COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2008-SC-0484-DE
(CASE NO. 2007-CA-0086 and NO. 2007-CA-00101)

ARMINTA JANE MULLINS — APPELLANT

VS

GARRAD CIRCUIT COURT
ACTION NO. 06-CI-00038

PHYLLIS DIANNE PICKLESIMER — APPELLEE

BRIEF FOR APPELLEE/PHYLLIS DIANNE PICKLESIMER

Submitted by:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of this brief was mailed, postage prepaid to Hon. Hunter Daugherty, Jessamine Circuit Courthouse, 101 N. Main Street, Nicholasville, Kentucky 40356;Garrard Circuit Court Clerk, Courthouse Annex, 7 Public Square, Lancaster, Kentucky 40444; Hon. William R. Erwin, 432 West Main Street, P.O. Box 137, Danville, Kentucky 40423-0137; and Clerk of Court of Appeals 360 Democrat Drive, Frankfort, Kentucky 40601, this 13th day of March 2009.

ROBIN R. SLATER

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee is not requesting that this case be set for an oral argument.

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COUNTERSTATEMENT OF THE CASE

Phyllis Dianne Picklesimer (hereinafter "Picklesimer") and Arminta Jane Mullins (hereinafter "Mullins") were involved in a relationship for approximately five years. (VR No. 2: 11/06/06; 2:18:30). On November 16, 2004 Picklesimer was artificially inseminated by an anonymous donor and became pregnant. Prior to becoming pregnant, Picklesimer and Mullins discussed raising this child together, but no legal documents were executed. Picklesimer and Mullins had difficulty with their relationship and separated during the pregnancy. The parties reconciled prior to the birth of Zachery Alexander Picklesimer-Mullins (hereinafter "Zachery") on May 31, 2005. Both parties provided care for Zachery until Picklesimer and Mullins separated again in August, 2005. (VR No. 2: 11/06/06; 2:24:08). Picklesimer and Zachery remained in the residence the parties had shared. (VR No. 2: 11/06/06; 2:39:12). Mullins testified that at no point did she live alone with Zachery. (VR No. 2: 11/06/06; 2:38:37). In December 2005, Mullins once again initiated a relationship with Picklesimer. Mullins indicated that she wanted to be a family with Picklesimer and Zachary. (VR No. 2: 11/06/06; 2:40:40).

After returning home, Mullins immediately complained that she needed legal documents to allow her to get medical care for Zachery if Picklesimer was not available. Mullins also indicated to Picklesimer that she wanted documents to allow her to care for Zachery if Picklesimer were to die. (VR No. 2: 11/06/06; 2:56:37). In December of 2005, Mullins, who is a police officer and familiar with the court system, retained an attorney. (VR No. 2: 11/06/06; 2:22:46).

Picklesimer was not represented by counsel. (VR No. 2: 11/06/06; 2:30:16). On January 20, 2006 Picklesimer went to the office of Mullins' attorney and although concerned about the language in the document, signed an Agreed Judgment of Custody, which acknowledged Mullins as a de facto custodian and provided for Picklesimer and Mullins to share joint custody of the child. Picklesimer testified that she objected to the language in the Agreed Judgment of Custody that stated that Mullins was the primary financial support and primary care provider for Zachary, but signed the document anyway believing it was the only way to ensure that Mullins could provide for Zachary's care in the event of her absence or death. The Agreed Judgment of Custody prepared by Mullins' attorney indicated an intention for the parties to continue to reside together and therefore child support was waived. Picklesimer also signed an Entry of Appearance on January 20, 2006. The Petition for Custody and the Agreed Judgment of Custody were filed by Mullins on January 25, 2006. No summons was issued in the case. The Entry of Appearance dated January 20, 2006 was filed in the record.

