[Cite as *In re B.M.*, 2015-Ohio-1504.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

IN THE MATTER OF: B.M.	:	
	:	Case No. 14CA12
Melissa Meuller Rose,	:	
	:	
Plaintiff-Appellant,	:	
	:	DECISION AND JUDGMENT
vs.	:	ENTRY
	:	
Nikolas Mabry,	:	
	:	
Defendant-Appellee.	:	**Released: 04/15/15**

APPEARANCES:

L. Jackson Henniger, Logan, Ohio, for Appellant.[1]

William W. Henderson, Logan, Ohio, for Appellee.[2]

Charles A. Gerken, Logan, Ohio, Guardian Ad Litem.

Melissa Meuller Rose, Middletown, Ohio, Pro Se Appellant.

McFarland, A.J.

{¶1} Mark R. Meuller and Melody L. Meuller (hereinafter "Appellants") appeal the entry of the Hocking County Court of Common Pleas, Juvenile Division, filed July 9, 2014. Upon review of the record, we

[1] L. Jackson Henniger filed a notice of appearance for Mark R. Meuller. The brief lists Attorney Henniger as the attorney for appellant. However, the brief is captioned "Brief of Appellants" and there are references to the "appellants" throughout. We assume the other appellant is Melody L. Meuller, Mark R. Mueller's wife and B.M.'s step-grandmother, who joined in the filing of the complaint for grandparent custody.

[2] Appellee Nikolas Mabry, the Guardian Ad Litem Charles Gerken, and Pro Se Appellant Melissa Meuller Rose did not file appellate briefs or otherwise participate in this appeal.

find the trial court's judgment is not a final appealable order. As such, we dismiss the appeal.

FACTS

{¶2} This matter concerns "B.M.," who was born in 2002. Her parents are Melissa Meuller-Rose (hereinafter "mother") and Nikolas Mabry, (hereinafter "father"). On August 8, 2005, the Hocking County Child Support Enforcement Agency filed a motion for support payments and medical insurance in the Hocking County Court of Common Pleas, Juvenile Division. On October 13, 2005, by magistrate's decision and judgment entry, the trial court found B.M.'s mother had custody and it established a child support order. The judgment entry noted B.M.'s father was properly served notice of the child support proceeding but did not appear. On April 23, 2007, the Hocking County Juvenile Court ordered B.M.'s father to seek work. These filings constitute the substance of the proceedings occurring in the Hocking County Juvenile Court during B.M.'s early childhood.

{¶3} On January 14, 2014, the father filed a motion for ex parte emergency custody in the Hocking County Juvenile Court. Attached to the motion was the father's affidavit alleging that he could provide a stable home environment for B.M. On January 14, 2014, the court granted the motion, ordering temporary custody to the father.

{¶4} The Hocking County Juvenile Court record contains a judgment entry/order of transfer from the Shelby County Juvenile Court to the Hocking County Juvenile Court, dated January 19, 2014. On November 4, 2013, Mark R. Meuller and Melody L. Meuller, B.M.'s maternal grandfather and step-grandmother, filed a complaint for grandparent custody in Shelby County. The complaint alleged that both B.M.'s parents were unsuitable and incapable of being her legal custodians. The complaint also alleged B.M. had been abused and neglected by the mother's husband. On December 12, 2013, the father filed a complaint to allocate parental rights and a motion for temporary and permanent custody in Shelby County. On January 15, 2014, the father also filed a motion to dismiss, in Shelby County, for lack of jurisdiction.

{¶5} On January 27, 2014, the conflicting ex parte custody orders from the Shelby County and Hocking County Juvenile Courts came on for a hearing. On January 28, 2014, the Hocking County Juvenile Court found that the Hocking County Juvenile Court had jurisdiction as of August 8, 2005, when both B.M. and her mother lived in Laurelville, Ohio.

