

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001863-MR

RICHARD W. HILL
GUARDIAN AD LITEM FOR
PETITIONER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN MCDONALD, JUDGE
ACTION NO. 98-FJ-02127

FINANCE AND ADMINISTRATION
CABINET, COMMONWEALTH OF
KENTUCKY

APPELLEES

AND: 1998-CA-002242-MR

LOUISE B. WELCH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN MCDONALD, JUDGE
ACTION NO. 98-FJ-02127

NO APPELLEE

OPINION AND ORDER
VACATING AND REMANDING IN 1998-CA-001863-MR
DISMISSING APPEAL 1998-CA-002242-MR

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. In these consolidated appeals, Richard W. Hill (Hill) and Louise B. Welch (Welch) appeal from several

orders of the Jefferson District Court which either reduced or denied altogether their respective motions for attorney fees arising from their representation of T.R.B., a minor under the age of 18. Although these appeals arise from the same facts and despite the fact that we previously consolidated these cases only for the purpose of assigning them to the same three judge panel, for purposes of this opinion we choose to treat each appeal separately. Accordingly, we vacate and remand for further proceeding in regard to Hill's appeal and dismiss Welch's appeal.

BACKGROUND FACTS

On May 29, 1998, T.R.B. filed an abortion petition with the trial court seeking permission to undergo a self-consent abortion pursuant to KRS 311.732. In the petition, T.R.B. specifically requested appointment of both counsel and a guardian ad litem and asked that any applicable fees be waived as she was unable to pay them. Although Welch signed the petition in her capacity as counsel for T.R.B., she was never formally appointed to represent TRB.

On June 1, 1998, the Clerk of the Court contacted Hill and asked if he would be willing to serve as guardian ad litem for T.R.B. at a hearing to be held the next day. Hill consented, and although the trial court never formally signed the order appointing him as guardian ad litem, it subsequently acknowledged his appointment as such in a writing at a later date.

On June 3, 1998, the trial court entered an order denying T.R.B.'s petition. Welch subsequently appealed the trial court's order on behalf of T.R.B. On June 10, 1998, a

three judge panel of this Court reversed the trial court's order insofar as it denied T.R.B.'s petition for a self-consent abortion. In conjunction with this Court's opinion, the trial court entered an order granting T.R.B.'s petition on June 12, 1998.

HILL'S APPEAL

In conjunction with the hearing on June 2, 1998, Hill tendered a form "order for attorney's fees in case of juvenile dependency, neglect or abuse, termination of parental rights, and mental inquest" seeking a fee of \$250. Hill indicated in writing on the form that it was filed pursuant to KRS 311.372. In the order entered June 3, 1998, the trial court denied not only T.R.B.'s petition, but also Hill's motion for attorney fees, stating:

[T]he application for attorney's fees submitted by [Hill] who was appointed Guardian Ad Litem in this action is not approved. KRS 311.372 provides no mechanism for payment concerning these petitions and there has been no showing by [Hill] that he is entitled to recover any fees, the legal authority for such claim, an affidavit in support of any fees, and who or what entity is to pay such fees if the application is otherwise approved.

Subsequent to the trial court's second order following the appeal, Hill again filed a motion and affidavit in support of an award of attorney fees. In his motion, Hill provided a breakdown of the time spent acting as guardian ad litem and sought fees in the amount of \$462.50 representing 3.7 hours of work at the rate of \$125 per hour. Once again, Hill stated that he was acting as guardian ad litem for T.R.B. pursuant to KRS

311.372 and the Rules of Civil Procedure. In an order entered June 22, 1998, the trial court ordered that Hill be paid \$125 for his services as guardian ad litem pursuant to KRS 311.732 and directed that a copy of the order be sent to the Finance Cabinet for payment.

On July 21, 1998, Hill filed his notice of appeal from the trial court's order of June 22, 1998, naming the Finance and Administration Cabinet, Commonwealth of Kentucky (the Cabinet) as the appellee. The Cabinet initially sought dismissal of Hill's appeal on the grounds that (1) it was not a party to the action before the trial court and hence was not a proper party on appeal; and (2) that Hill failed to first pursue an appeal to the Jefferson Circuit Court pursuant to CR 72. The Cabinet's motion was dismissed by order of a three judge motion panel of this Court entered September 24, 1998, and Hill's appeal was ultimately perfected.

Hill contends that the trial court erred in reducing his fee from \$462.50 to \$125. In its appellee brief, the Cabinet indicated that it does not oppose Hill's argument to the extent that he is not seeking a fee greater than \$500. We agree with Hill that the trial court erred in setting his guardian ad litem fee at \$125.

Pursuant to KRS 311.732(3)(c), appointment of a guardian ad litem is mandatory when a minor petitions for a self-consent abortion. Although that statute does not provide that the guardian ad litem is to be paid for his services, support for that proposition can be found in House Bill 321, the

appropriations bill passed by the 1998 Kentucky General Assembly. Under Section 21(d) of the Bill, the General Assembly appropriated \$2,000,000 for the years 1998-2000 for the payment of guardian ad litem fees. That provision included the following language:

Included in the above appropriation is funding for fees to be paid to the guardian ad litem appointed by the court pursuant to KRS 311.732. The fee shall be fixed by the court and shall not exceed \$500.

