RENDERED: SEPTEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000615-ME

M. D. [1] APPELLANT

APPEAL FROM WAYNE CIRCUIT COURT
v. HONORABLE JENNIFER UPCHURCH CLARK, JUDGE
ACTION NO. 08-J-00209

CABINET FOR HEALTH AND FAMILY SERVICES
AND E. H., IN THE INTEREST OF: D. D. APPELLEES

OPINION & ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

[1] To protect the child, the Court will reference the individuals by their initials. Other than using initials, we have named the parties as the Appellant did in his notice of appeal.

MOORE, JUDGE: M. D., a "father,"[2] appeals the adjudication hearing order of the Wayne Family Court, in which the court ordered D. D., whom the father alleges is his child, to be placed in the custody of the child's maternal aunt following a finding that the child had been neglected by her mother. After a careful review of the record, we dismiss this appeal because the father failed to name indispensible parties in his notice of appeal.[3]

Pursuant to CR[4] 73.03(1),

> The notice of appeal shall specify by name all appellants and all appellees ("et al." and "etc." are not proper designation of parties) and shall identify the judgment, order or part thereof appealed from. It shall contain a certificate that a copy of the notice has been served upon all opposing counsel, or parties, if unrepresented, at their last known address.

In the caption of the notice of appeal, the father lists the appellant as himself and the appellees as "Family Court" and E. H. The caption also provides "In the interest of: D. D." The body of the notice of appeal does not name any

[2] M. D. asserts that he is the father of D. D., but a review of the family court record reveals that his paternity of the child was not established and that the child's mother reported there was a possibility that M. D. was not the child's father. The family court record does not include any documents showing that a paternity test was conducted in this case, and there is nothing in the record to indicate that M. D. was married to the child's mother when the child was born. Additionally, we note that M. D., whom we will refer to as the "father," in this order, was incarcerated during the proceedings but was represented by counsel and it appears from the docket sheet that M. D. attended some of the proceedings. From the record, we cannot discern when his period of incarceration actually commenced.

[3] The father filed an "appeal motion," which we will characterize as a notice of appeal for purposes of this order.

[4] Kentucky Rule of Civil Procedure.

parties as appellees to this appeal, and it cannot otherwise be discerned from the body of the notice of appeal who the parties are.

In dependency, neglect, and abuse actions filed by the Cabinet for Health and Family Services (Cabinet), the Cabinet is the plaintiff. *See Commonwealth v. Byer*, 173 S.W.3d 247, 249 (Ky. App. 2005). In the present case, the Cabinet filed the neglect action in the family court, so the Cabinet was the plaintiff. Thus, the Cabinet is an indispensible party to this appeal.

Although the Cabinet was the plaintiff in the action below and is listed on the father's brief, the Cabinet is not a party to this appeal because it was not named in the caption of the notice of appeal or listed in the body of the notice of appeal as a party. *See Clark Equipment Co. v. Bowman*, 762 S.W.2d 417, 419 (Ky. App. 1988). Further, as noted *supra* in reviewing the language of the body of the notice of appeal, the Court cannot discern from it that the Cabinet is a party to this appeal.

Additionally, the mother, who had custody of the child and who was found to have neglected the child prior to removal, is not listed in the caption of the notice of appeal or named in the body of the appeal as a party. Just as with the Cabinet, the Court cannot discern from the language in the body of the notice of appeal that the mother is intended as a party to this appeal.

Consequently, because the father failed to include indispensible parties in his notice of appeal, we do not have jurisdiction to review the family

court's order granting custody to the maternal aunt. Accordingly, we must dismiss this appeal.

Alternatively, assuming *arguendo* that the father's notice of appeal met the requirements of CR 73.03(1) listing all indispensible parties, his arguments lack merit. The father contends in his appellate brief that the Cabinet placed the child in imminent danger by placing her with her maternal aunt, and he alleges that, as the child's parent, his wishes for the child's placement should have been considered before the child was placed with her maternal aunt.

In child custody cases, this Court's scope of review is very limited. We will not overturn a trial court's factual findings unless they are clearly erroneous. *See Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Factual findings are clearly erroneous if they are "manifestly against the weight of [the] evidence." *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967) (internal quotation marks omitted). A "reviewing court should not substitute findings of fact for those of the trial court where they were not clearly erroneous." *Reichle*, 719 S.W.2d at 444. We will not disturb a trial court's custody determination unless there was an abuse of discretion. *See Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (internal quotation marks omitted). With this standard in mind, the father has a

very high benchmark to meet to convince this Court that we should find error with the circuit court's decision.

In the present case, the father was either represented by counsel and/or present for the pertinent family court proceedings according to the docket sheet in the record. During these proceedings, the father's counsel raised issues concerning the child's placement with the maternal aunt, but it does not appear that counsel put forth any evidence in the family court to support these allegations. Nonetheless, these concerns were before the family court when it made its decision. Based on the record before us, we cannot find that the family court abused its discretion when it placed the child in the custody of the maternal aunt.

Accordingly, this appeal is dismissed.

ALL CONCUR.

ENTERED: September 18, 2009

/s/ Joy A. Moore
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

M. D., *Pro se*
LaGrange, Kentucky

NO BRIEF FOR APPELLEE