

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000943-ME

B.W., NATURAL MOTHER OF B.M.,
J.M., AND T.M.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DOLLY W. BERRY, JUDGE
ACTION NOS. 04-J-505700-002, 04-J-505701-002, & 04-J-505702-002

DOLLY WISEMAN BERRY, JUDGE;
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; T.S.; S.S.; B.M.; J.M.; T.M.

APPELLEES

OPINION AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; HENRY,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: B.W. appeals from the denial of her motion filed pursuant to Kentucky Rules of Civil Procedure (“CR”) 60.02. In that motion, she had asked the Jefferson Family Court to reconsider its award of permanent custody of her children,

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

B.M. (d.o.b. 5/4/00), J.M. (d.o.b. 4/22/03), and T.M. (d.o.b. 9/10/04) to Appellees T.S. and S.S. After our review, we affirm.

The events leading to this litigation began in June 2004 when B.W., a mother of three, was referred to the Jefferson County Cabinet for Health and Family Services as a “Family in Need of Services,” or “FINSA.”² At the time of the referral, B.W. had no utilities in her home, was behind in her bills, could not provide medical care for her children, and lived in squalid conditions. In an effort to address these concerns, the Cabinet offered the family food stamps, a medical card, access to transportation, and budgeting assistance; it also assigned a social worker to the family.

On December 7, 2004, the Cabinet filed a “Juvenile Dependency, Neglect and Abuse Petition” against B.W. in the Jefferson Family Court. The Cabinet alleged that B.W. had neglected her children either by failing to address or to make progress on a number of concerns raised by the FINSA referral. Specifically, the petition recited a number of serious allegations: that B.W. had failed to attend a WIC appointment to obtain free formula for her youngest child – despite receiving access to free transportation to attend the appointment; that the family was completely out of food stamps due to her failure to attend their recertification appointment; that there was no food in the home as of November 18, 2004; that there were continuing problems as to the presence of filth and lack of plumbing in the house; that B.W. continued to be unemployed; and that B.W. failed to utilize daycare services.

² This litigation also involved L.M., the father of B.W.’s children; however, he did not object to the family court’s ultimate permanent custody decision and therefore is not a party to this appeal.

Following a temporary removal hearing on December 16, 2004, the children were allowed to remain in B.W.'s home on the proviso that she fully cooperate with the Cabinet's "Help Team" and with other treatment providers and that she remain in strict compliance with their recommendations.

On July 12, 2005, the Cabinet filed a second neglect petition against B.W. It alleged a continuing failure on her part to address issues relating to the care and well-being of her children. Numerous serious claims were contained in the petition: that the children were showing up for daycare and school unkempt and dirty -- often with cat scratches and flea bites on their skin; that B.W.'s youngest child had an ear infection that went untreated for some time; that the car seat for B.W.'s youngest child was found to contain cat feces; that B.W.'s home continued to be dirty and cluttered; that the family had no income; that B.W.'s two oldest children had medical and dental problems that had not been properly addressed; and that B.W.'s two oldest children may have been subjected to sexual abuse by a family friend (who had hanged himself in the family's garage in the spring).

Following another temporary custody hearing, the children were removed from B.W.'s home and were placed in the care of T.S. and S.S., B.W.'s sister and brother-in-law, respectively. B.W. was instructed to undergo psychological and "JADAC" (Jefferson Alcohol and Drug Abuse Center) evaluations. Once again, she was ordered to cooperate with service providers in remedying the problems at her home. She was also placed under the supervision of the Cabinet in order that her progress could be

monitored. On September 1, 2005, the children's natural father stipulated to neglect of the children; on November 17, 2005, B.W. entered her own stipulation of neglect.

T.S. and S.S. filed a motion for permanent custody of B.W.'s children on January 26, 2006. The Cabinet supported their motion due to B.W.'s continued failure to address issues of long standing and her failure to visit, communicate with, or provide financial support to her children on a regular basis.

