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SUPREME COURT

COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
NO. 2012-SC-000721-D

MELISSA ANN COFFEY, ET. AL

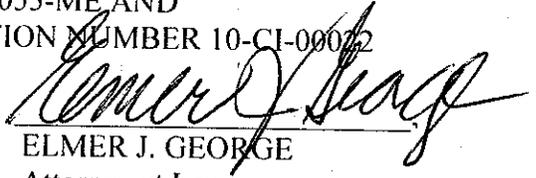
APPELLANTS

-VS

BRIEF FOR APPELLEE

JAMES M. WETHINGTON

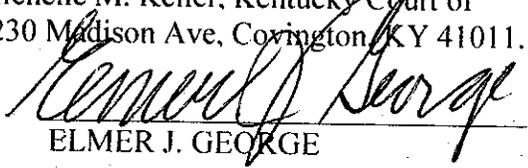
ON DISCRETIONARY REVIEW FROM KENTUCKY COURT OF APPEALS  
CASE NO. 2011-CA-00055-ME AND  
GREEN CIRCUIT COURT CIVIL ACTION NUMBER 10-CI-00072



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that the original and nine (9) copies of the foregoing Brief for Appellee were mailed on June 18, 2013 via first class U.S. mail postage pre-paid, to Hon. Susan Stokely Clary, Clerk, Kentucky Supreme Court, 209 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601; a true copy to Hon. James L. Avritt, Jr. 105 West Main Street, Lebanon, Kentucky 40033, Counsel for Appellant; Hon. Janet Coleman, Special Judge, 420 Briarwood Circle, Elizabethtown, KY 42701; Judge Donna Dixon, Kentucky Court of Appeals, 423 South 28<sup>th</sup> Street, Suite B, Paducah, KY 42001; Judge Christopher Shea Nickell, Kentucky Court of Appeals, 3235 Olivet Church Road, Suite F, Paducah, KY 42001 and Judge Michelle M. Keller, Kentucky Court of Appeals, Kenton Co. Justice Center, Suite 810, 230 Madison Ave, Covington, KY 41011.



ELMER J. GEORGE

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## **INTRODUCTION**

After the Green Circuit Court entered a judgment awarding the Appellants custody of two minor children, the Court of Appeals vacated the trial court's judgment finding that Appellants lacked standing since the trial court's interpretation of KRS 403.800(13) did not encompass that statute's entire definition. As such, the limited issue before this Honorable Court is the definition of KRS 403.800(13).

**STATEMENT CONCERNING ORAL ARGUMENT**

Appellee, James M. Wethington, believes that oral argument would be helpful to the Court in understanding of the issues before it and thus desires same.

**COUNTERSTATEMENT OF POINTS AND AUTHORITIES**

<u>CASES:</u>	<u>PAGES</u>
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## COUNTER STATEMENT OF THE CASE

Despite the fact that the sole issue before this Court is a question of law, the Appellant's wage a smear campaign that has nothing to do with issue before the Court. The Appellants' go on to recite nearly 13 pages of alleged facts taken both out of context and without proper citation.

The Appellee, (hereinafter, "Jimmy") vehemently disagrees with the Appellants' "statement of facts," especially in regards to his fitness as a parent. However, unlike Appellants, he will only point out herein the facts germane to this appeal.

James M. Wethington, "Jimmy" the Appellee and Joann Wethington were lawfully married on July 1, 1995. As a result of the marriage, Lucas Wethington and Leah Wethington, (hereafter "Lucas and Leah"), were born on February 6, 1996.

Joann instituted a divorce proceeding on October 16, 2000 resulting in a Decree of Dissolution of Marriage being entered on April 17, 2001 incorporating a Separation Agreement granting Jimmy and Joann the joint care, custody and control of Lucas and Leah.

Joann became seriously ill on or about December 30, 2009. The phone records verify that Jimmy contacted Lucas and Leah and other members of Joann's family numerous times during Joann's illness to check on her status and the children.

Joann passed away on January 23, 2010. Scott Coffey, the nephew of Joann, and his wife Melissa Coffey (the "Appellants" or "Coffeys") immediately filed Juvenile Dependency, Neglect and Abuse Petitions in Green District Court. The basis for

designating Lucas and Leach dependent was set out therein as "mother, Joann Wethington, is deceased and father, James Wethington, is unable to be located at this time."

