

RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002362-MR

C.H., NOW C.M.¹

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 93-CI-01129

R.C.H.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

JOHNSON, JUDGE: C.M. has appealed from an order of the Campbell Circuit Court entered on October 10, 2003, which, inter alia, granted R.C.H.'s motion for a change of custody and awarded R.C.H. sole custody of A.H. Having concluded that C.M. is not entitled to relief for any errors which may have occurred during the temporary custody phase of the proceedings below, we affirm.

¹ The parties will be referred to by initials to protect the interests of the minor child.

On September 23, 1989, C.M. and R.C.H. were married in Campbell County, Kentucky. C.M. had given birth to the couple's only child, A.H., in June 1989. On October 18, 1993, R.C.H. filed a petition for dissolution of marriage in the Campbell Circuit Court. On June 20, 1994, the trial court entered a decree dissolving the marriage of C.H. (now C.M.) and R.C.H. Among other things, the trial court incorporated the couple's property settlement agreement into the decree of dissolution and awarded C.M. the "care, custody and control" of A.H., while granting R.C.H. visitation rights.

As the voluminous record shows, beginning immediately after the decree of dissolution was entered and continuing through the entry of the order from which C.M. has appealed, both parties filed numerous motions before the trial court regarding various issues related to the couple's divorce. Our review of the record shows that for the most part, the parties have been engaged in a continuous dispute with respect to the issues of visitation and/or child custody since the decree of dissolution was entered.

At some point in early 2000, A.H. was diagnosed with Attention Deficit and Hyperactivity Disorder and dysthymia, a chronic depressive mood disorder. Among other things, A.H. exhibited behavioral problems at home and in school, and experienced difficulties in completing his homework. As both

parties have conceded in their briefs, C.M. and R.C.H. could not agree from a parenting standpoint how to best handle A.H.'s psychiatric problems. Hence, in February 2000, the parties were referred to Dr. Kimberly Wolfe, a registered custody evaluator who began serving as a court-appointed monitor. Approximately one month later, in March 2000, Karen Tapp was appointed guardian ad litem for A.H.

On August 31, 2001, R.C.H. filed a motion for a change of custody. In his accompanying memorandum, R.C.H. argued that a "change has occurred in the circumstances of the minor child and/or [C.M.], and modification is necessary in order to serve the best interest of the child." On September 20, 2001, C.M. filed a response opposing R.C.H.'s motion for a change of custody. On November 16, 2001, Dr. Wolfe filed a report recommending, inter alia, that C.M. and R.C.H. undergo a "role reversal" for a period of six weeks, i.e., R.C.H. would become A.H.'s primary caretaker for that time period, while C.M. would be given visitation rights. In mid-December 2001 both R.C.H. and Tapp filed motions asking the trial court to adopt and enforce the recommendations of Dr. Wolfe.

On January 9, 2002, a hearing was conducted before the Domestic Relations Commissioner. During the hearing, R.C.H. agreed to withdraw his motion for a change of custody and stated that he would not renew any such motion until at least the end

of the school year. Following this hearing, the Commissioner recommended that the parties follow Dr. Wolfe's report. By an agreed order of the parties entered on April 3, 2002, C.M. and R.C.H. agreed to undergo the "role reversal" as suggested by Dr. Wolfe. In early April 2002 the "role reversal" time period began and continued for six weeks thereafter.

On July 11, 2002, C.M. filed a motion requesting the trial court to enter a final order resolving any pending matters related to visitation. A hearing on C.M.'s motion was scheduled for August 2, 2002. On the date of the scheduled hearing, Tapp filed a report in which she made several recommendations based upon both her own observations and her consultations with Dr. Wolfe. In her report, Tapp noted that A.H. had expressed a desire to spend "significantly" more time with R.C.H. In addition, Tapp recommended that "[p]hysical custody to [R.C.H.] should be considered based on" the behavioral improvements A.H. had exhibited since he began spending more time with R.C.H.

