

RENDERED: February 27, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 97-CA-0043-MR

LARRY MIDDLETON and  
REGINA MIDDLETON

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 92-CI-3745

GINA MORAN (NOW WILLIAMS)

APPELLEE

**OPINION**  
**AFFIRMING**

\* \* \* \* \*

BEFORE: GUDGEL, Chief Judge; EMBERTON and JOHNSON, Judges.

JOHNSON, JUDGE: Larry and Regina Middleton (the Middletons) appeal from an order of the Fayette Circuit Court entered on December 9, 1996, that granted permanent custody of Alisha D. Moran (Alisha) to her natural mother, Gina Williams (Gina). Regina Middleton is Alisha's maternal grandmother and Larry Middleton is Alisha's maternal step-grandfather. We affirm.

On appeal, all parties appear pro se. Contrary to the misunderstanding of the parties, Archie Williams, the husband of Gina Williams, was not a party to the underlying action and is not a party to this appeal. Accordingly, it was improper for him to have joined with Gina in submitting the brief on behalf of Gina.

By separate order, this Court has stricken Gina's brief from the record.

In their brief, the Middletons cite no relevant legal authority in support of their positions; however, they did give an extensive recitation of their version of the facts. The record indicates substantive disagreements between the Middletons and Gina concerning relevant events; these variations are noted as necessary.

On December 27, 1989, Gina married Alisha's father, John Moran. Alisha was born on March 26, 1992. Gina filed for divorce on October 30, 1992. In November 1993, Gina joined the U.S. Army and reported to South Carolina for basic training, leaving Alisha with the Middletons. At this point in time, according to the Middletons, Alisha had spent about 17 months of her 20-month life with them. The parties disagree on the amount of time Alisha has stayed with the Middletons. About this time a contentious dispute over Alisha's custody developed between John (supported by his mother, Shari Moran) and Gina (supported by the Middletons). In particular, the maternal and paternal grandmothers developed a bitter relationship, which included allegations of death threats. On March 18, 1994, John was granted temporary custody of Alisha. On August 18, 1994, Gina was granted temporary custody of Alisha, and Alisha again, according to the Middletons, stayed with them. Subsequently, Gina was deployed to Haiti and custody returned to John. In December 1994, the trial court granted joint custody to Gina and John with alternating custody and visitation on a two-week basis. Between then and December 1995, according to the Middle-

tons, Alisha spent about nine months with them. On December 28, 1995, in conjunction with the property settlement in the divorce action, Gina was granted permanent full-time custody of Alisha. John and Gina's divorce decree was likewise entered on December 28.

Meanwhile, in January 1995, Gina and her future husband, Archie, began residing in the same home. Archie is an African-American, whereas Gina, John, Alisha, and the Middletons are Caucasian. During the course of this proceeding, each side has accused the other of racism; each side, in turn, has defended itself against these charges. Archie, according to the Middletons, "is the crux that gave rise to the Middletons['] action." In addition to Alisha, there are now five other children living in the Williams household. Two of these are the natural children of Archie and Gina; the other three are Archie's natural children.

In February 1996, Alisha visited the Middletons. At this time, the Middletons contend that they observed welts on Alisha's thigh which were allegedly caused by Archie whipping her with a belt. The Middletons allege that similar welts, as well as bruises, were again observed in August 1996. Gina acknowledges that Archie whipped Alisha with a belt on one occasion. Also in August 1996, 15-year-old Leah Chimenz, who was in the custody of Regina Middleton, alleged that while she was visiting the Williamses in June 1996, Archie raped her. Gina vigorously denies this allegation. The Middletons timely informed Gina of their suspicions of the abuse and neglect of Alisha and the rape of Leah. Gina refused to believe these allegations and requested the immediate return of Alisha. Rather than return Alisha to the

Williamses, the Middletons contacted Alisha's paternal grandmother, Shari Moran (Shari) (Regina Middleton's former adversary), and arranged to transfer custody to her. The Middletons transferred custody to Shari on August 19, 1996, in Prestonsburg, Kentucky. The two grandmothers made plans to locate John and persuade him to again seek custody of Alisha. On August 20, the Middletons were arrested for custodial interference.

