

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000359-MR

ALISHA HARGROVE (NOW BLEVINS)

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
CIVIL ACTION NO. 92-CI-00061

ROBERT WAYNE TURNER

APPELLEE

AND

NO. 2002-CA-000360-MR

ALISHA HARGROVE (NOW BLEVINS)

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
CIVIL ACTION NO. 01-CI-000064

CHRIS HARGROVE

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, KNOPF and HUDDLESTON, Judges.

HUDDLESTON, Judge: In these consolidated appeals, Alisha Hargrove (now Blevins¹) appeals two Ballard Circuit Court custody orders. In Civil Action No. 01-CI-00064, the court found as part of the dissolution of the marriage between Alisha and Chris Hargrove that the parties should share joint custody of their minor daughter with Chris designated as primary residential custodian. In Civil Action No. 92-CI-00061, the court found that circumstances regarding the care and custody of the minor son of Alisha and Robert Turner had sufficiently changed to warrant modifying its prior award of joint custody to one of sole custody awarded to Turner.

The procedural history of these cases is somewhat unusual. The two cases were consolidated for purposes of hearings held together on December 3, 2001, which continued to December 5. By agreement of the parties, evidence presented at any time in either hearing could be used in reaching a decision with respect to either child.

¹ While there is no direct proof in the record regarding her change in marital status, we have no reason to disbelieve the statement to that effect in her brief. While other parties are referred to by last names, we will refer to Alisha by her first name to lessen confusion.

Counsel for Alisha moved to continue the proceeding, citing his having been hired only days before. The court denied this motion, citing two prior continuances and its direction that Alisha was to have retained new counsel prior to November 17. However, the court did state that although it would hold the hearing as scheduled and make an initial ruling based on the evidence presented therein, it would not enter its final ruling until January 23, 2002. Alisha thus would have from the conclusion of the hearing until January 23 to present any evidence she could summon to refute what was presented at the hearing.

Despite the additional time, Alisha failed to present supplemental evidence. Accordingly, the court entered its final orders on January 23, awarding custody of the children as described above. After the judgment was entered, Alisha did tender affidavits to the court on January 28 without filing any post-judgment motion. Alisha then filed a notice of appeal on February 13.

In both cases, Alisha argues that the circuit court's decision not to continue the hearing violated her Due Process rights by effectively denying her the ability to put on evidence. While we would agree that the court's method was unusual, we cannot say it deprived Alisha of due process. The decision whether to grant or deny a continuance is left to the

discretion of the trial court; its discretion will not be disturbed absent a clear showing of abuse.² As more thoroughly explained below, we are not of the opinion that the circuit court abused its discretion in denying Alisha's motion for what would have been a third continuance.

The judgments entered in both cases show an original date next to the judge's signature of December 18, 2001. However, in both instances, that date is lined through and replaced with January 23, 2002. Likewise, both judgments show entry by the circuit clerk on January 23, 2002.

On the basis of the corrected date, Alisha argues that the circuit court had effectively decided the case on December 18, and that it would have been futile for her to submit evidence after that time. However, the incorrect date is of no consequence because a judgment is not effective until entered by the clerk.³ The purportedly signed order was of no effect until its entry on January 23; the circuit court was free to amend the order as it saw fit if presented with new evidence from Alisha. Alisha's position is further undermined by her having submitted additional evidence to the court on January 28, 2001; if she believed the court's order not subject to modification, it is

² See, e.g., Wells v. Salyer, Ky., 452 S.W.2d 392 (1970).

³ Ky. R. Civ. P. (CR) 58(1). See also American Pulverizer Co. v. Cantrell, Ky. App., 694 S.W.2d 714 (1985).

unlikely that she would have attempted to alter its decision through the submission of this evidence.

Furthermore, the argument that it would have been futile to submit additional evidence in light of then-existing orders strikes us as having been disingenuously raised in the course of preparing this appeal. According to the clerk's notation, the judgments were not mailed to the parties' counsel until January 23. Therefore, Alisha's counsel would not have known of the substance of the judgments until after that date.⁴

Nowhere in the record is there a motion by Alisha under Kentucky Rules of Civil Procedure (CR) 59.05 to alter, amend or vacate the final orders, nor is there a motion for relief from judgment pursuant to CR 60.02. Had such a motion been properly made, the circuit court could have reconsidered its judgments in light of the new evidence Alisha attempted to present. However, because no such motions were made, Alisha waived her opportunity to present post-judgment evidence.

Contrary to the disingenuous argument presented to us, Alisha had ample opportunity to present the circuit court with whatever evidence she deemed necessary to her case. Any failure

⁴ We should also note that the claim in her brief that the judgments were final as of December 18, 2001, actually undermines her position. If that were true, her notice of appeal filed on February 13, 2002, would be untimely and we would be required to dismiss her appeal. See CR 73.02(1)(a).

to do so lies entirely with her or her counsel, not the court. Consequently, her Due Process rights were in no way violated by the circuit court's method of proceeding.

