [46] Appellee claimed that he didn't know he was supposed to have visitation on holidays.[47] However, the agreed temporary visitation order from May 13, 2010 made no mention of any exceptions for holidays. Appellant, Scott Coffey, testified that Appellee never made any effort to see the children that weekend and would not return phone calls.[48]

The parties also appeared before the trial court on July 28, 2010 on Appellee's motion for an emergency hearing after the prior visitation order expired. At that time, Appellee requested and was awarded additional day time visitation every other weekend from Saturday at 8:00 a.m. until 8:00 p.m., as well as Sunday from 12:00 p.m. until 6:00 p.m.[49] Appellee exercised his visitation during the weekends of July 30 and August 13, but not the weekend of August 28 which was only four days before the scheduled final hearing. Appellee claimed that he got "confused".[50]

Appellee testified that he always purchased Christmas and birthday gifts for the children, a claim which they denied.[51] Appellee stated that he would not disagree with the children's testimony that he did not purchase birthday gifts for them on February 6, 2010, which was only 14 days after their mother's death. Both children testified that Appellee occasionally gave them pull tabs that he purchased at a gas station. [52] However, if they won any money Appellee would say: "I'll just hold onto that for you so you won't lose it." But Appellee kept the money and

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[46] Id at 10-18-10 at 2:42:14-44
[47] Id. at 2:42.
[48] Id. at 10-18-10 at 10:48:35
[49] Record on appeal, pgs. 45-46.
[50] Video recording, 10-18-10 at 2:50:28—2:50:00; 10-18-10 at 10:47:29
[51] Id at 10-18-10 at 10:10:00
[52] Id at 09-23-10 at 10:08:57

never gave it back. Lucas also testified that his aunt Kathy gave them money on one occasion, but Appellee kept it. [53]

Appellee has a history of alcohol abuse. He acknowledged a DUI conviction in Green County on October 11, 1999 after he was stopped while returning from Green River Lake. [54] He also acknowledged a second offense DUI conviction in Hardin County in August of 2003.[55] Finally, he acknowledged a third offense DUI conviction in Hardin County on October 4, 2004.[56] Appellee testified that he attended court ordered Alcoholics Anonymous meetings as a result of these DUI convictions, but stopped going when the order expired. [57]

Appellee's alcohol abuse was also a concern with regard to his ability to parent his children. On November 14, 2005 an order was entered in the divorce action (Green Circuit Court Case No. 02-CI-00016) which provided:

> Appellant shall not drink alcohol while in the presence of the parties' children and shall not drink alcohol while in the presence of the parties' children and shall not drink alcohol within the twelve (12) hours preceding his visitation with said children. The Petitioner may refuse visitation if the Respondent is under the influence of illicit drugs or alcohol at the time of said visitation.[58]

Nevertheless, Lucas testified that he observed his father consume alcohol in 2008 during a trip to Bristol, Tennessee for a car race. According to Lucas, Appellee said: "I don't care what your mom thinks. I am going to have a beer if I want to when I'm around you, and so he did." [59]

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[53] Id at 9-23-10 at 10:09:46;9-23-10 at 1:36:14
[54] Id at 10-18-10 at 2:21:38
[55] Id at 10-18-10 at 2:22:37-51
[56] Id at 10-18-10 at 2:23:06-16
[57] Id at 10-18-10 at 3:08:52-3:09-05
[58] Id at 10-18-10 at 2:25:04-08
[59] Id at 9-23-10 at 10:02:52-10:03:00

Appellee and his girlfriend testified that he stopped drinking or bringing beer into the house three or four weeks prior to the final hearing in this case on November 29, 2010.[60]