Mullins filed the Petition for Custody in Garrard Circuit Court even though both parties and Zachery lived in Lincoln County. The issue of venue was not specifically waived in any of the initial pleadings. Mullins testified that the action was filed in Garrard Circuit Court due to concern that the Lincoln County Circuit Judge Lambert would not sign the Agreed Judgment of Custody. (VR No. 2: 11/06/06; 2:47:30). The Agreed Judgment of Custody was signed by Judge Hunter Daugherty on February 3, 2006.

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 a relationship with another woman since before Picklesimer was inseminated. Mullins had no intention 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 Picklesimer.

After the parties' relationship ended, Picklesimer allowed Mullins to spend time with the child including some weekends and when Picklesimer was working twelve hour shifts as a nurse. (VR No. 2: 11/06/06; 2:25:40). In September, 2006 Picklesimer stopped the contact between Mullins and Zachery when Mullins violated a verbal agreement that she would not leave the child with anyone other than a family member. Specifically, Mullins left the infant with a man who had, according to Mullins, assaulted her current partner after learning she was involved in a lesbian relationship with Mullins. (VR No. 2: 11/06/06; 2:51:03).

On September 30, 2006 Mullins filed a Motion for Visitation in Garrard Circuit Court. Mullins subsequently filed a Motion for Sole Custody of Zachery. Picklesimer retained counsel and filed a Motion to Dismiss alleging that the Garrard Circuit Court lacked jurisdiction based on the fact that no summons was ever issued in the case, that the entry of appearance was invalid because it was

signed prior to the filing of the Petition for Custody and that the venue was improper. In the alternative, Picklesimer filed a Motion to Set Aside the Agreed Judgment of Custody Pursuant to Civil Rule 60.02 on the basis of fraud and mistake. Picklesimer alleged that the finding of fact in the Agreed Judgment of Custody that Mullins was a de facto custodian was based on mistake. Picklesimer argued that Mullins did not qualify as a de facto custodian because she resided in the same home as the biological parent and therefore the Agreed Judgment of Custody should be set aside. Picklesimer also argued that the Agreed Judgment of Custody should be set aside because it was obtained by fraud. The basis of this argument was Mullins rekindled the relationship with Picklesimer for the sole purpose of inducing her to sign the Agreed Judgment of Custody and ended the relationship the day after it was signed.

A hearing was held before Domestic Relations Commissioner Johnny Bolton in Garrard Circuit Court on November 6, 2006 and recommendations were issued by Commissioner Bolton on November 8, 2006. Commissioner Bolton recommended that the Garrard Circuit Court overrule the Motion to Dismiss on the basis that a summons was not issued; that the entry of appearance was deficient; and that there was a lack of venue.

Commissioner Bolton found that no summons was necessary since there was an entry of appearance and Picklesimer had knowledge of the proceedings. The Commissioner rejected the argument that the entry of appearance was invalid because it predated the filing date of the Petition for Custody. The Commissioner reasoned that this is not a problem since it is common practice.

The Commissioner also rejected the argument that the Garrard Circuit Court lacked venue over the parties finding that venue may be waived.

The Commissioner recommended that the Garrard Circuit Court overrule the Motion for Relief Pursuant to Civil Rule 60.02 on the basis of fraud and sustain the motion on the basis of mistake. The Commissioner ruled that the Agreed Judgment of Custody should be set aside because had there been a hearing, Mullins would not have met her burden of proof to be declared a de facto custodian.

Commissioner Bolton indicated in his report that the legal effect of setting aside the Agreed Judgment of Custody would be to deny Mullins standing as a party to seek consideration as a custodian. The Commissioner made a finding that this would be an unjust and unreasonable result. The Commissioner made a finding that Picklesimer had waived her superior right of custody by permitting visitation and co-parenting with Mullins. The Commissioner recommended that Picklesimer and Mullins share joint custody of Zachery. He further recommended that Mullins be given visits every other weekend and when Picklesimer was working as a nurse. The recommendation anticipated that Mullins would receive at a minimum 6 out of every 14 days. He recommended that Mullins not be ordered to provide health insurance or pay child support. Picklesimer and Mullins both filed exceptions to the recommendations of the Domestic Relations Commissioner. Judge Hunter Daugherty overruled all exceptions and adopted the recommendations of Commissioner Bolton on December 1, 2006.

