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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000759-ME

RENEE ANTOINETTE TORNATORE APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NO. 17-CI-503688

DENISE JO KARIBO APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, TAYLOR, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Renee Antoinette Tornatore appeals from the order of the Jefferson Family Court which granted Denise Jo Karibo joint custody and equal parenting time to S.J.T. (child), who Renee adopted at birth.

Renee and Denise lived together in a long-term same-sex relationship. In 2008, Renee adopted child. Denise and Renee jointly cared for child, with

Denise taking on the primary caregiving role and Renee being the primary earner. In 2017, Renee and Denise split up and Denise moved out.

In December 2017, Denise filed a petition for joint custody, parenting time, and child support, arguing she and Renee were child's parents. In February 2018, Renee filed a motion to dismiss arguing she was child's only legal parent, she had not waived her superior right by clear and convincing evidence, and Denise had no standing to bring an action for custody. Later, in February 2018, the family court denied Renee's motion to dismiss on the basis that it appeared that both women had acted as co-parents of child and entered a temporary parenting schedule in which both women had equal time with child.

Following a trial, on February 25, 2019, the family court granted Denise joint custody and equal parenting time with child, finding as follows:

> Most of the facts in this matter are undisputed. The parties met in 2001 and began a romantic relationship. After about a year, they moved in together and started sharing expenses and bank accounts. Denise testified that she attempted in vitro fertilization off and on between 2003 and 2006, but the procedure was unsuccessful. Renee contends that the decision to adopt a child was hers alone, but she does not dispute that Denise did most of the research about different types of adoption and possible adoption agencies. Both parties completed all preliminary requirements for eligibility to adopt: parenting classes, CPR training, home study, preparation of "marketing materials" for prospective birth mothers. In fact, the "book" of photos and information that the parties used to introduce themselves as possible adoptive parents was, according to both

> parties' testimony, created primarily by Denise, although it was a joint effort.
>
> Both parties were present at the hospital when S.J.T. was born and stayed with him for two days until he was discharged to go home with them. They were both present when S.J.T. was baptized in June 2018; they stood before their religious community as his parents. Denise's sister and brother-in-law were chosen as his godparents. Until November 2017, the parties lived with S.J.T. as a family; both women provided daily care for him, attended his school events and medical appointments. Renee provided for the family financially. Denise stayed home with S.J.T. for the first three years of his life. She worked part time for Renee's chiropractic practice when S.J.T. started pre-school, but would leave work in time to pick him [up] from school every afternoon.
>
> The Court heard testimony from Denise's sister, from a parent of one of S.J.T.'s classmates, from a former employee of Renee's, and from a long-time friend of both Renee and Denise, all of whom stated that they considered both Renee and Denise to be S.J.T.'s parents. For almost ten years, with their families and friends, at work, at home, and at the child's school, the parties held themselves out as co-parents. However, Renee is the sole adoptive parent; she is the only legal parent on the child's birth certificate; and she and the child have the same last name. Until this case was filed in December 2017, Denise took no legal action to establish custody rights.

After discussing the legal standard for a non-parent to seek legal custody, the family court opined it needed to determine whether Renee voluntarily and intentionally waived her superior right to custody, noting that in 2008, Renee and Denise could not legally jointly adopt child. In considering this, it explained:

It is clear to the Court that Denise acted as a mother to S.J.T., beginning with part of the pre-adoption book and holding herself out as a person who would care for S.J.T. and be part of his life if Renee were permitted to adopt him, meeting his birth mother and being present at his birth, being part of his baptism, caring for him on a daily basis from his birth until the parties parted ways. Although Renee testified that she solely made medical and educational decisions, she did not testify to any significant disagreements the parties had about parenting decisions or any occasions when she placed parameters on Denise's contact with S.J.T. until the parties' romantic relationship ended.

Denise testified that the parties made joint decisions about S.J.T.'s care and upbringing. In fact, she filled out all of the necessary paperwork for S.J.T. to go to Temple Traeger, Chance School, and Kentucky Country Day. Renee signed all necessary paperwork, as the child's legal parent, but all documents listed Denise as a parent and most were completed in her handwriting.

. . .

As in *Mullins* [*v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010)], where the parties prepared for the birth of their child together, Renee and Denise set themselves out as co-parents to prospective birth mothers and went through the adoption process together. Denise participated to a great extent in creating the book that presented Denise and Renee as a couple who hoped and planned to jointly raise the child as a family. The book included photos of the parties together as well as both of their extended families and an introductory message signed by both parties, Renee [and Denise]. Although Renee testified that it was she who chose the potential birth mother and pursued the adoption because it was always her intent to adopt a child, irrespective of being single or in a relationship, it is clear that the parties engaged in the adoption process together and continue to

share co-parenting responsibilities jointly after S.J.T.'s adoption.

