

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001158-ME
&
NO. 2010-CA-002102-ME

THERESA M. BALLARD-WILLOUGHBY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, III, JUDGE
ACTION NO. 08-CI-01085

ANTHONY W. WILLOUGHBY

APPELLEE

OPINION
AFFIRMING

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BEFORE: COMBS AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Theresa M. Ballard-Willoughby, pro se, appeals from orders of the Franklin Circuit Court related to the custody and child support of her minor child. In case no. 2010-CA-001158-ME, she argues the trial court erred by: (1) granting the paternal grandparents visitation without a hearing; (2) assuming grandparent visitation was in the child's best interest; (3) allowing the introduction

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

of a grandparent evaluation into evidence; (4) requiring her to pay the costs of the child's evaluation; and (5) failing to follow the child support guidelines. In case no. 2010-CA-002102-ME, she argues: (1) the trial court violated various provisions of the Code of Judicial Conduct; (2) the court failed to correct an alleged discrepancy between its notes and the actual order; (3) the trial court's order violated the Family Court Rules of Procedure and Practice; (4) the order violated her constitutional rights; and (5) the trial court was without jurisdiction to enter the order because her appeal from the decree was pending. We affirm the orders of the trial court in their entirety.

Theresa and Anthony Willoughby married in 2004. There is one minor child of the marriage. Theresa filed a petition for dissolution of marriage in the Franklin Family Court in 2008. The parties filed various motions seeking custody of the child. After a hearing, the court ordered that the parties have temporary joint custody with equal timesharing and no primary residence. On February 23, 2009, the parties filed a separation and property settlement agreement, which disposed of all issues relating to their marital and nonmarital property. The court held a hearing on June 9, 2009, to determine the remaining custody, timesharing, and child support issues. A custodial evaluation was conducted by Dr. Paul Ebben at Theresa's request and filed with the court. The

final hearing was rescheduled several times and was ultimately conducted on December 7, 2009.

At the hearing, the court heard the testimony of the parties and their parents. A second hearing was scheduled to allow the court to hear additional testimony from Dr. Ebben. On April 26, 2010, the court entered findings of fact, conclusions of law, and a decree of dissolution of marriage. The court ordered that the parties would have joint custody with equal timesharing and that neither party would pay child support. The court further found that both the maternal and paternal grandparents were appropriate caregivers and would be permitted upon the election of either party to provide childcare during the workday while the child is in that party's custody.

On May 6, 2010, Theresa filed a motion to alter, amend, or vacate the decree, which the trial court denied. This appeal followed. While the appeal was pending, Anthony filed a motion to hold Theresa in contempt for failing to abide by the court's orders regarding timesharing. The court held a hearing on September 20, 2010. Theresa failed to appear. The court entered an order prohibiting Theresa from communicating with the child while she is in the care of the paternal grandparents and further prohibited her from interfering during Anthony's timesharing periods. Theresa filed a motion to alter, amend, or vacate

the order, which the trial court denied. The appeal in case no. 2010-CA-002102-ME followed.

Case No. 2010-CA-001158-ME

Theresa first argues that the trial court erred by granting the paternal grandparents visitation without a hearing and that the court violated her constitutional rights by allowing the paternal grandparents visitation.

Theresa conflates the legal concept of visitation rights with simple childcare. The court did not grant either the maternal or parental grandparents visitation rights under KRS 405.021. The court simply found that the grandparents were permitted to provide childcare upon the election of either party while the child is in their care. There was no error.

Theresa next argues that the trial court erred by assuming that visitation with the paternal grandparents was in the child's best interests. Again, as the court did not grant the paternal grandparents visitation rights, there was no error.

Theresa next argues that the trial court erred by allowing the introduction of a grandparent evaluation performed by Dr. Ebben into evidence. She cites no statute, case law, or other authority in support of this argument. We discern no error.

