RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000802-ME

SHEILA CARPENTER-MOORE — APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 04-CI-01651

CHAD CARPENTER;
R.M.F.C. (A MINOR CHILD);
M.S.C. (A MINOR CHILD); AND
L.B.C. (A MINOR CHILD) — APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HARRIS,[1] SENIOR JUDGE.

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HARRIS, SENIOR JUDGE: Sheila Carpenter-Moore appeals from an order entered in the Kenton Family Court on March 30, 2009, denying her motion to relocate the parties' three minor children. Sheila[2] argues that the trial court erred by: (1) failing to grant her motion because of Chad Carpenter's failure to timely respond to her motion; (2) retroactively applying the recent Kentucky Supreme Court decision in *Pennington v. Marcum*, 266 S.W.2d 759 (Ky. 2008); and (3) failing to give appropriate weight to the testimony of the children's guardian *ad litem*. Because our review of the record discloses that appeal has been taken from an interlocutory order, we dismiss this appeal on jurisdictional grounds.[3]

The Kenton Family Court entered an order dissolving Sheila and Chad's marriage on August 31, 2005. The trial court entered a subsequent agreed order resolving all of the outstanding issues in the dissolution action on May 2, 2007. The May 2, 2007, agreed order awarded the parties joint custody of their three minor children with Sheila serving as the primary residential custodian.

On November 1, 2007, Sheila filed a motion to relocate the children to Glade Springs, Virginia,[4] to reside with her soon-to-be new husband. On November 13, 2007, the trial court set a hearing date for February 7, 2008, and appointed a guardian *ad litem* for the children. On January 30, 2008, Chad filed a

[2] We refer to the parties by their given names for the sake of clarity and with no disrespect intended.

[3] This Court must determine for itself whether the jurisdictional requirements have been satisfied. *Wilson v. Russell,* 162 S.W.3d 911, 913 (Ky. 2005). Appellate jurisdiction may not be conferred by the consent of the parties. *Id.*

[4] Ultimately, Sheila requested relocation to Tiffin, Ohio, where her new husband obtained employment as a football coach.

motion for review of parenting time, which was set for hearing at the same date as the motion for relocation. On February 6, 2008, Sheila filed a motion requesting the trial court to summarily grant her motion for relocation. This motion was not ruled upon. In response to the motion to summarily grant relocation, Chad filed a motion to modify custody with two affidavits attached. At the hearing on February 7, 2008, the trial court requested briefing on the relocation and modification issues.

On June 2, 2008, the trial court held a hearing in chambers, which was apparently not put onto the record. On August 11, 2008, the trial court entered findings of fact and conclusions of law stating that Chad was entitled to a full evidentiary hearing pursuant to KRS 403.340(2) because he had presented substantial evidence of emotional harm to the children. The trial court set a hearing date for October 31, 2008.

On October 23, 2008, the Supreme Court of Kentucky rendered *Pennington v. Marcum*, which dealt specifically with relocation issues. Prior to the hearing on October 31, 2008, Chad filed a motion to plead in the alternative for a modification of timesharing to name him the residential parent. At the October 31, 2008, hearing, the trial court determined that *Pennington* would apply to this case and that according to *Pennington*, the best interest of the child standard applies to motions for relocation. On November 13, 2008, Sheila filed a motion for sole custody without any supporting affidavits.

On January 6, 2009, the trial court held a hearing on the relocation and custody modification issues. Chad made an oral motion to deny Sheila's

motion for change of custody, which the trial court orally granted. On March 30, 2009, the trial court entered an opinion and order denying Sheila's motion to relocate. The trial court did not rule on any other matters and specifically reserved ruling upon them, including by implication Chad's motion for modification of custody and his alternative motion to modify timesharing. The opinion and order entered on March 30, 2009, did not contain Kentucky Rules of Civil Procedure (CR) 54.02 finality language. This appeal followed.

At the outset, we must determine if the order of the trial court is final and properly appealable. CR 54.02(1) states:

> 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. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The language of CR 54.02(1) is mandatory, and in the absence thereof "the order is interlocutory and subject to modification and correction before becoming a final and appealable judgment or order." *Wilson v. Russell,* 162 S.W.3d 911, 913 (Ky. 2005).

In the present case there were multiple claims. Chad's motions for modification of custody and timesharing were not ruled upon. The trial court specifically reserved ruling upon issues not addressed in its order entered on March 30, 2009. The order did not include the recitation of CR 54.02(1) finality language. Therefore, we are without jurisdiction to hear the merits of this appeal and must dismiss it as premature.

Accordingly, this appeal is dismissed.

ALL CONCUR.

ENTERED: December 11, 2009

/s/ William R. Harris
SENIOR JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE, CHAD CARPENTER:

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