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Supreme Court of Kentucky

2021-SC-0008-DGE

J.S.B. APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NOS. 2020-CA-0549, 2020-CA-0550,
AND 2020-CA-0551
LIVINGSTON CIRCUIT COURT NOS. 19-CI-00073,
19-AD-00007, AND 19-AD-00008

S.R.V. APPELLEE

OPINION OF THE COURT BY JUSTICE LAMBERT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

J.S.B. (David)[1] appeals a decision of the Court of Appeals that vacated the Livingston Circuit Court's orders regarding the adoption and custody of two children. David is not the biological father of either child, but the children believe that he is their father and he has acted as such throughout their lives. Following a combined hearing, the Livingston Circuit Court terminated the parental rights of the children's unknown biological fathers and granted David's petition to adopt the children. The court also made him their primary residential custodian. The Court of Appeals vacated the circuit court's

[1] We refer to both parties and the children involved in this case by pseudonym to protect their privacy.

adoption and custody orders and granted full custody of both children to their biological mother, S.R.V. (Melissa).

The curious facts of this case require this Court to address two issues as a matter of first impression. First, whether a non-stepparent adoption that does not terminate the parental rights of both biological parents is violative of Kentucky's adoption statutes. And, second, whether the doctrine of "partial waiver" of a biological parent's superior custodial rights as established in *Mullins v. Picklesimer*[2] is still viable in light of the federal legalization of same-sex marriage in *Obergefell v. Hodges*[3].

After review, we hold that our adoption statutes require that the parental rights of both biological parents be terminated upon the grant of an adoption with the single explicit exception of a stepparent adoption. We further hold that partial parental waiver remains a viable doctrine post-*Obergefell*. Accordingly, we affirm the Court of Appeals' holding insofar as it vacated the circuit court's adoption and custody orders. However, we reverse the Court of Appeals' holding regarding waiver and remand to the circuit court for consideration of whether David is entitled to custody of the children based upon Melissa's waiver of her superior custodial rights.

I. FACTUAL AND PROCEDURAL BACKGROUND

David and Melissa married in October of 2008 and divorced in July of 2014. Their marriage produced no children. Sometime after their divorce, they

[2] 317 S.W.3d 569 (Ky. 2010).

[3] 576 U.S. 644 (2015).

reconciled but never remarried. During their period of reconciliation, Melissa gave birth to two children: Jack in December of 2014 and Jane in August of 2016. David was present for the birth of both children, is listed as the father on both children's birth certificates, and both children bear his surname.

The parties separated permanently in February of 2018, but continued to cooperate with one another regarding their non-court ordered timesharing arrangement for the children. At the time, Melissa worked long hours and evening shifts, and David was not working due to a motorcycle accident for which he drew unemployment until he resumed working in April of 2019. Therefore, David was the children's primary caregiver, while Melissa was their primary financial supporter. David's mother also helped care for the children.

The parties' agreed-upon timesharing arrangement continued for a little over a year after their final separation. Then, in May of 2019, an incident occurred during one of the exchanges of the children. David went to Melissa's home to pick up the children, and according to the factual findings in the circuit court's custody order in this case: "[t]here were threats made and [Melissa's] father grabbed [David] by the throat and [David] eventually broke through the glass on the front door to retrieve [Jack] from [Melissa]." Shortly thereafter, David and Melissa both filed for an emergency protective order and an emergency custody order in their counties of residence, Livingston and McCracken respectively. Livingston District Court ultimately took jurisdiction

over the proceedings. During the district court proceedings, both David and Melissa tested positive for controlled substances. The Cabinet[4] then temporarily placed both children with David's brother and sister-in-law who also lived in Livingston County.

On June 5, 2019, during the pendency of the district court proceedings, Melissa filed a "Verified Petition to Establish Paternity and for Custody"[5] in the Livingston Circuit Court. In her petition, without asserting who the father or fathers of the children were, she alleged that David was not the biological father of either child and requested sole custody of both children. DNA test results later proved that David was in fact not the father of either child. Throughout this case, David has continued to assert that he was unaware he was not the children's father until the results of the September 2019 DNA test, while Melissa claims that he had been aware he was not the father of either child since their births.

