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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001728-ME

AMBER NICOLE EVANS — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 07-CI-00190

VICKY EVANS; MIKE R. EVANS;
AND MIKE R. EVANS II — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; KNOPF,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Amber Nicole Evans appeals from a judgment of the Bell Circuit court that granted custody of her three children to their paternal grandparents, Vicky and Mike R. Evans, Sr. The father of the children, Mike R. Evans II (Mike II), was then – and still remains – incarcerated. Amber and Mike II

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

were divorced on October 25, 2006, and Amber was originally awarded custody of the children with Mike II receiving liberal visitation rights. In addition to contesting the custody award to Mike II's parents, Amber also appeals from an order that denied her motion for relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. After our review, we affirm.

On April 5, 2007, Vicky and Mike Evans filed a Verified Petition in the Bell Circuit Court alternatively seeking custody of or visitation rights with the children (H.C.E., D.M.E., and T.A.E.)[2] (the children). Grandparents may establish their right to custody of their grandchildren if they can demonstrate that they meet the statutory elements for custody. *See Posey v. Powell*, 965 S.W.2d 836, 839 (Ky.App. 1998). The Evanses alleged that Amber and Mike Evans II were unfit to have custody of the children and that, therefore, they had waived their right to custody. The petition also charged that there were reasonable grounds to believe that Amber and Mike II were unable or unwilling to protect the children adequately, having placed them in danger of immediate death or serious physical injury.

Mike II filed an Entry of Appearance, Waiver & Response on May 10, 2007, in which he admitted to each and every allegation contained within his parents' custody petition and requested that the circuit court enter an order granting custody of his children to them.

[2] Because the children are minors, privacy concerns dictate that we use their initials rather than their given names.

On May 9, 2007, Vicky and Mike filed a Verified Motion for Default Judgment and Motion for Hearing against Amber pursuant to CR 55.01. They alleged that Amber had failed to file a responsive pleading or to otherwise assert a defense even though she had been personally served with a summons and a copy of the custody petition on April 14, 2007.

On June 12, 2007, the circuit court entered an order holding that Amber was in default for her failure to respond to the custody petition. The order also acknowledged Mike II's pleading requesting that the court grant custody to Vicky and Mike. It provided that a hearing would be held on all relevant issues on July 2, 2007.

Although Amber failed to make an appearance at the July 2 hearing, the court allowed Vicky and Mike to present testimony in support of their petition. In response to questioning from the judge, Vicky testified that Amber was not a fit custodian of the children because she had admitted ("owned up") to abuse of hydrocodone, Xanax, and marijuana during the previous eleven to twelve years. On one occasion, HCE had told Vicky and her husband that "his mommy smokes out of a can." Vicky testified that she had routinely witnessed Amber and Mike II under the influence of drugs.

Vicky expressed her concern that Amber was either unable or unwilling to provide for the needs or the safety of the children. She told that Amber frequently had to ask for money for utility payments and diapers, that she failed to use child restraints when transporting the children, and that the children

were often dirty. The youngest child had suffered from severe diaper rash. H.C.E.'s school records reflected excessive absences and tardiness.

Vicky also was concerned that Amber was not properly addressing H.C.E.'s obesity and symptoms of diabetes, which included elevated hemoglobin levels and irregular liver function problems. She indicated that although there was a serious family history of diabetes, Amber failed to comply with her doctor's recommendations for follow-up treatment of H.C.E. Vicky testified that as a result of her professional training as a registered nurse, she had experience caring for diabetic patients that would enable her to care for H.C.E.'s diabetic propensities. She also noted that her job would provide adequate health insurance coverage for the children.

Vicky testified that the children had stayed with Mike and her almost every weekend since September 2006 and on a number of other occasions during the week. She indicated that they had a great relationship with the children and that they had a large home in which they could live comfortably. She also provided details regarding potential babysitting plans and schedules. Vicky expressed her hope that Amber and Mike II eventually would be able to regain custody of the children after getting their lives "straightened up."

Stacy Taylor, who was Amber's neighbor, testified concerning a controlled drug buy that he had made at the home of Amber and Mike II on March 20, 2006. Amber and the children were present in the room "within three foot" of

him at the time of the transaction. He also described another incident at their home that had occurred approximately two weeks earlier:

> [T]he oldest boy ... was sitting at the kitchen table eating pork and beans out of a can, and the middle boy ... was sitting at the table, too ... coloring ... and the baby was crawling around in the floor. And there was another man ... a visitor ... who was snorting some, I assumed it to be cocaine, it was a white powder, at the kitchen table – the same kitchen table where the little boy was eating at and just a few feet from where the baby was crawling in the floor.

