

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000248-MR

COURTNEY THOMAS

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HON. GEORGE W. DAVIS III, JUDGE
ACTION NO. 15-CI-00444

KAREN WHITT AND
JASON ROSE

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Courtney Thomas, a nonparent, brings this appeal from an order entered by the Boyd Circuit Court on February 5, 2016, granting Karen Whitt and Jason Rose joint custody of Jason's minor child, B.R. For the reasons stated, we dismiss this appeal.

From an appellate procedural standpoint, this case is a tortured attempt to appeal a circuit court order awarding custody of a minor child to her

father and paternal grandmother. Before explaining why this appeal must be dismissed, a thorough recitation of the relevant underlying facts is necessary.

FACTUAL BACKGROUND

B.R., the minor child, was born in May 2007. Her mother is Tabitha Justice who is not a party to this appeal. Jason is the father of B.R. but his paternity was not established until 2008.

A few months after birth, the Cabinet for Health and Family Services removed B.R. from Tabitha. Shortly thereafter, B.R. was placed with Charles Ingram, Tabitha's brother. At that time Ingram was dating Kayla Thomas and they were residing with Kayla's mother, Lynette Thomas. Lynette Thomas is also Courtney's mother. Subsequently, Lynette became the primary caregiver for B.R. and was appointed guardian for the child by the Boyd District Court in 2009. Courtney and Kayla have periodically lived with their mother and have been involved with B.R. during Lynette's guardianship.

Jason was using illegal drugs and was having dependency issues in the early years after B.R.'s birth. However, at the hearing in 2015, the Domestic Relations Commissioner (DRC) found that Jason had made significant changes in his life through medical treatment and rehabilitation. He visited B.R. frequently in recent years, especially when B.R. was visiting Karen Whitt, who, as noted, is the child's grandmother and Jason's mother. Karen had maintained an active

involvement with B.R. throughout her entire life, including while Lynette was the child's legal guardian.

In 2011, Lynette initiated an adoption proceeding in the Boyd Circuit Court to adopt B.R. Little or no action was taken in the case and the adoption was never granted by the court. Lynette died in June 2015 and the adoption action was dismissed shortly thereafter.¹

On June 15, 2015, a few days after Lynette Thomas's death, Karen and Jason filed a petition in the Boyd Circuit Court, seeking joint custody of B.R. At the time of Lynette's death, she was residing with B.R. at Courtney's residence in Ashland, Kentucky. Courtney was the only respondent named in the petition. Courtney and her sister Kayla, who was not named in the original petition, filed a counterpetition for custody of B.R. The case was assigned by the circuit court to the DRC to conduct a hearing on the respective petitions for custody. The parties were granted temporary timesharing with B.R. during the pendency of the proceeding.

¹ The docket entries for the adoption proceeding, 11-AD-00027, are meager at best and the adoption file was not made a part of the record on appeal in this case. Two years prior to the adoption proceeding in 2009, Jason Rose executed a "Voluntary Informed Consent to Adoption" form which was filed in the adoption proceeding on May 27, 2011. This form was not introduced into the record of this appeal although Courtney Thomas attached it as an exhibit to her brief in contravention of Kentucky Rules of Civil Procedure 76.12(4)(c)(vii). Accordingly, the form is of no legal effect or consequence in this proceeding and will not be considered by this Court. See *Godman v. City of Ft. Wright*, 234 S.W.3d 362 (Ky. App. 2007).

After conducting an evidentiary hearing, the DRC issued her report and recommendation on January 13, 2016. The DRC recommended awarding Karen and Jason joint custody of B.R., concluding that Courtney lacked standing to seek custody as she could not attain *de facto* custodian status under Kentucky Revised Statutes (KRS) 403.270. The circuit court initially entered an order confirming the DRC's report by order entered January 26, 2016. Apparently, this order was entered in error without consideration of exceptions filed by Courtney. The court set aside its initial order and entered its final order confirming and adopting the report as the court's judgment by order entered February 5, 2016. This appeal was timely filed by Courtney only, naming Karen and Jason as appellees.

