

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000481-ME

CHRISTINA SLONE (now KIMES)

APPELLANT

v. APPEAL FROM MARTIN FAMILY COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 14-CI-00144

WILLIAM SLONE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, SMALLWOOD¹ AND TAYLOR, JUDGES.

COMBS, JUDGE: Christina Slone (now Kimes) appeals from the order of the Martin Family Court that declined to vacate its determination with respect to custody of the minor children born prior to her marriage to William Slone.

Christina challenges the conclusion of the family court that she had waived or was

¹ Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

estopped from challenging the court's jurisdiction to render a custody decision in the divorce action. After our review, we reverse and remand.

William filed a verified petition for dissolution of the parties' marriage on July 29, 2014. It indicated that the parties married on August 7, 2012, and separated in May 2013 (this appears to be a typographical error because the property settlement agreement and William's deposition provide that they separated in May 2014). It also indicated that Christina is a resident of Wyandotte, Michigan, and that they have two minor children. The petition requested nothing with respect to the care and control of the children and omitted the information required by the provisions of KRS² 403.838 concerning the present address or location of the children as well as the name and address of the persons with whom they had lived during the years preceding the filing of the petition.

On October 23, 2014, the family court entered a decree dissolving the marriage. It purported to award joint custody of the children to the parties. However, William's deposition did not include any testimony that the parties' children had resided in the Commonwealth for at least six months before the petition was filed. In fact, none of the information necessary to invoke the jurisdiction of the family court to make an initial child custody determination was ever presented. Christina was not represented by counsel.

² Kentucky Revised Statutes (KRS).

On December 20, 2017, William filed a motion to show cause why Christina should not be held in contempt for failing to abide by the court's visitation orders. Christina made a limited appearance and presented information establishing that the parties' children had resided with her in Wyandotte, Michigan, continuously since November 1, 2013. She requested that the trial court dismiss the action insofar as it related to custody of the children for lack of subject matter jurisdiction. William filed no response, and neither he nor his attorney appeared for the show cause hearing. Nevertheless, the family court concluded that Christina had waived or was estopped from asserting any argument with respect to the court's jurisdiction to decide custody. In an order entered on February 27, 2018, it denied Christina's motion to dismiss. This appeal followed.

On appeal, Christina contends that the family court erred by concluding that it properly exercised its subject matter jurisdiction in the matter. William filed no brief in this appeal. The provisions of CR³ 76.12(8)(c) set forth penalties for such failure. If the appellee's brief has not been filed within the time allowed, the court 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. Our decision with respect

³ Kentucky Rules of Civil Procedure (CR).

to imposing these penalties is a matter committed to our sound discretion. *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). In this case, we reverse the judgment because Christina's brief reasonably appears to sustain such action.

Based upon the foregoing, the judgment of the Martin Family Court is reversed, and this case is remanded for entry of an order dismissing the case for lack of subject matter jurisdiction.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Davidson
Lexington, Kentucky

BRIEF FOR APPELLEE:

No brief filed