

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In re: :
R.A.W., a minor child, : No. 11AP-1072
(Elizabeth Warren, : (C.P.C. No. 08JU-09-13321)
Appellant). : (REGULAR CALENDAR)

D E C I S I O N

Rendered on October 18, 2012

Gary J. Gottfried Co., L.P.A., Gary J. Gottfried, and Eric M. Brown, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶ 1} Plaintiff-appellant, Elizabeth Warren, appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch denying her motion to dismiss Cheryl and Lance Scotney's motion for custody and/or companionship. For the reasons that follow, we dismiss this appeal for lack of a final appealable order.

I. FACTUAL AND PROCEDURAL HISTORY¹

{¶ 2} Appellant gave birth on November 11, 2005 to a child ("the child"), as the result of artificial insemination. At the time of the child's birth, appellant was involved in a relationship with defendant, Nancy Scotney, and the couple was residing in California. Thereafter, the couple and the child relocated to Ohio.

¹ Though the record contains numerous filings, including various motions and orders, our procedural summary will include only those relevant to the matter before us.

{¶ 3} The case herein began on September 30, 2008, with the joint filing of a "Complaint to Establish Joint Custody Plan for Minor Child." The complaint alleged appellant is the child's biological mother and Nancy is the child's "legal mother," as a result of her step-parent adoption of the child that occurred in Santa Clara County, California. Having moved to Ohio and subsequently separated into two households, the parties jointly requested that, pursuant to R.C. 2151.23, the trial court determine custody and parenting responsibilities.

{¶ 4} The trial court appointed a guardian ad litem ("GAL") and an "Agreed Interim Magistrate's Order" was filed on October 7, 2008. The agreed order provided that the child would reside with each party on an "essentially equal basis," and the order set forth specific dates and times of visitation. According to the record, Nancy was experiencing a number of personal issues, including an alleged suicide attempt which resulted in the "Third Agreed Interim Magistrate's Order" filed on June 4, 2010. The order provided for Nancy's supervised parenting time with the child and specified that said visitation would be supervised by Nancy's parents, "Cheryl and/or Lance Scotney," ("the Scotneys"). On September 27, 2010, an "Agreed Judgment Entry" was filed. The entry finalized all matters relating to the allocation of parental rights and responsibilities for the child and resolved all matters set forth in the complaint.

{¶ 5} On January 28, 2011, the Scotneys filed a motion for grandparent visitation and a motion to be joined as parties; however, the motion for grandparent visitation was subsequently dismissed. On March 23, 2011, the Scotneys filed a motion for custody and/or companionship. By magistrate's entry dated April 4, 2011, the Scotneys' motion to be joined as parties was granted, and appellant subsequently filed a motion to set aside the magistrate's order.

{¶ 6} Shortly thereafter, appellant filed a motion to dismiss the Scotneys' motion for custody for failure to state a claim upon which relief can be granted "and/or" a motion for judgment on the pleadings. In her motion, appellant argued dismissal was required because the Scotneys' motion failed to allege parental unsuitability on the part of appellant.

{¶ 7} By judgment entry dated November 7, 2011, the trial court addressed three issues: (1) appellant's objections to the magistrate's order joining the Scotneys,

(2) appellant's motion to dismiss the Scotneys' motion for custody, and (3) the GAL's motion regarding payment of GAL fees. As is relevant here, the trial court rejected appellant's arguments challenging the magistrate's order joining the Scotneys, and the trial court denied appellant's motion to dismiss. In denying the motion to dismiss, the trial court stated, in part, "this Court finds it in the best interest of the child to allow the Scotneys to enjoy companionship rights pursuant to ORC §3109.051. Accordingly, [appellant's] Motion to Dismiss is not well taken and the same is hereby DENIED and DISMISSED." (Entry, 5.)

II. ASSIGNMENTS OF ERROR

{¶ 8} This appeal followed and appellant brings the following two assignments of error for our review:

[I.] The trial court erred and abused its discretion when it failed to dismiss, pursuant to Civ.R. 12, the Scotneys' custody motion.

[II.] The trial court erred and abused its discretion when it failed to dismiss, pursuant to Civ.R. 12, the Scotneys' companionship motion.

III. DISCUSSION

{¶ 9} As an introductory matter, we must determine whether this court has jurisdiction over this appeal. Pursuant to Ohio Constitution, Article IV, Section 3(B)(2) and R.C. 2505.03, appellate courts have jurisdiction to review only final orders, judgments or decrees. R.C. 2505.02(B) defines a final appealable order as one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action.

{¶ 10} " "[T]he 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." " *Rigsby v. Albright*, 10th Dist. No. 10AP-288, 2010-Ohio-5630, ¶ 7, quoting *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶ 10, quoting *Noble v. Colwell*, 44 Ohio St.3d 92, 94 (1989), quoting *Lantsberry v. Tilley Lamp Co.*, 27 Ohio St.2d 303, 306 (1971).

