

RENDERED: SEPTEMBER 26, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-001632-MR

J.O.

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JUDA M. HELLMANN, JUDGE
ACTION NO. 00-FY-001636

COMMONWEALTH OF KENTUCKY, CABINET
FOR FAMILIES AND CHILDREN AND L.S.

APPELLEES

OPINION AND ORDER

DISMISSING APPEAL

** ** * * * * * ** ** ** **

BEFORE: BAKER AND SCHRODER, JUDGES; AND HUDDLESTON, SENIOR
JUDGE.¹

SCHRODER, JUDGE: J.O., the maternal grandmother of B.M.W.,
appeals from an order of the Jefferson Family Court denying her
motion pursuant to CR² 60.02 to vacate an order awarding
permanent custody of B.M.W. to L.S., the child's paternal great-

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Civil Procedure.

aunt. The family court, without reaching a decision on the merits, denied the motion on the basis that J.O. did not have standing to bring a CR 60.02 motion because she was not a party to the family court proceedings. Because the family court custody orders J.O. seeks to vacate in her CR 60.02 motion were based upon district court subject matter jurisdiction pursuant to KRS³ 620.027⁴ and KRS 610.010(13),⁵ J.O.'s appeal was to Jefferson Circuit Court. As this cause is not properly before us, we dismiss the appeal.

D.W. and S.W. are the parents of B.M.W., born November 23, 1999. L.S. is B.M.W.'s paternal great-aunt, and J.O. is B.M.W.'s maternal grandmother. On September 28, 2000, the Cabinet for Families and Children (Cabinet) filed a petition in Jefferson Family Court pursuant to KRS 610.020(1),⁶ 610.010(1)(e),⁷ and KRS 620.070⁸ alleging that B.M.W. was an

³ Kentucky Revised Statutes.

⁴ KRS 620.027, among other things, grants a district court concurrent jurisdiction to determine custody where the need for permanent placement is established in a dependency, neglect, and abuse case.

⁵ KRS 610.010(13) provides for district court permanency hearings in dependency, neglect, and abuse cases.

⁶ KRS 610.020 provides the procedure to file a complaint to bring a child within the purview of KRS Chapters 600 to 645.

⁷ KRS 610.010(1)(e) provides that the juvenile session of the district court shall have exclusive jurisdiction in proceedings concerning a child who has not reached his or her eighteenth birthday and is a dependent, neglected, or abused child.

⁸ KRS 620.070(1) provides that a dependency, neglect, or abuse action may be commenced by the filing of a petition by any interested person in the juvenile session of District Court.

abused child. The petition was based upon an incident involving physical violence between D.W. and S.W. in the presence of the child. Following a hearing, the family court ordered that B.M.W. be placed in the temporary custody of L.S. On February 15, 2001, a final disposition hearing was held. Following the hearing, the family court entered a final disposition order continuing temporary custody with L.S. The order also placed various parent-counseling requirements upon D.W. and S.W., and indicated that the Cabinet was to redocket the case for return of custody to the parents "when appropriate."

On June 21, 2001, S.W. and D.W. filed a pro se motion requesting that custody of B.M.W. be returned to them. In the motion the parents state that they had complied with the requirements imposed upon them by the family court and were entitled to the return of the child. The family court appointed an attorney to represent S.W. and D.W. and ordered the Cabinet to investigate the motion.

On August 13, 2001, the Cabinet, through the Jefferson County Attorney, filed a motion to review the case for permanent custody. The motion and the attached affidavit both indicated that the Cabinet was seeking that the family court review the case "for permanency."

On December 13, 2001, a hearing was held on the pending motions. Following the hearing the family court entered two written orders, one on December 13, 2001, and one on January 7, 2002, awarding L.S. permanent custody of B.M.W.

On March 12, 2002, J.O. filed a motion pursuant to CR 60.02 to vacate the family court's December 13, 2001, and January 7, 2002, orders granting permanent custody of B.M.W. to L.S. In her motion, J.O. alleged that she had not been given proper notice of the motions for permanent custody or the entry of the orders granting permanent custody. Following a hearing, on June 27, 2002, the family court entered an order denying J.O.'s CR 60.02 motion on the basis that she did not have standing to bring the motion. This appeal followed.

On August 9, 2002, L.S. filed a motion to dismiss this cause on the basis that this Court does not have jurisdiction to consider this appeal. L.S. argued that the appeal is from a family court decision on a district court matter and, therefore, the appeal should properly lie in Jefferson Circuit Court. Following a response by J.O., on October 16, 2002, an order was entered passing the motion to this panel. Because we must first have jurisdiction to consider this appeal on the merits, we first address whether this appeal is properly before this Court.

