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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001401-MR

MARTHA BOGGS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 01-CI-02027

COMMONWEALTH OF KENTUCKY, EX REL JOHN D. BOGGS; JOHN D. BOGGS; AND CHRISTOPHER J. MEHLING, JUDGE, KENTON FAMILY COURT, DIV. II — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Martha Boggs appeals an order of the Kenton Family Court overruling her motion to vacate a previous order of child support. Finding

the Commonwealth did not properly intervene in the action, we conclude the motion to set child support was ineffectual, and we vacate and remand.

I. Facts and Procedure

John and Martha Boggs were married November 22, 1997, and a child was born to the marriage on June 24, 1998. Martha filed a petition for dissolution of the marriage on September 24, 2001, and later that year the parties entered into a Property Settlement Agreement; attached thereto was an agreement entitled Joint Custody Plan, by which they agreed to share joint custody of the child. Timesharing was split approximately equally. The parties also agreed in that document that neither would pay child support. The decree of divorce, entered February 4, 2002, adopted the portion of the separation agreement which addressed property division but reserved issues of visitation and custody for a future hearing.

The parties negotiated and ultimately arrived at an Amended Joint Custody Plan which provided for joint custody of the child, designated Martha the primary residential parent, and granted John visitation. While this agreement did not require John to pay child support *per se*, it did require that he reimburse Mother for one-half of the expenses incurred for the child's childcare and healthcare expenses.[1] The circuit court adopted the Amended Joint Custody Plan and

[1] The wording of this portion of the Amended Joint Custody Plan is unusual in that it states, "Father shall not pay child support in the amount of half of the child's daycare expenses (currently $18.50 per day four days per week). Father shall pay this amount directly to the daycare provider each month." Although the language says John "shall not pay child support in the amount of half of the child's daycare expenses," it appears – and the parties do not dispute on appeal – that the parties intended that John would pay half the daycare expenses.

There was no finding, as required by Kentucky Revised Statute(s) (KRS) 403.211(2)-(3), that following the child support guidelines was unjust or inappropriate, but neither party has challenged this omission.

incorporated it into the decree of dissolution by an order entered September 16, 2002.

In the two years following entry of the Amended Joint Custody Plan, very little action occurred in the case. An agreed order was entered correcting a clerical error in the property settlement agreement. Also, Martha filed a motion which in relevant part: (1) notified the circuit court of the appearance of Sally J. Herald on her behalf;[2] (2) demanded that John be held in contempt for failure to pay one-half of the child's childcare and healthcare expenses and to comply with the Property Settlement Agreement; and (3) requested that John be ordered to pay child support in the amount established in the statutory child support guidelines. Although the motion was noticed for hearing on August 30, 2004, a hearing was never conducted, and the court never ruled on the motion.

Throughout this period, all documents filed with the circuit court were captioned either as "Martha Jeanette Boggs[,] Petitioner and John David Boggs[,] Respondent" or "In re: the marriage of Martha Jeanette Boggs[,] Petitioner and John David Boggs[,] Respondent[.]" The family court's caption has always been, "Boggs, Martha Jeanette vs. Boggs, John David[.]"

Following Martha's 2004 motion, no further action was taken in this case until September 29, 2009, when the Commonwealth filed a motion to set child support. Specifically, in this motion the Kenton County Assistant County Attorney asked that the family court order Martha to pay child support to John and provide

[2] Ashley S. McDavid had previously represented Martha.

health insurance. The Commonwealth represented that the child had been living with John, who had received welfare benefits on the child's behalf. A pretrial conference was noticed for October 27, 2009.[3]

The Commonwealth filed no motion to intervene; instead, the assistant county attorney merely changed the caption to read, "Martha Boggs, Petitioner v. Commonwealth of Kentucky, *ex rel* John D. Boggs, Respondent[.]" The family court made no mention of the Commonwealth's failure to file a motion to intervene.

In the motion to set child support, the assistant county attorney certified that a copy of the motion had been mailed to Martha at 130 Albert Lane, Booneville, Kentucky, 41314. Following an evidentiary hearing on November 9, 2009, at which Martha did not appear, she was ordered to pay $587.37 per month in child support to John, effective October 1, 2009, and to pay 78% of unreimbursed medical and daycare expenses. The family court also ordered Martha to pay $40 per month in arrearage payments.[4]

Martha made no payments, and the Commonwealth filed a motion to hold her in contempt on January 22, 2010. This motion, too, contained a certification that a copy had been mailed to Martha at 130 Albert Lane in Booneville. A hearing was scheduled for April 13, 2010; notice of the hearing was sent to the same address.

[3] The hearing was continued; it was actually conducted on November 9, 2009.
[4] The "arrearage" accrued between the filing of the Commonwealth's motion on September 29, 2009, and entry of the order establishing Martha's child support obligation on November 24, 2009, presumably as authorized by KRS 403.213.

