

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000563-MR

VERNETTA MERINA

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 01-CI-00245

BERNADETTE IRVAN

APPELLEE

OPINION

AFFIRMING IN PART - REVERSING IN PART AND REMANDING

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BEFORE: BAKER, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Vernetta Merino (hereinafter "Vernetta") has appealed from the Marshall Circuit Court's January 18, 2002, order adopting the Domestic Relation Commissioner's January 2, 2002, recommended order, and the February 22, 2002, order denying her motion to alter, amend or vacate. Having determined that the record does not support a finding that Vernetta received adequate notice of the December 18, 2001, custody

hearing, we affirm in part, reverse in part and remand for a new custody hearing.

Our review of the certified record from Marshall Circuit Court reveals that Bernadette Irvan (hereinafter "Bernadette") filed a Verified Petition for Custody on June 11, 2001, requesting custody of her natural granddaughter Kenodie Levy Reed (hereinafter "Kenodie"), born February 20, 1996, and of Eva Taylor Merino (hereinafter "Taylor"), born March 6, 1989. Kenodie and Taylor are Vernetta's natural daughters. Bernadette's son, Eric Reed (hereinafter "Eric"), is Kenodie's natural father while Taylor's natural father is deceased. The petition named Vernetta, Eric and the Cabinet for Families and Children (hereinafter "the Cabinet") as respondents. According to the petition, the Cabinet was named because custody of the minor children had been awarded to it on May 1, 2001, in a previously filed juvenile action.

The circuit court appointed attorney Laurie Miller (hereinafter "Attorney Miller") as guardian ad litem for Vernetta, who filed a response to the petition as well as a counter-petition for custody. Vernetta was seeking custody of Kenodie and Taylor upon her completion of a substance abuse treatment program at Chrysalis House in Lexington, Kentucky. The Cabinet also filed a response to the original petition, requesting that custody remain with the Cabinet. Thereafter,

Vernetta moved to dismiss or stay the action based upon a lack of jurisdiction. Although Vernetta initially indicated that she would be filing exceptions to the DRC's recommendation that the motion be denied, she later withdrew her exceptions. On November 7, 2001, the circuit court adopted the DRC's recommendation, thereby holding that Marshall Circuit Court was the appropriate forum and had jurisdiction to decide the permanent custody issue.

On October 5, 2001, counsel for Bernadette re-noticed the custody hearing from October 16, 2001, to December 18, 2001. The notice was served on Attorney Miller, but not upon Vernetta herself. Bernadette noticed Vernetta's deposition for November 20, 2001, which was served on Attorney Miller by mail on October 31, 2001. Subsequently, on November 13, 2001, Attorney Miller moved to withdraw as counsel for Vernetta, citing irreconcilable differences between herself and her client, and also moved to quash the previously noticed deposition. Attorney Miller did not serve either the motion to withdraw or the motion to quash on Vernetta. Over Bernadette's objection, the circuit court granted both motions on December 4, 2001, and ordered Vernetta to appear before it on December 17, 2001, with new counsel or to explain what her plans were in regard to representation. The order was served on Vernetta in care of Helen Selvey at an

address in Naples, Florida. The court docket sheet for December 17, 2001, shows that no action was taken that day.

The matter proceeded to a custody hearing before the DRC on December 18, 2001. Vernetta did not appear personally and she did not have an attorney representing her interests at the hearing.<sup>1</sup> After discussing the lack of Vernetta's presence, either personally or through counsel, and reasoning that Vernetta had sufficient notice of the hearing through the October 5, 2001, re-notice, the DRC opted to go ahead with the custody hearing. Bernadette and Eric both testified at the hearing. In particular, Eric testified that Vernetta called him the night before the hearing and told him that although she was aware of the December 18, 2001, hearing, she did not intend to appear. At the end of the hearing, the DRC made the recommended findings that Bernadette was the de facto custodian of both Taylor and Kenodie and that Vernetta was an unfit mother. He recommended awarding permanent custody to Bernadette and ordering Vernetta and Eric to pay child support. In his recommended order dated January 2, 2001, the DRC found that all of the parties knew of the hearing and had a sufficient opportunity to present proof. He specifically found that Vernetta received notice through her former attorney. The

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<sup>1</sup> By this time, Vernetta had apparently completed her substance abuse therapy program, regained custody of Taylor and Kenodie through the Fayette District Court, and moved to her mother's apartment in Florida.

circuit court adopted the DRC's recommended order on January 18, 2002.

Vernetta then retained attorney Anne Smith, who filed a motion to alter, amend or vacate with the circuit court on January 28, 2002. In the motion, Vernetta argued that she did not have notice of the December 18, 2001, hearing, and did not learn of it until after the circuit court had adopted the DRC's recommended order. No affidavits or other supporting documents were attached to the motion. Bernadette objected, arguing that if Vernetta did not know about the hearing, it was through her own fault and neglect. Following a brief motion hour hearing, the circuit court denied the motion to alter, amend or vacate in an order entered February 22, 2002, noting that Vernetta had proper notice of the hearing and that she was responsible if her rights had been compromised. This appeal followed.