Taylor indicated that Amber was in the same room at the time.

Mike Evans was the last to testify. Based on his conversations with the children, he expressed his concern that they were not getting enough to eat. He also testified that Amber and Mike II had problems paying their bills and faced issues regarding their drug use. He recounted that during the previous six to twelve months when he went to pick up the children, he was certain that Amber was frequently under the influence of drugs because of the change in her personality. He testified that H.C.E.'s report of Amber's drug use was the catalyst for this custody action. Mike told the court that the children would all have rooms in which to sleep at his home; he described how he and Vicky spent time with them. He testified that he simply wanted the children to "get educated and be away from drugs."

Following the hearing, the circuit court entered an order captioned "Findings of Fact, Conclusions of Law, and Judgment" on July 6, 2007. The order's findings were consistent with the allegations made in Vicky's and Mike's

custody petition. The court found that Amber and Mike II were unfit to have custody of the children and that they had waived their right to exercise custody and control over them, reciting that "[t]he children's custody or visitation with either of the Respondents may endanger seriously the physical, mental, moral, or emotional health of the children." The court further held as follows:

> There are reasonable grounds to believe the Respondents are unable or unwilling to protect the children, that the children are in danger in the custody of Respondents, that Respondents have inflicted or allowed to be inflicted by other than accidental means emotional injury on the children, that the children are in immediate danger due to Respondents' failure or refusal to provide for the safety or needs of the children, that Respondents have abused illegal drugs in the presence of the children, and that Respondents have failed to properly care for the children.

The court observed that Amber was in default for failing to file a pleading or otherwise to attempt a defense in the matter, noting that she had failed to appear at the hearing of July 2nd even though she had been given notice of that hearing. Concluding that Vicky and Mike were the fit and proper persons to have custody of the children, the court awarded joint custody to them.

On July 11, 2007, Amber filed a Motion to Alter, Amend, or Vacate Judgment pursuant to CR 59.05 in which she asked that the case be placed back on the active docket and that she be allowed to file a response to the custody petition. In her motion, she alleged the following errors with the custody petition and the circuit court's decision: (1) that since there was no affidavit accompanying the petition, it did not comply with Kentucky Revised Statutes (KRS) 403.350 and

that, therefore, the court lacked jurisdiction to rule as it did; (2) that the petition was effectively a petition for involuntary termination of parental rights that failed to comply with the requirements of KRS 602.090; and (3) that no guardian *ad litem* had been sought or appointed to represent the interests of the children. The motion also explained that Amber's failure to attend the July 2 hearing or to request a continuance of that hearing was due to the fault of her counsel in failing to advise her of the date and that it was, therefore, excusable neglect or mistake as defined in CR 60.02. She also argued in her motion that entry of a default judgment amounted to a termination of her parental rights and was too harsh a penalty under the circumstances (lack of notice through her attorney) that resulted in her absence from the hearing.

A hearing on this motion was conducted on July 23, 2007. Her attorney candidly explained to the circuit court that Amber's failure to attend the July 2 hearing was his fault. Amber had paid a portion of a retainer to secure his services so that he could represent her at the hearing; nonetheless, his staff omitted to note the hearing date on his calendar and failed to inform him that Amber had paid part of the retainer. As a result, neither of them attended the hearing. Amber assumed that it had been re-scheduled. Amber's attorney acknowledged that Amber's failure to attend or to request a continuance was his fault. He asked for relief pursuant to CR 60.02, which provides, in relevant part:

> On motion a court **may**, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following

> ground[]: (a) mistake, inadvertence, surprise or excusable neglect[.] (Emphasis added.)

CR 60.02(a).

In denying Amber's motion to alter, amend, or vacate judgment in an order entered on August 14, 2007, the court held that Amber's excuse for her default was unacceptable. In light of the evidence presented at the July 2 hearing, it determined that the award of custody to Vicky and Mike was in the best interests of the children. This appeal followed.

