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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000553-ME

BRITTNEY KRUGER APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM E. LANE, JUDGE
ACTION NO. 15-CI-00150

JIM HAMM AND JEANETTE HAMM APPELLEES

OPINION
VACATING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: Brittney[1] Kruger (Mother) appeals the Montgomery Circuit Court's Findings of Fact, Conclusions of Law and Judgment of December 12, 2017, as amended by Order entered March 23, 2018, granting joint custody to

[1] Brittney's name is given various spellings. When quoting the record, this opinion retains the spelling used; otherwise, her name is spelled as it appears in the caption of the petition.

Mother and Jim and Jeanette Hamm (the Hamms). She argues the circuit court's judgment is erroneous because: (1) the Hamms were not *de facto* custodians; (2) Mother did not waive her parental rights; (3) Mother is not, and the circuit court did not find her to be, unfit; and (4) when nothing in the record supported these findings, the court misapplied judicial estoppel as a substitute. We agree and vacate the judgment, as amended, that granted the Hamms custodial rights.

BACKGROUND

Mother gave birth to S.K. (Daughter) on October 14, 2014. At the time of Daughter's birth, Mother was twenty-one years old, already the mother of a two-year-old son (Son) and living with her mother and stepfather. She has been consistently employed during all relevant times, but her employers and schedules varied. She struggled as a young, single mother and did not have the help of Daughter's father, William Hawkins (Father), who was incarcerated. Consequently, Mother had difficulty paying bills, caring for her children, and arranging child care to suit her work schedule.

Before Daughter was born, Mother developed a friendship with her mother's neighbors, the Hamms. Early into the pregnancy, Mother's stepfather asked Mother and Son to leave his home; they moved in with the Hamms for about a week. (Jeanette Hamm testimony, Video Transcript (VT) 09/06/2017; 11:41:00 – 11:41:30). The Hamms were empty-nesters and discussed the possibility of

adopting Daughter. They even met with an attorney about adoption. But, as Mr. Hamm was about to write a check to secure the attorney's services, "Jim said, 'Instead of us adopting [Daughter], why don't we help, help you take care of [Daughter] and be a better mother?'" (*Id.* at 11:43:45 – 11:45:00). Mother apparently agreed to the Hamms' proposal. Even so, before the child was born, Mother moved back in with her mother and stepfather.

When Daughter was born, Mother took the child home to her mother and stepfather's house. That lasted about a week and a half before Mother's stepfather again kicked Mother, Son, and Daughter out of his house "because he couldn't stand the crying, could not stand [Son] touching his stuff . . . and she come to live with us [the Hamms]." (*Id.* at 11:51:04 – 11:51:54). Thereafter, Mother did secure an apartment. However, by Jeanette's testimony, Mother was at the Hamms' residence "every other day," *i.e.*, every second day, at least until the filing of the petition in this case. (*Id.* at 11:53:45 – 11:54:20).

Mother returned to work soon after Daughter's birth. The parties' friendship continued to blossom for a time. Mother considered the Hamms babysitters or caregivers – a view she maintained throughout these proceedings. The relationship between the Hamms and the single Mother seemed symbiotic.

Daughter began spending more and more time with the Hamms and spending the nights. Concern arose that circumstances might necessitate

documentation giving some authority to the Hamms to have Daughter with them when Mother was not there. Jim Hamm paid attorney Richard Kenniston $1,000 to assist them with this simple legal task.

At the evidentiary hearing finally conducted, the Hamms asked attorney Kenniston, "Was it your recollection that the Mother wanted to give them [the Hamms] legal status so that they could, could take the child to the doctor and do these other things that they would need to do since the child was living with them?"; he responded, "That was my understanding, yes." (Richard Kenniston testimony, VT 05/10/2017; 2:47:22 – 2:47:39). That is what Mother also testified was her conversation with Kenniston – that she needed something that would authorize the Hamms to take Daughter to the emergency room or pick her up at school. (Mother's testimony, VT 09/07/2017; 11:24:18 – 11:25:15). Kenniston did not tell her a power of attorney would satisfy that need, but he said joint custody would. (*Id.* at 11:25:10 – 11:25:50).

Kenniston prepared a "Petition for Custody" naming Mother and the Hamms as joint petitioners, and naming Father as respondent.[2] The attorney apparently failed to see any potential for conflict between a young biological

[2] Testimony indicated a belief that another goal of the joint petition was to prevent Father from asserting custodial rights.

mother and the older couple who paid him as there is no evidence of a conflict letter or written consent by anyone. SCR[3] 3.130, RPC[4] Rule 3.130(1.7)(b)(4).

Kenniston filed the petition on August 17, 2015. Daughter was 22-months old. The petition begins traditionally enough with "Comes now the Petitioner, BRITTANY KRUGER, by and through counsel," but then says "for *his* cause of action, states the following: . . ." (R. 1 (emphasis added)). Then, it again identifies Mother as "Petitioner" (singular) and Father as "Respondent." It states Daughter is Mother's biological child, an averment establishing Mother's standing to claim custody, and that Daughter lives with Mother. (*Id.*).

Then the petition becomes more unconventional. The third paragraph lists nonparents Jim and Jeanette Hamm as "Petitioners" (plural) without any explanation why they have standing to be petitioners or why they have any legal right to claim custody. The petition states simply that the Hamms "are the fit and proper persons to have joint care, custody and control of the child . . . ." (R. 1-2).

A few days after this petition initiated the action, attorney Kenniston filed a motion for temporary custody in favor of Mother and the Hamms and against Father. (R. 4). Father, who was still incarcerated, had not yet been served

[3] Supreme Court Rule.
[4] Rule of Professional Conduct.

properly, had not been established in this action as the father,[5] and had not been appointed a guardian ad litem as required by CR[6] 17.04.

The affidavit supporting that motion is more than unconventional. After identifying a single "Petitioner" as not just Mother, but also Jim and Jeanette Hamm, the affidavit becomes illogical. This affidavit had all three swear to the truth of the following statement: "We am the Petitioner in the above-styled action and the father of one minor child born to the parties, [Daughter], age 1 years. . . . It is in the best interest of the minor child that we have sole custody." (R. 6). We call this affidavit illogical because, grammar aside, we are confident that none of the three affiants is the father, that a child was not born to the three parties, and we are at a loss as to how sole custody can be granted to three people.

