IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED
November 27, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30411

RELEASED
November 27, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

REBECCA LYNN C.,
Plaintiff Below, Appellant,

V.

MICHAEL JOSEPH B.,
Defendant Below, Appellee.

Appeal from the Circuit Court of Ohio County
Honorable Ronald E. Wilson, Judge
Civil Action No. 88-C-734

AFFIRMED

Submitted: November 6, 2002
Filed: November 27, 2002

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CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICES STARCHER AND ALBRIGHT dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R. C. P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syllabus point 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

2. "Appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." Syllabus point 3, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

3. A final order terminating parental rights completely severs the parent-child relationship, and deprives the court of the authority to impose a post-termination award of child support on the parent whose rights have been terminated. However, termination of parental rights does not deprive a court of jurisdiction to enforce payment of child support that accrued before the obligor's parental rights were terminated.

Davis, Chief Justice:

The appellant and plaintiff below, Rebecca Lynn C.[1] [hereinafter referred to as "Ms. C."], appeals from an order entered July 2, 2001, by the Circuit Court of Ohio County. In that order, the circuit court upheld a prior agreement between Ms. C. and Michael Joseph B. [hereinafter referred to as "Mr. B."], the appellee herein and defendant below, whereby Mr. B. agreed to make a lump sum child support payment to Ms. C. in exchange for his relinquishment of all parental rights in and to the parties' child. On appeal to this Court, Ms. C. contends that a change of circumstances involving the child's health necessitates a modification of the parties' prior agreement and an award of additional child support. Upon a review of the parties' briefs, the record submitted for appellate consideration, and the parties' arguments, we affirm the decision of the Circuit Court of Ohio County.

[1]Mr. B. moved this Court to denominate the parties by their initials in light of the sensitive nature of the facts involved in this proceeding. We granted the motion. Therefore, we adhere to the practice we follow in similar cases wherein it is necessary to protect the privacy of the parties involved. *See, e.g., In re Emily B.*, 208 W. Va. 325, 329 n.1, 540 S.E.2d 542, 546 n.1 (2000); *In re Michael Ray T.*, 206 W. Va. 434, 437 n.1, 525 S.E.2d 315, 318 n.1 (1999); *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 559 n.2, 490 S.E.2d 642, 646 n.2 (1997).

I.

FACTUAL AND PROCEDURAL HISTORY

During its consideration of this matter, the circuit court found the following facts. Ms. C. and Mr. B. had a romantic relationship, which ended shortly before Ms. C. discovered that she was pregnant with the parties' child. Prior to the child's birth, Ms. C. discussed with her attorney an arrangement whereby Mr. B. would pay a set amount of child support and relinquish his parental rights to the child. Although Ms. C.'s counsel subsequently communicated this proposal to counsel for Mr. B., the birth of the parties' child on May 27, 1988, foreclosed further discussions. Thereafter, on October 12, 1988, Ms. C. instituted a paternity action seeking to establish that Mr. B. was the father of Ms. C.'s child and to obtain an award of child support.

Following hearings before the family law master[2] and the receipt of his recommended decision, the circuit court entered orders on January 17, 1990, and April 11, 1990, determining Mr. B. to be the father of Ms. C.'s child; awarding custody to Ms. C.; extending visitation rights to Mr. B.; imposing joint liability on Ms. C. and Mr. B. for the child's medical expenses; and granting child support to Ms. C. By subsequent order entered

[2]The West Virginia Legislature has abolished the office of family law master and replaced it with the judicial office of family court judge. *See* W. Va. Code § 51-2A-1, *et seq.* To maintain consistency with the proceedings underlying this appeal, however, we will continue to use the phrase "family law master."

June 7, 1990, the circuit court modified the amount of its prior award of child support.[3]

In the months after the court's June order, Ms. C. and Mr. B. resumed their earlier negotiations regarding a settlement to involve a lump sum payment of child support by Mr. B., and his relinquishment of all parental rights to the parties' child. As a result of Ms. C. not being represented by counsel at that time, Mr. B.'s attorney declined to assist him with the drafting of such an agreement. By letter dated August 28, 1990 [hereinafter referred to as the "letter agreement"], Mr. B. memorialized the parties' arrangement, in pertinent part, as follows:

> I [Mr. B.] will pay you [Ms. C.] the total amount of Thirty Five Thousand Dollars ($35,000.00) for all past and future support of [the parties' child], as well as all past and future medical expenses for you and [the child]. . . .
>
> . . . .

