RENDERED: NOVEMBER 30, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001774-ME

TAMMIE DELANEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA D. MCDONALD, JUDGE
ACTION NO. 16-CI-500097

TERI WHITEHOUSE — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, JOHNSON,[1] AND SMALLWOOD, JUDGES.

JOHNSON, JUDGE: The primary issue in this appeal is whether the Jefferson Family Court correctly concluded that appellee Teri Whitehouse had standing to seek joint custody and parenting time for a child born to her former partner Tammie Delaney. Because we are convinced that the family court's application of

[1] Judge Robert G. Johnson authored this opinion prior to the expiration of his term of office on November 20. 2018. Release of the opinion was delayed by administrative handling.

the holding in *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), is erroneous as a matter of law, we reverse.

After hearing evidence by both parties to this appeal, the family court entered a judgment which contained factual findings commencing with the fact that Delaney and Whitehouse were romantically involved at the time Delaney gave birth to a baby boy. Central to its conclusion that the Whitehouse had standing to seek custody of the child, the family court set out the following findings of fact:

> The common thread is the participation of both parties in the insemination process, pregnancy and birth of the child. The parties treated each other as equal partners and clearly intended to create a parent-like relationship between [Whitehouse] and the child.
>
> In the present matter, it is clear that the parties have held themselves out as the parents of this child since before conception. They engaged in the process of selecting a donor together, they attended appointments prior to insemination as a couple, they attended prenatal appointments together, [Whitehouse] was present for the birth, and she has been known to the child as Momma. The parties participated in a union ceremony, after the birth of the child, and they held themselves out as a family unit with friends and family.
>
> The primary difference in the two fact scenarios [the present case and *Mullins*] is the cessation of the fostering of the parent-child relationship between [Whitehouse] and the child following the demise of the romantic relationship. [Delaney] has attempted to distinguish the present case from *Mullins* primarily by pointing to the fact that [Whitehouse] was not involved with the child, *i.e.*, speech therapy, etc. However, the primary reason for that is [Delaney's] unilateral decision

> not to include [Whitehouse] after the break-up of the parties' relationship.
>
> Additionally, [Delaney] relies on the dissent in *Mullins* wherein it was noted that by merely allowing a third party to participate in child-rearing does not constitute waiver. This Court has identified major shared decisions and actions taken as a unified parental unit for the intent of creating a child and rearing that child together as Momma and Mommy, up to and including, the holy union **after** the birth of the child. These are simply not acts of a third party merely being around and helping. This was, in the opinion of the Court, the formation of a family unit that intended for both parents to act with full parental rights.

On the basis of these findings, the family court concluded that Whitehouse had met her burden of establishing that Delaney had waived her superior right to custody and had therefore conferred upon Whitehouse standing to seek custody of the child. The family court ultimately granted Whitehouse shared joint custody and parenting time, giving rise to this appeal.

Although Delaney raises two issues for reversal, the pivotal inquiry is whether the family court correctly concluded that Delaney waived her superior right to custody. We are persuaded that it did not.

As an initial matter, we note the scope of our review:

> [a] custody determination is a mixed question of fact and law requiring a two-tier analysis. First, we review a trial court's factual findings, disturbing them only if they are clearly erroneous—meaning they are unsupported by substantial evidence which is defined as that which is "sufficient to induce conviction in the mind of a

> reasonable person." *B.C. v. B.T.*, 182 S.W.3d 213, 219–20 (Ky. App. 2005). Second, we examine the trial court's application of the law de novo. *See Heltsley v. Frogge*, 350 S.W.3d 807, 808 (Ky. App. 2011).

Ball v. Tatum, 373 S.W.3d 458, 463–64 (Ky. App. 2012). Finding no basis for disturbing the family court's factual findings, we turn to a de novo analysis of whether those findings are sufficient to support its legal conclusions.

In Kentucky, a non-parent has standing to seek custody or visitation of a child only: 1) if he or she qualifies as a de facto custodian; 2) if the parent has waived his or her superior right to custody; or 3) if the parent is conclusively determined to be unfit. *Truman v. Lillard*, 404 S.W.3d 863, 868 (Ky. App. 2012)(citing *Mullins*, 317 S.W.3d at 578). Because there is no allegation that Whitehouse could qualify as a de facto custodian or that Delaney is unfit, we focus our analysis on the *Mullins* standards for proving that a parent has waived her superior custodial rights.

Citing *Greathouse v. Shreve*, 891 S.W.2d 387, 390 (Ky. 1995), the court in *Mullins* reiterated that, "legal waiver '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.'" *Mullins*, 317 S.W.3d at 578. The Supreme Court also emphasized that although there need not be a written or formal waiver, "'statements and supporting circumstances must

be equivalent to an express waiver to meet the burden of proof.'" *Id*. (citing *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky 2004)).