When the motion for temporary custody was heard, Father did not appear, nor was he otherwise properly before the court. On the strength of the unusual affidavit, the circuit court ordered that "Petitioners Brittney Kruger and the Hamms are awarded temporary custody of the minor child . . . ." (R. 13).

[5] However, five months before Kenniston filed the Joint Petition in the instant action, Father was the subject of an Order Establishing Paternity in the same circuit court. *Cabinet for Health and Family Services, ex rel. Brittany Kruger v. William Hawkins*, No. 14-J-00152 (Montgomery Cir. Ct. March 19, 2015) (Order Establishing Paternity; Hon. Don Blair, Chief District Judge, presiding). The records indicate no child conceived by Mother and Father, other than Daughter.

[6] Kentucky Rules of Civil Procedure.

A few months later, Kenniston moved for a default judgment against Father and for another custody order in favor of the Hamms and Mother. (R. 16). A few months after that, the circuit court entertained the motion. In a January 2016 "Order for Temporary Custody," the circuit court ordered only that "petitioners Brittney Kruger and Jim and Jeanette Hamm are awarded joint custody of [Daughter because] this is in the best interest of [Daughter]." (R. 19). The order does not include a default judgment, *per se*, against Father.

Before Kenniston was indefinitely suspended from the practice of law on unrelated matters, *Kentucky Bar Association v. Kenniston*, 547 S.W.3d 520, 522 (Ky. 2018), his joint representation of Mother and the Hamms came to an end. The Hamms were exercising increased control over Daughter. In June 2016, Mother used a form she acquired from the court clerk's office to file a *pro se* "Motion for Review of Child Custody." Her motion identified Jim and Jeanette Hamm as "the opposing party[.]" (R. 23). The handwritten motion gave the following account of the reasons Mother asked for the circuit court's review of the custody arrangement (conventional capitalization was added in transcribing):

> I have temporary custody of minor child with the opposing party, [Daughter], Age 2, [address same as Kruger]. I need the court to review the custody arrangements for the following reasons: [Daughter]'s biological father has been absent from her life. I asked Jim and Jeanette to watch my children while I worked long hours, and they wanted to help me. And being a single mother with no help of family members or child

support, I was very appreciative. Not only have they helped me with my daughter but they have helped me before as well. I provided for my kids well and they always had what they needed I thought. I trusted these people. I remember the day I asked them about doing this whole joint custody, because I was so excited how close we were and how happy me, [Son], and [Daughter] were. I wanted them to be able to help me take [Daughter] to the doctor and help me in general, and watch her grow up. Because yes I do work a lot and I just wanted to make sure my little girl is taken care of. On June 16th 2016, I didn't know that would be the last day of seeing my daughter. The story behind this, I had a cook-out the same day, same evening, my friend Kory was over to see me. He messaged me on Facebook weeks ago asking about [Daughter] and informed me he may be the father. I didn't agree with him and said her father is in jail. Kory asked me to do a home DNA test. I knew he wasn't the father but to assure him I agreed to take it anyway. So I had this cook out, Jeanette and all the girls she had with her, me and Kory, and my kids were there. After we ate Jim showed up and left with Jeanette and [Daughter] to the park down the road. They came back but remained outside, I came out and seen Jim taking [Daughter] to his truck, I asked Jeanette to tell him to bring her back. I told Jim she would be part of this DNA test and he was fine with that. I also mentioned she was staying the night with me. He was okay with that and left. He came back and knocked on the door and said "Don't you think we should transition this slowly[?]" I was upset about the way he said that and I said "you babysit her while I work night shift, I shouldn't have to do anything because she is my daughter and you're her babysitter!!" He took [Daughter] from where she was in my living room, and walked off really fast to his truck, he didn't even have a carseat so I called the police but they took off. The police showed up and said there was nothing they could do because it was a temp custody Agreement. They left and came back and said there was a report of Alcohol use and hurting my child. They

> investigated and it was all unfounded. I've had social workers in my home and it was the same report but again I've done nothing wrong. The people I thought I trusted have not only made false accusations about me but today its June 22 2016, a week I haven't seen my daughter the most miserable days of my life. I have begged Jim and Jeanette via phone call, text, facebook everyday to just let me know how shes doing at least and they ignore/block me. I seen my daughter everyday my son has been asking about her and its really tore this family apart. I have begged to work things out with them just so I could see my daughter, they won't talk to me at all and right now I'm concerned for the safety of my child, I can't sleep at night and I feel like I made a mistake doing this. I ask the judge to please look into my case and I would like to terminate this order. I have tried to work things out with the Hamm's, they won't respond. They are not thinking about [Daughter], they are trying to take her away from her mother.

(R. 22-29 (some pages are out of sequence in the record)).

Mother asked that her motion be heard on July 6, 2016. In response, the Hamms hired new counsel who entered an appearance and moved to continue the hearing until July 29. Simultaneously, counsel filed a "Verified Response; Motion to Enter Permanent Custody Order" in favor of the Hamms, but with only supervised visitation for Mother. (R. 35-43).

The hearing on Mother's motion was postponed until September 2, 2016. By then, there were anonymous complaints to the Cabinet for Health and Family Services about Mother and her care of her children. The circuit court

ordered the Cabinet for Families and Children "to provide all records concerning [Mother] . . . ." (R. 65). The Cabinet was never a party to this action.

Despite representations of the Hamms' counsel in open court, the Cabinet's records showed each of the complaints were unsubstantiated.[7] Furthermore, medical records provided to the circuit court contradicted the Hamms' representations that Mother did not accompany Daughter to the doctor. Those records show Mother was present at most, if not all, doctor visits; none show her absent. (Mother's Exhibit 6 (filed under seal)).

Prior to the hearing on her *pro se* motion, Mother was able to secure her own counsel who responded to the Hamms' motion for permanent custody stating, in pertinent part:

> Jim Hamm and Jeanette Hamm have no biological relationship with [Mother or Daughter]
>
> . . . .
>
> The Hamms paid for and employed attorney Kenniston to file the Petition for Custody. [Mother] was not advised of the legal ramification of doing so.
>
> . . . .