Elery v. Martin, Ky. App., 4 S.W.3d 550 (1999), addressed a similar appeal from the Jefferson Family Court to

this Court. As noted in Elery, the determination of whether an appeal should be brought to the Jefferson Circuit Court or this Court is determined by the two Rules of Practice of the Jefferson Family Court (JFRP) that relate to appeals. JFRP 108, which addresses appeals from family court on circuit court matters, provides as follows:

In Family Court matters over which Circuit Court would otherwise have jurisdiction, any appeal shall proceed by the Rules of Civil Procedure to the Court of Appeals, except that all appeals from Domestic Violence or Emergency Protective Orders shall proceed to Circuit Court.

Similarly, JFRP 109, which addresses appeals from family court on district court matters, provides as follows:

(A) In Domestic Violence cases and other Family Court matters over which District Court would otherwise have jurisdiction, any appeal shall proceed by the Rules of Civil Procedure (or Criminal Procedure in the event of a delinquency or status action) to Circuit Court.

(B) In the event of such an appeal, the appeal will be assigned randomly to one of the thirteen divisions of Circuit Court that are not involved in the Family Court Project.

Based upon these local rules of procedure, Elery devised a two-part test to determine the appropriate court to appeal a family court matter: first, identify the family matter or matters being appealed, and second, determine whether the

circuit court or district court would otherwise have subject matter jurisdiction. Elery at 552.⁹

J.O.'s CR 60.02 motion sought to vacate the family court's orders of December 13, 2001 and January 7, 2002, granting permanent custody to L.S. As further discussed below, those orders were based upon a district court jurisdiction permanency determination pursuant to KRS 610.010(13) and concurrent district court child custody jurisdiction under KRS 620.027. As the family court was exercising district court jurisdiction when it entered those orders, it follows that it was exercising district court jurisdiction when it denied J.O.'s CR 60.02 motion to vacate those orders.

The family court case was originally initiated by the filing of a Complaint by the Cabinet pursuant to KRS 610.020, KRS 610.010(1)(e), and KRS 620.070 alleging that B.M.W. was a dependent, neglected, or abused child. "A dependency, neglect, or abuse action may be commenced by the filing of a petition by

⁹ We note that 2003 Ky. Acts 66 § 16 provides, in relevant part, as follows:

KRS 22A.020 is amended to read as follows:

(1) Except as provided in Section 110 of the Constitution, an appeal may be taken as a matter of right to the Court of Appeals from any conviction, final judgment, order, or decree in any case in Circuit Court, **including a family court division of circuit court**, unless such conviction, final judgment, order, or decree was rendered on an appeal from a court inferior to Circuit Court.

Hence, upon the effective date of this provision, June 24, 2003, all appeals from family court will be to this Court.

any interested person in the juvenile session of the District Court." KRS 620.070(1). "[T]he juvenile session of the District Court of each county shall have exclusive jurisdiction in proceedings concerning any child . . . who has not reached his or her eighteenth birthday . . . who allegedly . . . [i]s dependent, neglected, or abused[.]" KRS 610.010(1)(e). There does not seem to be any dispute that this case was originally commenced in family court as a matter over which the district court would otherwise have jurisdiction.

On January 18, 2001, an adjudication hearing was held at which, among other things, a stipulation of abuse was entered by the parents.

On February 15, 2001, a dispositional hearing was held following which the family court entered a dispositional order by way of calendar entries filed into the record. See KRS 610.080¹⁰; 610.110¹¹; and 620.140.¹² Among other things the dispositional order provided that L.S. was to remain the temporary custodian of B.M.W. and that "[the Cabinet was] to redocket for return of custody to parents when appropriate." The order also imposed parent-counseling requirements on D.W. and S.W. At this point, it appears undisputed, the family court

¹⁰ Requiring separate adjudication and dispositional hearings.

¹¹ Setting forth disposition requirements.

¹² Setting forth dispositional alternatives.

was still exercising district court jurisdiction. Further, we conclude that the family court, in the dispositional order, acting under district court jurisdiction, specifically reserved further review of reunification of B.M.W. with her parents. See KRS 610.010(1) and KRS 610.010(13).

On June 21, 2001, S.W. and D.W. filed a pro se motion seeking that custody of B.M.W. be returned to them. In their motion the parents argued that they had complied with the parent counseling requirements imposed by the family court and were thus entitled to the return of their child. We construe this motion as relating back to the continuing jurisdiction reserved by the family court in its February 15, 2001, order and not as a motion for custody pursuant to KRS 403.270, *et seq.*, the child custody provisions invoking circuit court jurisdiction.