PROCEDURAL ISSUES

As noted, B.R.'s mother, Tabitha, has not been named a party to this appeal. In the initial petition filed by Karen and Jason, Tabitha was not named a party. As the child's mother, she was clearly an indispensable party under Kentucky Rules of Civil Procedure (CR) 19.01. After the initial appearance before the DRC, Karen and Jason filed a motion to add Tabitha as a party to the proceeding and the circuit court entered an order on August 21, 2015, adding Tabitha as a respondent. The court also appointed a warning order attorney to give notice to Tabitha of the proceedings and added her name to the caption of the

proceeding. No appearance was made by Tabitha in the custody proceeding below and the warning order attorney filed the required report regarding service, noting the attorney's inability to locate Tabitha.

Thereafter, the circuit clerk served all court notices and orders on Tabitha at her last known address and most, if not all of the envelopes containing the service, were returned and filed in the court record. However, the notice of appeal and amended notice filed by Courtney in this appeal do not identify Tabitha as a party to the appeal, in either the caption or body of the notices. Likewise, the certificate of service on the notices reflects that Tabitha was not served with a copy of the notice of appeal or the amended notice.

There is no dispute that Tabitha is B.R.'s mother and was a party in the custody proceeding below. As noted by the Kentucky Supreme Court in *Walker v. Blair*, 382 S.W.3d 862, 868 (Ky. 2012), "under the Due Process Clause of the Fourteenth Amendment, parents have a fundamental liberty interest in the care, custody, and control of their children." (citing *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)); see also *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010). Even though Tabitha did not appear below, her fundamental liberty interest in the custody of her child remains viable in this appeal.

Under CR 73.03(1), the notice of appeal must name all appellants and appellees. As Tabitha was an indispensable party below under CR 19.01, she remains an indispensable party in this appeal under CR 73.03. The failure to name an indispensable party to an appeal is a jurisdictional defect that this Court is powerless to correct and otherwise requires the dismissal of the appeal. *Slone v. Casey*, 194 S.W.3d 336 (Ky. App. 2006) (citing *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990)). Given that Tabitha's parental rights have not been terminated, as a party below she retained her constitutional liberty interest as a parent regarding the custody of B.R. Thus, she is an indispensable party to this appeal. CR 73.03. The failure to name her as a party in the notice of appeal requires dismissal.

Notwithstanding, assuming *arguendo*, that Courtney's notice of appeal had complied with CR 73.03, her legal argument on appeal would nonetheless fail. The parties cite in their briefs to the video record of the evidentiary hearing before the DRC on December 2, 2015. However, the record on appeal before this Court does not contain the video record or a transcript from the hearing. Apparently, Courtney did not designate the video recording as part of the record on appeal. It is appellant's duty under CR 75.01 and CR 98 to ensure that the record on appeal is sufficient for the appellate court to review the alleged errors. *Smith v. Smith*, 450 S.W.3d 729 (Ky. App. 2014). CR 98(3) specifically

requires that the video record be designated within the ten (10) day period set out in CR 75.01. It has long been the rule in appellate practice that when the complete record is not before the appellate court, we must assume that the omitted record supports the judgment rendered below, which in this case includes the DRC's recommendation. *Smith*, 450 S.W.3d 729, 732.

The DRC concluded that Courtney did not qualify as a *de facto* custodian under KRS 403.270(1), for which we can find no evidence in the record to conclude otherwise. It is unrefuted that Courtney's mother Lynette provided the primary and substantial support of B.R. as her legal guardian, up to the time of Lynette's death in June 2015. Given Courtney cannot be a *de facto* custodian to establish a right to custody, the only other basis for her to have standing to assert custody of B.R. is if she can establish that she was "a person acting as a parent" pursuant to the provisions of KRS 403.800(13); *Mullins*, 317 S.W.3d 569, 575. Our review of the limited record in this case reflects that Courtney does not meet the statutory requirements set out in KRS 403.800(13).

As noted by the DRC in her findings and recommendation, Courtney has at best a "sister type relationship" with B.R. There is nothing in the record in this appeal that would establish that Courtney had somehow succeeded Lynette in her role as a guardian for B.R. prior to her death sufficient to constitute a person acting as a parent under KRS 403.800(13). We are aware of no legal authority in

Kentucky, nor has any been cited, that would allow someone to “inherit” or assume a guardian related status by virtue of simply being related to a legal guardian who dies. The guardianship terminated as a matter of law when Lynette died and Courtney acquired no legal standing or rights as a result thereof. Courtney’s arguments on the merits would fail for these reasons.

CONCLUSION

For the reasons and grounds set forth in the Opinion and Order, the appeal is hereby DISMISSED.

ALL CONCUR.

ENTERED: AUGUST 10, 2018

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

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