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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002445-ME

KIMBERLY ANN HOWARD

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 05-CI-00003

MARTIN SHANE HOWARD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

VANMETER, JUDGE: Kimberly Ann Howard appeals from an order entered by the Clark Circuit Court, Family Division, regarding matters relating to child custody. We affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Kimberly and Martin Shane Howard (Marty) married in 1999, and their only child was born in 2000. When the parties divorced in 2005, the decree of dissolution provided for joint custody with equal time sharing arrangements. The issue of who would have primary residential custody when the child reached school age was specifically reserved for later determination.

In April 2006, Marty filed an *ex parte* motion seeking temporary custody of the child based on the following allegation:

2. That [Kimberly] contacted him at 1:15 a.m. on Sunday morning, April 16, 2006 and stated her new husband had beaten her and was taken to jail. She asked [Marty] to come pick up the minor child to ensure her safety. She further stated her husband would be released at 7:00 a.m. and she did not know where she would be when he arrived at home.

Marty stated that although he agreed Kimberly acted properly by calling him and removing the child “from the violence,” he believed it was “in the child’s best interest for her to remain in his temporary custody until a final hearing can occur.”

The trial court awarded Marty temporary custody of the child and scheduled a hearing some two weeks later. Kimberly did not attend the hearing, evidently due to car problems. On May 12 the court awarded temporary custody of the child to Marty, ordered that the child should have no contact with Kimberly’s husband, and directed the parties to “mediate the issues of custody and timesharing before filing a motion for a final hearing on the matters.”

Some fourteen months later, in July 2007, Kimberly filed a motion seeking child custody, stating that mediation had been unsuccessfully attempted.

The court conducted a hearing on October 8 and ordered the parties to share joint custody. The court further established a timesharing schedule, and directed that “the child shall not be around” Kimberly’s husband. This appeal followed.

First, Kimberly in essence contends that the trial court erred by adopting findings of fact which were prepared by Marty’s attorney and which were unsupported by the evidence. We disagree.

The court and the parties clearly viewed this matter as the resolution of the custody issue reserved at the time of dissolution, rather than as a proceeding to modify custody. Thus, when addressing the issues before it, the court considered the child’s best interests and relied on the factors set out in KRS 403.270(2). Those factors include in pertinent part:

- (a) The wishes of the child’s parent or parents . . . ;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interests;
- (d) The child’s adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved; [and]
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720[.]

The record shows that although both parties submitted proposed findings and conclusions to the court before the hearing, the trial court accepted neither version. Instead, during the hearing the court made numerous findings and conclusions on the record in accordance with the factors set out in KRS

403.270(2). Indeed, the court specifically noted that the only statutory factor favoring Kimberly was the child's alleged relationship with the other children in Kimberly's home. Moreover, for lack of proof, the court rejected Kimberly's allegations that Marty was not responding appropriately to the child's allergies and asthma. Although the court opined that it probably would be beneficial if Marty was employed more hours, the court also voiced that having Marty at home as a full time parent may have worked in the child's favor. After describing Kimberly's husband as an alcoholic and wife-abuser based on his several DUI convictions and the April 2006 incident, the court expressed its concern over Kimberly's decision to marry the husband despite knowing that he was not to be around the child. The court also noted that despite Kimberly's assertions that no further incidents had occurred, no evidence had been presented to show that the husband had sought help. Indicating a willingness to attempt joint custody despite some apprehension over its feasibility, the court named Marty as the primary residential custodian. The court ordered that Kimberly's husband should have no contact with the child, but left open the possibility that such condition could be modified in the future.

The trial court subsequently entered findings, conclusions and an order which Marty's counsel prepared after the court made verbal findings and conclusions on the record during the hearing. Such order differed significantly from the proposed orders submitted by the parties before trial. Thus, unlike the situations in *Callahan v. Callahan*, 579 S.W.2d 385 (Ky.App. 1979), and *Brunson*

v. Brunson, 569 S.W.2d 173 (Ky.App. 1978), the court clearly made independent findings of fact and conclusions of law rather than simply adopting an order prepared by counsel. No error occurred in this regard. *See, e.g., Bingham v. Bingham*, 628 S.W.2d 628 (Ky. 1982); *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954 (Ky. 1987). Additionally, after reviewing the record we cannot say that the trial court's findings were unsupported by the evidence and therefore erroneous. CR² 52.01.

Next, Kimberly in essence contends that the trial court erred by failing to find that the introduction of evidence of her husband's past criminal record was barred by *res judicata*. However, this affirmative defense was waived when it was not raised in a responsive pleading. CR 8.03. *See Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610 (Ky. 2005); *Bailey v. Bailey*, 231 S.W.3d 793 (Ky.App. 2007). In any event, the doctrine of *res judicata* is inapplicable to bar the evidence in question since the current husband's criminal record apparently has not been, nor could have been, a subject of litigation during the parties' earlier dissolution proceedings. *See, e.g., Wheeler v. Wheeler*, 154 S.W.3d 291 (Ky.App. 2004); *Huntzinger v. McCrae*, 818 S.W.2d 613 (Ky.App. 1990).

Finally, Kimberly asserts that the trial court erred by entering the temporary custody order in May 2006. Simply put, as a temporary custody order is a nonappealable interlocutory order, *see, e.g., Knight v. Knight*, 419 S.W.2d 159

² Kentucky Rules of Civil Procedure.

(Ky. 1967), the terms of the May 2006 order are not properly before this court on appeal.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William D. Elkins
Winchester, Kentucky

BRIEF FOR APPELLEE:

Kimberly Carter Blair
Winchester, Kentucky