COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

2008-SC-0484-DE
(CASE NO. 07CA0086 AND 2007CA00101)

ARMINTA JANE MULLINS **APPELLANT**

VS **GARRARD CIRCUIT COURT**
2006-CI-0038

PHYLLIS DIANNE PICKLESIMER **APPELLEE**

BRIEF FOR APPELLANT, ARMINTA JANE MULLINS

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6)

I do hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, United States mail, to: Garrard County Clerk, Lancaster, Kentucky 40444; Robin Slater, Attorney for the Appellee, 511 West Short Street, Lexington, Kentucky 40507; Judge Hunter Daugherty, Garrard Circuit Court, 101 N. Main Street, Nicholasville, Kentucky 40356; and the Clerk of the Court of Appeals, all on this the 11 day of February, 2009.

WILLIAM R. ERWIN

I. INTRODUCTION

This case involves a custody dispute between an unmarried same sex couple.

II. STATEMENT REGARDING ORAL ARGUMENT

Appellant desires oral argument in this case.

III. STATEMENT OF POINT AND AUTHORITIES

1. The Court of Appeals Erred in Voiding the Agreed Judgment of Custody Entered February 3, 2006.

2. Court Should have Dismissed Motion to Set Aside Agreed Judgment Due to Failure to file Appeal.

3. The Court Abused its Discretion in Granting Relief Under Civil Rule 60.02.

4. Appellant Maintains Legal Standing to Pursue Custody.

5. The Trial Court Properly Held that Appellee Waived her Superior Right to Custody.

STATEMENT OF THE CASE

Arminta Jane Mullins (hereinafter "Mullins") and Phyllis Dianne Picklesimer (hereinafter "Picklesimer") were involved in a lesbian relationship for a period of five years. (VR No. 2:11/06/06; 2:18:40 and 2:11/06/06; 2:43:20). During this relationship, Mullins and Picklesimer made the joint decision to have a baby. (2:11/06/06; 2:18:20). The parties worked together to decide on a specific sperm donor that was closest in characteristics to Mullins. (VR No. 2:11/06/06; 2:19:00 and 2:11/06/06; 3:01:30). Once a sperm donor was chosen, and the donation mailed to Mullins and Picklesimer, the parties went to the hospital for the artificial insemination. Mullins was present for the insemination of Picklesimer. (VR No. 2:11/06/06; 2:19:30) The insemination was successful, and Pickelsimer became pregnant. It was a difficult pregnancy, which resulted in Picklesimer being hospitalized for one month prior to the birth of the child. (VR No. 2:11/06/06; 2:19:40).

The parties child, Zachary Alexander Picklesimer-Mullins (hereinafter "Zachary"), was born May 31, 2005. Mullins, and Mullins' mother, Nancy Mullins, were present for the birth of the child. The parties jointly made the decision to name the child Zachary Alexander Picklesimer-Mullins. This is the name that was placed on the birth certificate. (VR No. 2:11/06/06; 2:20:10) and (VR No. 2:11/06/06; 3:02:30). Picklesimer signed the birth certificate naming the child Zachary Alexander Picklesimer-Mullins. (VR No. 2:11/06/06; 3:02:30).

Zachary was two months pre-mature which resulted in the child being placed in the neonatal unit of the hospital for a period of two months. During this time, Mullins and Picklesimer went to the hospital and provided neonatal care as the parents of the child. (VR No. 2:11/06/06; 2;20:40) and (VR No. 2:11/06/06; 3;03:10). Mullins is a detective with the Danville

Police Department. (VR No. 2:11/06/06; 2;18:00). Mullins took vacation leave for a period of one month to care for the child. (VR No. 2:11/06/06; 2:21;40). Mullins' parents also aided in the care of the child one to three times per week after the child came home. (VR No. 2:11/06/06; 2:22:00). The parties jointly decided who was to take off from work to care for the child. (VR No. 2:11/06/06; 3:04:00). Mullins, along with her family, worked to create a nursery at her home and provided continual care for Zachary who was on a heart monitor. (VR No. 2:11/06/06; 2:21:10).

After the child was released from the hospital, the parties resided together until April, 2006, or for a period of eleven months. The residence the parties resided in, the two vehicles being driven, and the checking account primarily used to pay living expenses were all in Mullins name. The parties participated together in raising and caring for Zachary Picklesimer-Mullins. However, even when the parties lived separately, the parties exercised a timesharing arrangement on an equal basis with Zachary.

As the child began to grow older, Zachary began calling Mullins "momma" and Picklesimer "mommy". Zachary and Picklesimer refer to Mullins parents at "granny and pawpaw". For all practical purposes, Mullins and Picklesimer raised the child, jointly, as parents of the child, and extended family of both Mullins and Picklesimer have become the family of the child.

As Zachary became older, Mullins became concerned regarding her legal rights regarding Zachary. She discussed this with Picklesimer on more than one occasion. (VR No. 2:11/06/06; 3:06:50). Specifically, Mullins discussed with Picklesimer issues such as what would happen to Zachary in the event Picklesimer died or was in an accident. (VR No. 2:11/06/06; 3:08:00). The

issue of medical treatment was also discussed.

Mullins ultimately contacted attorney William R. Erwin concerning her legal rights. (VR No. 2:11/06/06; 2:22:40). Picklesimer was aware the attorney was contacted, and testified that she wanted some type of papers prepared for Mullins in order that Mullins' legal rights would be documented. (VR No. 2:11/06/06; 3:11:40). The parties jointly met with attorney Erwin on two occasions. Picklesimer and Mullins came to Erwin's office to discuss the legal documents and the issues regarding the parties' legal status regarding Zachary. (VR No. 2:11/06/06; 3:08:10). Picklesimer testified that Erwin specifically informed her that he represented Mullins only, and could not represent both of the parties. (VR No. 2:11/06/06; 3:08:10).