Appellee is also the father of 21 year old Kayla Wethington, who is Lucas and Leah's half-sister. [61] Kayla had a very difficult childhood bouncing back and forth between her parents after they were divorced. While she was residing with Appellee, he left Kayla home alone on multiple occasions from 2:30 a.m. until she got on the school bus at approximately 7:00 a.m.[62] Kayla was only 12 years old at the time. These incidents were reported to DCBS. As a result of their investigation, Appellee signed a safety plan whereby he agreed to make arrangements for someone to stay with his daughter when he was not at home. Kayla was unable to call Appellee because he did not have a working phone number. Kayla also testified that Appellant struck her on many occasions with objects that included a board (2x4), switches, vines from bushes, his hand and a belt. On September 15, 2003 DCBS conducted an investigation and substantiated physical neglect by Appellee after admitting that he spanked Kayla with a piece of wood.[63]

After Kayla and Appellee moved to Elizabethtown and began living in Karen McGee's residence, she was told to stay in her room almost all of the time except when she went to school. Kayla testified: [64] "I'd sit in my room all day, do nothing, stare at the walls. He would put tape on my door to see if I had got out or not. Even at one point in time, he had put a five gallon bucket in my bedroom so I had to go to the bathroom. I wasn't even allowed to come out and go to the actual bathroom to use it. He had, at one point in time, I know had put a board on my window because I had ran away previously from the home."[65]

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[60] Id at 10-18-10 at 10:48:00
[61] Id at 9-23-10 at 3:41:00-3:45:38
[62] Id at 9-23-10 at 3:49:16
[63] Id at 9-23-10 at 4:05:52-4:05:57
[64] Id at 9-23-10 at 4:07:09
[65] Id at 9-23-10 at 4:07:44-4:08:22

Kayla observed that Appellee drank at least a 12 pack of beer each day. She said that it always seemed like Appellee had a beer in his hand for as long as she could remember.[66]

While in the custody of her mother, Kayla was diagnosed with ADHD and being bi-polar. She was prescribed medications that her mother administered. However, according to Kayla, Appellee did not give her the medicine when she resided with him.[67] Although Appellee claimed that he gave her the medication, but only provided the court with prescription records for a three month period. However, records from Communicare that Appellee introduced show that he reported to Kayla's therapist that she had been diagnosed with ADD five years earlier. Appellee told the therapist that he took her off the medication because he didn't think it was needed.[68]

Kayla testified that Appellee began raping her right he obtained physical custody of her in the summer of 1997. However, she denied that he ever performed oral sex on her or vice-versa. [69] Kayla ran away from Appellee's home on multiple occasions. The last time occurred on June 30, 2004 when she ran to her next-door neighbor's house, who took her to the DCBS office.[70]

On July 2, 2004, DCBS filed an abuse petition in the Hardin Juvenile Court alleging that Kayla ran away from home due to Appellee's ongoing sexual abuse.[71] On September 29, 2004 an adjudication hearing was scheduled, but Appellee entered into a plea agreement with the county attorney's office where he stipulated to dependency. The court accepted the plea without inquiry or explanation by either party as to the reasons for the plea. A disposition hearing was held on October 5, 2004 where the court directed that Kayla remain committed to DCBS and

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[66] Id at 9-23-10 at 4:12:59-4:15:38
[67]
[68] Id at 9-23-10 at 4:16:07-4:16:32
[69] Id at 9-23-10 at 4:19:34-4:35:42
[70] Id at 9-23-10 at 4:35:58-4:36:09
[71] Id at 9-23-10 at 4:36:29-4:37:11

further ordered that Appellee have no contact with her. Kayla remained in foster care until she reached 18 years of age.

