RENDERED: JUNE 13, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002317-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 98-AD-00033

P.L.O. AND S.C.T.
AND THE CHILD, A.B.T. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

TACKETT, JUDGE: The Cabinet for Families and Children (the Cabinet) appeals from the judgment of the Laurel Circuit Court, which dismissed an action to terminate the parental rights of P.L.O., with prejudice. We affirm.

In December 1998, the Cabinet filed a petition for termination of P.L.O.'s parental rights to the subject infant, A.B.T., in Laurel Circuit Court. The trial court entered an order on June 8, 2001, granting the motion of the appellee to

dismiss. Over the next four months, the circuit court entered four orders, the effect of which were to correct or vacate a previous order. The confusion centered on whether the dismissal would be with or without prejudice.

On July 2, 2001, the circuit court corrected the order of June 8, 2001, *nunc pro tunc*, by adding, "It is hereby ORDERED that this action is dismissed, *without prejudice*." Order, July 2, 2001 (emphasis added). A third order was issued on August 8, 2001. This order corrected the June 8, 2001 order to read, in pertinent part, "It is hereby ORDERED that this action is dismissed, *with prejudice, as to any events up to the date of this dismissal*." Order, August 8, 2001 (emphasis added). On August 15, 2001, a fourth order was issued, correcting *nunc pro tunc* the June 8, 2001 order by adding the following sentence: "It is hereby ORDERED that this action is dismissed, *without prejudice*." Order, August 15, 2001 (emphasis added). Finally, on October 5, 2001, a fifth order was entered, vacating the order of August 15, 2001, the effect of which was to dismiss the action, *with prejudice, as to any events up to the date of this dismissal* thereby reinstating the order of August 8, 2001. It is from this order that the Cabinet appeals.

The Cabinet argues that the phrase "as to any events up to the date of this dismissal" attaches an impermissible condition to the judgment of the circuit court. Such

contention, it is argued, is supported in the case of Cabinet for Human Resources v. J.B.B., Ky. App., 772 S.W.2d 646 (1989). In that case, our court held that the "circuit court exceeded the limited authority granted it" by KRS 625.090 (6) [then, KRS 625.090 (4)] when it attached conditions[1] on its final judgment in a termination of parental rights action. Id. at 647.

No conditions were attached to the order involved in the case before us. The fact that the action was dismissed with prejudice is not tantamount to the conditional nature of a judgment, hinging on the fulfillment of some proviso. Instead, it bears only on the conclusive nature of the adjudication. Black's Law Dictionary, 5th ed., p. 1435. The judgment of the circuit court did not exceed the "limited authority" granted it by KRS 625.090 (6) when it dismissed the Cabinet's petition with prejudice.

The Cabinet further argues that the inclusion of the phrase "as to any events up to the date of this dismissal" conflicts with applicable case law, in that it would impermissibly preclude from consideration in a second action the facts extant as of the time of the first judgment. In support, the Cabinet cites M.P.S. v. Cabinet for Human Resources, Ky.

[1] Here, conditions were imposed in that the court ruled that parental rights would not be terminated, provided that both parents restrained from engaging in certain behavior, continued receiving counseling for themselves, and continued obtaining counseling for the child. Cabinet for Human Resources v. J.B.B., 772 S.W.2d at 647.

App., 979 S.W.2d 114 (1998), in which this court held that where the evidence in a second proceeding is "substantially greater" than in the first, the former opinion is not controlling.[2]

While this is an accurate statement of the law, the circumstances of this case do not permit the application of M.P.S. v. Cabinet for Human Resources. The crux of the matter is that the Cabinet has failed to present an issue that is ripe for appeal. A controversy is not justiciable, or ripe, when it includes questions "which may never arise or which are merely advisory . . . [or] hypothetical. Curry v. Coyne, Ky. App., 992 S.W.2d 858, 860 (1998). The United States Constitution "permits only adjudication of actual cases and controversies . . . [, which] requires that a controversy be ripe." Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947, 951 (1995) (citing Flast v. Cohen, 392 U.S. 83 (1968); Pacific Gas & Elec. V. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983)).

In the case sub judice, no second action has been commenced, nor has there been a "substantially greater"

---

[2] The former opinion would otherwise control as a result of the operation of the "law of the case" doctrine. M.P.S. v. Cabinet for Human Resources, 979 S.W.2d at 116. The "law of the case" doctrine operates by

> …requir[ing] a comparison of the evidence presented in the two cases to determine if the substance and probative effect of the evidence present in the second case were equal or superior to the evidence present in the first case. A former opinion becomes the law of the case only where the facts are substantially identical, or the same, upon the trial of each case.

Id.

production of evidence by the Cabinet. If such had occurred, a different case would have been presented. Instead, the circuit court has merely entered an order dismissing the Cabinet's petition for termination of the parental rights of P.L.O, with prejudice. A court must refrain from "decid[ing] speculative rights or duties which may or may not arise in the future. Veith v. City of Louisville, Ky., 355 S.W.2d 295 (1962). It may decide "only rights and duties about which there is a present actual controversy." Id. Since no second action has been initiated, M.P.S. v. Cabinet for Human Resources is not applicable to resolve these issues and indeed would be speculative. "It is not incumbent on the courts to decide questions that may never arise." Alexander v. Hicks, Ky., 488 S.W.2d 336, 337 (1972).

The order of August 8, 2001, serves to correct *nunc pro tunc* the order of June 8, 2001, by adding the sentence: "It is hereby ORDERED that this action is dismissed, with prejudice, as to any events up to the date of this dismissal." The effect of a correction *nunc pro tunc* is retroactive, "allow[ing] an act to be done after the time when [it] should [have] be[en] done." Black's Law Dictionary, 5th ed., p. 964. Thus, only those events occurring *prior* to June 8, 2001, the date of the initial judgment, are covered by the (final) order of October 5, 2001,

as a result of the retroactive effect of a *nunc pro tunc* correction. No other events have been considered.

By dismissing the petition with prejudice, the circuit court merely determined that the facts, existing as of the time of the first judgment and as presented by the Cabinet, were insufficient to warrant termination of the parental rights of P.L.O. The circuit court has not spoken through its order as to any future proceeding, nor has it attempted to preclude the use of these facts in such proceeding where "substantially greater" evidence could be introduced, as it was in M.P.S. v. Cabinet for Human Resources. Instead, the phrase "with prejudice, as to any events up to the date of this dismissal" reflects only the court's conclusive adjudication of the evidence existing on or before June 8, 2001.

Based upon a review of all the evidence, we do not find that the trial court was clearly erroneous in including the phrase in its order dismissing the Cabinet's petition.

For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Terry L. Morrison
Assistant Counsel
Frankfort, Kentucky

NO BRIEF FOR APPELLEES