

RENDERED: JANUARY 14, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-001213-MR

BOBBY NOBLE

APPELLANT

APPEAL FROM PERRY CIRCUIT COURT
v. HONORABLE JOHN DAVID CAUDILL, SPECIAL JUDGE
ACTION NO. 02-CI-00245

NATHAN MILLER;
LOLA MILLER

APPELLEES

OPINION AND ORDER

DISMISSING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; MILLER, SENIOR JUDGE.¹
MILLER, SENIOR JUDGE: Bobby Noble appeals from a May 27, 2002,
order of the Perry Circuit Court adjudging that the appellees,
Nathan Miller and Lola Miller, are de facto custodians of their
grandson, Bobby Jacob Noble (Jacob). Because the circuit court
order appealed from is interlocutory, we are compelled to
dismiss the appeal.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

Bobby Noble and the daughter of the appellees, Kathleen Noble, were married on July 4, 1998. Their son, Jacob, was born on June 10, 1999. Kathleen died on September 17, 2000.

The appellees, Nathan and Lola Miller are the maternal grandparents of Jacob. Following Kathleen's death, the appellees began providing care and support for Jacob. The extent and significance of that care and support is fiercely contested between the parties.

Eventually, the arrangements for Jacob's care, and perhaps other factors, led to a disagreement between the parties. On May 8, 2002, Nathan and Lola filed a petition in Perry Circuit Court seeking custody of Jacob. The petition alleged that Nathan and Lola were de facto custodians of Jacob pursuant to Kentucky Revised Statutes (KRS) 403.270(1).

On February 3, 2004, an agreed order was entered under which a hearing would be held before the Domestic Relations Commissioner on the sole issue of whether Nathan and Lola qualified as de facto custodians of Jacob. The agreed order had the effect of bifurcating the proceeding into two phases - first, a determining of whether the appellees qualified as de facto custodians of Jacob, and, if so, second, a determining of custody pursuant to the best interest factors contained in KRS 403.270(2).

A hearing on the de facto custodianship issue was held before the Commissioner on March 23, 2004. On April 14, 2004, the Commissioner tendered a "Custody Decree"² setting forth his recommendations. The Commissioner recommended that the appellees be granted de facto custodian status; that the parties be "awarded joint custody of the minor, Bobby Jacob Noble, and until further Orders of the Court [] shall follow the [previously established visitation schedule]";³ and that "[a]ll further issues concerning the care, custody and control of [Jacob be] passed consistent with the bifurcated nature of these proceedings."

Bobby subsequently filed exceptions to the Commissioner's recommendations. On May 27, 2004, the circuit court entered an order overruling Bobby's exceptions and adopting the Commissioner's recommendations in its entirety. The order contained the recital "[t]his is a final and appealable order with no just cause for delay." This appeal followed.

Pursuant to Ky. R. Civ. P. (CR) 54.01, "[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

² We note that contrary to this caption, the tendered recommendation does not purport to establish the permanent custody arrangements for Jacob.

³ A July 29, 2002, order reflects that Bobby currently has custody of Jacob and that Nathan and Lola are entitled to visitation every weekend from Friday evening to Sunday evening.

made final under Rule 54.02." Further, CR 54.02(1) states, in pertinent part, that "[w]hen 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."

However, "[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." Hale v. Deaton, 528 S.W.2d 719, 722 (Ky.App. 1975). Moreover, "[w]here 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." Hook v. Hook, 563 S.W.2d 716, 717 (Ky. 1978). Further, even if the parties do not raise a finality issue in their briefs, "the appellate court should determine for itself whether it is authorized to review the order appealed from." Id. at 717.

Although the circuit court's May 27, 2004, order included CR 54.02 finality language, "[t]his is a final and

appealable order with no just cause for delay," this is not a case which involves multiple claims or multiple parties and CR 54.02 is not applicable. The appellants and the appellees are the only parties to the case, and the only claim before the circuit court is the appellees' petition for custody. The issue of whether the appellees are de facto custodians is merely an intermediate issue ancillary to the appellees' custody claim. See KRS 403.270(1).

It is clear that the trial court's May 27, 2002, order simply resolved an intermediate issue without disposing of any of the claims or parties. As the order did not finally adjudicate any of the claims in litigation, it is by its very nature an unappealable, interlocutory order which cannot be made final by the inclusion of CR 54.02 language. It necessarily follows that the appeal from that order is 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: January 14, 2005

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

BRIEF FOR APPELLANT:

Dawn R. Watts
Simmons & Watts
Jackson, Kentucky

BRIEF FOR APPELLEES:

No Brief for Appellees.