[7] A social worker for the Cabinet, Brittany Jackson, "testified that there have been multiple investigations initiated as to [Mother's older child] and unsubstantiated. S[he s]tated that [Mother's] residence is appropriate and has no concerns as to [Mother's] ability to care for [Daughter]." (Judgment, R. 136). Ms. Jackson said she had gone to Mother's residence more than five times on complaints but found no issues or concerns regarding Mother or her residence, that the home has appropriate sleeping arrangements, no safety hazards, and no sign of the use of illegal substances. (Brittany Jackson testimony, VT 09/06/2017; 3:46:18 – 3:48:05).

> At no time did this Court make a specific finding by clear and convincing evidence that Jim Hamm and Jeanette Hamm were *de facto* custodians of [Daughter] . . .
>
> The Hamms were not standing in the place of the biological parent . . . [and] the Hamms acknowledge that [Daughter] resided with [Mother] . . . .
>
> Due to her age and pressure and influence exerted by the Hamms, [Mother] commenced this action without the full understanding of the ramifications of the legal consequences for doing so.
>
> [Mother] . . . believed that this action would facilitate the providing of child care services by the Hamms while she was at work and allow the Hamms to obtain medical treatment for the child in the event of an emergency.
>
> The Hamms have engaged in a pattern of conduct to deprive [Mother] of her fundamental constitutional right to parent her child.
>
> The Hamms have engaged in a pattern of conduct to deprive [Mother] from exercising custody [and have] unilaterally taken custody of [Daughter] . . . .
>
> The Hamms are not *de facto* custodians . . . .
>
> [Mother] has not waived her superior right to custody.

(R. 67-69). Mother then demanded the Hamms' motion for permanent custody be denied, that the petition be dismissed for lack of standing, and that Mother be awarded "the immediate and sole care, custody and control of the minor child[.]" (R. 70).

The Hamms responded by claiming Mother "waived any right she may have had to object to the HAMMS [capitalization in original] as joint custodians. . . . It is clear on the face of the pleadings that the Court should enter a joint custody Decree and enter appropriate timesharing for the minor child for the mother." (R. 73). They also claimed they were "in fact *de facto* custodians" and claimed the right to custody "under the doctrine of waiver." (R. 74). The Hamms' demand for relief sought "an Order, consistent with the mother's initial request, that they be made joint custodian of said minor child, and that visits with the mother should be limited to supervised contact for two nights a week for no more than an hour per time." (R. 77). They also "believe that the mother should subject herself to a psychological evaluation and a parenting assessment to determine what level of contact she should have with this child, and to determine whether she should have possession of her old child."[8] (R. 77).

When these arguments of counsel were heard, there was some question regarding the need to take proof. During that discussion, the following conversation occurred, revealing the general legal beliefs of counsel and the court:

> Counsel for Mother: If we need to schedule a hearing that's fine but I would petition the court: (1) to entertain my motion to dismiss them [the Hamms] as

[8] We note the record shows Mother completed two parenting classes in February and March 2017. (Mother's Exhibit 9).

parties; (2) that they [the Hamms] need to prove themselves by clear and convincing evidence that they are "*de facto* custodians" before they even can petition the court.

Court: Well, they're original parties to this action.

Counsel for Hamms: That's right, Your Honor. They did a joint petition with the Mother.

Court: Which is the origination of this action so that seems to take it out of the *de facto* – that was kind of, I guess – whether there's an agreement or whatever. . . .

Counsel for Hamms: . . . If you place a child with somebody and act as if they're the parent, caselaw in Kentucky says you are then estopped from denying their status as a custodian.

Court: Which pre-existed the *de facto* statute, so –

Counsel for Hamms: That's correct. But I mean, so I mean there's three options and, I mean, I think my clients should win on all three options with regard to their standing.

Court: You've got *de facto*, waiver, and unfitness; of course, the waiver and unfitness [interrupted]

Counsel for Mother: Your Honor, they've never proven unfitness [interrupted]

Counsel for Hamms:	You don't have to prove unfitness. You have to prove waiver or unfitness. That is a red herring because my clients are already *de factos* so it's more or less irrelevant.
Court:	Well she [Mother] was present when an order of temporary custody was entered over a year ago. Now, Mr. Hawkins [Father] was not and [garbled] there may be some issues there . . . Given that they [the Hamms] were initiating petitioners along with her [Mother] I mean that's, that's, would seem to be hard to overcome.

(Video Transcript (VT) 9/01/2016; 11:42:37 - 11:59:40). That day, the circuit court entered an order granting Mother supervised visitation with her own child twice a week for two hours per visit. (R. 82).

The court then attempted to solve the problem of having awarded custodial rights to the Hamms without having Father before the court. The court appointed a guardian ad litem pursuant to CR 17.04 to represent Father. (R. 81). On November 4, 2016, the court ordered Father to undergo paternity testing at the Hamms' cost initially.[9] (R. 91).

[9] *See*, *supra*, footnote 5, regarding paternity testing of Father as urged by Mother more than a year and a half earlier.

Soon, Father's guardian ad litem moved to set aside the custody orders. (R. 94). The circuit court granted the motion, but only in part. Those orders were "set aside as they pertain to [Father]." (R. 97).

Now that he was finally before the court, Father asserted his position, consistently with Mother, that the Hamms lacked standing on any legal theory. (R. 118-19). An evidentiary hearing was scheduled. The court heard three days of testimony beginning May 10, 2017, and ending on September 7, 2017.

The judgment summarizes the testimony of seventeen witnesses. For the most part, the Hamms' witnesses told the court that Mother was not a good parent and Mother's witnesses testified that Mother did all she could to care for her children with the help of those in her community willing to do so.

It is worth noting that, in their attempt to establish Mother's lack of interest in raising Daughter, the Hamms did not distinguish between pre-petition evidence and what happened post-petition after the circuit court awarded the Hamms temporary joint custody. For example, workers for the Cabinet's HANDS[10] program testified about the limited number of times Mother was present when they visited the child, but at least half those visits (when Mother was not present) occurred after the Hamms were awarded custody and Mother's time with Daughter was, by court order, limited and supervised.