Kayla was residing in Tampa, Florida when she testified in this case. [72] When asked why she came back to Kentucky to testify, Kayla replied: "...because I do not want them to go through the same thing—every—all the stuff that I went through with the abuse, the—you know, the beatings. I didn't want them to go through the same thing that I went through. I don't want him to corrupt their lives. I don't them—him to ruin their lives like he ruined mine."[73]

The trial court also heard testimony from Appellee's friends and family. However, most of these witnesses had very limited contact with Lucas and Leah. Most, if not all, of the them could not even recall the last time that they saw Appellee and the children together prior to JoAnn's death on January 23, 2010. The trial court found their testimony to be of little value.[74]

After considering the evidence, the trial court entered very detailed Findings of Fact, Conclusions of Law and Judgment which awarded joint custody of Lucas and Leah to the parties, but directed that the children reside primarily with Appellants. Appellee was awarded daytime visits every other weekend on Saturday from 8:00 a.m. until 8:00 p.m. and Sunday from 12:00 p.m. until 7:00 p.m., as well as certain holidays.

Thereafter, Appellee appealed to the Kentucky Court of Appeals on the following grounds:

(1) That the trial court erred when it found Appellants had standing to file the petition for custody under KRS 403.800(13);

(2) That the trial court erred by finding Appellee to be an unfit parent, and;

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[72] Id at 9-23-10 at 3:41:00-3:45:38
[73] Id at 9-23-10 at 4:38:15-4:38:34
[74] Appendix A.

(3) That the trial court erred in the way that it defined and applied the term abandonment when it found Appellee to be unfit.

The Court of Appeals reversed the trial court's judgment on the grounds that Appellant's lacked standing, but did not address the issue of Appellee's fitness as a parent. More specifically, the court held that Appellants did not qualify as a "person acting as a parent" as defined in KRS 403.800(13). The Court of Appeals' opinion was rendered October 5, 2012 and designated "to be published."

ARGUMENT

I. STANDARD OF REVIEW

The standard of review in this matter requires a two-part analysis. First, the construction and application of any statute is reviewed denovo without deference to the interpretations adopted by lower courts. Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 612 (Ky.); Brewick v. Brewick, 121 S.W.3d 524, 526 (Ky.App. 2003). Second, any issue regarding a factual determination by the trial court is governed by CR 52.01 which states: "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Findings of fact are not clearly erroneous if supported by substantial evidence. Sherfey v. Sherfey, 74 S.W.3d 777 (Ky.App. 2002). If the testimony before the trial court is conflicting, appellate courts may not substitute their decision in place of the trial court's judgment. R.C.R v. Commonwealth Cabinet for Human Resources, 988 S.W.2d 36 (Ky.App. 1998).

Furthermore, trial courts are vested with broad discretion in matters concerning custody and visitation. Futrell v. Futrell, 346 S.W.2d 39 (Ky. 1961); Drury v. Drury, 32 S.W.3d 521, 525 (Ky.App. 2000). In the absence of an abuse of discretion, a trial court's decision will not be disturbed. Young v. Holmes, 295 S.W.3d 144, 146 (Ky.App. 2009). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Shurfey, 74 S.W.3d at 783 (internal quotation marks omitted). "The test for abuse of discretion is whether the trial judge's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). Once again, the test is not whether an appellate court would have decided the matter differently, but whether the trial court's rulings were clearly erroneous or constituted an abuse of discretion. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

II. THE KENTUCKY COURT OF APPEALS RULED ERRONEOUSLY THAT APPELLANTS DO NOT HAVE STANDING TO PURSUE THIS CUSTODY ACTION.

The right of a non-parent to pursue custody of a child is authorized by KRS 405.020(3), KRS 403.800 et seq., and KRS 405.020(1). More specifically, KRS 405.020(3) provides: "...A person claiming to be a defacto custodian, as defined in KRS 403.270, may petition a court for legal custody of a child." The term "defacto custodian" has been defined as "a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older..." KRS 403.270(1). In the case-at-bar, Appellants concede that they do not meet the requirements to qualify as defacto custodians.

