

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000809-ME

DEBRA THOMAS FREE

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 04-CI-00308

BILL GOLEY, CHRISTINE GOLEY,
AND ERIK STACKLIE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹

BUCKINGHAM, JUDGE: Debra Thomas Free appeals from an order of the Logan Circuit Court denying her CR² 60.02 motion. Free had sought relief from a prior order of the court giving custody of her daughter, Kallie Rebecca Mackey, to Free's mother, Christine Goley. We affirm.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Civil Procedure.

Free has three children, and Kallie is the middle child. Kallie was born on November 24, 1995. Her father is Erik Stacklie. Although Stacklie is listed as a party in this case, it appears he has had little interaction with Kallie.

In July 2001, Free agreed to give her mother, Goley, guardianship of Kallie because Free was encountering financial difficulties. Goley was appointed as Kallie's guardian by order of the Logan District Court at that time. Kallie has remained in the physical custody of Goley and her husband, Bill, since July 20, 2001. The Goleys have been the sole providers of Kallie's support and upkeep.

During the period Kallie was in the Goleys' custody, Free worked jobs for minimum wage and attended school. She acknowledged that she provided no support for Kallie during this time. She testified that she had all she could do to continue to care for her youngest child while at the same time paying child support for her oldest child.

Free eventually felt she was capable of providing a home for Kallie. In June 2004, she filed a motion in the Logan District Court seeking to have the guardianship order set aside. Goley opposed the district court action, and she and her husband filed an original action in the Logan Circuit Court seeking to be declared *de facto* custodians and asking for custody of Kallie.

A domestic relations commissioner (DRC) was assigned to hear the matter. Pursuant to the Goleys' motion, the DRC first entered a recommendation finding that the Goleys qualified as *de facto* custodians since they provided Kallie's sole financial support and had custody of her since the guardianship order was entered in July 2001. In addition, the DRC recommended that Kallie remain in the custody of the Goleys until a final hearing could be held and an order could be entered. Free made no challenge to the DRC's recommendations.

The final hearing before the DRC was held on September 15, 2004. Finding the Goleys had Kallie in their care and custody for over three years, the DRC again concluded they qualified as *de facto* custodians. Based on this finding, the DRC applied the best interests of the child standard in making his recommendation concerning custody. After noting Kallie was fully integrated into the Goleys' home, was thriving in her present environment both socially and academically, and that there was no reason to change her residence, the DRC concluded it was in Kallie's best interests to recognize the Goleys as her primary custodians. The DRC also recommended that Free have visitation with the child.

Free's attorney filed exceptions to the DRC's recommendations. A hearing was held, and on October 22, 2004,

the court entered an order confirming the DRC's recommendations. Free did not challenge this order by direct appeal.

On November 29, 2004, Free's attorney filed a motion to alter, amend, or vacate the prior custody order under CR 60.02. As a basis for her motion, Free set out two arguments. First, she argued that she had newly discovered evidence that would show she attempted to obtain legal assistance prior to filing the action in district court seeking to set aside the guardianship order. The evidence consisted of a letter from an attorney indicating that, given her financial limitations, she should seek help through legal aid. Second, Free argued that Goley had repeatedly denied her additional visitation in excess of the guidelines since the custody order was entered.

A hearing was held on Free's motion, and the DRC entered a recommended order denying the motion. Free's attorney filed timely exceptions to the recommendation, and the circuit court rejected the exceptions and confirmed the DRC's recommendation in an order entered on April 14, 2005. This appeal by Free followed.

Free raises four main arguments in her brief. She argues that: 1) the circuit court never had subject matter jurisdiction to award custody to the Goleys because their motion was not supported by affidavits; 2) the court erred by refusing to enter findings of fact and conclusions of law in the

underlying custody decision; 3) the court erred by not considering all relevant factors in KRS³ 403.270 before making the custody decision; and 4) the *de facto* custodian statute was unconstitutionally applied in her case. For the reasons set forth below, we affirm the court's denial of Free's motion.

