

RENDERED: NOVEMBER 9, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001939-MR

PERRY CECIL

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 96-CI-01299

NAOMI CECIL (NOW JONES)

APPELLEE

OPINION AND ORDER DISMISSING APPEAL

** ** * ** * ** *

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI¹ SENIOR JUDGE.

STUMBO, JUDGE: Perry Cecil appeals from an order of the Hardin Family Court awarding joint custody of the parties' two children and designating Perry's former wife, Naomi Cecil, as primary custodian. He also appeals from a subsequent order overruling his motion to vacate the custody order. Perry contends that he did not receive notice of a June 5, 2006, hearing on Naomi's motion to amend custody, and that the court's findings arising from the hearing were clearly erroneous and unsupported by the record. For the reasons stated below, we dismiss the instant appeal.

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

Naomi and Perry were married on June 7, 1990, in Breckinridge County, Kentucky. The marriage produced two children, namely Anthony Cecil who was born in 1992, and Austen Cecil who was born in 1996. On August 28, 1996, Naomi filed a petition with the Hardin Circuit Court seeking to dissolve the marriage.

Naomi and Perry entered into a separation agreement on May 30, 1997. It provided in relevant part that they would share joint custody of the children, with Naomi having primary physical custody. The agreement was incorporated into a decree of dissolution rendered on August 5, 1997. An amended separation agreement was entered into on April 22, 1999, which established that the parties would have alternating primary physical custody on a weekly basis. The amended separation agreement was incorporated into the decree of dissolution by way of an order rendered on April 26, 1999.

On June 8, 2005, Naomi filed a motion to modify the alternating primary physical custody agreement. As a basis for the motion, Naomi alleged that it was no longer in the children's best interest to be subjected to alternating physical custody. Specifically, she maintained that the children, especially Anthony, were angry and sad when they had to return to Perry's residence; that Anthony had threatened to kill a classmate; and that Perry told Naomi to "beat the hell out of him [Anthony]" if he ever did it again. She further alleged that Perry did not celebrate the children's birthdays or buy them birthday presents; that the boys were often tardy to school or had unexcused

absences when residing with Perry; that Perry failed to allow the boys to fully participate in sports and other activities, and that he neglected the boys' medical care.

A hearing on the motion was scheduled, and subsequently continued by agreement of the parties until December 1, 2005. Prior to the December hearing date, Perry's counsel tendered a motion to withdraw his representation of Perry and have counsel's name stricken from the record "because of a breakdown in communications with the Respondent [Perry]." For reasons not addressed by the record, the hearing on Naomi's motion to amend custody was not conducted until June 5, 2006. On that date, the circuit court heard proof from Naomi. Neither Perry, nor his counsel, were present. The court rendered an order on the hearing date sustaining counsel's motion to withdraw. On June 14, 2006, it rendered an order which forms the basis of the instant appeal. The court sustained Naomi's motion and ordered that the children would reside at all times with Naomi, except as provided for Perry's reasonable visitation.

On July 3, 2006, Perry filed a motion to alter, amend or vacate the "June 5, 2006" order. The only order rendered on June 5, 2006, was that which sustained the motion of Perry's counsel to withdraw. In actuality, Perry's July 3, 2006, motion apparently sought to alter, amend or vacate the June 14, 2006, order amending custody. In support of the motion, Perry tendered an affidavit stating that he was not aware of the June 5, 2006, hearing. He claimed that had he been aware of the hearing, he would have appeared in person with new counsel, or would have appeared without counsel and sought a continuance. The affidavit further stated that he had not missed a hearing since

Naomi initiated the action in 1999, and that he was advised by the clerk's office on May 23, 2006, and June 5, 2006, by a clerk's office employee named "Caroline" that no hearing was on the docket. In sum, Perry blamed his failure to attend the hearing on counsel's withdrawal from the case and failure to inform him of the hearing date.

On August 17, 2006, the circuit court rendered an order denying the motion to alter, amend or vacate. Perry filed a notice of appeal from the June 14, 2006, and August 17, 2006, orders on September 15, 2006.

Perry now argues that the circuit court committed reversible error in 1) rendering the June 14, 2006, order awarding Naomi primary physical custody; and 2) failing to subsequently alter, amend or vacate the order based on Perry's excusable neglect in failing to attend the hearing. His argument focuses on the fact that his original counsel, Barry Birdwhistell, moved to withdraw as Perry's counsel several months in advance of the June 5, 2006, hearing, and failed to inform Perry of the hearing date. He also contends that irrespective of this, the June 14, 2006, order was clearly erroneous as it was based on less than two minutes of discussion, and failed to delineate the court's findings as to each factor it is required to consider under KRS 403.340(3) and KRS 403.270(2).

In response, Naomi argues that Perry's motion to alter, amend or vacate the June 14, 2006, order was not timely filed within 10 days as required by the civil rules. She also maintains that the instant appeal was not timely filed within 30 days.

Having closely examined the written arguments and the law, we find no error arising from the June 14, 2006, and August 17, 2006, orders. We must first note that Perry was required to prosecute an appeal from the June 14, 2006, order, if at all, within 30 days from the date upon which the order was served as provided for under CR 73.02. Perry filed his Notice of Appeal well beyond the 30-day period on September 16, 2006. The timely filing of a Notice of Appeal is the means by which jurisdiction is transferred from the circuit court to the Court of Appeals. *Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918 (Ky.App. 1998). The corollary is that we may not exercise jurisdiction absent such a timely filing. *Id.* Since Perry did not appeal in a timely manner, we are without jurisdiction to reach the merits of his underlying claim of error.

Perry contends that the filing of his motion to alter, amend or vacate - which was filed 19 days after the June 14, 2006, order - operates to stay the running of the 30-day period during which a Notice of Appeal must be filed. In an effort to circumvent the rule set forth in CR 59.05 that a motion to alter, amend or vacate must be filed within 10 days of the judgment, Perry maintains that the motion was brought under the “excusable neglect” provision of CR 60.02. This would have allowed him to file the motion at any time within one year. CR 60.02. The record refutes this contention. Perry’s July 3, 2006, motion expressly used the words “alter, amend or vacate”, as did the order denying it. The motion made no reference to CR 60.02, nor does Perry cite to anything in the record indicating that the motion was argued or adjudicated under CR 60.02. As such, the motion was properly characterized by the circuit court as a

motion to alter, amend or vacate, and it should have been filed - if at all - within 10 days as provided for by CR 59.05.

Having determined that the Notice of Appeal was not filed within 30 days, nor that the filing of the July 3, 2006, motion to alter, amend or vacate stayed the running of that 30-day period, jurisdiction over the matter never vested with this Court. As such, we must dismiss the appeal.

For the foregoing reasons, we dismiss Perry's appeal from the June 14, 2006, and August 17, 2006, orders of the Hardin Circuit Court.

ALL CONCUR.

DATE

JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Robert C. Bishop
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Douglas E. Miller
Radcliff, Kentucky