On August 10, 2001, the Cabinet, through the Jefferson County Attorney, filed a motion which stated, in part, "Comes the Commonwealth through the Jefferson County Attorney, and moves the court to review for permanency." (emphasis original.) Further, the attached social worker affidavit stated, in part, "Affiant further states that he/she feels that this case should be redocketed and further moves the court for review for permanency." (emphasis added.) KRS 610.010(13) provides as follows:

The [district] court shall have continuing jurisdiction over a child pursuant to subsection (1) of this section, to review dispositional orders, and to conduct permanency hearings under 42 U.S.C. sec. 675(5)(c)¹³ until the child is placed for adoption, returned home to his or her parents with all the court imposed conditions terminated, or reaches the age of eighteen (18) years.

Based upon the specific language used in the Cabinet's August 10, 2001, motion - i.e., its reference to "review for permanency" - we construe the motion as intending to seek a permanency determination under KRS 610.010(13), and not as intending to invoke a circuit court child custody determination under KRS 403.270, *et seq.*

At the outset of the December 13, 2001, hearing, the family court announced that the purpose of the hearing was to address the two outstanding motions for custody. Following the December 13, 2001, hearing, two orders were entered. The first order was a form order entered on December 13, 2001. That order stated that "This matter came before the court for a hearing on Permanency Planning for the above-named child(ren) on 12-13-01. . . ." (emphasis added.) The order further stated "The need for permanency for the child(ren) and all other relevant

¹³ 42 U.S.C. sec. 675(5)(c) provides, among other things, that a child placed in foster care will within 12 months be entitled to a hearing to determine a permanency plan for the child that includes, among other things, a determination of whether and if the child will be returned to the parents, placed for adoption, or placed in another planned permanent living arrangement.

factors pursuant to KRS Chapter 403, and having found pursuant to KRS 620.027¹⁴ that it is in the best interest of the child(ren) that Permanent custody be granted to [L.S.]” (emphasis added.)

On January 7, 2001, a more detailed order was filed. Among other things, that order stated that the family court “has jurisdiction over the subject matter herein. KRS 620.027.” (emphasis added.)

In its custody orders the family court thus referred to its custody determination as a “permanency” proceeding, which we construe as invoking the district court jurisdiction of KRS 610.010(13), and, further, specifically stated that it had jurisdiction pursuant to KRS 620.027,¹⁵ which, again, grants a district court concurrent jurisdiction to determine matters of child custody in dependency, abuse, and neglect cases:

The District Court has jurisdiction, concurrent with that of the Circuit Court, to determine matters of child custody and visitation in cases that come before the District Court where the need for a permanent placement and custody order is established as set forth in this chapter. The District Court, in making these

¹⁴ KRS 620.027 provides that a district court determining custody under that statute shall utilize the provisions of KRS Chapter 403. One of the provisions of KRS Chapter 403 is that custody be awarded in accordance with the best interest of the child. See KRS 403.270(2).

¹⁵ KRS 610.010(9) provides that “The [district] court shall have no jurisdiction to make permanent awards of custody except as provided by KRS 620.027.” Hence, clearly a district court has jurisdiction to make an award of permanent custody in a case involving dependency, abuse, or neglect.

determinations, shall utilize the provisions of KRS Chapter 403 relating to child custody and visitation. . . .

KRS 620.027.

As previously noted, it is undisputed that this case originated as a dependency, neglect, or abuse matter over which a district court normally has subject matter jurisdiction. Based upon the subsequent proceedings, we are persuaded that the custody determination in this case was pursuant to the concurrent jurisdiction provisions of KRS 620.027 and the permanency hearing provisions of KRS 610.010(13). No event occurred to trigger the termination of the proceeding as a dependency, abuse, or neglect case. Further, nowhere in the family court record was any motion made or order entered which invoked circuit court jurisdiction under KRS Chapter 403. As the family court was exercising district court jurisdiction throughout the proceedings below, it follows that J.O.'s appeal was to Jefferson Circuit Court. Elery, 4 S.W.3d 550; T.A. v. Byer, Ky., 13 S.W.3d 629 (2000); JFRP 109; KRS 620.155.

In summary, all of the family court orders in this case, including the custody orders and the order denying J.O.'s CR 60.02 motion to vacate the custody orders, were issued pursuant to that court's district court authority. J.O.'s right of appeal, therefore, was to the Jefferson Circuit Court.

Accordingly, this Court lacks jurisdiction to hear J.O.'s appeal, which is hereby dismissed.

ALL CONCUR.

ENTERED: September 26, 2003

/s/ Wilfrid A. Schroder
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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