{¶6} On February 27, 2014, Appellants filed a motion for visitation and a motion for an in camera interview. On March 7, 2014, the trial court heard the motion for ex parte emergency custody filed by the father and the

complaint for grandparent custody. By judgment entry dated March 18, 2014, the trial court found Hocking County had original jurisdiction over the matter since 2005. The trial court also granted Appellants' motion for in camera interview. The trial court ordered that B.M. would remain in the temporary custody of Appellants. The court further ordered that B.M. would be seen by a licensed psychologist.[3]

{¶7} The Hocking County Juvenile Court held a final hearing on the motion for change of custody and the grandparents' complaint on June 27, 2014. By the court's entry dated July 9, 2014, the court found that both parents were suitable. The court denied Appellants' complaint for custody. The court further found a substantial change in circumstances since the time custody was granted to the mother. The trial court found it in the best interests of B.M. to grant the father's motion for custody and also granted the mother standard visitation rights pursuant to local rule. The trial court continued Appellants' motion for visitation pending further order of the court. This timely appeal followed.

ASSIGNMENTS OF ERROR

"I. THE HOCKING COUNTY JUVENILE COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OF THIS CASE, UNDER R.C. SECTION 2151.23(A)(2) AND R.C. SECTION

[3] The trial court was concerned about B.M.'s allegations of physical and sexual abuse. These allegations had been reported to the children's services agencies in Butler, Pickaway, and Franklin counties.

2151.06 IN THAT NO PARTY WAS A RESIDENT OF THE COUNTY AND THE CHILD SUPPORT CASE FILED & DETERMINED IN THE COURT IN 2005 DID NOT CONFER SUBJECT MATTER JURISDICTION ON THE COURT, AND THE PARTIES COULD NOT SO CONFER.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING CUSTODY TO APPELLEE-DEFENDANT FATHER.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO FIND THAT BOTH APPELLEE DEFENDANT FATHER AND APPELLEE DEFENDANT MOTHER WERE UNSUITABLE.

IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN THAT THE TRIAL JUDGE RICHARD M. WALLAR FAILED TO ACT IN A FAIR AND IMPARTIAL MANNER, BY, *INTER ALIA*:

A. IMPROPERLY, INAPPROPRIATELY, AND WITH PARTIALITY AND PREJUDICE ORDERING THAT HE DID NOT CARE TO ENTERTAIN NEGATIVE VIEWS OF THE PARENTS WHEN PROOF OF NEGATIVE MATTERS ABOUT THEM IS THE ESSENCE OF MEETING THE UNSUITABILITY STANDARD IN PROVING UNSUITABILITY, THEREBY IMPROPERLY PRECLUDING THE APPELLANTS FROM PROVING THEIR CASE.

B. THROUGHOUT THE PROCEEDINGS, JUDGE WALLAR ACTED WITH PREJUDICE, AND THEREBY ABUSED HIS DISCRETION, TO INTIMIDATE, COERCE AND COW THE APPELLANTS, THEIR WITNESSES, THEIR ATTORNEY, AND THE CHILD, THEREBY DEPRIVING THE APPELLANTS OF A FAIR TRIAL, AND IMPROPERLY AFFECTING WHAT EVIDENCE CAME BEFORE THE COURT, KEEPING EVIDENCE OUT OF COURT, AND NOT GIVING THE EVIDENCE BEFORE THE COURT ITS PROPER WEIGHT BY REASON OF THE JUDGE'S PREJUDICE TOWARD AND INAPPROPRIATE

ATTITUDE TOWARD THE APPELLANT LITIGANTS AND THE CHILD.

V. THE TRIAL COURT JUDGE WALLAR FAILED TO ACT IN A FAIR AND IMPARTIAL MANNER, AND THEREBY ABUSED HIS DISCRETION, BY, INTER ALIA, JARRINGLY AND INAPPROPRIATELY ANNOUNCING THAT HE WAS UPSET WITH APPELLANTS BECAUSE THEY HAD FILED PLEADINGS IN SHELBY COUNTY WHICH WAS THE IMPROPER COUNTY, WHICH IS A STATEMENT BASED ON AN INCORRECT LEGAL ASSESSMENT IN THE FIRST PLACE, AND BY IMPROPERLY TWISTING AND MISCHARACTERIZING THE STATEMENT OF COUNSEL RELATIVE TO THE ISSUE OF NOT BEING ABLE TO SCHEDULE A COUNSELING SESSION FOR THE CHILD BY CRITICIZING AND BERATING COUNSEL, OR THE APPELLANTS AS IF THEY HAD BEEN RESPONSIBLE FOR BEING UNABLE TO SCHEDULE THE SESSIONS AND IN WRONGLY ACCUSING COUNSEL OF BLAMING THE FAILURE TO OBTAIN THE COUNSELING ON THE STAFF MEMBER THE COURT HAD ASSIGNED TO ASSIST, WHEN IN FACT THAT WAS NOT COUNSEL'S STATEMENT NOR HIS POSITION, AND WHEN IN FACT THAT FAILURE TO OBTAIN THE COUNSELING WAS NOT DUE TO ANYTHING COUNSEL OR HIS CLIENTS DID.

