RENDERED: AUGUST 31, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000127-ME

JODI THOMAS APPELLANT

v.

APPEAL FROM TRIMBLE CIRCUIT COURT
FAMILY COURT DIVISION
HON. DOREEN S. GOODWIN, JUDGE
ACTION NO. 16-CI-00065

JOAN PHILLIPS; UNKNOWN FATHER
OF S.N.Z.; AND ELLA JOAN WHORTON APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jodi Thomas brings this appeal from a December 7, 2016, order of the Trimble Circuit Court, Family Court Division, denying Thomas's motion for default judgment and *sua sponte* dismissing Thomas's Verified Petition

for Grandparent Visitation. For the reasons stated, we affirm in part, reverse in part, and remand for proceedings before the family court.

Jodi Thomas is the maternal grandmother of S.N.Z. In June 2016, Thomas filed a Verified Petition for Grandparent Visitation with S.N.Z. pursuant to Kentucky Revised Statutes (KRS) 405.021. The petition stated Ella Whorton was the child's mother but the child resided with Joan Phillips, the child's maternal great-grandmother. Both Phillips and Whorton were named as parties below but failed to file any answer or otherwise respond to the petition. On October 31, 2016, Thomas moved for default judgment. Without conducting a hearing, by order entered December 7, 2016, the family court denied the motion for default judgment and *sua sponte* dismissed the petition. This appeal follows.

We begin our review by noting that Phillips has not filed an appellee's brief in this case. Kentucky Rules of Procedure (CR) 76.12(8)(c) "provides the range of penalties that may be levied against an appellee for failing to file a timely brief." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). This Court may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." *Id.* at 732 (quoting CR 76.12(8)(c)). For purposes of this appeal, given the unique issues

raised in this appeal and that the case looks to grandparent visitation with a child, we have deferred any sanction and elected to review the entire record to address the merits of the appeal.

Appellant raised two issues on appeal. First, she argues the family court erred by not granting her a default judgment for visitation with S.N.Z. Second, she asserts the family court erred in dismissing her petition, *sua sponte*. We will address each issue as follows.

(i) Default Judgment

The family court denied Thomas's motion for default judgment on her petition for visitation. Normally, the denial of a motion for default judgment is an interlocutory order that is not appealable. However, in this case, the family court also summarily dismissed the entire case *sua sponte*. Thus, the issue is ripe for our review in this appeal.

As a general proposition under Kentucky law, default judgments are disfavored. *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007). Thomas has cited no supporting authority that default judgments are permissible in grandparent visitation proceedings in Kentucky. In *Crews v. Shofner*, 425 S.W.3d 906 (Ky. App. 2014), another panel of this Court noted that public policy in Kentucky favored protecting a child's best interest in custody matters, given the necessity to address the child's best interest. *Id.* at 911. Given that the

grandparent visitation statute, KRS 405.021, also requires a court to determine whether such visitation is in the child's best interest, the logical inference is that a default judgment should not be granted under KRS 405.021, but rather the court should address whether visitation is in the child's best interest, preferably through an evidentiary hearing. Accordingly, we do not believe the family court erred in denying the motion for default judgment and affirm the same.

(ii) *Sua Sponte* Dismissal of Petition

As noted, after denying Thomas's motion for default judgment, the family court *sua sponte* dismissed Thomas's petition without conducting an evidentiary hearing or considering the merits of the petition. The court merely concluded that visitation would not be in S.N.Z.'s best interest, although we find no evidence regarding this issue in the record on appeal. Relevant to our review, the family court did state the following:

> In July, 2016, the Cabinet for Health and Family Services became aware of Petitioner's petition for grandparent visitation. The Cabinet became aware, and did advise this Court, that the Petitioner, Jodi Thomas, has CPS [presumably child protective services] history in Indiana of substantiated abuse against Ella Whorton. Accordingly, the Cabinet advised this Court that it did not recommend unsupervised contact between S.N.Z. and the Petitioner. This Court did adopt the recommendations of the Cabinet.
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> . . . .

> Given the substantiated physical abuse by Petitioner, this Court finds it would not be in the best interest of S.N.Z. to have unsupervised contact with S.N.Z. [sic] The Court need not hold an evidentiary hearing in order to reach the conclusion that visitation with Petitioner would not be in the child's best interest. In fact, to do so would be in direct contravention of this Court's own prior Orders.

Order at 2.

Presumably, the family court's communications with the Cabinet for Health and Family Services (Cabinet) were the basis for the family court's dismissal of the petition. What is disturbing for this Court is the appearance of possible *ex parte* communications with the Cabinet given the Cabinet is not a party to nor has entered an appearance in this proceeding. Our review of the 26-page record on appeal does not reflect that the Cabinet participated in any manner in this case. Nor does the record reflect when, where and how the Cabinet "advised" the court of its recommendation in this case when it was not a party. Yet, communications from the Cabinet, perhaps in the DNA case referenced by the court, appears to be the sole basis why the court dismissed the case, *sua sponte*. This is most troublesome, especially since there is nothing in the record of this case to support dismissal.

Like default judgments, Kentucky law strongly disfavors *sua sponte* dismissals. *See e.g.*, *Doster v. Kentucky Parole Bd.*, 308 S.W.3d 231, 232 (Ky. App. 2010). Indeed, nearly 25 years ago, this Court forcefully held that "it is

fundamental that a trial court has no authority to otherwise dismiss claims without a motion, proper notice and a meaningful opportunity to be heard." *Storer Commc'ns of Jefferson Cty, Inc. v. Oldham Cty. Bd. of Educ.*, 850 S.W.2d 340, 342 (Ky. App. 1993). The only limited exception would be *sua sponte* dismissal for lack of subject matter jurisdiction, which is not relevant to this case. *Id.* Thus, dismissal of this action by the family court clearly constituted an abuse of discretion and otherwise an error of law.

On remand, we remind the family court of the long-standing precedent in Kentucky that requires a court to conduct a hearing to resolve a grandparent visitation petition. *Mustaine v. Kennedy*, 971 S.W.2d 830, 832 (Ky. App. 1998). Additionally, to determine whether visitation in this case is in the child's best interest, an evidentiary hearing is mandated. *See K.C.O. v. Cabinet for Health and Family Servs.*, 518 S.W.3d 778, 785 (Ky. App. 2017). And, the family court must consider the various factors to determine if the visitation is in the child's best interest as set out in *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004).

For the foregoing reasons, we affirm the Trimble Family Court's denial of Thomas's motion for default judgment but reverse its *sua sponte* dismissal of the grandparent visitation petition. The matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen Emery
LaGrange, Kentucky

NO BRIEF FOR APPELLEES.