Mullins was granted visitation with Zachary beginning December 7, 2006. This visit was scheduled to end on December 9, 2006. On December 8, 2006 Mullins filed an Emergency Protective Order on behalf of herself and the child in Lincoln County where she resides. The Emergency Protective Order was filed in Lincoln Family Court, CA# 06-D-139-001. Mullins relied on the custody orders entered by the Garrard Circuit Court to meet "the child in common" standard for the Emergency Protective Order. In the Petition for the Emergency Protective Order, Mullins alleged an altercation with Picklesimer occurred during the exchange of the child on December 7, 2006. Mullins requested and was granted ex parte sole custody of Zachary by the Lincoln Family Court. The hearing on the Emergency Protective Order was originally set in Lincoln County on December 14, 2006. At that time, due to the fact that custody orders were pending in Garrard County, the case was transferred to the next available docket in Garrard County which was the Garrard District Court docket on December 21, 2006. Picklesimer was denied any contact with her son during this time period.

On December 20, 2006 Picklesimer filed a Petition for Writ of Prohibition/Mandamus and a Motion for Emergency or Expedited Intermediate Relief. The Petition for the Emergency Protective Order filed against Picklesimer by Mullins was heard on December 21, 2006 and Picklesimer's timesharing rights with Zachery were restored. On December 22, 2006 the Court of Appeals issued an Order Denying Emergency Relief and stating that since the Garrard Circuit Court on December 21, 2006 provided for a timesharing schedule, no emergency relief was appropriate. The Court of Appeals subsequently issued an

Order Denying Petition for Writ of Mandamus/Prohibition on January 29, 2007 stating that Picklesimer had failed to show that reliance on the remedy provided by appeal would cause irreparable injury or great injustice.

A Notice of Appeal was filed by Picklesimer on December 28, 2006 challenging the Order entered December 1, 2006 adopting the Domestic Relations Commissioner's Recommendations filed on November 8, 2006. A Notice of Cross Appeal was filed by Mullins on January 3, 2007.

On appeal Picklesimer argued that the Garrard Circuit Court lacked jurisdiction and venue to issue orders regarding the custody of the minor child; that Mullins lacked standing to pursue custody of the minor child and that the trial court erred in finding that Picklesimer waiver her superior right to custody. In her cross appeal, Mullins argued that the Garrard Circuit Court abused its discretion by invalidating the Agreed Judgment of Custody entered February 3, 2006; that the Garrard Circuit Court maintained jurisdiction of the parties pursuant to the entry of appearance; that the Garrard Circuit Court was the proper venue for the action; that Mullins had standing to pursue custody and that the Garrard Circuit Court acted within its discretion in finding, by clear and convincing evidence, that Picklesimer waived her superior right to custody pursuant to KRS 403.270.

On March 28, 2008 the Court of Appeals issued an Opinion Affirming in Part, Reversing in Part, and Remanding. The Court of Appeals rejected Picklesimer's argument that the Garrard Circuit Court lacked jurisdiction and venue. The Court of Appeals also rejected Mullins argument that the trial court abused its discretion by setting aside the Agreed Judgment of Custody. The

Court of Appeals agreed with the trial court that Mullins did not qualify as a de facto custodian under KRS 403.270 and thus it was proper to invalidate the Agreed Judgment pursuant to CR 60.02. The Court of Appeals also found that Mullins lacked standing to assert custody of Zachary because she failed to establish that she was a de facto custodian of the child or that Picklesimer was unfit or waived her superior right to custody. The Court of Appeals remanded the case for entry of an amended order denying Mullins' motion for joint custody of Zachary.

Mullins filed a Petition for Rehearing and Modification of Opinion pursuant to Civil Rule 76.32. The Court of Appeals issued an Order on June 6, 2008 partially granting the Petition for Rehearing and Modifying of Opinion. The original opinion was modified only to correct an inaccuracy concerning the names of the parties on page two of the opinion and in no way affected the result.