Applying the *Mullins* standards to the facts as found by the family court, we are convinced that its conclusion regarding Delaney's waiver is erroneous as a matter of law. While it is indisputable that some of the factors set out in *Mullins* are present in this case, we are persuaded that those factors fall short of the clear and convincing proof required to establish waiver. It seems clear that both parties agreed to artificial insemination for the purpose of having a child, that both parties shared parenting responsibilities to some extent, and that for a relatively short period of time held themselves out as a family unit. However, "no specific set of factors must be present in order to find there has been a waiver." *Id.* at 579.

In concluding that biological parent in *Mullins* waived her superior right to custody, the Supreme Court noted that "a myriad of factors" supporting waiver were present. In addition to facts which are similar to those in the present case, the Supreme Court cited the following factors: the child in *Mullins* was given a hyphenated surname combining both parties' last names; the hyphenated surname was placed on the child's birth certificate; the parties' attempted to enter into a formal written agreement bestowing custody rights on Mullins; and the fact that, even after the parties separated, Mullins and Picklesimer continued to share

custody of the child for another five months. In contrast, Delaney and Whitehouse made no efforts to formalize the custody status of the child at any point and the child bore only Delaney's name. Although the parties did participate in a union ceremony after the child was born, that was not a legally cognizable marriage ceremony. Neither did the parties attempt to formalize their relationship after the decision of the United States Supreme Court in *Obergefell v. Hodges*, ___U.S.___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), holding that the Fourteenth Amendment guarantees same sex couples the right to marry, despite having had an opportunity to do so. It is also telling that the family court found that the parties intended to create a "parent-like" relationship between Whitehouse and the child, not that Delaney specifically intended to confer parental rights on Whitehouse. Finally, upon the deterioration of her relationship with Whitehouse, Delaney did not allow Whitehouse to continue to participate in parenting responsibilities with the child. As this Court noted in *Truman, supra,* "this case serves as an illustration of 'the exception to *Mullins*, where we distinguish a non-parent truly acting in the capacity as a parent from the many people who may love, care for and support a child. Not every person who genuinely loves and cares for a child gains custodial rights; waiver requires significantly more." *Truman*, 404 S.W.3d at 870.

Thus, on the basis of the family court's own factual findings, we cannot agree that Delaney expressly waived her superior rights by acting

inconsistently "with her constitutionally protected status as a natural parent." *Mullins*, 517 S.W.3d at 580. The parties in this case had the opportunity to expressly demonstrate an intent to confer parental rights on Whitehouse but failed to do so. We therefore hold that the findings of the family court do not support its conclusion that Delaney waived her superior custody rights to the child. Because we reverse the trial court's finding that Whitehouse had standing to seek custody and parenting time with Delaney's child, we need not address the family court's best-interests analysis.

The judgment of the Jefferson Family Court granting joint custody and parenting time is reversed.

ACREE AND SMALLWOOD, JUDGES, CONCUR AND FILE SEPARATE OPINIONS.

ACREE, JUDGE, CONCURRING: I concur but write separately for the same general reason as stated in a previous concurrence. *Fry v. Caudill*, 554 S.W.3d 866, 870-71 (Ky. App. 2018) (Acree, J., concurring). The Supreme Court should revisit *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010).

But I write again to emphasize the significance, in cases such as this, of the parties' decision not to marry, a right recognized as available to individuals in same-sex relationships in *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

Obergefell changed everything for same-sex relationships. Necessarily, it changed how we assess whether a parent has partially waived her constitutional right to raise her child, partial waiver being the theory invented in *Mullins*.[2] This case is an illustration.

Within thirty days of Delaney and Whitehouse's participation in a "holy union" ceremony in May 2015, they had the right and opportunity to legally marry. They chose not to do so. Considering the Supreme Court's emphasis in *Obergefell* on the importance of the marital relationship, legal significance must be given to a decision not to marry. Electing not to marry when the opportunity is available should be deemed to fully contradict all allegations by anyone seeking rights to another person's child based on the *Mullins* partial waiver theory. Otherwise, marriage means far less than *Obergefell* indicates.

