

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000630-ME

H.F.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT, FAMILY DIVISION
v. HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 09-CI-502712

J.F. AND K.F.

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * ** * **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

LAMBERT, JUDGE: H.F. (Mother) has appealed from the January 22, 2010, order of the Jefferson Family Court determining that paternal grandparents J.F. and K.F. (Grandparents) met the requirements to be the *de facto* custodians of her daughter, A.F. (Child). The primary issue raised in this appeal concerns whether the statutory time period as set forth in KRS 403.270(1) was tolled by Mother's

¹ Senior Judge Sheila R. Isaac 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.

actions in seeking to regain custody. However, because we have determined that the appeal was taken from an inherently interlocutory order that only addressed whether Grandparents met the status of *de facto* custodians, we must dismiss the above-styled appeal.

Mother and her husband, J.E.F. (Father), are the natural parents of Child, born in 2008. On August 28, 2008, when Child was close to six months old, the Cabinet filed a juvenile dependency, neglect, and abuse petition against both Mother and Father based upon a report that child pornography had been found on the family's computer (action No. 08-J-505558-1).² The juvenile record indicates that Mother and Father left the state just before the scheduled court hearing date of September 11, 2008. Prior to leaving, Mother left Child with Grandparents. The family court then formally placed Child in Grandparents' temporary custody on the date of the hearing. Mother returned to Kentucky several months later and began working on complying with the Cabinet's recommendations. Several months after that, Mother moved orally and in writing for a return of custody. Her motions were denied. On August 13, 2009, the family court dismissed the juvenile petition as to Mother based on problems with obtaining proof from the seized computer. A second juvenile petition (action No. 08-J-505558-2) filed by the Cabinet against Mother on August 28, 2009, was also dismissed in September 2009 on the county's recommendation.³

² Mother attached the record of the juvenile proceeding to her brief, and we shall take judicial notice of these court records.

³ The record for this proceeding is also attached to Mother's brief.

The action presently before this Court addresses *de facto* custodian status. On August 6, 2009, Grandparents filed a petition with the family court to be named Child's *de facto* custodians and to continue to exercise care, custody, and control of Child. In conjunction with the petition, Grandparents also filed a motion for temporary custody. In their petition and at the later hearing on the petition, Grandparents stated that Child, who was at that point seventeen months old, had been voluntarily placed in their care by Mother with Father's approval on August 14, 2008, and that they were granted temporary custody on September 11, 2008, as reflected in the first juvenile proceeding. Since that time, they stated that Child had continuously been in their care, custody, and control, and that they had been her primary caregivers and primary financial supporters in excess of six months as required by the statute.

Mother objected to the motion, disputing that she voluntarily handed Child over to Grandparents, and arguing that she was forced to do so by the Cabinet. She did admit that Grandparents were granted temporary custody and that they had been her primary caregivers and financial supporters for more than six months. Mother affirmatively stated that the tolling provision in KRS 403.270 applied because she had been seeking to regain custody of Child from the time she was removed from her care. She also asserted that because Child was placed by the Cabinet, the one-year requirement applied. Therefore, Grandparents could not meet the time requirement in order to be named *de facto* custodians. The family

court agreed with Grandparents that the six-month time period applied in this case because Child had not been placed by the Cabinet.

On January 22, 2010, the family court entered an order ruling on the petition to the extent that it granted Grandparents *de facto* custodian status. The family court disagreed with Mother's argument that her cooperation with the Cabinet was enough to toll the statutory time, stating that "the intent of the statute is to require the commencement of a legal proceeding by the **parent** seeking to regain custody of the child rather than to simply comply as a participant in a pending matter filed by a separate entity." (Emphasis in original). Because Grandparents were granted temporary custody, the family court instructed that the only method by which Mother could regain custody of Child was to move the court for modification of the existing custody order. Therefore, the family court found that Grandparents met the requirements as set forth in KRS 403.270 and declared them to be Child's *de facto* custodians.

Mother filed a motion to alter, amend, or vacate the order, disputing the family court's finding that she admitted to voluntarily leaving Child with Grandparents and again raising her argument from the hearing that the one-year requirement applied in this case because she claimed Child had been placed by the Cabinet. The family court denied Mother's motion on March 11, 2010. We note that this order as well as the January 22, 2010, order included recitations that they were final and appealable, and that there was no just cause to delay their entry.

This appeal now follows.

