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DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:
JANUARY 14, 2009
(FILE NO. 2008-SC-0557-DE)

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001888-ME

REBECCA BEARDEN

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 05-CI-504729

GEORGE MAULDIN AND
JOYCE MAULDIN

APPELLEES

OPINION REVERSING IN PART,
VACATING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: LAMBERT AND MOORE, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, JUDGE: Rebecca Bearden appeals from an order denying her motion to set aside the Jefferson Circuit Court's judgment awarding permanent custody of her child, Olivia Mauldin, to Joyce and George Mauldin, Olivia's paternal grandparents. Rebecca further appeals from an order denying her motion for visitation, where the court found that it lacked jurisdiction to consider visitation. After careful review, we reverse in part, vacate in part, and remand for proceedings consistent with this opinion.

Rebecca gave birth to Olivia Mauldin on December 21, 2005. At that time she was married to Olivia's father, Christopher Mauldin. On December 29, 2005, the Mauldins filed a petition for custody and an emergency motion for temporary custody of Olivia. The Mauldins sought custody upon the discovery that both Rebecca and Christopher were alcoholics who were regularly abusing alcohol and upon realizing that Rebecca consumed alcohol throughout her pregnancy and was continuing to abuse alcohol while breastfeeding Olivia. The Mauldins also believed that the relationship between Rebecca and Christopher was fraught with domestic violence, with physical acts of violence being perpetrated by both Rebecca and Christopher. The Mauldins based their motion on a police run to Rebecca's and Christopher's home, wherein the house was found unsuitable for a child. The Mauldins further observed broken glass, cigarette butts, and alcohol bottles on the floor of the home.

On December 29, 2005, the court entered an order granting temporary custody of Olivia to the Mauldins. The court also referred the matter to the Cabinet for Health and Family Services for investigation. Following the trial court's referral, the Cabinet for Health and Family Services filed a juvenile dependency, neglect and abuse petition on January 3, 2006. This action was transferred to the Jefferson Family Court so that both the custody action and the dependency action would be heard by the same judge in the same division. On January 4, 2006, a hearing was held in which both Rebecca and Christopher appeared drunk and were taken into custody. That same day, the trial court awarded temporary custody to the Mauldins in the custody action and reaffirmed that decision in the dependency action.

After further investigation by the Cabinet for Health and Family Services, the dependency action was remanded from the court's docket on May 10, 2006, with the entry of an order that Olivia was to remain in the temporary custody of the Mauldins subject only to Rebecca and Christopher having supervised visitation. Rebecca and Christopher were ordered to participate in counseling, complete domestic violence training, complete chemical dependency treatment, and submit to random drug testing.

On January 11, 2006, the Mauldins filed an amended petition for custody seeking permanent custody of Olivia. Christopher was served on April 4, 2006, and again on May 31, 2006. Rebecca was served on April 4, 2006, and May 31, 2006. Neither filed a response, and on June 22, 2006, the Mauldins filed a

motion asking the court to enter a default judgment granting them permanent custody of Olivia. Neither Rebecca nor Christopher appeared at the hearing or filed anything to object to the entry of the order granting permanent custody of Olivia to the Mauldins. On August 18, 2006, the trial court entered an order granting the Mauldins permanent custody. On December 6, 2006, the Mauldins initiated proceedings in Alabama, their home state, to formally adopt Olivia. Those proceedings are still pending.

On April 3, 2007, Rebecca filed a pro se motion in both the custody and dependency actions seeking to regain custody of Olivia. A subsequent motion was filed by counsel on Rebecca's behalf, which sought to set aside the default custody decree entered against her on August 18, 2006, pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(d) and (f). In support of her motion, Rebecca filed affidavits signed by herself, Christopher, and by her parents, Dorothy and Robert Bearden.

Christopher's affidavit indicated that he physically abused Rebecca throughout the course of their relationship, including the period in which the custody action was pending. His affidavit further indicated that he told her if she intervened in the custody case, she would suffer further bodily harm, including death. Christopher also stated that he had access to the only vehicle and telephone and that he prevented Rebecca from using either during this period. Further, Christopher explained that his parents, the Mauldins, were aware of this violence and that they bailed him out of child support arrearages and gave him additional

money to encourage him to sign the custody papers. Finally, he stated that he and his parents worked together to prevent Rebecca from having any type of defense, from filing a response, or from protecting herself in any way during the custody case.