VI. THE TRIAL COURT JUDGE WALLAR ABUSED HIS DISCRETION IN THAT:

A. HE CONDUCTED LEAST (SIC) ONE IN CAMERA INTERVIEW(S) OF THE CHILD THAT WERE CONDUCTED CONTRARY TO LAW, IN THAT CONTRARY TO R.C. SECTION 3109.04(B)(2), MADE APPLICABLE TO THE PROCEEDING BY R.C. SECTION 2151.23(F)(1), BY INTERVIEWING THE CHILD WITH THE CHILD'S MOTHER PRESENT.

VII. THE TRIAL COURT JUDGE WALLAR ABUSED HIS DISCRETION IN THAT: MADE INAPPROPRIATE

COMMENTS AND STATEMENTS TO THE CHILD DESIGNED TO IMPROPERLY INFLUENCE HER RESPONSES AND COW HER INTO NOT BEING CANDID AND FORTHRIGHT, WHICH IS THE VERY PURPOSE OF AN IN CAMERA INTERVIEW OF A CHILD.

VIII. THE TRIAL COURT JUDGE WALLAR ABUSED HIS DISCRETION BY FAILING TO PROVIDE A FAIR AND IMPARTIAL HEARING TO THE APPELLANTS BY ANNOUNCING AN INCOMPLETE STATEMENT OF THE LAW OF UNSUITABILITY AND THEN FAILING TO APPLY OR CONSIDER THE PROPER CRITERIA FOR DETERMINING UNSUITABILITY.

IX. THE TRIAL COURT JUDGE WALLAR FAILED TO MAKE PROPER FINDINGS OF FACT AND LAW REGARDING HIS JUDGMENT THAT THE APPELLANTS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT NEITHER PARENT WAS UNSUITABLE, IN THAT, *INTER ALIA*, HE FAILED TO CONSIDER THE FOURTH CRITERIA, UNDER *PERALES* AND *HOCKSTOCK*, THAT AN AWARD OF CUSTODY TO EITHER PARENT WOULD BE DETRIMENTAL TO THE CHILD.

X. THE TRIAL COURT JUDGE RICHARD M. WALLAR ABUSED HIS DISCRETION IN FAILING TO CONSIDER THE FACT OF THE SHELBY COUNTY PROBATE COURT HAVING APPOINTED APPELLANTS AS GUARDIAN OF THE PERSON OF THE MINOR CHILD AND NOT THE APPELLEE FATHER, TO WHICH PROCEEDINGS, FATHER FAILED TO FILE ANY FORMAL OBJECTON OR APPEAL WHICH HAS THE LEGAL EFFECT OF DETERMINING THAT FATHER IS UNSUITABLE."

LEGAL ANALYSIS

{¶8} Before considering the merits of this case, we must first determine whether the trial court has issued a final appealable order. "Ohio

law provides that appellate courts have jurisdiction to review the final orders or judgments of inferior courts in their district. *Rice v. Lewis*, 4th Dist. Scioto No. 11CA3451, 2012-Ohio-2588, ¶ 9, quoting *Caplinger v. Raines*, 4th Dist. Ross No. 02CA2683, 2003-Ohio-2586, ¶ 2. It is well established that an order must be final before it can be reviewed by an appellate court. *In the Matter of Smith*, 4th Dist. Hocking No. 05CA15, 2006-Ohio-4385, ¶ 5. See, Section 3(B)(2), Article IV, Ohio Constitution; *General Acc. Ins. Co. v. Insurance Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed. *Smith, supra*, citing *Whitaker Merrell v. Geupel Constr. Co.*, 29 Ohio St.2d 184, 186, 280 N.E.2d 922, (1972). "In the event that this jurisdictional issue is not raised by the parties involved with the appeal, then the appellate court must raise it sua sponte." *Rice, supra*, quoting *Caplinger*, at ¶ 2, citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus.