The Court finds Renee clearly relied on Denise as a co-parent to perform daily caregiving activities. The parties lived together [as] a family unit, holding themselves out to the wider community at their workplace, at the child's school, and in public as co-parents for almost ten years. Both parties testified that Denise spent more time with S.J.T. on a daily basis, not working outside the home when he was an infant, providing the majority of the transportation to and from school each day, and taking him to most doctor's appointments. Furthermore, S.J.T. is fully a part of both parties' extended families; his middle name is the same as Denise's father, and Denise's sister and brother-in-law are his godparents.

Renee testified that she intentionally did not confer any legal or decision-making rights to Denise; however, she voluntarily relied on Denise to act as a parent at the child's doctor's visits and school. While it is true that the parties did not hyphenate S.J.T.'s last name as the parents in *Mullins* did, nor did they draft or execute a formal shared custody agreement, they lived their lives as S.J.T.'s parents. . . . There is no doubt that S.J.T. is well bonded to Denise, as a child to his parent. Renee would have the Court believe that because S.J.T. calls her "Mom" and Denise "Meem" that Denise's relationship to S.J.T. is somehow secondary or less important in his life. The Court finds that there is no credible evidence to support such a claim.

The Court finds the length of time that Renee and Denise co-parented S.J.T. to be important in its decision. . . . Denise was able to provide the Court with numerous documents (i.e. school applications and the child's baptismal certificate) which listed her as a parent and the Court heard testimony from people in several different areas of the parties' lives who recognize Denise as

> S.J.T.'s parent. There is ample evidence that Renee shared her life and responsibility for S.J.T. with Denise.
>
> The Court finds that Renee has waived her superior right to custody through her voluntary and intentional actions and that Denise has standing to petition this Court for joint custody of the minor child.

As to how custody and parenting time would be divided, the family court found it to be in child's best interest that both Renee and Denise have joint custody and equal parenting time, finding:

> Neither party testified that they had had any difficulties during their relationship caring for S.J.T. jointly. The Court heard no testimony regarding any significant disputes between the parties about decisions related to the child's education, medical care, religious upbringing, or any other aspect of his daily life. Neither party alleges that the other has ever harmed S.J.T. in any way or engaged in any behavior that is likely to put the child at risk physically or emotionally. In fact, since this Court entered temporary orders for the parties to share parenting time, S.J.T. has adjusted to the new arrangement; the parties have been able to accommodate each other's schedules and communicated amicably about the child's activities, etc. Neither reported to the Court any serious problems with S.J.T.'s behavior or performance at school, although it was suggested that a week-on/week-off schedule might be less disruptive to S.J.T.'s school work.
>
> The Court finds that S.J.T. is very fortunate to have two loving parents who are committed to his care and upbringing.

Renee filed a motion to vacate which the family court denied.

Renee argues the family court erred by: (1) not dismissing the action on the basis that there is not an actual case or controversy because the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) does not create an actionable cause of action; (2) finding that Denise had standing to seek custody or visitation; (3) finding that Renee waived her superior right to custody; and (4) not using the appropriate factors to determine the best interest of the child in determining custody and timesharing.

Renee's first two arguments are overlapping and concern reasons why she believes *Mullins* was incorrectly decided by the Kentucky Supreme Court. She argues that because the UCCJEA is not a substantive custody statute, it cannot create a cause of action for seeking custody of a child or provide standards for making or modifying child custody and visitation decisions, and it only provides jurisdiction when two or more states are involved. She states that under our statutes, only a parent or an alleged de facto custodian can petition for custody. Renee argues it was inappropriate for *Mullins* to apply the definition of the UCCJEA which allowed standing for a "person acting as a parent" to confer jurisdiction and standing.

"When a court is alleged to be acting outside of its jurisdiction, the standard of review is *de novo.*" *Uninsured Employers' Fund v. Bradley*, 244 S.W.3d 741, 744 (Ky.App. 2007). We review whether the family court has general

subject matter jurisdiction over this type of case and particular case jurisdiction over this specific case.

Pursuant to Section 112(5) and (6) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 23A.100(1)(b)-(d), the family court has general subject matter jurisdiction to decide child custody, visitation, and child support. *See B.D. v. Commonwealth, Cabinet for Health and Family Services*, 426 S.W.3d 621, 623 (Ky.App. 2014); *Wallace v. Wallace*, 224 S.W.3d 587, 591 (Ky.App. 2007).

