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Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-1336-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES — APPELLANT

v.

APPEAL FROM BULLITT FAMILY COURT
HONORABLE MONICA K. MEREDITH, JUDGE
ACTION NO. 20-J-00145-003

K.T., A CHILD;
M.H. (MOTHER); K.T. (FATHER);
TAMMY R. BAKER, PETITIONER; AND
BULLITT COUNTY ATTORNEY'S OFFICE — APPELLEES

AND NO. 2020-CA-1342-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES — APPELLANT

v.

APPEAL FROM BULLITT FAMILY COURT
HONORABLE MONICA K. MEREDITH, JUDGE
ACTION NO. 20-J-00146-003

K.T., A CHILD;
M.H. (MOTHER); K.T. (FATHER);
TAMMY R. BAKER, PETITIONER; AND
BULLITT COUNTY ATTORNEY'S OFFICE APPELLEES

AND NO. 2020-CA-1343-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES APPELLANT

APPEAL FROM BULLITT FAMILY COURT
v. HONORABLE MONICA K. MEREDITH, JUDGE
ACTION NO. 20-J-00147-003

K.T., A CHILD;
M.H. (MOTHER); K.T. (FATHER);
TAMMY R. BAKER, PETITIONER; AND
BULLITT COUNTY ATTORNEY'S OFFICE APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND MAZE, JUDGES.

MAZE, JUDGE: The Cabinet for Health and Family Services (the Cabinet) appeals from an order of the Bullitt Family Court which denied its motions to dismiss three dependency/neglect/abuse (DNA) petitions which arose from its

actions involving the custody and care of children previously committed to its care. The Cabinet argues that the doctrine of governmental immunity bars the petitions against the Cabinet. We conclude that the petitions against the Cabinet were authorized under the clear language of the statute and that the Cabinet's governmental immunity is not implicated in this case. Hence, we affirm.

The underlying facts of this matter are not disputed. On June 1, 2020, the Cabinet received a report from law enforcement advising that M.H. (Mother) had left her three children[1] unattended in a vehicle. The Cabinet had an active, ongoing case with the family due to a prior incident of supervisory neglect. On June 9, 2020, the Cabinet filed DNA petitions in the Bullitt Family Court. On June 17, the court placed the children in the Cabinet's temporary custody. The Cabinet placed the children with a paternal aunt.

On June 30, 2020, the aunt notified the Cabinet that the children were with K.T. (Father). The following day, the Cabinet was notified that Father and Mother had taken the children to Florida. The Cabinet notified Florida Child Protective Services, which commenced an investigation. However, the Cabinet waited until July 6 to notify the family court of the situation.

[1] The three children in this case have identical initials. The two older children are twins, a male and a female, born in January 2018. The third child is a male born in November 2019. Since the matters involving each child are not in dispute, we will refer to them collectively as "the children."

After receiving this notice, the children's guardian *ad litem* (GAL) filed a motion for an emergency hearing. Following the hearing, the family court ordered the Cabinet to return the children to Kentucky within twenty-four hours. At a review hearing on July 10, the Cabinet advised the court that it was still trying to make arrangements to return the children to Kentucky.

Following this hearing, the GAL filed new DNA petitions on behalf of the children against the Cabinet. The petitions alleged that the Cabinet neglected the children by failing to take prompt action upon learning that Father and Mother had taken the children to Florida and by failing to promptly notify the court of this action. The petitions also alleged that the Cabinet took no steps to retrieve the children until July 8. The Bullitt County Attorney intervened to join the GAL's petitions.

The matter came before the family court on July 16. The GAL advised the court that she was not seeking to remove the children from the Cabinet's custody. The Cabinet filed a motion to dismiss the petitions based upon the doctrines of sovereign or governmental immunity. The family court denied the motion in an order entered on October 15, 2020.[2] This appeal followed.

[2] The children have been returned to Kentucky.

Generally, our jurisdiction is restricted to final judgments. *See* CR[3] 54.01. However, "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). Therefore, this appeal[4] is properly before this Court.

The Cabinet argues that it is shielded by the doctrine of governmental immunity. As our Supreme Court recently held, "*sovereign* immunity is limited to the Commonwealth itself, as well as counties and governments formed according to statute." *Bryant v. Louisville Metro Housing Authority*, 568 S.W.3d 839, 845 (Ky. 2019) (emphasis in original). "'Governmental immunity' is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency." *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001) (citation omitted). *See also Furtula v. Univ. of Kentucky*, 438 S.W.3d 303, 305 n.1 (Ky. 2014). Governmental immunity is limited to agencies which exercise an "integral state function." *Bryant*, 568 S.W.3d at 848.

