

RENDERED: AUGUST 26, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000066-ME

W.T., JR.

APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE LISA HART MORGAN, JUDGE
ACTION NO. 13-J-00077-001

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY;
JAMES ROBINSON; JENNIFER LYNN WILBURN;
AND L.T., A CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

ACREE, JUDGE: W.T., Jr. (Father) appeals from the Bourbon Circuit Court's denial of his motion filed pursuant to CR¹ 60.02, wherein he asked the court to vacate its October 16, 2014 permanent custody order entered at the conclusion of a

¹ Kentucky Rules of Civil Procedure

dependency, neglect, and abuse action involving his child, L.T. After review, we affirm.²

In April 2013, a dependency, neglect, and abuse petition was filed on behalf of L.T. because the child was born addicted to methadone, and Mother had a history of opiate addiction. She previously had an older child removed from her care due to her substance abuse. Appellant was named L.T.'s father in the petition. The petition indicates that Father was living in Ohio at that time. Upon discharge from the hospital, L.T. was placed in the temporary custody of James and Jennifer Robinson, relatives of Mother. Mother later stipulated to dependency. Father's paternity was established in October 2013 and recognized in the family court's dispositional order. L.T. remained in the care of the Robinsons. Due to Mother's lack of contact with L.T., noncompliance with her case plans, and the child's strong bond to his caretakers, the family court awarded permanent custody of L.T. to the Robinsons in October 2014.

Father contends that he appeared several times in court for proceedings throughout the dependency action, but insists that he was not

² Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

permitted to participate and he was not appointed counsel. For these reasons, he filed a CR 60.02 motion requesting the family court to vacate its permanent custody award to the Robinsons entered approximately nine months earlier.

The parties submitted briefs to the court on the issue and the court held a hearing on the motion.

Father argued that the two provisions of CR 60.02 which afford him relief are subsections “(e) the judgment is void, or has been satisfied, released, discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of extraordinary nature justifying relief.” CR 60.02. Father contended it was error for the court to exclude him from consideration as a relative placement in the dependency proceedings. He also argued that he was entitled to counsel pursuant to KRS 620.100(1).

The Robinsons responded by pointing out that the dependency matter had been closed for almost an entire year, and therefore, any custody or visitation motions should be filed in a separate circuit court action. Apparently, Father was instructed by the court several times throughout the course of the dependency matter to file a separate custody action should he so choose.

Furthermore, the Robinsons noted that a Warning Order Attorney was appointed for purposes of serving Father in May 2013. Father signed the certified mailing that was delivered to him, which informed him of the upcoming court date in August 2013 as well as advised Father that he may hire an attorney or request

the court to appoint one to represent him should he qualify. Father did appear before the court in August 2013. He was instructed to cooperate with the County Attorney in establishing his paternity to L.T. He did so, but the Robinsons asserted that Father never requested an attorney nor did he file the necessary documents to be entitled to a court-appointed attorney. The Robinsons further stated that Father was not considered an appropriate relative placement because he was a lifetime registered sex offender since pleading guilty to gross sexual imposition of a five-year-old victim. The Robinsons declared it would be in L.T.'s best interests to deny Father's motion.

On December 23, 2015, the family court entered an order overruling Father's CR 60.02 motion. The court found the motion to be untimely, and it could not find sufficient justification to reopen the dependency action one year after the permanent custody determination. The family court considered Father's rights to have been addressed in the dependency matter based on its review of the proceedings. As a result, the court held the dependency action was closed, and any further custodial issues were required to be heard in a separate custody proceeding. Father now appeals.

Our standard of review for a family court's denial of a CR 60.02 motion is abuse of discretion. *Lawson v. Lawson*, 290 S.W.3d 691, 693 (Ky. App. 2009). The test for abuse of discretion is whether the court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Father's notice of appeal clearly states that he is appealing from the order denying his CR 60.02 motion. The notice of appeal is jurisdictional and, thus, this Court gains jurisdiction only over the order identified as that from which the appeal is taken. *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). Therefore, this case does not require us to review the family court's award of permanent custody or to determine whether the court erred in declining to appoint counsel to represent Father in the dependency action as Father argues to this Court in his appellate brief. The time for challenging the merits of the ruling from that action have come and gone. *See United Bonding Ins. Co., Don Rigazio, Agent v. Commonwealth*, 461 S.W.2d 535, 536 (Ky. 1970) (“[a] party may not resort to CR 60.02 to gain an additional extension of time to prevent application of CR 73.02.”).

CR 60.02 provides the court authority to relieve a party from a final judgment, order, or proceeding if certain enumerated instances occur, none of which transpired here. Additionally, the relief available in a CR 60.02 proceeding “should be related to those instances where the matters do not appear on the face of the record, were not available by appeal or otherwise, and were discovered after rendition of the judgment without fault of the party seeking relief.” *Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 507 S.W.2d 183, 186 (Ky. 1974). The burden of proof to support such a motion “falls squarely on the movant.” *Foley v. Commonwealth*, 425 S.W.3d 880, 885 (Ky. 2014). However, Father has pointed to nothing which causes us to

believe the family court exceeded the bounds of its considerable discretion. His brief plainly states: “The entire reason the motion to vacate was filed was because [Father] did not have counsel.” (Appellant’s brief p.9). Beyond this, Father does not explain why he should be afforded relief pursuant to either subsection (e) or (f) of CR 60.02.

CR 60.02 is available only to raise issues which could not have been raised in a direct appeal or in any other applicable proceeding. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Dependency, neglect, and abuse proceedings are not intended to replace or act as a substitute for full custody hearings under KRS Chapter 403. *S.R. v. J.N.*, 307 S.W.3d 631, 637 (Ky. App. 2010). In this case, the family court advised Father to bring an action for custody in circuit court, and indicating proper procedure as a dependency matter “is simply not the appropriate forum for rehashing custody issues.” *Id.* Father’s participation or lack thereof in the dependency case is not the proper subject of a CR 60.02 proceeding. Accordingly, we conclude that the family court did not abuse its discretion in denying Father’s CR 60.02 motion. The decision of the Bourbon Family Court is affirmed.

ALL CONCUR

BRIEF FOR APPELLANT:

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