Amber has apparently abandoned her CR 59.05 claims made before the circuit court on appeal. Instead, in her brief, she relies exclusively upon her CR 60.02 argument that the court should have vacated its custody order because of the unusual and mitigating circumstances surrounding her failure to attend the July 2 hearing.

We begin our analysis by noting that the custody order was essentially a default judgment against Amber. The testimony that was presented to the court at the July 2 hearing was the kind that would generally have been heard at a full custody hearing. The order recited almost verbatim the allegations set forth in the custody petition filed by Vicky and Mike; it used default language as to Amber. We also note that the motion for a hearing tendered by Vicky and Mike was filed pursuant to CR 55.01, which is the default judgment rule. The briefs filed by the parties also treat the circuit court's order as a default judgment.

This case is highly unusual in that it involves a default judgment rendered in a custody matter. Default judgments are generally invoked in property or contract contexts. We have been unable to find any published case law in Kentucky in which a default judgment was entered in a custody matter. Normally an appeal from a default judgment based upon an error made by an attorney would not be sustainable. Inadvertence or mistake by a party or his attorney usually does not constitute an adequate basis to set aside a default judgment. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky.App. 1991), citing 7 W. Bertelsman and K. Philipps, *Kentucky Practice*, CR 55.02, comment 2 (4th ed. 1984). Similarly, "[n]egligence of an attorney is imputable to the client and is not a ground for relief under ... CR 60.02(a) or (f)." *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky.App. 1984).

As this is a case of first impression in Kentucky, we have researched this issue among many of our sister states for guidance. Many other jurisdictions have discussed default judgments in the custody context and have held that strict application of its provisions may not necessarily serve the best interests of a child and that, therefore, those provisions should be less rigorously applied. *See, e.g., Dozier v. Dozier*, 222 S.W.3d 308, 311 (Mo.Ct.App. 2007); *Patricia J. v. Lionel S.*, 611 N.Y.S.2d 374, 375 (N.Y.App.Div. 1994); *Esquibel v. Esquibel*, 917 P.2d 1150, 1152 (Wyo. 1996). This relaxation of standards has occurred when a party alleged to have been in default did not willfully neglect or intentionally ignore the custody

proceedings. *See Esquibel*, 917 P.2d at 1152; *Lantz v. Bowman*, 881 P.2d 1079, 1081-82 (Wyo. 1994).

Most jurisdictions have expressed a strong preference against use of default judgments in custody matters but do not go so far as to bar them. For example, Missouri courts have held:

> Because the adversarial process better protects the child's interests in a custody proceeding, default judgments in custody cases are strongly disfavored and **a refusal to set aside such a judgment is reviewed with heightened scrutiny**. (Emphasis added.)

Cutter-Ascoli v. Ascoli, 32 S.W.3d 167, 169 (Mo.Ct.App. 2000); *see also Dozier*, 222 S.W.3d at 311-12. Alabama courts have similarly held that there is a "strong bias" in favor of deciding cases on the merits when they involve issues of child custody. *See Buster v. Buster*, 946 So.2d 474, 478 (Ala.Civ.App. 2006) (plurality opinion); *Sumlin v. Sumlin*, 931 So.2d 40, 44 (Ala.Civ.App. 2005).

Florida appears to represent the extreme in wholly disfavoring utilization of default judgments in the context of child custody matters. It reasons that only one side giving testimony is insufficient to render a decision "that will truly be in the best interest of the child." *Webber v. Novelli*, 756 So.2d 164, 165 (Fla.Dist.Ct.App. 2000); *see also Childers v. Riley*, 823 So.2d 246, 246-47 (Fla.Dist.Ct.App. 2002); *Armstrong v. Panzarino*, 812 So.2d 512, 514 (Fla.Dist.Ct.App. 2002). Florida does, however, mirror Kentucky in imputing attorney negligence to a client. *Duckworth v. Duckworth*, 414 So.2d 562, 564 (Fla.Dist.Ct.App. 1982).

We agree with our sister states that courts should attempt to address the merits in child custody matters whenever possible after hearing evidence presented by **both** sides to a case. Default judgments are not creatures favored by the law, but trial courts nonetheless exercise broad discretion when considering motions to set them aside.

We may not overturn a circuit court's decision absent a showing that the court abused its discretion. *PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc.*, 139 S.W.3d 527, 530 (Ky.App. 2003). The criteria for evaluating a default judgment are dual in nature:

> Generally, relief against a default judgment is an extraordinary proceeding in which two major considerations must be made by the trial judge exercising discretion. They are whether the movant has had a fair opportunity to present his claim at the trial and whether the granting of the relief would be inequitable to the other parties.

Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc., 690 S.W.2d 393, 394-95 (Ky. 1985). A party who wishes to have a default judgment set aside must show "good cause," which consists of: (1) a valid excuse for the default, (2) a meritorious defense to the claim, and (3) an absence of prejudice to the non-defaulting party. *PNC Bank*, 139 S.W.3d at 530-31; *see also Sunrise Turquoise, Inc. v. Chemical Design Co., Inc.*, 899 S,W,2d 856, 859 (Ky.App. 1995). "Absent a showing of all three elements, the default judgment will not be set aside." *Sunrise Turquoise*, 899 S.W.2d at 859. In determining whether a default judgment should be set aside, a court must carefully evaluate the facts and circumstances of

each particular case. *Cox v. Rueff Lighting Co.*, 589 S.W.2d 606, 607 (Ky.App. 1979).

With these standards in mind, we hold that the compelling nature of the heightened due process interest in a child custody matter dictates that courts carefully evaluate arguments to set aside default judgments involving children. At the very least, neglectful conduct of a willful or intentional nature should be a factor.

In applying the criteria for setting aside a default judgment, we first note that Amber had actual notice of the proceeding and that she failed to file a response to the petition either when she was personally served on April 14, 2007, or before the July 2 hearing. Thus, she had a "fair opportunity" to present her claim – even if it had been on a *pro se* basis. *PNC Bank*, 139 S.W.3d at 530.

Of particular concern is the fact that she has **never as yet** filed any response – nor has an actual response been tendered on her behalf. There is no pleading before this Court responding to the serious, substantive charges alleged in the petition and setting forth an articulable basis for a meritorious defense. Her failure to file such a response is not supported by any explanation; no defense has been raised, leaving the Court in the untenable position of having to speculate about her possible defense. *Haven Point*, 690 S.W.2d at 394-95.

Finally, both *Haven Point* and *PNC Bank* weigh in the balance the inequity to other parties (or the absence of prejudice to those not in default). If we were to agree to set aside this default judgment, it is beyond dispute that enormous

trauma would result to the three children and their grandparents. The hearing of July 2 was highly charged with emotion. The children have enjoyed a stable, nurturing environment for more than nine months. We cannot say that there would be an absence of prejudice to the non-defaulting children and grandparents under these circumstances. On the contrary, we would be wholly unrealistic if we were to assume that no prejudice would occur.

We have studied this case carefully and are aware of the public policy concerns underlying Amber's due process rights to her children as well as the best interests of these children. Our ultimate concern is – and must be – the best interests of the children. We cannot conclude that the trial court abused its sound discretion in refusing to set aside the judgment awarding custody to the grandparents in this case.

Although on appeal Amber relied on CR 60.02, she had asserted three claims pursuant to CR 59.05 at the trial court. We need not discuss the CR 59.05 claims, but we have elected to do so because of the compelling nature of the due process rights at issue.

Before the trial court, Amber first claimed that no affidavit accompanied the petition filed by Vicky and Mike. An affidavit pursuant to KRS 403.350 is required for a motion seeking a modification of custody. We are not convinced that its omission in this case was fatal because this case involved an entirely new petition for custody rather than a modification.

She also complained that the proceeding was – in effect – a petition for involuntary termination of parental rights. It simply was not an involuntary termination and therefore did not in any way implicate the stiff requirements of KRS 602.090.

Finally, she noted that no guardian *ad litem* had been appointed to represent the children. Both KRS 403.300 (pertaining to contested custody proceedings) and KRS 620.100(1)(d) (pertaining to child abuse cases) make such an appointment a matter of discretion for the trial court. Hindsight makes it painfully clear that an appointment of a guardian *ad litem* would have been the better practice in light of the highly unusual circumstances and complexities in this case. However, we cannot say that the court erred in refraining from making that discretionary appointment.

After our careful analysis of the pertinent law and the facts of this case, we conclude that the trial court properly considered the best interests of the children and committed no error rising to the level of an abuse of discretion.

Accordingly, we affirm the judgment of the Bell Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEES:
Michael A. Taylor Middlesboro, Kentucky	Scott M. Webster London, Kentucky