

RENDERED: November 25, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001949-MR

HELEN COOPER

APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 87-CI-0440

TIMOTHY L. WHEELER

APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Helen Cooper appeals an order of the Barren Circuit Court denying her relief under Kentucky Rule of Civil Procedure (CR) 60.02 in a custody dispute with her former husband, Timothy Wheeler. Cooper argues that the circuit court erred because she had proof that Wheeler was not the natural father of her son and that Wheeler committed fraud and perjury concerning his living arrangements. After reviewing the record, the applicable law, and the arguments of counsel, we affirm.

Cooper and Wheeler married in 1981. Cooper gave birth to a son, Jeremy, on July 10, 1986. Cooper petitioned for dissolution of the marriage in December 1987. The marriage was dissolved in March 1988. By agreement of the parties, Cooper received sole custody of Jeremy, and Wheeler was granted reasonable visitation. In December 1996, Wheeler moved for modification of custody and for temporary custody. He alleged that Cooper had physically and mentally abused Jeremy. The court granted Wheeler's motion for temporary custody and scheduled a hearing on permanent custody for February 1997. After the hearing, the court ordered that custody be granted to Wheeler.

Cooper filed a "Motion to Reconsider/CR 60.02 Motion" and a "Motion for DNA Testing" with affidavits. The court heard arguments on the motions and permitted the parties to file additional affidavits. By orders entered July 8 and July 9, 1997, the court denied Cooper's motions. Cooper moved for additional findings of fact. The court made additional findings in an order entered July 22, 1997. This appeal followed.

Cooper raises three arguments on appeal: (1) the court should have decided custody according to the parent/non-parent standard because Wheeler is not the natural father of Jeremy; (2) the court erred by denying her CR 60.02 motion because of a need for DNA testing to determine paternity;¹ and (3) the court erred

¹Cooper states in her brief that this point is moot because of evidence presented to the Barren District Court. In an order entered after Cooper filed her brief, this Court denied Cooper's motion to supplement the record with this evidence

by denying her CR 60.02 motion because Wheeler committed fraud and perjury when he testified that he was not living with a woman outside of marriage. Since the first argument depends upon the second, we address them in reverse order.

Cooper argues that the paternity question was a reason of extraordinary nature justifying relief under CR 60.02(f). The standard of review for denial of relief under CR 60.02(f) is abuse of discretion. Bethlehem Minerals Company v. Church and Mullins Corp., Ky., 887 S.W.2d 327, 329 (1994). "Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made." Bishir v. Bishir, Ky., 698 S.W.2d 823, 826 (1985). The two factors to be considered by the trial court in exercising its discretion are "(1) whether the moving party had a fair opportunity to present his claim at the trial on the merits and (2) whether the granting of CR 60.02(f) relief would be inequitable to other parties." Bethlehem, supra; see also Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957).

The circuit court held that a DNA test would serve no purpose and would not be in the best interest of the child. It noted the statutory presumption that Wheeler was the father of Jeremy, KRS 406.011, and Wheeler's affidavit statement that his desire to be a father to Jeremy would not be affected by a DNA test.

because there was no proof it was ever considered by the circuit court. Accordingly, we will address this issue in light of the circuit court record.

The circuit court did not abuse its discretion when it denied Cooper's CR 60.02 motion. Cooper had a full and fair opportunity to present evidence of Jeremy's paternity at the custody hearing. In an affidavit, she stated that she did not raise the issue until after the hearing because she did not believe the court would change custody and because she did not want Jeremy to know Wheeler was not his father. She also asserted that Wheeler knew he was not the father, and she filed an affidavit by a man who swore he is Jeremy's father. Cooper's strategic choice not to raise this issue until after she lost custody did not entitle her to CR 60.02 relief.

The granting of CR 60.02(f) relief to Cooper would be inequitable to Wheeler. He has acknowledged Jeremy as his son since birth and exercised his visitation rights. A DNA test result excluding Wheeler as the natural father could only be harmful to Wheeler's relationship with Jeremy.

Neither party cited the three reported Kentucky cases approving reopening under CR 60.02 because of a paternity question. The cases do not create a per se rule for reopening all judgments involving paternity and are distinguishable on their facts.

In Crowder v. Commonwealth ex rel. Gregory, Ky. App., 745 S.W.2d 149 (1988), this Court held that the circuit court lacked discretion to deny a motion to reopen once a blood test established that the movant was not the father. Other facts supported reopening. First, the movant was seeking relief from a

default judgment, meaning he never had the opportunity to challenge the paternity issue. Second, the movant did not hold the child out as his own. In Cain v. Cain, Ky. App., 777 S.W.2d 238 (1989), this Court held that the "reasonable time" requirement for motions under CR 60.02(d) and (f) was met where the father filed the motion twelve years after the dissolution but within two years of learning that a child born during the marriage was possibly not his child. Finally, in Spears v. Spears, Ky. App., 784 S.W.2d 605 (1990), this Court held that res judicata did not bar relief under CR 60.02 where: (1) the child was born after the parents separated; (2) Mr. Spears never held the child out as his own; (3) no demand for support was made until after the dissolution; and (4) blood tests had already been conducted showing Mr. Spears was not the father.

This case is different from Crowder, Cain, and Spears in one obvious respect: here it is the mother, not the father, who attempted to reopen the case for a paternity test. Unlike the fathers in the above cases, Cooper presented no truly new evidence. Not only did she fail to raise this issue before, she affirmatively declared that Jeremy was Wheeler's son in previous dissolution proceedings. Under these circumstances, the court did not abuse its discretion when it refused to order a DNA test under CR 60.02. Bethlehem, supra.

In a related argument, Cooper maintains that the court should have used the parent/non-parent custody standard because Wheeler is not Jeremy's biological father. The court had no

reason to question Jeremy's paternity at the time of the custody hearing, and we have upheld the court's denial of the DNA test. The court used the correct standard.

Cooper also argues that the court should have granted her "Motion to Reconsider/CR 60.02 Motion" because Wheeler misrepresented his living arrangements. She claims that Wheeler intentionally hid the fact that he was planning to live with his girlfriend.

In its order changing custody to Wheeler, the court found that the circumstances surrounding the child had changed for the worse, that his "present home and expanded family has seriously endangered his emotional health," and that the harm likely to be caused by a change was far outweighed by its advantages to him. KRS 403.340(2)(c). In support of her CR 60.02 motion, Cooper filed affidavits suggesting that Wheeler's girlfriend lived with him except during custody hearings. Wheeler submitted his own affidavit, as well as those of his girlfriend and the child, indicating that the girlfriend and child got along well. In its additional findings of fact, the court found that the relationship between Wheeler and his girlfriend was not harmful to the child.

The record does not include the videotape of the February 1997 custody hearing. The references Cooper supplies in her brief are not accurate. Therefore, we cannot compare Wheeler's testimony at the hearing to the charges Cooper presented to decide if Wheeler committed fraud or perjury.

However, it is clear that the court's final decision rested on permissible grounds. Once the court determined that the child was seriously endangered by custody with Cooper, a finding Cooper did not appeal, the question was whether the harm likely to be caused by a change of environment would be outweighed by its advantages. KRS 403.340(2)(c). The court specifically found that Wheeler's relationship with his girlfriend was not harmful to the child. We find no clear error in the court's factual findings. CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986). The court did not abuse its discretion by denying Cooper CR 60.02 relief on this issue.

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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