

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000096-ME

C.G.

APPELLANT

v. APPEAL FROM LINCOLN FAMILY COURT
HONORABLE DEBRA HEMBREE LAMBERT, JUDGE
ACTION NO. 05-J-00188-001

COMMONWEALTH OF KENTUCKY ON BEHALF
OF J.A.G., A CHILD

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * **

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,¹ SENIOR JUDGE.

WINE, JUDGE: This is an expedited appeal from an order of the Lincoln Family Court dismissing an abuse petition and further imposing restrictions on the Appellant's visitation. The family court, having made no findings of fact to support its dismissal of the abuse petition, has provided nothing for this Court to review. Thus, we remand the

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

proceeding with instructions to the trial court to make specific findings of fact with regard to the abuse petition. Further, even without the appropriate findings of fact, it is clear that the trial court was outside its jurisdiction to modify the parties' custody agreement out of the Grant Circuit Court by putting restrictions on Appellant's visitation with his son and ordering him to submit to an emotional abuse evaluation.

On September 6, 2005, Christi Grubbs, on behalf of the Cabinet for Health and Family Services ("the Cabinet") filed an abuse petition in Grant District Court against J.G., mother of then five-year-old J.A.G., claiming the child was physically abused while in her care. The Grant District Court subsequently transferred the matter to Lincoln County as the alleged abuse had occurred in Lincoln County, where the mother and child lived, and Lincoln County was the proper venue for the action. J.A.G. was temporarily placed in the custody of his father, Appellant, C.G., pending the resolution of the allegations of abuse against his ex-wife. J.G.'s visits with J.A.G. were to be supervised by the maternal grandmother.

At the adjudicatory hearing on December 1, 2005, C.G. testified that he picked up J.A.G. from J.G.'s home in July 2005 as provided by the parties' divorce decree. Shortly thereafter, C.G. noticed bruises on J.A.G.'s buttocks. C.G. stated that J.A.G. explained that J.G. had paddled him. C.G. took the boy to the Kentucky State Police where photographs were taken of the bruises. The next day a representative of the Cabinet was called in to interview J.A.G. about the incident. During the interview, J.A.G. told the Cabinet investigator that his mother had caused the bruises by paddling him. After this interview, C.G. sought an Emergency Protective Order in the Grant

Circuit Court, the county where he lived. The EPO was granted and J.A.G. was temporarily placed in his custody pending resolution of the abuse allegations.

J.A.G. also testified before the trial court. J.A.G. was six years old at the time of the hearing, and due to his discomfort of having his mother and grandmother in the room, only the attorneys were allowed in the courtroom during his testimony. J.A.G. testified that his mother spanked him with a wooden paddle. J.A.G. then became perplexed and seemed to be struggling to remember what his testimony should be and asked, "Would you get my dad to come in here, I'm getting confused."

In her testimony, J.G. denied spanking J.A.G. and explained that she did not know how he got the bruises on his bottom. However, she recalled that shortly before she sent the child to his father, J.A.G. had fallen to the floor from the cabinets where he had been climbing. J.G. speculated that this fall might have caused the bruises.

J.G. further testified that J.A.G. told her C.G. had threatened to take away J.A.G.'s toys and Playstation if he did not say J.G. beat him. J.A.G. had also confided in his maternal grandmother, K.N., that C.G. had told him to lie about the abuse allegations. Unbeknownst to the trial court or the Commonwealth, K.N. had tape-recorded this conversation and she brought the tape to the hearing. By agreement of the parties, the trial court admitted the tape into evidence and it was played in open court. In the recording, K.N. asked J.A.G. about the allegations against his mother, and J.A.G. responds, "My dad told me to." J.A.G. further states that his father would be angry if he told the truth that it was C.G. telling him to lie and make up the abuse allegations.

After hearing the tape, the trial court stated, “I believe that there is at least a strong suggestion here that this child [J.A.G.] has been emotionally abused.” (Tape, 12/1/05, 9:24:30 – 9:38:27). The trial court then dismissed the case and returned the child to the custody of J.G. The family court further ordered C.G. to submit to an emotional abuse investigation, and directed that his visitation with J.A.G. be supervised pending the outcome of the investigation.

C.G. appeals the family court’s dismissal of the abuse petition and also the family court’s additional order requiring him to submit to an emotional abuse investigation, and restricting his visitation with J.A.G. As to the first matter, we agree with C.G. that the trial court failed to adequately support its decision to dismiss the petition. KRS 620.100(3) requires the court to “determine the truth or falsity of the allegations in the complaint.” The Commonwealth’s undisputed evidence clearly shows multiple, heavy bruising all over J.A.G.’s buttocks and legs. The trial court’s oral statements seem to imply that the child was coached by his father, but the court made no express findings as to the allegations of abuse raised in the petition.

While the trial court could have chosen to believe that the injuries were accidental and the allegations of abuse against J.G. were fabricated, the trial court did not set out such findings either orally or in its written order. In the absence of these necessary findings, we are unable to determine whether the trial court clearly erred by dismissing the petition. Therefore, we must vacate the order dismissing and remand for additional findings.

C.G. next argues the trial court did not have the authority to order him to be the subject of an emotional abuse investigation or order his visitation with J.A.G. to be supervised. The Commonwealth urges that C.G. failed to properly preserve this issue for appellate review with a specific reference to the record pursuant to CR 76.12 (4)(c)(v). However, the issue of jurisdiction can be raised for the first time on appeal. *Gullett v. Gullett*, 992 S.W.2d 866, 869 (Ky.App. 1999).

Moreover, we agree with C.G. that any issues regarding his visitation rights were not properly before the Lincoln Family Court. Once the family court dismissed the case against J.G. as to the abuse petition, the temporary order placing J.A.G. in C.G.'s care was terminated and the Lincoln Family Court properly restored custody to J.G. as set out in the Grant County decree. However, the Grant Circuit Court retained jurisdiction over the custody and visitation aspects of the original decree. *Gullion v. Gullion*, 163 S.W.3d 888 (Ky. 2005). Unless the matter is transferred to the Lincoln Family Court or a proper emergency motion is filed, the Grant Circuit Court retains jurisdiction over visitation, and the Lincoln Family Court did not have authority to make the orders beyond the abuse petition filed under KRS 620.

We recognize that the family court had the authority and the duty to report any suspicions it had involving emotional abuse of a child. KRS 620.030. Likewise, the family court had the authority to refer any suspected perjury for prosecution, or to address such matters through its contempt powers. But a trial court does not acquire subject-matter jurisdiction in a post-dissolution motion to modify a prior custody decree unless the motion is accompanied by the requisite affidavit. *Petrey v. Cain*, 987 S.W.2d

786, 788 (Ky. 1999). Here, no interested party had made a motion for modification of the custody order regarding J.A.G. before the trial court; no affidavits were filed; there was no motion transferring the custody matter to Lincoln Family Court; and C.G. was not even a party to a case. And without any express findings as to the merits of the petition, we find no basis in the record to conclude that an emergency existed requiring immediate protection of the child. In the absence of sufficient findings, or a proper motion or petition, the trial court was not at liberty to *sua sponte* address C.G.'s visitation rights.

Therefore, the order of the Lincoln Family Court is vacated and this cause is remanded for findings of fact with regard to the allegations in the abuse petition.

ALL CONCUR.

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