Picklesimer and Mullins met with Erwin on a second occasion to review the legal documents that had been drafted. Picklesimer, a Registered Nurse, testified that she read, understood, and signed a Petition for Custody, Entry of Appearance and Consent to Custody, and Agreed Judgment of Custody. She further testified that she reviewed the Affidavit of Mullins. (VR No. 2:11/06/06; 3:10:00). Picklesimer further testified that she understood that the sworn documents identified Mullins as a De Facto Custodian of Zachery. The Petition for Custody, Entry of Appearance and Consent to Custody, Affidavit of Mullins and Agreed Judgment were signed by both the parties on January 20, 2006. These documents were filed with the Garrard Circuit Court on January 25, 2006. (Record p. 7-12). The Agreed Judgment of Custody was signed and entered by the Court on February 3, 2006. (Record p. 11).

The parties continued to live together and raise the child as a couple for a period of approximately four months subsequent to the entry of the Agreed Judgment of Custody, based on Mullins testimony. (VR No. 2:11/06/06; 3:24:50). However, Appellee herein testified that the

relationship ended on February 4, 2006, the day after Judge Daugherty signed the Agreed Judgment of Custody which was entered in the Garrard Circuit Court. Between February or April, 2006, and September, 2006, the parties lived separate and apart but continued to exercise timesharing on an equal basis with Zachary. (VR No. 2:11/06/06; 2:25;20). Picklesimer acted as though the Judgment was valid by providing parenting time to Mullins pursuant to the order of the Court. The order of the Court was specifically adhered to.

In September, 2006, approximately seven months after the Agreed Order of Custody was entered with the Court, the parties timesharing agreement regarding Zachary began to fall apart. This was due to the fact that Picklesimer had a problem with Mullins having a new relationship with Brenda Rousey (hereinafter 'Rousey"). This was admitted by Picklesimer. (VR No. 2:11/06/06; 3:14:00). Picklesimer further admitted to making the statement, "we had him for us not for you and her" and " I am not going to share him with you to have a life of your own". (VR No. 2:11/06/06; 2:26:30) and (VR No. 2:11/06/06; 3:16:00). As a result of the timesharing problems, Mullins filed a motion in the Garrard Circuit Court on September 30, 2006 for the Court to enter an order providing for the parties to maintain the joint, care, custody and control of the infant child, Zachary, and declaring Mullins as the primary residential custodian pursuant to the Agreed Judgment entered February 3, 2006. An affidavit was attached to the motion. (Record p. 13-16).

Picklesimer responded with a motion to set aside the agreed judgment of custody entered February 3, 2006 for a number of legal reasons. Prior to the hearing of these issues, Mullins filed a motion to grant to her the sole custody of Zachary due to the fact that the Picklesimer had unilaterally withheld the child from Mullins and acted in a way that was detrimental to Zachary.

(Record p. 49).

All of the issues came before the Garrard Domestic Relations commissioner for hearing on November 6, 2006. As a result of that hearing, the Domestic Relations Commissioner entered Findings of Fact, Conclusions of Law, and Recommendations on November 8, 2006. (Record p. 85-92). The Domestic Relations Commissioner ruled that the Agreed Judgment of the partes was valid and should not be set aside due to the fact that there was not a summons entered in the case. The Domestic Relations Commissioner also overruled Picklesimer's motion to set aside the Judgment based on fraud. However, the Commissioner ruled that the Agreed Judgment of Custody, entered February 3, 2006, should be set aside due to the fact that there was no evidentiary record prior to the Court's entry of the order. The Domestic Relations Commissioner further held that it was in the child's best interest, considering the factors set forth in KRS 403.270 (2), and found that by clear and convincing evidence, that Picklesimer waived her superior right of custody by acknowledging, on a continuing basis, that Mullins is a parent of the child, and permitting extensive visitation and timesharing for Mullins and by co-parenting Zachary with Mullins from the date of the child's birth until the separation of the parties. The Domestic Relations Commissioner went on to enter a recommendation regarding timesharing and child support.

Mullins and Picklesimer raised timely objections to the Domestic Relations Commissioner's Report. (Record p. 98 and 103). Mullins moved the Court to make exceptions to the Domestic Relations Commissioner's Report so far as the Report set aside the Agreed Judgment on the basis of a lack of an evidentiary hearing. Picklesimer moved the Court to set aside the Commissioner's Recommendation based on the issues of lack of summons and lack of

venue, and to set aside the Recommendation that Picklesimer had waived her superior rights to custody. All of these exceptions were heard before Judge Hunter Daugherty on December 1, 2006. By order entered December 1, 2006, the Garrard Circuit Court overruled all exceptions, and the Domestic Relations Commissioner's Report entered November 8, 2006 became an order of the Court. (Record p. 126).

Picklesimer filed a Petition for Writ of Prohibition on December 21, 2006. (Record p. 130). This Court, by order entered December 28, 2006, denied emergency relief and denied the Writ of Prohibition. (Record p. 178). Picklesimer filed a Notice of Appeal in this action on December 28, 2006. (Record p. 180). Mullins filed the Notice of Cross Appeal on January 4, 2007. (Record p. 196).

During this interim, the parties continued to exercise time sharing with the child. The parties were subject to an Emergency Protective Order that was filed in the Lincoln Family Court. Mullins agreed to withdraw the Emergency Protective Order pursuant to an agreement that the parties would exercise joint timesharing with the parties child and be restrained from any contact with one another.

Since the birth of Zachary, these parties have raised Zachary as their own. Although they reside in separate residences, Zachary refers to Mullins as "momma" and Picklesimer as "mommy". Timesharing has been in place since the Court's order of November 8, 2006.

This case was Appealed by Phyllis Dianne Picklesimer to the Court of Appeals. The Court of Appeals rendered an opinion on March 28, 2008, Affirming in Part, Reversing in Part, and Remanding. Thereafter, Ms. Mullins filed a Petition for Rehearing and Reconsideration. The Opinion was modified by order entered June 6, 2008.

This Court granted Discretionary Review on January 14, 2009. Zachary is now over four (4) years of age. The child continues to know the parties hereto as his parents, and loves each as his mother.