Ultimately, David and Melissa completed their respective case plans with the Cabinet in relation to the district court proceedings. And, on September 12, 2019, the Cabinet recommended joint custody with David as the primary residential parent. The Cabinet's recommendation acknowledged that David was not the children's biological father, but noted that he "[appeared] on the birth certificate of both children making him a legal father to the children." On

[4] The Kentucky Cabinet for Health and Family Services.

[5] Melissa's petition was actually a petition to "de-establish" David's paternity and not a petition to establish the paternity of either child.

the same day, the district court entered permanent custody orders regarding both children that granted David primary custody and gave Melissa visitation in accordance with local guidelines.

Meanwhile, in the circuit court proceedings, David filed petitions to adopt both children on October 30, 2019, and a response to Melissa's petition for sole custody on November 12, 2019. Melissa filed a motion to dismiss the adoption petitions based, in part, on David's lack of paternity. In David's response to the motion to dismiss, he clarified that he was not attempting to terminate Melissa's parental rights. Rather, he was "attempting to *re-establish* himself as the *legal* father of the children," and that the only parental rights he sought to terminate were those of the children's unknown biological fathers. The circuit court ultimately denied Melissa's motion to dismiss the adoption petitions. The order denying the motion to dismiss also noted that the court would consolidate the adoption and custody cases for a single evidentiary hearing, citing judicial economy and the agreement of the parties. Following the evidentiary hearing, the circuit court entered separate orders concerning the adoption and custody petitions, beginning with the adoption.

With regard to David's adoption petitions, the court found that David was the fictive kin[6] of both children and therefore had standing to pursue the

[6] "'Fictive kin' means an individual who is not related by birth, adoption, or marriage to a child, but who has an emotionally significant relationship with the child." Kentucky Revised Statute (KRS) 199.011(9).

adoption without the Cabinet's pre-filing approval.[7] In addition, it found that David was unaware of the children's true paternity until the DNA results were filed, that David "raised these children in his home as if he were their biological father," that "the children have never had any other father figure in their lives," and that the children "[were] unaware that [David] is not their biological father."

The adoption order further found that "[Melissa] stated that she knew who the father of each child was, but has never told either father of the child (sic) birth and neither father has any contact or relationship with [Melissa] or either child." The court accordingly found that the conditions to involuntarily terminate the putative fathers' parental rights under KRS 199.502(1)(e) and (g)[8]

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[7] "(4) No petition for adoption shall be filed unless prior to the filing of the petition the child sought to be adopted has been placed for adoption by a child-placing institution or agency, or by the cabinet, or the child has been placed with written approval of the secretary; but no approval shall be necessary in the case of: (a) A child sought to be adopted by . . . fictive kin[.]" KRS 199.470(4)(a).

[8] KRS 199.502(e) and (g) state as follows:

> (1) Notwithstanding the provisions of KRS 199.500(1), an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding that any of the following conditions exist with respect to the child:
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> [. . .]
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> (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child, and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child; [or]
>
> (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and

were satisfied. And, given the fact that the putative fathers were unaware of either child, there was no reasonable expectation of improvement in their parental care. The circuit court therefore terminated the putative fathers' parental rights and allowed David to adopt the children while leaving Melissa's parental rights intact.

The circuit court then addressed Melissa's petition for sole custody. The court began by noting that it now considered David the children's adoptive father. It then went through a great deal of fact finding and ultimately found that Melissa had not rebutted the presumption of joint custody, and that David had rebutted the presumption of a 50/50 time split. The court considered each of the required factors under KRS 403.270(2), and, on balance, determined that it was in the children's best interest for David and Melissa to have joint custody, and for David to be their primary residential parent. Melissa appealed both the adoption and custody orders to the Court of Appeals.

