

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000622-ME

ANGELA ENGLE

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 03-AD-00010

WORLEY A. ENGLE; AND
ALEISA D. ENGLE, AN INFANT

APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Angela Engle appeals from an order entered December 22, 2004, that set aside and vacated the Letcher Circuit Court's Findings of Fact, Conclusions of Law, and Judgment Terminating Parental Rights entered on January 8, 2004. Because of the unusual facts associated with this case, we affirm in part and vacate and remand in part.

Angela and Worley A. Engle were married on July 25, 1998. One child, Aleisa D. Engle,¹ was born during the marriage on September 23, 1999. The parties separated on or about May 8, 2003, and Angela consulted with attorney Kevin R. Mullins about filing a dissolution of marriage petition. On July 8, 2003, Angela signed a verification of petition for dissolution of marriage that was prepared and notarized by her attorney, Kevin R. Mullins. On the same day a separation agreement was signed by both Angela and Worley resolving the issues of marital assets and debts, child custody and visitation, and child support. The parties' signatures were notarized by Mullins. Also on July 8, 2003, Worley signed an entry of appearance and waiver of notice. In the document he acknowledged that he had received the "Petition along with being present whild [sic] said document was drafted and has entered into a Separation Agreement which fairly and equitably resolves all matters." Again his signature was notarized by Mullins. The Petition for Dissolution of Marriage, the Separation Agreement and the Entry of Appearance and Waiver were not filed until September 25, 2003.

On August 15, 2003, between the time the petition for dissolution, the separation agreement and the entry of appearance was signed (July 8, 2003) and the date they were

¹ In the body of the petition for dissolution and for termination of parental rights the child's name is spelled ALEISA. However, in the caption of the termination case it is spelled ALEISHA. We believe ALEISA is the correct spelling.

filed (September 25, 2003) Worley signed a Verified Petition for Voluntary Termination of Parental Rights. The petition was prepared and notarized by attorney Mullins. This petition was also not filed until September 25, 2003. At that time the dissolution was filed as civil action number 03-CI-321 and the petition for termination of parental rights as civil action number 03-AD-010. In the dissolution action, Angela was the petitioner and Worley the respondent; in the termination petition, Worley was petitioner and Angela and Aleisha [sic] the respondents. In each case, attorney Mullins was attorney of record for the petitioner.

Subsequently in the dissolution action a judgment was entered October 6, 2003, dissolving the marriage and adopting and incorporating by reference the Separation Agreement. In the termination case a guardian was appointed who filed a report on October 10, 2003. The extent of his report is set forth as follows:

COMES the Guardian Ad Litem, for Aleisha [sic] D. Engle, the minor child herein; and for his report states as follows:

- (1) The [sic] he has examined the pleadings and entire record herein.
- (2) That he conducted an interview with the Respondents on October 9, 2003.
- (3) That the Guardian Ad Litem recommends that the parental rights of Worley A. Engle be terminated. That said termination is in the best interest of the child.

WHEREFORE, he files his Report and prays that he be awarded a reasonable attorney fee

for his service and be discharged from further duties.

On November 4, 2003, attorney Mullins certified that he mailed a Notice of Final Hearing to the circuit clerk, the guardian ad litem, Angela and Worley. The notice was filed with the court on November 20, 2003, the date set for the termination hearing.

At the November 20, 2003, hearing Angela was present and testified and the guardian was present and recommended that termination of Worley's parental rights was in the best interest of Aleisa. Worley was not present at the final hearing. Following the presentation of witnesses, the trial court stated its findings on the record, indicating that all legal requirements had been met, and that the termination of Worley's parental rights was in the best interest of the child. The court asked attorney Mullins to prepare a Judgment for his signature. On January 8, 2004, Findings of Fact, Conclusions of Law, and Judgment Terminating Parental Rights were entered. There is no certification of service in the record but a handwritten notation indicates the judgment was sent to the guardian and attorney Mullins.

No additional significant action took place in the case until October 21, 2004, when Worley, through new counsel, filed a CR 60.02 motion to set aside the findings of fact, conclusions of law and judgment terminating his parental rights.

In his motion, Worley alleged the judgment was entered by mistake, inadvertence and excusable neglect. He attached affidavits from himself, Clayton Sandlin, and Randy Parsons.