During the hearing held on August 2, 2002, R.C.H. orally renewed his motion for a change of custody. Three days later, on August 5, 2002, R.C.H. filed a written motion for a change of custody. On August 7, 2002, the Commissioner entered recommended findings of fact and conclusions of law. Among other things, the Commissioner recommended that R.C.H.'s motion for a change of custody be granted, based upon findings that

A.H.'s overall behavior had improved while he was with R.C.H. The trial court entered a temporary order adopting the Commissioner's recommendations in full on August 7, 2002.

On August 9, 2002, C.M. filed objections to the Commissioner's recommendations, and a motion for a temporary injunction seeking to stay the temporary order. On August 15, 2002, C.M. filed a petition for a writ of prohibition² with this Court, arguing that the trial court had erred by considering and eventually granting R.C.H.'s motion for a change of custody, without first conducting a hearing. C.M.'s motions before the trial court were stayed pending the resolution of her petition for a writ of prohibition in this Court. In an order entered on September 19, 2002, this Court denied C.M.'s request for emergency relief, after determining that any errors the trial court may have committed "would be correctable on appeal."

On October 22, 2002, after the trial court had conducted an "oral argument" regarding C.M.'s pending motions, the trial court entered an order overruling C.M.'s objections to the Commissioner's recommendations. The trial court ordered that C.M. and R.C.H. complete the Cooperative Parenting and Divorce Program at the Mediation Center of Kentucky, and stayed the issuance of a final order regarding child custody until the

² 2002-CA-001727-OA.

program could be completed and a final hearing could be conducted.

Following the entry of this temporary order, C.M. filed a motion to reconsider or, in the alternative, to alter or amend the trial court's order. Per the trial court's request, a hearing was held before the Commissioner on December 20, 2002. Subsequent to this hearing, on January 14, 2003, the trial court entered a temporary order adopting the Commissioner's recommended findings of fact and conclusions of law. This temporary order awarded C.M. and R.C.H. joint custody of A.H., but stated that R.C.H. would remain as the primary residential parent, due to the progress that A.H. had made while in the custody of his father.

On February 3, 2003, documentation was filed with the trial court indicating that C.M. and R.C.H. had successfully completed the eight-week parenting program at the Mediation Center of Kentucky. A final custody hearing was held on May 12-13, 2003. On August 21, 2003, the Commissioner filed her final recommended findings of fact and conclusions of law. In pertinent part, the Commissioner determined that based upon all of the evidence presented, A.H.'s overall health would be better protected by awarding R.C.H. sole custody of A.H., while granting C.M. visitation rights. On October 10, 2003, after considering and rejecting C.M.'s objections to the

Commissioner's recommendations, the trial court adopted the Commissioner's recommended findings of fact and conclusions of law in full. This appeal followed.

C.M. makes four primary arguments on appeal: (1) that the trial court erred by failing to conduct a hearing before granting R.C.H.'s motions for a change of custody in its temporary order entered on August 7, 2002; (2) that R.C.H.'s motions for a change of custody did not meet the statutory requirements of KRS³ 403.340 and KRS 403.350, and that the trial court therefore erred by considering R.C.H.'s motions; (3) that since the trial court improperly awarded R.C.H. a temporary change of custody in August 2002, the trial court erred when it entered the final custody order by relying on the change of circumstances which had taken place subsequent to the entry of the temporary order; and (4) that C.M. was denied due process of law when the Commissioner and the trial court engaged in allegedly improper ex parte communications prior to the entry of the temporary order in August 2002.

All of C.M.'s claims of error are based upon actions taken by the trial court during the temporary custody phase of the litigation below. In Gladish v. Gladish,⁴ this Court, when faced with a similar situation, stated:

³ Kentucky Revised Statutes.

⁴ Ky.App., 741 S.W.2d 658, 661-62 (1987).