A split Court of Appeals panel reversed the adoption order and the custody order and remanded with directions that full custody of both children be awarded to Melissa.[9] The court held that the adoption order was invalid because it terminated the children's putative biological fathers' parental rights,

> available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child[.]

[9] *S.R.V. v. J.S.B.*, 2020-CA-0549-ME, 2020 WL 7083301, *1 (Ky. App. Dec. 4, 2020).

but did not terminate Melissa's parental rights.[10] The court primarily relied upon KRS 199.520(2), which states in pertinent part that "[u]pon granting an adoption, all legal relationship between the adopted child and the biological parents shall be terminated except the relationship of a biological parent who is the spouse of an adoptive parent."[11] The court held that the plain language of KRS 199.520 required that an adoption terminate the rights of both biological parents, with the sole exception of a stepparent adoption.[12]

Regarding the custody order, the Court of Appeals simply found that the order was premised on the circuit court's erroneous adoption order and therefore had to be vacated.[13] This, it reasoned, entitled Melissa to sole custody of the children.[14]

The Court of Appeals then went on to address an alternate issue raised by David: whether Melissa had waived her superior parental rights, entitling him to joint custody.[15] Although the circuit court did not have the opportunity to address the issue of waiver, the Court of Appeals addressed David's argument on the merits and found that Melissa did not waive her superior parental rights.[16] In reaching this conclusion, the Court of Appeals held that

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[10] *Id.* at *3-*4.

[11] *Id.* at *3.

[12] *Id.*

[13] *Id.* at *4.

[14] *Id.*

[15] *Id.* at *4-*7.

[16] *Id.* at *6.

the concept of "partial waiver" of parental rights established in *Picklesimer*, *supra*, was

> applicable only when the child was conceived by artificial insemination with the intent that the child would be parented by the parent and her same-sex partner[.] And partial waiver may be further limited to cases in which there is a "written agreement" or similar writing as proof to show the biological parent's intent to confer parental rights on the same-sex, non-parent.[17]

And, because *Obergefell*, *supra*, federally legalized same-sex marriage, the court found it "[i]f not impossible, [surely] difficult to believe [*Picklesimer*] would have been decided identically in a post-*Obergefell* America," which was "part of the reason for limiting its application to a fact pattern that cannot be repeated today."[18] In other words, the Court of Appeals majority essentially held that *Picklesimer*'s doctrine of partial waiver was a dead letter in light of *Obergefell*, without explicitly overruling it.

Writing separately, Judge Kelly Thompson reluctantly agreed that the adoption order had to be vacated as it violated Kentucky's adoption statutes.[19] He further agreed that, because the custody order was premised on David's status as an adoptive parent, it also had to be vacated.[20] However, he disagreed that the doctrine of parental waiver was no longer viable under Kentucky law, and asserted that *Picklesimer* should be followed until a ruling of

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[17] *Id.* (internal citation and quotation marks omitted).

[18] *Id.*

[19] *Id.* at *7

[20] *Id.*

this Court says otherwise.[21] Accordingly, he would have remanded the case to the circuit court for it to consider "whether [David] should be entitled to share custody of the children on the basis that [Melissa's] actions constituted waiver of her superior parental rights."[22] This appeal followed.

Additional facts are discussed below as necessary.

II. ANALYSIS

A. The circuit court's adoption orders violate Kentucky's adoption statutes and must be vacated.

We begin our analysis with the adoptions. Specifically, this Court must determine whether a non-stepparent adoption order that terminates the parental rights of the biological father, but not the biological mother, is valid. Adoptions are innately statutory proceedings and, as such, it is the duty of this Court to rule in accordance with the adoption statutes enacted by our legislature.[23] In doing so, "[our] seminal duty [is] . . . to effectuate the intent of the legislature."[24] We do this by looking "first to the plain language of a statute and, if the language is clear, our inquiry ends."[25]

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[21] *Id.* (citing Rules of the Supreme Court (SCR) 1.030(8)(a)).

