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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000292-ME

SHAYNE BLACKABY

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 18-CI-00486

NANCY BARNES

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GOODWINE, LAMBERT, AND K. THOMPSON, JUDGES.

GOODWINE, JUDGE: Shayne Blackaby (“Blackaby”) appeals from a Shelby Circuit Court order denying his petition for grandparent visitation. Blackaby argues the family court erred in ruling he did not have standing to pursue visitation after Nancy Barnes (“Barnes”) adopted K.N.B. After careful review, we affirm.

BACKGROUND

K.N.B. was born in 2012 to Timothy Blackaby (“T.B.”) and Barnes’ unnamed daughter. On February 5, 2016, Barnes petitioned the family court to adopt K.N.B. During the adoption proceedings, Barnes’ daughter consented to the adoption, relinquishing her parental rights. However, T.B. contested the adoption and participated in the proceedings through a court-appointed guardian *ad litem* due to his incarceration.

On September 22, 2016, T.B. died, but K.N.B.’s adoption proceedings were still ongoing. The family court finalized Barnes’ adoption of K.N.B., entering its Amended Judgment of Adoption on October 23, 2017. Nearly one year later, Blackaby, K.N.B.’s paternal grandfather, petitioned the family court for grandparent visitation under KRS¹ 405.021.

During the adoption proceedings, the family court did not hold a hearing on Blackaby’s petition for grandparent visitation. Instead, it ordered the parties to provide memoranda regarding the legal issues by November 19, 2018. Both parties complied with this order. Two months later, the family court entered its findings of fact, conclusions of law, and order denying Blackaby’s petition for visitation. Blackaby did not file a motion to alter, amend, or vacate the ruling with the family court. Rather, this appeal followed.

¹ Kentucky Revised Statutes.

Before we begin our analysis, we must again address the rules of appellate procedure. Under Kentucky law, CR² 73 through CR 76 are the principal rules governing appellate practice in the Kentucky Court of Appeals and Supreme Court. CR 76.12 lays out the briefing criteria to which attorneys must adhere to successfully prepare an appellate brief for our review. A plain reading of the rule indicates strict compliance with its mandates are essential for a litigant’s vitality. It warns litigants that “[a] brief may be stricken for failure to comply with any substantial requirement of th[e] [r]ule[.]” CR 76.12(8)(a).

Moreover, our case law dictates that “[c]ompliance with CR 76.12 is mandatory.” *Smothers v. Baptist Hosp. E.*, 468 S.W.3d 878, 881-82 (Ky. App. 2015) (citing *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010)). It explains that we bear no responsibility “to consider portions of the Appellants’ brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein.” *Leamon v. Phillips*, 423 S.W.3d 759, 762 (Ky. App. 2014) (citing *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985)).

But in 1986, our Supreme Court acknowledged the doctrine of substantial compliance, which recognized, reconciled, and furthered “three significant objectives of appellate practice: achieving an orderly appellate process,

² Kentucky Rules of Civil Procedure.

deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal.” *Ready v. Jamison*, 705 S.W.2d 479, 482 (Ky. 1986). This doctrine provided our Court with *discretion* to address and point out latent defects in briefs and allow appeals to proceed based on the merits of the argument, if warranted, or review for palpable error.

Thus, we address the procedural issue before us in this case. Under CR 76.12(4)(c)(v), an appellant’s brief “*shall* contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” (Emphasis added). Here, Blackaby omits this integral section in his brief. He neither cites to the record to indicate where he preserved any issue for appeal nor addresses the preservation issue at all.

Our review of the record indicates that, in violation of CR 76.12(4)(c)(v), Blackaby never preserved the issues for appeal he now wishes us to examine. During the initial stages of this case, the family court did not hold a hearing on the issues of visitation, but rather ordered the issues be briefed by the parties. Once the parties filed their respective briefs, the family court did not hold oral argument. Instead, the family court made its ruling based solely on the substance of the briefs. Thereafter, Blackaby appealed.