The family court also has jurisdiction over the particular case involving child. Renee is incorrect that the UCCJEA only provides jurisdiction over child custody when two or more states are involved.[1] Pursuant to KRS 403.822(1)(a), "a court of this state shall have jurisdiction to make an initial child custody determination only if: . . . This state is the home state of the child on the date of the commencement of the proceeding[.]" KRS 403.800(7) defines "home state" in relevant part as "the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the

[1] We acknowledge that applying the UCCJEA to allow for a partial waiver of parental rights as was done in *Mullins* "required a little judicial contortion" of the UCCJEA from its "intended fundamental purpose" to "resolv[e] jurisdictional contests between states" because same sex couples could not marry or jointly adopt children. *Fry v. Caudill*, 554 S.W.3d 866, 871 (Ky.App. 2018) (Acree, J., concurring).

commencement of a child custody proceeding." Kentucky is child's home state, so the family court has particular case jurisdiction over this specific case to make an initial child custody determination even though Denise did not qualify as child's parent or de facto custodian so as to pursue custody under KRS 403.270 or KRS 405.020.

Mullins held that the UCCJEA conferred standing on "a person acting as a parent" and the definition of a person acting as a parent did not require exclusive physical custody of the child. *Mullins*, 317 S.W.3d at 574-75. The Kentucky Supreme Court adjudged "there can be a waiver of some part of custody rights demonstrating an intent to co-parent a child with a nonparent . . . essentially giv[ing] the child another parent in addition to the natural parent." *Id.* at 579.

Pursuant to Rules of the Supreme Court (SCR) 1.030(8)(a): "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court[.]" Therefore, we are bound by *Mullins* and must apply it.

Renee's third argument is that Denise failed to show by clear and convincing evidence that Renee made an express waiver of her exclusive parental rights. Renee argues much of the evidence was about Denise's feelings toward the child, which were irrelevant.

A waiver of parental rights need not be formal or written, but to be equivalent to an express waiver, the parent must knowingly, voluntarily, and intentionally waive his or her superior right to custody as established by clear and convincing evidence. *Mullins*, 317 S.W.3d at 578; *Penticuff v. Miller*, 503 S.W.3d 198, 205 (Ky.App. 2016). "[W]aiver [of a parent's superior right to custody] may be implied 'by a party's decisive, unequivocal conduct reasonably inferring the intent to waive[.]'" *Moore v. Asente*, 110 S.W.3d 336, 360 (Ky. 2003) (quoting BLACK'S LAW DICTIONARY 1574 (7th ed. 1999)). However, "statements and supporting circumstances [of an implied waiver] must be equivalent to an express waiver to meet the burden of proof." *Greathouse v. Shreve*, 891 S.W.2d 387, 391 (Ky. 1995). "Whether a parent waives his or her superior custody right is a factual finding that is subject to the clearly erroneous standard of review." *Penticuff*, 503 S.W.3d at 204.

We will not disturb the family court's findings unless there is no substantial evidence of record to support its findings; clear and convincing proof need not be uncontradicted. *R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36, 38-39 (Ky.App. 1998). "The test is not whether we as an appellate court would have decided the matter differently, but whether the trial court's rulings were clearly erroneous or constituted an abuse of discretion."

Truman v. Lillard, 404 S.W.3d 863, 869 (Ky.App. 2012). We can only set aside the family court's findings of fact if they are not supported by substantial evidence. *Mullins*, 317 S.W.3d at 581. Even if "some of the evidence conflicted with the trial court's conclusions, and a different trial court or a reviewing appellate court might disagree with the trial court, the standard on appellate review requires a great deal of deference both to its findings of fact and discretionary decisions." *Frances v. Frances*, 266 S.W.3d 754, 758 (Ky. 2008).

In *Mullins*, the Court considered *Heatzig v. MacLean*, 191 N.C.App. 451, 664 S.E.2d 347 (2008), to be helpful in its analysis, explaining in that decision the court:

> couched its analysis in terms of whether the natural parent had acted in a manner inconsistent with her constitutionally protected status as a natural parent . . . [and] noted that the focus should be on "whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a parent-like relationship with his or her child."

Mullins, 317 S.W.3d at 580 (quoting *Heatzig*, 664 S.E.2d at 354). The *Mullins* Court also relied on the *Heatzig* factors:

> (1) both plaintiff and defendant jointly decided to create a family unit; (2) defendant intentionally identified plaintiff as parent; (3) the sperm donor was selected based upon physical characteristics similar to those of plaintiff; (4) the surname of plaintiff was used as one of the child's names; (5) plaintiff participated in the

> pregnancy and the birth of the child; (6) there was a baptism ceremony where both plaintiff and defendant were identified as parents; (7) plaintiff was identified as a parent on school forms; (8) they functioned together as a family unit for four years; (9) after the relationship between plaintiff and defendant ended, the defendant allowed plaintiff the functional equivalent of custody for three years; (10) defendant encouraged, fostered, and facilitated an emotional and psychological bond between plaintiff and the child; (11) plaintiff provided care and financial support for the child; (12) the child considered plaintiff to be a parent; (13) plaintiff and defendant shared decision-making authority with respect to the child; (14) plaintiff was a medical power of attorney for the child; (15) the parties voluntarily entered into a parenting agreement; and (16) defendant intended to create between plaintiff and the child a permanent parent-like relationship.