ARGUMENT

1. The Court of Appeals Erred in Voiding the Agreed Judgment of Custody Entered February 3, 2006.

The Agreed Judgment of Custody was entered in this action on February 3, 2006. (Record p. 11). The Court entered the Agreed Judgment of Custody based upon the Verified Petition for Custody, Entry of Appearance and Consent to Custody signed by Phyllis Picklesimer and Affidavit of Arminta Jane Mullins, all filed of record on January 25, 2006. (Record p. 7-12). It is important to note that Picklesimer signed the Entry of Appearance and Consent to Custody, which was notarized on January 20, 2006. (Record p. 9). The Entry of Appearance and Consent to Custody provides as follows:

> Comes Phyllis Dainne Picklesimer, and hereby states that she is the Respondent in the above-styled action; that she has read a copy of the Petition for Custody filed by the Petitioner in said action, and hereby enters his (sic) appearance to said action for all intents and purposes. The Respondent herein further consents to the joint custody arrangement between the Petitioner and the Respondent herein. It is the Respondent's belief that it is in the best interest of the infant child, Zachary Alexander Picklesimer-Mullins, for the Petitioner and the Respondent to share the joint care, custody and control of the infant child.

The Affidavit of Arminta Jane Mullins was also tendered with the Agreed Judgment. (Record p. 10). The Agreed Judgment of Custody was signed by Phyllis Dianne Picklesimer on January 20, 2006. Picklesimer admits that she read and signed the Agreed Judgment and Consent to Custody and Entry of Appearance. (VR No. 2:11/06/06; 3:10:00) The Agreed Judgment of Custody, signed by Picklesimer and Mullins, provided that Mullins was to be declared the De Facto Custodian of the child, and that the Court finds by clear and convincing evidence, based on the Affidavit of the Petitioner and the Response of the Respondent, that Mullins has been the

primary caregiver for and financial supporter of the infant child herein for a period of approximately eight months.

The parties met with Attorney William Erwin together on two separate occasions. The parties informed counsel of their financial arrangement. The information provided was that the parties resided in Mullins' residence, and that the two vehicles and checking account primarily used to pay the living expenses were owned by Ms. Mullins. This was also the finding of the Domestic Relations Commissioner based on the hearing that occurred herein. Based on this evidence, as found by the Court, the evidence was sufficient to find that Ms. Mullins was the primary financial supporter of the infant child. The parties further stipulated in the Consent to Custody as well as the Agreed Order, that Ms. Mullins was the primary caregiver of the infant child. All of this evidence was presented to Appellant's counsel when the documents were drafted to be submitted to the Garrard Circuit Court.

The issue of the 60.02 motion is addressed later in this brief. However, it should be noted that Appellee's argument regarding the 60.02 motion, alleging fraud, was that Mullins allegedly defrauded Picklesimer solely on the issue of their continued relationship. Picklesimer alleged that Mullins claimed the relationship was to continue, and then discontinued the relationship after the Agreed Judgment was signed. The Domestic Relations Commissioner properly found that such allegation of fraud is not material and does not affect the validity of the joint custody agreement. The Circuit Court sustained this finding.

The Domestic Relations Commissioner set aside the Agreed Judgment due to its finding that the Agreed Judgment was entered without a hearing. The Garrard Circuit Court found that a hearing is required prior to entering into any judgment declaring a party a De Facto Custodian.

This is incorrect.

Review of KRS 403.270, finds that, "a person shall not be a De Facto Custodian until a Court determines by clear and convincing evidence that the person meets the definitions the De Facto Custodian established in Paragraph A of this section". The Statute does not mandate a "hearing" where evidence is received orally, only that the Court make a "determination".

KRS 403.270 is one of numerous Kentucky Statutes that require the Court to make "determinations" that do not require hearings. Routinely, Agreed Judgments and orders are submitted by parties to reach agreements that are submitted to the Court to be entered by Agreed Judgment or Agreed Order. Litigants and attorneys do this on a daily basis, and are in fact encouraged to reach agreements on issues that could be litigated. This is especially true in custody cases wherein mediation is often mandated. If the parties are able to reach an agreement they each believe is in the best interests of the child, an Agreed Judgment with accompanying documents are submitted to the Court for entry.

There are numerous statutes that require the Court to make "determinations" but do not require hearings. For example, KRS 403.180 provides that the Court must determine if a property settlement is unconscionable. There is rarely a hearing on this issue if there is an agreement of the parties, and the findings are stipulated. KRS 403.190 requires the Court to determine if property is marital or non-marital prior to making an award of property. There is no hearing on this issue if there is an agreement of the parties. KRS 403.200 provides that a Court must determine if maintenance is to be awarded after considering statutory factors. There is no hearing on this issue if there is an agreement of the parties. KRS 403.340 requires the Court to determine if the parties agree to a modification of custody. If the parties submit an agreed order modifying custody, there

is no hearing if there is an agreement of the parties.

In contrast, the General Assembly can, and has, enacted statutes which require "hearings". If the General Assembly desired to mandate a "hearing" on the issue of De Facto Custodian status, it could have done so by clear language. For example, in KRS 403.745, the General Assembly provides that a "hearing" is required prior to entry of a Domestic Violence Order. KRS 403.320 provides that all parties are to be granted reasonable visitation unless, "after a hearing", the Court finds that the visitation would endanger the child. KRS 625.042 requires the Court to have a "hearing" prior to the voluntary termination of parental rights within 3 days of the filing of the Petition. Each of these statutes are examples of when the General Assembly can mandate hearings prior to the entry of an order or judgment. That is simply not the case on the issue of declaring a party a De Facto Custodian.

There are many times and many different cases where parties enter Agreed Orders or Agreed Judgments to resolve cases based on their own wishes and desires rather than submit the case for judicial review and decision. In many of these instances, a party will agree on custody, division of property or other issues which is entirely different than what a Court would do if the case came before the Court for a hearing. For example, in a majority of all divorce cases involving children, the parties enter into an Agreed Judgment of custody rather than submit the case for hearing. The Court enters the Agreed Judgment based on the wishes, desires, and representations of the parties, absent a hearing.

In this case, the parties submitted a Petition for Custody, accompanied by an Entry of Appearance and Consent to Custody, and Affidavit of the parties. The Agreed Judgment of Custody was signed by both parties. The Court reviewed the Petition for Custody, Entry of

Appearance and Consent to Custody signed by Picklesimer, and the Agreed Judgment of Custody signed by both parties, and entered the Agreed Judgment of Custody. There is no basis to set aside this Agreed Judgment of the parties.

