RENDERED: SEPTEMBER 14, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002374-MR

VICKIE SHELTON — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS CASTLEN, JUDGE
ACTION NO. 98-CI-00635

BRUCE A. SHELTON II — APPELLEE

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

BEFORE: BARBER, JUDGE; BUCKINGHAM, JUDGE; AND COREY, SPECIAL JUDGE.

BARBER, JUDGE: Appellant, Vickie Shelton ("Vickie"), asks us to decide whether the trial court erred in allowing Appellee, Bruce A. Shelton, II ("Bruce"), to file a late response and in allowing the parties' two children to be interviewed together by the Commissioner. Finding no error, we affirm.

The parties were married on February 24, 1990. They have two children, Michael, born October 22, 1986 and Amanda, born June 17, 1991. On June 2, 1998, Vickie filed a petition for dissolution. On June 3, 1998, Bruce was served with summons. On January 7, 1999, Bruce filed a response:

By order of September 2, 1999, the trial court overruled Vickie's objection to the late response:

> This matter came before the Court on August 26, 1999, pursuant to Petitioner's Exceptions to the Report of the Circuit Commissioner . . . .
>
> Petitioner objects to the court entertaining Respondent's claim for custody because he did not file an Answer until approximately seven months after being served with the Petition herein.
>
> While the Court recognizes that Respondent was technically in default, the party seeking to take an advantage of the opposing party's omission must take affirmative action thereon. A default does not operate automatically against the party responsible for the default and therefore, it is within the discretion of the court, guided by the Rules of Civil Procedure, to determine the effect of the default. See, Tharp v. Security Ins. Co., Ky., 405 S.W.2d 760 (1966). Because Petitioner did not file a motion for entry of a default judgment prior to the time Respondent filed his response, the Court finds that this issue has been waived.
>
> In response to Petitioner's assertion that divorce actions should be held to the same stringent requirements with regard to the filing of responsive pleadings as in other cases, the Court disagrees. In Childress v. Childress, Ky. App., 335 S.W.2d 351, 353-354 (1960), it was held that courts should be liberal in divorce proceedings in permitting the raising of issues so that there may be a full opportunity to present all of the evidence. In this case, the Court finds it persuasive that while a formal answer had not been filed, Respondent and his attorney did participate in various hearings before the Commissioner in connection with pendente lite matters. Respondent filed his response before a determination was made concerning permanent custody. The Petitioner had the opportunity to present evidence in support of her claim

> for custody and in opposition of Respondent's claim and, therefore, was not harmed by the late filing of the responsive pleading. For the foregoing reasons, Petitioner's Exception relating to the late filing of the Response is OVERRULED.
> (Emphasis original.)

On appeal, Vickie claims that the trial court "ignored the Civil Rules" thereby rendering the trial court's order allowing the late response, unaccompanied by any request for leave, is a "nullity." We do not agree. In Cupp v. Cupp, Ky., 302 S.W.2d 371 (1957), the appellant in a custody proceeding unsuccessfully argued that the court should have granted his motion for default judgment because appellees had failed to answer his pleading within the time prescribed by the Civil Rules, CR 12.01. The court explained that this is a matter in which the trial judge has broad discretion. Here, the trial judge noted that Vickie was not harmed by any technical default because she had had an opportunity to present proof in support of her claim and in opposition to Bruce's claim. We agree and find no abuse of discretion.

The trial court ordered that the parties shall have joint custody with Bruce as the primary residential custodian. Vickie argues that the court abused its discretion in allowing both children to be interviewed together by the Commissioner. Vickie provides no authority in support of her position but claims that if the children had been interviewed separately they could have freely expressed their wishes regarding custody without fear of being "split up." Bruce explains that the

children were interviewed by the Commissioner, in camera, in the presence of the court reporter, without counsel or their parents. The children related that they wished to stay with their father.

Vickie claims that Bruce had "played on the children's emotions and had, in effect, bought the children." Vickie also claims that "[a]s the Court can see, the father has talked to the children and told them that he doesn't have enough money to buy them things now because he has to pay child support."

We cannot overturn the trial court's award of primary residence to Bruce unless the decision is clearly errroneous. Aton v. Aton, Ky. App., 911 S.W.2d 612 (1995). In its order overruling Vickie's exceptions to the Commissioner's recommendations, the trial court noted that the children had resided primarily with their mother since the parties' separation. The children had had frequent contact with their father. Evidence was presented which raised concerns about Vickie's ability to appropriately supervise and control the children. Vickie admitted leaving Amanda alone after school for 45 minutes to an hour at age 7 or 8. Michael had failed to complete and turn in homework assignments and his grades had dropped. We believe that the award of primary residence to Bruce is based on substantial evidence of record and is not clearly erroneous.

We affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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