[22] *Id.*

[23] *Day v. Day*, 937 S.W.2d 717, 719 (Ky. 1997) ("[A]doption only exists as a right bestowed by statute and, furthermore...there must be strict compliance with the adoption statutes. The law of adoption is in derogation of the common law. Nothing can be assumed, presumed, or inferred and what is not found in the statute is a matter for the legislature to supply and not the courts.").

[24] *See, e.g.*, *Adams v. Commonwealth*, 599 S.W.3d 752, 754 (Ky. 2019).

[25] *See, e.g.*, *Seeger v. Lanham*, 542 S.W.3d 286, 291 (Ky. 2018).

The dispositive statute regarding the adoptions in this case is KRS 199.520(2), which provides:

> [u]pon entry of the judgment of adoption, from and after the date of the filing of the petition, the child shall be deemed the child of petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting it the same as if born of their bodies. **Upon granting an adoption, all legal relationship between the adopted child and the biological parents shall be terminated except the relationship of a biological parent who is the spouse of an adoptive parent**.[26]

Based on the plain language of the foregoing, it is clear that upon the entry of an adoption order the parental rights of *both* parents must be terminated. Our legislature provided only one explicit exception to this rule: a stepparent adoption. This policy has long been reflected in the case law of this Court, which states that:

> the Legislature intended that the adoption of a child necessarily brings to an end all connections, legal and personal, with any natural parent. If a child is subject to the parental control of two families—which are alien and often hostile to each other—the resulting injuries to the child's emotions and future well-being are a matter of deep concern to the public. It is for this reason so many courts have held that public policy demands that an adoption shall carry with it a complete breaking off of old ties.[27]

We acknowledge that this policy has been somewhat relaxed in recent years, particularly in the area of grandparent visitation following an adoption. However, by and large, the policy remains that an adoption should provide a "clean break" from the child's biological family.

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[26] (Emphasis added).

[27] *Jouett v. Rhorer*, 339 S.W.2d 865, 868 (Ky. 1960).

Here, it is undisputed that David was not the children's stepparent at the time he filed the adoption petitions. Nevertheless, he urges this Court to hold that his status as the children's fictive kin should permit him to adopt the children by terminating their biological fathers' parental rights and leaving Melissa's parental rights intact. He argues that vacating the adoption orders in this case will "legally bastardize the children" and "legitimize the fraud committed by [Melissa]." But, while we in no way endorse Melissa's actions toward both David and her own children, we must apply the adoption statutes dispassionately and as written. The plain language of the statute clearly evinces that the legislature intended for an adoption to terminate the parental rights of *both* of a child's parents. The sole exception for this rule is a stepparent adoption; there is no exception for fictive kin. And any desired change in the adoption statutes to accommodate the factual situation presented by this case must come from the legislature, not the judiciary.

The circuit court's adoption orders in this case terminated the children's putative fathers' parental rights, but did not terminate Melissa's parental rights. We therefore hold that, because the orders did not terminate the parental rights of both of the biological parents of each child, they are invalid under KRS 199.520(2) and must be vacated.

B. *Picklesimer* remains good law post-*Obergefell*. The circuit court must therefore be given the opportunity to address whether Melissa waived her superior custodial rights.

Preliminarily, we must address Melissa's contention that David did not properly preserve the argument that she waived her superior custodial rights.

We disagree. David's response to Melissa's paternity and custody petition stated:

> [t]he Respondent affirmatively states that in the event the Adoption is denied, he is seeking custody as a de facto custodian. He reserves his right to Amend this Response to include separate "claims" for custody pending the Adoption, **including claims of waiver**, and/or unfitness.[28]

Of course, the trial court never addressed whether Melissa waived her superior custodial rights due to the fact that David's successful adoption petition put him on equal footing with her regarding his right to custody. Nevertheless, David clearly raised the issue before the trial court, and it is therefore properly preserved for our review.

It is a well-established tenet of our jurisprudence that a child's biological parents have "a fundamental, basic, and constitutional right to raise, care for, and control their own children."[29] It is "perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme Court]."[30] However, "[d]espite the exalted place that such rights hold, the law also recognizes that there are circumstances where a biological parent's rights are diminished or even forfeited due to his actions (or inaction) or due to legislative policy."[31] A nonparent seeking custody who does not meet the statutory standard for *de facto* custodian status must prove one of two exceptions to a parent's superior

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[28] (Emphasis added).