In a recent opinion from the Court of Appeals styled S.J.L.S. v. T.L.S., 265 S.W. 3rd 804 (Ky. App. 2008), the Court addressed a similar issue of the entry of an Agreed Order. In that case, two women, S and T.L.S, made plans to have a child. S was artificially inseminated and gave birth to Z in 2001. When the child was six (6) weeks old, T filed a Verified Petition for Permanent Joint Custody in the Jefferson Family Court naming S as the Respondent. S was not represented by legal counsel. S signed all of the documents, including an Entry of Appearance and waiver, Affidavit, and Agreed Order Granting the Petition. The Court ruled that the Agreed Order, entered by the Court without hearing, was a valid order. In its conclusion, the Court remanded the case to the Family Court with instructions that the Family Court could entertain a motion to modify the original Petition in the case or the parties could file a new action to seek custody determinations. However, the Court accepted the validity of the Agreed Order.

In this case, the parties adhered to this Agreed Judgment from January 25, 2006 through November 8, 2006. The Garrard Circuit Court found that Picklesimer knew exactly what she was doing when she entered the Agreed Judgment. Picklesimer is a registered nurse with a Degree from Eastern Kentucky University. (VR No. 2:11/06/06; 3:01:10). She read the documents and signed them as being true and correct. Picklesimer appears to now be telling the Court that she perjured herself when signing the original documents, and swearing, under oath, that the same were true and correct. That was simply not the case. At the time the documents were tendered, the parties submitted the evidence they each believed to be true and correct to the Court. Courts in

the Commonwealth rely on the representations of parties either by affidavit or sworn statement. The Court did so in this case based on the sworn statements of both parties and their joint desire to enter an Agreed Judgment regarding the custody of their child. The Judgment should not be set aside based merely on the fact that a party subsequently changes her mind.

It is also against public policy for the Court to set aside Agreed Judgments in cases where there has been no hearing. If the Court follows the rationale of the Garrard Circuit Court, there will be many agreements entered in Courts across this Commonwealth that could be set aside based on the fact that there was not a hearing. Justice requires the Court to honor the Judgments signed by the parties and submitted to the Court for entry.

Appellant moves the Court to vacate the finding of the Garrard Circuit Court insofar as it sets aside the Agreed Judgment of Custody entered by this Court on February 3, 2006. Mullins moves the Court to reinstate the Agreed Judgment of Custody entered by the Garrard Circuit Court and to remand this case to the Garrard Circuit Court for further proceedings.

2. Court Should have Overruled Motion to Set Aside Agreed Judgment Due to Failure to file Appeal.

The Court of Appeals never addressed the fact that Appellee failed to file a notice of Appeal in this action. In Ms. Picklesimer's statement of the case in her Brief to the Court of Appeals, she stated,

> The Agreed Judgment of Custody was signed by Judge Hunter Daugherty on February 3, 2006. Ms. Picklesimer testified that on February 4, 2006 Mullins ended their relationship. Mullins testified that she ended the relationship at least a week after she received the signed Agreed Judgment of Custody. (VR No. 2:11/06/06; 2:46:45). Mullins acknowledged that unbeknownst to Picklesimer,

> she was involved in relationship with another woman since before Picklesimer was inseminated. Mullins had no intentions of remaining in a relationship with Picklesimer or raising the child with her. The sole purpose of rekindling the relationship was to induce Picklesimer to sign the Agreed Judgment of Custody. The day after Judge Daugherty signed the Agreed Judgment of Custody, Mullins ended her relationship with the Movant (Picklesimer).

Based on these facts, as set forth by Appellee, Appellee was aware of the actions of Mullins the day after the Agreed Judgment was entered. Picklesimer testified that she had full knowledge of the Agreed Judgment providing that Mullins was designated as a De Facto Custodian and had joint custody of Zachary. In Appellee's Motion to Set Aside the Agreed Order, filed in September of 2006, Picklesimer alleged that she desired to set aside the judgment based on fraud. The alleged fraud pertained to the relationship between Mullins and another.

However, based on her own testimony, and with full knowledge of the circumstances a day after the Judgment was entered, Appellee could have taken a number of actions to immediately attempt to set aside the Agreed Order. Appellee could have filed a motion pursuant to Civil Rule 52.02 requesting the Court to amend its findings or make additional findings and amend the judgment accordingly. Appellee could have filed a motion under Civil Rule 52.03 requesting the Court to review the sufficiency of the evidence to support the findings and set aside the judgment. Appellee could have filed a motion pursuant to Civil Rule 59.01 requesting a new trial based on irregularity in the proceedings of the Court or Abuse of Discretion. Appellee could have filed a motion pursuant to Civil Rule 59.05, requesting the Court to Alter, Amend or Vacate the Judgment. Instead, Appellee did nothing, until approxiamtely eight months after the Judgment was entered.

Additionally, and more importantly, Appellee could have appealed the case if she thought

there was a problem with the Judgment. The filing of a notice of appeal within the time limit prescribed by Civil Rule 73.02 is mandatory. C.R. 73.02 and *United Bonding Insurance Company v. Commonwealth*, Ky., 461 SW 2d 535 (1970). The motion under Civil Rule 60.02 should not been authorized as a substitute for failure to file a proper notice of Appeal. *Wimsatt v. Hayden Oil Company*, Ky.,414 SW2d 908 (1967).

Appellant moves this Court to reverse the Trial Court and Court of Appeals decisions and declare this action moot for failure to file a timely appeal.

3. **The Court Abused its Discretion in Granting Relief Under Civil Rule 60.02.**

The facts of this case reflect that on September 30, 2006, Appellee filed motions to set aside the Judgment pursuant to Civil Rule 60.02. Specifically, Appellee raised the issue of fraud without designating which section of CR 60.02 was being utilized. In her motion, Appellee merely states that the fraud relating to the proceedings specifically related to the alleged fraud incurred by Picklesimer due to the relationship Mullins had with a significant other and how this affected the parties agreement to raise the child together. Appellee alleges that she was made aware of this alleged fraud the day after the Agreed Judgment was entered, when the relationship between Picklesimer and Mullins was terminated. Appellee further moved the Court to set aside the Judgment under Civil Rule 60.02 due to the Court's mistake in declaring Petitioner a De Facto Custodian.