His affidavit stated:

Comes the affiant, Worley A. Engle, and states that he is the Petitioner in the within action; that although the Petitioner voluntarily signed the Verified Petition for Voluntary Termination of Parental Rights on or about August 15, 2003, some short time, approximately two weeks, thereafter, the affiant contacted the office of Kevin A. Mullins and advised his secretary that he wished to withdraw the petition and requested that Mr. Mullins have the Court establish the amount of his child support obligation with regard to his daughter, Aleisa D. Engle; that on or about the next day, the affiant spoke by telephone to Mr. Mullins and again advised that he wished to withdraw the Petition and requested that Mr. Mullins have the Court instead establish the amount of his child support obligation with regard to his daughter; that the Petitioner received no further notification with regard to the within action or otherwise and assumed that the matter was withdrawn; that the Petitioner did not receive a copy of this Court's Findings of Fact, Conclusions of Law, and Judgment Terminating Parental Rights, and the copy filed with the Clerk does not show that a copy was sent to the Petitioner; that the Petitioner, believing that the Petition had been withdraw, [sic] began making cash payments of child support to the Respondent, Angela D. Engle, commencing about September, 2003, and continuing up until July, 2004, of \$200. per month; that Angela Engle came to the Petitioner's employment requesting and receiving child support during this period of time and without advising the Petitioner that his parental rights were terminated;

that on July 6, 2004, the Petitioner retained counsel who filed on his behalf a Motion for Show-Cause Order to hold Angela D. Engle in contempt of this Court's Order for refusing to permit him to have visitation with his infant child in his home since December 28, 2003; that it was not until the Petitioner appeared at the show-cause hearing held on September 23, 2004, that he first learned that this Court's Finding of Fact, Conclusions of Law, and Judgment Terminating Parental Rights had been entered by mistake and excusable neglect.

The affidavits of Sandlin and Parsons supported Worley's contention that he had contacted attorney Mullins to withdraw the termination petition and that Worley had paid child support for Aleisa between May 2003 and July 2004.

In response to the CR 60.02 motion Angela and her mother, Rebecca Mullins, filed affidavits in opposition to the motion to vacate. Each affirmed that Worley wanted to terminate his parental rights, was aware of entry of the judgment terminating his rights and that Worley had never paid any child support for Aleisa. On November 10, 2004, the circuit court entered an order that the CR 60.02 motion would stand submitted for a decision upon the pleadings. On December 22, 2004, the circuit court entered an order setting aside and vacating the Judgment terminating Worley's parental rights. The court found that the previous order had been entered by mistake, inadvertence and excusable neglect based upon the court's

finding that Worley had advised attorney Mullins not to proceed with filing the termination petition. In this order the court also ordered Worley to pay child support based upon the child support guidelines and ordered visitation consistent with guidelines which the court attached to the order. On December 29, 2004, attorney Mullins representing Angela filed a motion to alter, amend or vacate the December 22, 2004, order. The motion was denied by order entered March 11, 2005. Angela filed a *pro se* notice of appeal on March 17, 2005, and on April 13, 2005, attorney Mullins filed a motion to withdraw as counsel for Angela stating "that a conflict has arisen which precludes his further representation in this matter." While there is no signed order addressing attorney Mullins's motion to withdraw, on May 2, 2005, attorney C. Darlene Johnson filed a notice of entry of appearance on behalf of Angela and represents her in this appeal.

On appeal Angela contends that "the trial court abused its discretion and/or committed clear error by applying the wrong standard when it issued an order to vacate the Judgment" Angela argues that Worley was represented by attorney Mullins in the termination proceeding, received proper service and notice of all pleadings through his attorney and that the termination of parental rights should be upheld. While we believe a full hearing in open court on the record would have

been the method of addressing Worley's CR 60.02 motion we find no clear error in the court's action of submitting for a decision upon the pleadings since the parties agreed to such a proceeding. After reviewing the record, the court relied upon Worley's affidavit that he had contacted attorney Mullins to withdraw the petition prior to the date the petition was filed in reaching its decision to grant the CR 60.02 motion.

Attorney Mullins clearly had a conflict of interest and could not represent Angela in the dissolution and Worley in the termination action. This fact alone is sufficient reason for the court to rely upon Worley's affidavit and believe the termination petition had been erroneously filed. In addition there is nothing in the record to believe Worley's interests were in fact represented by attorney Mullins in this case or that Worley received notice of the hearing or a copy of the judgment. More important, KRS 625.041 and KRS 625.042(6) were not complied with. KRS 625.041(3) addresses the appearance-waiver of the parent when the parent chooses not to attend the termination hearing. Specifically it states:

The parent may sign an appearance-waiver and consent-to-adopt form when the parent chooses not to attend a voluntary termination of parental rights proceedings. This form, prescribed by the Administrative Office of the Courts, shall:

- (a) Contain a statement of acknowledgment and agreement, regarding the appearance at the proceeding, signed by the parent

counsel for the parent, and the cabinet. If the parent is a minor, the form shall also be signed by the guardian of the minor parent[.]

While this statute is not mandatory it does reflect that if a parent is not going to attend the hearing a statement "of acknowledgment and agreement, regarding the appearance at the proceeding, signed by the parent" should be included in the record. In this case no appearance-waiver is included in the record and Worley did not appear at the hearing. The fact that Worley did not attend the hearing and did not enter an appearance-waiver appears to be problematic. KRS 625.042(6) clearly contemplates that the initiating party be present at the hearing. KRS 625.042(6) states: "At the time of the hearing, the Circuit Court, after full and complete inquiry, shall determine whether each petitioner is fully aware of the purpose of the proceedings and the consequences of the provisions of this chapter."

