

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002629-MR

MELINDA K. JUSTICE  
(formerly Houtchens)

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE THOMAS WALLER, JUDGE  
ACTION NO. 99-CI-00313

DONALD E. HOUTCHENS

AND

COMMONWEALTH OF KENTUCKY EX REL  
CABINET FOR FAMILIES AND  
CHILDREN

APPELLEES

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND  
REMANDING

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BEFORE: BARBER, BUCKINGHAM, AND MINTON, JUDGES.

BUCKINGHAM, JUDGE: Melinda K. Justice appeals from a judgment of the Bullitt Circuit Court awarding custody of one of her children to her former husband, Donald E. Houtchens, Jr., the child's stepfather. We vacate and remand.

Melinda and Donald were married on June 6, 1987. Prior to their marriage, Melinda had a son, Adam Dewitt Miller, who was born on July 30, 1986.<sup>1</sup> After the marriage, Melinda and Donald had a daughter, Briteny Michelle Houtchens, who was born on July 29, 1988.

Melinda and Donald separated on March 30, 1999. Donald filed a petition for dissolution of marriage on May 3, 1999. On May 28, 1999, the court rendered an agreed order allowing Donald to maintain the residential custody of both Adam and Briteny "[p]ending a custody determination by the Court." Melinda was allowed visitation on alternate weekends.

Melinda filed her response to Donald's petition on June 11, 1999. Therein, she sought custody of both children. The following month, on July 30, 1999, Melinda and Donald signed an agreement which stated that they would "share custody of the two children." The agreement also provided that each parent was to support the child in his or her custody and that each child could choose which of the two they wanted to live with. It does not appear that this agreement was prepared by an attorney, and neither attorney in the case signed it. Further, the agreement was neither approved by the court nor filed of record.

On February 18, 2000, the court entered a decree dissolving the marriage. On April 20, 2000, the domestic

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<sup>1</sup> Donald is not the natural father of Adam.

relations commissioner (DRC) entered his report making recommendations concerning the custody and support of the two children. The report noted that the parties had agreed that Donald would have sole custody of Briteny and that Melinda had indicated an intention to terminate her parental rights in the child. Therefore, the DRC recommended that Donald have custody of Briteny.

Further, the DRC recommended that Donald be awarded custody of Adam, his stepson. The DRC recognized that "[i]n a dispute between a parent and non-parent, the parent must prevail unless there is a showing of unfitness or a showing that the parent has voluntarily waived her superior right to custody." The DRC then stated that, while there were serious questions concerning Melinda's fitness as a parent, it would not make that determination at that time. Rather, the DRC found that Melinda had voluntarily waived her superior right to custody by entering into the July 1999 agreement, by permitting Donald to be the exclusive caretaker for Adam for a period of nearly one year, and by continually telling Adam that he could live with Donald if he chose to do so.

Melinda filed exceptions to the DRC's report on April 28, 2000. Concerning the issue of Adam's custody, she argued that the DRC did not consider the best interests of the child and that the custody award was not supported by the evidence.

Approximately one and one-half years later, on October 16, 2001, the circuit court entered a judgment approving and adopting the DRC's report.<sup>2</sup> The court noted that "it appears that the Respondent has abandoned both this case and the children and that the Petitioner is a defacto custodian and the proper custodian for both children including his step-child Adam Miller." [Emphasis in original.]

Melinda then filed a motion to alter, amend, or vacate the judgment concerning Adam's custody. When the motion was argued to the court, Donald moved the court for leave to amend his amended petition. The motion to amend was granted, and Donald amended his petition so as to allege that he was Adam's *de facto* custodian. The case was then referred again to the DRC, and the DRC filed a report recommending that Melinda's motion to alter, amend, or vacate be denied. This report was entered on October 31, 2002, approximately two and one-half years after Melinda filed her exceptions. Finally, on November 25, 2002, the court entered an order denying Melinda's motion to alter, amend, or vacate. Further, the court entered a second

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<sup>2</sup> It appears to us that the delay between the filing of the exceptions and the ruling by the circuit court was caused by Melinda's failure to have a transcript of the proceedings before the DRC filed for the court's review of her argument that the custody award was not supported by the evidence. The local rules of the circuit court apparently required that a transcript be filed before the court could review that argument.

order awarding Donald sole custody of both children. This appeal by Melinda followed.

The court awarded Donald custody of Adam on two grounds. First, custody was awarded based on a determination that Donald was Adam's *de facto* custodian. Second, by approving and adopting the DRC's initial recommendations, the court determined that Melinda had waived her superior right to Adam's custody.

The statutes define "*de facto* custodian" as follows:

As used in this chapter and KRS 405.020, unless the context requires otherwise, "*de facto* custodian" means 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. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.

