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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002205-ME

JAYLYNNE KEIFER — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 08-CI-00272

CORY KEIFER — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

COMBS, JUDGE: This is an expedited case involving a visitation order of the Hardin Circuit Court concerning the issue of Jaylynne Keifer's visitation with her children. After our review, we reverse and remand.

Cory and Jaylynne Keifer were married in 2002. They have two minor children. Cory filed a petition for divorce in 2008. After a final hearing in

October 2008, the court entered its findings on February 17, 2009. At that time, it awarded joint custody to both Cory and Jaylynne without designating either one as the primary residential parent. However, the order provided that Cory would have visitation consistent with Hardin Family Court Rule (HFCR) 702. It also provided that if either parent relocated, he or she should either tender an agreed order or file a motion for mediation or a hearing to modify parenting times.

In July 2009, Jaylynne received orders from the U.S. Army relocating her to Fort Hood, Texas. That same month, she filed a motion with the court to modify Cory's parenting times. As a result, the family court entered an order that provided as follows:

> [T]he parties shall continue to have joint custody of their two minor children, with neither party being designated as the primary residential parent. Given [Jaylynne's] relocation to Ft. Hood, Texas, absent an agreement between the parties, she shall be entitled to parenting times which are consistent with the visitation schedule under HFCR 702.

It is from this order that Jaylynne appeals.

Preliminarily, we first address Cory's contention that Jaylynne's appeal should be dismissed because he was not served with the notice of appeal. Kentucky Rule[s] of Civil Procedure (CR) 73.03(1) requires a notice of appeal to be "served upon all opposing counsel, or parties, if unrepresented, at their last known address." In this case, the text of the notice of appeal recites the name and address of Cory's counsel. However, the certificate of service shows that it was

sent instead to Jaylynne's former counsel. Cory argues that because his counsel was not served, this appeal should be dismissed.

Cory is correct that CR 73.02(2) mandates that failure to file a notice of appeal in timely fashion requires dismissal of the appeal. In this case, the notice was timely filed; however, the service was defective. CR 73.02(2) also provides that "[f]ailure to comply with other rules relating to appeals . . . does not affect the validity of the appeal[.]" Our Supreme Court has clarified the rule as it pertains to notices of appeal, "[e]xcepting for tardy appeals and the naming of indispensable parties, we follow a rule of substantial compliance." *Johnson v. Smith*, 885 S.W.2d 944, 950 (Ky. 1994).

The purpose of pleadings is to provide fair notice to the opposite party. *Blackburn v. Blackburn*, 810 S.W.2d 55, 56 (Ky. 1991). When the conduct of the parties demonstrates that actual notice has been received, the objective has been met so as to amount to substantial compliance. *Id*. Although Cory's counsel was not immediately served with the notice of appeal, the record shows that his counsel was nonetheless aware of the appeal. His counsel had communicated with Jaylynne's counsel concerning the appeal. Both the certifications of the record and the order expediting the appeal were received by Cory's counsel. Cory and Jaylynne themselves talked about the appeal. There is no doubt that Cory and his counsel were aware of the appeal. This court properly denied Cory's motion to dismiss during the pendency of this appeal, and we will not revisit this issue.

Jaylynne's substantive argument is that the trial court erred when it did not allow her to relocate to Texas with the children. The court has broad discretion in custody cases, and we may only reverse if its decisions are clearly erroneous or constitute an abuse of discretion. *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

The original divorce decree entered in February 2009 anticipated that Jaylynne would be relocated by the Army. When Jaylynne received her relocation orders from the Army, she acted pursuant to the order and filed a motion with the trial court requesting a hearing to modify Cory's parenting time. Cory did not file any motions. After the hearing, the court entered an order that effectively shifted the children's residence to Cory and provided Jaylynne with visitation according to a standardized schedule. It did not amend its original finding that the parties have joint custody with neither one designated as the primary residential parent.

In cases involving joint custody where one parent desires to relocate without changing the custody status, our Supreme Court has held that the trial court should apply Kentucky Revised Statute(s) (KRS) 403.320 to determine whether the relocation is appropriate. *Pennington v. Marcum*, 266 S.W.3d 759, 770 (Ky. 2008). KRS 403.320(3) provides that "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]" KRS 403.270(2) sets forth a list of factors for the court to use in determining the best interests of the child for custody purposes. They include:

the wishes of the parents;
the wishes of the child;
the interaction and interrelationship of the child with his parents, siblings, and any other person who may significantly affect his best interests;
the child's adjustment to his home, school, and community;
the mental and physical health of all individuals involved; and
information, records, and evidence of domestic violence.

In the case before us, the court merely issued the order and referred to the findings of its original decree. It did not apply any of the factors set forth in KRS 403.270(2). In its original decree incorporated by reference in the order now on appeal, the court had made findings as to the best interests of the children and reached the opposite result; *i.e.,* that the children were to reside primarily with Jaylynne while Cory had visitation under the standardized schedule. In the order now before us, the court did not provide any findings to support the opposite result. Nor did it indicate what circumstances – if any – had changed other than Jaylynne's relocation, which was a contingency that the original order had specifically contemplated and addressed.

Under the circumstances of this case, we are persuaded that the failure to apply the statutory factors to determine the best interests of the children constituted an abuse of discretion. Accordingly, we remand this matter for further proceedings consistent with this opinion.

ALL CONCUR.

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