[Cite as *B.W. v. J.V.*, 2010-Ohio-1470.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

B.W.

Appellee

v.

D.B.-B., et al.

Defendants

[J.V. and C.V.--Appellants]

Court of Appeals Nos. L-10-1017
L-10-1045
L-10-1055

Trial Court No. JC 08-180254

DECISION AND JUDGMENT

Decided: March 24, 2010

* * * * *

Michael R. Voorhees, for appellant.

Alan J. Lehenbauer, for appellee.

* * * * *

PER CURIAM

{¶ 1} This matter is before the court sua sponte, and on plaintiff-appellee's, B.W., "Motion to Dismiss; Request for Sanctions with Memorandum in Support."[1] This action arises from a parentage complaint filed by appellee seeking to establish paternity to the minor child, G.W. Appellants, J.V. and C.V., were the prospective adoptive parents of G.W. The Lucas County Court of Common Pleas, Juvenile Division, entered an order establishing appellee's paternity to G.W.

{¶ 2} Appellants recently filed notices of appeal from the January 8 and February 3-5, 2010 judgments of the Juvenile Court.[2]

{¶ 3} On January 29, 2010, appellee filed a motion to dismiss appellant's appeal of the January 8 judgment. Appellee argues the rulings contained in the January 8 judgment are not final and appealable. Appellants argue the January 8 judgment is a final appealable order and claim the juvenile court found, for the first time, appellants were not parties to these proceedings and "lacked standing" as prospective adoptive parents to challenge the parentage complaint.

THE JUDGMENTS ON APPEAL

{¶ 4} In the January 8 judgment, the juvenile court addressed several outstanding motions and objections raised by appellants. In this judgment, the juvenile court held as

[1]While appellee's motion to dismiss was limited to the appeal of the January 8, 2010 judgment, the court has chosen to sua sponte examine whether the juvenile court's February 3-5, 2010 judgments are also final appealable orders.

[2]On March 19, 2010, the court issued an order consolidating case Nos. L-10-1045 and L-10-1055 with case No. L-10-1017.

follows: (1) found it had jurisdiction to determine custody of G.W; (2) denied appellants' motion for change of venue; (3) restated its previous findings that appellants lacked standing and were not "party Defendants" to the case; (4) denied appellants' motion for judicial notice; (5) denied appellants' habeas corpus petition; (6) denied appellants' "Motion to Strike/Dismiss Plaintiff's Verified Motion to Establish Parental Rights * * *"; (7) denied appellants' "Motion for Relief from Judgment"; (8) denied appellants' "Motion to Set Aside Magistrate's Order"; (9) agreed to hear appellants' and Adoption by Gentle Care's "Motion for Hair Follicle Drug Test" at a later date.

{¶ 5} In the February 3 judgment, the juvenile court overruled appellants' objections to the January 11, 2010 decision of the magistrate. The magistrate's decision recommended custody of G.W. be awarded to appellee.

{¶ 6} In the February 4 judgment, the juvenile court denied the guardian ad litem's request for a psychological evaluation/diagnostic assessment of appellee.

{¶ 7} On February 5, 2010, the juvenile court entered judgment as follows:

{¶ 8} "Plaintiff, B.W., is designated as the residential parent and legal custodian of the child, *pending submission* of a favorable home study of B.W. by the guardian ad litem. The home study shall be submitted to the court by February 4 * * *.[3] *If the home study is favorable* Adoption by Gentle Care shall place the minor child with B.W. * * *.

[3]The February 5 judgment was actually signed by the judge on January 20, but was not journalized until February 5, 2010.

The issue of child support is determined to the call of any party * * *." (Emphasis added.)

{¶ 9} The juvenile court has not entered an order approving or adopting the aforementioned home study or finalizing the custody of G.W.

FINAL APPEALABLE ORDER

{¶ 10} In *Christian v. Johnson*, 9th Dist No. 24327, 2009-Ohio-3863, our colleagues in the Ohio Ninth District Court of Appeals provided a succinct summary on the law relating to final appealable orders in custody proceedings:

{¶ 11} "This Court's jurisdiction over trial court judgments extends only to final orders. Ohio Const. Art. IV, § 3(B)(2). Section 2505.02(B)(2) defines 'a final order that may be reviewed, affirmed, modified, or reversed' as one that 'affects a substantial right made in a special proceeding. . . .' Divorce and ancillary custody proceedings did not exist at common law, but were created by statute, and are special proceedings within the meaning of Section 2505.02 of the Ohio Revised Code. *State ex rel. Papp v. James*, 69 Ohio St.3d 373, 379 (1994); R.C. 2505.02(A)(2). 'An order affects a substantial right if, in the absence of an immediate appeal, one of the parties would be foreclosed from appropriate relief in the future.' *Koroshazi v. Koroshazi*, 110 Ohio App.3d 637, 640 (1996) (citing *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63 (1993)). 'The entire concept of 'final orders' is based upon the rationale that the court making an order *which is not final is thereby retaining jurisdiction for further proceedings.* A final order, therefore, is one *disposing of the whole case* or some separate and distinct branch

thereof.' *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94 quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306." *Christian*, 2009-Ohio-3863, ¶ 9. (Emphasis added.)