Prior to 2004, standing to bring a custody action under the Uniform Child Custody Jurisdiction Act (UCCJA) was limited under KRS 403.240 to "a parent, a defacto custodian of the child, or a person other than a parent only if the child is not in the physical custody of one of the parents." B.F. v. T.D., 194 S.W.3d 310, 310-11 (Ky. 2006). However, the UCCJA was repealed in 2004 and replaced the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as adopted by our legislature in KRS 403.800 et seq. More specifically, KRS 403.822(1) provides that Kentucky courts have jurisdiction to make a custody determination if the child and the child's parents, or the child and at least one parent, or a person action as a parent, has a significant connection to the state. KRS 403.800(13) defines "person acting as a parent" as:

> A person, other than a parent, who:
>
> (a) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months, including any temporary absence, within one (1) years immediately before the commencement of a child custody proceeding; and
>
> (b) Has been awarded legal custody by a court or claims a right to legal custody under the law is this state.

Although the UCCJEA was adopted to address problems associated with interstate custody disputes, this Court held in Mullins v. Picklesimer, 317 S.W.3d 569, 575 (Ky. 2010) that it also applied to intrastate custody matters.

The UCCJEA was promulgated in 1997 by the National Conference of Commissioner's on Uniform State Laws as a replacement for the UCCJA. UCCJEA (1997), prefatory note. Appendix E The most important distinction between the two acts, as it pertains to this case, concerns the definition of a "person acting as a parent." The UCCJEA official commentary states:

> The term 'person acting as a parent' has been slightly redefined. It has been broadened from the definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as a person who currently has physical custody of the child. In addition, a person acting as a parent must either have legal custody or claim a right to legal custody under the law of this State. The reference to the law of this State means that a court determines the issue of whether someone is a 'person acting as a parent' under its own law. This reaffirms the traditional view that a court in a child custody case applies its own substantive law. The court does not have to undertake a choice-of-law analysis to determine whether the individual who is claiming to be a person acting as a parent has standing to seek custody of the child. Id. at page 11.

In Mullins v. Picklesimer, supra, this Court discussed the significance and meaning of this modification:

> "It is presumed that the Legislature was cognizant of pre-existing statutes at the time in enacted a later statute on the same subject matter." Shewmaker v. Commonwealth, 30 S.W.3d 807, 809 (Ky.App. 2000). Instead of requiring that the child not be in the physical custody of the parent as KRS 403.240 did, the new statute grants standing to a non-parent who, acting as a parent to the child, has physical custody of the child. Hence, KRS 403.822 would seem to permit standing in a shared custody co-parenting situation, since there is no longer a requirement of physical custody to the exclusion of the parent, if the non-parent can meet one of the requirements of subsection (b) of KRS 403.800(13)—she has been awarded legal custody or claims a right to legal custody under Kentucky law. Id. at 577.

Therefore, if a non-parent has physical custody of a child and has been awarded legal custody or claims a right to legal custody then the non-parent has standing. The statute does not require a non-parent who has physical custody at the time of filing to also have custody for six out of the preceding twelve months.

In the case-at-bar, Appellants clearly satisfied both prongs of KRS 403.822(1). The evidence was undisputed that they had physical custody of Lucas and Leah at the time this action

was filed. In fact, the children had been residing with Appellants since December of 2009 when their mother was initially hospitalized. Appellants also satisfied subsection (b) of the Statute because they had legal custody of the children pursuant to emergency custody and temporary custody orders entered by the Green District Court on January 23, 2010 and January 25, 2010. Furthermore, they were claiming a right to legal custody of the children on a permanent basis because Appellee was an unfit parent.

Appellee argued that Appellants lacked standing because KRS 403.800(13) required them to have physical custody of Lucas and Leah for at least six of the preceding twelve months prior to initiating this action. Appellants argued that the six month requirement only applied in cases where a child was no longer in the physical custody of an individual who was seeking custody at the time of filing. The trial court rejected Appellee's argument and held that Movants had standing because they had both physical and legal custody of the children at the time this case was initiated. The trial court's application of the statue was consistent with this Court's holding in Mullins v. Picklesimer, supra.