[10] The acronym stands for Health Access Nurturing Development Services.

After summarizing the testimony, the circuit court analyzed this custody case. Notably, the judgment refers repeatedly to a "joint custody agreement." This is misleading as there is no such written agreement. The circuit court's analysis stated, in part, as follows:

> This case has lots of twists and turns to it. . . . The mother obviously was under stress and latched onto any help and support she could get while trying to prove her indepen-dence to her family. The Hamms were searching for something, particularly Jeanette to fill a perceived void that needed to be satisfied. All of this has run into each other like a once in a decade alignment of planets, moons, stars and other celestial bodies. . . . The joint custody agreement was haphazardly reached albeit in a good faith manner by the parties at the time although arguably could have used another vehicle. The joint custody agreement was what got everybody started on a plan that worked for a year, unless in the beholder's hindsight perspective. In reviewing all the relevant factors of KRS 403.270 there is nothing to disqualify either the mother or the Hamms to the trust of caring for this child. The unfortunate issue has been the repeated delays due to numerous Cabinet investigations that have all been unsubstantiated and the resultant delay of this matter reaching a final hearing. These parties reached an accord for Joint Custody previously and in the present preferential climate for same there is no reason to not do so now.

(Judgment, December 12, 2017, R. 138). The circuit court then ordered that Mother and Jim Hamm and Jeanette Hamm have joint custody of Daughter, leaving it to them to "exercise shared time as they agree or in default alternating weeks" and to jointly decide what visitation Father would enjoy.

After energetic post-judgment procedural practice,[11] the circuit court entered an order "reiterat[ing] it[s] previous Judgment and noting there that waiver applied and otherwise amends to incorporate the doctrine of Judicial Estoppel and that *de facto* custody applies as an even right was originally granted thus waiving the mother's superior right." (Order, R. 178).

Father does not appeal. Mother appeals the judgment claiming her right to sole custody because the Hamms have no legal basis to claim custody.

STANDARD OF REVIEW

Child custody matters involve two types of reviews. First, a circuit court's findings of fact are examined for clear error and will be set aside when they lack substantial evidence to support them. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence from the record must support any factual determinations regarding a child custody or visitation decision. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Second, the analysis shifts to an examination of legal conclusions. Accordingly, our review of this decision is *de novo. Laterza v. Commonwealth*, 244 S.W.3d 754, 756 (Ky. App. 2008). "Under

[11] The Hamms moved the circuit court to limit Mother to "specific timesharing as warranted by the mother's work schedule . . . only on those days which she is not going to work during the evening." They also sought an order allowing them to claim Daughter as a dependent on their taxes noting that "[t]he mother received over $9,000 last year as a tax refund for claiming the child . . . ." (R. 144-47). Mother filed several post-judgment pleadings including a motion to introduce records of five domestic violence charges against Jim Hamm brought by four different individuals over a five-year period. (R. 148-55). Mother also filed responses to the Hamms' motion to amend the judgment, incorporating her own motions to amend. (R. 159-63; 171-76).

this standard, we afford no deference to the trial court's application of the law to the facts[.]" *Id.* (citation omitted).

ANALYSIS

The term "waiver" has been bandied about in this appeal, sometimes referring to Mother's acquiescing in the Hamms' assertion of standing to claim custodial rights, and at other times referring to her relinquishment of her superior rights to the custody of her child. We address both but begin by addressing the former reference.

Mother did not waive her right to contest the Hamms' standing

Despite multiple requests by Mother's counsel to rule on her motions challenging the Hamms' standing, the circuit court never did so directly. Clearly, Mother preserved this issue and now presents the argument to this Court.

The Hamms' responsive brief does not directly engage the procedural issues of standing or preservation of error. They claim "[t]he disputes in these matters do not necessarily resolve [sic] around the procedural matters of how the parties arrived at their respective positions." (Hamms' brief, p. 1). However, preservation issues notwithstanding, the Hamms assert the joint petition constitutes Mother's waiver of the right to contest the Hamms' custody claim itself. The same argument is at least an implicit assertion that she waived the right to contest standing.

"[L]ack of standing is a defense which must be timely raised or else will be deemed waived." *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010). The "right to contest standing may be waived, even in child custody cases." *Id.* Comments by the Hamms' counsel and by the circuit court indicate their belief that, by filing a joint petition with the Hamms, Mother waived any objection to standing. That is not so. *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010) presents an analogous set of facts.

In *Mullins*, same-sex partners were trying to parent a child together. Mullins, the nonparent, was concerned that she did not have the same legal rights regarding the child as her partner, Picklesimer, the parent. *Id.* at 572. At multiple meetings together, one attorney counseled the couple, but he made it clear he only represented Mullins. The attorney "discussed with them their legal rights regarding the care of [the child] and the legal documents that could protect Mullins' interest regarding [the child]." *Id.* When Mullins and Picklesimer met again with the attorney, the purpose was "to review and sign the legal documents that he had drafted . . . : petition for custody; entry of appearance and consent to custody; and agreed judgment of custody." *Id.*

Under similar facts found by the circuit court in the case now under review, the parties' sole attorney drafted and filed: a joint petition for custody; motion for temporary custody; affidavit; second motion for temporary custody; a

tendered order granting temporary custody entered by the court; and a motion for default and custody order. Unlike the documents described in *Mullins v. Picklesimer*, not one of the legal documents in this case asserts the Hamms have standing or any right to legal custody under Kentucky law.

The documents filed in *Mullins v. Picklesimer* falsely claimed Mullins had standing and the right to custody; the Supreme Court said the parties thereby committed a fraud. "[T]he fraud upon which we base our ruling . . . was the false claim by both parties that Mullins was the *de facto* custodian." *Id.* at 577. In the case before us, there is no such fraud by commission. The petition here was not based on false grounds. Rather, no grounds for the Hamms' standing were stated in the petition or motions leading to the custody orders or in the orders themselves. We need not label these unfounded custody-related legal documents as evidence of fraud by omission. However, we are equally unwilling to call them proof of Mother's waiver of standing, particularly because Mother was not represented by independent counsel.