Rebecca's affidavit admitted that both she and Christopher were alcoholics during the time period at issue and that Christopher was also abusing drugs. She further stated that she was subjected to regular physical abuse by Christopher, and that she was so bruised during Olivia's birth that authorities were notified. This violence apparently went on until the couple separated in 2006, and the marriage was subsequently dissolved. Rebecca additionally asserted in her affidavit that, at the time of signing it, she was clean and sober and was actively seeking treatment for alcoholism and domestic violence. Finally, Rebecca stated that Christopher made it clear to her that if she attempted to go to court to do anything, he would inflict bodily harm on her and that he threatened to kill her if she participated.

On July 27, 2007, the parties appeared before the circuit court for a hearing on Rebecca's CR 60.02 motion. At the hearing, the court denied Rebecca an evidentiary hearing on the merits of her motion. On August 2, 2007, the Jefferson Circuit Court issued an order finding that Rebecca failed to allege fraud or other improper conduct by the Mauldins and had not documented collusion occurring between Christopher and the Mauldins to prevent her from attending or participating in the custody proceedings. The Court found that there was no basis

pursuant to CR 60.02 to set aside the August 18, 2006, judgment granting permanent custody to the Mauldins.

Following this order, Rebecca filed a motion for visitation and an additional motion that the court alter, amend, or vacate its order denying her relief under CR 60.02. Rebecca reaffirmed that Christopher's affidavit stated that both he and the Mauldins worked together in preventing her from participating in any way in the custody proceedings. In an order issued August 31, 2007, the court denied Rebecca's motion to alter, amend or vacate, but stated no grounds for the denial. The court declined to exercise jurisdiction concerning the visitation issue, finding that Kentucky was no longer the home state of the child. This appeal followed.

Rebecca first argues that the trial court improperly denied her 60.02 motion without an evidentiary hearing. CR 60.02 provides in pertinent part:

[o]n 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 . . . (d) fraud affecting the proceedings, other than perjury or falsified evidence . . . or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time

“Any action under CR 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse.” *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co.*

v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000). More pertinent to the case at hand, a 60.02 movant is entitled to an evidentiary hearing if “[she] [] affirmatively allege[s] facts, which if true, justify vacating the judgment and further allege[s] special circumstances that justify 60.02 relief.” *Gross v. Com.*, 648 S.W.2d 853, 856 (Ky. 1983). Therefore, the question before us is whether the trial court abused its discretion in denying Rebecca an evidentiary hearing.

Rebecca's 60.02 motion was accompanied by extensive affidavits signed by Rebecca and Christopher, which both indicated that Christopher worked with his parents to prevent Rebecca from appearing at the custody proceedings and presenting evidence on the custody issue. The affidavits further stated that Christopher in fact threatened Rebecca with death if she got involved in the proceeding. Christopher directly admitted that his parents knew of his threats and that they were helping him out monetarily in exchange for his cooperation and lack of participation in the custody proceedings. The court's order denying Rebecca's motion stated, however, that she had not alleged any fraud or other improper conduct by the Mauldins nor had she alleged that there was any collaboration between Christopher and his parents to prevent her from objecting to permanent custody. The affidavits, however, directly contradict the trial court's determination. The contents of the affidavits are clear examples of Rebecca's allegations of fraud on the proceedings and collusion on the part of Christopher and the Mauldins. More to the point, they are allegations of facts, which if true, would justify vacating the judgment under CR 60.02(f) and possibly (d).

Moreover, this Court held in *Jago v. Special Needs Home Health Care*, 190 S.W.3d 352 (Ky.App. 2006), that the trial court should have conducted an evidentiary hearing to determine whether actual authority to enter into a settlement agreement existed between an attorney and his client. The opinion stated that:

[a] party making such a serious allegation [as an attorney violating his duty to a client] in a motion for relief from a judgment ought to be afforded every opportunity to present his case and cross-examine his former counsel, so that the court may have the opportunity to judge the credibility of both parties to decide the matter. Affidavits can be a useful tool in the service of judicial economy, but on such a critical matter they are simply insufficient to form the basis of a decision.

