

RENDERED: OCTOBER 10, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001958-ME

TOMMY SOUTHARD

APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 04-CI-00688

BREANNA RENFRO (NOW RUSSELL);
LEWIS RENFRO (DECEASED);
AND KIM RENFRO (DECEASED)

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MAZE, THOMPSON AND VANMETER, JUDGES.

MAZE, JUDGE: Tommy Southard, *pro se*, appeals from an order of the Hardin

Family Court which denied his motion for custody of and visitation with his child.

We conclude that the trial court erred in finding that it had lost jurisdiction over the custody matter. Hence, we reverse and remand for additional proceedings.

Tommy Southard and Breanna Renfro (now Breanna Russell) are the father and mother, respectively, of K.S., born January 2001. Following her birth, K.S. resided with her maternal grandparents, Lewis and Kimberly Renfro (collectively, “the Renfros”). In 2004, the Renfros filed a petition for custody, alleging that neither parent was capable of providing care and support for K.S. Southard was incarcerated in 2004, and Russell had ongoing issues with drug abuse.

In 2005, the parties entered into an agreed order granting custody of K.S. to the Renfros. The Renfros agreed to arrange visitation between K.S. and Southard. The parties also stipulated that the Hardin Circuit Court would retain jurisdiction over the custody matter. On December 6, 2007, the trial court entered an order dismissing the matter for lack of prosecution pursuant to Kentucky Rule of Civil Procedure (CR) 77.02.

The record indicates that Kimberly Renfro died on January 1, 2013. Lewis Renfro had predeceased her, and K.S. was residing with Steven Crum.¹ On January 23, 2013, Leslie and Sonja Lynn (“the Lynns”) filed a motion to intervene and to seek custody of K.S. The Lynns stated that both Renfros were now deceased and that Southard was still incarcerated. Although the relationship is not entirely clear from the record, it appears that Leslie was a cousin of Lewis Renfro and both Lynns were close friends of the family. Russell filed an affidavit stating

¹ At the time of her death, Kimberly Renfro and K.S. had been living with Crum for several years. However, the record is not clear whether Kimberly and Crum were married.

that she was still unable to care for K.S. and she believed that the Lynns were in the best position to care for the child.

The Lynns' counsel withdrew and filed a motion to remand the motion to intervene before the trial court could rule upon it. However, the Lynns were granted guardianship of K.S. in a district court proceeding.² Shortly thereafter, they moved to Minnesota with the child. Southard filed a *pro se* response objecting to the Lynns' motion to intervene. He also filed a motion seeking resumption of visitation and requesting that K.S. be returned to Kentucky.

The matter came before the trial court for a hearing on October 15, 2013. The court noted that the Lynns had never been made parties to this action and now lived in Minnesota. The court also took notice of the district court order granting the Lynns guardianship of K.S. Finally, the court pointed out that K.S. had resided with the Lynns in Minnesota for more than six months. Consequently, the court concluded that it did not have jurisdiction over the Lynns and did not have home-state jurisdiction of K.S. under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA). Thereafter, Southard filed a motion to alter, amend or vacate the order pursuant to CR 59.05. The trial court denied the motion on November 8, 2013. This appeal followed.

Southard is proceeding *pro se* on appeal, and he admits that he has limited understanding of the legal issues involved. However, he specifically

² The record indicates that Southard initially consented to the guardianship, but later appeared in the district court proceeding and objected to the Lynns being granted guardianship of K.S.

objects to the trial court's dismissal of the action in 2007, and its finding that it lacked jurisdiction over the Lynns or K.S. As these are all questions of law, we review the matter *de novo* without deference to the trial court's conclusions.

Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004).

As an initial matter, we disagree with the trial court that the prior dismissal of the custody matter affected its jurisdiction over the current matter. Although the underlying action was dismissed, the court had entered a final custody order in 2005. Moreover, the agreed order stipulated that the court would retain jurisdiction over the custody matter. The trial court retained jurisdiction to enforce that order until it was superseded by a custody-modification order properly entered by a court with jurisdiction. *Brighty v. Brighty*, 883 S.W.2d 494, 496 (Ky. 1994).

Upon the death of both of the Renfros, Southard and Russell were entitled to custody of K.S. "if suited to the trust." KRS 405.020(1). Given their respective circumstances, it appears that neither parent was suited to the trust. However, the Lynns did not have physical possession of K.S. and could not be considered as *de facto* custodians under KRS 405.020(4). Therefore, it was incumbent upon them either to intervene in this action or to bring a separate action seeking custody. *See Coffey v Wethington*, 421 S.W.3d 319 (Ky. 2014).

Although the Lynns filed a motion to intervene, they did not pursue that motion to a ruling. Furthermore, we must emphasize that a guardianship determination is not the same as legal custody. *Hicks v. Halsey*, 402 S.W.3d 79, 83

(Ky. App. 2013). The district court's order granting guardianship of K.S. to the Lynns did not affect the Family Court's jurisdiction to make a custody determination. *Id.*, citing KRS 23A.100.

We must also emphasize that the Lynns' decision to remove K.S. to Minnesota did not automatically deprive Kentucky of jurisdiction. Under the UCCJEA, the child's "home state" "means the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months *immediately before the commencement of a child custody proceeding.*" KRS 403.800(7) (*Emphasis added*). K.S. resided in Kentucky at the time the Lynns filed their motion to intervene and when Southard filed his responsive motion seeking custody and visitation.

Thus, Kentucky retained continuing jurisdiction over the pending custody motion. *Biggs v. Biggs*, 301 S.W.3d 32, 33 (Ky. App. 2009). Even if the child acquires a new home state, a new state may not exercise jurisdiction for purposes of custody unless a Kentucky court first determines that the new state would be a more convenient forum according to the factors listed in KRS 403.834. *Mauldin v. Bearden*, 293 S.W.3d 392, 401 (Ky. 2009). There is no indication in the record that Minnesota has sought to exercise jurisdiction over K.S. In the absence of a proceeding in any other state, Kentucky still has continuing jurisdiction over the custody matter.

The primary difficulty in this appeal arises from the fact that the Lynns withdrew their motion to intervene after obtaining guardianship of K.S.

Although Southard filed a motion seeking custody and visitation, he did not seek to join the Lynns as parties and they are not parties to this appeal. Nevertheless, we conclude that the trial court should have joined the Lynns as parties to Southard's motion for custody.³ While Southard is unlikely to be suited to have custody of K.S., he had a superior right to seek custody unless proven otherwise. By allowing the Lynns to withdraw their motion to intervene after obtaining guardianship and physical possession of K.S., the trial court permitted the Lynns to circumvent the primary jurisdiction of the Family Court to determine custody.

Therefore, we conclude that the trial court's order denying Southard's motions for custody and visitation must be set aside and this matter remanded for additional proceedings. Upon remand, the Lynns should be joined as parties to this matter. We would also suggest that the Cabinet for Health and Family Services be joined as a party, as there is no party who currently has legal custody of K.S. The matter should then proceed on the merits of Southard's motions and any motion by the Lynns seeking permanent custody of K.S. Any matter regarding the child's home state or the more convenient forum may be taken up at that time.

Accordingly, the order of the Hardin Family Court denying Southard's motion for custody and visitation is reversed, and this matter is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

³ Indeed, it appears that the trial court considered pleadings and exhibits filed by the Lynns even though they had not been joined as parties to this action.

BRIEF FOR APPELLANT:

No Brief for Appellees

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