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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002582-ME

GINA WAGNER CHIARAMONTE — APPELLANT

v.

APPEAL FROM MERCER CIRCUIT COURT
HONORABLE D. BRUCE PETRIE, JUDGE
ACTION NO. 04-CI-00118

DONALD L. SEXTON; BONNIE K. SEXTON;
ERNIE MEEKS; AND WANDA FAYE MORRISON — APPELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

JOHNSON, JUDGE: Gina Wagner Chiaramonte has appealed from two orders of the Mercer Circuit Court, one entered on October 19, 2004, naming Donald L. Sexton and Bonnie K. Sexton de facto custodians of Alisha LeeAnn Wagner, and another order entered on November 23, 2004, denying Chiaramonte's motions filed under CR[1] 59.07,[2] and CR 60.02.[3] Having concluded that these orders are

[1] Kentucky Rules of Civil Procedure.

[2] CR 59.07 states as follows:

> On motion for a new trial in an action tried without a jury, the court may grant a new trial or it

not final and appealable judgments and, thus, this Court lacks jurisdiction to decide the issues presented, we dismiss this appeal.

This case concerns the custody of the minor child, Alisha, who was born on January 18, 1993. Both of Alisha's parents are deceased. Alisha's father, Billy Lee Wagner, died on July 8, 1999, and her mother, Candy Wagner, died after a long-term illness on April 14, 2004. Prior to Candy's death, she resided with Ernie Meeks, but the two were never married. During this time, Alisha was cared for by Candy and Meeks and also cared for by the Sextons, who are not related to Alisha.

On April 23, 2004, only days after Candy's death, the Sextons filed a petition for custody of Alisha in the Mercer Circuit Court, asking the circuit court to declare them de facto custodians of Alisha, pursuant to KRS[4] 403.270(1), and to award

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> may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

[3] CR 60.02 states, in relevant part, as follows:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; . . . or (f) any other reason of an extraordinary nature justifying relief. . . .

[4] Kentucky Revised Statutes.

them custody of Alisha. They alleged that they had been Alisha's primary caregivers and financial supporters for one year or more before filing the petition. On May 15, 2004, Meeks filed a counter-petition for custody and asked to be declared Alisha's de facto custodian. Pursuant to an agreed order entered on May 26, 2004, the Sextons and Meeks agreed to a temporary joint custody arrangement, but specified in the agreement that the arrangement in no way determined who was de facto custodian of Alisha.

On July 2, 2004, Chiaramonte, Alisha's paternal aunt, filed a motion to intervene in the case and was granted leave of the circuit court to file her intervening petition for custody. Chiaramonte strongly contested the Sextons's allegation that they were Alisha's de facto custodians. On August 9, 2004, the circuit court entered an order scheduling separate hearings for the determination of de facto custodianship and permanent custody of Alisha. This order specifically stated: "Except where inconsistent herein, the Agreed Order entered on May 26, 2004, shall continue in full force and effect, pending the further orders of this Court or another Court of competent jurisdiction."

An evidentiary hearing was held on October 1, 2004, regarding the de facto custodian status of the Sextons and Meeks. By order entered on October 19, 2004, the circuit court

ruled that the Sextons were Alisha's de facto custodians, but ruled that Meeks did not qualify for such status. The circuit court did not make a permanent custody award at this hearing, or thereafter. Subsequently, Chiaramonte filed motions for relief pursuant to CR 59.07 and CR 60.02. In these motions, Chiaramonte asked the circuit court to set aside its judgment because it was not based on substantial evidence and was contrary to Kentucky law. She also moved to supplement the record with additional information, and for the circuit court to make new findings and conclusions and enter a new judgment. She argued in these motions that there was newly discovered evidence and that the Sextons had submitted false testimony. A hearing was held on November 5, 2004,[5] on these motions and the circuit court entered an order on November 23, 2004, upholding its October 19, 2004, order naming the Sextons as Alisha's de facto custodians. This appeal followed.[6]

[5] On November 5, 2004, Wanda Faye Morrison, Alisha's maternal grandmother was granted leave to intervene in the case to petition for visitation rights with Alisha. On November 8, 2004, a guardian ad litem was appointed to represent Alisha's interests in the case.

