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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002808-MR

EDGAR V. VAUGHN, II — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE MASON TRENAMAN, JUDGE
ACTION NO. 94-FD-002983

JULIA VAUGHN (NOW GARRISON) — APPELLEE

OPINION
AFFIRMING
* * * * * * * * * *

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE. Edgar V. Vaughn, II (Vaughn) appeals from an order of the Jefferson Family Court denying his CR 60.02(f) motion. He asked the family court to reopen an order awarding sole custody of his two (2) children to their mother, Julia Garrison (Garrison). Vaughn argues that the earlier order lacked required findings. After reviewing the record, the applicable law, and the arguments of counsel, we affirm.

Vaughn and Garrison married in 1988. They had two (2) children, a boy born in 1989 and a girl born in 1991. Garrison

petitioned for dissolution in 1995. She requested sole custody, child support, and maintenance. Vaughn responded through counsel but later proceeded pro se. The court held a hearing in June 1995. Garrison appeared with counsel. Vaughn did not appear and was not represented. By order entered August 23, 1995, the court dissolved the marriage, awarded sole custody to Garrison, and ordered Vaughn to pay child support and maintenance.

In August 1997, Vaughn moved the court to reopen the August 1995 decision under CR 60.02(f) and hold a de novo custody hearing. He alleged that sole custody with Garrison seriously endangered the childrens' mental, emotional, physical and moral health, and attached affidavits. KRS 403.340. By order entered September 30, 1997, the court denied the CR 60.02 motion and ruled that Vaughn's motion would proceed as a motion to modify custody under KRS 403.340. This appeal followed.

Vaughn argues that the court should have reopened the case under CR 60.02(f) and ordered a de novo custody hearing under KRS 403.270. He maintains that the 1995 order was not final and did not contain required findings. Garrison responds that the motion was not proper under CR 60.02.

The standard of review for 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). Two (2) factors for the trial court to

consider 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; Fortney v. Mahan, Ky., 302 S.W.2d 842, 843 (1957).

Vaughn was not present at the June 1995 hearing. Garrison's attorney told the court that the parties had agreed that Garrison would have sole custody of the children. There is a discussion on the record about reducing the agreement to writing, getting Vaughn to sign it, and having it entered in the court record. However, the August 1995 order granting custody to Garrison contains no reference to an agreement. Nor does the order contain any findings relative to KRS 403.270.

The trial court ruled that Vaughn did not bring his CR 60.02 motion within a reasonable time. It noted that Vaughn waited two (2) years, and, during that time, entered into an agreed order to reduce his child support. The court acknowledged that the August 1995 order did not contain findings under KRS 403.270. It attributed this to Vaughn's failure to present any proof or pleadings opposing sole custody to Garrison.

The trial court did not abuse its discretion. Applying Bethlehem, supra, Vaughn had a fair opportunity to present his claim at the trial on the merits. He had notice of the hearing but did not attend. On the other hand, granting CR 60.02(f) relief would be inequitable to Garrison. Under KRS 403.340, the court shall not modify a prior custody decree unless a change in

the circumstances of the child or his custodian has occurred, and modification is necessary to serve the best interests of the child. KRS 403.340(2). The burden of proof is on the parent seeking to modify custody. Quisenberry v. Quisenberry, Ky., 785 S.W.2d 485, 488 (1990). Given Vaughn's inaction, Garrison should not be deprived of the statutory presumptions in her favor. The trial court correctly ruled that the case proceed under KRS 403.340.

Vaughn is correct in asserting that trial courts are required to consider all the factors under KRS 403.270(1) and find facts specifically. CR 52.01; McFarland v. McFarland, Ky. App., 804 S.W.2d 17, 18 (1991). However, the August 1995 judgment adjudicated the custody rights of the parties and was final and appealable. CR 54.01, Gates v. Gates, Ky. 412 S.W.2d 223, 224 (1967). Vaughn did not appeal the order or timely request findings of fact. He thus waived any error. Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982). In August 1995 the court believed that the parties had agreed as to who should have custody. If this was incorrect, Vaughn should have brought this to the court's attention sooner.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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