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[3]Under the June 7 order, the circuit court modified the amount of its prior award of child support as follows:

> 1. That [Mr. B.] is responsible for child support at the rate of Three Hundred Dollars ($300) from and after June 1, 1988.
>
> 2. That [Ms. C.] is granted a decretal judgment in the sum of Seven Thousand Two Hundred Dollars for child support from June 1, 1988 to May 31, 1990.
>
> 3. That [Mr. B.] is responsible to pay the sum of One Thousand Five Hundred Forty-one Dollars Thirty-eight Cents ($1,541.38) for child birth costs as previously ordered by the Family Law Master[.]

> I will relinquish any custodial or parental right to [the child], including any rights of visitation.
>
> I will agree to execute all necessary forms relinquishing any custodial or parental right to [the child] necessary for any future adoption purposes. The form also will provide that [the child's] name can be changed or adopted without further notice.
>
> . . . .
>
> To the extent that this agreement must be approved by Judge Broadwater, I will assume all fees and expenses associated with obtaining the consent.
>
> If this letter contains our complete understanding, please sign your name at the end of this letter and I will attempt to obtain all necessary consents from the court.

Upon Ms. C.'s acquiescence to the terms of the letter agreement, Mr. B. petitioned the circuit court to approve the parties' letter agreement. By order entered November 14, 1990, the circuit court determined the parties' letter agreement to be "fair and reasonable, and in the best interests of the plaintiff [Ms. C.] and [the parties' child], and under the circumstances, ratif[ied] and approve[d] the letter agreement dated August 28, 1990."[4]

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[4]In accordance with this decision, the circuit court made the following pertinent rulings:

> (1) Judgment is hereby entered in favor of [Ms. C.] in the amount of Thirty-Five Thousand Dollars ($35,000.00) representing all past and future support of [the parties' child], as well as all past and future medical expenses for [Ms. C.] . . . and [the child]. . . .

(continued...)

It is undisputed that Mr. B. made the requisite payments to Ms. C. in accordance with the letter agreement and court order. Further, there is no dispute that Mr. B. correspondingly has foregone any attempt to contact, communicate, or otherwise form a relationship with the parties' child.

On October 24, 1994, Ms. C.'s child (and former child of Mr. B.) was diagnosed with Type I, Brittle Juvenile Diabetes. The record indicates the child is generally in good health and is active. The treatment of the child's medical condition requires regular blood sugar testing and insulin shots, as well as quarterly physician's appointments and laboratory

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[4](...continued)

. . . .

> It is further, ORDERED that based upon said Letter Agreement, which is hereby ratified and approved, the petitioner [Mr. B.] be found to have relinquished any and all custodial and parental rights in and to [the parties' child] and that this order shall be sufficient evidence of that relinquishment and may be utilized by the plaintiff [Ms. C.] in any future adoption proceedings as a complete relinquishment by the natural father [Mr. B.] of any parental rights that he may have in [the child]. It is further,
>
> ORDERED that any future proceedings designed to either change the name of [the child] or to adopt [the child] may proceed and occur without any future notice to [Mr. B.].
>
> It is further, ORDERED that the decretal judgment contained in the order of June 7, 1990, be and the same is hereby held for naught and the petitioner released from any obligation thereunder[.]

tests. The approximate cost for such care is $218.85 per month, and is not covered by Ms. C.'s medical insurance for the child. Presumably as a result of these expenses, Ms. C., on February 26, 1996, petitioned the circuit court to set aside its earlier ratification of the parties' letter agreement insofar as it terminated Mr. B.'s obligation to pay child support.[5] Mr. B. responded by filing a motion to dismiss Ms. C.'s petition.