Mullins filed a Motion for Discretionary Review on July 3, 2008 indicating that there were four questions of law that the Supreme Court should review and consider. They are as follows: Whether courts should grant third parties access to custody of a child if it is in the best interest of the child? Whether the Garrard Circuit Court abused its discretion by invalidating the Agreed Judgment of Custody entered February 3, 2006? Whether Picklesimer failed to file a timely appeal to the Agreed Judgment of Custody? Whether Picklesimer waived her superior right to custody by her actions?

Picklesimer filed a Response to Motion for Discretionary Review and argued that Mullins had failed to show that this was a proper case for

discretionary review. On January 14, 2009 Mullins' motion for review of the decision of the Court of Appeals was granted.

1. THE VOIDING OF THE AGREED JUDGMENT OF CUSTODY WAS PROPER

Mullins argues that the trial court abused its discretion by voiding the Agreed Judgment of Custody entered on February 3, 2006. Mullins states that the Garrard Circuit Court set aside the Agreed Judgment due to its finding that the Agreed Judgment was entered without a hearing. Mullins further states that the Garrard Circuit Court found that a hearing is required prior to entering into any judgment declaring a party a de facto custodian. Mullins argues at length that the trial court erred in finding that a hearing is required before a person may be declared a de facto custodian and provides numerous cases to support the argument that a hearing is not required. Mullins' argument is misplaced. The Garrard Circuit Court did not set aside the Agreed Judgment of Custody because there was not a hearing and the Garrard Circuit Court did not find that a hearing is required prior to entering into any judgment declaring a party a de facto custodian. The Garrard Circuit Court set aside the Agreed Judgment of Custody because it was based on incorrect and misleading evidence.

The Findings of Fact, Conclusions of Law, Recommendations of the Domestic Relations Commissioner on page 6 provided as follows:

> This Court is greatly concerned that no hearing and no evidentiary record of any kind was established prior to the Court's entry of a finding of the De Facto Custodian status of the Petitioner. Had such a hearing been held, it is clear that the Court would not have signed the Agreement, as the Petitioner would not have met her burden of proof. The Respondent testified that at the time she signed the documents she objected to the language stating that the Petitioner was the primary financial support and primary care provider, but signed the documents anyway believing it was the only way the Court would award the parties joint custody. 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 CR 60.02.

The Garrard Circuit Court stated that it was greatly concerned that no hearing and no evidentiary record of any kind was established prior to the Court's entry of the finding of the de facto custodian status of the Petitioner, but the Court did not set aside the Agreed Judgment of Custody because a hearing was not held. The Court set aside the judgment declaring Mullins a de facto custodian because it was entered on the basis of incorrect and misleading evidence. Mullins provided misleading and incorrect evidence in the affidavit she submitted to the Court. Mullins misrepresented that she was the primary financial supporter and primary caregiver of the child when this clearly was not the case. The Domestic Relations Commissioner stated that based on the testimony of the parties, it was clear that had Mullins sought to be declared a de facto custodian absent an agreement, she would have failed to meet her burden of proof.

Mullins filed the Petition for Custody and Affidavit stating that she had been the primary caregiver for and primary financial supporter of the child since

his birth. This was clearly false and misleading. Both parties later testified that Mullins was never the primary caregiver and primary financial supporter of the child as is required to qualify as a de facto custodian pursuant to KRS 403.270(1).

Both parties testified that the Petition for Custody came about due to concern that in the event that Picklesimer died, Mullins needed legal documents that would allow her to care for the child. Mullins obtained an attorney and this attorney drafted the Petition for Custody, Affidavit, Entry of Appearance and Agreed Judgment of Custody. This was all done in response to concern that Mullins be able to make medical decisions for the child in the event that Picklesimer was unable to do so and to care for the child in the event of Picklesimer's death. Picklesimer was not represented at the time she signed the Agreed Judgment of Custody. She testified that she took issue with the language in the agreement indicating that Mullins was the primary caregiver and primary financial supporter of the child, but was told that it was the only way to ensure that Mullins would be able to care for the child in her absence.

