

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000770-ME

DAVID JUDE

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 15-CI-00049

TRACY KINCER,¹ JEFF KINCER,
CAROLYN STALVEY, AND
LAWRENCE FAMILY COURT
JUDGE JAMIE C. WELLS

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: DIXON, NICKELL AND VANMETER, JUDGES.

NICKELL, JUDGE: David Jude, *pro se*, has appealed from the April 20, 2015,
order of the Lawrence Circuit Court granting temporary custody of his minor

¹ The Notice of Appeal filed in this matter as well as documents authored by Jude refer to the Appellees as “Kincer.” However, our review of the record reveals the correct spelling to be “Kinser.” We shall hereinafter refer to the Appellees using the latter.

daughter to Tracy and Jeff Kinser, the child's maternal aunt and uncle. Following a careful review, we conclude the appeal is premature and must be dismissed.

Jude and Carolyn Stalvey are the biological parents of a five-year-old girl; they are unmarried. Jude is currently incarcerated and is serving a twelve-year sentence for manslaughter. Stalvey is unemployed, transient, and allegedly suffers from an illicit drug addiction. Since January 5, 2015, the minor child has resided with the Kinsers, who have provided for her support and care.

On March 18, 2015, the Kinsers filed a verified petition seeking custody of the child. They requested appointment of a Guardian ad Litem ("GAL") to protect Jude's interests and appointment of a Warning Order Attorney to receive service on behalf of Stalvey as her whereabouts were unknown. The GAL initially appointed to represent Jude sought relief from service based on a conflict of interest. The appointment was vacated on April 6, 2015. For unknown reasons, a substitute was not appointed until May 5, 2015.

On March 27, 2015, Stalvey filed a written entry of appearance, waiver of notice of future proceedings, and custody agreement which purported to give her assent to transferring temporary custody of the minor child to the Kinsers. Stalvey indicated the change would be in the child's best interest. On April 8, 2015, the Kinsers moved for temporary custody of the minor child. The motion came on for a hearing on April 20, 2015, following which the trial court entered an order finding it to be in the child's best interest to approve the custody agreement

and grant temporary custody to the Kinsers. The same day, Jude filed a *pro se* petition seeking visitation with the child.

On May 11, 2015, and before a ruling was issued on the visitation motion, Jude filed a subsequent motion seeking appointment of a GAL and a change of venue. One week later, on May 18, 2015, Jude filed a notice of appeal from the April 20, 2015, temporary custody order. That same day, the trial court entered an order purportedly granting the change of venue, appointing a third GAL, and setting Jude's visitation motion for an evidentiary hearing. No finality language pursuant to CR² 54.02 was included or requested. This appeal followed.

Before this Court, Jude contends the trial court's April 20, 2015, order—giving the Kinsers temporary custody—was entered without proper notice, violated his due process rights and deprived him of the right to visit and maintain a relationship with his daughter. We are unable to reach the merits of Jude's claims because of a fatal jurisdictional flaw and make no comment on the veracity or accuracy of his claims.

The order entered in this case approved a custody agreement entered into by the custodial parent and granted temporary joint custody of the minor child to the child's aunt and uncle. No mention of Jude appears in the order, nor does it purport to alter his rights to the child in any way. The order clearly did not adjudicate all of the rights of all of the parties as it left the matter open for further proceedings—including rulings on Jude's motion for visitation with the child—and

² Kentucky Rules of Civil Procedure.

was therefore not a final order. As no final order ruling on the rights of all parties related to custody and visitation with the child was entered, there is no final and appealable order from which Jude can appeal. As such, no proper appeal has been perfected in this case. *See Gosney v. Commonwealth*, 309 Ky. 187, 217 S.W.2d 225 (1949) (where no final judgment entered into record, this Court is without jurisdiction to entertain an appeal).

Although we are dismissing this appeal, we must correct additional jurisdictional errors which occurred below. It is axiomatic that the filing of a notice of appeal divests a trial court of jurisdiction and “transfers jurisdiction of the case from the circuit court to the appellate court.” *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). Here, despite Jude’s filing of an appeal on May 18, 2015, the trial court subsequently entered an order purportedly granting Jude’s motion for a change of venue and appointment of a substitute GAL “if the Respondent wishes to proceed prior to an appeal.” The trial court entered two additional scheduling orders continuing the hearing on Jude’s visitation motion “if the Respondent, David Jude, wishes to proceed with a Hearing prior to proceeding with his appeal.” These orders were clearly improper as the trial court was without jurisdiction to proceed following the filing of the notice of appeal and was wholly without authority to imply Jude had an option of whether to proceed in the trial court or in this Court based on his “wishes.”

It is well-established in Kentucky law that any order issued by a court not having proper jurisdiction is “void *ab initio* . . . is not entitled to any respect or

deference by the courts.” *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 833 (Ky. App. 2008) (internal citations omitted). Therefore, any orders entered in this matter after the filing of Jude’s notice of appeal must be vacated and held for naught.

Accordingly, because there is no final order in the instant case from which Jude has properly appealed, we dismiss this case for lack of jurisdiction.

ALL CONCUR.

ENTERED: December 11, 2015

/s/ C. Shea Nickell
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

David Jude, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEES, TRACY
KINSER AND JEFF KINSER:

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