RENDERED: JULY 11, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001445-ME

PAUL M. DAMRON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT, FAMILY BRANCH
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 03-CI-02036

CHRISTINA DAMRON — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MOORE AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Paul M. Damron (Paul) has appealed from a ruling of the Fayette Circuit Court setting aside the August 18, 2004, order for monthly child support by Christina Damron (Christina) in the amount of $612.08 and the attendant arrearage, because, according to the June 21, 2007, order the "child support was set without proper notice to Respondent." Paul argues that the circuit court erred in its ruling as Christina was properly served pursuant to Kentucky

Rules of Civil Procedure (CR) 5.02. We agree with Paul, and therefore, reverse the circuit court and reinstate the original order for child support.

Paul and Christina were married on October 12, 1996, in Pike County, Kentucky. They have one child together, William B. Damron (Bradley). His birthday is July 1, 1996. Bradley is a special needs child and his interests are served by a stable routine. Paul filed a petition for dissolution on May 13, 2003, and on June 2, 2004, the decree of dissolution and property settlement agreement were entered. Under the property settlement agreement, the parties have joint custody with equal time-sharing. Based on the establishment of equal time-sharing arrangement, the parties decided that neither party would pay child support. This factor was noted in the property settlement agreement.

The original action commenced on October 10, 2003, when Paul filed the petition for dissolution of marriage. All legal documents were sent to 3489 Lansdowne Drive, Apartment 2, Lexington, Kentucky, 40517. Christina never contested the circuit court's jurisdiction and participated in the dissolution. The same address used to commence the action was the one used to continue it when Paul acted to change joint custody to sole custody. Indeed, less than two months had passed when Paul filed an *ex parte* emergency motion for custody on July 22, 2004, stating that Christina had moved to Florida without telling him, refused to give him a forwarding address, and had no contact with Bradley since June 16, 2003.

The circuit court ordered temporary custody of Bradley to Paul on July 23, 2004. Thereafter, on July 26, 2004, Paul filed a motion to change custody from joint custody to sole custody and sought child support in the amount of $612.08 per month from Christina. The motion was mailed to both Christina (at her last known address) and her attorney of record, Julie Gragg (Gragg). On August 19, 2004, the circuit court granted sole custody of Bradley to Paul, and ordered Christina to pay $612.04 in monthly child support beginning August 1, 2004. With regards to notice, the court's order said specifically "having been advised former counsel for Respondent had given Respondent notice of said motion as did Petitioner . . . ," thus indicating notice had been given to Christina. The order itself was sent to Christina's last known address.

Approximately two years later, as Christina had not yet paid child support, Paul contacted the Fayette County Attorney's Office to facilitate the collection of child support and determine the amount of child support arrearage. The notice of child support assignment and authority to collect was filed on May 8, 2006. Whereupon, after a hearing on June 2, 2006, the circuit court ordered that effective June 2, 2006, Christina pay $150 per month in child support arrearage until paid in full or further order of the court. At this time, her child support arrearage was $12,241.60.

About a year later, on April 4, 2007, because Christina had still not paid any child support, the circuit court ordered her to appear in Fayette Circuit Court on May 25, 2007, to show cause why she should not be held in contempt of

court for her failure to pay child support. Perplexingly, looking at the timeline, the court entered an order on June 19, 2007, referencing the May 25, 2007, hearing and ordering Christina to continue paying $612.08 per month in child support and $150 per month in arrearage. Although the order was entered on June 19, 2007, the review of the order was set for June 15, 2007. Consequently, it appeared that the review had already taken place.

Meanwhile, on June 5, 2007, Christina filed a pro se motion also seeking review of the child support and supported her motion by stating that "employment does not support amount demanded by court." The motion did not cite the issue of improper notice. (Nothing in the record explains how notice of Christina was achieved at this time, although in her response, Christina supplies a different address than the one used by the Fayette County Attorney.) This motion was set for hearing on June 15, 2007.

Following the June 15, 2007, hearing wherein the circuit court considered both Paul's and Christina's motions, the court entered an order on June 21, 2007, that set aside the monthly child support of $612.08 because the court order said it was set without proper notice to Christina. Child support was set at $289.00 per month and no arrearage was mentioned in the order. The circuit court provided no reasoning explaining its conclusory remark about lack of adequate notice. And the court did not reference its June 19, 2007, order which had continued the previous child support and arrearage payments.

Hence, the issue before this Court is whether or not Christina had proper notice of the 2004 motion for change of custody that also set child support. Apparently, Christina has no issue with the custody order itself, or her lack of knowledge of the custody order, as she did not contest it.

The Kentucky Rules of Civil Procedure set forth the proper method for providing service when service is required under the Rules: "Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address . . . . Service by mail is complete upon mailing." CR 5.02. Therefore, the rule provides two mechanisms for service – one to the party or one to the attorney of record for the party. Both methods are at play in the case herein because notice of the motion was given to Christina and the attorney of record.

First, we will address the issue of service to the party. In *Benson v. Benson*, 291 S.W.2d 27 (Ky. 1956), the former Court of Appeals examined CR 5.02 shortly after the adoption of the Rules of Civil Procedure in 1953. The *Benson* Court relied upon the statement of the law on notice contained in *Mrs. W.R. Klappert Moving & Storage Warehouse v. Muehlenkamp*, 256 Ky. 506, 76 S.W.2d 597 (Ky. 1934). Therein, the Court held that where notice by mail is authorized under a statute and the statute was duly complied with in respect to posting the notice, the validity of the service was not affected by a failure to receive the notice. *Benson*, 291 S.W.2d at 29. Indeed, the wording of CR 5.02 itself states that "service by mail is complete upon mailing." In contrast, where it

is established that notice was not mailed to the proper last known address, service is not effective. "A notice mailed to an incorrect address and not received by the addressee is not in compliance with CR 5.02." *McAtee v. Wigland of Louisville, Inc.*, 457 S.W.2d 265 (Ky. 1970).

The facts at hand show that Paul's counsel mailed this particular motion to Christina's last known address. There is nothing in the record to suggest that the address was incorrect. It is incumbent upon us to add that, notwithstanding the fact that service is complete upon mailing, parties still have a remedy if they can establish any of the grounds enumerated in CR 60.02 for voiding an order entered. *Benson*, 291 S.W.2d at 30.

Now, we will examine the issue regarding service to the attorney of record. These facts are more convoluted. At the time that Paul initiated his motion to change custody in the established action, his counsel conscientiously sent notice not only to Christina but also to the attorney of record, Gragg. While Paul was aware that Christina had sent a letter to her attorney's law firm discharging them, he also knew that they had not officially requested to withdraw from the case. When the lawyer from Gragg's firm, Jill Hall Rose, submitted the motion to withdraw, the motion itself stated that the pending motion to change custody had been forwarded to Christina. Thus, because Paul met the requirements of CR 5.02 regarding notice, we hold the service was valid.

At this point, in the interest of children, we must point out some obvious facts. First, the rationale behind child support is based on the necessity of

parents supporting their children. The result of the court order that is the subject of this action was to excuse Christina from any obligation to Bradley from 2004 to 2007. Here, with the mandate of the Family Support Act adopted by the Commonwealth in 1988, it would be egregious for us to allow Christina to be relieved of the obligation to pay child support when, less than two months after the divorce, she left her special-needs child and did not inform either Paul or her child about her whereabouts. Moreover, she never sent financial support for Bradley. Surely, during this three year time period, Christina knew about Bradley.

The judgment is reversed and remanded to the Fayette Circuit Court, Family Branch, for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Patrick B. Shirley
Lexington, Kentucky

NO BRIEF FILED FOR APPELLEE