RENDERED: FEBRUARY 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-001346-ME

J.A.S. APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 08-CI-03307

C.E. APPELLEE

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: J.A.S. (Mother) appeals from an order of the Kenton Family Court determining that it had jurisdiction over a paternity action brought by C.E. concerning N.R.S., a child born to Mother while she was married

[1] Senior Judge David C. Buckingham 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.

to R.S. Because we agree with C.E. that the order was interlocutory and thus not appealable, we dismiss the appeal.

Mother and R.S. were married on October 9, 1999. Mother had an extramarital affair with C.E. from October 2007 until March 2008. Within that time frame, Mother was having unprotected sexual relations with both C.E. and her husband and became pregnant with N.R.S. N.R.S. was born on September 8, 2008. Following the child's birth, Mother drove C.E. and N.R.S. to a testing facility for a DNA test. The test showed that there was a 99.942% chance that C.E. was the father.

C.E. filed an action in the family court seeking a paternity determination in his favor and also seeking custody of N.R.S. and parenting time. Mother, who had continued to live with her husband during this entire period of time, filed a motion to dismiss C.E.'s action, citing lack of subject matter jurisdiction and lack of standing as supporting grounds.

"Subject-matter jurisdiction over paternity proceedings for all of our trial courts is governed by Kentucky Revised Statutes (KRS) Chapter 406, also known as the Uniform Act on Paternity." *J.N.R. v. O'Reilly*, 264 S.W.3d 586, 590 (Ky. 2008). KRS Chapter 406 "does not apply and does not confer subject-matter jurisdiction on the family court or standing on [a party] to have paternity

determined and custody/visitation matters decided" where the child was not born out of wedlock. *Id*. at 593.

KRS 406.011 provides in part as follows:

> A child born during wedlock, or within ten (10) months thereafter, is presumed to be the child of the husband and wife. However, a child born out of wedlock includes a child born to a married woman by a man other than her husband where evidence shows that the marital relationship between the husband and wife ceased ten (10) months prior to the birth of the child.

On December 8, 2008, the family court issued an order stating that it "must take evidence to determine whether the marital relationship ceased ten months before the child at issue's birth." A hearing for that purpose was held on January 23, 2009. On June 19, 2009, the court entered an order finding that Mother and R.S.'s marital relationship had ended in November 2007, more than ten months prior to the birth of the child. The court further stated that "[t]he fact that [Mother] has since reconciled with her husband is of no consequence to the matter at hand." Having found that the marital relationship had ceased "at the key time," the court concluded that it had subject matter jurisdiction and that C.E. had standing. Further, the court distinguished the facts in this case from those in the *O'Reilly* case. The court ended its order by stating that C.E. "is entitled to present proof supporting his paternity claims regarding N.R.S." Mother's appeal herein followed.

Shortly after Mother filed her appeal, she filed a petition for writ of prohibition in a separate action with this court, seeking to prohibit the family court

from any further hearings in the case on the ground it lacked subject matter jurisdiction. *J.A.S. v. C.E.,* 2009-CA-001378-OA (Ky. App. November 3, 2009)(Not to be published order). In a 2-1 decision of a panel of this court, the petition was denied. The majority of the panel found that there was sufficient evidence to support the family court's finding that the marital relationship had ceased ten months prior to the child's birth. Thus, the panel upheld the family court's determination that the child was born out of wedlock and that the court was acting within its jurisdiction.

In this appeal, Mother seeks a reversal of the family court's order on the ground the family court erred in determining it had subject matter jurisdiction and on the ground the court erred in allowing certain testimony in the hearing. In addition to responding to Mother's arguments, C.E. asserts that the appeal should be dismissed because it is from an interlocutory order. He maintains that the order is not a final and appealable order because "[i]t merely states that [C.E.] has standing to pursue his claims for paternity and custody – certainly all the parties' rights have not been adjudicated." C.E. further states that "[t]he trial court has yet to issue any orders regarding paternity, custody, or parenting time and no judgment of the court will be final until these issues are adjudicated." We agree.

Kentucky Rules of Civil Procedure (CR) 54.01 provides in part that "[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 CR 54.02." "As a general rule, an interlocutory order may not be appealed unless it operates to

divest a party of some right in such a manner as to put it out of the power of the court to place the parties in their original condition." *KI USA Corp. v. Hall*, 3 S.W.3d 355, 358 (Ky. 1999).

In *Hubbard v. Hubbard*, 303 Ky. 411, 197 S.W.2d 923 (1946), Kentucky's highest court stated that "[i]t has been said that if an order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final." *Id*. at 924. In that case, the appellate court dismissed an appeal from a lower court's order that stated it had jurisdiction. *Id*.

Similarly, in *Lebus v. Lebus*, 382 S.W.2d 873 (Ky. 1964), the trial court had denied a motion to dismiss that had been made on the ground of lack of jurisdiction. In dismissing the appeal, the appellate court held that "[t]he decision of a court that it has jurisdiction of a cause and that the venue is proper does not determine the ultimate rights of the parties, and is well recognized as an interlocutory order. 4 Am.Jur.2d, Appeal & Error, section 89 (page 604)." *Id*. at 874.

In her reply brief, Mother responds to this issue by stating only that she filed a notice of appeal "to protect [her] interests." Because the order of the family court did not dispose of all the rights of all the parties, we conclude that the order was an interlocutory one and that the appeal must be dismissed.

It is hereby ORDERED that this appeal is DISMISSED.

ALL CONCUR.

ENTERED: February 26, 2010 /s/ David C. Buckingham
SENIOR JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

R. Matthew Moore
Covington, Kentucky

BRIEF FOR APPELLEE:

M. Erin Wilkins
Newport, Kentucky