RENDERED: APRIL 10, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

MODIFIED: APRIL 17, 2009; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001495-ME

JOSHUA SCOTT REED — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE
ACTION NO. 07-CI-00352

RACHEL TINSLEY AND
AMANDA SOLOMON — APPELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND LAMBERT, JUDGES.

CLAYTON, JUDGE: Joshua Scott Reed (Reed) appeals from a July 3, 2008, order of the Calloway Circuit Court adjudging that the appellee, Rachel Tinsley (Tinsley) is a de facto custodian of her grandson, J.A.R. Because the circuit court order appealed from is interlocutory, we are compelled to dismiss the appeal.

Reed and Amanda Solomon (Solomon) are the parents of J.A.R. who was born on December 5, 2005. Tinsley is the maternal grandmother of J.A.R. Following J.A.R's birth, he has lived with and been taken care of by his mother, father, paternal grandmother (Pam Reed), and maternal grandmother.

On April 12, 2006, Solomon filed a domestic violence petition against Reed. The Calloway District Court, on May 16, 2006, entered an order of protection, which gave Solomon primary custody, set child support for Reed, and provided him with the standard visitation schedule. Since then, Reed has been obligated to pay child support for J.A.R. in the amount of $45.36 per week, which is approximately $195.56 per month.

Later, after a dependency, neglect, and abuse petition was filed against Solomon, the trial court, on March 12, 2007, gave temporary custody of J.A.R. to Tinsley. Moreover, regarding the issue concerning whether Tinsley was a de facto custodian and primary caretaker of J.A.R., the trial court, in its June 12, 2008, findings of fact, stated that Tinsley had been the primary caretaker for J.A.R. from sometime before September 1, 2006, through the hearing date of June 12, 2008. Clearly, the extent and significance of both parties' care and financial support (of J.A.R.) is contested by the parties.

On August 3, 2007, Reed filed a petition in Calloway Circuit Court seeking custody of J.A.R. Tinsley, on August 30, 2007, filed a response to the petition and a cross-petition for custody of J.A.R. Her petition alleges she is a de facto custodian of J.A.R. pursuant to Kentucky Revised Statutes (KRS)

403.270(1). Following the petitions, a hearing was held on June 12, 2008, to ascertain whether Tinsley qualified as a de facto custodian under KRS 403.270(1). On July 3, 2008, the trial court held that Tinsley had established, by clear and convincing evidence, that she was the primary care giver and financial support for J.A.R. over a period of six consecutive months, and therefore, qualified as a de facto custodian.

After the court ruled, Reed made a motion to alter, amend, or vacate for a new trial and made a motion for an interlocutory decree. The trial court, on July 23, 2008, denied Reed's motion to alter, amend, or vacate as it was not timely filed but granted the motion for interlocutory appeal and ordered that the June 12, 2008, order is "a final and appealable order."

Kentucky Rules of Civil Procedure (CR) 54.01states "[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." In addition, CR 54.02(1) says, in pertinent part:

> When 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.

More important, however, as the Court stated in *Hale v. Deaton*, 528 S.W.2d 719, 722 (Ky. 1975):

> Before the processes of CR 54.02 may be invoked for the purpose of making an otherwise interlocutory judgment final and appealable, there must be a final adjudication upon one or more of the claims in litigation. The judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding.

Moreover, the Kentucky Supreme Court has held that "[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). And 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 order mandated CR 54.02 finality language, this case does not involve multiple claims or multiple parties, and therefore, does not meet the threshold required for CR 54.02. Reed and Tinsley are the only parties to the case, and the only claims before the circuit court are the petition and cross-petition for custody.

KRS 405.020(3) provides that "a person claiming to be a de facto custodian, as defined in KRS 403.270, may petition a court for legal custody of a child. The court shall grant legal custody to the person if the court determines that the person meets the definition of de facto custodian and that the best interests of the child will be served by awarding custody to the de facto custodian." Thus, the determination of whether Tinsley's status as a de facto custodian is an intermediate, ancillary issue to the parties' custody claims. *See* KRS 403.270(1).

And the trial court's July 3, 2008, order, simply resolved an intermediate issue without disposing of the claims or parties. Here, the process was such that the issues of de facto custodian status and custody have been bifurcated into two phases. The trial court has made a determination that Tinsley is a de facto custodian but has not yet determined custody pursuant to the best interest factors contained in KRS 403.270(2). Because the order did not adjudicate the custody issue, it is by its very nature an unappealable, interlocutory order which cannot be made final by the inclusion of CR 54.02 language. Accordingly, 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: April 10, 2009

c/cDenise G. Clayton

JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Ricky A. Lamkin
Murray, Kentucky

BRIEF FOR APPELLEE:

K. Bryan Ernstberger
Murray, Kentucky