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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001466-ME
AND
NO. 2017-CA-001924-ME

S.H. APPELLANT

v. APPEALS FROM CLARK FAMILY COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 15-J-00209-001

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; S.F.; J.F.; AND K.F., A MINOR CHILD APPELLEES

AND

NO. 2017-CA-001467-ME
NO. 2017-CA-001932-ME

S.H. APPELLANT

v. APPEALS FROM CLARK FAMILY COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 15-J-00210-001

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; S.F.; J.F.; AND L.J.F., A MINOR CHILD — APPELLEES

AND

NO. 2017-CA-001894-ME

S.H. — APPELLANT

v.

APPEALS FROM CLARK FAMILY COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 16-CI-00115

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; S.F.; AND J.F. — APPELLEES

OPINION AND ORDER
AFFIRMING
NO. 2017-CA-001894-ME
AND DISMISSING
NOS. 2017-CA-001466-ME, 2017-CA-001467-ME,
2017-CA-001924-ME, AND 2017-CA-001932-ME

** ** ** ** **

BEFORE: ACREE, CLAYTON AND TAYLOR, JUDGES.

ACREE, JUDGE: S.H. (Grandmother) is the paternal grandmother of K.F. and L.F. (Children) who are the subjects of the Clark Family Court's findings of facts, conclusions of law, and order that addressed and resolved two related juvenile

actions and a custody action. Grandmother filed five appeals from these three actions. By this Opinion and Order we dismiss Grandmother's appeals from the juvenile actions for lack of standing because she was not a party of record in the underlying cases before the family court.[1] We affirm the family court's dismissal of Grandmother's petition for custody because it failed to state a claim upon which relief can be granted.

BACKGROUND

This case began in 2015 when the Cabinet filed neglect petitions against the Children's parents based on allegations of the parents' substance abuse and domestic violence. The Cabinet removed the Children from their parents' care and placed them with their paternal aunt. Two days later, the Children's father threatened the aunt, causing her to fear for her safety and that of her own children. The Cabinet filed an emergency custody action and immediately placed the Children in foster care without seeking an alternative relative placement.

Grandmother, disapproving of this action, contacted the Cabinet so she could be considered a candidate for placement of the Children. The Cabinet did not originally consider Grandmother for placement because she lived with the

[1] When final disposition of an appeal is made by an "Opinion and Order," as in this case, the party adversely affected may move for reconsideration as provided by Kentucky Rules of Civil Procedure (CR) 76.38(2) within ten days of entry, but a petition for rehearing is unauthorized. CR 76.32(1).

aunt when father's threats disrupted placement with her. Grandmother had since moved from the aunt's residence, but it took some time before she was able to establish a stable living situation that the Cabinet could evaluate.

After the Cabinet placed the Children in foster care, Grandmother succeeded in scheduling a home evaluation. Although the Cabinet gave Grandmother a good recommendation, it declined to place the Children with her because of "her lack of relationship with K.F., the youngest child; her limited history of stability (she had only lived on her own for about three months); her financial instability; and her questionable protective capacity regarding her ability to protect the children from her son." The denial of placement prompted Grandmother to file a motion to intervene in the juvenile actions. She also initiated a separate action with the family court petitioning for custody of the Children.

The family court denied Grandmother's motion to intervene. She never appealed that decision. Instead, she proceeded with the custody action. The Cabinet filed a motion to dismiss the custody action for failure to state a claim upon which relief could be granted, which the family court took under advisement.[2] In the meantime, the family court noted at one of the hearings that it

[2] The record includes no written response from Grandmother. However, Grandmother's counsel is seen on the videotape transcript of the July 19, 2016 hearing presenting to the judge a written memo purportedly opposing the motion. Grandmother states in her brief: "Oddly this memo is

"wishes to allow [Grandmother] opportunity to make her case in C.I. action before goal change [in the juvenile cases]. Counsel for [Grandmother was] warned time is of the essence."

Prior to a hearing date in the custody action, the parties agreed that the Cabinet should conduct a second home evaluation for Grandmother. Based on the second evaluation, the Cabinet recommended placement with Grandmother.[3] The Cabinet then began a lengthy transition period by slowly increasing the length and frequency of the Children's visits with Grandmother. She complied with all the Cabinet's requests.

By this point, the Children had resided with their foster family for almost two years. Nevertheless, Grandmother filed a motion *in limine* to exclude the foster parents from participating in her custody action. She also took issue with the Cabinet's handling of her initial home evaluation, which the family court did not address.

