

RENDERED: May 6, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-001983-ME

KAYE WHALEN

APPELLANT

v. APPEAL FROM CLARK FAMILY COURT
HONORABLE REED RHORER, SPECIAL JUDGE
ACTION NO. 01-CI-00526

ART VILLARREAL;
LISA FERRELL

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Kaye Whalen appeals from an order of the Clark Family Court denying her visitation with her grandson, Alexander Villarreal (Alex) pursuant to Kentucky Revised Statutes (KRS) 405.021. Kaye contends that the family court erred in denying her reasonable visitation with Alex. Because

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

the order appealed from in this action was a nonfinal interlocutory order, we are compelled to dismiss the appeal.

Alex was born on June 8, 1992. Kaye is Alex's maternal grandmother. Art Villarreal is the natural father, and Lisa Ferrell is the natural mother, of Alex. Art and Lisa divorced in 1994. Following the divorce, Art assumed custody of Alex.

According to Kaye, following the divorce, from the time Alex was about two until he was about seven, she provided substantially all of the basic daily caretaking duties for Alex, including feeding him breakfast, lunch, and dinner; bathing him; laundering his clothing and dressing him; signing him up for school, sports, and recreational activities; taking him to activities and on vacations; making and attending medical appointments for him; transporting him to and from school, medical appointments, and sports activities. She also testified that for a period of approximately nine months beginning in 1999 and continuing through 2000, Art and Alex resided at her residence.

In 2000, Art and Alex left Kaye's residence and moved to Clark County. Shortly thereafter, Art terminated all visitations between Kaye and Alex.

On September 26, 2001, Kaye filed a petition for visitation with Alex in Clark Family Court. Following a

hearing, on August 24, 2004, the family court entered an order denying Kaye's petition for grandparent visitation. On September 3, 2004, the Guardian Ad Litem for Alexander Villarreal filed a Ky. R. Civ. P. (CR) 59.05 motion requesting that the family court reconsider its August 24, 2004, order. On September 23, 2004, while the Guardian Ad Litem's CR 59.05 motion was still pending, Whalen filed her notice of appeal. On September 30, 2004, a hearing was held on the pending CR 59.05 motion. The record on appeal contains the family court's signed September 30, 2004, docket sheet containing a notation that the Guardian Ad Litem's CR 59.05 motion was overruled.

We first address the appellee's contention that the order appealed from, the family court's August 24, 2004, order, is a nonfinal interlocutory order which is not properly before this Court. Because there was a pending CR 59.05 motion at the time Kaye filed her notice of appeal, we must agree with the assertion of the Appellee.

"[A] judgment subject to a CR 59 motion cannot be final until the motion has been ruled on." Bates v. Connelly, 892 S.W.2d 586, 588 (Ky. 1995). Because a CR 59.05 motion was pending at the time Kaye filed her notice of appeal, the family court's August 24, 2004, order was, at the time of the notice, a nonfinal interlocutory order. Id. Except in situations not applicable here, a nonfinal interlocutory order of a family

court may not be appealed to this court. Hook v. Hook, 563 S.W.2d 716, 717 (Ky. 1978). It follows that we must dismiss this appeal.

We note that the filing of the notice of appeal on September 23, 2004, divested the family court of jurisdiction to rule on any issue while the appeal was pending. Johnson v. Commonwealth, 17 S.W.3d 109, 113 (Ky. 2000). Thus, the docket sheet order issued by the trial court on September 30, 2004, was entered without jurisdiction and is a nullity. Upon a proper ruling on the Guardian Ad Litem's September 23, 2004, CR 59.05 motion, this case will, following the dismissal of this appeal, at last be ripe for a timely appeal. We note with regret that the parties are caught in a procedural "Catch-22" that much needs to be addressed.

For the foregoing reasons, this Court **ORDERS** that this appeal be and it is hereby **DISMISSED**.

ALL CONCUR.

ENTERED: May 6, 2005

/s/ John D. Miller
SENIOR JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Brian N. Thomas
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BRIEF FOR APPELLEE ART
VILLARREAL:

John H. Rompf
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