Emergency Custody Orders and Temporary Custody Orders were subsequently entered on January 23, 2010 in both Juvenile Cases listing only Joann Wethington as a person with custody and stating that Social Worker, Kristie Huddleston testified that "the children are dependent due to the sudden death of their mother and due to the father's whereabouts being unknown at this time."

However, there was overwhelming evidence to the contrary. In fact Jimmy's address was written on the actual Petition. Furthermore, the Coffeys and Lucas and Leah all testified later that they knew Jimmy lived in Elizabethtown, Kentucky. Both children had been to Jimmy's home and both children had Jimmy's phone number. Jimmy was present at both the funeral home and the funeral. The Coffeys made no effort to contact Jimmy even though Jimmy's phone number was programmed into Joann's cell phone.

Jimmy was present for the Temporary Removal Hearing in the Juvenile Cases on January 25, 2010, but was not represented by counsel. The Court granted temporary custody to the Coffeys.

Thereafter, the Coffeys filed a Petition for Custody on or about February 17, 2010 in Commonwealth of Kentucky, Eleventh Judicial District, Green Circuit Court, Division II, Civil Action No. 10-CI-00022, Melissa Ann Coffey, et vir., v. James M. Wethington, et al., (hereafter "Custody Case"), in which they failed to provide their basis for their standing to file the Petition. Jimmy filed a Motion and Response to same on or about March 12, 2010.

Hearings were held on January 25, 2010, September 23, 2010, October 18, 2010 and November 29, 2010 in which the parties, Lucas and Leah, and several witnesses offered testimony.

The Court entered its Findings of Fact, Conclusions of Law and Judgment herein on March 1, 2011, in which the court found that Coffeys did have standing to file the action pursuant to KRS 403.822 (1) (b) 1 and KRS 403.800 (13), and that Scott and Melissa did not engage in any fraudulent, illegal or unconscionable conduct in obtaining emergency custody.

On appeal Jimmy argued, inter alia, that the lower court erred when in failed to find that the Coffeys did not having standing since they did not meet the requirements of KRS 403.800(13).

The Court of Appeals agreed as a matter of law, and held that Appellants did not have standing pursuant to KRS 403.800(13).

### **ARGUMENT**

#### **THE COURT OF APPEALS CORRECTLY HELD THAT THE APPELLANTS DID NOT HAVE STANDING TO BRING THE CUSTODY ACTION SINCE THEY FAILED TO MEET THE SIX MONTH REQUIREMENT OF KRS 403.800(13)**

On October 5, 2012, the Kentucky Court of Appeals rendered its Opinion correctly holding that the Appellants did not have standing to pursue the Custody Action. While the Court of Appeals agreed with the trial court's use of KRS 403.822 in its analysis of standing, the Court of Appeals disagreed with the trial court's interpretation and application of KRS 403.800(13).

The Court of Appeal stated:

“In support of its finding that the Coffeys had standing, the trial court stated:

KRS 403.800(13) defines “a person acting as a parent” as: “A person other than a parent who has been awarded legal custody by a court or claims a right to legal custody under the law in this state.”

In this case, [the Coffeys] became de jure custodians after they were granted Emergency custody pursuant to an Order signed by Green District Judge Connie Phillips on January 23, 2010.”

The Court of Appeals held that:

“The trial court’s definition of a “person acting as a parent” fails to encompass the entire definition of KRS 403.800(13), which requires: 1) a party be awarded legal custody or claim a right to legal custody; **and** 2) have or have had physical custody of the child **for six consecutive months** within the year preceding the custody action.”

“The Coffeys had physical custody of the twins for less than a month prior to filing their petition with the circuit court. They argue, however, that they satisfy both requirements of the statute because the six month requirement only applies in situations where the children are no longer in the physical custody of the party seeking custody. Thus, because they had physical custody at the time the action was filed, they argued they were not subject to the six month requirement.”

The Court of Appeals opined, however:

“Our reading of the statute, however, reveals that the six month requirement applies to any party seeking custody, whether he or she currently has or previously had physical custody. Accordingly, the Coffeys did not meet the definition of “person acting as parent” and consequently did not possess standing under KRS 403.822(1)(b)1.”

