

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001631-ME

RICKIE L. DAVIS;
VIVIAN J. DAVIS

APPELLANTS

APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 04-CI-502581

GENEVIEVE R. GARRETT (NOW GOODLETT);
CHARLES SHAWN LYON

APPELLEES

OPINION AFFIRMING

** ** *

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Rickie and Vivian Davis appeal from an order of the Jefferson Family Court, Division Three (the Division Three Court) denying their motion to be declared *de facto* custodians of their great nephew, C.L. The Davises also appeal the Division Three Court's order denying their request for visitation with C.L. For the reasons set forth below, we affirm.

As with many family law cases, this case has a lengthy and rather contentious procedural history. We will only set forth in detail the facts and procedural history that are necessary for our opinion. We will not set forth in any detail the numerous motions and/or allegations filed by the parties that are not relevant hereto.

FACTS

On June 22, 2003, Genevieve R. Garrett¹ (Goodlett) gave birth to C.L. On July 28, 2003, Rickie and Vivian Davis, Goodlett's aunt and uncle, filed a petition for custody of C.L. in Oldham Circuit Court. The Davises noted in their petition that C.L. had resided with them since "shortly after his birth," that Goodlett consented to the award of both temporary and permanent custody to the Davises, and that Charles Shawn Lyon was C.L.'s putative father. In her entry of appearance and waiver of service, Goodlett stated that she waived and released all right to custody of C.L. "but only if this Court awards custody to Petitioners" (the Davises). Goodlett reserved and retained "all rights she may have to custody of the infant child should the putative father or any other person or persons attempt to attain custody or possession of the infant child." On August 27, 2003, Lyon filed a response to the Davises' petition and a counter-petition for custody. In his counter-petition, Lyon stated that he believed that he was C.L.'s father and that he had sought visitation with C.L., but had been refused access to the child. Lyon sought temporary custody of C.L. and requested that the court order a paternity test and, if the test confirmed that Lyon was C.L.'s father, that Lyon be awarded permanent custody.

¹ During the course of these proceedings Ms. Garrett married and used her current husband's last name, Goodlett, throughout the majority of the litigation below.

The paternity testing was delayed while Lyon filed a paternity action in district court, where Lyon was ultimately determined to be C.L.'s father.

With his paternity determined, Lyon filed a motion seeking sole custody of C.L. in February of 2004. In March of 2004, Lyon filed a motion seeking a default judgment against the Davises and Goodlett, who had not responded to his counter-petition for custody. Lyon also alleged that the Davises lacked standing as they did not meet the statutory requirements to be considered *de facto* custodians of C.L. The Davises then sought, and received, an order permitting them to amend their petition to allege that Lyon was not fit to have custody of C.L. because of Lyon's history of domestic violence, abuse of his other children, and alcohol and illicit drug abuse.

On June 30, 2004, the Davises filed a motion to dismiss without prejudice their petition for custody. In their motion, the Davises stated that they believed that it was in C.L.'s best interest to be in the custody of Goodlett and that Goodlett was in a financial and emotional position to care for C.L. Furthermore, the Davises noted that C.L. had been gradually introduced into Goodlett's home and was living with Goodlett. The Oldham Circuit Court granted that motion and dismissed the Davises as parties to the action on June 30, 2004.

On July 6, 2004, the Oldham Circuit Court, noting that the Davises had withdrawn their motion for custody, ordered joint custody of C.L.² and set forth a visitation schedule for Lyon and C.L. Furthermore, because the Davises had dismissed

² The Oldham Circuit Court's order does not specify joint custody between Goodlett and Lyon. However, since the Davises' petition had previously been dismissed, we presume the order of joint custody refers to Goodlett and Lyon.

their petition and Lyon and Goodlett both resided in Jefferson County, the Oldham Circuit Court transferred this case to the Division Three Court.

Following several motions not relevant to our determination, Lyon and Goodlett eventually agreed to mediation and entered into a visitation and child support schedule on November 3, 2004. However, this apparent peaceful interlude did not last long as Lyon filed a motion on December 29, 2004, for sole custody and for an order limiting Goodlett to supervised visitation. It appears from the record that this motion was motivated by a dependency action that had been filed against Goodlett in Jefferson Family Court, Division Six (the Division Six Court). The Division Six Court action arose from allegations that Goodlett had sexually abused her six-year-old child from another relationship. The Division Six Court removed both the six-year-old and C.L. from Goodlett's care, limited Goodlett to supervised visitation with C.L., and gave temporary custody of C.L. to the Davises. The Division Three Court denied Lyon's motion for sole custody on January 5, 2005.