The trial court voided the Agreed Judgment of Custody that declared Mullins a de facto custodian due to the fact that it was entered on the basis of incorrect and misleading evidence. The Court of Appeals upheld the trial court's decision and ruled that the trial court did not abuse its discretion in vacating the Agreed Judgment of Custody. Pursuant to CR 60.02(c) a trial court to set aside a judgment that is based upon "perjury or falsified evidence". Both parties admit that the Affidavit and Petition for Custody submitted to the trial court contained

false information. Therefore, Pursuant to CR 60.02(c) the Court was allowed to set aside the judgment.

2. MULLINS' ARGUMENT THAT THE COURT SHOULD HAVE DISMISSED THE MOTION TO SET ASIDE AGREED JUDGMENT DUE TO FAILURE TO FILE APPEAL WAS PROPERLY DENIED.

Mullins argues that Picklesimer's challenge to the Agreed Judgment of Custody under Civil Rule 60.02 should have been barred due to her failure to file a proper notice of appeal. Mullins argues that there were a number of other actions Picklesimer could have taken to challenge the Agreed Judgment of Custody and her failure to do so should have barred her from filing for relief pursuant to Civil Rule 60.02. Mullins argues that Picklesimer's Motion for Relief Pursuant to Civil Rule 60.02 should be barred because she failed to file for relief pursuant to Civil Rule 52.02; Civil Rule 52.03; Civil Rule 59.01 or Civil Rule 59.05.

There is no authority for barring Picklesimer's Motion for Relief Pursuant to Civil Rule 60.02 for her failure to file for relief pursuant to any of the above referenced Civil Rules. Pursuant to Civil Rule 60.02 a judgment or order may be set aside on grounds of mistake, newly discovered evidence, fraud, etc. The motion may be made not more than one year after the judgment or order is entered. Picklesimer properly filed the Motion for Relief Pursuant to Civil Rule 60.02 within one year and alleged that there was mistake and fraud. Under Mullin's argument all motions filed pursuant to Civil Rule 60.02 would be barred

unless there was a previous appeal. This clearly is not a requirement for relief under Civil Rule 60.02.

3. THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING RELIEF UNDER CIVIL RULE 60.02.

The trial court did not abuse its discretion in setting aside the Agreed Judgment of Custody pursuant to Civil Rule 60.02. The court found that since the judgment declaring Mullins de facto custodian was entered on the basis of incorrect and misleading evidence the judgment is void under Civil Rule 60.02. Mullins argues that the trial court erred in voiding the Agreed Judgment of Custody due to the fact that Picklesimer raised the issue of fraud without designating which section of Civil Rule 60.02 was being utilized.

Picklesimer moved to set aside the Agreed Judgment of Custody pursuant to Civil Rule 60.02 on two separate grounds. The first was based on fraud. Picklesimer argued that Mullins fraudulently induced her to enter into the Agreed Judgment of Custody by stating that she intended to maintain a relationship with Picklesimer and raise the child as a family. The trial court overruled this argument. Picklesimer also moved to set aside the Agreed Judgment of Custody pursuant to Civil Rule 60.02 on the basis that it mistakenly declared Mullins a de facto custodian.

KRS 403.270(1)(b) provides 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 1 of this section". KRS 403.270(1)(a) defines a de facto custodian 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 or has been placed by the Department for Community Based Services".

In *Consalvi v. Cawood*, 63 S.W. 3d (Ky. App. 2001) the Court interpreted KRS 403.270 to require that in order to qualify as a de facto custodian a party must stand in place of the natural parent. It is not enough that a person provide for a child along side the biological parent. The trial court properly found that Mullins did not meet the standards set out in KRS 403.270 or *Consalvi* and therefore did not qualify as a de fact custodian.