The petitioners in *Obergefell*, speaking for same-sex couples everywhere, convinced the Court "that the right to marry is fundamental because it

[2] Full waiver of the right already existed where there was a degree of parental neglect. *Mullins*, 317 S.W.3d at 579 (in earlier cases, "natural parent has surrendered full possession of the child to a nonparent"). *Mullins* is radically different. It involves no neglect but, instead, an "agreement of the parties to parent the child together." *Id.* at 576. In such cases, said the Court, "We see no reason why the law of waiver of custody rights should apply only to the full surrender of the child to the nonparent, to the exclusion of a waiver of <u>*some part*</u> of the superior parental right, which would essentially give the child another parent in addition to the natural parent." *Id.* at 579 (emphasis added). Candidly speaking, this does not actually deprive the biological parent of any right as much as it grants the putative non-biological parent the same constitutional standing and parental rights as her partner.

supports a two-person union unlike any other in its importance to the committed individuals." *Id.* at 2599. They persuaded the Court that:

> it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Obergefell v. Hodges, ___ U.S. ___, 135 S. Ct. 2584, 2594, 192 L. Ed. 2d 609 (2015). This sentiment permeates the opinion and uplifts the institution of marriage as few opinions have. In my view, it is not an insincere capitulation to social pressure. The opinion signals anew the judiciary's recognition of the majesty of marriage.

In the case before us, however, despite the Supreme Court's granting of the right to sanctify and memorialize "this profound commitment" to one another, Delaney elected not to marry Whitehouse. That decision deprived Whitehouse of the legal right to adopt Delaney's child without entirely terminating Delaney's parental rights. KRS 199.470(4)(a). We must attribute legal import to Delaney's decision not to marry Whitehouse. Specifically, we must attribute legal import of that decision to the waiver calculus under *Mullins*.

This Court should hold, as a matter of law, that no parent, including Delaney, who resists a claim of partial waiver of parental rights can be found to

have done so unless she has married the person so claiming. Adopting such a rule is the only way to honor *Obergefell's* recognition of America's reverence for the institution. Either marriage is worthy of government sanction, or it is not. Either a parent's constitutional right to raise a child is worthy of the judiciary's utmost protection, or it is not.

Furthermore, failure to adopt such a rule will invite other individuals, and even groups, whether they cohabit with a biological or adoptive parent or not, to claim the partial waiver *Mullins* invented. *See Turner v. Rogers*, 564 U.S. 431, 461, 131 S. Ct. 2507, 2527, 180 L. Ed. 2d 452 (2011) (Thomas, J., dissenting) (citing Krause, *Child Support Reassessed*, 24 Fam. L.Q. 1, 16 (1990) ("Easy-come, easy-go marriage and casual cohabitation and procreation are on a collision course with the economic and social needs of children")). Although "it takes a village" is a catchy cant, the nucleus of a *family*[3] is not made up of loose threads of casual affection. It is a tightly woven fabric of unifying love amongst two parents and their children.

I concur with the majority because the record lacks sufficient evidence to support a legal conclusion that Delaney waived her constitutional right.

[3] "Family" is defined as "parents and their children, considered as a group . . . ." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED) 696 (2nd ed. 1987). The Merriam-Webster Dictionary website defines "Family" as: "the basic unit in society traditionally consisting of two parents rearing their children . . . ." https://www.merriam-webster.com/dictionary/family (last accessed September 29, 2018).

SMALLWOOD, JUDGE, CONCURRING: I concur in the majority opinion which faithfully follows the established jurisprudence, *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), but rightly refuses to broaden its holding as undertaken by the circuit court

However, while it is this court's duty to follow precedence established by "the high court", it is also this court's duty to "set forth the reason why the precedence should be overruled . . . ." *Special Fund v. Francis* 708 S.W.2d 641, 642 (Ky. 1986). I join with Judge Acree[4] in encouraging the Supreme Court to revisit *Mullins*. Justice Cunningham's well-reasoned and understated warnings in his dissent in *Mullins* have proven true.[5]

Since the result-driven opinion in *Mullins*, the law has dramatically changed, rightly or wrongly. The United States Supreme Court in *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), concluded that the Fourteenth Amendment guarantees same-sex couples the right to marry. "*Mullins* was decided as it was because of, and as a way of avoiding the pre-*Obergefell* prohibitions."[6]

[4] Concurring Opinion in *Fry v. Caudill,* 554 S.W.3d 866 (Ky. App. 2018).

[5] His dissent was joined by Chief Justice Minton and Justice Scott.

[6] *Fry*, *supra* at 871.

The conceived basis for the court's opinion in *Mullins* no longer exists. Nevertheless, *Mullins,* as established jurisprudence, leaves open a door to assault the constitutionally protected right of a person to parent his or her child. Justice Cunningham's comment of the need of stability for the children of the Commonwealth is no less true today. I agree that *Mullins* was a destabilizing decision engineered to accommodate a unique peculiar situation which no longer exists.

For these reasons I encourage the Supreme Court to revisit this issue in light of the modern development in this area of law, to reaffirm all prior precedence on this issue and return the legal standing of parenthood to the safe mooring of the law as guaranteed by the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. P. Ed. 49 (2000).

BRIEFS FOR APPELLANT:

Louis P. Winner
Kristin M. Birkhold
Louisville, Kentucky

BRIEF FOR APPELLEE:

Hugh W. Barrow
Louisville, Kentucky