As soon as Mother had independent legal counsel – and even before that when she filed her *pro se* motion to review custody – she clearly voiced her objection to the Hamms' standing and claim of custody. These facts are quite similar to those of *Mullins*, a case that focused upon the biological mother's

challenge to the nonparent's standing and not just her claim of custody. We hold as a matter of law that Mother asserted a timely objection to standing.

Circuit court's finding that Hamms were de facto *custodians is erroneous*

Next, we address the circuit court's finding "that *de facto* custody applies . . . ." That finding is erroneous. We again turn to *Mullins* where the Supreme Court said:

> to qualify as a *de facto* custodian in Kentucky, one must be "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 years of age. . . ." KRS 403.270(1)(a). It has been held that parenting the child alongside the natural parent does not meet the *de facto* custodian standard in KRS 403.270(1)(a). *Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky.App.2001), *abrogated on other grounds by Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Rather, the nonparent must "literally stand in the place of the natural parent." *Id.*

Id. at 573-74. Although the Hamms were providing care and financial support for Daughter, it is undisputed that Mother was at least co-parenting Daughter. Jeanette Hamm testified that Mother was with her Daughter at the Hamms' house every other day and provided formula and bought clothes for Daughter. The medical records show Mother was present at more than a few doctor's appointments. The joint petition itself evinces the Hamms' belief that they and Mother are on the same custodial footing. This was so at least until June 2016 when Jim Hamm took Daughter, against Mother's will, from Mother's residence during a cookout.

We conclude the circuit court's ruling that the Hamms satisfied the legal requirements to be *de facto* custodians is not supported by substantial evidence and, as a legal ruling, is clearly erroneous.

As in *Mullins*, that does not end the analysis. Under *Mullins*, we must account for our jurisprudence interpreting Kentucky's Uniform Child Custody Jurisdiction and Enforcement Act, KRS 403.800 *et seq*. (UCCJEA).

A claim of standing pursuant to the UCCJEA

The UCCJEA was designed and enacted in jurisdictions across the country to "promote uniformity of the law with respect to its subject matter among states that enact it." KRS 403.876; *see* 15 Ky. Prac. Domestic Relations L. § 14:24 ("KRS 403.822 now governs those instances in which a Kentucky court may assert subject matter jurisdiction in a child custody determination."). Although there are more than forty separate statutes comprising the UCCJEA, "standing" is not mentioned in the text of any of them. However, our Supreme Court discovered in those statutes a new legal basis upon which a party may claim standing,[12] notwithstanding "our precedent and strict recognition of the material differences between standing and subject-matter jurisdiction." *Harrison*, 323 S.W.3d at 705

[12] The Supreme Court first drew conclusions about standing from the Uniform Child Custody Jurisdiction Act, KRS 403.400, *et seq.* (repealed) (UCCJA), which the UCCJEA replaced. *B.F. v. T.D.*, 194 S.W.3d 310, 310 (Ky. 2006) ("KRS 403.420 limits standing to commence a child custody action to a parent, a de facto custodian of the child, or a person other than a parent only if the child is not in the physical custody of one of the parents."). Like the UCCJEA, the UCCJA never uses the word standing but, as the title indicates, addresses jurisdiction.

("[W]hat effect the repeal of KRS 403.420 had upon the ability of a nonparent to seek custody of children is important [but] . . . is not really before us. Instead, this appeal revolves around the concept of standing.").

In *Mullins*, the Supreme Court concluded that the legislature, "cognizant of preexisting statutes[,]"[13] made it easier for certain nonparents to achieve standing under the UCCJEA and, specifically, KRS 403.800(13)(b) and KRS 403.822. The Court held that when the legislature repealed KRS 403.420, it eliminated the requirement that the child not be in the physical custody of the parent before a nonparent can claim standing. Instead, said the Court:

> [T]he new statute grants standing to a nonparent who, acting as parent to the child, has physical custody of the child. Hence, KRS 403.822 would seem to permit standing in a shared custody co-parenting situation, since there is no longer a requirement of physical custody to the exclusion of the parent, if the nonparent can meet one of the requirements of subsection (b) of KRS 403.800(13) – she has been awarded legal custody or claims a right to legal custody under Kentucky law.

[13] The Court misidentified those pre-existing statutes as KRS 403.240 and KRS 403.270 *et seq*. Specifically, the Court said: "Prior to 2004, standing to bring a custody action was limited by KRS 403.240 to 'a parent, a de facto custodian of the child, or a person other than a parent only if the child is not in the physical custody of one of the parents.'" *Mullins*, 317 S.W.3d at 574 (quoting *B.F. v. T.D.*, 194 S.W.3d 310, 310-11 (Ky. 2006)). Respectfully, the Court quite obviously intended to cite KRS 403.420, not KRS 403.240; KRS 403.420 is part of the Uniform Child Custody Jurisdiction Act (repealed) and predecessor to the UCCJEA's KRS 403.822. There is at least one other citation to KRS 403.240 when the intent was clearly to cite KRS 403.420. *Mullins*, 317 S.W.3d at 575 ("Instead of requiring that the child *not* be in the physical custody of the parent as KRS 403.240 did, . . ."). The Court also said: "KRS 403.270 *et seq.*, the Uniform Child Custody Jurisdiction Act, was repealed in 2004 and replaced by KRS 403.800 *et seq.*, the Uniform Child Custody Jurisdiction and Enforcement Act." *Id.* at 574. Again, quite obviously, the Court miscited KRS 403.270 when it meant to cite KRS 403.400.

Mullins, 317 S.W.3d at 575 (emphasis added).

Pursuant to *Mullins*, a petition asserting standing under KRS 403.800(13)(b) and KRS 403.822 must include averments that the nonparent: (1) is acting as a parent, (2) has physical custody of the child, and (3) shares physical custody as co-parent with the parent. However, there must also be an additional averment (4), either: (a) that the nonparent has been awarded legal custody or (b) that the nonparent claims a right to legal custody under Kentucky law.