The family law master took evidence on both motions. A decision was filed by the family law master recommending Ms. C.'s motion be denied and Mr. B.'s motion be granted. Ms. C. objected to the family law master's recommendation. The circuit court, by order entered July 2, 2001, adopted the recommendation of the family law master. From this order of the circuit court, Ms. C. appeals to this Court.

II.

STANDARD OF REVIEW

The circuit court characterized Ms. C.'s motion as seeking relief under Rule 60(b) of the West Virginia Rules of Civil Procedure. We have held that "[a] motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R. C. P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syl. pt. 5, *Toler v. Shelton*, 157 W. Va. 778, 204

[5]In her petition, Ms. C. did not challenge, or request modification of, Mr. B.'s relinquishment of his parental rights and the ratification thereof by the circuit court.

S.E.2d 85 (1974). We further held in Syllabus point 3 of *Toler* that "[a]ppeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." 157 W. Va. 778, 204 S.E.2d 85.

Insofar as the circuit court's order denying Ms. C.'s Rule 60(b) motion adopted the recommendation of the family law master, our review is also guided by Syllabus point 1 of *Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264 (1995), where we held, in part, that:

> In reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final . . . order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.

See also Stephen L.H. v. Sherry L.H., 195 W. Va. 384, 393 n.11, 465 S.E.2d 841, 850 n.11 (1995) ("In reviewing the decisions of the circuit court [reviewing a family law master's recommended order], the scope of this Court's review is relatively narrow. Our role is limited to considering errors of law and making certain that the circuit court adhered to its statutory standard of review of factual determinations, that is, whether the family law master's findings are supported by substantial evidence and consistent with the law.").

III.

DISCUSSION

The primary issue presented by the instant appeal is whether Ms. C. established grounds to require Mr. B. to pay additional child support, after his parental rights were terminated. The circuit court's order set out numerous substantive and procedural reasons to deny the relief sought by Ms. C. However, we need address only one of the reasons given by the circuit court in order for us to dispose of this case. The circuit court found that it did not have continuing jurisdiction to award additional child support in this case. We agree.[6]

As a general matter, a circuit court "is vested with continuing jurisdiction to modify its original order regarding child support . . ., as the circumstances of the parties or the welfare of the children may require." *Carter v. Carter*, 198 W. Va. 171, 177 n.10, 479 S.E.2d 681, 687 n.10 (1996). *See* W. Va. Code § 48-11-105 (2001) (Supp. 2002). The decisions of this Court that have recognized a circuit court's continuing jurisdiction to modify a child support order have primarily been in the context of a parent whose parental rights *had not* been

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[6]The circuit court also concluded, and we agree, that Ms. C. was not entitled to relief because she failed to timely file her Rule 60(b)(1) motion. Under the version of Rule 60(b) that was in place when Ms. C. filed her motion, she had only eight months to bring the motion after the final judgment was entered. *Cf.* W. Va. R. Civ. P. 60(b)(1) (extending, under current version of rule, time within which aggrieved party must file motion within one year). In this case, Ms. C. filed her Rule 60(b)(1) motion *six years* after the entry of judgment of which she complains. It goes without saying, then, that Ms. C's untimely motion precludes her from seeking the relief she desires. *See State ex rel. West Virginia Dep't of Health & Human Res. v. Sinclair*, 210 W. Va. 354, 362, 557 S.E.2d 761, 769 (2001) (Davis, J., dissenting) ("We have previously recognized that 'in general, the law ministers to the vigilant, not to those who sleep on their rights.' *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996).").

terminated. We have never squarely addressed the issue of a circuit court's authority to award additional child support after an obligor's parental rights have been terminated.[7] The resolution of this issue, however, was alluded to in dicta by this Court in *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001).

One of the issues in *Edward B.* involved the circuit court's termination of parental rights of a mother and putative father. This Court reversed the lower court's ruling as it related to the mother and remanded the case for further consideration. In doing so, the Court noted in dicta that "[i]f the [mother's] rights are not terminated after consideration on remand, adoption is no longer an issue, and the [mother's] rights to receive support from the natural father would be negated by termination of the father's parental rights." *Edward B.*, 210 W. Va. at 636 n.24, 558 S.E.2d at 635 n.24.

