

RENDERED: JANUARY 21, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000861-ME

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 94-J-01793

C.W., A MINOR CHILD;
J.E. (MOTHER); AND C.W.
(FATHER)

APPELLEES

OPINION
REVERSING

** ** * * * * *

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

LAMBERT, SENIOR JUDGE: The Cabinet for Health and Family Services,
Commonwealth of Kentucky, appeals from an order of the Fayette Circuit Court,

¹ Senior Judge Joseph E. Lambert 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.

Family Division. That order, entered *nunc pro tunc*, retroactively committed custody of C.W.,² a minor child, to the Cabinet solely for the purpose of having the Cabinet pay for the minor's residential treatment program. The Cabinet contends that the family court lacked authority to enter such an order and, upon review, we agree. Consequently, for reasons that follow, the family court's decision must be reversed to the extent that it purports to have anything other than prospective application.

Facts and Procedural History

Because Appellees failed to file a brief, we accept the Cabinet's statement of the facts and issues as correct. Kentucky Rules of Civil Procedure (CR) 76.12(8)(c)(i). This action began as a status offender case in which the mother of C.W. brought a juvenile dependency petition in the family court because C.W. was a habitual runaway and otherwise beyond the mother's control. C.W. had previously engaged in a number of other offenses and was confined to home detention pending a pre-trial hearing when she once again ran away from home. This incident led to the filing of the juvenile dependency petition.

C.W. was subsequently sent to the Gateway residential treatment facility in Mt. Sterling, Kentucky, per the advice of the Cabinet. However, C.W.'s mother retained custody of the child. The matter came before the family court on January 20, 2010, and a Cabinet representative testified that the juvenile dependency petition was a non-removal petition; thus, the Cabinet had not

² Because a juvenile is involved, the names of all involved parties have been withheld in order to assure confidentiality.

assumed custody of C.W. and did not desire to do so. The family court specifically noted on a docket sheet entered that day that custody of C.W. was to remain with the mother, and later orders reflected the same determination.

On April 7, 2010, the family court conducted another review of the matter because a problem had arisen as to who was responsible for paying for C.W.'s stay at Gateway. The parties apparently assumed – mistakenly – that since C.W.'s stay at Gateway was an alternative to detention or placement, payment would be covered by the Administrative Office of the Courts or by the child's medical card. The family court acknowledged that custody of C.W. had remained with the mother; therefore, the Cabinet was not responsible for paying Gateway. However, the Assistant Fayette County Attorney then suggested to the court that the problem could be remedied by the issuance of an order *nunc pro tunc* that retroactively committed custody of C.W. to the Cabinet as of January 2010 “for payment purposes only.” As such, the Cabinet would be responsible for paying for C.W.'s residential treatment. Custody of C.W. would then revert back to the mother once the child had finished her stay at Gateway. The family court accepted this suggestion and noted on a docket sheet entered that day that custody of C.W. was to be retroactively given to the Cabinet effective as of January 15, 2010. This appeal followed.

Analysis

On appeal, the Cabinet contends that the family court overstepped its bounds by entering the order *nunc pro tunc* because the Cabinet did not have

custody of C.W. prior to entry of the order. It reasoned that the court could not “correct” this fact by entry of a retroactively-applicable order.

The purpose of a judgment or order *nunc pro tunc* is “to record some act of the court done at a former time which was not carried into the record[.]” *Benton v. King*, 199 Ky. 307, 250 S.W. 1002, 1003 (1923). It is well-established under Kentucky law that “[t]he power to enter judgments and orders *nunc pro tunc* is inherent in the courts and is not dependent for its existence upon any statute.” *Munsey v. Munsey*, 303 S.W.2d 257, 259 (Ky. 1957). However, the court’s power “to make such entries is restricted to placing to record evidence of judicial action which has been actually taken. It may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken.” *Benton*, 199 Ky. 307, 250 S.W. at 1003. In other words, “a *nunc pro tunc* order can only be used to place in the record evidence of judicial action that has actually been taken. It cannot correct an error or supply the record with action that the court failed to make.” *Harden v. Commonwealth*, 885 S.W.2d 323, 325 (Ky. App. 1994); *see also Powell v. Blevins*, 365 S.W.2d 104, 106 (Ky. 1963); *Carroll v. Carroll*, 338 S.W.2d 694, 696 (Ky. 1960).

In view of the foregoing settled precedent, it is apparent that the family court’s order cannot be sustained as it clearly went beyond the parameters of orders *nunc pro tunc*. The minor in this case, C.W., was not in the Cabinet’s custody prior to entry of the order; indeed, the family court specifically noted this fact during the hearing of April 7, 2010. “In no event can [an order *nunc pro tunc*]

be made to reflect something that did not happen. If a court has omitted to make an order it might or should have made, the omission cannot be covered *nunc pro tunc*.” *Powell*, 365 S.W.2d at 106. Consequently, the family court lacked authority to retroactively place C.W. in the custody of the Cabinet prior to April 7, 2010, by means of an order *nunc pro tunc*.

Conclusion

For the foregoing reasons, the order *nunc pro tunc* of the Fayette Circuit Court, Family Division, retroactively granting custody of C.W. to the Cabinet prior to April 7, 2010, is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerry M. Lovitt
Lexington, Kentucky

BRIEF FOR APPELLEES:

NO BRIEF SUBMITTED