The Domestic Relations Commissioner, in his Findings subsequent to a hearing of this matter, failed to find in Appellee's favor with regards to the fraud allegation. The Domestic Relations Commissioner wrote as follows:

> The Respondent (Picklesimer) asked the Court to set aside the Judgment as having been obtained by fraud. She first alleges that a material element of the Joint Custody Agreement was that she and the Petitioner raise the child together as a family. The Respondent claims that the Petitioner(Mullins) had no intention to continue the relationship; and, not long after the Court papers were entered, entered a relationship and began a new relationship with another woman. Nothing in the documents filed with the Court requires the Petitioner and Respondent to live together.
>
> The purpose of the legal documents was to establish the relationship between the Petitioner and the child, not the Petitioner and the Respondent. If there was any fraud, as alleged by the Respondent, it went solely to the relationship between her and the Petitioner not the Petitioner and the child. Since it is the relationship between the Petitioner and the child that is the material aspect of the custody agreement, the fraud alleged by the Respondent, even if it exists, is not material and does not effect the validity of the joint custody agreement. (Pg 5).

The Domestic Relations Commissioner did set aside the agreed judgment of custody under Civil Rule 60.02, by stating as follows, "since the Judgment declaring the Petitioner De Facto custodian was entered on the basis of incorrect and misleading evidence presented to the Court by both parties, the Judgment is void under Civil Rule 60.02." The Domestic Relations Commissioner and the Circuit Court failed to designate which section of Civil Rule 60.02 was the basis to sustain the motion.

The Court of Appeals affirmed the Trial Court's decision to void the Agreed Judgment, but added that it was specifically authorized pursuant to Civil Rule 60.02(c) and 60.02(d). The Court of Appeals should have ruled that the Trial Court abused its discretion in setting aside the Agreed Judgment pursuant to 60.02.

There are two factors that are to considered by the Trial Court in exercising its discretion to vacate a Judgment pursuant to Civil Rule 60.02: "(1) whether the moving party had a fair opportunity to present his claim at the trial on the merits, and (2) whether the granting of Civil Rule 60.02(f) relief would be inequitable to other parties." *Bethlehem Minerals Company v.*

Church and Mullins Corporation, Ky., 887 SW2d 327 (1994).

In the case of *Barnett v. Commonwealth*, Ky. 979 SW2 98 (1998), citing *Young v. Edward Technology Group, Inc.*, 918 SW2 229 (Ky. App. 1995), Chief Justice Lambert gave more clarification as to the use of Civil Rule 60.02. Chief Justice Lambert wrote,

> Appellant next claims that Cox's participation in the trial was improper because of his legal relationship with Harding, the victim. Appellant raises this claim pursuant to CR 60.02, which allows appeals based upon claims of error that "were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the Court." *Young v. Edward Technology Group, Inc.*, Ky. App. 918 SW2d 229, 231 (1995). **CR 60.02 is the codification of the Common Law Writ of Coram Nobis, which allows a Judgment to be corrected or vacated based "upon facts or grounds, not appearing on the face of the record and not available by appeal or otherwise, which were not discovered until rendition of Judgment without fault of the party seeking relief."** *Davis v. Home Indemnity Company*, Ky., 659 SW2d 185, 188 (1983) (citing *Harris v. Commonwealth*, Ky., 296 SW2d 700 (1956). CR 60.02 is meant to provide relief which is not available by direct appeal or under RCr. 11.42. *Gross v. Commonwealth*, Ky., 648 SW2d 853, 856 (1983); *McQueen v. Commonwealth*, Ky., 948 SW 2d 415, 416 (1997). In order to be eligible for CR 60.02 relief, the movant must demonstrate why he is entitled to this special, extraordinary relief. Gross at 856. (Emphasis added) .

The Court's citation of the Common Law Writ of Coram Nobis is illustrative in this case. The first principle of this Writ is that it provides for vacation of judgment based upon facts or grounds not appearing on the face of the record and not available by appeal or otherwise. In this case, as set forth above, Picklesimer was aware of all of the facts warranting appeal the day after the judgment was entered. She failed to file an appeal. Instead, she waited eight (8) months, and filed a motion under Civil Rule 60.02. Based on the Common Law Writ of Coram Nobis, this is not permissible.

The second portion of the definition of the Writ provides that, "which were not discoverable until after rendition of Judgment without fault of the party seeking relief." In this

case, the basis for setting aside the Judgment is the Trial Court's determination that there was incorrect or misleading evidence presented by **both parties** that would render the Judgment of De Facto Custodian void. It was found by the Court that Picklesimer was the one who presented this evidence to the Court. It is Picklesimer who signed a Consent, Entry of Appearance, and Agreed Order that was submitted to the Trial Court Judge for entry. She cannot claim that she is free of fault as the party seeking relief.

The Court of Appeals opinion sustaining vacating the Order under CR 60.02 attempts to provide clarification to the Trial Court order. The Court of Appeals opinion provides that the Judgment should be set aside due to the fact that, "such conduct and pleadings not only constitute perjured or falsified evidence under Civil Rule 60.02(c), but further constitute a fraud effecting the proceedings. CR 60.02(d)." (Court of Appeals Opinion pg. 11.) Each of these sections will be addressed separately. It should be noted that Appellant does not believe she submitted perjury or falsified evidence in this proceeding. However, for purposes of these arguments only, it will be presumed that each of the parties submitted perjury or falsified evidence

The first issue to be considered is whether the Court can set aside the Judgment based on perjured or falsified evidence under Civil Rule 60.02(c). It is Appellant's position that this should not have occurred due to the actions of Picklesimer in presenting the alleged perjury or falsified evidence to the Court. In other words, Picklesimer came before the Court with unclean hands. This Court has set forth standards as to when a Judgment can be set aside as a result of perjury or falsified evidence. In the case of *Benberry v. Cole*, Ky., 246 SW2 1020 (1952), this Court held that,

> Our Court of Appeals laid down certain standards of measurement in cases of this nature in *Norheimer v. Keiper, 255 Ky. 232, 73 SW2 36, 37*, there stating:

> "If we were forced to take a position, we would at least require this much: If a Judgment is obtained by perjury the unsuccessful litigant subsequently to obtain a new trial must offer to show and must clearly and convincingly show (a) that such evidence was false; (b) that the result was produced thereby; (c) that the successful party participated therein; (d) that its nonexposure then was not due to negligence of the unsuccessful party; (e) that ordinary diligence would not have anticipated it; (f) that diligence was exercised to expose it then; (g) that he can expose it now; and (h) that the means by which it is proposed to expose it now were not available to him then. Id. at 1022.