Although we agree that the trial court proceeded erroneously in conducting a hearing to modify temporary custody on the barren affidavits and further abused its discretion in modifying the custody arrangement, we cannot afford the appellant any relief as the temporary order has been replaced by a permanent custody decree. While we recognize the practical effect of the court's temporary ruling, there was nevertheless evidence, specifically the testimony of psychologist, Dr. Sheila Schuster, to support the court's finding that Amanda's best interest would be served by being placed in her father's care. Thus, under our standard of review, we cannot set aside the final custody award because of irregularities in the temporary custody phase of the litigation [footnote omitted].

Although the trial court probably erred by failing to conduct a hearing before granting R.C.H.'s motions for a change of custody in August 2002,⁵ it is important to remember that the trial court's temporary order has been replaced by a permanent custody order. C.M. has not argued that the evidence which was

⁵ See KRS 403.350, which reads in full as follows:

A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted [emphasis added].

presented to the trial court before the entry of the final custody order was insufficient to support the trial court's ultimate determination to award R.C.H. sole custody of A.H. Therefore, we cannot grant relief to C.M. for any errors which may have occurred during the temporary custody phase of the proceedings below.

As a final matter, we must note that unlike the appellant in Gladish, C.M. properly challenged the trial court's temporary custody order by filing a petition for a writ of prohibition with this Court. As we mentioned previously, this Court denied C.M.'s petition after determining that any errors committed by the trial court "would be correctable on appeal." We disagree and conclude that this Court erred by failing to consider the merits of C.M.'s petition. As this Court stated in Gladish, since an aggrieved party may not appeal from a temporary custody order, the proper action is to seek relief by filing a petition for a writ of prohibition.⁶ However, this

⁶ See Gladish, 741 S.W.2d at 661 (stating that "the court acted erroneously in changing its temporary custody order. First, the affidavits were not sufficient for their intended purpose as a matter of law. KRS 403.350 specifically provides that '[t]he court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits' As stated hereinbefore, the affidavits submitted to change temporary custody contained no facts upon which the court could find cause for a hearing but instead were vague and conclusory. Under those circumstances it was an abuse of discretion for the court to entertain Bruce's motion. Forcing Deborah to defend her role as temporary custodian on such short notice and without benefit of the facts upon which the movant intended to rely was a particularly egregious denial of due process. However, her remedy was to file an original action in this Court seeking to prohibit the trial court from conducting the hearing. Such extraordinary relief is appropriate where the court is acting erroneously in its

Court's order denying C.M.'s petition has since become the law of the case.⁷ Where the law-of-the-case doctrine is invoked, we will not disturb the previous decision, even if it is later shown to be erroneous, if rights have vested or there has been a substantial change in the status of the parties since the previous ruling.⁸

In this case, there has been a substantial change in the parties' circumstances since the entry of the trial court's temporary order and the entry of this Court's order denying C.M.'s petition for a writ of prohibition. There was substantial evidence presented to the trial court indicating that A.H. had adjusted well to being in the custody of R.C.H., and that his behavior had improved during that time period. Based upon this improvement, the trial court ultimately concluded that R.C.H. should be granted sole custody of A.H. Accordingly, we decline to depart from the law-of-the-case doctrine under these facts.

jurisdiction and where the party aggrieved has no remedy by appeal. This Court does not hesitate to issue necessary writs, particularly to protect the well-being of children" [emphasis original][emphasis added][citations omitted]).

⁷ After this Court denied C.M.'s petition for a writ of prohibition, she did not seek discretionary review from the Supreme Court.

⁸ See Union Light, Heat & Power Co. v. Blackwell's Adm'r, Ky., 291 S.W.2d 539, 543 (1956)(stating that an exception to the law-of-the-case doctrine is possible "especially where no rights have accrued or become vested and no substantial change has been made in the status of the parties by reason of the former decision").

Based on the foregoing reasons, the order of the
Campbell Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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