Edward B. alluded to, in dicta, what appears to be the position taken by a majority of courts addressing the issue. That is, a majority of courts have held that "an order terminating parental rights completely severs the parent-child relationship and deprives the court of the authority to make an award of child support." *County of Ventura v. Gonzales* 106

[7]This case concerns only the issue of the termination of parental rights. We do not address the issue of the effect of an adoption of a child as it relates to post-adoption child support. *See* W. Va. Code § 48-22-703(a) (2001) (Repl. Vol. 2001) ("Upon the entry of such order of adoption, any person previously entitled to parental rights . . . shall be divested of all obligations in respect to the said adopted child[.]").

Cal. Rptr. 2d 461, 462 (2001). *See Erwin v. Luna*, 443 So.2d 1242, 1244 (Ala. Civ. App. 1983); *In re Bruce R.*, 662 A.2d 107, 111 (Conn. 1995); *Ponton v. Tabares*, 711 So. 2d 125, 126 (Fla. Ct. App. 1998); *Department of Human Res. v. Ammons*, 426 S.E.2d 901, 902 (Ga. Ct. App. 1993); *Kansas ex rel. Sec'y of Soc. & Rehab. Servs. v. Clear*, 804 P.2d 961, 966 (Kan. 1991); *Mauk v. Mauk*, 873 S.W.2d 213, 216 (Ky. Ct. App. 1994); *Louisiana v. Smith*, 571 So. 2d 746, 748 (La. Ct. App. 1990); *In re Estate of Braa*, 452 N.W.2d 686, 688 (Minn. 1990); *Schleisman v. Schleisman*, 989 S.W.2d 664, 671 (Mo. Ct. App. 1999); *Nevada v. Vine*, 662 P.2d 295, 297-98 (Nev. 1983); *Gabriel v. Gabriel*, 519 N.W.2d 293, 295 (N.D. 1994); *In re Scheehle*, 730 N.E.2d 472, 475 (Ohio Ct. App. 1999); *Kauffman v. Truett*, 771 A.2d 36, 39 (Pa. 2001); *Coffey v. Vasquez*, 350 S.E.2d 396, 398 (S.C. App. 1986); *Estes v. Albers*, 504 N.W.2d 607, 608 (S.D. 1993); *Swate v. Swate*, 72 S.W.3d 763, 771 (Tex. Ct. App. 2002); *Virginia ex rel. Spotsylvania County Dep't of Soc. Servs. v. Fletcher*, 562 S.E.2d 327, 329 (Va. Ct. App. 2002); *In re Dependency of G.C.B.*, 870 P.2d 1037, 1042 n.6 (Wash. Ct. App. 1994). *But see Evink v. Evink*, 542 N.W.2d 328, 331 (Mich. Ct. App. 1996) (concluding that child support obligation continues after parental rights have been terminated); *Rhode Island v. Fritz*, 801 A.2d 679, 685 (R.I. 2002) (same).

The majority rule is premised upon the reality that "termination of parental rights is a complete severance of all ties between the child and parent so as to render them 'legal strangers[.]'" *Virginia ex rel. Spotsylvania County Dep't of Soc. Servs. v. Fletcher*, 562 S.E.2d 327, 329 (Va. Ct. App. 2002). Consequently, "[b]ecause a party whose parental rights

have been terminated is a 'legal stranger' to the child, that parent no longer has a duty to support the child." *Fletcher*, 562 S.E.2d at 329. Of course, "[t]ermination does not foreclose the possibility that a parent may seek to recover the amount of past due child support."*Swate v. Swate*, 72 S.W.3d 763, 771 (Tex. Ct. App. 2002). *See Runner v. Howell*, 205 W. Va. 359, 518 S.E.2d 363 (1999) (per curiam) (disapproving cancellation of child support payments that accrued before obligor agreed to relinquish parental rights). Even so, "[a] judgment terminating a parent's rights . . . absolves that parent of all future support obligations." *In re Bruce R.*, 662 A.2d 107, 111 (Conn. 1995).