Theresa next argues that the trial court erred by requiring her to pay the cost of the child's evaluation by Dr. Ebben. The allocation of costs under KRS 403.220 is left entirely to the discretion of the trial court. *Wilhoit v. Wilhoit*, 521 S.W.2d 512 (Ky. 1975). Theresa herself requested the evaluation of the child. She has not demonstrated any abuse of discretion.

Finally, Theresa argues that the trial court erred by deviating from the child support guidelines by failing to order either party to pay child support. KRS 403.211(3)(g) states:

A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:

(g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

The trial court specifically found that application of the child support guidelines was inappropriate because the parties share joint custody and equal timesharing. Theresa has not cited any case law in support of her position nor has she demonstrated an abuse of discretion.

Case No. 2010-CA-002102-ME

Theresa first argues that the trial judge violated Canon 2, Rule 2.5 and Canon 2, Rule 2.6 of the American Bar Association (ABA) Model Code of Judicial

Conduct. The ABA Model Code was not adopted by Kentucky. The Kentucky Code of Judicial Conduct is contained in Supreme Court Rule (SCR) 4.300.

Theresa specifically argues that the trial judge did not exercise due diligence in preparing for the contempt hearing and failed to ensure her right to be heard.

SCR 4.000 states:

This Part IV of these rules applies to all proceedings before the Judicial Conduct Commission involving the discipline, retirement or removal of justices of the Supreme Court and judges of the Court of Appeals, circuit court and district court, pursuant to Section 121 of the Constitution of Kentucky, as well as the disciplining of lawyers seeking judicial office who during their candidacy shall be deemed subject to the jurisdiction and discipline of the Commission.

Further, the Preamble of the Code of Judicial Conduct states:

[t]he Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

Therefore, Theresa's claims that the trial judge did not exercise due diligence and failed to ensure her right to be heard are not cognizable in this context.

Next, Theresa argues that the trial court erred by failing to correct an alleged discrepancy between the trial court's notes and the actual order entered, which prohibited her from contacting the child while in the care of Anthony's

parents. She cites no authority in support of her position. This Court has said frequently that the court speaks only by its written record. *Holland v. Holland*, 290 S.W.3d 671, 675 (Ky.App. 2009). We discern no error.

Theresa next argues that the trial court's order violated the Family Court Rules of Procedure and Practice. She cites no authority in support of this contention nor does she demonstrate its application to the circumstances of this case. Moreover, this issue was not brought to the attention of the trial court in her motion to alter, amend or vacate the September 20, 2010 order. Therefore, we will not address it.

Theresa next argues her constitutional rights were violated by the trial court's order prohibiting her from contacting the child while in the care of the paternal grandparents or otherwise interfering with Anthony's timesharing periods. Trial courts have the inherent authority to enforce its own orders. *Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky. 1970). It is clear that the September 20, 2010 order did not circumscribe Theresa's rights or modify the original decree. The court simply entered an order to prevent Theresa's continuing interference with Anthony's timesharing period and her failure to abide by the terms of the decree. There was no abuse of discretion.

Theresa next argues that the trial court had no jurisdiction to enter the September 20, 2010 order because her appeal of the decree was pending. "As a

general rule, except with respect to issues of custody and child support in a domestic relations case, the filing of a notice of appeal divests the trial court of jurisdiction to rule on any issues while the appeal is pending.” *Young v. Richardson*, 267 S.W.3d 690, 695 (Ky.App. 2008). The September 20, 2010 order dealt with child custody issues. Therefore, the trial court retained jurisdiction.

Finally, Theresa again argues that the trial court granted grandparent visitation rights in violation of KRS 405.021. Theresa points to a strained reading of the trial court’s order in support of her claim. We have already rejected this argument above. The trial court did not award the grandparents visitation rights. The court simply ruled that they were appropriate caretakers during Anthony’s visitation periods.

Accordingly, the orders of the Franklin Circuit Court are affirmed in their entirety.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Theresa M. Willoughby, pro se
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BRIEF FOR APPELLEE:

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