[29] *Picklesimer*, 317 S.W.3d at 578.

[30] *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

[31] *Boone v. Ballinger*, 228 S.W.3d 1, 6 (Ky. App. 2007).

right to custody: (1) that the parent is unfit; or (2) that the parent has waived his or her superior rights.[32] Parental waiver, in turn, must be demonstrated by clear and convincing evidence.[33]

As stated, *supra*, due to the holding of the Court of Appeals in this case we are called upon, primarily, to address whether the concept of "partial waiver" established in *Picklesimer* remains a viable doctrine after the federal legalization of same-sex marriage via *Obergefell*. A brief discussion of the case law in this area is therefore useful.

Prior to *Picklesimer*, the doctrine of waiver was only addressed in situations where, for lack of a better term, there had been a "full surrender" of the child to a nonparent. Based on our review of the law in this area, waiver was a possibility in three distinct situations. The first situation was a custody dispute between the biological parent(s) and the prospective adoptive parents after possession of the child had already been surrendered to the adoptive parents, as in *Moore v. Asente*,[34] and *Van Wey v. Van Wey*.[35] The second possible scenario involved a dispute between the child's biological father and another member of the child's extended family who had been the child's primary caregiver prior to the custody dispute. This scenario was

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[32] *See, e.g.*, *Vinson v. Sorrell*, 136 S.W.3d 465, 468 (Ky. 2004) (discussing *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003)).

[33] *See, e.g.*, *Asente*, 110 S.W.3d at 359.

[34] 110 S.W.3d 336 (Ky. 2003).

[35] 656 S.W.2d 731 (Ky. 1983).

demonstrated by cases such as *Vinson v. Sorrell*,[36] *Greathouse v. Shreve*,[37] and *Shifflet v. Shifflet*.[38] The final factual scenario was presented in *Boone v. Ballinger*, which addressed the "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."[39]

Then, five years prior to *Obergefell*, this Court rendered *Picklesimer*. In *Picklesimer*, the parties, Phyllis Picklesimer (Picklesimer) and Arminta Mullins (Mullins) were an unmarried, same-sex couple that lived together for nearly five years.[40] At some point during their relationship, they decided to have a child together.[41] The couple chose a sperm donor whose characteristics were similar to Mullins, and Picklesimer was later artificially inseminated.[42] Mullins and her mother were present for the child's birth, and the child bore the surname "Picklesimer-Mullins."[43] It was undisputed that both women provided care and financial support for the child.[44]

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[36] 136 S.W.3d 465 (Ky. 2004).

[37] 891 S.W.2d 387 (Ky. 1995).

[38] 891 S.W.2d 392 (Ky. 1995).

[39] *Boone*, 228 at 1.

[40] *Picklesimer*, 317 S.W.3d at 571.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 572.

[44] *Id.*

Not long after the child's birth, Mullins grew concerned about her legal rights to the child.[45] The couple therefore consulted an attorney who drafted a "petition for custody," an "entry of appearance and consent to custody," and an "agreed judgment of custody" for them.[46] The documents predicated Mullins' entitlement to custody on their claim that she was the child's *de facto* custodian.[47] Notwithstanding that Mullins' claimed status as a *de facto* custodian was essentially a "legal fiction,"[48] the trial court signed and entered them based, presumably, on the parties' mutual agreement.[49] Neither party appealed from the judgment.[50]

Mullins and Picklesimer eventually separated, but continued to have equal timesharing for a short stint.[51] But their relationship soon soured further and Picklesimer altogether stopped allowing Mullins to see the child unless she agreed to come to Picklesimer's home for the visit.[52] This prompted Mullins to seek sole custody of the child, and the matter was referred to a

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] "'[D]e facto custodian' means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who [has resided with that person for the statutory time period]." KRS 403.270(1)(a). Parenting alongside the natural parent is insufficient; the *de facto* custodian must be the child's sole caregiver. *See, e.g.*, *Boone*, 228 S.W.3d at 8.