[6] After Chiaramonte filed this appeal, the Sextons filed a motion with this Court on May 2, 2005, arguing that the orders being appealed were interlocutory, and requesting that the appeal be dismissed. Chiaramonte filed her response on May 10, 2005, and this Court entered an order denying the Sexton's motion on July 6, 2005. See Knott v. Crown Colony Farm, Inc., 865 S.W.2d 326, 329 (Ky. 1993) (noting that a decision made by a Court of Appeals motion panel is not binding on the merits panel).

"This Court has jurisdiction over appeals from final judgments or orders of circuit courts."[7] Pursuant to CR 54.01, "[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." Further, CR 54.02(1) states, in pertinent part, as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final.

However, "[b]efore the processes of CR 54.02 may be invoked for the purpose of making an otherwise interlocutory judgment final and appealable, there must be a final adjudication upon one or more of the claims in litigation."[8] Moreover, "[w]here an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable" [citations omitted].[9] Even if the Sextons had not raised the finality issue in their brief, "the

[7] Francis v. Crounse Corp., 98 S.W.3d 62, 64 (Ky.App. 2002) (citing KRS 22A.020(1)).

[8] Hale v. Deaton, 528 S.W.2d 719, 722 (Ky.App. 1975).

[9] Hook v. Hook, 563 S.W.2d 716, 717 (Ky. 1978).

appellate court should determine for itself whether it is authorized to review the order appealed from."[10]

Although the circuit court's orders dated October 19, 2004, and November 23, 2004, included CR 54.02 finality language, "[t]his is a final and appealable Order, there being no just cause for delay," since this is not a case which involves multiple claims, CR 54.02 is not applicable. "[A]ttempted compliance with CR 54.02(1) will not necessarily make an otherwise interlocutory judgment final and appealable."[11] The appellant and the appellees are the only parties to the case, and the only claims before the circuit court are the parties' various petitions for custody and visitation. The issue of whether the Sextons are Alisha's de facto custodians is merely an intermediate issue ancillary to the parties' various custody claims.[12]

"Sound judicial administration requires the avoidance of piecemeal dispositions of cases, and appellate courts must not be indiscriminately thrust into the processes of single-party or single-claim trials until they are final."[13] It is

[10] Id. at 717. See also Huff v. Wood-Mosaic Corp., 454 S.W.2d 705, 706 (Ky. 1970); and Central Adjustment Bureau, Inc. v. Ingram Associates, Inc., 622 S.W.2d 681, 683 (Ky.App. 1981).

[11] Francis, 98 S.W.3d at 65.

[12] See KRS 403.270(1).

[13] Bellarmine College v. Hornung, 662 S.W.2d 847, 848 (Ky.App. 1983).

clear that the circuit court's October 19, 2004, and November 23, 2004, orders simply resolved an intermediate issue without disposing of any of the claims or parties.[14] As the orders did not finally adjudicate any of the claims in litigation, they are by their very nature unappealable, interlocutory orders which cannot be made final by the inclusion of CR 54.02 language. It necessarily follows that the appeal from those orders is not properly before this Court.

Based on the foregoing reasons, this Court orders that this appeal be and it is hereby dismissed.

ALL CONCUR.

ENTERED: February 17, 2006

/s/ Rick A. Johnson
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Edward D. Hays
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BRIEF FOR APPELLEES DONALD AND BONNIE SEXTON:

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[14] In its November 23, 2004, order the circuit court stated in paragraph six that the payment of the guardian ad litem fees "shall be determined at the time of entry of an Order resolving all issues herein." This is further evidence of the interlocutory nature of the orders on appeal.