In this case, the Cabinet is an agency of the state government, currently established under KRS[5] Chapter 194A, which undisputedly performs an

[3] Kentucky Rules of Civil Procedure.

[4] The above-captioned appeals were consolidated for all purposes by order dated December 29, 2020.

[5] Kentucky Revised Statutes.

integral governmental function. Therefore, the Cabinet is clearly entitled to the protection of governmental immunity. The question in this case is whether the Cabinet's immunity precludes the filing of a DNA petition against it.

As previously noted, governmental immunity limits the imposition of tort liability upon a state agency. *Yanero*, 65 S.W.3d at 519. *See also Stratton v. Commonwealth*, 182 S.W.3d 516 (Ky. 2006). However, the Supreme Court recently reiterated that sovereign immunity does not bar an action against the state or its agencies when the remedy sought does not involve the use of public funds. In *University of Kentucky v. Moore*, 599 S.W.3d 798, 812 (Ky. 2019), the Court held:

> "[A declaratory judgment action] is qualitatively different from [an action] requiring the state to pay out the people's resources as damages for state injury to a plaintiff." [*Com. v. Kentucky Ret. Sys.*, 396 S.W.3d 833, 839 (Ky. 2013).] "There is no harm to state resources from a declaratory judgment. When the state is a real party in interest, the state is merely taking a position on what a plaintiff's rights are in the underlying controversy." *Id.* at 838. "When statutory . . . rights are adjudicated, the state is inevitably affected in some manner. There simply can be no sovereign immunity when [a court is asked to declare someone's rights under a statute]. The state is not above its own . . . laws." *Id.* at 840.

Moore, 599 S.W.3d at 812-13.

In this case, the GAL is not attempting to bring either a tort action against the Cabinet or an action seeking declaratory or injunctive relief. Rather, a

DNA petition is a statutory action authorized by KRS Chapter 620. Specifically, KRS 620.070(1) provides that "[a] dependency, neglect, or abuse action may be commenced by the filing of a petition by any interested person in the juvenile session of the District Court." Section (2) sets out that the summons of the petition shall be served "to the parent or *other person exercising custodial control or supervision*[.]" (Emphasis added.) KRS 600.020(47) defines "person exercising custodial control or supervision" to mean "a person *or agency* that has assumed the role and responsibility of a parent or guardian for the child, but that does not necessarily have legal custody of the child[.]" (Emphasis added.)

KRS 600.020(11) defines "child-placing agency" to mean "any agency, other than a state agency, which supervises the placement of children in foster family homes or child-caring facilities or which places children for adoption[.]" But in KRS 600.020(47), the legislature chose to use the broader term "agency" rather than the more limited term "child-placing agency." Furthermore, the term "commitment" means "an order of the court which places a child under the custodial control or supervision of the Cabinet for Health and Family Services, Department of Juvenile Justice, or another facility or agency until the child attains the age of eighteen (18) unless otherwise provided by law[.]" KRS 600.020(13).

Given these definitions, we must conclude that the Cabinet is "a person or agency that has assumed the role and responsibility of a parent or

guardian for the child[.]" KRS 600.020(47). Indeed, the family court granted custody of the children to the Cabinet. We also note that the Cabinet has not asserted that its amenability to suit in a DNA action would implicate any liability of state funds. In its reply brief, the Cabinet suggests that the exercise of the family court's authority would infringe upon the separation of powers between the judiciary and a discretionary executive function. But in light of the clear language of KRS 600.020(47) and KRS 620.070, we conclude that the legislature has authorized the filing of a DNA petition against the Cabinet. Therefore, we agree with the family court that the Cabinet is not immune from a DNA petition under the facts presented in this case.

However, we must note that it is unusual to bring a DNA petition against the Cabinet. It is seldom necessary to file a new petition against the Cabinet because the court retains jurisdiction over the terms of placement and custody of the children. In addition, the court possesses the inherent authority to enforce its orders against the Cabinet through the use of its contempt powers. *See Cabinet for Health and Fam. Servs. v. J.M.G.*, 475 S.W.3d 600, 619 (Ky. 2015). For these reasons, we express no opinion concerning the merits of the GAL's petitions in this case or the scope of any available remedy. Those are matters which must be decided upon later adjudication by the family court. We hold only

that the doctrine of governmental immunity does not preclude the filing of a DNA petition against the Cabinet.

Accordingly, we affirm the order of the Bullitt Family Court denying the Cabinet's motions to dismiss.

ALL CONCUR.

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