Throughout the spring and summer of 2005, Goodlett and Lyon filed a number of motions dealing with visitation and child support issues and the court issued several orders requiring psychological and home evaluations. These motions and orders, other than revealing the apparent inability of Goodlett, Lyon, and the Davises to cooperate with each other, are not meaningful to this appeal.

On August 24, 2005, Goodlett, Lyon, and the Davises participated in mediation and they all agreed to joint custody between Goodlett and Lyon and a

visitation schedule for the following six weeks. On November 30, 2005, the parties attended a third mediation and agreed to a visitation schedule through the end of the year.

The apparent truce among the parties again broke down and the Davises filed a motion on January 3, 2006, asking the Division Three Court to set aside the order dismissing their initial petition for custody. In support of their motion, the Davises stated that they had dismissed their petition based on their belief that Goodlett and Lyon would be able to care for and raise C.L. However, they no longer believed that was possible. Furthermore, the Davises noted that C.L. had lived with them for the majority of his life, other than for a few months in 2005 when he lived with Goodlett. Finally, the Davises asked the family court to declare them *de facto* custodians of C.L.

On January 5, 2006, Lyon filed a motion asking the family court to set out a schedule for transitioning C.L. to his full-time care. Lyon noted that he and Goodlett had previously agreed to joint custody but that C.L. had been removed from Goodlett's care by the family court.

The Division Three Court held a hearing on the preceding motions filed by the Davises and Lyon. We note that, although the Davises and Lyon had witnesses available to testify, the Division Three Court did not hear any testimony. Rather, the court heard argument from counsel and asked counsel what testimony might be presented.

In its final written order, the Division Three Court denied the motion to set aside the order granting the Davises' motion to dismiss as well as their motion to be

declared *de facto* custodians. Pursuant to the mediation agreement, the court awarded joint custody to Goodlett and Lyon and declared Lyon to be C.L.'s residential custodian. The court stated that Goodlett should have visitation with C.L. pursuant to the order of the family court and ordered the Davises to gradually transition C.L. to Lyon over a four-week period. Finally, the court denied the Davises' motion for ongoing visitation. It is from this order that the Davises appeal.

ANALYSIS

As set forth above, prior to the transfer to the Division Three Court, the Davises voluntarily dismissed their petition for custody in Oldham Circuit Court. They subsequently sought an order from the Division Three Court vacating the order dismissing their claim, which was denied. Therefore, before we can address whether the Division Three Court erred in failing to hear evidence on the Davises' motion to be declared *de facto* custodians, we must address whether the Davises were properly before that court. The method for setting aside an order is contained in CR 60.02; therefore, we will analyze the family court's denial of the Davises motion under the CR 60.02 standard, which is abuse of discretion. *See Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). For the reasons set forth below, we hold that the Division Three Court did not abuse its discretion.

The Civil Rules provide that, after a counterclaim has been filed, a plaintiff may only voluntarily dismiss an action without prejudice by order of court. CR 41.01(2). Once a court order dismissing without prejudice is obtained, the parties are left as if no

action had been instituted. *Magill v. Mercantile Trust Co.*, 4 Ky.L. Rptr. 927, 81 Ky. 129 (Ky. 1883). CR 60.02 provides the method for seeking relief from an order of the court and sets forth six reasons that a party may cite to justify setting aside a court's order:

- (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;
- (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (f) any other reason of an extraordinary nature justifying relief.

Motions relying on (a), (b), or (c) must be made "not more than one year after the judgment, order, or proceeding was entered or taken." CR 60.02.

The Davises filed their petition for custody in Oldham Circuit Court on July 28, 2003. Without objection by Lyon and Goodlett, the Davises moved to dismiss that petition in June of 2004. On June 30, 2004, the Oldham Circuit Court granted the Davises' motion to dismiss and, on July 6, 2004, awarded joint custody of C.L. to Goodlett and Lyon. The Davises did not appeal or otherwise seek to alter the June 30, 2004, order until they filed their motion to set aside on January 3, 2006. As grounds for

their motion, the Davises stated that, when they dismissed their petition for custody, they believed that Goodlett and Lyon "would be capable of and willing to raise" C.L. However, they now realized that would not be the case. It appears that the Davises were asserting that they had been mistaken when they moved to dismiss their petition. As such, the Davises should have filed their motion to set aside within one year of the Oldham Circuit Court's order, which they did not do. Therefore, their motion was untimely and the Division Three Court properly denied it. Because the Davises had dismissed their petition and had neither filed a new petition nor obtained an order setting aside their dismissal, the family court correctly found that only Goodlett and Lyon were parties to the action pending before it.