Therefore, it is clear that Hill, in his capacity as guardian ad litem for T.R.B. is entitled to payment for his services. The question then becomes how much.

We note that under KRS 453.060(2), KRS 387.305(4), and CR 17.03(5), court appointed guardians ad litem are entitled to a reasonable fee for their services. We believe that the same is true for guardians ad litem appointed pursuant to KRS 311.732. In deciding the reasonableness of a guardian ad litem fee, the following criteria are to be considered:

the character of the litigation, the rights in controversy, the nature, duration and extent of the services and the responsibility, industry, diligence and accomplishment of the guardian ad litem.

Goldfuss v. Goldfuss, Ky. App., 609 S.W.2d 696, 698 (1980), citing Black v. Wiedeman, Ky., 254 S.W.2d 344, 347 (1953). We will not reverse a trial court's award of a guardian ad litem fee unless the trial court has abused its discretion in assessing the hourly rate. Cabinet for Human Resources v. S.R.J., Ky. App., 706 S.W.2d 431, 434 (1986). We find that the trial court has abused its discretion in this case.

First, as Hill demonstrates in his brief on appeal, the hourly rate assessed by the trial court in this case comes out to \$33.78. We agree with Hill that attorneys would most likely be reluctant to serve as guardians ad litem in similar cases for such a small amount.

Second, and most important, there is absolutely no evidence in this case that the trial court considered the elements set forth in Goldfuss and Black in establishing Hill's fee. Upon remand of this matter, the trial court is to re-examine Hill's motion for attorney/guardian ad litem fees in light of the elements set forth in Goldfuss and Black. While further examination may or may not result in an increase in the fee awarded to Hill, he is entitled to have his fee assessed under the proper standard. Therefore, the trial court's order of June 22, 1998 is vacated, and this matter is remanded for further consideration in concordance with this opinion.

WELCH'S APPEAL

On July 6, 1998, following the entry of the trial court's second order pertaining to T.R.B., Welch filed a motion with the trial court seeking attorney's fees in the amount of \$660 for her representation of T.R.B. In her affidavit, Welch itemized her services and stated that her normal hourly rate is \$80. On July 14, 1998, the trial court denied Welch's motion in its entirety, stating:

This court appointed Mr. Hill as [guardian ad litem] pursuant to KRS 311.732(3)(c). There has been no showing that KRS 311.732 requires the State to pay for two attorneys.

Following denial of her motion to reconsider, Welch filed a notice of appeal on August 25, 1998. Welch indicated that there was no appellee in her case. On September 21, 1998, a three judge motion panel of this Court entered an order requiring Welch to show cause as to why her appeal should not be dismissed for failure to designate a necessary party. Welch responded to the order on October 5, 1998, and on November 20, 1998 this Court entered an order passing the issue raised in the show cause order and response thereto to the merits on appeal. In the same order, the appeals of Hill and Welch were consolidated, but only to the extent that they would proceed together and be assigned to the same merits panel.

On appeal, Welch contends that the trial court erred in denying her motion for fees in its entirety. Before we address the merits of her appeal, we must first decide whether her appeal should be dismissed for failure to designate a necessary party - namely an appellee.

Having read and considered Welch's response to this Court's show cause order, we find that dismissal of her appeal is proper due to her failure to designate an appellee. The reasoning for this ruling is fairly obvious; in the absence of an appellee this Court is without jurisdiction over the party from whom relief is sought. At best, it seems that the proper party to this appeal is the district court judge who entered the order appealed from. In light of Welch's failure to designate an appellee, this Court would not know who to direct an order to if

we were inclined to find that Welch is entitled to a reversal of the trial court's order.

We are further unpersuaded by Welch's argument that the consolidation of her appeal with Hill's cures this deficiency. First, there is nothing in the statutes discussed pursuant to Hill's appeal which warrant anything other than payment of guardian ad litem fees by the Cabinet. Therefore, it would be improper to name the Cabinet as the proper appellee in Welch's appeal by virtue of the fact that these appeals have been consolidated because the Cabinet is clearly not liable for payment of attorney's fees.

Furthermore, as noted by the three judge motion panel of this court, these appeals were consolidated only "to the extent that the appeals will proceed together and . . . be assigned to the same merits panel." The fact that they were consolidated for this purpose does not act to cure any defect which existed prior to consolidation.

Having considered the arguments of Hill and the Cabinet on appeal, the order of the Jefferson District Court entered June 22, 1998 pertaining to Hill's guardian ad litem fee is vacated and this matter is remanded for further proceedings in accordance with this opinion. Having considered Welch's response to the show cause order of this Court, her appeal is hereby dismissed for failure to designate a proper party.

ALL CONCUR.

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: December 10, 1999

BRIEF FOR APPELLANT IN NO.
1998-CA-001863-MR:

Richard W. Hill
Louisville, KY

BRIEF FOR APPELLANT IN NO.
1998-CA-002242-MR:

Louise B. Welch
Louisville, KY

BRIEF FOR APPELLEE IN NO.
1998-CA-001863-MR:

Boyce A. Crocker
Assistant General Counsel
Frankfort, KY

No appellee of record in No.
1998-CA-002242-MR