On August 23, 1996, the Floyd District Court entered a protective order granting temporary custody of Alisha to Erica Goble, Alisha's paternal aunt (John's sister). Efforts to locate John were unsuccessful, so the Middletons filed for modification of custody in the Fayette Circuit Court seeking custody of Alisha. A hearing was scheduled for September 27, 1996; however, at that time, the trial court merely assumed jurisdiction and set a hearing for November 6, 1996, to determine custody. The Middletons allege that after the September 27 hearing, Gina and Archie had ex parte contact with Judge Payne's staff attorney, a Ms. Gunther. The Middletons allege that this meeting led to a "secret order" requiring the immediate return of Alisha to Gina. The Middletons allege that Judge Payne and his staff attorney, who are African-Americans, have conspired in some manner to show favoritism to Gina because she is married to an African-American. Alisha was returned to Gina on September 27. Hearings in the matter were then held on November 6 and December 6, 1996. At the conclusion of the Middletons' presentation of their case, the trial court denied the motion and ruled in favor of Gina. On December 9 the trial court issued its order granting Gina custody of Alisha and, further,

granting the Middletons one week of visitation per month. This appeal followed.

The filings of the parties reflect that each side suspects the other is guilty of racism and each side, in turn, defends itself against charges of racism. So, as a preliminary matter, we note that race may not be considered in child custody proceedings. See Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984); and Holt v. Chenault, Ky., 722 S.W.2d 897 (1987). With respect to the racial issue, Holt is similar to the case at bar. In Holt the Caucasian mother had remarried an African-American, and the father, for that reason, sought custody of the child. As noted in that case:

"It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

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"Whatever problems racially mixed households may pose for children . . . [they] cannot justify . . . removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."

Id. at 898, quoting Palmore at 433, 434, 104 S.Ct. at 1882 (emphasis in original). Thus, the racial backgrounds of the parties is not a factor to be considered when determining custody between a parent and a nonparent.

In a custody dispute between a parent and a nonparent, there is a decisive preference for the parent. The parent has a

superior right and the nonparent has the burden of showing that the parent is not "suited to the trust." There is also a presumption that a parent is competent and suitable to rear the child. Reynardus v. Garcia, Ky., 437 S.W.2d 740, 743 (1968). Anyone seeking to abrogate the right of a parent to child custody has to show unfitness by clear and convincing evidence. Sumner v. Roark, Ky. App., 836 S.W.2d 434, 439 (1992). When the choice of custodian is to be made between a natural parent and a nonparent, the parent will prevail if all else is equal. James v. James, Ky., 457 S.W.2d 261, 263 (1970); Jones v. Jones, Ky. App., 577 S.W.2d 43, 44-45 (1979). For a nonparent to prevail, it "must be shown that the child's welfare is better served by placement with the nonparent and also that the parent is unfit." Jones at 45. See also Chandler v. Chandler, Ky., 535 S.W.2d 71, 72 (1975). When a natural parent and one not the natural parent are equally fit, the natural parent shall prevail. Bond v. Shepherd, Ky., 509 S.W.2d 528, 529 (1974). In view of these authorities, it is clear that the Middletons must meet a heavy burden of proof to justify removing Alisha from her natural mother.

However, the presumption in favor of the natural mother is not absolute. A nonparent may prevail over a natural parent if "it is shown that the natural parent (1) is unsuitable to have custody, or (2) is harmful to the child, or (3) has contracted to give his child away, or (4) is clearly estopped to claim custody." James, 457 S.W.2d at 263. The Middletons have alleged facts that, if true, would meet the requirements of the standards set out above in (1), (2) and (4).

The first two standards, "unsuitable to have custody," and "harmful to the child," address the unfitness of the natural parent. The test for unfitness is set forth in Davis v. Collinsworth, Ky., 771 S.W.2d 329 (1989).

The type of evidence that is necessary to show unfitness . . . is: (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.

Id. at 330. The Middletons raise three cognizable grounds for finding Gina unfit: (1) the alleged rape of Leah by Archie; (2) the alleged physical and emotional abuse of Alisha, i.e. inappropriate whippings and confinement in a closet; and (3) the alleged inadequate medical and nutritional care of Alisha.

The alleged rape of Leah Chimenz by Archie and the alleged tolerance of such conduct by Gina, if true, would justify a determination that Gina was unfit to be Alisha's custodian. See, Davis, supra at 330. However, the Richmond County (Georgia) Sheriff's office investigated this allegation and determined the charge to be unsubstantiated. The trial court accepted this determination. We recognize that the Middletons dispute the conclusions of the rape investigation; however, as in any case, the findings of fact of the trial court cannot be reversed unless they are determined to be clearly erroneous. The appellate court must recognize "that the trial court had the opportunity to hear the evidence and observe the witnesses, so as to judge their credibility, and therefore, is in the best position to make findings of fact." Bealert v. Mitchell, Ky. App., 585 S.W.2d 417,

418 (1979); Kentucky Rules of Civil Procedure (CR) 52.01. Given the contradictory evidence on this matter, we cannot conclude that the trial court's findings were clearly erroneous. The Middletons, in the view of the trial court, failed to meet their burden with respect to this allegation. We have no basis to determine otherwise.