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not in the record and is attached as appendix II, to this brief." (Appellant's brief, p. 5). "On appeal, our review is confined to matters properly made a part of the record below. . . . [P]resentation of extraneous material in briefs is improper . . . ." *Baker v. Jones*, 199 S.W.3d 749, 753 (Ky. App. 2006) (citations omitted). We have disregarded the extraneous materials.

[3] The Cabinet's position has changed. Its brief includes this acknowledgement: "While the Cabinet recognizes that a goal change [to adoption] is not what it recommended at the permanency hearing, the Cabinet believes the [Family] Court had sufficient evidence to support its findings of fact and conclusions of law. . . [which also] outline the sound legal grounds for its decision. . . . The Cabinet respects the [Family] Court's decision and plans to proceed with termination of parental rights and adoption." (Appellee Cabinet's brief, p. 1).

A hearing was scheduled in the custody matter for June 28, 2017. When time for the hearing arrived, the Cabinet declined to send an attorney because of its understanding with Grandmother that placement in the juvenile cases would be with her. Despite the Cabinet's lack of participation, the family court commenced the hearing while simultaneously conducting a permanency hearing in the juvenile actions. Grandmother was unaware that the family court was going to hear both matters concurrently. Regardless, Grandmother presented proof and testimony and was cross-examined with evidence presented in the juvenile actions. The family court allowed the foster parents to testify, contrary to the objections of the parties and Grandmother's motion *in limine*.

Witnesses also testified to Grandmother's inability to protect the children. Testimony was had to the effect that Grandmother: (1) would never call the police on the children's father because of her strong loyalty toward him; (2) would allow the children's parents to stay in the home while they were on drugs or had warrants; and (3) would call family members for financial help. The guardian ad litem also recommended that the family court change the goal to adoption and deny Grandmother's request for custody.

At the end of the hearing, the family court stated it would dismiss the custody matter and change the goal in the juvenile cases from placement to

adoption. The family court addressed the juvenile actions and the custody action in a single written order. Grandmother's five appeals followed.

This Court issued an order for Grandmother to show cause why we should not dismiss her appeals from the juvenile cases for lack of standing. She filed, and we have considered, her response to that show cause order. For the reasons stated below, we dismiss her appeal from the juvenile actions.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. *Upchurch v. Clinton County*, 330 S.W.2d 428, 429-30 (Ky. 1959). A court should not grant such a motion "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved . . . ." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Accordingly, "the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009). This eliminates any need by the trial court to make findings of fact; "rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Because a motion to dismiss for failure to state a claim upon

which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

ANALYSIS

Juvenile Actions

Grandmother raises numerous issues rooted in the juvenile actions. However, we will not reach those issues because we must dismiss Grandmother's appeals from those actions for lack of standing.

The family court denied Grandmother's motion to intervene in the juvenile actions and she did not appeal that ruling. Therefore, she was not a party of record in those underlying actions and has no standing to appeal them. *Grange Mut. Cas. Co. v. McDavid*, 664 S.W.2d 931, 934 (Ky. 1984) (person denied intervention is a nonparty without standing to appeal, except when appeal is to challenge denial of intervention as matter of right). "Only parties of record in the underlying action have standing to appeal . . . ." *Howell v. Commonwealth*, 163 S.W.3d 442, 446 (Ky. 2005) (citing *Bartholomew v. Paniello*, 287 S.W.2d 616, 617 (Ky. 1956)).

"For actions under KRS 610.010(2)(d) the Kentucky Rules of Civil Procedure [(CR)] shall apply." Kentucky Revised Statutes (KRS) 610.080(2). Although the Supreme Court, from time to time, has amended CR 73.02 (the rule

governing notices of appeal), it is still true that "[t]he term 'party' as used in CR 73.02(2) clearly means a party to the proceeding." *City of Louisville v. Christian Business Women's Club, Inc.*, 306 S.W.2d 274, 276 (Ky. 1957).

Grandmother relies solely on *White v. England*, 348 S.W.2d 936 (Ky. 1961) for a broader view of who has standing to bring an appeal. *White* is a post-decree custody case which Grandmother accurately quotes as saying: "The term 'party' as used in KRS 243.590 and CR 73.02, which respectively authorize an appeal by 'any party aggrieved' by a judgment, means a party of record, and one who is not a party may not do so even though he filed a notice of appeal." *Id.* at 937. Rather than focusing on the phrase "means a party of record," Grandmother emphasizes *White's* citation to KRS 243.590 as allowing appeals by "any party aggrieved[.]" She claims that statute grants her the right to appeal as a "party aggrieved" by the family court's judgment in the juvenile cases. Her argument is not persuasive.