Mullins does not deny that the Agreed Judgment of Custody was entered on the basis of false or misleading evidence, but argues that it was Picklesimer who presented the perjury or falsified evidence to the court. Mullins further argues that since it was Picklesimer who provided perjury or falsified evidence to the Court she should not have been allowed to come before the Court with "unclean hands" and seek relief. Mullins states in her brief that she does not believe that she submitted perjury or falsified evidence. Mullins puts all the blame for the trial court being provided false or misleading evidence on Picklesimer and states for this reason the Agreed Judgment of Custody should not be set aside. However, it was Mullins who was represented by counsel at the time the Agreed Judgment of Custody was entered. Mullins' attorney drafted the Petition for Custody and Affidavit executed by Mullins that falsely stated she was

the primary financial and primary caregiver of the child. Mullins' attorney drafted the Agreed Judgment of Custody that misrepresented Mullins as a de facto custodian. Picklesimer was not represented by counsel at the time she signed the Agreed Judgment of Custody and objected to the language in the pleadings that stated that Mullins was the primary financial supporter and caregiver of the child but was told that this was the only way to protect her son in the event of her death. Mullins and her attorney knew that she did not qualify as a de facto custodian. They knew that she was not the primary caregiver or financial supporter of the child and that she had not parented the child separate from Picklesimer so as to qualify as a de facto custodian. In terms of "unclean hands" it is Mullins who comes before the Court with the greater culpability.

4. THE APPELLANT LACKED LEGAL STANDING TO PURSUE CUSTODY

Upon the voiding of the Agreed Judgment of Custody, Mullins had no standing to seek custody of the child. Once the trial court determined that Mullins was not a de facto custodian the court was precluded from any further consideration of the case.

KRS 403.270 provides that a court may grant custody of a child to a parent or to a de facto custodian. Mullins is neither a biological nor adoptive parent of the child and she does not qualify as a de facto custodian. Therefore she lacks standing to pursue custody of Zachary.

The case at hand is exactly like *B.F. v. T.D.*, 194 S.W. 3d 310 (Ky. 2006). In *B.F. v. T.D.* an adoptive mother's former domestic partner requested custody and visitation rights with respect to her former partner's child. B.F. and T.D. were in a co-habitation relationship for approximately eight years. After living together for several years they decided to adopt a child. T.D. was the only adoptive parent due to the parties' uncertainty of Kentucky law with respect to same sex adoptions. The child resided with both T.D. and B.F. until she was six years old at which time the parties' separated. B.F. filed an action seeking to be designated a de facto custodian of the child and also asserted a right to custody based on common law theories such as waiver. The finding of the Jefferson Circuit Court's that B.F. did not qualify as a de facto custodian since she had been the primary financial supporter of the child, but not the primary caregiver of the child was upheld. The court upheld trial courts determination that B.F.'s failure to qualify as a de facto custodian precluded any further consideration of the case. Citing *Consalvi v. Cawood*, 63 S.W. 3d 195 (Ky. App. 2001) the Supreme Court determined that absent de facto custodian status, B.F. did not have standing to assert any other claims. The Supreme Court ruled that waiver does not confer standing to a party, but only goes to the issue of the standard required to gain custody. The Supreme Court found that cases such as *Moore v. Asente*, 110 S.W. 3d 336 (Ky. 2003) would not confer standing on B.F. because they involved children who were not in the physical custody of either parent, a fact not present in B.F.'s case and a fact not present in the case at hand.

5. THE COURT OF APPEALS PROPERLY HELD THAT THE APPELLEE DID NOT WAIVE HER SUPERIOR RIGHT TO CUSTODY

The Court of Appeals properly found that the trial court erred in finding that Picklesimer waived her superior right to custody of Zachary. The trial court ruled that by acknowledging, on a continuous basis, that Mullins was a parent of the child, by permitting extensive visitation and timesharing and by co-parenting the child along with Mullins until the separation of the parties, Picklesimer waived her superior right to custody. The trial court further found that unlike a de facto custodian, waiver of the parent's superior right of custody is not required to be exercised at the exclusion of the natural parents.