Id. at 354. We find it counterintuitive that alleged fraud and collusion involving the custody of a child would be any less serious an allegation than a violation of an attorney's duty to his client. Therefore, we find that the trial court should have held an evidentiary hearing to allow Rebecca to present her claims through testimony rather than the court basing its decision on the affidavits presented by Rebecca. Accordingly, we vacate the order denying relief on Rebecca's 60.02 motion and instruct the court to conduct a full evidentiary hearing on the matter.

Rebecca additionally argues that the court improperly found that it lacked jurisdiction to modify her visitation rights. The Mauldins argue that the court properly declined to exercise jurisdiction over the issue of modification of Rebecca's visitation rights pursuant to KRS 403.824. We find that the court had jurisdiction to modify the visitation agreement.

In its order dated August 31, 2007, the court stated that with regard to the motion for visitation, it would decline to exercise jurisdiction, given that Kentucky was no longer the home state of the child. The court explained that the parties were well aware that a petition for adoption was pending in Alabama and that the court would defer to the Alabama court. The court, however, noted that Rebecca was free to pursue visitation in the abuse action, to the extent that visitation had already been granted in that action.

KRS 403.824 confers exclusive and continuing jurisdiction on the Kentucky court that made the initial child custody determination only until:

(a) [a] court of this state determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) [a] court of this state or a court of another state determines that the child, the child's parents, and any other person acting as a parent do not presently reside in this state.

KRS 403.824(1). At the time Rebecca's motion was filed, an Alabama court had already assumed jurisdiction over the adoption proceedings. Thus, under the apparent terms of KRS 403.824, a court of another state had determined that the child and the child's acting parents did not presently reside in this state and thus that Kentucky was not the home state of the child. However, the trial court's ruling is not in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as adopted in Kentucky.

In *Wallace v. Wallace*, 224 S.W.3d 587, 590 (Ky.App. 2007), this court held that under KRS 403.824, “the state having original jurisdiction over custody maintains exclusive continuing jurisdiction though the child has acquired a new home state if the general requirement of the substantial connection jurisdictional provisions are met.” In the instant case, Kentucky had original jurisdiction over custody. Despite the fact that Olivia has acquired a new home state, Kentucky is still the home state of Olivia’s mother, Rebecca, who is alleging that the Mauldin’s obtained custody by fraud and then transported Olivia to their home state, which subsequently asserted jurisdiction. We believe the trial court’s refusal to exercise jurisdiction, while understood, is misaligned with the purposes of the UCCJEA as adopted in Kentucky.

In *Wallace*, this court explored the UCCJEA’s attempt to conform with the Parental Kidnapping Prevention Act (PKPA), the federal law on the issue of jurisdiction. The court noted that originally in the Uniform Child Custody Jurisdiction Act (UCCJA), home state jurisdiction was at the top of the jurisdictional hierarchy, but that the PKPA adopted the concept of continuing jurisdiction and provided that once a state had entered or modified a child custody determination in compliance with the statute’s jurisdictional requirements, its jurisdiction would “continue [] as long as . . . such State remains the resident of the child or of any contestant.” 28 U.S.C.A. 1738A(d). It follows, then that because the UCCJEA was modeled after the PKPA, continuing jurisdiction should trump home state jurisdiction. Accordingly, despite the Alabama court’s finding

that Kentucky was no longer the home state of the child, Rebecca Bearden, a contestant, still resided in Kentucky and Kentucky was the initial state to make the custody determination. We find that Kentucky therefore has continuing jurisdiction under the UCCJEA to determine visitation.

Furthermore, the trial court's ruling would indicate that anytime a Kentucky couple divorced and one of them was awarded custody and then moved out of state with the child, the future custody and visitation disputes would have to be litigated in the other state. This is not in unison with the uniform act, which seeks to support the idea of continuing jurisdiction.

Accordingly, we vacate and remand the August 2, 2007, order of the court denying the CR 60.02 motion with instruction that the court conduct an evidentiary hearing, and we reverse the portion of the court's August 31, 2007, order indicating that it does not have exclusive and continuing jurisdiction and remand for proceedings consistent with Rebecca's motion for visitation.

ALL CONCUR.

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