Mullins, 317 S.W.3d at 580 (quoting *Heatzig*, 664 S.E.2d at 353-54).

While Renee is correct that a person having a substantial and significant loving relationship with a child does not demonstrate waiver, *Truman*, 404 S.W.3d at 869-70, the evidence supporting the family court's judgment was supported by far more evidence than simply how Denise feels about child. The family court found that a myriad of the factors considered in *Mullins* showed waiver, finding: (1) Renee and Denise jointly decided to create a family unit; (2) Renee and Denise intentionally identified themselves to the birth mom as the potential parents of child; (3) Renee and Denise arrived at the hospital to welcome child and child was immediately brought to meet Denise's extended family; (4) Renee and Denise were identified as child's parents in the baptism ceremony and

Denise's sister and brother-in-law were named as child's godparents; (5) although Denise's surname was not used for child, her father's name was selected as child's middle name; (6) Denise was identified as child's parent on all school forms that Renee signed; (7) Renee and Denise had a long-term relationship and functioned as a family unit with child from his birth through the next nine years; (8) Denise stayed home with child and was primarily responsible for his care; (9) child calling Denise "Meem" was the same as calling Renee "Mom"; (10) if Renee retained decision making authority, Renee and Denise agreed on all decisions; and (11) witnesses considered child to have two moms based on the interactions they observed.

This case is distinguishable from *Truman*. In *Truman*, 404 S.W.3d at 865 n.2, the only documentary evidence to support Truman's claim of waiver by Lillard consisted of a preschool enrollment form which referred to Truman as parent:

> Testimony revealed that due to [Truman's] employment status, [child] was entitled to a small reduction in tuition. Further, it was established that the school actively sought to increase diversity in its enrollment and the parties believed that the child of a gay couple would have a greater chance of being accepted into the program. To that end, the application for admission into the nursery school referenced Lillard and Truman as [child's] "parents."

In *Truman*, the only other evidence presented to support waiver was that child lived with Lillard and Truman, Truman assisted in rearing the child, child referred to each woman as "Mom" or "Mommy," Lillard and Truman commingled their money to benefit the three of them, and child had a strong bond with both women and their families. *Id.* at 865-66.

The plethora of documentary evidence of waiver by Renee stands in stark contrast to *Truman*. The family court found that all the school enrollment forms referred to Denise as a parent and other documents did as well, including the baptism record and the birth mom book. Similarly, many other actions Renee took supported the family court's finding of waiver. The situation before us is much more closely aligned with that in *Mullins*. Therefore, we affirm the finding of waiver.

Renee's fourth argument is that the family court erred in failing to consider the best interest of child and not considering the proper factors in determining how time would be shared.

Once the family court determined there was a waiver of Renee's parental rights, it then needed to consider the best interest of child in deciding custody. *Shifflet v. Shifflet*, 891 S.W.2d 392, 394 (Ky. 1995).

KRS 403.270(2) provides factors to help the court to consider the best interest of the child in determining custody. As Denise was found to be equivalent

to child's parent, she benefits from the "presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child." KRS 403.270(2). The factors include: the wishes of the child's parents; the wishes of the child; the interaction and interrelationship of the child with his parents; the motivation of the adults; the child's adjustment to home, school, and community; the physical and mental health of all involved; a finding of domestic abuse or neglect was committed by one of the parties against child or the other party; and the likelihood of frequent, meaningful, and continuing contact with the other parent. KRS 403.270(2)(a)-(g), (k).

Although the family court may not have specifically listed and explained how it was applying the factors, clearly it was cognizant of its duty to presume that shared parenting time was in child's best interest. The wishes of Renee and Denise were appropriately discussed earlier in the court's findings and it properly considered that child was doing well with joint custody, neither Renee or Denise was abusive, Renee and Denise were being amicable for the sake of child, there was no reason to think that the current arrangement was not working out well for all involved, and child was benefiting from spending time with two loving parents. The family court properly applied the relevant factors.

Accordingly, we affirm the Jefferson Family Court order which granted Denise joint custody and equal parenting time to child.

ALL CONCUR.

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