

Cite as 2023 Ark. App. 510  
**ARKANSAS COURT OF APPEALS**  
DIVISION III  
No. CV-23-41

ZACHARY M. OXLEY

APPELLANT

V.

LARRY RAY LUMPKINS

APPELLEE

Opinion Delivered November 8, 2023

APPEAL FROM THE LONOKE  
COUNTY CIRCUIT COURT  
[NO. 43DR-16-744]

HONORABLE JASON ASHLEY  
PARKER, JUDGE

REMANDED TO SETTLE AND, IF  
NECESSARY, SUPPLEMENT THE  
RECORD

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**BART F. VIRDEN, Judge**

The Lonoke County Circuit Court entered an order denying appellant Zachary Oxley's petition for modification of custody with respect to his daughter, a minor child (MC). The trial court ruled that custody of MC was to remain with appellee Larry Lumpkins, who is not biologically related to MC. Oxley argues that the trial court erred in denying custody to him because he is MC's natural parent and has not been determined unfit. He contends that the trial court failed to properly consider the presumption in favor of the natural parent in its best-interest analysis. We must remand to settle the record and, if necessary, supplement it with a transcript of any final hearing that was held and with the report of the attorney ad litem (AAL) as referenced in the order on appeal.

## I. *Background*

This case began in September 2016 as a divorce proceeding between Tiffani Davis and Patrick Davis in which both Oxley and Lumpkins intervened.<sup>1</sup>

Tiffani and Oxley were never married; MC was born in June 2011; and the couple's relationship ended in September 2011. The record indicates that Tiffani ceased contact with Oxley and that Oxley had only sporadic contact with MC over the next several years.

In February 2017, Lumpkins, who had raised Tiffani–MC's mother—under the mistaken belief that he was her biological father, was awarded temporary custody of MC in an agreed order. In March 2017, Oxley petitioned to establish paternity of MC. Tiffani admitted that Oxley is MC's father, and the trial court subsequently adjudicated him as such. In October 2018, Lumpkins was awarded custody of MC, and Oxley was granted visitation.

In June 2020, Oxley filed a petition for citation of contempt and for modification of custody asking that Lumpkins be ordered to permit visitation between him and MC and that he (Oxley) be awarded primary custody of MC. A hearing was held on September 1, 2021, on Oxley's petition to modify custody. The trial court ruled in relevant part from the bench as follows:

I'm not going to change custody at this time. I'm going to treat this as a temporary hearing based on I'm going to appoint an attorney ad litem 'cause I have some real concerns about what's going on with [MC] . . . I also know that Mr. Oxley has a right to see his child. I think he's gone too long without seeing her. . . . He's the father and he's been completely cut out . . . . But we're not cutting Mr. Oxley out of [MC]'s life. Not at this point, that's for sure. . . . I'm going to look at [appointing] Chris Lacy. I want him to find out what's going on because I do have some real issues . . . . And

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<sup>1</sup>A divorce decree was eventually entered in July 2018.

figure out what's going to be right for [MC and her half sister] too going forward. And so I need more information before I can—I can decide that. So I'll call this a temporary order.

In the temporary order reinstating visitation between Oxley and MC entered September 23, 2021, the trial court stated that “[t]his order shall remain in effect *until a final hearing is held* for the issues pending before the Court.” (Emphasis added.) The trial court appointed Lacy as AAL, and Lacy entered his appearance October 1, 2021. The record indicates that on March 2, 2022, Oxley’s attorney sent a letter to the trial court asking, in part, that a deadline be set for submission of Lacy’s report.

In the trial court’s order dated September 27, 2022, which is the subject of this appeal, the trial court ruled in relevant part as follows:

2. That a hearing was held on September 1, 2021, and this Court entered a *Temporary Order to Reinstate Visitation*, which ordered visitation to be reinstated and appointed an attorney ad litem, Chris Lacy (“Mr. Lacy”).

3. That a final determination of Mr. Oxley’s petition to modify custody was withheld until Mr. Lacy could conduct an investigation and provide a recommendation to the court.

4. That Mr. Lacy has since provided his recommendation.

5. That Mr. Oxley’s petition to modify custody is hereby denied and all previous orders of this Court shall remain in effect.

(Emphasis in original.)

The record, however, does not contain a transcript of any final hearing that may have been held. Further, Lacy’s report with its recommendation, which appears to have been critical to the trial court’s decision, does not appear in the record.

## II. Discussion

Our appellate rules provide that “[i]f anything material to either party is omitted from the record by error or accident or is misstated therein, . . . the appellate court . . . on its own initiative may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted.” Ark. R. App. P.–Civ. 6(e).

The trial court’s 2021 temporary order contemplated a final hearing. There is some indication in the 2022 order on appeal that the trial court held some type of hearing. The order states that “[o]n this day, the Court called the case” and that Oxley and Lumpkins “appear[ed] by and through [their] attorney[s].”

Arkansas Supreme Court Administrative Order No. 4(a) provides that “[t]he circuit court shall require the official court reporter to make a verbatim record of all proceedings, pertaining to any matter before the court or the jury, regardless of whether these proceedings occur in-person, in court, or in chambers; telephonically; or through video-conference.” Further, the verbatim record shall include a transcription of “all spoken words from any source” including, but not limited to, colloquies between the court and counsel and arguments. Ark. Sup. Ct. Admin. Order No. 4(a). The record does not contain a waiver of this requirement by the parties. If a final hearing was indeed held, it must be transcribed and the record supplemented accordingly.

The record likewise does not contain Lacy’s report. The record indicates that Lacy conducted a lengthy investigation into MC’s best interest and submitted a report with his findings and recommendation on custody. The trial court appears to have denied Oxley’s petition for modification of custody due, at least in part, to Lacy’s report. Given that Lacy’s

report was created for and provided to the court at its direction, the record must be settled and thereafter supplemented.

In accordance with Ark. R. App. P.-Civ. 6(e), we remand to settle the record and, if necessary, supplement it within thirty days. Oxley will then have fifteen days to supplement his brief, and Lumpkins will be given an opportunity to revise or supplement his responsive brief.

Remanded to settle and, if necessary, supplement the record.

GLADWIN and BARRETT, JJ., agree.

*Westark Law*, by: *John R. Zaharopoulos*; and *Reddick Law, PLLC*, by: *Matthew D. Swindle* and *Heather G. Zachary*, for appellant.

*Kent Tester, P.A.*, by: *Kent Tester*, for appellee.