{¶ 12} Interim orders in child custody and related proceedings that remain subject to modification or final ruling by the trial court do not constitute final appealable orders under R.C. 2505.02(B). See *Overmyer v. Halm*, 6th Dist. No. S-08-021, 2009-Ohio-387, ¶ 13 (finding the trial court's order temporarily modifying father's visitation rights was not a final appealable order of modification of visitation, but instead an interim order); *Shaffer v. Shaffer*, 3d Dist. No. 11-04-22, 2005-Ohio-3884, ¶ 8 (finding a temporary order in proceedings for divorce allocating custody of the child to husband was not a final judgment from which appeal could be taken); and *In re S.M.*, 8th Dist. No. 81566, 2004-Ohio-1243, ¶ 30 (finding an award of temporary custody is an interlocutory order that is subject to modification upon a later dispositional hearing). See, also, *In re Burke* (Jan. 24, 2002), 8th Dist. Nos. 78982, 79414 (holding when a juvenile court determines custody, but defers decision on other issues such as child support to another date, the decision does not constitute a final appealable order under R.C. 2505.02(B)).

{¶ 13} Based upon our review of the record and applicable law, we find the January 8, February 3, 4, and 5 judgments are not final appealable orders. The question before the court in determining whether any of these orders affects a substantial right is two fold. First, in the absence of an immediate appeal, would appellants be foreclosed

from appropriate relief in the future? Second, is the order "final," or has the juvenile court retained jurisdiction to modify that order in further proceedings?

{¶ 14} As to the first question, none of the orders in the January 8, February 3 and 4 judgments are final and appealable. In the absence of a right to an immediate appeal, appellants would not be foreclosed from seeking appropriate relief, i.e. a challenge to the juvenile court's exercise of jurisdiction, once the juvenile court issues its final decision on appellee's parentage complaint and the custody of G.W. The court finds the January 8, February 3 and 4 judgments are interim decisions and not final appealable orders.

{¶ 15} Appellants argue the January 8 judgment is a final appealable order with respect to the juvenile court's finding appellants lacked standing as prospective adoptive parents to challenge appellee's parentage complaint.

{¶ 16} We agree a judgment finding appellants lacked standing to challenge the parentage complaint would be a final appealable order. However, as noted by appellee, the juvenile court first addressed the issue of standing in its July 24, 2008 judgment entry. The juvenile court found:

{¶ 17} "[T]he prospective adoptive parents *do not have standing in this parentage action*. * * * Additionally * * * the prospective adoptive parents *are not proper parties* to the parentage action" (Emphasis added.)

{¶ 18} The January 8 judgment did not address any new issues with respect to the juvenile court's ruling as to appellants' standing as prospective adoptive parents. The juvenile court restates its findings in the July 24 judgment. Accordingly, the July 24,

2008 judgment finding appellants did not have standing, and were not proper parties to the parentage action, was a final appealable order. However, appellants did not appeal this judgment.

{¶ 19} App.R. 4(B)(5) provides for exceptions to the general 30-day appeal deadline under App.R. 4(A) and states:

{¶ 20} "**5. Partial final judgment or order**. If an appeal is permitted from a judgment or order entered in a case *in which the trial court has not disposed of all claims as to all parties* * * * a party may file a notice of appeal within thirty days of entry of the judgment or order appealed *or the judgment or order that disposes of the remaining claims*. * * *" (Emphasis added.)

{¶ 21} Thus, appellants retained the option of appealing the juvenile court's July 24, 2008 judgment finding they lacked standing within 30 days of that judgment, *or* within 30 days after the entry of the judgment disposing of the remaining claims in this case.

{¶ 22} Since appellants did not appeal the juvenile court's finding within 30 days, they cannot appeal that judgment until the juvenile court issues a final decision on the custody of G.W. See App.R. 4(B)(5).

{¶ 23} That brings us to the February 5 judgment. The February 5 judgment is also not a final appealable order. While the trial court designated appellee as the residential and legal custodian of G.W., the court's designation was *contingent* upon the juvenile court approving appellee's home study as favorable. Thus, the February 5

judgment was also an interim decision that remains subject to future modification by the juvenile court. We note the juvenile court has not yet entered judgment adopting or rejecting this proposed home study. Therefore, the February 5 judgment is also not a final appealable order.

{¶ 24} Appellee also requests this court award attorney fees and costs pursuant to App.R. 23. That rule reads: "If a court of appeals shall determine that an appeal is frivolous, it may require the appellant to pay reasonable expenses of the appellee including attorney fees and costs." The court finds this appeal was not frivolous.

{¶ 25} Appellee's motion to dismiss is granted and his request for attorney fees is denied. Furthermore, this case is dismissed in its entirety. All other pending motions are dismissed as moot. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24. It is so ordered.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE