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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000932-MR

MARY HOLLOWAY APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 12-CI-00916

RICHARD MYERS APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, D. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Mary Holloway has appealed from multiple orders of the Hardin Family Court changing primary residential parent of her minor child from herself to the child's father, Richard Myers ("Rick"), and denying her multiple requests to alter, amend or vacate that decision. Following a careful review, we reverse and remand.

Mary and Rick were never married but are the parents of a minor child born in November of 2009. In 2013 the Hardin Circuit Court entered a final and appealable order granting the parties joint custody of the child, designating Mary as primary residential parent, granting Rick visitation, and ordering him to pay child support. When this order was entered, Mary and the child were residents of Tennessee while Rick lived in Kentucky. No appeal was taken from this order.

Approximately eighteen months later, on October 15, 2014, Rick filed a motion seeking a change in primary custody, alleging Mary had moved from Tennessee to Minnesota in contravention of the local rules of practice and procedure. An affidavit in support was attached to the motion indicating Rick learned of the move in September. Despite knowing Mary no longer resided in Tennessee, the motion was sent to her at an address known to be bad. A courtesy copy of the motion was also sent to the attorney who had represented Mary when the final judgment was entered in 2013. That attorney no longer represented Mary and did not attempt to advise her of the pending motion. Unsurprisingly, Mary did not attend the hearing on Rick's motion convened some six days later, but the trial court orally concluded Mary had been "sufficiently and duly notified" of the pending motion. In an order entered on October 23, 2014, the trial court modified the parenting time and named Rick primary residential parent. The two-sentence order included no findings of fact and no indication the child's best interests had been considered.

With this order in hand, Rick sent a text message to Mary asking for her address under the guise of needing to mail her some documentation regarding the child. Mary texted her address almost immediately. On October 25, 2014, local police officers arrived at Mary's home to take custody of the child to deliver him to Rick and his family who were waiting at the police station. This was the first time Mary was made aware of Rick's efforts to modify parenting time. Mary retained new counsel in Kentucky and began attempting to undo the change to no avail.

Mary's first motion informed the trial court of the lack of notice—specifically referencing Rick's prior knowledge of her relocation—and requested the child be restored to her custody. The trial court denied the motion, concluding notice had been sufficiently provided and admonished Mary for seeking relief in light of her own failure to follow the local rules prior to relocating with the child. Mary requested more specific findings. The trial court entered an order containing findings on January 7, 2015, some of which were directly contrary to the evidence adduced regarding Rick's admitted prior knowledge of Mary's relocation. Again, however, no findings regarding the child's best interests were included.

Prior to receiving the January 7, 2015, order, Mary filed another motion seeking modification of timesharing to restore her status as primary residential parent. At an evidentiary hearing conducted in March, evidence was adduced regarding Mary's relocation and discussions between the parties regarding same, including Mary's suggestion that Rick cease making child support payments

as he would have increased travel expenses to exercise his timesharing, and Rick's failure to make any support payments after that time. It was also adduced that Rick was well-aware Mary had relocated no less than a month prior to his filing the initial timesharing modification motion and she no longer resided at the Tennessee address where he had sent notice of the motion. A host of additional evidence and testimony not pertinent to this appeal was also adduced at the hearing. At the conclusion of the hearing, both parties were directed to tender proposed orders containing findings of fact and conclusions of law. More than two months later, on May 28, 2015, the trial court entered Rick's proposed order denying Mary's motion. This appeal followed.

As a preliminary matter, we note Rick has chosen not to file an appellee brief. Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) "provides the range of penalties that may be levied against an appellee for failing to file a timely brief." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). At our discretion, we may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). However, in actions involving child custody or support, regarding the appellee's failure as a confession of error has been deemed inappropriate. *Ellis v. Ellis*, 420 S.W.3d. 528, 529 (Ky. App. 2014). We choose to accept Mary's statements of facts and issues as correct.

Mary presents three arguments seeking reversal. First, she alleges the trial court erred in determining adequate notice of the pending motion to modify timesharing had been provided to her. Next, she contends the trial court's failure to make findings as to the child's best interests prior to modifying the timesharing arrangement was improper. Finally, she argues the trial court's adoption of Rick's proposed order constituted an inappropriate delegation of decision-making responsibility and resulted in entry of an order containing findings contrary to the evidence presented. Because the notice provided did not comply with the letter or the spirit of the civil rules, reversal based solely on that issue is mandated and no discussion of Mary's other contentions is warranted.

"Parental rights are so fundamentally esteemed under our system that they are accorded Due Process protection under the Fourteenth Amendment of the United States Constitution." *Cabinet for Health & Family Servs. v. A.A.G.*, 190 S.W.3d 338 (Ky. App. 2006) (citing *O.S. v. C.F.*, 655 S.W.2d 32, 33 (Ky. App. 1983)). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Robinson v. Hanrahan,* 409 U.S. 38, 39-40, 93 S.Ct. 30, 31, 34 L.Ed.2d 47 (1972) (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). In *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972), the United States Supreme Court stated, "[f]or

more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (quoting *Baldwin v. Hale,* 68 U.S. 223, 233, 17 L.Ed. 531 (1863)).