In response to the four arguments raised by Free in her brief, the Goleys argue that Free is improperly challenging the underlying custody order. They assert that she should have appealed from the custody order if she desired to challenge it, and that she may not challenge it by way of a CR 60.02 motion. The Goleys also argue that Free's challenge in this appeal should be limited only to the CR 60.02 motion. We agree.

Citing Fanelli v. Commonwealth, 423 S.W.2d 255, 257 (Ky. 1968), Free maintains that a CR 60.02 motion is not a separate action but a continuation or reopening of the same proceeding that culminated in the judgment under attack. As the Fanelli case does not address whether an appeal of the denial of a CR 60.02 motion allows direct challenges to the underlying case, it provides little support for Free's argument. In Amernational Indus., Inc. v. Action-Tunggram, Inc., 925 F.2d 970 (6th Cir. 1991), the court noted that "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for

³ Kentucky Revised Statutes.

review.”⁴ Id. at 975. [Citations omitted.] See also Hood v. Hood, 59 F.3d 40, 42 (6th Cir. 1995). Furthermore, the language of CR 60.02 states that “[a] motion under this rule does not affect the finality of a judgment or suspend its operation.” See also Lewallen v. Commonwealth, 584 S.W.2d 748, 749 (Ky.App. 1979). Finally, CR 60.02 may not be used as an avenue for obtaining relief on issues that could have been raised on direct appeal. See Bowling v. Commonwealth, 163 S.W.3d 361, 365 (Ky. 2005). Based on these authorities, we conclude that Free’s second, third, and fourth arguments are improper challenges against the underlying judgment. Had Free desired to raise those arguments, she should have done so by way of a direct appeal.

The remaining issue raised by Free in her brief is whether the trial court had subject matter jurisdiction of the custody case since the Goleys did not file supporting affidavits with their motion for custody. In support of her argument, Free cites KRS 403.340-.350. By their language, those statutes are applicable only to custody orders or decrees. Here, there had been no custody order or decree that was subject to modification. Furthermore, Kallie had been in the custody of the Goleys pursuant to the guardianship order for approximately three years before they filed their motion for custody. In

⁴ The wording of Fed. R. Civ. P. 60(b) is similar to the wording of CR 60.02.

short, we conclude that the Goleys' motion for custody of Kallie did not require supporting affidavits pursuant to the aforementioned statutes.

Finally, we turn to the issue of whether we should affirm the circuit court's denial of the CR 60.02 motion on its merits. Free raised two arguments in her motion. First, she argued she had newly discovered evidence that would show she attempted to obtain legal assistance prior to filing the action in district court seeking to set aside the guardianship order. The evidence consisted of a letter from an attorney indicating that, given her financial limitations, she should seek help through legal aide. Second, she argued that Goley had repeatedly denied her additional visitation in excess of the visitation guidelines since the custody order was entered.

The decision of whether to grant a CR 60.02 motion is left to the sound discretion of the trial court. Bethlehem Minerals Co. v. Church and Mullins Corp., 887 S.W.2d 327, 329 (Ky. 1994). See also Fortney v. Mahan, 302 S.W.2d 842, 843 (Ky. 1957). "The trial court's exercise of discretion will not be disturbed on appeal except for abuse." Id.

We conclude the circuit court did not abuse its discretion in denying Free's motion. The letter from the attorney was not "newly discovered evidence which by due diligence could not have been discovered in time to move for a

new trial under Rule 59.02[.]” See CR 60.02(b). As for Free’s argument that Goley had denied her additional visitation in excess of that allowed under the guidelines, we conclude that the allegation, to the extent it could be proven, would have been more appropriately addressed under a motion concerning visitation. At any rate, it was not an abuse of discretion for the court to reject the CR 60.02 motion on that ground.

The order of the Logan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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