Appellee does not meet a number of these standards. Suffice it to say, due to the fact that Appellee was one of the parties who set forth the alleged perjury or falsified evidence, she does not meet the standard set forth in this opinion.

The law was stated by a different Court, on a different occasion, when it was held that the standard for fraud affecting the proceedings was "to mean a fraud upon his adversary's rights which resulted in having thrown him off guard, or otherwise prevented him from defending, provided, however, that the losing party was not himself negligent and that he showed that the prima facie valid defense." *Overstreet v. Grensteads Administrator*, Ky., 140 SW2 836 (1940). Again, Appellee fails to meet this standard to utilize CR 60.02 (c) as a means to set aside the Agreed Judgment.

The other portion of the Civil Rule cited by the Court of Appeals is Civil Rule 60.02(d), which allows a Judgment to be set aside for "fraud affecting the proceedings, other than perjury or falsified evidence." However, 60.02(d) is also inapplicable to this proceeding.

It has been held that,

> The type of 'fraud affecting the proceedings' necessary to justify reopening under CR 60.02(d) generally relates to extrinsic fraud. W. Bertelsman and K. Phillips, *Kentucky Practice* CR 60.02, cmt. 6, at 426 (4th Ed. 1984). Extrinsic fraud covers 'fraudulent conduct outside of the trial which is practiced upon the Court, or upon the defeated party, in such a manner that he is prevented from appearing or presenting fully and fairly his side of the case'. Id.

> Furthermore, 'perjury by a witness or non-disclosure of discovery material is not the type of fraud to outweigh the preference for finality.' *McMurry v. McMurry*, 957 SW2d 731 at 732 (Ky. App. 1997)

It cannot be stated that Pickelsimer was prevented from participating in the action based on fraud. The Trial Court specifically found that this was not the case. The Trial Court found that the fraud alleged in the relationship had no bearing on the case. The Trial Court further held that the Appellee knowingly and voluntarily entered into the Agreed Judgment with full knowledge of its impact.

The Court of Appeals cited the case of *Burke v. Sexton*, 814 SW2d 290 (Ky. App. 1990). However, in that case, the Court sustained a motion under 60.02 due to the fact that one of the parties was prevented from participating in the action. That fact was not present in this action.

As stated above, a Civil Rule 60.02 motion should not have been permitted by the Court due to the fact that Appellee had ample opportunity and knowledge to file an appeal or other motions to set aside the Judgment in a timely fashion. Additionally, the Court lacked authority to sustain the 60.02 motions based on perjury or falsified evidence, or fraud affecting the proceedings other than perjury or falsified evidence. As such, the Agreed Judgment of Custody should be declared valid and enforceable.

4. Appellant Maintains Legal Standing to Pursue Custody.

The issue of standing was not addressed in detail by the Court of Appeals. However, Appellee raised the issue in her Brief to the Court of Appeals. It is anticipated that the issue of standing will be raised before this Court. Therefore, Appellant believes the issue should be briefed for this Court.

Appellee argues that if the Agreed Order is set aside pursuant to Civil 60.02, then

Appellant lacks standing to pursue any type of joint custody arrangement in this proceeding. Appellee cited the cases of *B.F. v. T.D.*, Ky., 194 SW3d 310 (2006) and *Moore v. Asente*, Ky., 110 SW3d 336 (2003), as the basis for this argument.

In the case of *Moore v. Asente*, decided by this Court in 2003, the Court addressed the issue of standing with reliance upon KRS 403.420. This Court stated,

> In Kentucky a non-parent's standing to bring a custody action is governed by KRS 403.420(4)(b), which provides in relevant part: (4) a child custody proceeding is commenced in the Circuit Court: (b) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents. Id. at 355-356.
>
> The *Asente* Court went on to state that,
>
> > This language appears rather straight forward, i.e., a nonparent has standing if the child is not in the "physical custody" of a parent. Id.

Appellee argues that, due to the fact that Zachary was in the physical custody of a parent at the time the Petition for Joint Custody was filed in the Garrard Circuit Court, Mullins did not have standing to file the Petition.

However, effective July 13, 2004, KRS 403.420 was repealed by the General Assembly. KRS 403.420 was replaced by KRS 403.822. KRS 403.822 does not set forth this specific language relating to standing only if the child is not in the physical custody of a parent. The "straight forward" statutory language relied upon by previous Courts is no longer valid law.

Additionally, the *Asente* Court went on to expand on this issue. The *Asente* Court noted that, in the case of *William v. Phelps*, 961 SW2d 40 (Ky. App. 1998), the Court of Appeals provided that the non-parent's mere physical possession of a child did not confer standing on her, but nonetheless held that the parent had standing, "based upon all of these facts, under the unique circumstances of this case." Id. The Court recognized that a non-parent could establish standing

if a non-parent could demonstrate that the child's parent had voluntarily relinquished his/her right to physical custody by evidence submitted to the Court. This issue of waiver will be addressed in greater detail below.

In this case, Appellee signed an Entry of Appearance, Consent to Custody and Agreed Judgment on January 20, 2006. The documents were filed with the Garrard Circuit Court on January 25, 2006. The Agreed Judgment of Custody was signed and entered by the Court on February 3, 2006. When Appellee signed these documents and submitted them to the Court, she consented to Appellant's standing to proceed in this custody proceeding. This is the additional evidence contemplated by the *Asente* Court to confer standing on the Appellant.

