

RENDERED: OCTOBER 30, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000652-ME

WARD MICHAEL CUMMINS

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 04-CI-00241

RANDALL THOMAS AND
RUBY THOMAS

APPELLEES

OPINION & ORDER DISMISSING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; LAMBERT, SENIOR JUDGE.¹

MOORE, JUDGE: Ward Michael Cummins appeals from a March 27, 2009 order of the Madison Family Court ruling that Randall Thomas and Ruby Thomas are *de facto* custodians of their grandson. After a careful review of the record, we are compelled to dismiss because the family court's order is interlocutory.

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.

Due to the procedural nature of this appeal, the underlying facts of this matter are not highly relevant for its disposition. It is sufficient to state that after the tragic death of the mother of the child involved in this case, the maternal grandparents sought a determination from the family court that they were *de facto* custodians of their grandson. The father of the child fought against this determination.

The family court held a hearing on the *de facto* custodian designation. The court ruled that the Thomases met the statutory requirements of *de facto* custodian status pursuant to Kentucky Revised Statute (KRS) 403.270 by clear and convincing evidence. According to the court's order, the Thomases provided the primary care and financial support of their grandson from October 4, 2006, until November 27, 2007, which met the required one-year time period under the statute. The father appeals from this order.

Kentucky Rule of Civil Procedure (CR) 54.01 states “[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02.” The relevant portion of CR 54.02(1) states:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The

judgment shall recite such determination and shall recite that the judgment is final.

As the Court stated in *Hale v. Deaton*, 528 S.W. 2d 719, 722 (Ky. App. 1975), “[b]efore the processes of CR 54.02 may be invoked for the purposes of making an otherwise interlocutory judgment final and appealable, there must be a final adjudication upon one or more of the claims in litigation.” Despite the parties’ not raising the issue of finality in their briefs, “the appellate court should determine for itself whether it is authorized to review the order appealed from.” *Hook v. Hook*, 563 S.W. 2d 716, 717 (Ky. 1978).

KRS 405.020(3) provides that “a person claiming to be a de facto custodian, as defined in KRS 403.270, may petition a court for legal custody of a child. The court shall grant legal custody to the person if the court determines that the person meets the definition of de facto custodian and that the best interests of the child will be served by awarding custody to the de facto custodian.”

The family court’s decision grants the Thomases standing to seek custody of their grandson; however, a custody determination pursuant to the best interest of the child governed by the factors outlined in KRS 403.270(2) has not yet been made. Accordingly, the family court’s order regarding *de facto* custodian status is an intermediate, ancillary determination to a custody dispute between the parties. Because the order did not adjudicate the custody issue, it is by its very nature an unappealable, interlocutory order not properly before this Court.

Being sufficiently advised, this Court *sua sponte* orders that this appeal be, and it is hereby, dismissed.

ALL CONCUR.

ENTERED: October 30, 2009

/s/ Joy A. Moore
JUDGE, COURT OF APPEALS

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