Cite as 2012 Ark. 278

SUPREME COURT OF ARKANSAS

No. 11-1092

IN THE MATTER OF THE GUARDIANSHIP OF A.M., A MINOR

BRITTANY MAHAVIER
APPELLANT

V.

TERESA MAHAVIER
APPELLEE

Opinion Delivered JUNE 21, 2012

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT

[NO. PR-2011-203-4]

HONORABLE JOHN R. SCOTT, JUDGE

REVERSED AND REMANDED.

DONALD L. CORBIN, Associate Justice

Appellant Brittany Mahavier appeals the orders of the Benton County Circuit Court granting a permanent guardianship of her son, A.M., to her mother, Appellee Teresa Mahavier, and declaring the Arkansas statutes on guardianships to be constitutional. Appellant stipulated below that there was evidence sufficient to establish a need for the guardianship, but did not agree to the guardianship so that she could maintain her constitutional challenges based on equal protection and substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction of this appeal is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(b)(1) and (6) (2011), as it presents an issue of first impression requiring interpretation of the Arkansas statutes on guardianship, Ark. Code Ann. §§ 28-65-101 to -707 (Repl. 2012). We do not address the merits of the constitutional arguments because the Attorney General was not notified of the constitutional challenges to the guardianship statutes, as required by Ark. Code Ann. § 16-111-106(b) (Repl. 2006), and there has not been full and complete adversarial development of the constitutional issues.

Accordingly, we reverse and remand for compliance with the notice requirement of section 16-111-106(b).

The only points on appeal are Appellant's constitutional challenges to the Arkansas guardianship statutes that she first raised to the circuit court by way of a motion for declaratory judgment. Appellant asserts that the Arkansas guardianship statutes infringe on her fundamental right to parent protected by the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Appellant makes no claim under the Arkansas Constitution. She contends that the guardianship law discriminates against parents whose suitability or fitness has been called into question in probate court as opposed to parents whose suitability or fitness has been called into question in a dependency-neglect proceeding in juvenile court. Because her fundamental right to parent is at issue, Appellant maintains that any state infringement or discrimination based on that right must pass strict constitutional scrutiny. She concedes that the parens patriae function of the state qualifies as a compelling state interest. But Appellant maintains that "[t]he duplicative nature of legal forces which meet this interest—guardianships and dependency neglect proceedings—prohibit any argument that the law is 'narrowly tailored.'" Therefore, argues Appellant, guardianships as applied to the issue of parental suitability should be declared unconstitutional.

Appellant has not produced a record on appeal establishing that the Attorney General was notified of her constitutional challenges to the guardianship statutes in accordance with section 16-111-106(b). Section 16-111-106(b) of our Declaratory Judgment Act requires that

> [i]n any proceeding which involves the validity of a municipal ordinance or franchise, the municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.

The purpose of notifying the Attorney General of a constitutional attack on a statute is to prevent that statute from being declared unconstitutional in a proceeding that might not be a complete and fully adversary adjudication. *Ellis v. State Farm Bank, F.S.B.*, 2011 Ark. 206.

We note that there is one entry on the probate docket dated June 24, 2011, stating in its entirety, "Notice of Compliance with Ark. Code." There is no further explanation of this docket entry, however. The record is void of any letter from Appellant's counsel giving notice to the Attorney General of her constitutional challenge to the guardianship statutory scheme. The record is likewise void of any response from the Attorney General indicating that his office had received notice of these proceedings. The Attorney General is not included in the certificate of service on Appellant's motion for declaratory judgment and dismissal. Finally, we note that Appellant's designation of the record in her notice of appeal does not include any type of notice to, or response from, the Attorney General. As the challenger of the statute and as the appellant in this case, it is Appellant's burden to produce a record demonstrating the notice to and response of the Attorney General. *See Williams v. Johnson Custom Homes*, 374 Ark. 457, 288 S.W.3d 607 (2008).

It is generally reversible error not to give the Attorney General notice of a declaratory-judgment action involving a constitutional challenge to a statute. *Reagan v. City of Piggott*, 305 Ark. 77, 805 S.W.2d 636 (1991); *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229

(1982), *overruled on other grounds by T&T Chem., Inc. v. Priest*, 351 Ark. 537, 95 S.W.3d 750 (2003). Exceptional circumstances may render the omission harmless, as where the record discloses that there was full and complete development of the constitutional issues by truly adversary parties and where this court is able to uphold the constitutionality of the challenged statute. *See, e.g.*, *Olmstead v. Logan*, 298 Ark. 421, 768 S.W.2d 26 (1989) (full adversarial development); *see also In re Estate of Epperson*, 284 Ark. 35, 679 S.W.2d 792 (1984) (upholding constitutionality).

There are no such exceptional circumstances in this case. Full and complete adversarial development is lacking here. Although Appellant did argue her constitutional claims to the circuit court, and although the circuit court attempted to resolve her claims, the difficulties in deciding a constitutional challenge without the benefit of full adversarial development are apparent throughout this record, and this record simply does not allow us to uphold the constitutionality of the statutes. In these circumstances, where Appellant has not produced a record on appeal demonstrating that she notified the Attorney General of her constitutional challenge to the guardianship statutes, and where there has not been full adversarial development of the constitutional issues, we reverse and remand for compliance with the notice requirements of section 16-111-106(b). *See Ellis*, 2011 Ark. 206; *see also Olmstead*, 298 Ark. 421, 768 S.W.2d 26.

Reversed and remanded.