

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000903-MR

JANICE LATTUS

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 99-CI-00013

ROBERT C. LATTUS

APPELLEE

OPINION AND ORDER
DISMISSING APPEAL
** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

MILLER, JUDGE: Janice Lattus brings this appeal from a February 29, 2000, order of the Graves Circuit Court. We dismiss the appeal as being interlocutory.

This is a case involving modification of a child custody order. The marriage of Robert and Janice Lattus was ended by a decree of dissolution entered July 1, 1999 in the Graves Circuit Court. The parties were granted joint custody of their daughter, Mary Ellen, with Janice's residence being primary. Kentucky Revised Statutes (KRS) 403.270(5). Janice moved for modification of visitation of seven year old Mary Ellen pending her acceptance of a job in New Mexico in March 2000.

Robert countered with a motion to modify custody so that Mary Ellen might remain with him in Kentucky in the event Janice's move to New Mexico came to fruition. The motions came on for hearing February 29, 2000. The order of the circuit court states, in part:

From the evidence in the record, the Court finds that joint custodial parents are unable to cooperate and agree as to whether Petitioner's planned relocation of the child to New Mexico is in the child's best interest, and this Court further finds from the record that should the Petitioner choose to accept her new position and relocate to New Mexico, such move under the circumstances would have adverse psychological and emotional effects upon the child to such an extent that this Court should consider modification of the parties' custody agreement that would allow the child to continue to reside in Kentucky with the Respondent.

Based upon these findings and Orders, the Respondent's Motion to Modify shall pend [sic] based upon whether the Petitioner, in fact, relocates to New Mexico.

It is our opinion the foregoing order is interlocutory. It seems to us the order does not dispose of the motions before the court nor does it grant relief whatsoever. This Court has no jurisdiction inasmuch as the order appealed from is not a final and appealable order. CR 54.01, and American Fidelity & Casualty Co. v. Patterson, Ky., 237 S.W.2d 57 (1951).

We note that the circuit court "attempted" to make the order appealable by inclusion of Ky. R. Civ. P. (CR) 54.02 language. The order simply states that it is ". . . final and appealable." We hasten to point out, however, that CR 54.02 is not implicated in this matter. Even if it were implicated, the

language is insufficient as it fails to include both premises required of the rule, to wit: that the order is final and appealable and there is no just cause for delay. As a matter of information, we direct the parties' attention to Hook v. Hook, Ky., 563 S.W.2d 716, 716-717 (1978), wherein it was stated:

Prior to the adoption of the Civil Rules of Procedure, the appellate court had no jurisdiction to review by direct appeal order and judgments of a circuit court unless they were final. *Hubbard v. Hubbard*, 303 Ky. 411, 197 S.W.2d 923 (1946). In 1953 the adoption of the Civil Rules of Procedure retained this rule in a modified form by the provisions of CR 54.

CR 54.01 declares: ". . . 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."

CR 54.02 is confined to actions involving multiple claims or multiple parties. It permits an interlocutory judgment or order to be made appealable under specified circumstances. The action before the circuit court involved neither multiple claims nor multiple parties. CR 54.02 did not apply.

[1] Where an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable. *Hale v. Deaton*, Ky., 528 S.W.2d 719 (1975). See also *Clay*, Ky. Prac., 3rd Ed. Civil Rule 54.02, p. 14 (1977 Pocket Part).

[2] Although the question is not raised by the parties or referred to in the briefs, the appellate court should determine for itself whether it is authorized to review the order appealed from. *Hubbard v. Hubbard*, *supra*.

[3] This "jurisdiction order" was plainly an interlocutory determination. The recitals made by the trial judge added

nothing. It was not reviewable by direct appeal.

For the foregoing reasons, this appeal is hereby DISMISSED.

ALL CONCUR.

ENTERED: June 15, 2001

/s/ John D. Miller
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Melinda Martin Ormsby
Mayfield, Kentucky

BRIEF FOR APPELLEE:

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