The Court of Appeals addressed a similar issue in the case of *Boone v. Ballinger*, 228 SW3d 1 (Ky. App. 2007). In that case, the Court held that the non-parent had standing to proceed on the custody issue due to the fact that a Petition for Dissolution was filed and the non-parent was deemed a necessary party and permitted to intervene in the case. Although the non-parent did not have physical custody of the child, and the child was in the physical custody of a parent, the non-parent retained standing due to the fact that the non-parent was a proper party before the Court. Similarly, Mullins was a proper party before this Court when the petition for Custody and other legal documents were filed with the Garrard Circuit Court.

5. The Trial Court Properly Held that Appellee Waived her Superior Right to Custody.

As set forth above, Appellant believes that the Agreed Order signed by the Garrard Circuit Court declaring Appellant a De Facto Custodian of the infant child, and joint custodian of

the infant child, should be reinstated. Additionally, Appellant believes that the Agreed Order should not be set aside due to the fact that Civil Rule 60.02 motions were inapplicable. However, in the event the Court rules that the Agreed Order should be set aside, the next issue presented to the Court is whether the Appellee has waived her superior right to custody in this action.

The Trial Court had a full day of hearings in this case. The Court took extensive testimony from the parties and others regarding the actions of the parties between the time this child was born through November, 2006. The Court found that the Appellee knowingly and voluntarily signed the Entry of Appearance and Consent to Custody as well as the Agreed Order. The Court found that the Appellee consented to the Appellant having regular contact with the child, initially every weekend, and then adjusted to adhere to the parties' work schedules. The Court went on to find that, "while the Petitioner(Mullins) does not qualify as a De Facto Custodian, the Court finds by clear and convincing evidence that the Respondent(Picklesimer) waived her superior right of custody by acknowledging, on a continuous basis, that the Petitioner is a parent of the child, by permitting extensive visitation and timesharing with the Petitioner, and by co-parenting the child along with the Petitioner from the child's birth until the separation of the parties." The Court also took notice of the legal documents tendered to it.

The Court of Appeals reversed this finding based on its interpretation of the evidence. It should first be noted that, a Trial Court's findings should not be set aside by an Appellate Court unless they are found to be "clearly erroneous" and therefore not supported by substantial evidence. *Vinson v. Sorrell*, 136 SW3d 465 (Ky. 2004). The Trial Court specifically found, by clear and convincing evidence, that Appellee had waived her superior rights to custody based on

an extensive hearing. There was substantial evidence for the finding, as set forth above. These findings of the Trial Court should not be set aside by the Court of Appeals. As such, the decision of the Court of Appeals should be reversed on this issue.

Furthermore, the Court of Appeals improperly interpreted and misapplied the law relating to waiver. In the Court of Appeals opinion, the Court reversed the Trial Court's decision based on the opinions of *Moore v. Asente*, Ky.,110 SW3d 336 (2003); *Vinson v. Sorrell*, Ky.,136 SW3d 465 (2004); and *Shifflet v. Shifflet*, Ky., 891 SW2d 392 (1995).

The Court of Appeals began its analysis regarding waiver citing the case of *Moore v. Asente*, 110 SW3d 336 (Ky. 2003). The Court properly stated that the *Asente* decision allows non-parents to obtain custody of a child if the non-parent can either show that the parent is unfit, or the parent has waived their superior right to custody. See also *Boone v. Ballinger*, 228 SW3d 1 (Ky. App. 2007).

The Court of Appeals proceeded to cite factors set forth in *Vinson v. Sorrell*, 136 SW3d 465 (Ky. 2004), citing the case of *Shifflet v. Shifflet*, 891 SW2d 392 (Ky. 1995). These "factors" cited by the Court, were actually set forth by Justice Spain, in his concurring opinion in *Shifflet*. The Court of Appeals' Opinion relating to these facts insinuates that the factors set forth by Justice Spain are exclusive to any other factors. This is clearly not the case. Citing Justice Spain's concurring opinion, it was written, "**among the factors the trial Court should consider** in deciding whether waiver has occurred are:...". *Shifflet v. Shifflet*, 891 SW2d 392 (Ky. 1995) (Emphasis added). Justice Spain goes on to recite the five factors cited by the Court of Appeals. Additionally, in the case of *Moore v. Asente*, the Court states that, "whether a parent has waived his or her superior right to custody under KRS 405.020 **is a fact-specific determination that**

should be made after consideration of all relevant factors." *Moore v. Asente*, 110 SW3d 336 (Ky. 2003) (Emphasis added). The factors identified by Justice Spain were merely factors to be considered relevant to the *Shifflet* decision, and not factors that are exclusive of any other factors in the particular case.

The Court of Appeals' Opinion in this case makes it clear that the factors set forth in *Shifflet* were the only factors it considered, exclusive of all other factors, when the Court states that,

> "The trial Court's findings in this case do not justify the conclusion that Picklesimer waived her superior right to custody of Zachary. The fact that Picklesimer acknowledged that Mullins is a parent of the child by allowing her to assist in his daily life is not one of the factors to be considered in concluding waiver."

In fact, the opposite is true. The fact that Picklesimer acknowledged that Mullins was the parent of this child, and took affirmative action to legalize Mullins' standing as a parent of the child, documents her waiver and is an extremely important factor for the Court to consider.

Waiver has been defined as a voluntary and intentional surrender or relinquishment of a known right. This definition has been cited by all the Courts. The Courts have clearly outlined that the Court is to consider all relevant factors. In the case of *Vinson v. Sorrell*, the Court writes,

> What evidence constitutes proof a parent, who is not proved unsuited to the trust (KRS 405.020(1)) has waived his or her superior custodial right when that right is challenged by a non-parent?
> As stated above, waiver requires proof of a "knowing and voluntary surrender or relinquishment of a known right." 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.** *Vinson v. Sorrell*, Ky., 136 SW3d 465 at 469 (2004). (Emphasis added).