However, the Court of Appeals disagreed and held that Appellant's lacked standing to pursue custody of Lucas and Leah:

> Interpretation of KRS 403.822(13) appears to be a matter of first impression. Our reading of the statute, however, reveals that the six month requirement applies to any party seeking custody, whether he or she currently has or previously had physical custody. Accordingly, the Coffey's did not meet the definition of "person acting as a parent" and consequently did not possess standing under KRS 403.822(1)(b). Appendix A

In addition to disregarding the holding in Mullins v. Picklesimer, supra, the interpretation ignored the wording of the statute and the conjunction "or", which is used to indicate two alternatives. KRS 403.800(13) provides two different ways for one to qualify as "a person acting

as a parent." Under the first alternative the non-parent "has physical custody of the child." The second alternative provides "or has had physical custody for six (6) consecutive months, including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding." If the Kentucky Legislature intended for the six month requirement to apply to any party seeking custody then it would have defined "a person acting as a parent" as a person, other than a parent, who "has physical custody of the child for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding." In other words, the legislature would have omitted the conjunction "or" and the four words that followed: "has had physical custody."

Furthermore, the Court of Appeals interpretation of the UCCJEA is in direct contradiction to the intent of the drafters. The official commentary states that the term "acting as a parent... has been broadened from the definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as "a person who currently has physical custody of the child." UCCJEA Official Commentary (1997) at page 11. In short, an individual no longer must have physical custody of a child for six out of twelve months before filing a custosdy action.

In Maynes v. Commonwealth, 361 S.W.3d 922 (Ky. 2012), this Court described the analysis to be followed when interpreting statutes:

> In construing statutes, our goal is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. Osborne v. Commonwealth, 185 S.W.3d 645 (Ky. 2006). We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008); Lewis v. Jackson Energy Cooperative Corporation, 189 S.W.3d 87

> (Ky. 2005). We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one. Layne v. Newberg, 841 S.W.2d 181 (Ky. 1992).

The Court of Appeals' interpretation of KRS 403.800(13) ignored existing case law, did not give meaning to all parts of the statute, and disregarded the intent of the drafters. If this interpretation of Kentucky's statutory scheme and case law is allowed to stand then Lucas and Leah will be condemned to live with a father who has been found by a court of law to be unfit. Moreover, this decision will have serious ramifications for countless children across the Commonwealth. By requiring any person seeking custody of a child to have physical custody for at least six of the preceding twelve months, the Court of Appeals has placed severe limitations on the ability of family members and other interested parties to protect children from unfit parents like Appellee. The Court of Appeals has thus constructed an almost insurmountable obstacle that our legislature never intended and which this Court has never recognized. "It always follows that if a parent is unfit, the best interests of the children require that he not be granted custody." Rice v. Hatfield, 638 S.W.2d 712 (Ky. App. 1982).

III. THE COURT OF APPEALS FAILED TO CONSIDER THAT APPELLANTS HAVE STANDING UNDER KRS 405.020(1) AND MOORE V. ASENTE, 110 S.W.3d 336 (Ky. 2003).

Custody disputes between surviving parents and non-parents are governed by KRS 405.020(1), which provides in pertinent part: "[I]f either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture and education of the children who are under the age of 18...." (emphasis added) In Moore v. Asente, 110 S.W.3d 336, (Ky. 2003), this Court held:

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

Approximately one year later, this Court revisited the question of how a non-parent may challenge a parent's superior right to custody of a child. In Vinson v. Sorrell, 136 S.W.3d 465 (Ky. 2004), this Court reiterated the principle that a non-parent who does not meet the statutory standard of defacto custodian may pursue custody if there is clear and convincing evidence that the parent is either unfit or has waived his or her superior custody rights. Id. at 468.

