

RENDERED: OCTOBER 29, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2004-CA-000523-MR

BENJAMIN A. KIPER

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
INDICTMENT NO. 99-CI-00138

COMMONWEALTH OF KENTUCKY,  
EX REL. TAWNYA COY;  
AND EMMA PHARRIS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: Benjamin A. Kiper, *pro se*, appeals from an order of the Ohio Circuit Court denying his motion for visitation with his child, R.K. He argues that the trial court erred in denying his motion to appoint a *guardian ad litem* for him, and in denying his motion for visitation without a hearing. He also asserts that the trial court applied the incorrect standard in denying his motion for visitation. Although we agree that the

trial court should have afforded Kiper a hearing and an opportunity to be heard, we conclude that any error did not affect his substantial rights because Kiper did not seek to exercise his right to personal visitation with R.K.. Hence, we affirm.

On April 5, 1999, the Commonwealth, on behalf of Tawnya M. Coy, filed a complaint against Kiper seeking child support for R.K., who was born on July 14, 1998. On August 23, 1999, after Kiper failed to appear, the trial court entered an order directing him to pay \$160.00 per month in child support. The court also held Kiper responsible for paying one-half of all necessary medical expenses for the child.

In a separate proceeding in Butler Circuit Court, Kiper was indicted and later convicted of first degree rape and first degree sexual abuse. He was sentenced to a total of fifty-five years. Although it is not entirely clear from the record, it appears that Kiper was incarcerated shortly after the initial child-support order was entered. In early 2002, a dependency action was brought in the Ohio District Court after Tawnya Coy and her husband Mark Coy, were incarcerated. By agreement of the Coys, the district court placed R.K. in the custody of Emma Pharris, the child's great-aunt. At that point, Kiper appeared in the circuit court action, moving to establish

paternity, to proceed *in forma pauperis* and for appointment of a *guardian ad litem*.

The trial court granted Kiper's motions and ordered that a paternity test be conducted. After genetic testing established Kiper as the father of R.K., Kiper moved for visitation. He requested that his sisters, to whom he has given his power of attorney, be allowed to exercise visitation rights on his behalf. On August 27, 2002, the trial court entered an order adjudging Kiper to be the father of R.K and set the case for further proceedings before the domestic relations commissioner.

In the same order, the trial court discharged the *guardian ad litem*. Kiper moved the court to re-appoint a *guardian ad litem* for the visitation proceedings, but the trial court denied the motion. He also requested an order directing his personal appearance at the commissioner's hearing. The trial court denied both motions, but directed him to provide a phone number so he could participate in the hearing by telephone.

On the date of the scheduled hearing, R.K's *guardian ad litem* appeared, along with counsel for Emma Pharris, who had been made a party to the action. Kiper's sisters appeared with their own counsel, although they were not representing Kiper nor were they parties to the action. Kiper was not contacted for

the hearing. However, the commissioner continued the hearing, and directed that Kiper be provided with a copy of a report prepared by Karol Smith-Rowe, a licensed professional clinical counselor with LifeSkills, Inc. Smith-Rowe had evaluated R.K. at Pharris's behest and concluded that the visitation sought by Kiper would be detrimental to the child's emotional development.

Although Kiper was provided with a copy of the report, the hearing was not rescheduled. On January 30, 2004, the commissioner issued his report recommending that Kiper's motion for visitation be denied based upon Smith-Rowe's report and after considering the nature of the offenses for which Kiper had been convicted. In separate orders entered on February 20, 2004, the trial court overruled Kiper objections and adopted the commissioner's report. This appeal followed.

Kiper raises three grounds of error in this appeal. First, he argues that the trial court erred in denying his motion to appoint a *guardian ad litem* to represent him during the visitation proceedings. This argument is entirely without merit. While CR 17.04 requires appointment of a *guardian ad litem* if a prisoner fails to defend a civil action brought against him, the rule has no application where the action is brought by, rather than against, the prisoner.<sup>1</sup> In this case,

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<sup>1</sup> May v. Coleman, Ky., 945 S.W.2d 426, 427 (1997).

the trial court properly appointed a *guardian ad litem* during the contempt proceedings against Kiper for his failure to pay child support. But once those matters were resolved and only his visitation motion remained pending, the trial court properly discharged the guardian.

We are more concerned that the commissioner entered his findings without conducting a hearing or affording Kiper an opportunity to be heard.<sup>2</sup> Any deficiency, however, did not affect his substantial rights. Kiper did not seek to exercise visitation rights on his own behalf, but asked that his sisters be allowed to exercise visitation for him. KRS 403.320 provides only for visitation with a parent. While grandparents and other non-parents may be granted visitation under certain circumstances,<sup>3</sup> visitation rights cannot be exercised by a non-parent on a parent's behalf. Consequently, the trial court was not obligated to grant Kiper's request to allow his sisters to exercise visitation with R.K. on his behalf.

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<sup>2</sup> See Hornback v. Hornback, Ky. App., 636 S.W.2d 24 (1982).

<sup>3</sup> See KRS 405.021 and Simpson v. Simpson, Ky., 586 S.W.2d 33, 35 (1979) ("KRS 403.320 does not prohibit the grant of visitation to nonparents who stand *in loco parentis* and are jurisdictionally capable of litigating custody. It merely guarantees that a non-custodial natural parent will not be denied visitation privileges unless it would seriously endanger the child. ... A trial court as an incident to custody determination may grant visitation to such nonparents if it is in the best interest of the child.").

In his objections to the commissioner's report, Kiper requested that the court require Pharris to arrange visits with R.K. at his prison. However, the only motion before the trial court at that time was Kiper's motion that his sisters exercise visitation with R.K. on his behalf. While Kiper is free to make a motion for personal visitation with R.K., the trial court did not abuse its discretion by declining to consider his belated non-motion attempt to seek personal visitation.

Accordingly, the order of the Ohio Circuit Court denying Kiper's motion for visitation is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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