The Court of Appeals held that the trial court's findings in this case do not justify the conclusion that Picklesimer waived her superior right to custody of the child. The Court of Appeals noted that the factors relevant to determining generally whether a parent has waived his or her superior custody right was set forth in *Vinson v. Sorrell*, 136 S.W. 3d 465 (Ky. 2004). The factors include: the length of time the child has been away from the parent, circumstances of separation, age of the child when care was assumed by the non-parent, time elapsed before the parent sought to claim the child, and frequency and nature of contact, if any, between the parent and the child during the non-parent's custody. The Court of Appeals found that waiver, contemplates circumstances of separation between the parent and child. Since there was no separation between Picklesimer and her child there was no waiver.

Pursuant to K.R.S. 403.270 a de facto custodian is a person who has been shown by clear and convincing evidence to have been the primary caregiver for and the financial supporter of a child. Not a primary caregiver and a primary financial supporter of a child. The Court of Appeals in *Consalvi v. Cawood*, 63 S.W. 3d 195 (Ky. App. 2001) held that it is not enough that a person provide for a child alongside the natural parent, but that to qualify as a de facto custodian a person must stand in place of the natural parent. The Court of Appeals stated that, "To hold otherwise would serve to expand a narrowly drawn statute intended to protect grandparents and other persons who take care of a child in the absence of a parent into a broad sweeping statute placing all step-parents on equal footing with natural parents. In light of both the legislative history and the common sense interpretation of the language of the statute, we do not believe that this result was contemplated by the General Assembly." Id. at 199.

The Court of Appeals in Consalvi held that previous appellate decisions applying the traditional doctrine of waiver in custody disputes between a natural parent and a non-parent were superseded by the amendment of KRS 403.270(1). Now that KRS 403.270(1) gives courts specific guidance as to what is necessary to qualify as a de facto custodian the ability to argue the right to custody under the theory of waiver should be precluded. Since the passage of KRS 403.270(1) the only cases that have considered waiver have been ones where the child in question was not in the physical custody of the biological

parent. Waiver does not occur unless the biological parent fails to be a part of the child's life.

6. PUBLIC POLICY DOES NOT MANDATE AN EXPANSION OF RIGHTS

Mullins raises for the first time in her brief filed on February 11, 2009 the argument that public policy mandates the court provide legal access to custody for same sex couples. The argument has not previously been asserted and was not set out as a basis for her motion for discretionary review. Therefore the argument should not be considered at this time.

In the event that the court decides to consider the argument it should be overruled. The legislature has set out the criteria for a third party to gain standing to assert custodial rights of a child. Unfortunately for Mullins she does not meet this criteria.

Mullins proposes that all individuals who assist a parent in caring for a child should be granted standing to seek custody of a child. Under Mullins argument, at a minimum all stepparents would be granted standing to seek custody of their stepchildren. At its extreme the neighbor who picks up a child after school could have standing or the family member to occasionally assists a parent by taking a child to a medical appointment could have standing to seek custody of the child.

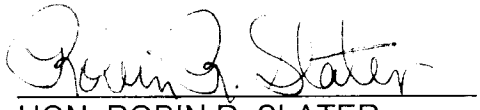
One of the purposes of the KRS 403.270 was to specifically define when a person qualifies as a de facto custodian. It was the intention of the legislature to

provide guidance in determining when waiver has occurred. Waiver occurs when a parent allows someone else to be the primary caregiver and primary financial supporter of a child for at least six (6) months if the child is under one year of age. The law is very clear on this issue. To follow the logic of Mullins and grant standing to seek custody of a child to any person who helps a parent would create confusion and uncertainty that the legislature was trying to avoid with the passage of KRS 403.270.

CONCLUSION

The Appellee moves the Court to uphold the ruling of the Court of Appeals and find that the Appellee did not waive her superior right to custody.

Submitted by:



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