In 2010 this Court once again reaffirmed its adherence to this legal precedent in Mullins v. Picklesimer, supra, and held:

> When a non-parent does not meet the statutory standard of defacto custodian in KRS 403.270, the non-parent pursuing custody must prove either of the following two exception to a parent's superior right or entitlement to custody: (1) that the parent is shown by clear and convincing evidence to be an unfit custodian, or (2) that the parent has waived his or her superior right to custody by clear and convincing evidence. (internal citations omitted). Id. at 578.

More recently, the Court of Appeals cited and applied this body of case law in Brumfield v. Stinson, 368 S.W.3d 116 (Ky.App. 2012).

IV. THE TRIAL COURT'S FINDING THAT APPELLEE WAS AN UNFIT PARENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The trial court found that Appellee was an unfit parent based on the five factors set forth in Davis v. Collinsworth, 771 S.W.2d 329, 330 (Ky. 1989) which includes the

following: "(1) evidence of inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children."

The term "abandonment" as used in KRS 625.010(2)(a) requires clear and convincing evidence that a parent has abandoned a child for a period of not less than 90 days before parental rights can be terminated. This same language is also used in KRS 199.502(1) before an adoption can be granted without the consent of the biological parents. However, neither statute actually defines what constitutes abandonment. In O.S. v. C.F., 655 S.W.2d 32, 34 (Ky.App. 1983), the Court held: "[A]bandonment is demonstrated by facts or circumstances that events a settled purpose to forego all parental duties and relinquish all parental rights to the child. Also see J.H. v. Cabinet for Human Resources, 704 S.W.2d 661, 663 (Ky.App. 1985).

The term "abandoned child" was also defined in Hafley v. McCubbins, 590 S.W.2d 892, 894 (Ky.App. 1979) to mean:

> ...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. [citations omitted]. (emphasis added).

In the case-at-bar, the trial court found evidence of Appellant's abandonment of his children to be "compelling and persuasive." More specifically, the trial court found:

> In this case, Lucas and Leah were only five years old when their mother and Respondent divorced in 2001. Since that time Respondent's involvement with his children has been somewhere between slim and none. Prior to JoAnn's death on January 23, 2010 Respondent admitted that he had not seen his children for 13 months. The last contact occurred during Christmas of 2008 when he spent approximately four hours with them. Prior to that time, Respondent saw the children once or twice during the summer of

2008 when they spent a day camping at Green River Lake. Neither the children nor Respondent could recall the last time that they spent the night with him. Both Lucas and Leah could only recall staying two nights with Respondent since their parents divorced. They estimate the occurrence to have been five or six years ago when they were eight or nine years old. For the past five years, Respondent only saw his children once or twice during the summer months and for a few hours at Christmas and Thanksgiving.

Both children are currently in the ninth grade at Green County High School. However, Respondent has never demonstrated any interest in their education. He has never attended any parent teacher conferences, school related activities, or assisted them with homework. In fact, Respondent was unaware of any of the subjects they are currently taking and their grades in any class. Respondent also never took the children to the doctor or showed awareness of their medical history. During the limited amount of time that he spent with the children, he never took them to ballgames, shopping, movies, bowling or other events that one would expect from a father who is interested in his children.

In short, Respondent's actions demonstrate total disinterest and indifference toward his children. As a result, Respondent has a very poor relationship with them. Lucas refers to Respondent as "Jimmy" instead of "dad". When asked for an explanation, Lucas testified: "Because I don't consider him a dad. He doesn't act like one." Likewise, Leah could not provide any examples or describe any love and affection that Respondent has shown her in the past five years. She also testified: "I don't think he wants to spend time with us, and we don't want to spend time with him....He doesn't like us. He never wanted—before our mom died, he never wanted to see us except on the major holidays."