In this case the court relied upon attorney Mullins and Angela (Worley's ex-wife) to confirm that Worley was "fully aware of the purpose of the proceedings and the consequences of the provisions of this chapter." We do not believe the statute contemplated such testimony to satisfy the mandatory requirements of the statute. We note that the guardian's report clearly indicates that he had no contact with Worley throughout

the proceedings and relied exclusively on attorney Mullins's and Angela's representations in filing his report.

In granting Worley's CR 60.02 motion the circuit court held, in relevant part:

This cause came on for hearing upon motion of the Petitioner to set aside this Court's Findings of Fact, Conclusions of Law, and Judgment Terminating Parental Rights entered on January 8, 2004, and the Court, having reviewed the pleadings, the affidavits filed in support thereof, and being otherwise sufficiently advised, does hereby **FIND** that this Court's Findings of Fact, Conclusions of Law, and Judgment was entered by mistake, inadvertence, and excusable neglect after the Petitioner had advised the Respondent's attorney that he did not wish to proceed with the Petition for Voluntary Termination of Parental Rights so that the matter should have been dismissed; that therefore, the Court does hereby **ORDER, ADJUDGE, and DECREE** that the Findings of Fact, Conclusions of Law, and Judgment Terminating Parental Rights be, and the same is hereby **SET ASIDE AND VACATED**.

The Supreme Court of Kentucky recently addressed the granting of a CR 60.02 motion under an unusual factual situation similar to the unusual procedure we find herein. In Kurtsinger v. Board of Trustees, 90 S.W.3d 454 (Ky. 2002), the court held:

The rule upon which the trial court acted, CR 60.02, is a safety valve, error correcting device for trial courts. It applies in six enumerated situations: "(a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence . . .; (c) perjury or falsified evidence; (d) fraud affecting the proceedings . . .; (e) the judgment is

void . . .; or (f) any other reason of an extraordinary nature justifying relief." The rule is designed to allow trial courts a measure of flexibility to achieve just results and thereby "provides the trial court with extensive power to correct a judgment." Accordingly, CR 60.02 addresses itself to the broad discretion of the trial court and for that reason, decisions rendered thereon are not disturbed unless the trial judge abused his/her discretion.

Id. at 456 (citing CR 60.02 and Fortney et al. v. Mahan, et al., 302 S.W.2d 842, 843 (Ky. 1957)). Later in Kurtsinger, our Supreme Court cites to Potter v. Eli Lilly and Co., 926 S.W.2d 449 (Ky. 1996) for the importance of allowing a CR 60.02 motion to correct mistakes and protect the integrity of the judicial process. Specifically, the court stated:

In *Potter v. Eli Lilly & Co.*, the trial court suspected collusion on the part of the parties whereby a settlement had been reached prior to the return of a jury verdict. The trial court undertook an inquiry into the true facts and the parties sought a Writ of Prohibition. This Court allowed the trial court to reopen the case after judgment under the inherent authority of courts to see that their judgments are not tainted with deceit. The *Eli Lilly* Court agreed that "the courts have developed and fashioned [the equity rule] to fulfill a universally recognized need for correcting injustices." Although, CR 60.02 was not utilized by the Court in *Eli Lilly*, the decision displays a belief that under the rules of equity courts have an inherent authority to correct mistakes and protect the integrity of the judicial process. Equity and fairness were the bases of that decision and it illustrates the importance of CR 60.02 in other contexts.

Kurtsinger, 90 S.W.3d at 457 (footnotes omitted).

Applying the standard of review set forth above to the facts presented herein we discern no abuse of discretion by the trial court. Based upon the affidavits filed by Worley with his motion, the apparent conflict of interest of attorney Mullins, the failure of Worley to be present at the hearing, the failure of the court to comply with KRS 625.042(6), and the parties agreement to submit the matter for decision upon the pleadings (November 4, 2004 order), the court did not abuse its discretion in granting Worley's CR 60.02 motion. In so doing the court was exercising its inherent authority to correct mistakes and protect the integrity of the judicial process.

Having affirmed the trial court's order granting CR 60.02, this matter is remanded for further proceeding in that the court merely set aside and vacated its previous order of January 8, 2004, terminating Worley's parental rights. No further action was taken and the case is still pending on the original petition. In addition, we believe the trial court erred in addressing child support and visitation in this matter. Those matters, depending on the disposition of the termination petition, should be addressed in the dissolution case should the court not terminate Worley's parental rights.

For the foregoing reasons we affirm the Letcher Circuit Court's order granting Worley's CR 60.02 relief and remand this matter for further proceedings not inconsistent with this opinion. We also vacate in part the order addressing child support and visitation issues which are not properly before the court in a termination petition.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Darlene Johnson
Hazard, Kentucky

BRIEF FOR APPELLEE WORLEY A.
ENGLE:

Gene Smallwood, Jr.
Whitesburg, Kentucky

NO BRIEF FROM GUARDIAN AD
LITEM.