When addressing a "child custody determination"[1] involving a parent who resides outside Kentucky, a court must consider the notice requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), adopted in Kentucky under KRS 403.800, *et seq*. The relevant portions of that statute require notice, and an opportunity to be heard "in accordance with the standards of KRS 403.812 shall be given to . . . any parent whose parental rights have not been previously terminated . . . ." KRS 403.830(1). The statute to which this provision alludes further requires notice "shall be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice shall be given in a manner reasonably calculated to give actual notice . . . ." KRS 403.812(1).

The rules governing service of process in Kentucky require a court wishing to exercise jurisdiction over a resident of another state to notify that person either by personal service, certified mail or by warning order attorney. *See* CR

[1] Kentucky Revised Statutes (KRS) 403.800(3) defines "child custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes permanent, temporary, initial, and modification orders. The term does not include an order relating to child support or other monetary obligation of an individual[.]"

4.04(8); CR 4.05. The rules providing for adequate "constructive notice" do not include verbal or telephonic communication.

As previously stated, notice must be reasonably calculated to reach the opposing party and give actual notice of the pendency of an action regarding child custody determinations. Pursuant to CR 5.02, service may be made upon a party by mailing the pleading to them at their last known address. Service is deemed "complete upon mailing *unless the serving party learns or has reason to know that it did not reach the person to be served*." *Id*. (emphasis added). It is undisputed Rick was aware Mary no longer lived in Tennessee prior to seeking physical custody of the child. Neither he nor his counsel made any effort to obtain a correct address for Mary until *after* the trial court had entered its initial order modifying parenting time. The complete lack of effort before filing the motion and sending notice thereof to a known bad address is troubling. The motion and attached affidavit make it clear Rick knew the relocation had already occurred, and equally clear any notice would not reach Mary if sent to her prior address. A simple text message resulted in obtaining the needed information after the order had been secured, but absolutely no effort was expended to ensure Mary received notice of the pending motion to remove the child from her custody. Rick did not act in good faith to provide notice to Mary and cannot benefit from his insufficient effort.

Next, CR 5.02 specifies when service is to be made upon a party represented by counsel, "service shall be made upon the attorney unless service

upon the party is ordered by the court." Normally, once an attorney appears in a case, he/she remains attorney of record until the trial court grants a motion to withdraw. However, a niche has been carved for service of post-decree motions upon the former attorney. In that situation,

> the provision of CR 5.02 requiring service of a motion be made upon the attorney of a party "represented by an attorney" clearly contemplates currency and continuity of litigation and representation. It is our opinion that in a divorce case representation by [an] attorney is not to be deemed to have continued for the purpose of service in connection with proceedings for modification of the judgment upon a change of conditions, after the case otherwise has been finally concluded.

Guthrie v. Guthrie, 429 S.W.2d 32, 35 (Ky. 1968). While *Guthrie* dealt with a divorce action, we believe its guidance is equally applicable to this child custody matter. The record contains no indication counsel's prior representation of Mary demonstrated a "currency and continuity of litigation and representation" from which one could reasonably conclude she was still represented by the same counsel or that service upon him was reasonably certain to inform Mary of the motion to modify timesharing. Thus, we determine, as a matter of law, conclusion of the custody action terminated the attorney-client relationship between Mary and her prior counsel and sending notice of the modification motion to the former attorney did not properly effectuate service upon Mary.

Mary had insufficient legal notice of the proceedings. That lack of notice undermined the validity of the trial court's decision to modify the then-existing custody and visitation order. As she was not provided notice of the

modification motion, it follows Mary did not have any opportunity to present evidence to rebut the allegations contained therein. *See Lynch v. Commonwealth*, 610 S.W.2d 902, 907 (Ky. App. 1980) ("Without service there can be no notice; without notice there can be no compliance with one's constitutional rights of due process."). In addition, the complete lack of findings of fact and conclusions of law justifying the trial court's decision, or indeed any discussion of the child's best interests, strengthens our resolve that the trial court acted in error. Further, our review of the record reveals the trial court's actions could—as Mary suggests—be potentially construed as a use of the custody statutes as punishment for Mary's failure to strictly follow procedural rules. While we make no determination as to the legitimacy of such a view, were that to have been the case, such an action would have been improper. *See Chalupa v. Chalupa*, 830 S.W.2d 391, 392 (Ky. App. 1992) (custody not to be used as punishment).

For the foregoing reasons, we reverse and remand this matter with instructions that the trial court vacate any orders stemming from the improperly noticed motion and return the parties to the *status quo* immediately preceding the filing of the motion, including, but not limited to restoring Mary to the role of primary residential parent and reinstating the child support previously ordered to be paid.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Catherine Ann Monzingo Lexington, Kentucky	No brief filed.