Respondent claims that he attempted to exercise visitation with the children, but was prevented by JoAnn. Respondent testified that he pulled into JoAnn's driveway on multiple occasions and honked the horn, but she refused to allow the children to leave the house. Both children adamantly deny this claim. The Court notes that Respondent filed a motion for contempt against JoAnn on September 4, 2002 for not allowing him to pick up the children. The matter was scheduled for a hearing on November 6, 2002, but was not held. The issue was never raised again despite the fact he subsequently filed a motion to reduce his child support obligation. If JoAnn interfered with or denied Respondent visitation with the children as alleged, he had

every opportunity to seek the Court's intervention. However, he did not.

Respondent's actions, or lack thereof, as a father since this case was filed on February 17, 2010 further illustrate that he has little interest in nurturing and raising his children. On May 13, 2010 the parties appeared before the Court for a temporary custody hearing. With the assistance and encouragement of the Guardian ad Litem for the children, the parties agreed that Respondent would have visitation when school ended (on or about June 1) every Sunday from 1:00 p.m. until 7:00 p.m., as well as every Monday, Tuesday and Wednesday from 6:45 a.m. until 7:00 p.m. Although Respondent exercised his Sunday visitation, he did not exercise any weekday visitation. He blamed Lucas and Leah because they didn't want to go and he didn't want to force them. He also brought the children home early on two occasions. In addition, Respondent failed to exercise visitation with his children on Sunday, July 4, 2010, but claimed to be unaware that he was supposed to have visitation on holidays. However, the Agreed Temporary Visitation Order from May 13, 2010 does not refer to any exceptions for holidays. Moreover, Petitioner, Scott Coffey, testified that he called Respondent and told him that he could have the children but Respondent never showed up.

Furthermore, the parties appeared before the Court on July 28, 2010 for an emergency hearing regarding temporary custody/visitation because the prior order expired. Respondent asked for more time with his children, so the Court awarded him visitation every other weekend on Saturday from 8:00 a.m. to 8:00 p.m. and Sunday from 12:00 p.m. to 6:00 p.m. Respondent exercised his visitation during the weekends of July 31 and August 14. However, he failed to exercise visitation on the weekend of August 28, which was only four days before the scheduled final hearing. According to Respondent, he failed to exercise visitation because he got "confused."

Instead of taking responsibility for his actions or inactions as the case may be, Respondent has chosen to blame others and offer one hollow excuse after another for his failure to be a father in more than just name only. Respondent's testimony consisted of one explanation, rationalization and justification after another. The fact that Respondent was current in the payment of his child support at the time of JoAnn's death is woefully insufficient to overcome his utter and complete failure to fulfill his responsibilities of providing parental care, training and guidance to his children. The overwhelming evidence (much more than clear

> and convincing evidence as required by law) demonstrates that Respondent abandoned his children. Appendix B.

In addition to overwhelming evidence of abandonment, the trial court also found that Appellee was unfit due to clear and convincing evidence of moral delinquency. Appellee has a history of alcohol abuse. He acknowledged having three DUI convictions between 1999 and 2004. He attended court ordered Alcoholics Anonymous meetings but stopped going when the order expired. Appellee's alcohol abuse was also addressed by the trial court when his visitation was reinstated in 2005 after being suspended for 15 months. The court ordered Appellee to not consume alcohol while in the presence of the parties' children or within the twelve (12) hours preceding his visitation. Nevertheless, Lucas testified that Appellant drank beer in his presence in 2008 when they attended a car race.

Although Appellee claimed that he stopped consuming alcohol approximately three or four weeks prior to the final hearing, the testimony caused the trial court "to have serious concerns." More specifically, the court wrote:

> During the final hearing on November 29, 2010, Respondent testified that he had not brought any beer into the house within the past 30 days. His girlfriend, Karen McGee, testified that he had been drinking two to three nights a week, but stopped drinking altogether about three or four weeks ago. However, Respondent contradicted Karen when he testified: "I don't hardly drink much anymore. When I—when I do drink, Karen is at work. She works until—she don't get home until 1:00 in the morning and I might have a couple of beers once a night or once a week or once every ten days. She don't even know when I drink beer or if I drink beer and my—I save my cans and give them to my nephew and I take them down to Bobby's house, so she don't see the cans." When Respondent was asked if he had stopped bringing alcohol into the home because it had become a major issue in this custody case, he responded: "Because I'm getting to where I don't drink hardly anymore." However, his friend, Jimmy Newton, testified that Respondent drinks five or six beers when they get together.