Prior to reaching the merits of the appeal, we must first address the shortcomings of the brief Vernetta filed with this Court. Bernadette has argued that we should decline review in this matter because Vernetta has failed to comply with the applicable Civil Rules concerning the filing of briefs. CR 76.12(4)(c)(iv) provides that an appellant's brief shall have:

A 'STATEMENT OF THE CASE' consisting of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the

appeal, with ample references to the specific pages of the record . . . supporting each of the statements narrated in the summary.

Additionally, CR 76.12(4)(c)(v) provides that an appellant's brief shall also contain:

An 'ARGUMENT' conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

In reviewing Vernetta's brief, we note that the statement of facts does not contain any references to the certified record on appeal. In fact, the brief contains many unsubstantiated references to information and has documents attached to it that are not contained in the certified appellate record. Likewise, the argument section does not conform to the Civil Rules. There are no statements at the beginning of each argument regarding issue preservation and no supportive references to the certified record. Although Vernetta did reference a February 4, 2002, motion hour hearing in the argument section, that particular hearing was not originally included in the certified record.<sup>2</sup>

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<sup>2</sup> On December 11, 2002, this Court, on its own motion, ordered the Clerk of the Marshall Circuit Court to certify a supplemental record to include the

Pursuant to CR 76.12(8)(a), we have the power to strike a brief that fails to comply with any substantial requirement of the rule. Although there are enough deficiencies in the brief that would permit us to exercise this option, we are nevertheless mindful of the nature of this case and the interests of two minor children. Therefore, we decline Bernadette's request that we forego a review of the merits and dismiss the appeal.

On appeal, Vernetta argues that Marshall Circuit Court did not have jurisdiction to decide custody matters, erred in finding Bernadette to be a de facto custodian, and erred in denying the motion to alter, amend or vacate due to Vernetta's lack of notice of the custody hearing. On the other hand, Bernadette argues that the circuit court did not commit any error. In particular, Bernadette states that Marshall Circuit Court was the appropriate forum for the custody petition, that Vernetta had adequate notice of the hearing, and that the circuit court properly awarded custody to her by finding that she was a de facto custodian and that Vernetta was unfit.

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videotaped recording of the February 4, 2002, motion hour. The clerk certified the supplemental record on December 13, 2002, and the recording is now in the certified record. Of course, it is the appellant's responsibility to ensure that the complete record is certified for review by this Court and to provide the circuit court clerk with a list of any videotaped proceedings in his or her designation of evidence. CR 75.01. Although Vernetta filed a designation of record, she neither specified any particular hearing dates nor identified any videotape numbers she wanted the clerk to include in the certified record.

We do not believe that the venue/jurisdiction issue was properly preserved for our review. Although Vernetta filed a notice of exceptions to the DRC's recommendation that her motion to dismiss or stay be denied, she later withdrew her exceptions. This precluded her from raising the issue later. However, in the interest of clarity, we affirm the circuit court's finding that Marshall Circuit Court had jurisdiction to decide the custody matter. The Marshall District Court had already exercised jurisdiction over the children, who had been residents of the county.

As to the issue of notice, however, we hold that the certified record does not support the circuit court's finding that Vernetta received adequate notice of the December 18, 2001, custody hearing. We are mindful of CR 52.01, which provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered findings of the court."

Although Bernadette's re-notice of the hearing was served on Vernetta's court-appointed attorney/guardian ad litem prior to her withdrawal, there is nothing in the documentary record to establish that Vernetta herself actually received

notice of this hearing. We note that Attorney Miller did not serve her motion to withdraw upon Vernetta and that the circuit court did not appoint anyone else to represent her interests when it granted the motion, but instead ordered Vernetta to appear before it on December 17, 2001. Although she did not appear that day, the DRC continued with the custody hearing the next day, at which time Vernetta did not appear either in person or through an attorney. She had no one to represent her interests at the hearing, and was therefore unable to refute the statements made by the witnesses or present any evidence on her own behalf. Other than Eric's testimony at the hearing regarding his telephone conversation with Vernetta, there is nothing in the record to establish that Vernetta had adequate notice of the hearing. Eric did not provide any type of supporting evidence to establish the content of his telephone conversation, such as an authenticated audio recording or an affidavit.

Based upon the circumstances of this case, we hold that the circuit court's finding that Vernetta received adequate notice was clearly erroneous, and therefore, this matter must be remanded to the circuit court for a new custody hearing before the DRC. Vernetta must be adequately notified of the new hearing so that she may attend the hearing if she so chooses. However, she is cautioned that a failure to appear

either in person or through counsel may lead to the same result if similar evidence is presented.

Because we are remanding the matter for a new custody hearing, we need not address the remainder of issues Vernetta raised in her brief.

For the foregoing reasons, the orders of the Marshall Circuit Court are affirmed in part as to the jurisdiction issue, and reversed in part and remanded for a new custody hearing.

SCHRODER, JUDGE, CONCURS.

BAKER, JUDGE, CONCURS IN RESULT ONLY.

ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

Anne M. Smith  
Calvert City, KY

Natalie Gayle Moodie  
Paducah, KY