{¶ 11} If an order is not final and appealable, an appellate court has no jurisdiction to review the matter and the appeal must be dismissed. *Davison v. Rini*, 115 Ohio App.3d 688, 692 (4th Dist.1996). If the parties themselves fail to raise the issue of whether or not a judgment constitutes a final appealable order, we must raise the issue sua sponte. *In re Adoption of S.R.A.*, 189 Ohio App.3d 363, 2010-Ohio-4435, ¶ 11 (10th Dist.), citing *Whitaker-Merrell Co. v. Geupel Constr. Co.*, 29 Ohio St.2d 184, 186 (1972).

{¶ 12} "Generally, an order denying a motion to dismiss is not a final order." *Polikoff v. Adam*, 67 Ohio St.3d 100, 103 (1993). This is so "because the reasons for which the dismissal was sought continue undisturbed to the final judgment, permitting prosecution of the error, if any, on the final judgment." *Haskins v. Haskins*, 104 Ohio App.3d 58, 60 (2d Dist.1995), citing *Polikoff* at 105. Thus, "an order denying a motion to dismiss does not determine the action as the merits 'have yet to be addressed.'" *Rigsby* at ¶ 8, quoting *Ferrell v. Standard Oil Co. of Ohio*, 11 Ohio St.3d 169, 171 (1984).

{¶ 13} Here, the trial court's November 7, 2011 entry denied appellant's motion to dismiss the Scotneys' motion for custody and/or companionship, but the entry does not qualify as a final appealable order under R.C. 2505.02(B) with respect to said issue. No

substantive right has been affected because there has been no hearing on the merits of the matter, nor has there been an order declaring the status of the parties concerning the child. *Vizzo v. Morris*, 5th Dist. No. 2011-CA-52, 2012-Ohio-2141, ¶ 42 (overruling a motion to dismiss for lack of subject-matter jurisdiction not a final appealable order); *Holm v. Smilowitz*, 83 Ohio App.3d 757, 765 (4th Dist.1992), fn.7 (denial of mother's motion to dismiss father's motion for change of custody not a final appealable order); *Haskins* (denial of motion to dismiss petition for change of custody not a final appealable order). Accordingly, the trial court's decision denying appellant's motion to dismiss the Scotneys' motion for custody and/or companionship does not constitute a final appealable order.

{¶ 14} Nor can we construe the judgment entry at issue here as one granting the Scotneys' motion for custody and/or companionship. The entry states in part that the court finds it is in the best interest of the child to allow the Scotneys to enjoy companionship rights. Nonetheless, the judgment entry does not contain an express granting of the Scotneys' motion, and the entry does not include any relief to the Scotneys.

{¶ 15} " 'A decision announces what the judgment will be. The judgment entry unequivocally orders the relief.' " *Holdren v. Garrett*, 10th Dist. No. 09AP-1153, 2011-Ohio-1095, ¶ 11, quoting *Harkai v. Scherba Industries, Inc.*, 136 Ohio App.3d 211, 216 (9th Dist.2000). Even if captioned a judgment entry, courts must look at the language employed in the entry to ascertain whether it accomplishes the termination of a case or controversy submitted to the trial court for resolution. *St. Vincent Charity Hosp. v. Mintz*, 33 Ohio St.3d 121, 123 (1987). The judgment entry present before us does not dispose of the Scotneys' motion for custody and/or companionship, nor does the judgment entry order any other form of relief to the Scotneys. Instead, in denying appellant's motion to dismiss, the entry merely announced the trial court's finding that it is in the child's best interest to allow the Scotneys to enjoy companionship rights.

{¶ 16} While perhaps an indication of how the trial court will dispose of the Scotneys' motion for custody and/or companionship, the trial court's order does not order any relief or terminate the case or controversy submitted to it and, therefore, does not constitute a final appealable order. *Thebeau v. Thebeau*, 4th Dist. No. 07CA34, 2008-Ohio-4751, ¶ 15 (decision stating the court lacked jurisdiction over the controversy was

only an announcement of the court's decision and until the court ordered the complaint dismissed, the entry was not a final appealable order); *Holdren* (though text of the court's discussion indicated an intent to dismiss a counterclaim, such relief was not included in the judgment entry; therefore, there was no final appealable order with respect to the counterclaim).

IV. CONCLUSION

{¶ 17} Because appellant does not appeal from a final order of the trial court, this court lacks jurisdiction to consider appellant's assigned errors. Accordingly, the appeal is dismissed for lack of jurisdiction.

Appeal dismissed.

KLATT and FRENCH, JJ., concur.