Not one of these averments appears in the Hamms' petition. An immediate motion challenging the petition would have been appropriate, but as in *Mullins* and similar cases,[14] the parties and their attorney were treating the circuit court as a non-adversarial forum (as between Mother and the Hamms) to approve new custodians without alleging or satisfying statutory requirements designed to protect Daughter and both Mother and Father. Many months would pass before Mother had independent counsel; many months would pass before Father was before the court. Even then, the circuit court did not entertain Mother's and Father's challenges to the Hamms' standing.

[14] In another same-sex partners case addressing parental rights, the parties and counsel "were all on the same page here. Because these proceedings were carried out in 'friendly suit' manner, without the presentation of a countervailing legal position, and without even the objective participation of the Cabinet, the parties lost all benefit of an otherwise *adversarial* system." *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 836 (Ky. App. 2008) (emphasis in original).

Notwithstanding its facial deficiency, the Hamms' petition was never amended. Though leave to amend might have been allowed pursuant to CR 15.01 ("a party may amend his pleading only by leave of court"), amendment pursuant to CR 15.02 would not have been authorized because Mother never expressly or impliedly consented to try the issue.[15] However, the Hamms prevailed in this matter and we shall presume, in their favor, that the circuit court would have permitted amendment to include the bare bones averments called for in *Mullins*.

Because the Hamms had not been awarded custody, they could claim standing only by asserting "a right to legal custody under Kentucky law" – a quite skeletal allegation, but all that is necessary to assert standing under *Mullins*. We here emphasize, however, that clearing the standing hurdle does not mean the Hamms established Mother's waiver of her superior custodial rights.

Finding standing does not defeat Mother's superior custodial rights

Establishing standing under the UCCJEA by claiming a right to custody under Kentucky law does not establish the right itself. Standing is only a "party's *right to make a legal claim* . . . [to] a judicially recognizable interest in the subject matter of the suit[.]" *Harrison*, 323 S.W.3d at 705 (citations and internal

[15] "*When issues not raised by the pleadings are tried by express or implied consent* of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . ." CR 15.02 (emphasis added).

quotation marks omitted; emphasis added). Most significantly, standing pursuant to the UCCJEA is very different from standing as a *de facto* custodian.

The effect of a nonparent's establishment of *de facto* custodian status is two-fold. First, it achieves standing. Second, it simultaneously levels the playing field for nonparent and parent so that "equal consideration shall be given to each parent and to any *de facto* custodian" in a best interest analysis to determine custody itself. KRS 403.270(2). That is not so when the basis of standing is allegations of a parent's unfitness or his or her waiver of superior custodial rights.

Unable to establish themselves as *de facto* custodians, the Hamms faced a formidable task of wresting custody from Mother. As the Supreme Court put it:

> Parents of a child have a fundamental, basic, and constitutional right to raise, care for, and control their own children. *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989). When a non-parent does not meet the statutory standard of *de facto* custodian in KRS 403.270, the non-parent pursuing custody must prove either of the following two exceptions to a parent's superior right or entitlement to custody: (1) that the parent is shown by clear and convincing evidence to be an unfit custodian, or (2) that the parent has waived his or her superior right to custody by clear and convincing evidence.

Mullins, 317 S.W.3d at 578.

A nonparent, non-*de facto* custodian who claims standing only by pleading a right to legal custody under Kentucky law based on a parent's unfitness

must separately prove such unfitness by clear and convincing evidence before the court can undertake a best interest analysis to determine custody. As the Supreme Court said, "[T]he nonparent must first show by clear and convincing evidence that the parent has engaged in conduct similar to activity that could result in the termination of parental rights by the state. Only after making such a threshold showing would the court determine custody in accordance with the child's best interest." *Moore*, 110 S.W.3d at 360.

The same is true when a nonparent establishes standing by claiming custody based on a parent's waiver of superior custodial rights. Such standing, as we have presumed the Hamms could have alleged here, only entitles a nonparent to court access to present evidence of waiver. That evidence "must be equivalent to an express waiver to meet the burden of proof." *Mullins*, 317 S.W.3d at 578 (internal quotation marks and citation omitted). That burden of proof is "clear and convincing evidence." *Moore*, 110 S.W.3d at 359. Until that burden is satisfied, a parent's right to custody remains superior. When and if that burden is met, the nonparent and the parent are on equal footing and the court must conduct a best interest analysis to determine whether the interest of the child is best served by awarding custody jointly, or to the parent solely, or to the nonparent solely.

After thoroughly examining this record, we conclude there is no evidence to support a finding that Mother was unfit, and we conclude there is insufficient evidence to find Mother had waived her superior custodial rights.

There was no finding, nor could there be, that Mother was unfit

It is easy to clear the air regarding the "unfitness" question. That topic was touched upon by and before the circuit court and alluded to in argument and in Mother's brief. However, nothing in this record supports such a finding; the circuit court did not and could not make such a finding. In fact, the circuit court found to the contrary – that "there are no significant issues as to the potential for the mother to be a part of the child's life [and] there is nothing to disqualify . . . mother . . . to the trust of caring for this child." (R. 138). Just as in a decision upon which the Hamms rely, *Moore v. Asente*, "the 'unfitness' standard is inapplicable in this case." 110 S.W.3d at 340.

That leaves only this question: does clear and convincing evidence establish that Mother waived her superior right to custody of Daughter? The answer to that question is no.

Record fails to support finding that Mother waived her superior custodial rights

When we consider what the law requires as factual support for a finding that Mother waived her superior custodial rights, we see this record is

lacking. Our legal analysis starts by examining a case upon which the Hamms rely, *Moore v. Asente*.

In *Moore*, the Supreme Court of Kentucky said:

> Kentucky's appellate courts have recognized two circumstances that constitute a knowing and voluntary waiver of a parent's superior right to custody. *Van Wey v. Van Wey*[, 656 S.W.2d 731, 734 (Ky. 1983)] and *Boatwright v. Walker*[, 715 S.W.2d 237, 244 (Ky. App. 1986)] held, respectively, that once (1) a voluntary petition to terminate parental rights to permit an adoption or (2) a voluntary, knowing consent to adoption, have "been executed, withdrawal, while permissible, nevertheless waives the parent's superior right to child custody, 'and the best interests of the child [then] takes precedence."' [citation omitted] Whether a parent has waived his or her superior right to custody under KRS 405.020 is a fact-specific determination that should be made after consideration of all relevant factors.

Id. at 360-61. When the Supreme Court said this in 2003, it was holding fast to the concept that a parent's waiver of superior custodial rights is quite circumscribed and was limited, at that time, to adoption proceedings. In fact, *Van Wey* indicated that limiting the waiver concept to adoptions comes from "[a] long line of Kentucky cases beginning with *Lee v. Thomas,* 297 Ky. 858, 181 S.W.2d 457 (1944), where the mother signed her consent for adoption in the hospital and then attempted to revoke her consent and resist the adoption procedure . . . ." *Van Wey*, 656 S.W.2d at 735.

Moore reaffirmed the limited applicability of waiver of custodial rights illustrated in the Court's then most recent ruling in that long line of adoption cases, *Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995). In *Greathouse*, the maternal grandmother pursued adoption of her grandchild and termination of both parents' parental rights, but only the father resisted. Grandmother claimed father waived his superior custodial rights because his "contacts with the child were few and sporadic, [attributable] to his lack of maturity, his working out of town, switching jobs, an unstable home life, and drug and alcohol abuse problems during this period shortly after the child's birth." *Id.* at 388-89 (internal quote marks omitted). After making these findings, the circuit court held the child's father waived his superior right to custody.

In a split opinion affirming, the Court "*finessed* the father's superior right of custody under KRS 405.020 by utilizing a waiver principle [concluding father] . . . surrendered the care and custody of the child to . . . a grandparent, and has acquiesced in the child's remaining there for an extended period of time." *Id.* at 389 (emphasis added). The opinion would not survive further scrutiny.

Greathouse acknowledges that "there is a waiver principle which may be involved *in a case of this nature* [*i.e.*, an adoption]," and then emphasizes "that it is one more narrowly circumscribed than would appear from the Court of Appeals' opinion." *Id.* at 390 (emphasis added). The Court cautioned

grandparents that they "must realize, when they take in a grandchild to care for, that agreeing to care for a grandchild is a temporary arrangement, not a surrender of custody, regardless of the quality of care and the bonding that follows." *Id.* at 391. The same also must be realized by *non-relative*, nonparent caregivers.

The year after *Moore* was rendered, in *Vinson v. Sorrell*, there was no need to decide the unraised issue whether waiver of superior custodial rights was limited to adoptions as stated in *Moore*. In a more direct way, the Supreme Court affirmed this Court's holding that the "trial court's finding that [father] had waived his superior right to custody was not supported by clear and convincing evidence . . . ." 136 S.W.3d 465, 467 (Ky. 2004). As the Supreme Court said, "Case law clearly demonstrates that allowing [a child] to live with her grandparents and [a father]'s sporadic participation in [the child]'s upbringing does not constitute express waiver." *Id.* at 469. *Vinson* thus does not deviate from *Moore*'s recognition that waiver had only been found applicable in adoption cases.

This Court interpreted *Vinson* as recognizing the possibility that waiver of superior custodial rights could be applicable outside the adoption context – when the contest is between a parent and a member of the child's extended family. In *Boone v. Ballinger* we said:

> Traditionally, waiver of a parent's superior custodial right has been recognized in two distinct scenarios. The first involves a biological mother['s] or father's claim of custody as against the putative adoptive parents

> appurtenant to adoption proceedings, *Moore v. Asente, supra; Van Wey v. Van Wey,* 656 S.W.2d 731 (Ky. 1983); *Boatwright v. Walker,* 715 S.W.2d 237 (Ky. App. 1986), and the second involves a dispute between a known natural father and another member of the child's extended family, *Vinson, supra* (father versus child's maternal grandparents); *Greathouse v. Shreve,* 891 S.W.2d 387 (Ky. 1995) (father versus child's maternal grandmother).

228 S.W.3d 1, 10 (Ky. App. 2007).[16] Then, this Court presumed to find waiver in a third context, not previously recognized by the Supreme Court:

> This case presents a third factual scenario to which the doctrine of waiver is equally applicable, *i.e.*, waiver of a biological father's custodial right as against the husband to whom the mother was married when the child was born and who has been led to believe that he *is* the child's father.

Id. (discretionary review not sought). Clearly, the Hamms do not fit in any of these three factual scenarios.

Since *Moore* and *Vinson*, the Supreme Court has recognized waiver of a parent's superior right to custody in only one context other than adoptions – *Mullins v. Picklesimer*.

Adoption was not a legal option for nonparent Mullins because it would have meant terminating the parental rights of her same-sex partner, the

[16] Actually, *Greathouse* falls in the first category because it was "initiated in March 1990, by the maternal grandmother as an *action to adopt* the child and terminate the parental rights of both parents." *Greathouse*, 891 S.W.2d at 388 (emphasis added).

biological mother. *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 818 (Ky. App. 2008). As described earlier, the Supreme Court interpreted the UCCJEA to find, in same-sex partner cases, a basis for establishing waiver of superior custodial rights outside the context of adoption. However, the Court did not depart from the circumscribed nature of the waiver concept. As can be seen in the interaction of the majority and dissenting opinions, the Court anticipated circumstances like those now before this Court and rejected them as a basis for finding waiver.

Dissenting in part, Justice Cunningham expressed concern that the Court was, "by judicial edict, just open[ing] wide the door and wav[ing] everyone in who wishes to parent a child." *Mullins*, 317 S.W.3d at 583 (Cunningham, J., concurring, in part, and dissenting, in part). He said, "This new[-]found rule of law will – in an age of working parents and shared nurturing – equally fit as many grandparents, uncles, aunts, neighbors, *and even babysitters*, as it does [Mullins] and others who may 'co-parent' a child." *Id.* (emphasis added). But the majority reassured him otherwise and clarified our jurisprudence by doing so.