The Court of Appeals correctly interpreted the statute.

In their Brief on Appeal, the Appellants suggest that the Court of Appeals decision is inconsistent with this Court's holding in Mullins v. Pickelsimer, 317 S. W. 3d 569 (Ky. 2010) since this Court did not require a party to have physical custody at the time of the action and to also have had custody for at least six months.

First, it should be noted that the Mullins decision dealt with "de facto standing" and has no application in this case. But even if it does, Appellants misreads Mullins. Nothing in the Mullins decision indicates that the statute did not require a party that "has physical custody of the child" to also have had such custody for the requisite six months. Quite the contrary. This Court stated in Mullins that:

".... a person like Mullins, who **for the requisite period of time** performed all the traditional parental responsibilities....had "physical custody" under the provisions of KRS 403.800 et seq." Id. at 575.

Thus, such language by this Court in Mullins strongly suggests that the six month requirement applies to any non-parent who has physical custody of the child seeking permanent custody of the children.

Further, the Court of Appeals decision in the instant case is correct for two reasons:

First, it is a grammatically correct reading of the statute since it is a single sentence without a colon or semicolon that does not denote there are two methods to establish standing as suggested by the Appellants. The statute does not have the necessary wording and punctuation to support the Appellants' contention.

Moreover, the Appellants reading of the statute is nonsensical. For example, suppose a parent left his or her child in the care of a friend, or family member while the parent was vacationing over a week-end. Under Appellant's interpretation of the statute,

that non-parent could immediately could make allegations that the parent was unfit and pursue custody of that child before the return of the parent. While it unlikely the non-parent would prevail in such a case, the point is that should the Court rule in favor of the Appellants, such ruling would provide non-parents the legal basis to file such custody actions in violation of natural parent's superior rights. Certainly, such a reading of the statute makes no sense and was not the intent of the drafters.

When interpreting a statute, this Court reads the statute as a whole and in context with the other parts of the law. Wade v. Poma Glass & Speciality Windows, 394 S.W. 3d 886 (Ky. 2012). As noted above KRS 403.800(13)(a) states in part:

- (a) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months,

KRS 403.800(13)(a) goes on to state, however:

including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding; and

The inclusion of latter language strongly suggests that "six (6) consecutive month" waiting period applies to both "has physical custody" and "has had physical custody" phrase of the statute. To suggest otherwise is to read that language out of the statute.

In this case the Court of Appeals gave meaning to all parts of the statute, and with due regard to the intent of the drafters.

It is well noted that the drafters have included the six (6) month waiting period to other custody statutes. For example, the drafters included a six (6) month requirement under KRS 403.270. Just recently this Court ordered the Kentucky Court of Appeals decision in Brumfield v. Stinson, 368 S.W.3d 116 (Ky. App. 2012) to be published

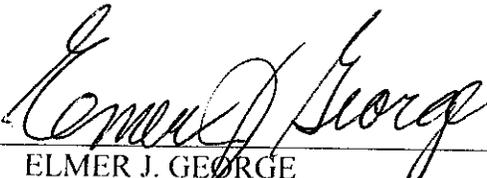
which dealt with the six (6) month requirement for de facto custodians. The Brumfield. Court ruled that in order to qualify as a de facto custodian, the de facto custodian must have been the primary caregiver for six (6) months or more. To provide balance and consistency to custody statutes, the six (6) month requirement should apply as the Court of Appeals has held here.

Lastly, the six (6) month requirement is sound public policy that protects a natural parent's superior rights to the care, custody, and management of his or her own children by requiring six months of possession of the child by the non-parent before he or she can file for permanent custody of the child. See, e.g. Santosky v. Kramer, 455 U.S. 745 (1982) (recognizing that natural parents have a fundamental basic and constitutionally protected right to raise their own children.").

### CONCLUSION

In this case, the Court of Appeals' interpretation of KRS 403.800(13) is correct. It is more than obvious that the intent of the General Assembly of a six month requirement was to protect both the constitutional rights of a natural parent and prevent non-parents from usurping those constitutional rights.

Respectfully Submitted,

BY:   
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