A permanent custody hearing was held on March 16, 2006. The family court concluded that the best interests of the children would be best served by an award of permanent custody to T.S. and S.S. because of the stable environment which they provided to the children – especially when viewed in light of the lack of substantial progress made by B.W. in order to secure the return of her children. The court entered findings of fact and conclusions of law in support of its decision on the same day.

On March 27, 2006, B.W. filed a motion pursuant to CR 60.02 to ask the family court to reconsider its decision. The court entered an order on April 13, 2006, denying B.W.'s motion on the grounds that no legal basis for relief existed under CR 60.02. This appeal followed on May 1, 2006.

On appeal, B.W. contends that the evidence presented to the family court did not support the award of permanent custody of her children to her sister and brother-in-law. She advances several arguments: (1) that the court did not follow the appropriate statutory provisions as to neglect and did not properly consider her extreme poverty in its determination; (2) that the Cabinet did not carry its burden of proof for an award of

permanent custody; (3) that services available by way of certain administrative regulations were not provided to her; and (4) that the permanent custody award was not supported by statutory law and was not in the best interest of the children.

In considering this appeal, we emphasize that it is taken from the denial of a CR 60.02 motion. This procedural fact alone is dispositive of the issues presented. CR 60.02 gives courts the authority to relieve a party from a final judgment, order, or proceeding if any of the following grounds is met:

(a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

Motions brought under CR 60.02 are addressed to the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless the trial judge abused his discretion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

It is a well-established rule that a movant must make a substantial showing to be entitled to the extraordinary relief offered by CR 60.02. *Ringo v. Commonwealth*,

455 S.W.2d 49, 50 (Ky. 1970); *see also Wilson v. Commonwealth*, 403 S.W.2d 710, 712 (Ky. 1966). Of particular relevance here, CR 60.02 is not a remedy to be invoked as a supplement to an appeal. Rather, it is only available to raise allegations of error that could not have reasonably been raised in a direct appeal or in any other applicable proceeding. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997); *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983); *Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908, 910 (Ky. 1967). The relief available in a CR 60.02 proceeding:

should be related to those instances where the matters do not appear on the face of the record, were not available by appeal or otherwise, and were discovered after rendition of the judgment without fault of the party seeking relief.

Board of Trustees of Policemen's & Firemen's Retirement Fund of the City of Lexington v. Nuckolls, 507 S.W.2d 183, 186 (Ky. 1974) (Emphasis added).

All of the arguments raised by B.W. in this appeal address and attack the substantive grounds for the decision of the family court to grant permanent custody of her children to T.S. and S.S. Accordingly, they were the proper subject of a direct appeal from the court's original judgment. B.W. did not file a direct appeal, however, and her CR 60.02 motion did not toll or otherwise affect the running of the time for an appeal from the judgment. *Brozowski v. Johnson*, 179 S.W.3d 261, 263 (Ky.App. 2005); CR 73.02(1)(e). We note that "[a] party may not resort to CR 60.02 to gain an additional extension of time to prevent the application of CR 73.02." *United Bonding Ins. Co., Don Rigazio, Agent v. Commonwealth*, 461 S.W.2d 535, 536 (Ky. 1970). Consequently, the

time for challenging the substantive merits of the judgment by direct appeal has long since passed. *See* CR 73.02(1)(a) & (e).

B.W. has not explained why she failed to pursue a direct appeal of the family court’s decision to award permanent custody as it did, and she has cited no authority or circumstances to demonstrate how the provisions of CR 60.02 might be applicable to her case. Accordingly, we conclude that the family court did not abuse its discretion in rejecting her CR 60.02 motion for relief.

The decision of the Jefferson Family Court is AFFIRMED.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES:

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BRIEF AND ORAL ARGUMENT FOR APPELLEES T.S. AND S.S.:

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BRIEF AND ORAL ARGUMENT OF GUARDIAN AD LITEM ON BEHALF OF CHILDREN:

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