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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000336-ME

MELISSA ANN DRUEN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 10-CI-500028

PAULA JEAN MILLER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Melissa Druen appeals from two orders of the Jefferson Circuit Court. One order conferred standing on Paula Miller to pursue custody of Druen's biological daughter[1] and the other granted the parties joint custody of said minor child. We find no error and affirm.

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[1] The minor child will be referred to as Child.

Druen and Miller began a same-sex relationship in 1997. In 1998 the parties began living together, along with Druen's teenage child. The parties eventually decided to have a child together. Miller was older than Druen and unable to conceive or carry a child. Druen decided to bear the child. The parties used a sperm donor to facilitate the pregnancy. The parties chose the sperm donor together and participated in all aspects of the insemination process together. In 2002, Druen became pregnant. On May 30, 2003, Child was born. Miller was present in the delivery room and cut the umbilical cord. The parties and Child lived together until Druen moved out of the home in September of 2007. When Druen left the home, Child remained with Miller. Druen states that Child remained in the home with Miller because it was the only home Child knew. Additionally, Druen's job required her to leave home at approximately 6:00 am. At this time, Child was beginning school. Druen claimed that by allowing Child to remain with Miller, Child would not have to be woken up needlessly early and be taken to a caregiver before school.

After the parties terminated their relationship, they continued to jointly care for Child. A schedule was implemented where Druen would pick Child up after school on Tuesdays and Wednesdays and keep her until approximately 8:00 p.m. Druen would then take Child to Miller's house. On the other weekdays, Druen would pick Child up from school and take her to Miller. The parties would then rotate visitation on the weekends.

In January of 2010, Miller filed her petition for custody. Druen argued that Miller did not have standing to pursue custody because she was not Child's biological parent and not a de facto custodian as described in Kentucky Revised Statutes (KRS) 403.270. Miller argued that Druen had waived her superior right to custody, thereby giving her standing to pursue custody. In an order dated July 10, 2010, the trial court found that Miller was not a de facto custodian; however, the court found that pursuant to KRS 403.822 Miller was a person acting as a parent and that Druen had waived her superior right to custody. The court held that Miller had standing to pursue joint custody and the parties were given temporary joint custody of Child. On February 14, 2013, the trial court entered an order finding that it would be in Child's best interest if Druen and Miller were awarded permanent joint custody. This appeal followed.[2]

The first issue Druen argues on appeal is that of standing. The standing issue in this case is controlled by the Kentucky Supreme Court case of *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010). In that case, Phyllis Picklesimer and Arminta Mullins were involved in a same-sex relationship and lived as a couple for five years. During that time, they decided to have a baby. Picklesimer was the one who was artificially inseminated and who ultimately gave birth to a son, Zachary. The two lived together for about a year after the birth and then ended the relationship. The two continued to exercise timesharing with Zachary on an equal basis. This lasted for about five months. At that time,

[2] Further facts will be discussed as they become pertinent to our opinion.

Picklesimer stopped allowing Mullins to have visitation with Zachary. Mullins then filed a motion for joint custody.

Standing to bring such an action became the central issue in the case. The Kentucky Supreme Court held that Mullins did not meet the statutory requirements to be deemed a de facto custodian; however, the Court found she had standing to seek custody pursuant to KRS 403.822. The Court held that the statute gave standing to seek custody to a "person acting as a parent." KRS 403.800(13) defines "person acting as a parent" as:

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

The Court went on to discuss that two people who perform the traditional parental responsibilities for a child can each be deemed to have physical custody for the purposes of this statute.[3] The Court further held that Mullins claimed a legal right to custody under the laws of Kentucky by asserting Picklesimer waived her superior right to custody, thereby meeting the second requirement to be considered a person acting as a parent.

[3] The physical custody of Child is not at issue in this case.

The Court ultimately found that Mullins had standing to pursue custody because Picklesimer had waived her superior right to custody. The Court listed the following facts to support its finding:

> The evidence established that Picklesimer and Mullins decided jointly to start a family, and the sperm donor was selected based on Mullins' characteristics. The child was given a hyphenated surname combining both parties' last names, and that name was listed on his birth certificate. Mullins was involved in the pregnancy, was there for the delivery and cared for Zachary during the period he was in the neonatal unit. Mullins, Picklesimer and Zachary functioned as a family unit for nearly a year, after which time the parties shared custody of Zachary for another five months. Zachary referred to Mullins as "momma," and it was undisputed that Picklesimer encouraged, fostered, and facilitated an emotional and psychological bond between Mullins and the child. Picklesimer admitted in her testimony that Zachary looked to both her and Mullins as his parents. There was evidence that Mullins provided for the care and financial support of Zachary (along with Picklesimer) when she was with Picklesimer and thereafter when they shared custody.

