RENDERED: JANUARY 5, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000153-ME

L.K.H. APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 04-CI-00226

CABINET FOR HEALTH AND
FAMILY SERVICES; AND M.D.H. APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: ACREE, SCHRODER[1] AND VANMETER, JUDGES. SCHRODER, JUDGE: L.K.H. has appealed from the orders of the Marion Circuit Court dismissing her Petition for Custody of her granddaughter and denying her motion to alter, amend or vacate. Because L.K.H. failed to name an indispensable party (the child) in her notice of appeal and the appeal is untimely, we must dismiss the above-styled appeal.

[1] Judge Wilfrid A. Schroder completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

L.K.H., a resident of Indiana, is the paternal grandmother of B.J.H., born April 21, 1996, to M.D.H. and B.S.B, who were never married. In early 2004, an Indiana court adjudged B.S.B., who passed away in 2000, to be B.J.H.'s natural father. M.D.H. was incarcerated at the time the petition was filed. B.J.H. and her two half-siblings have been in the custody of the Cabinet for Health and Family Services since late 2002 with a permanency goal of adoption, and an involuntary termination of parental rights action was filed in Marion County in early 2004 (Confidential Action No. 04-AD-00001).

On July 13, 2004, L.K.H. filed a Petition for Custody in Marion Circuit Court seeking sole custody of B.J.H.[2] The Cabinet moved to dismiss her petition, citing improper venue, L.K.H.'s failure to state a claim in that she lacked standing (L.K.H. is not her parent, B.J.H. was not in her custody, and she did not qualify as a *de facto* custodian), and her failure to name B.J.H. as an indispensable party. The circuit court later permitted L.K.H. to amend her petition to add B.J.H. as a party and for the appointment of guardians *ad litem* for the child and her mother. L.K.H. then moved to intervene in the termination of parental rights case that had been filed earlier that year. The Cabinet objected to this motion, again citing L.K.H.'s lack

[2] We note that Judge Doughlas M. George is the presiding judge in both the termination case and L.K.H.'s custody case.

of standing as a non-parent without actual possession or control of the child.

In response to the motion to dismiss and objection to her motion to intervene, L.K.H. argued that she had standing pursuant to KRS 403.420(4)(b), which allowed a non-parent to file for custody if the child was not in the physical custody of one of the parents. In this case, B.J.H. was not in the physical custody of either parent when she filed her petition, as M.D.H. was incarcerated and B.S.B. was deceased. However, the Cabinet pointed out in a supplemental pleading in response that KRS 403.420 had been repealed on July 13, 2004, the same date on which L.K.H. filed her petition. Under the newly enacted HB 91, a person must qualify as a *de facto* custodian or a person acting as a parent, and have physical custody for a specified time before being permitted to seek custody of the child. Here, B.J.H. had been in the custody of the Cabinet since 2002, and resided with foster parents.

On November 22, 2004, the circuit court entered an order dismissing L.K.H.'s petition for custody, finding that the new law applied and that she did not have standing as she could not establish physical custody of the child. On November 30, 2004, the circuit court entered an order in the termination action denying L.K.H.'s motion to intervene, citing her lack of standing and noting that it had previously ordered that she

could not establish physical custody of B.J.H. sufficient to maintain her custody action. On December 2, 2004, L.K.H. filed a CR 59.05 motion to alter, amend, or vacate the November 30, 2004, order, but referenced her custody petition in the body of the memorandum in support of the motion. The circuit court then decided to hold the motion to alter, amend, or vacate in abeyance pending a decision in the termination case. Apparently M.D.H.'s parental rights were terminated, because the Cabinet notified the circuit court in August, 2005, that B.J.H.'s foster parents filed an adoption petition on July 25, 2005. The Cabinet then suggested that Baker v. Webb, 127 S.W.3d 622 (Ky. 2004), addressing the right of a relative to intervene in an adoption proceeding, mandated that the issue of B.J.H.'s permanent custody be resolved in the pending adoption case. Agreeing with the Cabinet, the circuit court entered an order on January 3, 2006, denying the motion to alter, amend, or vacate, and finding that L.K.H. had a right to intervene in the adoption proceeding pursuant to Baker. This appeal from the November 22, 2004, and the January 3, 2006, orders followed.

In her brief, L.K.H. argues that the Cabinet did not act in the best interests of the child by failing to give preference to relatives, that application of the *de facto* custodian definition was improper, that KRS 403.270(1) is unconstitutional, and that the circuit court prematurely denied

her motion to alter, amend or vacate prior to allowing her to present favorable evidence. The Cabinet, in turn, continues to argue that L.K.H. does not qualify as a *de facto* custodian, that she does not have standing to pursue a custody action, and that KRS 403.270 is constitutional.

In our review of this appeal, we have identified two procedural defects that appear to be fatal as both affect our subject matter jurisdiction to review the case. First, L.K.H. failed to name B.J.H. or her guardian *ad litem* as an appellee in her notice of appeal, either in the caption or in the body. An appellant is required by CR 73.03 to "specify by name all appellants and all appellees" in the notice of appeal. Early in this case, the Cabinet had moved to dismiss the Petition for Custody, citing L.K.H.'s failure to name B.J.H. as a necessary party. In response to this motion, L.K.H. promptly moved for leave to amend her petition in order to name B.J.H. as a party and for the appointment of a guardian *ad litem* to protect her interests, which the circuit court granted. However, L.K.H. failed to name B.J.H. as a party in the appeal.

We liken the situation in this case to a proceeding to terminate parental rights, especially as the Petition for Custody was intertwined with a pending termination of parental rights case. The law is well settled in this Commonwealth that children are necessary parties in both termination proceedings

as well as appeals from rulings in such cases. R.L.W. v. Cabinet for Human Resources, 756 S.W.2d 148 (Ky.App. 1988). An appellant's failure to name an indispensable or necessary party in the notice of appeal constitutes grounds for dismissal. Id. In the present case, L.K.H. did not name B.J.H. or her guardian *ad litem* in either the body or caption of the notice of appeal, thereby depriving B.J.H. of the ability to protect her interests.

We have also determined that L.K.H.'s appeal from the November 22, 2004, order appears to be untimely. Pursuant to CR 73.02(1)(a), a notice of appeal must be filed within thirty days after notation by the clerk of service of the judgment. However, the running of the time to file a notice of appeal is terminated by the filing of a timely motion under CR 59, among others, and the running of time for the appeal begins again upon a ruling on such a motion. In this case, L.K.H. filed a CR 59.05 motion to alter, amend or vacate, which must be served by ten days after the entry of the final judgment. While L.K.H. filed a CR 59.05 motion within ten days of the entry of the November 22 order, she did not reference that order in her motion. Rather, she referenced the November 30, 2004, order denying her motion to intervene in the termination proceedings. Because she did not technically move to alter, amend, or vacate the November 22 order, the time for the filing of a notice of

appeal was not terminated, and the thirty-day period would have elapsed on December 22, 2004. L.K.H. did not file her notice of appeal until January 17, 2006, over one year later. While this mistake might not have been fatal, as L.K.H. did reference the dismissal of her Petition for Custody (the subject of the November 22 order) in the memorandum supporting her CR 59.05 motion, when coupled with her failure to name B.J.H. as a party, we have no choice but to dismiss her appeal.

For the foregoing reasons, the above-styled appeal is ORDERED DISMISSED.

ALL CONCUR.

ENTERED: _January 5, 2007_ _/s/ Wil Schroder_____
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

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