As to the issue regarding the Davises' status as *de facto* custodians, KRS 405.020(3) provides that "a person claiming to be a de facto custodian . . . may petition a court for legal custody of a child. The court shall grant legal custody to the person if the court determines that the person meets the definition of de facto custodian and that the best interests of the child will be served by awarding custody to the de facto custodian." In order to obtain a determination of their status, the Davises were required to file a petition for custody. It is undisputed that the Davises did file a petition for custody in the Oldham Circuit Court. However, the Davises dismissed that petition, with leave of court, prior to the transfer of this case to the Jefferson Family Court. The Davises did not file a petition for custody and were not properly before that court. Therefore, the family court

had no authority to make any determinations regarding the Davises' status as *de facto* custodians.

We are sympathetic to the Davises' arguments regarding the best interests of C.L. However, before making those arguments, the Davises were required to take steps to become parties before the family court. This, they failed to do.

The next issue raised by the Davises is that the Division Three Court abused its discretion by refusing to grant them ongoing visitation. Although couched by the Davises as an abuse of discretion standard, the Division Three Court denied their motion as a matter of law. Therefore, our standard of review is *de novo*. *Lexington-Fayette Urban County Health Department v. Lloyd*, 115 S.W.3d 343 (Ky.App. 2003).

Specifically, the Davises argue that the Division Three Court failed to take into consideration the best interests of C.L. Lyon argues that the Division Three Court correctly found that there was no basis in law for it to award visitation to the Davises. As set forth below, we agree with Lyon and the family court.

As noted by the Supreme Court of Kentucky in *Cole v. Thomas*, 735 S.W.2d 333, 334 (Ky.App. 1987) in pertinent part:

Visitation, set by a court, is a limitation on exclusive custody awarded to a party. *Phillips v. Horlander*, Ky., 535 S.W.2d 72 (1975). It is apparent, from reading the statutes dealing with the care and custody of children that the legislature has sought to limit the right of visitation to only those involved in a “jurisdictionally sound” custody proceeding when it is in the best interest of the child to do so, *Simpson v. Simpson*, Ky., 586 S.W.2d 33 (1979), and to a child's grandparents under KRS 405.021. It was only in 1984 that the legislature decided to extend the right of grandparents to petition for

visitation when the parent or parents of the child are not deceased. Clearly, a review of these statutes represents the legislature's desire to leave for the most part the total custody, care and upbringing of a child in the hands of the custodial parent. In other words, the legislature determined that the parents are entitled to decide who their child shall visit and who they shall not. Only grandparents have been given the right, outside a custody proceeding, to request visitation.

...

To allow great-grandparents to be included within KRS 405.021(1) would open the door to aunts and uncles, cousins and great-great-grandparents. While we would not be adverse to allowing those persons "standing in loco parentis" or "any person having an interest in the welfare of the child" to file petitions such as this, we do not believe this was the intention of the legislature. A hearing to determine the best interest of the child in regard to visitation is only required in a "jurisdictionally viable custody action." *Simpson*, supra, at 36.

Based on the above, the family court correctly held that "there is no basis in law for the Court to order" visitation for the Davises with C.L.

We note that the Davises argue that the family court failed to take into account the best interest of C.L. when it denied ongoing visitation. Again, while we are sympathetic to the Davises, there is no basis in the law as it currently stands for the court to award them visitation; therefore, the family court correctly did not address the issue of the best interest of C.L. However, as did the family court, we urge the Davises, Goodlett, and Lyon to "to set aside their differences and to consider the best interests of [C.L.] in determining any on-going [sic] contact with extended family members and those who have cared for [him]."

Finally, we note that the Davises cited *Moore v. Assente*, 110 S.W.3d 336 (Ky. 2003), throughout their brief. However, that case is clearly distinguishable from the case herein. In *Moore*, both parents consented to placement of the child with the Assentes and the Assentes were parties to the action. In the present case, Lyon has never consented to the placement of C.L. with the Davises, and the Davises ceased to be parties to this action in July of 2004, when they voluntarily dismissed their petition for custody. Therefore, we hold that *Moore* has no application to the case herein.

CONCLUSION

For the above reasons, we affirm the decision of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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NO BRIEF FOR APPELLEE GENEVIEVE
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