Having decided that initial issue, we will now examine the merits of the circuit court's custody awards. In Civil Action No. 01-CI-00064, the court decided that Alisha and Chris Hargrove should share joint custody of their minor daughter, with Chris designated as primary residential custodian. Because this was an initial custody determination, it was governed by the best interests of the child standard contained in Kentucky Revised Statutes (KRS) 403.270.

A circuit court's decision regarding the best interests of a child will only be reversed on appeal if the findings of fact on which it bases its decision are clearly erroneous. To put it in another way, we will not disturb the circuit court's findings unless there is no substantial evidence to support them.⁵ Therefore, the question we must answer is whether there is substantial evidence that supports the findings of fact that underlie the circuit court's decision that it was in the best interest of their daughter that the parties be awarded joint custody with Hargrove designated primary residential custodian.

⁵ M.P.S. v. Cabinet for Human Resources, Ky. App., 979 S.W.2d 114, 116 (1998).

The circuit court devoted over three pages to its findings on this issue. It pointed to the testimony of the parties and that of the teacher of Alisha's other child for its conclusions that the stability offered by Hargrove's custody was in their daughter's best interest. Specifically, the court was looking at Alisha's personal history of multiple marriages and separations, employment history of over ten jobs in six years, relocation to a different state and attendant lack of familial contacts in the new home state, and her general lack of credibility with respect to issues involving her life and that of her children.

Even were we to include Alisha's improperly submitted evidence, it would not compel us to find an abuse of the circuit court's discretion. As demonstrated by its ample findings, there is substantial evidence in the record from which to conclude that it would be in their daughter's best interest to be placed in Hargrove's primary custody. We will therefore not disturb its discretionary decision.

In Civil Action No. 92-CI-00061, Robert Turner moved to modify the custody of the minor son whose custody had been jointly awarded to Turner and Alisha in 1993. Turner alleged that pursuant to KRS 403.340 and 403.350, more than two years had passed since the entry of the initial custody decree, that there had been a change in circumstances regarding the child's

custody, and that modification would be in the best interests of the child.⁶ Specifically, as stated in the circuit court's judgment, Turner alleged that

[Alisha] was involved in and subjecting [their son] and his sister to another sequential extramarital affair; that [their son] was moving to Georgia where [Alisha] was cohabitating with the new boyfriend; that [their son] was morally, physically, emotionally and psychologically endangered by [Alisha's] behavior; that [their son's] hygiene, school work and behavior were not being adequately monitored by [Alisha]; that [Alisha] represented to medical and school personnel that she was [their son's] sole custodian and to release no information to [Turner]; that [Alisha] was untruthful and uncooperative with [Turner] in parenting [their son] and that [their son's] best interests would be served by residence with his father and an award of sole custody.

Alisha argues on appeal that the circuit court's decision was predicated solely on her relocation to Georgia and her cohabitive relationship arising out of an extramarital affair while married to Chris Hargrove. However, an examination

⁶ See Scheer v. Zeigler, Ky. App., 21 S.W.3d 807 (2000).

of the court's findings reveals that its decision was based on much broader concerns.

As in Civil Action No. 01-CI-00064, the circuit court's findings span multiple pages which need not be repeated here in their entirety. The court pointed to Alisha's lack of stability in her life, poor credibility as a witness, failure to cooperate with Turner regarding the custody of their son, and their son's behavioral, educational and hygienic difficulties which arose while in Alisha's custody as reasons why it was in their son's best interests to modify custody in favor of Turner. Although an inability of custodial parents to cooperate is no longer a requirement before a court can modify a custody award, circuit courts retain the authority to modify such an award when the parents cannot cooperate.⁷

In this case, the circuit court found that Alisha's inability or refusal to cooperate with Turner regarding the custody of their son and their son's resulting problems created a change in circumstances sufficient to warrant revisiting its prior custody award. It found that the instability in Alisha's life was endangering their son's welfare, as demonstrated by his behavioral, scholastic and hygienic problems. Furthermore, it found that sole custody awarded to Turner would provide greater

⁷ Scheer, supra, at 814.

stability and a more positive environment, as evidenced by the child's recent improvement in school after having been placed in Turner's temporary custody, as well as the contacts with extended family and the Ballard County community which Turner could provide.

We cannot say that the circuit court's findings with respect to this child were clearly erroneous. Again, there was substantial evidence in the record which formed the basis of the court's findings. Even if we were to include the improperly submitted evidence tendered by Alisha after the circuit court entered its judgment, we could not say that the circuit court abused its discretion in finding that it was in the best interests of the child that Turner be granted sole custody.

The circuit court did not violate Alisha's due process rights in reaching its decisions regarding the custody of her children, and it did not abuse its discretion by awarding joint custody of one child to Alisha and Hargrove with Hargrove designated primary residential custodian and sole custody of the other child to Turner. Therefore, the orders from which these appeals are prosecuted are affirmed.

ALL CONCUR.

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