Sufficient time has passed since *White* was rendered that we can acknowledge its patent error without too much embarrassment. The statute cited in that custody action, KRS 243.590, has nothing to do with custody. It is part of the legislative scheme for alcoholic beverage licensing.[4] Its citation can only be

[4] Under Chapter 243 (Alcoholic Beverages; License and Taxes), "final orders of the [State Alcoholic Beverage Control B]oard may be appealed to the Circuit Court" but only by "[a] party to the administrative action . . . ." KRS 243.560(1), (2). "Any party [to the circuit court

explained as the Court's inattentive research blunder. KRS 22A.020, not KRS 243.590, authorizes "an appeal [to] be taken as a matter of right to the Court of Appeals from . . . Circuit Court, including a family court division . . . ." KRS 22A.020.

Because Grandmother was denied intervention in the underlying juvenile proceedings, she was not a party to those cases and lacks standing to appeal the order entered in them. We must dismiss those appeals.

Dismissal of Custody Action

When Grandmother filed her petition for custody and timesharing, she failed to allege facts that under Kentucky law would state a claim that she is entitled to custody of the Children. Our thorough examination of the record reveals there are no facts to establish such a claim. Grandmother is not the Children's biological parent. She did not claim she qualified as a *de facto* custodian and no evidence would have supported such a claim. KRS 403.270; KRS 405.020(3). She did not fit the definition of a "person acting as a parent[.]" *Chadwick v. Flora*, 488 S.W.3d 640, 644 (Ky. App. 2016) (citing KRS 403.800(13)(a)). And there was no "waiver of some part of [the Children's

administrative appeal] aggrieved by a judgment of the Circuit Court may appeal to the Court of Appeals in accordance with the Rules of Civil Procedure." KRS 243.590.

parents'] custody rights demonstrating an intent to co-parent a child with" Grandmother. *Mullins v. Picklesimer*, 317 S.W.3d 569, 579 (Ky. 2010).

In its motion to dismiss the custody petition the Cabinet argued, among other things, that Grandmother failed to state a claim upon which relief could be granted. A year later, at the end of the June 2017 hearing, the court announced it would be granting the motion. When the judgment was rendered in October 2017, it stated simply: "Civil Action No. 16-CI-00115 is hereby DISMISSED as the Court had full jurisdiction to determine the care, custody and control of the children in the juvenile actions."

Grandmother's argument for reversing the dismissal of her custody petition does not address whether her custody petition states a claim. Rather, it blurs the line between her custody case and the juvenile cases. The same can be said for the family court's handling of these cases together. That blur was the basis for Grandmother's arguments that the family court acted improperly. In essence, Grandmother argues the family court abused its discretion when it allowed the June 28, 2017 hearing, believed by Grandmother to be about her custody petition, to "morph instantaneously into a permanency hearing" conducted without participation by the Cabinet. (Appellant's brief, p, 20).

Neither appellee responds to Grandmother's argument, nor does either appellee address the dismissal of the custody petition at all.

Nevertheless, it is "the rule in this jurisdiction that the judgment of a lower court can be affirmed for any reason in the record." *Fischer v. Fischer*, 348 S.W.3d 582, 591 (Ky. 2011), *abrogated on other grounds by Nami Res. Co. L.L.C. v. Asher Land & Mineral, Ltd*., 554 S.W.3d 323 (Ky. 2018) And, "[i]f an appellate court is aware of a reason to affirm the lower court's decision, it must do so, even if on different grounds." *Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 496 (Ky. 2014) (citing *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006). The Cabinet's motion was well taken that Grandmother's petition for custody failed to state a claim for which relief can be granted. We affirm the order dismissing the custody petition.

CONCLUSION

Grandmother's appeals from the juvenile actions (NO. 2017-CA-001466-ME; NO. 2017-CA-001467-ME; NO. 2017-CA-001924-ME; NO. 2017-CA-001932) are hereby DISMISSED for lack of standing.

We have read Grandmother's petition for custody and conclude that it fails to state a claim upon which relief can be granted. For that reason, we AFFIRM the family court's dismissal of Grandmother's custody petition (NO. 2017-CA-001894-ME).

ALL CONCUR.

ENTERED: March 1, 2019

/s/ Glenn E. Acree
Judge, Court of Appeals

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