> Respondent also had an affair with his current girlfriend, Karen McGee, while still married to JoAnn. According to the petition for dissolution of marriage that was filed in the Green Circuit Court, the parties separated on October 14, 2000. A decree dissolving their marriage was entered on April 17, 2001. Respondent testified that he and Karen have been together "about 11 years." However, this statement is inconsistent with information provided to Social Services when Respondent was interviewed as part of a home evaluation in February of 2010. According to the interviewer, Mr. Wethington stated that he and Ms. McGee have been "steadily together for approximately nine years and have been a couple off and on for thirteen years." Therefore, he was obviously having an affair with Ms. McGee for two or three years prior to separating from Lucas and Leah's mother. Extra-marital affairs and marijuana usage was upheld by the Kentucky Supreme Court as evidence of moral delinquency in Knight v. Young, 2010 WL 252246 (Ky.). Appendix B.

The trial court also found that Appellee's abandonment and behavior towards Lucas and Leah has caused them emotional harm, which is a third factor indicating that he is an unfit parent. Lucas refers Appellee by his first name instead of calling him dad. Lucas stated that he would rather be put in a foster home than to live with Appellee. Even when the children are with Appellee, there is no communication, interaction or love. The feelings of Lucas and Leah, as expressed in their own words, provide the best evidence of the emotional harm that their father has caused.

There is no reasonable expectation of improvement in Appellee's ability to parent his children. During the nine months that passed between JoAnn's death and the final hearing in this case there was no improvement in Appellee's relationship with Lucas and Leah. He repeatedly failed to take advantage of the visitation awarded by the trial court. His communication with them by telephone and in person was limited. In addition, Appellee continued to show no interest in their education and was unaware of the classes they were taking. Appellee is like a

zebra in that he has made no effort to change his stripes. He remains disengaged and disinterested in the lives of his children.

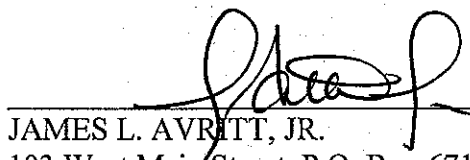
The trial court summarized its findings as follows:

> ...Respondent is not suited to the trust to have custody of his children. The Petitioners have satisfied their burden of proving his unfitness by clear and convincing evidence. They have satisfied three of the five factors identified in Davis v. Collinsworth, supra, including the following: evidence of inflicting or allowing to be inflicted emotional harm, moral delinquency and abandonment.
>
> Even if the Court did not find clear and convincing evidence of emotional harm or moral delinquency the outcome would not change. Petitioners are only required to prove one of the five factors identified in Davis v. Collinsworth, supra. The strength of the evidence regarding Respondent's abandonment of his children is compelling and demonstrates by itself that he is an unfit parent. Appendix B.

CONCLUSION

The Court of Appeals opinion vacating the trial court's Judgment that awarded custody of two minor children to Appellants was inconsistent with the UCCJEA as adopted in KRS Chapter 403.800 et seq and Kentucky case law. Appellants have standing to pursue custody under both KRS 403.822(1)(b)1 and KRS 405.020(1). In addition, the trial court's findings of fact regarding Appellee's unfitness as a parent were supported by substantial evidence. Therefore, the Court of Appeals' opinion should be vacated and the trial court's judgment awarding custody of the children to Appellants should be affirmed.

Respectfully submitted,



JAMES L. AVRITT, JR.
103 West Main Street, P.O. Box 671
Lebanon, KY 40033
Phone (270) 692-4270/9530
COUNSEL FOR APPELLANTS