[49] *Picklesimer*, 317 S.W.3d at 572.

[50] *Id.*

[51] *Id.*

[52] *Id.*

Domestic Relations Commissioner (DRC).[53] The DRC ruled that the parties' prior agreed-upon judgment of custody had to be set aside, as Mullins could not legally qualify as a *de facto* custodian.[54] However, it further found that Picklesimer "had waived her superior right to custody in favor of Mullins as a joint custodian."[55] The DRC recommended joint custody with Picklesimer as the primary residential custodian.[56]

The trial court adopted the DRC's recommendations in full, finding that "Picklesimer waived her superior right to custody by acknowledging, on a continuous basis, that Mullins is a parent of the child, by permitting extensive visitation and time sharing with Mullins, and by co-parenting the child along with Mullins from the child's birth until the separation of the parties."[57]

The Court of Appeals reversed the trial court's finding that Picklesimer had waived her superior right to custody based on its reasoning under *Vinson*, *supra*, "that there can be no waiver of one's custody right unless the child is separated from the natural parent while in the custody of the nonparent."[58] Therefore, the court reasoned, Picklesimer could not have waived her superior rights because the child had always been in her care.[59]

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[53] *Id.* at 573.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 578 (internal quotation marks omitted).

[58] *Id.* at 579.

[59] *Id.*

This Court reversed the Court of Appeals' holding as it related to waiver and reinstated the trial court's judgment.[60] The *Picklesimer* Court noted first that it disagreed with the apparent conclusion of the Court of Appeals that the *Vinson* factors[61] were exhaustive.[62] Rather, it held that

> [b]ecause of the complexity and uniqueness of child custody cases…[w]hile the factors in *Vinson* serve as a helpful guide in evaluating cases where the natural parent has surrendered full possession of the child to a nonparent, we believe these cases should be viewed on a case-by-case basis and that no specific set of factors must be present in order to find there has been a waiver.[63]

This Court then unequivocally relaxed the previously stringent standard regarding what may constitute parental waiver. It held, as a matter of first impression, that waiver can and should apply in certain situations where a child has not been "fully surrendered" to a nonparent:

> [m]oreover, we adjudge that there can be a waiver of some part of custody rights demonstrating an intent to co-parent a child with a nonparent. 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 some part of the superior parental right, which would essentially give the child another parent in addition to the natural parent.[64]

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[60] *Id.* at 581.

[61] For reference, the *Vinson* factors are:

> [the] length of time the child has been away from the parent, circumstances of separation, age of the child when care was assumed by the non-parent, time elapsed before the parent sought to claim the child, and frequency and nature of contact, if any, between the parent and the child during the non-parent's custody.

Vinson, 136 S.W.3d at 470.

[62] *Id.* at 579.

[63] *Id.*

[64] *Id.*

Unsurprisingly, the rationale behind this new doctrine of "partial waiver" was grounded on what is best for the child at issue in a custody case. Specifically, the Court reasoned:

> [t]he recognition of the applicability of the doctrine of waiver in a child custody situation is legally justified as well as necessary in order to prevent the harm that inevitably results from the destruction of the bond that develops between the child and the nonparent who has raised the child as his or her own. The bond between a child and a co-parenting partner who is looked upon as another parent by the child cannot be said to be any less than the bond that develops between the child and a nonparent to whom the parent has relinquished full custody.[65]

Finally, quoting *Heatzig v. MacLean*,[66] the Court listed several factors that could be considered to determine "whether the natural parent had acted in a manner inconsistent with her constitutionally protected status as a natural parent."[67] We restate here the *Heatzig* factors in full, though we acknowledge not all of them are relevant to this case. The applicable factors should be utilized on remand in this case. Though, as with the *Vinson* factors, this list should not be considered exhaustive and the circuit court is free to find additional facts that it deems relevant to the issue of waiver. The *Heatzig* factors are:

> (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

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[65] *Id.* (internal quotation marks omitted).