On appeal, Mother has raised four issues. These are: 1) whether the family court lost jurisdiction over Child when the first juvenile petition was dismissed; 2) whether the family court properly applied the six-month statutory period to this case; 3) whether the family court should have held Mother's actions in the juvenile action tolled the statutory period; and 4) whether the family court erred by failing to follow the two-step process set forth in KRS 403.270 since it did not address the best interest of the child standard. In their brief, Grandparents contend that Mother failed to raise the issues of jurisdiction and the best interest standard before the family court and is, therefore, precluded from raising those issues for the first time on appeal. Otherwise, they argue that the family court did not commit any error in its ruling.

Before we are permitted to reach the merits, we must address what we consider to be a fatal problem with the appeal in that it was taken from an interlocutory, nonappealable order that only addressed the *de facto* custodian status, but did not address the actual issue of Child's custody. Although this particular jurisdictional issue was not raised by either party, "the appellate court should determine for itself whether it is authorized to review the order appealed from." *Hook v. Hook*, 563 S.W.2d 716 (Ky. 1978).

The Kentucky Rules of Civil Procedure (CR) address what orders are subject to review on appeal. CR 54.01 defines a judgment as follows:

A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. 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. Where the context requires, the term “judgment” as used in these rules shall be construed “final judgment” or “final order.”

CR 54.02, in turn, addresses situations where multiple claims or parties are present:

(1) 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.

In the present case, the family court attempted to invoke CR 54.02 by including the required recitals at the conclusion of each order. However, “CR 54.02 is confined to actions involving multiple claims or multiple parties.” *Hook*, 563 S.W.2d at 717. The present matter concerns one claim, that of custody, and involves one set of parties. While Grandparents are two individuals, “a married couple is considered a single unit for the purposes of *de facto* custodianship.” *J.G. v. J.C.*, 285 S.W.3d 766, 768 (Ky. App. 2009). Therefore, the family court could not invoke CR 54.02 to make its orders final and appealable, and the orders had to be final pursuant to CR 54.01 in order to be reviewable by this Court.

Even had this been a case involving multiple parties or multiple claims, the law is clear that before CR 54.02 may be applied, “there must be a final

adjudication upon one or more of the claims in the litigation. The judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding.” *Hale v. Deaton*, 528 S.W.2d 719, 722 (Ky. 1975). “Where 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*, 563 S.W.2d at 717.

The factual situation addressed in *Hook* is analogous to the situation presently before the Court. *Hook* involved the modification of a foreign custody order. When the mother brought the child to Kentucky where the father lived, the father filed suit against the mother in Jefferson Circuit Court to modify the original order. The mother contested jurisdiction of the court, and she appealed from the court’s order in which it determined that it had jurisdiction. On appeal to the Court of Appeals, the panel affirmed the jurisdiction order and remanded for disposition of the modification question. The Supreme Court accepted discretionary review and ultimately vacated the opinion of the Court of Appeals for dismissal of the appeal, holding that the jurisdictional order was interlocutory and, therefore, not reviewable on direct appeal. *Hook*, 563 S.W.2d at 716-17.

Likewise, the present case addresses child custody, albeit under KRS 403.270. That statute provides for the grant of custody and provides, in part, as follows:

(1) (a) As used in this chapter and KRS 405.020, unless the context requires otherwise, “de facto custodian” means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if

the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.

(b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.822, and 405.020.

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Based on the statute, a family court must first decide whether an applicant, if there is one, meets the standard to be afforded *de facto* custodian status. Once that has been determined, then the family court must consider the statutory factors listed above to determine the best interest of the child in deciding to whom custody should be awarded as between the parent or parents and the *de facto* custodian. Therefore, the *de facto* custodian issue is merely a subpart of the ultimate custody decision.

Turning to this case, the family court had to first determine whether Grandparents met the statutory requirements to be afforded the status of *de facto* custodians. The determination that Grandparents met these requirements is the basis for the orders on appeal. Next, the family court had to decide the question of permanent custody, giving both Mother and Grandparents equal consideration. This issue the family court has not yet decided. The January 22, 2010, order only states that “they are granted *de facto* custodian status.” The order does not reflect

that the family court went on to consider any of the factors as set forth in KRS 403.270(2) or even mention the best interest of the child standard. Until the matter of permanent custody is finally decided, the issue of whether the family court properly assigned Grandparents the status as *de facto* custodians is interlocutory. Accordingly, Mother's appeal from the finding of *de facto* custodian status is premature and will not be ripe for appeal until an actual custody order is entered.

For the foregoing reasons, the above-styled is ORDERED
DISMISSED as interlocutory.

ALL CONCUR.

ENTERED: January 7, 2011

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Susan M. Meschler
Shelbyville, Kentucky

BRIEF FOR APPELLEES:

Sammy Deeb
Louisville, Kentucky