{¶9} To determine whether an order is final and appealable, an appellate court's review often involves a multi-step process. *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 1993-Ohio-120, 617 N.E.2d 1136. First a reviewing court must focus its attention on whether the appealed order is "final" as established by R.C. 2505.02; that is, whether the

order affects a substantial right and in effect determines the action and prevents a judgment, or, an order that affects a substantial right made in a special proceeding. *Smith, supra*, at ¶ 6; *Wisintainer* at 354, 617 N.E.2d 1136. For an order to be final and appealable, it must meet the requirements of R.C. 2505.02(B), which provides:

> "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment."

{¶10} Proceedings in the juvenile division are special statutory proceedings, see *State ex rel. Fowler v. Smith*, 68 Ohio St.3d 357, 360, 626 N.E.2d 950, (1994) and parental rights, including visitation and communication qualify as substantial rights. *Smith, supra.* In *Smith,* we held:

> "There is but one 'claim' or remedy being sought here, i.e., the exercise of parental rights. Seeking alternative means of expressing that right does not create multiple claims. When a court does not resolve the entire claim, regardless of whether it includes Civ.R. 54(B) language, the matter is not ripe for appellate review. *Id.* See, also *Jackson v. Scioto Downs, Inc.*, 80 Ohio App.3d 756, 758, 610 N.E.2d 613, (10th Dist. 1992).

> This principle applies even if the matter involves a special proceeding."[4]

{¶11} "An order affects a substantial right if, in the absence of an immediate appeal, one of the parties would be foreclosed from appropriate relief in the future. *Elliott v. Rhodes,* 4th Dist. Pickaway No. 10CA26, 2011-Ohio-339, ¶ 17, quoting *Koroshazi v. Koroshazi,* 110 Ohio App.3d 637, 640, 674 N.E.2d 1266, (9th Dist. 1996), citing *Bell v. Mt. Sinai Med. Ctr.,* 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993). To constitute a final order, the order must dispose of the whole case or some separate and distinct branch. *Elliott, supra,* citing *Noble v. Colwell,* 44 Ohio St.3d 92, 94, 540 N.E.2d 1381 (1989). In general, when an order does not contemplate further action and no other related issues remain pending, the order normally constitutes a final order. *Elliott, supra.* See *In re H.T.W.,* 6th Dist. Lucas No. L-1-1027, 2010-Ohio-1714, at ¶ 7; see, also *Christian v. Johnson,* 9th Dist. Summit No. 24327, 2009-Ohio-3863, ¶ 10.

{¶12} Civ.R. 54(B) provides the following:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transaction, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of

[4] In *Smith,* the trial court denied visitation, but did not rule on [the appellant's] request in the alternative to have written contact with his child. This court held because the trial court failed to address all the issues presented in the motion to exercise parental rights, there was no final order.

> the claims or parties only upon an express determination that there is no just reason for delay."

Therefore, "[a]n order which adjudicates one or more but fewer than all the claims presented in an action also must meet the requirements of Civ.R. 54(B) in order to be final and appealable." *Rice, supra*, at ¶ 10, quoting *Oakley v. Citizens Bank of Logan*, 4th Dist. Hocking No. 04CA25, 2004-Ohio-6824, ¶ 6, citing *Noble*, 540 N.E.2d 1381 (1989), syllabus. In *Rice* we discussed Civ.R. 54(B) as applied in *Bumgarner v. Bumgarner,* 4th Dist. Highland No. 08CA21, 2009-Ohio-3490, observing that:

> "Civ.R. 54(B) is intended to 'strike a reasonable balance between the policy against piecemeal appeals and the possible injustice sometimes created by the delay of appeals.' [*Bell Drilling, Producing Co. v. Kilbarger Constr., Inc.*, 4th Dist. No. 96CA23, 1997 WL 361025, *3 (June 26, 1997).] '* * * Civ.R. 54(B) certification demonstrates that the trial court has determined that an order, albeit interlocutory, should be immediately appealable, in order to further the efficient administration of justice and to avoid piecemeal litigation or injustice attributable to delayed appeals.' *Sullivan v. Anderson Twp.*, [122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, ¶ 11]."