[66] 191 N.C. App. 451, 664 S.E.2d 347 (2008).

[67] *Picklesimer*, 317 S.W.3d at 580.

> 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.[68]

As mentioned, this Court held based on the foregoing factors that there was clear and convincing evidence to support the trial court's conclusion that "Picklesimer waived her superior right to sole custody of the child in favor of a joint custody arrangement with Mullins."[69]

With that said, we want to be clear that the holding in *Picklesimer*, including its establishment of the partial waiver doctrine, was in no way predicated upon the fact that the case involved a same-sex couple. At its core, the case is about the preservation of a child's family unit in order to protect that child's best interest and emotional well-being. We therefore wholeheartedly disagree with the majority of the Court of Appeals that the legalization of same-sex marriage instituted by *Obergefell* in any way affected the holding in *Picklesimer*.

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[68] *Id.*

[69] *Id.* at 579.

In that vein, we further note that at least two Court of Appeals cases rendered post-*Obergefell* contemplate the application of parental waiver under *Picklesimer* notwithstanding that those cases did not involve a custody dispute between a same-sex couple.

In *Chadwick v. Flora*, the primary issue addressed by the Court of Appeals was whether a maternal grandmother qualified as her granddaughter's *de facto* custodian.[70] The Court of Appeals agreed with the trial court's finding that she did not.[71] However, the court held that her hearing before the trial court was limited to the issue of her *de facto* custodian status, and the case therefore needed to be remanded for further hearings regarding custody and visitation.[72] The court held:

> we remand for additional proceedings on Grandmother's custody and visitation petition. Because Grandmother has standing to bring her petition but is not a *de facto* custodian, to obtain custody Grandmother must prove either: (1) the parents are shown by clear and convincing evidence to be unfit custodians; **or (2) the parents have waived their superior right to custody by clear and convincing evidence. *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky.2010)**.[73]

Another case, *Penticuff v. Miller*, involved a custody dispute between the biological mother's former husband and the biological father of the child with whom the mother had an extramarital affair.[74] When analyzing the case, the

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[70] 488 S.W.3d 640 (Ky. App. 2016).

[71] *Id.* at 645.

[72] *Id.* at 646.

[73] *Id.* (emphasis added).

[74] 503 S.W.3d 198, 201 (Ky. App. 2016).

court reiterated, under *Picklesimer*, that "[b]ecause a bond develops between a child and a nonparent who raises the child as his or her own, a parent through his or her actions can waive in whole or in part his or her superior right to custody."[75] And, that

> a parent who knows a child is his or hers may demonstrate the voluntary and intentional nature of the waiver by: entering into a joint custody arrangement with the nonparent; intentionally identifying the nonparent as a parent; having the nonparent participate in the child's birth; identifying the nonparent as a parent on school forms; functioning as a family unit for years; allowing the nonparent to be a medical power of attorney; and other such factors.[76]

In the case now before us, we agree that the custody orders must be vacated, as they were based on the erroneous adoption orders. However, we remand for further proceedings to address whether Melissa's actions constituted a waiver of her superior custodial rights to the children. We leave to the circuit court's discretion whether to make the requisite findings based on the record already established or to hold additional hearing(s). If the court determines that Melissa waived her superior custodial rights, it must then determine custody based on the children's best interest.[77]

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[75] *Id.* at 203.

[76] *Id.*

[77] *See, e.g.*, *Greathouse*, 891 S.W.2d at 391 ("[T]he first question here is whether, considering the totality of the evidence, Bobby Greathouse engaged in a knowing and voluntary relinquishment of his superior right of custody . . . If he did so, the next question here is whether, in present circumstances, Bobby Greathouse or Nancy Shreve should be awarded custody in the best interests of the child.").

III. CONCLUSION

Based on the foregoing, the adoption and custody orders for each child are vacated. This case is hereby remanded to Livingston Circuit Court for further custody proceedings consistent with this opinion.

All sitting. All concur.

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