

RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002208-ME

M.F., FATHER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 03-J-00892

M.F., A CHILD;
S.S., MOTHER;
REBECCA AND CARL MORAN, TEMPORARY
CUSTODIANS;
KENTUCKY CABINET FOR HEALTH AND
FAMILY SERVICES,
AMY LAINHART AND BETTY MONTGOMERY;
AND DEPARTMENT OF MEDIATION AND FAMILY
COURT SERVICES, SHANEA GARRETSON

APPELLEES

OPINION AND ORDER
DISMISSING

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BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

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 KRS 21.580.

BUCKINGHAM, SENIOR JUDGE: M.F. (Father) appeals from orders of the Fayette Family Court relating to mediation and other matters concerning his child. Because the appeal is from nonfinal orders, it must be dismissed.

Father and S.S. (Mother) are the parents of a male child born on January 10, 2003. They had an "off and on" relationship and were not married. The Cabinet for Health and Family Services became involved with the family in June 2003.

The family court became involved with the case in June 2003 when the Cabinet filed a non-removal neglect petition against Mother. In July 2003, Mother granted legal guardianship of the child to Rebecca Moran. This was done independently of the Cabinet. In September 2003, the family court found neglect by Mother and granted temporary custody of the child to Moran. Father was a part of the proceedings, and he agreed to cooperate with the Cabinet.

In April 2004, the Cabinet recommended to the court that it award permanent custody of the child to Moran, but the court instead continued temporary custody with Moran. The next month, Moran withdrew her motion for permanent custody and the court ordered the child returned to Father and Mother.

In August 2004, the Cabinet filed a non-emergency removal petition alleging neglect by both parents due to substance abuse and domestic violence. Temporary custody was

awarded to the Cabinet, and the child was placed with Moran and her husband. The following month, Father and Mother stipulated to risk of neglect, and the court ordered temporary custody with the Cabinet with continued placement of the child with the Morans. At the October 2004 disposition hearing, the court committed the child to the Cabinet.

In January 2005, the Cabinet asked the court to be relieved of its duty to use reasonable efforts to reunite the family. In June of that year, the court denied the Cabinet's motion.

In August 2005, Father filed a motion for the return of parental custody, for review of visitation, and for findings of alternatives to removal. The court passed Father's motion and ordered the parties to permanency mediation.² Father followed by moving the court to set aside its mediation order and to grant him immediate custody of the child. The court denied the motions, and Father's appeal herein followed.

Father argues on appeal that the family court erred in denying him hearings on his motions and in ordering permanency

² Father states that, according to the Administrative Office of the Courts (AOC) Mediation and Family Court website, one of the goals in permanency mediation is to encourage parents to give up their rights and "make the courageous and loving decision to let someone more capable raise their children." Father included the AOC material in his brief as an exhibit. The AOC permanency mediation material also states that "the parents who voluntarily gave up their rights were gratified to be part of the solution." In searching the AOC website, it appears that the aforementioned language has been omitted and that the mediation program is now referred to as the Child Protection Mediation Program. The goals of the program have also been modified.

mediation. First, he asserts that forcing him to sign the mediation agreement and participating in mediation "would have waived his claim of superior custody entitlement he had not lost, and negated the effect of proceedings he instituted to toll the de facto parent statute." Second, he argues that "specific legislative entitlement to review temporary custody orders, placement and visitation, are available on motion of a natural parent, and specific statutory procedure supercedes general rules of procedure authorizing permanency mediation." In other words, Father maintains he was entitled to be heard on his motions rather than simply be ordered to participate in mediation of the issues. Third, he argues that permanency mediation was barred because the victim of domestic violence did not consent to it.³

We note first that while the court did not grant Father a hearing on his motions, it did dispose of the motions by denying them. We also note that Father does not argue in his brief that the basis of the court's rulings on the motions as set out in the order was erroneous. Rather, he argues that he should have been granted a hearing on the motions and that the court erred in ordering permanency mediation.

³ Father relies on KRS 620.027 and KRS 403.036 to support this argument. Also, it is unclear as to whether either Father or Mother was a domestic violence victim.

Kentucky Revised Statutes (KRS) 620.155 provides in part that a parent aggrieved by a proceeding in a dependency, neglect, or abuse case may appeal as a matter of right. However, the statute does not say which proceeding or proceedings may be appealed from and which may not.

" 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."

Kentucky Rules of Civil Procedure (CR) 54.01. Included within the definition of a final and appealable order is one which "operates to divest some right in such a manner as to put it out of the power of the court making the order . . . to place the parties in their original condition." Murty Bros. Sales, Inc. v. Preston, 716 S.W.2d 239, 241 (Ky. 1986)(internal citation omitted). In this case, the court disposed of the case by committing the child to the custody of the Cabinet in accordance with KRS 620.140(1)(d). That order was a final and appealable one, but Father did not appeal from it.

Furthermore, the court continued its jurisdiction over the case following the dispositional order committing the child to the Cabinet. Among other things, the Cabinet is required to file case permanency plans and case progress reports with the court that ordered the commitment. See KRS 620.230 and KRS 620.240. Eventually, the child will either be returned home or

there will be permanent placement, which may include termination of parental rights. See KRS 620.240(9). This case had not progressed to the extent the court had taken either of those actions. Rather, the court had ordered permanency mediation.

Pursuant to CR 16(1)(f), courts have the express authority to order mediation. See Kentucky Farm Bureau Mut. Ins. Co. v. Wright, 136 S.W.3d 455, 458-59 (Ky. 2004). Such an order resolves no issue between the parties. Instead, it places them in a position to reach an agreement on how to resolve a matter should they choose to agree. Further, as the court had not taken final action in the case, the mediation order was clearly interlocutory and not subject to appeal. Thus, as this appeal was from nonfinal orders, it must be dismissed.

It is ORDERED that this appeal be DISMISSED.

ALL CONCUR.

ENTERED: December 22, 2006

/s/ David C. Buckingham
JUDGE, COURT OF APPEALS