Martha appeared at the April hearing and informed the family court that her current address was 1141 Ann Street, Newport, Kentucky, 41071. Martha also explained that she had resided at a number of different locations over the previous years, including the address in Booneville, and had not received notice of the Cabinet's initial motion to set child support. Essentially, the court discovered, Martha was homeless and had resided with a series of friends and relatives.

A public defender was appointed to represent Martha, and an additional hearing was scheduled.

On June 11, 2010, Martha's attorney filed a motion pursuant to Kentucky Rule(s) of Civil Procedure (CR) 55.02 and CR 60.02, to declare the November 24, 2009 order of child support void. She characterized that order as a default judgment and argued that as such, the movant's attorney was obligated to certify "that no papers have been served on [her] by the party in default." CR 55.01. She additionally argued that the motion to set child support was an initiating document as defined by CR 4.01, and personal service was therefore required. The family court judge was not persuaded and denied the motion. This appeal followed.

II. Discussion

Martha's arguments before this Court are essentially the same as those she presented to the family court; she believes the order of child support should be vacated for a number of reasons: (1) the Commonwealth's motion for child support was an initiating document, and therefore simply mailing the document to her last known address was ineffective according to CR 4.01; (2) even if it was not an

initiating document, notice should have been mailed to Martha's attorney rather than Martha herself, CR 5.02; and (3) the order of child support was actually a default judgment and entry was improper because the assistant county attorney failed to certify that he had received no correspondence on Martha's behalf, CR 55.01.

"Our standard of review of a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion." *Age v. Age*, 340 S.W.3d 88, 94 (Ky. App. 2011) (citing *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959)). We will conclude the family court has abused its discretion only when we find its "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted).

We will not address all of Martha's arguments on appeal because we find the order was void on another basis: because the Commonwealth failed to properly intervene, it was not a party before the family court and had no power to file the motion which led to the order of child support. *See Yocum v. Oney*, 532 S.W.2d 15, 16 (Ky. 1975) (When an order of a trial court is void, the reviewing court may entertain the appeal and reverse or dismiss it.) Therefore, the family court's entry of the order of child support was improper and it should have been vacated.

A. The Commonwealth failed to file a motion to intervene

According to KRS 205.712, the local county attorney is authorized to act on behalf of the Commonwealth's Cabinet for Health and Family Services to secure

child support payments for a dependent child. KRS 205.712(6) ("The local county attorney shall be considered the designee of the cabinet for purposes of administering the program of child support recovery within a county, subject to the option of the county attorney to decline such designation."); *Cabinet for Human Res. v. Houck*, 908 S.W.2d 673, 673 (Ky. App. 1995). Further, the county attorney, on behalf of the Cabinet, "may institute a legal action against an obligor [parent] for the reimbursement of money paid by the [C]abinet for the benefit of the child through the public assistance programs[,]" KRS 205.780, or may bring an action to establish child support for any child. KRS 403.211(1); KRS 205.721(1); KRS 205.765.

In furtherance of this function, the county attorney has a right of intervention in any existing action concerning child support as between the child's parents. *Houck*, 908 S.W.2d at 674 (citing KRS 205.765). Therefore, when a county attorney files a motion to intervene for purposes of securing child support, the motion must be granted. *Id.*

A county attorney is not entitled to participate in such an action, however, until she has filed a motion to intervene. *Berry v. Cabinet for Families & Children ex rel. Howard,* 998 S.W.2d 464, 467 (Ky. 1999) ("The Court of Appeals correctly remanded this matter to the trial court with directions to allow the Cabinet to intervene, provided an intervening complaint is tendered as required by CR 24.03."). This requirement is not a mere formality; rather, it ensures that the parent against whom an order of child support is sought receives notice that a third party,

backed with the authority and resources of the government, has become involved in a dispute concerning matters which are otherwise of a relatively personal nature.

Here, the county attorney failed to submit any application to intervene on behalf of the Cabinet, so the Cabinet was not properly before the court. Its motion to set child support had no effect, and as a result the family court should have entered no order of child support.

B. Service required by CR 24.03

CR 5 is the proper means of service of a motion to intervene. *Berry,* 998 S.W.2d at 467 (citing CR 24.03). According to that rule, the proper means of delivery is by mailing the motion to the party's last known address or, if the party is represented by an attorney, mailing the motion to the attorney. CR 5.02. Despite Martha's arguments to the contrary, personal service as described in CR 4 is not required. Because we have resolved the appeal by other means, we need not address her argument that under CR 5.02 the motion should have been mailed to her most recent attorney of record.

III. Conclusions

Because the Cabinet failed to properly intervene prior to filing its motion for child support, we vacate the order resulting from that motion and remand.

ALL CONCUR.

BRIEF FOR APPELLANT:

Karen Shuff Maurer
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BRIEF FOR APPELLEES:

Stephen J. Elsbernd
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