

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001184-ME

VIRGINIA RAYMOND

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 02-CI-00261

GREG BOYD; STACY BOYD;
RAQUEL RAYMOND; AND
GARY MITCHELL RAYMOND

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Virginia Raymond (Raymond) appeals from the March 5, 2004, Order of the Ohio Circuit Court denying her motion pursuant to Ky. R. Civ. P. (CR) 60.02 to set aside the order granting sole custody of the minor child, Raquel Raymond, to Greg and Stacy Boyd (the Boyds). We affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Raymond's home was destroyed by fire sometime in September 1999. Raquel sustained severe injuries and one of her siblings died as a result of injuries sustained in the fire. In 2000, Raymond was arrested on drug-related charges. Pursuant to a district court order, temporary custody of Raquel was awarded to the Boyds.² Over the next two years, Raymond made no attempt to regain custody of Raquel or establish visitation. In July of 2002, the Boyds filed a petition for legal custody and Raymond filed a response and "petition for immediate entitlement to custody and/or order granting liberal visitation."

The matter was referred to the Domestic Relations Commissioner pursuant to CR 53.03, and on December 10, 2002, a hearing was conducted. The Commissioner's recommended order of January 21, 2003, stated that it was "ordered and agreed" that the Boyds shall have permanent sole custody of Raquel and that Raymond would have supervised visitation. No objections to the Commissioner's recommendations were filed.

Following a "status report and review of visitation," the Commissioner entered a recommended order on March 7, 2003. The Commissioner found that Raquel was suffering emotionally as a result of Raymond telling Raquel that she would be returning to live with Raymond in the near future. The Commissioner

² Although the record is unclear, the Boyds apparently also had temporary custody of Raquel for a brief period immediately following the fire. Raquel had been returned to her mother's custody prior to Raymond's arrest in 2000.

recommended that Raymond's visitation with Raquel be suspended. Raymond subsequently filed pro se objections to the Commissioner's recommendation. Therein, Raymond asserted she was not aware of the agreed order awarding permanent sole custody to the Boyds and that she truly believed Raquel would be coming home to her.³ The circuit court overruled Raymond's objections.

Raymond retained substitute counsel, and on January 20, 2004, a motion was filed pursuant to CR 60.02 seeking to set aside the January 21, 2003, order awarding permanent sole custody to the Boyds. The circuit court denied the motion by order entered March 5, 2004. Pursuant to CR 59.05, Raymond filed a motion to alter, amend or vacate the March 5, 2004, order. The motion was subsequently denied by order entered May 21, 2004. This appeal follows.

Raymond contends the circuit "court's decision is untenable and contrary to the weight of the evidence and should be reversed." We observe that Raymond appeals from the denial of her CR 60.02 motion, and thus, have treated her contentions of error accordingly. Raymond specifically asserts the following: she was not present for the hearing on the custody

³ Although Raymond asserts she was unaware of the agreed order awarding sole custody to the Boyds and granting her supervised visitation, we note that Raymond was apparently operating under that agreement and exercising visitation accordingly.

matter; she did not consent to permanent sole custody being awarded to the Boyds; she did not authorize her attorney to agree to such an award; she was not informed of the order by her attorney; and she was not aware of the order until her visitation was subsequently suspended.

CR 60.02 provides, in relevant part, as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds:

(a) mistake, inadvertence, surprise or excusable neglect; . . . (f) any other reason of an extraordinary nature justifying relief. . . .

It is well-established that the “[n]egligence of an attorney is imputable to the client and is not a ground for relief under . . . CR 60.02(a) or (f).” Vanhook v. Stanford-Lincoln Co. Rescue Squad, Inc., 678 S.W.2d 797, 799 (Ky.App. 1984). In Vanhook, we emphasized that a litigant who voluntarily chooses an attorney to represent him cannot later avoid the consequences of the attorney’s acts. Id., citing Link v. Wabash R.R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962). This Court specifically stated that to allow a litigant to avoid the consequences of his attorney’s acts “would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of

his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Vanhook, 678 S.W.2d at 800 quoting Link, 370 U.S. at 633.

Although we are sympathetic to Raymond's claim that she was not adequately represented by counsel, a motion pursuant to CR 60.02 is not the proper remedy. As such, the circuit court did not err by denying Raymond's 60.02 motion for relief.

Even if a CR 60.02 motion was appropriate, we do not believe the circuit court abused its discretion by denying Raymond's motion. It is well-established that granting relief pursuant to CR 60.02 is within the sound discretion of the court and some effort must be made by the moving party to demonstrate why she is entitled to such extraordinary relief. The court's discretion will not be disturbed on appeal absent an abuse thereof. Fortney v. Mahan, 302 S.W.2d 842 (Ky.App. 1957).

In the case sub judice, the record supports the circuit court's denial of Raymond's CR 60.02 motion. The entire basis of Raymond's CR 60.02 motion was that she never consented to the custody arrangement. However, Raymond's attorney was present and did agree to the custody award. As the circuit court noted in its May 21, 2004, order, Raymond had the opportunity at the hearing on her CR 60.02 motion and CR 59.05 motion to call her previous counsel to testify and she did not. Raymond made no effort, other than her bare allegation, to

demonstrate she was entitled to relief pursuant to CR 60.02. As such, we do not view the circuit court's denial of her motion as an abuse of discretion.

For the foregoing reasons, the Order of the Ohio Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David T. Sparks
Bowling Green, Kentucky

BRIEF FOR APPELLEES GREG BOYD
AND STACY BOYD:

Daniel A. Clark, III
Owensboro, Kentucky

BRIEF FOR APPELLEE RAQUEL
RAYMOND:

Amanda Perkins
Guardian Ad Litem
Hartford, Kentucky