RENDERED: SEPTEMBER 21, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001887-DG

ROBERT MATHIS AND
PATRICIA MATHIS — APPELLANT

v.

ON DISCRETIONARY REVIEW
FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 06-XX-00004

K.L., SR.; M.L.; AND CABINET FOR
HEALTH AND FAMILY SERVICES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, HOWARD, AND LAMBERT, JUDGES.

LAMBERT, JUDGE. Robert and Patricia Mathis appeal from a denial of their Motion to Reconsider the Marshall Circuit Court's Order affirming the Marshall District Court's Order revoking their guardianship of K.L., Jr. After careful review, we affirm.

On December 22, 2005, under the advice of Social Services, the Mathises filed a Dependency, Neglect, or Abuse (DNA) Petition in Marshall District Court against K.L., Sr. and M.L., the biological parents of K.L., Jr., a newborn infant. The Petition

alleged neglect of the minor child as evidenced by the child having untreated "ringworm" and "scabies." Prior to filing the DNA action, K.L., Sr. and M.L. gave custody of K.L., Jr. to the Mathises, to whom they are related through marriage.

The DNA Petition was scheduled to be heard December 27, 2005, at which time the court converted the Petition to a public guardianship case. None of the parties were represented by counsel and no counsel was appointed by the court for any of the parties. Furthermore, the court did not appoint a guardian ad litem for the child. At that time, the court appointed the Mathises legal guardians for K.L., Jr. The Order, however, did not contain any language requiring the Mathises to perform any other orders or decrees nor did it contain any provision for child support or child visitation. K.L., Jr., was not committed to the Cabinet for Health and Families Services (hereinafter "the Cabinet").

On February 3, 2006, K.L., Sr., and M.L. filed an Affidavit in Marshall District Court requesting that guardianship of their child be return to them on the alleged grounds that the Mathises were not allowing them visitation pursuant to an extra-judicial agreement reached between the parties and drafted by the Mathises that provided for visitation on Monday, Wednesday, Friday, and Saturday. K.L., Sr. and M.L. alleged that per the agreement only one of the Mathises had to be present for the visits, but that Mrs. Mathis refused them visitation on Monday, January 30, 2006, because Mr. Mathis was not at home. They further alleged that the Mathises had tried to get them to voluntarily allow them to adopt K.L., Jr.

At the hearing on the Affidavit of K.L., Sr. and M.L., the Mathises specifically requested the court to reinstate the original DNA Petition they had filed and further justified the denial of visitation based on the extremely poor hygiene K.L., Sr., and M.L. exhibited when attempting to visit. The request for reinstatement of the DNA Petition was denied, but the court did recognize that withholding visits when hygiene was a problem was appropriate. At this point, the Cabinet became involved in a limited capacity due to an anonymous phone call placed regarding the fact that M.L. was pregnant again. Rita Daughaday, a worker at the Cabinet, testified at the hearing that K.L., Sr. and M.L. were open to working with the Cabinet with the goal of providing a suitable home for K.L., Jr. and the child on the way. The court therefore stated that it was not going to discourage K.L., Sr. and M.L. in any way from continuing to improve their situation to provide for K.L., Jr., but it would leave the guardianship in place while encouraging the parties to work together with the Cabinet on the various issues raised in the hearing.

On March 17, 2006, a review hearing of the guardianship took place where the court issued a Docket Order terminating the Mathises' guardianship of K.L., Jr. The court did not release the child to K.L., Sr. and M.L., but instead ordered that the Mathises surrender custody of the child to the Cabinet.

The Mathises appealed this decision to the Marshall Circuit Court. The court held that "nonrelatives" cannot bring DNA actions and concluded that the Mathises lacked standing to challenge whether or not the District Court erred or abused its

discretion in converting the DNA case to a public guardianship case and later terminating guardianship of the minor child. The Mathises promptly filed a Motion to Reconsider, which was again denied but modified, recognizing that a "nonrelative" can bring a DNA action under KRS 620. This appeal followed.

The Mathises argue that the court erred in denying their appeal to reinstate their guardianship of K.L., Jr., and further that the DNA Petition was wrongfully converted to a public guardianship case and should therefore be reinstated. We agree in part and disagree in part.

Although we will agree that the Marshall District Court made some glaring procedural errors in switching the original DNA Petition to a public guardianship case and then compounded these errors by not providing representation for *any* of the parties, this issue has been rendered moot by subsequent events and proceedings. It has been brought to our attention that the Cabinet, after receiving voluntary custody of K.L., Jr. from K.L., Sr. and M.L., on March 22, 2006, initiated a DNA action against K.L., Sr. and M.L. Therefore, it would be moot to initiate a second DNA action against K.L., Sr. and M.L., and we accordingly deny review on these grounds.

The only remaining question is whether the circuit court erred in affirming the Order revoking the Mathises' guardianship. The Supreme Court of Kentucky set forth the applicable standard of review for appellate courts in another custody case, *Moore v. Asente*, 110 S.W.3d 336, 353-4 (Ky. 2003). There it held a reviewing court may set aside a trial court's findings only if those findings are clearly erroneous, i.e., those findings are

not supported by substantial evidence. We, however, review the circuit court's application of law to the facts *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App.2001); *Hunter v. Hunter*, 127 S.W.3d 656 (Ky.App.2003). After careful review of the record, we agree that the findings of fact by the trial court were not clearly erroneous, but the circuit court erred in its application of the law to those facts. In holding that the Mathises could bring a DNA action but could not appeal the outcome, the circuit court clearly erred. The error, however, is moot in light of the Cabinet's involvement and the new information provided to the Court regarding K.L., Jr.'s placement.

Accordingly, we affirm the judgment of the Marshall Circuit Court.

ALL CONCUR.

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