RENDERED: SEPTEMBER 28, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001857-ME

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

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 05-AD-00079

J.E.; D.R.E.; K.E., INFANT; I.E., INFANT — APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KELLER, JUDGE: The Cabinet for Health and Family Services has appealed from the order of the Fayette Family Court requiring it to provide specified services free of cost to parents whose parental rights to one child were not terminated. The Cabinet asserts that the applicable statute does not provide the necessary authority for a court to require such

[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.

payment and that the order violates the Kentucky Constitution. Because the Cabinet failed to serve the appellees with the notice of appeal, we must dismiss this matter.

J.E. and D.R.E. are married and are the natural parents of three children: I.E., a son, born April 12, 2001; K.E., a daughter, born July 9, 2003; and F.E., another daughter, born August 20, 2004. I.E. and K.E. were both removed from the home in early 2004 due to their medical diagnoses and domestic violence incidents, as well as their parents' inability to care for them or maintain stable housing. F.E. was removed in late 2005 because she was at risk of abuse and neglect due to ongoing domestic violence in the home. In 2005, the Cabinet filed a Petition for Involuntary Termination of Parental Rights as to K.E., and filed an amended petition in early 2006 seeking a termination of parental rights as to I.E. Prior to trial, the parents agreed to terminate their rights as to K.E., who suffers from cystic fibrosis, because of their admitted inability to care for their medically fragile child. The matter proceeded to trial on I.E.'s petition. Cabinet social worker Nakia Isabel testified about the family and indicated that the parents had not completed their treatment plan.

At the conclusion of the trial, the family court entered its judgment from the bench. Judge Wise found that termination as to I.E. would not be in his best interest, citing 1) her inability to determine whether I.E.'s prospects for improvement would actually be better if parental rights were terminated; and 2) the efforts and adjustments made by the parents. Therefore, Judge Wise dismissed the Cabinet's petition as to I.E. However, she did not order an immediate return to his parents. Instead, Judge Wise

indicated that additional services would be helpful and ordered the Cabinet to provide several services free of cost to the parents. These services included a domestic violence assessment, domestic violence (perpetrator) classes for the father, domestic violence (victim) classes for the mother, medical and eye examinations for the mother, education on diet and exercise, and the Family Reunification Program or diversion program for the parents to reunify them with I.E. I.E. was to stay in the custody of the Cabinet pending a successful completion of the programs, with a trial visit scheduled before the start of the 2006 school year. Finally, Judge Wise entered a three-year Domestic Violence Order against the father, ordering him to have no violent contact with the mother. The Order of Judgment dismissing the petition as to I.E., but requiring the Cabinet to continue to provide services to the family as listed in its written Findings of Fact and Conclusions of Law, was entered August 25, 2006. This appeal by the Cabinet followed.

While the Cabinet does not challenge the family court's decision not to terminate parental rights, it does challenge the portion of the order requiring it to provide services to the family free of charge. The Cabinet argues that KRS 625.090 does not authorize a court to direct future actions of the parents or the Cabinet; that the family court does not have the authority to require the Cabinet to pay for such services unless specifically provided for by statute; and that the order requiring the payment of future services violates the Kentucky Constitution.

Our review of the record revealed a procedural issue that is fatal to the Cabinet's appeal. At the family court level, both parents were appointed separate counsel

and a guardian ad litem was appointed to represent the children involved in the termination proceedings. On June 20, 2006, at the conclusion of the hearing and prior to the entry of the judgment or the filing of the notice of appeal, the family court awarded appointed counsel and the guardian ad litem $500 each for their respective services for the parents and the children. The family court then excused them from further duties in the case, as their services were completed. The notice of appeal and appellate brief filed by the Cabinet were not served on the parents or children, but were only served on the guardian ad litem for the children and on the attorneys appointed to represent the parents below, all of whom had been permitted to withdraw. Pursuant to CR 73.03(1), the notice of appeal "shall contain a certificate that a copy of the notice has been served upon all opposing counsel, or parties, if unrepresented, at their last known address." Because it appeared to the Court that the Cabinet failed to comply with the service requirement, the Cabinet was ordered to show cause why the appeal should not be dismissed for its failure to serve the notice of appeal on the unrepresented appellees pursuant to CR 73.03(1).

The Cabinet responded to the show cause order. In its response, the Cabinet conceded that its brief and the notice of appeal were served on the parties' prior counsel, who had all been excused by the family court in the orders awarding them fees. The Cabinet stated, however, that the same attorneys continued to represent the parties in the continuing dependency action. In requesting that the appeal not be dismissed, the Cabinet relies upon cases requiring only substantial compliance in the filing of a notice of appeal in cases where the appellant has failed to name the child in the notice of appeal,

noting that fair notice is what is required. *See Morris v. Cabinet for Families and Children*, 69 S.W.3d 73 (Ky. 2002); *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998). While we agree that the courts of this Commonwealth have adopted a policy of substantial compliance, we are unable to discern any compliance, substantial or otherwise, with the service requirement contained in CR 73.03(1). Although the same attorneys represent the parties in another action, those attorneys no longer represented the appellees in the present termination proceeding and were specifically excused from further responsibilities at the time the Cabinet filed its notice of appeal. It is undisputed and the Cabinet has conceded that neither the parents nor the child were served at their last known address. We hold that service on the excused attorneys is not sufficient to confer notice upon their former clients. Because the Cabinet failed to serve the notice of appeal on the appellees, this appeal must be dismissed.

Therefore, the Court FINDS that the Cabinet has not shown sufficient cause why the appeal should not be dismissed. Accordingly, the above-styled appeal is ORDERED DISMISSED.

ALL CONCUR.

ENTERED: September 28, 2007

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Terry L. Morrison
Lexington, Kentucky

NO BRIEF FOR APPELLEES