RENDERED: DECEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000507-ME

JAMES E. HOPWOOD — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 04-CI-00103

TAMI S. RIZZO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: James E. Hopwood appeals from an order of the Warren Circuit Court denying his motion to vacate a previous order dismissing his motion to modify visitation and timesharing. On appeal, Hopwood argues that the trial court abused its discretion in denying his motion to vacate.

James Hopwood and Tami Rizzo's marriage of four years was dissolved by a decree of the Warren Circuit Court on October 6, 2004. The decree

granted Hopwood and Rizzo joint custody of the two children, C.H. and J.H, with Rizzo being named as the primary residential custodian.

On February 25, 2010, Hopwood, by counsel, filed a "Motion to Modify Custody" with an accompanying affidavit. The motion was noticed for the motion hour on March 10, 2010. In the motion, Hopwood sought to be named the primary residential custodian for both C.H. and J.H. The Warren Circuit Court denied Hopwood's "Motion to Amend Custody" based upon the Supreme Court's recent holding in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), noting that Hopwood was actually asking for a modification of timesharing/visitation rather than a modification of custody. The trial court denied the motion "with leave to amend."

Hopwood filed an amended motion to modify timesharing and visitation on March 24, 2010, which was noticed to be heard on April 7, 2010. However, a response was not filed by Rizzo until April 15, 2010. A hearing date was then set for June 10, 2010. On June 21, 2010, the hearing date originally set for June 10, 2010, was continued to August 13, 2010, by agreed order of the parties.[1]

On August 13, 2010, the parties came before the court, however, there appeared to be insufficient time for a hearing that day. The Court continued the hearing to October 7, 2010, "due to insufficient time to hear testimony of all

[1] The record indicates that the hearing was continued *after* the date that had been scheduled for the hearing.

parties and witnesses[.]" However, on October 7, 2010, neither party nor their respective counsel appeared in court for the hearing.

On October 14, 2010, the trial court entered an order denying Hopwood's motion. The order stated as follows:

> This matter having come before the Court on the Petitioner's Motion to Modify Timesharing/Visitation filed with the Court on March 24, 2010, it appearing that this matter has been scheduled on five different occasions to be heard by this Court with the final hearing once again to be held on October 7, 2010, no one appearing at scheduled trial and no notices having been filed with the Court canceling said event, and the Court being otherwise sufficiently advised;
>
> IT IS HEREBY ORDERED that the Petitioner's Motion to Modify Timesharing/Visitation shall be DENIED.

On November 29, 2010, Hopwood's counsel, Bethany Catron, filed a motion to vacate the order. Therein, counsel stated that she never received a copy of the court's order denying the motion to modify timesharing and visitation until November 22, 2010, when she received correspondence regarding same from Rizzo's counsel, Stephanie Ritchie. Attorney Catron stated that the licensed clinical social worker who was supposed to testify at the hearing sent a fax to her on Saturday October 2, 2010, just days before the scheduled hearing, to inform her that she could not be present at the hearing on October 7th. The fax was attached to the motion.

Catron stated that she did not receive the fax until the morning of October 5, 2010. The motion stated that, thereafter, she had her legal assistant

contact the court to obtain a new hearing date of January 7, 2011, and to have the October 7, 2010, date stricken from the docket. Catron further maintained that the assistant told the clerk an agreed order would be forthcoming regarding the change in dates and that the date had already been agreed on by counsel for both parties. Catron's motion claims that she sent the agreed order to Ritchie's office, via fax, on October 6, 2010. An affidavit of Catron's legal assistant was attached to the motion confirming the same. Catron further stated that she was told the order was sent to Ritchie's office on that day and that she had "no idea" why the order was never sent to the court. The motion requested that the prior order denying Hopwood's motion be vacated as the outlined events were the fault of counsel and no fault of Hopwood's.

The trial court entered an order setting a hearing on Catron's motion to vacate for February 2, 2011. Attorney Ritchie then filed a response to Catron's motion to vacate stating that she did not oppose the motion because it was her understanding that the October hearing was to be continued by agreement.

The motion was heard on February 2, 2011. Thereafter, the court entered an order denying the motion to vacate without written explanation. The judge orally repeated from the bench the grounds she stated in her previous written order denying Hopwood's motion. The trial judge reiterated that the hearing had been continued no less than five times, that the case otherwise did not proceed after it was filed in February of 2010, and that neither party or counsel showed up for the October hearing date. The trial judge then addressed the parties individually,

saying "if either of you are serious about going forward on that motion, you need to file a proper motion, have it properly scheduled, and appear in court when it is scheduled."

Hopwood now appeals from the denial of his motion to vacate.[2] The sole question before this Court on review is whether the trial court abused its discretion by denying his motion to vacate the court's previous order denying his motion to modify timesharing and custody. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

It requires pointing out that Hopwood does not appeal from the order denying his motion for modification of timesharing, but rather appeals from an order denying his motion to *vacate* the court's previous order denying his motion for modification. Hopwood waited for more than thirty days before taking any action after the original motion was denied, thus missing his opportunity to file a motion to alter, amend, or vacate under Kentucky Rules of Civil Procedure (CR) 59.05 or to file a notice of appeal pursuant to CR 73.02(1)(a). Although Hopwood appears to be claiming something along the lines of mistake, inadvertence, or excusable neglect, he did not file a CR 60.02 motion. Instead, Hopwood filed a "motion to vacate," presumably under CR 59.05. Thus, the motion was filed out of

[2] No responsive brief was filed by Appellee/Respondent, presumably because Appellee/ Respondent did not object to the motion for a continuance.

time as it was filed more than ten days after the court's order denying his motion to modify timesharing.

For this reason, the trial court was correct to deny Hopwood's motion. Ten days after the entry of a final and appealable order, the trial court loses jurisdiction over the order and cannot then alter it. *Com. v. Sowell*, 157 S.W.3d 616, 618 (Ky. 2005). Indeed,

> [u]nder CR 59, a final judgment or order may be vacated only in accordance with the ten day provisions of the rule. Thereafter, the trial court loses jurisdiction to act.

Id. Thus, the trial court could not have granted Hopwood's motion to vacate, even if it desired to do so. While counsel likens the plight of her client in the current case to that of "Elliot" in the movie "E.T.: The Extra-Terrestrial," and makes emotional appeals to this Court based thereon, we are obliged to follow the established law of this Commonwealth rather than arguments based on whim or popular culture.—

In light of the foregoing, we hereby affirm the order of the Warren Circuit Court denying Hopwood's motion to vacate. We reiterate the words of the trial court by saying that if Hopwood is "serious" about his motion to modify visitation and timesharing, he is at liberty to refile it in the Warren Circuit Court and appear in court at the scheduled times in support thereof.[3]

ALL CONCUR.

[3] Rather than Elliot in "E.T.: The Extra-Terrestrial," Hopwood will more closely identify with cyborg in "The Terminator" – he'll be back.

BRIEF FOR APPELLANT:

Bethany L. Catron
Columbia, Kentucky

NO BRIEF FILED FOR APPELLEE.