{¶13} The instant appeal arose from the denial of Appellants' grandparent complaint for custody and the continuation of the motion for visitation. Grandparents generally have no legal rights of access to their grandchildren. *Wood v. Palumba,* 5th Dist. Tuscarawas No. 05AP100071, 2006-Ohio-3030, ¶ 24; *In re Fusik,* 4th Dist. Athens No. 02CA16, 2002-

Ohio-4410, citing *In re Whitaker,* 36 Ohio St.3d 213, 214, 522 N.E.2d 563 (1988); *In re Martin*, 68 Ohio St.3d 250, 626 N.E.2d 82 (1994). The Ohio Supreme Court has held grandparents have no constitutional right of association with their grandchildren. *Wood, supra*; See *In re Schmidt*, 25 Ohio St.3d 331, 336, 496 N.E.2d 952 (1986).

{¶14} Nevertheless, the trial court's July 9, 2014 entry states that the matter came on for hearing on: (1) the motions for change of custody filed by the father (in Shelby County Juvenile Court and in Hocking County Juvenile Court); (2) the custody complaint filed by the maternal grandparents (in Shelby County Juvenile Court); and (3) on the grandparents' motion for visitation filed in the Hocking County Juvenile Court. The entry further denied Appellants' (grandparents') complaint/motion for custody. The trial court's entry further continued the hearing on the grandparents' motion for visitation. The entry explicitly stated:

> "[T]he Court will conduct further hearings on the grandparents' request for visitation if the parents cannot agree to what, if any, contact the grandparents should have with * * *. The Court requires parents to participate and cooperate with * * * counselor and requests a written progress report from the Counselor regarding * * * progress in counseling. The Court will also consider the counselor's opinion as to the impact of granting Grandparents' motion for visitation with * * *. All until further order of the Court."

{¶15} In *Rice,* this court found that the lack of Civ.R. 54(B) language was significant for the reason that the trial court entered judgment on fewer than all of the claims and also fewer than all of the parties. The entry in *Rice* contemplated further action on a parenting time issue. In *Rice,* the paternal grandmother was a party and the trial court did not clearly address her rights and responsibilities. In *Rice,* we stated "Because the judgment appellants are appealing failed to adjudicate every claim and/or dispose of all parties, we must look to see if the trial court certified that there was no just reason for delay.[5] In *Rice*, the entries did not contain the required Civ.R. 54(B) language that there was "no just reason for delay."

{¶16} Here, the entry clearly did not address the visitation rights, if any, appellants/grandparents would receive, although the motion for visitation was one of the motions that came on for final hearing. The entry provided that the visitation issue would be addressed in further dispositional proceedings and was contingent on the minor child receiving counseling and the court receiving a report from the counselor. The transcript reveals the trial court was going to "start off with supervised visits for the grandparents pursuant to the standard visitation schedule" and "supervised visits for the

[5] In *Rice* there were actually two entries being appealed from.

grandparents during the time that we're working with the counselors."[6] The trial court's remarks are somewhat vague. Moreover, none of this was clarified by incorporation into the trial court's entry. "It is axiomatic that a court speaks through its journal pronouncements." *Ogle v. Hocking County,* 4th Dist. Hocking No. 11CA31, 2013-Ohio-597, ¶ 33, quoting *State ex rel. Collier v. Farley,* 4th Dist. Lawrence No. 05CA4, 2005-Ohio-4204, ¶ 18.

{¶17} In addition, there was no Civ.R. 54(B) certification added to the trial court's entry in this case. Based on the above, we find the trial court's judgment entry of July 9, 2014 does not constitute a final appealable order. As such, we dismiss the appeal.

APPEAL DISMISSED.

[6] The transcript also indicates the trial court planned to give "some extended time this summer * * * something the equivalent of, * * * one visit a week or something a week."

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED. Costs assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.