The *Vinson* Court specifically references formal or written documents as clear evidence of waiver. This is precisely the fact set forth in this case. Picklesimer knowingly and voluntarily signed formal and written waivers of her rights to custody, granting to Mullins joint custody of the child and declaring Mullins to be the De Facto Custodian of the child. These formal and written documents, as set forth in *Vinson*, constitute clear and convincing evidence necessary to meet the burden of proof in the case.

This same type of evidence can be found in the facts of *Moore v. Asente*, Ky., 110 SW3d 336 (2003). The *Asente* decision, a case which affirmed the waiver, did so based on written documents entered by the Court. In that case, the written documents were consents to adopt. However, the Court relied on these written and affirmative documents to provide clear and convincing evidence that the parents waived their superior rights to custody.

In addition to the written and executed evidence of waiver, there was other evidence that documents Pickleseimer's waiver of custodial rights. For example, at birth, the child was given the name of Zachary Alexander Picklesimer-Mullins. As the child grew older, he began calling Mullins "momma" and Picklesimer "mommy", which is a practice still in effect today. The parties have worked together to raise the child since his birth. The Court's decision should take into account the impact its decision will have upon the child based on the circumstances created by the parties jointly.

Mullins was granted joint custody of the child by affirmative action and documentation signed and filed by Picklesimer. In this case, the Court has misapplied the case law cited above.

The Court has improperly cited Justice Spain's concurring opinion, citing "factors" to be considered, as exclusive factors. This is not the intent of Justice Spain or the intent of the Court. All relevant factors are to be considered. The factor the Court states it cannot consider is the exact factor it should consider under case law and the facts of this case. When the Court reviews all relevant factors, the fact that the parties to this case hired an attorney, drafted documents, and signed the documents to be submitted to the Court constitute clear and convincing evidence of waiver in this action. Clearly, Picklesimer's actions were a voluntary and intentional surrender or relinquishment of her known right to custody, and her election to forgo an advantage which she had to be the primary custodian of the child. As such, the Court of Appeals should be reversed on this issue, and the Trial Court's finding reinstated.

6. Public Policy Mandates the Court Provider Legal Access to Custody for Same Sex Couples.

This case presents issues of the rights of a third party, or non-parent, for access to custody of a child. The General Assembly permits third parties to obtain custody of a child under certain circumstances. This case involves the right of a party designated by the birth mother as a parent of the child. As set forth in the facts, the parties, jointly, made the decision to have a child and raise the child together. This is evident from their decision to join together to select a sperm donor, to be present for the artificial insemination, as well as the birth of the child. The acts of the parties to raise the child together is further evidenced by their decision to name the child Zachary Alexander Picklesimer-Mullins. This is the name that was placed on the birth certificate. Subsequent to the birth of the child, the parties worked together to raise the child.

Ms. Mullins took vacation leave for a period of one month to care for the child. The child, now age 3, has grown to refer to Mullins as "momma" and Picklesimer "mommy". Zachary further refers to Mullins parents as "granny and pawpaw".

It is evident by these facts that the parties made a joint decision to raise a child together. The Court of Appeals focuses on whether this decision should stand under Kentucky law. The issue that the Court of Appeals does not address, and needs to be addressed, are issues regarding the best interest of the child. The Court of Appeals never discusses the effect and consequences of the parties' actions on the child. This Court should review the best interest of the child when rendering a decision in this matter. The law in Kentucky should be clear as to when third parties have access to the Courts for custody of children.

The Court of Appeals, in the case of *S. J. L. S. v T. L. S.*, 265 SW3d 804 (Ky. App. 2008), addressed the issue of public policy. In that case, the Court wrote:

> There is a clear hierarchy in the enunciation of public policy nowhere better expressed than in *Kentucky State Fair Board v. Fowler*, 310 Ky. 607, 221 SW2 435 (1949). (*Citing Kentucky State Fair Board*) "The public policy of a State is to be found: first, in the Constitution; second, in the Acts of the Legislature; and third, in its Judicial Decisions. Where the Constitution is silent, the public policy of the State is to be determined by the Legislature on subjects which it has seen fit to speak. It is only where the Constitution and the Statutes are silent on the subject that the Courts have an independent right to declare the public policy." Id. at 439.

When two people of the same sex desire to parent a child together, the law is silent as to how parties are to proceed or Courts are to adjudicate. In the absence of law, it is the children who are caught in the middle. In this case Zachary did not choose his parents. The parties to this case chose to be artificially inseminated, give birth, and raise this child together. When they did so, the commitment was made. Now, one parent wants to disregard the other, which is obviously

not in the child's best interest.

When married couples have children, and divorce, the law protects the children. When unmarried couples have children, and separate, the law protects the children. When two parties of the same sex have children, the law provides no protection for the children.

The General Assembly has enacted Statutes clearly addressing the issues of marriage, custody, same sex marriage, and same sex adoption. There is no law that can be found on same sex custody. As set forth in the case of *S. J. L. S. v T. L. S.*, when the Constitution and the Statutes are silent on the subject, then the Courts have an independent right to declare the public policy.

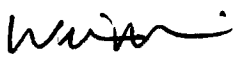
It is argued above that the law allows a third party to obtain custody pursuant to the De Facto Custodian Statute, or proving that a parent is unfit or waived their superior right to custody. Obviously, as set forth above, this is a troublesome and burdensome avenue for these parties to pursue. This Court should declare, as a matter of law, that if two parties of the same sex desire to have joint custody of a child, they should be permitted to do so by express agreement signed by the parties and submitted to the Court for order to be entered. Once the order is entered, the Court can then protect the best interests of the child just as it would in the event of a custody determination in a divorce decree.

CONCLUSION

Appellant moves the Court to reverse the Court of Appeals and the Trial Court, and rule that the Agreed Judgment submitted to the Garrard Circuit Court was entered knowingly and voluntarily, not properly appealed, and should not be set aside under Civil Rule 60.02. This can be done on legal grounds as well as public policy grounds. Notwithstanding this argument, if

this Court declares that the Agreement Judgment is void, Appellant moves the Court to grant Appellant standing in the matter, and rule that Appellee has waived her superior right to custody, sustaining the Trial Court, and reversing the Court to Appeals.

Submitted by:



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