

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000141-ME

FRANCES BARGO

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE STEPHEN M. JONES, JUDGE
ACTION NO. 17-CI-00344

MILDRED SMITH AND
RANDY WAYNE SMITH

APPELLEES

OPINION
DISMISSING

** ** * * * * *

BEFORE: COMBS, D. LAMBERT AND SMALLWOOD, JUDGES.

COMBS, JUDGE: Frances Bargo¹ seeks review of an order of the Knox Family Court denying her motion to set aside an agreed order entered on October 18, 2017. Bargo contends that the family court abused its discretion by awarding

¹ While the pleadings denominate Bargo as “Francis Bargo,” the notice of appeal identifies her as “Frances Bargo.” Since Bargo verified her answer as “Frances,” we have used that correct spelling of her name in this opinion.

custody of her two minor children to their grandmother without first conducting a hearing and finding facts sufficient to justify such an order. We disagree fundamentally with Bargo's characterization of the agreed order. Moreover, we are compelled to dismiss the appeal because it is not taken from a final adjudication of the claim asserted in litigation.

Mildred Smith is the paternal grandmother of two children born to Frances Bargo and Randy Wayne Smith. On September 14, 2017, Smith petitioned the court for custody of the children. In her verified petition, Smith asserted that she was in truth and in fact the children's *de facto* custodian as she had been their primary caregiver and financial supporter for more than a year. Bargo timely filed an answer in which she vigorously denied Smith's contentions.

On October 4, 2017, Randy Smith entered an appearance and waived his right to service of process. Additionally, an agreed order was tendered to the court on this date. Randy Smith agreed that his mother had served as the primary caregiver and financial supporter of his children for more than a year; that she met the statutory requirements to be adjudged their *de facto* custodian; and that the children's best interests would be served by awarding her their care, custody, and control.

On October 9, 2017, Mildred Smith filed a motion requesting that a date be set to be heard on her claim for custody of the children. On October 18,

2017, the agreed order was entered, and Bargo served Mildred Smith with written discovery.

On December 8, 2017, Bargo filed with the family court what she captioned as a “Motion To Set Aside *Ex Parte* Order.” In the motion, Bargo asked the court to set aside the agreed order tendered by Randy Smith which had been entered on October 18. Bargo claimed that the order had been entered without her notice, without her consent, and without a hearing.

At motion hour on December 8, 2017, the family court assigned a date for the custody hearing and allotted two hours for the parties’ evidence on February 21, 2018. The court’s order was entered on December 12, 2017. At motion hour on December 21, 2017, the court denied Bargo’s motion to set aside the agreed order entered on October 18.

On December 28, 2017, Bargo filed her notice of appeal. On January 10, 2018, the family court’s order was entered by the clerk. The order recited that it was final and appealable.

On February 2, 2018, Bargo filed an amended notice of appeal designating the family court’s order of January 10 as a proper order to be appealed. She also amended her prehearing statement and designation of record. We ordered the appeal to be expedited.

CR² 73.02(2) provides that “failure of a party to file timely a notice of appeal” shall result in automatic dismissal. Although Bargo’s notice of appeal was filed prematurely, we would normally construe it as relating forward and filed after entry of the order designated as final. *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986). However, in this case, the family court’s decision is not appealable, and the mere recitation of finality does not make it so.

A final adjudication upon one or more of the claims in litigation is required to render an order or judgment final and appealable. *Diaz v. Barker*, 254 S.W.3d 835 (Ky. App. 2008). In the case before us, the disputed agreed order failed to fully resolve the rights of the parties as to the single claim among them: whether Mildred Smith would be granted custody of the minor children. Instead, the agreed order merely acknowledged that Randy Smith would go along with his mother’s contention that she had met the statutory requirements for a *de facto* custodian and that the children’s best interests would be served by granting her custody. The family court set the matter for an evidentiary hearing to be conducted on February 2018 in order to render a custody decision in accordance with the statutory requirements. Bargo’s notice of appeal prevented the court’s timely consideration of the issue before it.

² Kentucky Rules of Civil Procedure.

Where an underlying order appears to lack finality, we must raise the issue, *sua sponte*. Since we have concluded that the court's order is not final and appealable, the appeal must be, and is, hereby, dismissed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Laura A. Phillips
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BRIEF FOR APPELLEE,
MILDRED SMITH

Dave R. Collins
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