The Middletons allege that Alisha has been physically abused on the basis that she has been subjected to whippings with a belt that left welts and bruises on her body. The Middletons further allege physical or emotional abuse in that, as a form of discipline, Gina and Archie have on occasion locked Alisha in the closet. Gina and Archie deny these allegations, which have been investigated by the Georgia Social Services and found to be unsubstantiated. The trial court accepted the findings of the investigating agency. It was the determination of the trial court that the Middletons have failed to meet their burden with respect to these allegations. We have no basis for concluding that the trial court was clearly erroneous. See Bealert, supra at 418.

Lastly, the Middletons allege that Alisha has received inadequate medical and nutritional care while in the custody of Gina. This claim is based on a medical examination conducted in September 1996 which reflected that the four-and-one-half-year-old Alisha weighed only thirty pounds; had a low hemoglobin count; and suffered from the skin disease impetigo. The Middletons claim that Alisha suffered from a "failure to thrive" as a result of Gina's custodianship. The Georgia Social Services was in a position to investigate these allegations. Moreover, the trial court was in a



position to observe Alisha on September 27, November 6, and December 6, 1996. In view of the trial court's superior position to evaluate any matters pertaining to health and medical care, we cannot find clear error in its rejection of the Middletons' claims. See Bealert, supra at 418.

With respect to the other two factors identified in James, supra--i.e., a nonparent may prevail if the natural mother has contracted to give her child away or if the natural parent is estopped to claim custody--there is no allegation as to the former. However, the Middletons do claim that, because Gina left Alisha with them for long periods of time, she has waived her right to custody. We disagree. "The parent's superior right of custody is not lost to a non-parent, including a grandparent, simply because a child is left in the care of the non-parent for a considerable length of time." Shifflet v. Shifflet, Ky., 891 S.W.2d 392, 394 (1995). "'[T]he first question here is whether, considering the totality of the evidence, [the parent] engaged in a knowing and voluntary relinquishment of [her] superior right of custody, to which [she] was entitled unless unsuited to the trust.'" Id., quoting Greathouse v. Shreve, Ky., 891 S.W.2d 387, 391 (1995). Here, there is no evidence presented that Gina ever engaged in a knowing and voluntary relinquishment of her superior right to custody. In fact, throughout the divorce proceedings Gina pursued custody of Alisha, first against John and Shari, and then against the Middletons. Additionally, Gina traveled extensively to visit Alisha during those times in which she did not have custody. Further, the leaving of Alisha with the Middletons was at times

necessary due to her military obligations. In view of this, it is apparent that the evidence supported the trial court's determination that there was not a knowing and voluntary waiver by Gina of her custodial rights.

Two additional issues were raised by the Middletons which merit discussion. First, the Middletons object to the trial court's sua sponte granting of a "directed verdict"<sup>1</sup> at the conclusion of their presentation of evidence. We believe the action taken by the trial court was appropriate.

[I]t is the essence of judicial power to determine whether or not a party has produced evidence which is sufficient in law to sustain judgment in his favor and to exercise that inherent power by directing a verdict where there is lack of proof supporting the material elements of the cause of action asserted.

Masonic Widows and Orphans Home and Infirmary v. City of Louisville, 309 Ky. 532, 544, 217 S.W.2d 815, 822 (1948). The Middletons were provided ample opportunity to introduce evidence in their favor, and, at their discretion, could have called Gina and Archie to the stand and questioned them concerning the various allegations. The trial court's ruling was supported by the lack of evidence presented.

The last issue to be addressed is the Middletons' allegations of judicial bias. The simple allegation of prejudice on the part of the judge is insufficient to sustain a claim of judicial bias. Foster v Commonwealth, Ky., 348 S.W.2d 759 (1961),

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<sup>1</sup> The trial court used this terminology in both the hearing and its order. We believe that this is a misnomer; actually it merely sua sponte denied the movants' motion for custody at the close of movants' presentation of evidence.

cert. denied, 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530. "The asserted belief must be predicated upon stated facts showing bias or prejudice sufficient to prevent the judge from fairly or impartially trying the case." Howerton v. Price, Ky., 449 S.W.2d 746, 748 (1970). See also Johnson v. Ducobu, Ky., 258 S.W.2d 509, 511 (1953). Here, the Middletons' allegation is totally groundless and unsupported by any evidence and amounts to nothing more than their suspicions. There is nothing in the record to reflect that the trial court was biased in any regard. In fact, we note that the trial court awarded the Middletons one week per month visitation with Alisha. The Middletons had a heavy burden to overcome in this case. As noted above, there is a strong preference for the natural parent in a custody proceeding. We find no error in the trial court's ruling and no basis for the Middletons' allegations of bias.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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