The majority responded directly to Justice Cunningham's concern, stating:

> In the present case, the *child was conceived through artificial insemination and brought into the world upon agreement of the parties* to parent the child together. It was undisputed that Mullins physically cared for and supervised [the child] from birth throughout the period the parties were together and for the five months

> thereafter when they shared custody. And she did so in the capacity of a parent, which is evidenced by her living as a family with the child and Picklesimer, the child calling her "momma," the child's hyphenated surname (Picklesimer–Mullins), the parties' attempt to confer parental rights on Mullins with the agreed judgment of custody, and Picklesimer continuing to allow Mullins to co-parent to the child for some five months after the parties' relationship dissolved. *This would distinguish the nonparent acting as a parent to the child from a grandparent, a babysitter, or a boyfriend or girlfriend of the parent, who watched the child for the parent, but who was never intended by the parent to be doing so in the capacity of another parent*.

Id. at 576-77 (emphasis added). These unique qualifiers were repeated during the discussion of the evidence supporting waiver of the parent's superior custodial rights, strongly suggesting that waiver outside the adoption context is applicable only to same-sex relationships. The Court stated:

> In the case at hand, a myriad of . . . factors are present. 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.

Id. at 580.

We thus interpret *Mullins* as recognizing that waiver of superior custodial rights outside the context of adoptions is limited to nonparents who participated with the biological parent in a plan and agreement to: conceive (albeit artificially), bring into the world, and raise a child together. The Hamms can neither assert nor prove facts supporting waiver on that theory. The facts of this case take it outside the applicability of the *Mullins* waiver argument because the Hamms were expressly the kind of temporary caregivers excluded by *Mullins*; they were "babysitter[s] . . . who watched the child for the parent" but they were never intended to *replace* Mother or Father. *Id.* at 577.

It remains true that no published decision of this Court has ever upheld a finding of waiver of superior custodial rights outside the scenarios described in *Moore* (adoptions), *Vinson* (parent versus grandparent), *Mullins* (same-sex couples), or *Boone* (fathering child of another person's wife).[17] The case under review will not be the first to do so.

[17] Some of these cases address the standing issue primarily: *Fry v. Caudill*, 554 S.W.3d 866 (Ky. App. 2018) (remanded for further finding; former husband seeking visitation with former step sons might have standing if ex-wife/mother waived superior custody rights); *Penticuff v. Miller*, 503 S.W.3d 198 (Ky. App. 2016) (affirmed judgment that mother did not waive superior custody rights; reversed judgment that father did waive superior custodial rights); *Chadwick v. Flora*, 488 S.W.3d 640 (Ky. App. 2016) (grandmother had standing under KRS 403.800(13)(b); remanded to address whether superior right to custody was waived); *Glodo v. Evans*, 474 S.W.3d 550 (Ky. App. 2015) (mother did not waive rights; only path to standing is finding mother unfit); *Truman v. Lillard*, 404 S.W.3d 863 (Ky. App. 2012) (same-sex partners; affirmed trial court's finding that adoptive mother had not waived superior custodial rights); *Brumfield v. Stinson*, 368 S.W.3d 116 (Ky. App. 2012) (reversed judgment that grandparents of subject child's stepsibling were *de facto* custodians; remanded to consider whether alternative grounds for standing existed under *Moore* or *Mullins*); *Temple v. Temple*, 298 S.W.3d 466 (Ky. App. 2009) (mother waived

We cannot affirm the circuit court's legal conclusion that Mother waived her superior rights to custody of Daughter. No combination of records, testimony, or documents in this record support a legal finding that Mother's conduct and statements are "equivalent to an express waiver" of her superior custodial rights. *Mullins*, 317 S.W.3d at 578. The facts found in the judgment (*e.g.*, there is nothing to disqualify Mother to the trust of caring for her Daughter), plus the uncontradicted portions of the Hamms' testimony (*e.g.*, Mother was together with Daughter and the Hamms "every other day"), militate in favor of the opposite conclusion.

Judicial estoppel has no application in this case

This leaves one final issue grounded in the circuit court's judgment – judicial estoppel. The order amending the judgment simply says: "The Court . . . amends at this time to incorporate the doctrine of Judicial Estoppel . . . ." (R. 178). We hold the doctrine has no applicability to this case.

Judicial estoppel is intended to protect the integrity of the judicial process. *Colston Investment Co. v. Home Supply Co.*, 74 S.W.3d 759, 763 (Ky.

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superior custody rights when, given opportunity to request court-ordered custody, she declined and said she would abandon child to father if court awarded her custody); *Diaz v. Morales*, 51 S.W.3d 451, 454, 455 (Ky. App. 2001) (affirming "that [parents] did not waive their superior right to custody" even though the mother's friend "assumed temporary custody when [the child] was four months old and [mother] did not attempt to regain custody until [child] was six years old.").

App. 2001). To do so, the doctrine "can be applied to prohibit a party from taking inconsistent positions in judicial proceedings." *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 434 (Ky. App. 2008). We construe the circuit court's order in this case as intending to use the doctrine in this way. That is, we believe the circuit court effectively held that Mother's filing of the joint petition is inconsistent with a denial that she intended to waive her superior rights to custody of her Daughter. We disagree.

Before a court turns to judicial estoppel, consideration must be given to the criteria that would justify it. Although there is no absolute formula, we do have the following general guidance:

> [S]everal factors have been recognized such as: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 434-35 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001)).

We do not consider Mother's assertion that her custodial rights are superior to the Hamms as "clearly inconsistent" with the filing of the joint petition. Setting aside for the moment that she was not represented by independent counsel when the petition was filed, the joint petition says nothing about waiving superior

custodial rights. We state with judicial certainty that when the petition was filed, Mother's custody rights were constitutionally protected and the Hamms' were not. The joint petition can be read, consistently with the position of all parties, as implying they were seeking joint custody *notwithstanding* Mother's superior custodial rights. The first, and most critical factor, is not present.

As for the second factor, Mother did not succeed in convincing the circuit court that she waived her superior rights; the Hamms did. As soon as she recognized what the joint petition meant, she opposed it.

Finally, even if we presumed Mother's position regarding non-waiver is inconsistent with the joint petition, that change in position does not give her an unfair advantage nor does it impose an unfair detriment on the Hamms. Applying judicial estoppel gives the Hamms an unfair advantage and imposes an unfair detriment upon Mother.

Judicial estoppel does not apply in this case.

CONCLUSION

For the reasons set forth above, we vacate the circuit court's judgment as amended, with instructions to award custody of Daughter to Mother.

ALL CONCUR.

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