In view of the foregoing authorities, we hold that a final order terminating parental rights completely severs the parent-child relationship, and deprives the court of the authority to impose a post-termination award of child support on the parent whose rights have been terminated. However, termination of parental rights does not deprive a court of jurisdiction to enforce payment of child support that accrued before the obligor's parental rights were terminated.

The position adopted today is distinguishable from this Court's ruling in*Kimble v. Kimble*, 176 W. Va. 45, 341 S.E.2d 420 (1986). In*Kimble*, the ex-husband of the appellant executed an agreement to permit the appellant's new husband to adopt the parties' child. As a condition for this agreement, the ex-husband would be relieved of child support payments once the adoption was finalized. The adoption was never finalized, and the appellant, a year

later, sought past child support payments from her ex-husband. The circuit court awarded past child support payments up to the day the parties executed the adoption agreement, but relieved the ex-husband of all child support payments that had accrued after execution of the agreement. On appeal this Court held, in Syllabus point 1, that "[t]he execution of consent to the adoption of a child by its custodial parent and the custodial parent's current spouse is alone insufficient to terminate a noncustodial parent's decretal obligation to make child support payments." 176 W. Va. 45, 341 S.E.2d 420. We therefore reversed and remanded the case for the trial court to determine whether principles of equitable estoppel precluded the appellant from obtaining child support payments.

The decision in *Kimble* stands for the proposition that an agreement to allow a child to be adopted that *has not* been approved by a court order, will not relieve a parent of his/her child support obligation.[8] *Kimble* did not address the issue confronting this Court in

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[8]The holding in *Kimble* was applied by this Court in *Stevens v. Stevens*, 186 W. Va. 259, 412 S.E.2d 257 (1991) (per curiam). In *Stevens*, one of the issues we addressed involved an agreement made by the appellant father to have his parental rights terminated as to one of his children. As a result of the parental termination agreement, the appellant argued on appeal that the circuit court erroneously required him to pay child support for the child. We disagreed with the appellant. In doing so, we held that

> In view of the circumstances and the holding in *Kimble v. Kimble*, this Court concludes that in the present case the appellant's parental rights to his daughter were never judicially terminated and that consistent with the rule set forth in *Kimble v. Kimble*, his obligation to support the child appropriately should continue.

(continued...)

the instant case. That is, in the matter *sub judice*, we are confronted with an agreement to terminate parental rights that was approved of and executed by the circuit court.[9]

In the instant proceeding, Ms. C. does not challenge the validity of the termination of Mr. B.'s parental rights. That is, Ms. C. does not seek to have Mr. B.'s parental rights restored to the child. Instead, Ms. C. argues that she is entitled to have additional child support from Mr. B. because of changed circumstances in the health of the child. Additional support is not available as a result of the termination of Mr. B.'s parental rights. The order terminating Mr. B.'s parental rights required him to pay $35,000.00 to fulfill all of his child support obligations. In this appeal, Ms. C. does not allege that Mr. B. failed to comply with the child support provisions of the order that terminated his parental rights. Instead, Ms. C. seeks to impose additional post-termination child support upon Mr. B. The relief sought by Ms. C. cannot be awarded because Mr. B. has become a "legal stranger" to Ms. C.'s child. Simply put, "[a] parent whose parental rights have been terminated is relieved of all duties and obligations to support the child[.]" *Kansas ex rel. Sec'y of Soc. & Rehab. Servs. v. Clear*, 804 P.2d 961,

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[8](...continued)
Stevens, 186 W. Va. at 262, 412 S.E.2d at 260.

[9]Not only did one circuit judge approve the agreement and conclude such termination to be in the best interest of the child, but, subsequent to the termination, the agreement and the "best interest of the child" was again reviewed by a family law master and by a second circuit judge. As three judges have reviewed the matter and made lengthy findings of fact and conclusions of law regarding the best interest of the child, we conclude that, if there had been a challenge to the termination of parental rights, we would have found that there was no abuse of discretion in the lower court's ruling.

966 (Kan. 1991). It is quite clear that in applying our holding to the facts of this case, we must affirm the circuit court's determination that it lacked authority to award additional child support to Ms. C.

IV.

CONCLUSION

We affirm the July 2, 2001, order of the Circuit Court of Ohio County.

Affirmed.