The Court also found to be relevant the fact that Mullins and Picklesimer tried to enter into a formal written agreement which would have bestowed custodial rights to Mullins. The Court ultimately found the agreement to be invalid, but stated it was relevant to show Picklesimer's intent to give Mullins parental rights to Zachary.

Kentucky Rules of Civil Procedure (CR) 52.01 directs that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A judgment "supported by substantial evidence" is not "clearly erroneous." *Owens–*

Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

> "The common definition of a legal waiver is that it is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon." "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."

Mullins, 317 S.W.3d at 578 (citations omitted).

The trial court found that Druen had waived her superior right to custody; therefore, Miller had standing to pursue custody in accordance with KRS 403.822. We agree. The following facts are relevant to this conclusion: Miller and Druen decided to create a family unit together; both were involved in the choosing of a sperm donor; both were held out to be Child's mother; Miller participated in all the insemination and pregnancy doctor appointments; Miller was present at the birth of Child and cut the umbilical cord; Miller participated in school activities, parent-teacher conferences, and her address is listed on school forms; Miller, Druen, and Child functioned as a family unit for four years; after Miller and Druen's relationship ended, Child remained with Miller in the family home for a majority

of the time and continues to do so; both provided financial support for Child; Child considers both Miller and Druen to be her mother; Miller is the primary person who cares for Child when she is sick; Miller makes parental decisions as to Child when they are together; Druen acknowledges that Child and Miller have a psychological and emotional bond; Druen gave Miller power of attorney over Child which was not revoked until after this litigation began in 2010; and in 2002, Druen executed a will appointing Miller the trustee of her estate and placing "full and total custody of **our** child" with Miller, and it was not until this litigation commenced that Druen began the process of revoking that will. These facts were discussed by the trial court and are undisputed. The facts are clear and convincing that Child was conceived with the intention that both Druen and Miller be her parents. The trial court did not err in finding Druen waived her superior right to custody. Miller therefore has standing to seek custody of Child.

Druen also argues on appeal that she should have been granted sole custody of Child, with Miller being given visitation only. She claims this would have been in Child's best interest.

> In reviewing the trial court's decision, we must determine whether it abused its discretion by awarding custody of the children to [the parent at issue]. An abuse of discretion occurs when a trial court enters a decision that is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. We will not substitute our own findings of fact unless those of the trial court are "clearly erroneous." Further, with regard to custody matters, "the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion."

Miller v. Harris, 320 S.W.3d 138, 141 (Ky. App. 2010) (citations omitted).

KRS 403.270(2) states in relevant part:

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
>
> (b) The wishes of the child as to his custodian;
>
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
>
> (d) The child's adjustment to his home, school, and community;

In the case at hand, Druen wants sole custody, while Miller wants joint custody. Child is happy with the custody arrangement as it stood at the time of the custody hearing and wants to spend as much time with Druen and Miller as possible. Witness testimony indicated that both parties provide a loving and nurturing environment for Child and that Child is thriving. There is also no indication that Child is not adjusted to her current living situation. In addition, Dr. Jennifer Cebe, a court appointed therapist, worked with the parties in order to facilitate better communication skills. Dr. Cebe reported that Druen and Miller each had a strong bond with Child and that both understood the need for communication and cooperation for the benefit of Child. Finally, a guardian ad litem (GAL) was appointed for child. The GAL reported that Child expressed to

her that Druen and Miller were getting along better and that Child liked the joint custody arrangement currently in place. The GAL ultimately recommended a shared parenting schedule.

Based on the above, it is evident that the trial court did not abuse its discretion in awarding Druen and Miller joint custody. The parties have already been living in a joint custody type situation since 2007. Furthermore, Child is flourishing and is happy with her situation.

For the foregoing reasons, we affirm the judgments of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Marcia L. Sparks Ashley Duncan Gibbons Louisville, Kentucky	James Taylor Chicago, Illinois