KRS<sup>3</sup> 403.270(1)(a). Because Adam was three years of age or older at the time of the custody proceedings, the statute required Donald to show by clear and convincing evidence that he had been Adam's primary caregiver and financial supporter for a period of

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<sup>3</sup> Kentucky Revised Statutes.

one year or more. Furthermore, in computing the time period, the period of time after the custody proceeding was commenced by Melinda could not be included in determining whether Adam had resided with Donald for the required minimum period of one year.

We agree with Melinda's argument that the court erroneously determined that Donald was Adam's de facto custodian. As we have noted, Melinda and Donald separated on March 30, 1999, and Adam was left in Donald's care at that time. Less than three months later, on June 11, 1999, Melinda responded to Donald's petition and stated that she was seeking custody of both Adam and Briteny. Because the time period following Melinda's response to Donald's petition could not be included in determining whether Donald had been Adam's primary caregiver and financial supporter for at least a one-year period, Donald was unable to prove his status as a de facto custodian. Thus, the court erred in this determination.<sup>4</sup>

The second ground for awarding custody of Adam to Donald was the court's determination that Melinda had waived her superior right to custody. In her appeal of this determination, Melinda contends that the court did not find that she was an

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<sup>4</sup> We are unpersuaded by Donald's reliance on Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777 (2002), to support his argument that he met the one-year requirement for being Adam's de facto custodian. While Donald contends that Melinda never "commenced" a custody action within the meaning of KRS 403.270(1)(a), we conclude that her response to Donald's petition on June 11, 1999, commenced the action because she stated therein that she was seeking the custody of both children.

unfit parent and did not find that the custody award was in Adam's best interests. Further, she asserts that the court erred in granting Donald custody on the basis that she had agreed at one time to such an arrangement.

In Moore v. Asente, Ky., 110 S.W.3d 336 (2003), the Kentucky Supreme Court addressed custody contests between a parent and a nonparent in situations where the nonparent was not a de facto custodian. The court stated:

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

Id. at 359. See also Greathouse v. Shreve, Ky., 891 S.W.2d 387 (1995). In other words, Melinda was entitled to custody of Adam unless Donald could prove either that she was unfit or that she had waived her superior right to custody. The court did not find that Melinda was unfit, but it did find that she had waived her superior right to custody.

Waiver must be shown by clear and convincing evidence. Moore, 110 S.W.3d at 360. In order to prove a waiver by a parent of his or her superior right to custody, there must be a

showing of an intentional or voluntary relinquishment of the right. Greathouse, 891 S.W.2d at 390. “[W]hile no formal or written waiver is required, statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof.” Id. at 391.

We conclude there was clear and convincing evidence supporting the court’s determination that Melinda had waived her superior right to custody. As we have noted, the DRC found that Melinda had voluntarily waived her superior right to custody by entering into the July 19, 1999 agreement, by permitting Donald to be the exclusive caretaker for Adam for a period of nearly one year, and by continually telling Adam that he could live with Donald if he chose to do so. The July 1999 agreement, wherein Melinda agreed to share the custody of both children with Donald and agreed that each child could choose who they wanted to live with, is strong support for the court’s determination that Melinda had waived her superior right to Adam’s custody. In short, we find no error in this determination by the court.

Finally, Melinda argues that the court erroneously awarded Donald custody of Adam without making a determination that such an award would be in Adam’s best interests. In reviewing the DRC’s recommendations and the court’s orders, we have been unable to find any reference to the award being in



Adam's best interests. We agree with Melinda that the failure of the court to address Adam's best interests requires the custody order to be vacated and remanded for further proceedings.

KRS 403.270(2) requires the court to determine custody "in accordance with the best interests of the child." In Stafford v. Stafford, Ky. App., 618 S.W.2d 578, 580 (1981), overruled on other grounds by Largent v. Largent, Ky., 643 S.W.2d 261 (1982), this court held that "in a trial without a jury conducted pursuant to CR 52.01, the trial court is required to find those facts which are raised in the pleadings or those facts which are mandated to be considered by statute, whichever the case may be." Because the court was required by statute to consider Adam's best interests and because it did not make a specific finding in that regard, we must vacate the custody award and remand for further proceedings.

Simply because Melinda had waived her superior right to custody did not mean that Donald was entitled to custody. Rather, the determination between the parent and the nonparent rested on what was in Adam's best interests. As the Kentucky Supreme Court noted in the Moore case, "if a waiver has been shown by clear and convincing evidence, the trial court shall determine custody between the parent and nonparent based on the best interest of the child." Id. at 360.

We vacate the award of Adam's custody to Donald and remand this case to the circuit court for the entry of a custody award based upon a finding as to Adam's best interests.<sup>5</sup>

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Timothy White  
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Mark Shouse  
Shepherdsville, Kentucky

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<sup>5</sup> We note that Adam is now within months of his eighteenth birthday.