We find issue with Blackaby's refusal to seek recourse at the trial level. The record lacks any indicia of an objection by Blackaby to the family court, including no: (1) formal objection on the record; (2) motion to reconsider; or (3) CR 59.05 motion to alter, amend, or vacate. Blackaby did not provide the family court an opportunity to correct, consider, or contemplate any objection to the supposed error in its ruling.

We also note that Patrick F. Graney, counsel for Barnes, notified this Court that Barnes did not intend to file a brief and moved this Court to withdraw. His motion was granted. We have three options when an appellee has failed to file a brief within the time allowed. We 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." CR 76.12(8)(c).

Due to the importance of addressing grandparents' visitation following adoption under the facts of this case, we review for palpable error. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). However, counsel for Blackaby should take note that this Court may not be so forgiving in the future.

STANDARD OF REVIEW

The family court's findings of fact are entitled to great deference on appeal. Accordingly, this Court applies the clearly erroneous standard of review. CR 52.01 ("Findings of fact, shall not be set aside unless clearly erroneous"); *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). Where the record contains substantial evidence to support the trial court's findings, we will not disturb them on appeal. *Id.* Application of the law to the facts will be reviewed *de novo*. *D.G.R. v. Commonwealth, Cabinet for Health and Family Services*, 364 S.W.3d 106, 113 (Ky. 2012) (citing *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 716 (Ky. App. 2010)).

ANALYSIS

The facts before the family court were "largely uncontroverted." Record ("R") at 52. K.N.B. was born in 2012 to Barnes' daughter and T.B. On February 5, 2016, Barnes, K.N.B.'s maternal grandmother, petitioned the family court for adoption of K.N.B. During the proceedings, Barnes' daughter consented to the adoption, relinquishing her parental rights. However, T.B. contested the adoption and, due to his incarceration, participated in the proceedings through a court-appointed guardian *ad litem*.

T.B. died on September 22, 2016, prior to the completion of K.N.B.'s adoption proceedings. The family court finalized Barnes' adoption of K.N.B.,

entering its Amended Judgment of Adoption on October 23, 2017. Blackaby petitioned the family court for grandparent visitation for the first time on September 25, 2018.

The family court determined that Blackaby did not file his petition for grandparent visitation timely, waiting more than two years after T.B.'s death. Barnes' petition for adoption of K.N.B. was filed prior to T.B.'s death and he participated in the proceedings. Moreover, Blackaby did nothing to establish court-ordered visitation between the time of T.B.'s death and the conclusion of the adoption proceedings.³ The family court found that Blackaby knew about the adoption case because Blackaby stated numerous times in his affidavit in support of his petition for visitation the fact that Barnes had attempted multiple times to have T.B.'s parental rights terminated, but T.B. refused.

Blackaby acknowledged he was aware of “the court proceedings . . . trying to terminate [T.B.'s] rights. . . .” R. at 25. However, despite this knowledge, Blackaby did not pursue grandparent visitation rights established in accordance with KRS 405.021. *Id.* Instead, he argues, he merely believed [Barnes] was pursuing “custody.” *Id.*

³ According to Blackaby's affidavit, he did not seek any legal advice during the adoption proceedings because he did not know that his visitation rights were being affected. R. at 25. “[K.N.B.] regularly came to all of our family functions and holiday dinners/celebrations. I would also get visitation with [K.N.B.] on a regular basis. These visits continued after [T.B.'s] death but were cut off by [Barnes] in June 2018.” *Id.*

KRS 405.021(1)(a) provides that a court may “grant reasonable visitation rights to either the paternal or maternal grandparents of a child”

The statute carves out an exception in the case of a parent whose rights were terminated, allowing the grandparent who sought visitation prior to termination to enforce any orders obtained for visitation. Thus, the statute protects all such grandparents in those termination cases.

However, this Court has held that KRS 405.021 is foreclosed upon the termination of parental rights if a grandparent has not previously been granted visitation by the circuit court. *E.D. v. Commonwealth, Cabinet for Health and Family Services*, 152 S.W.3d 261 (Ky. App. 2004). As the family court properly found, Blackaby could not avail himself of KRS 405.021⁴ because he did not obtain an order for grandparent visitation prior to the termination of T.B.’s parental rights.

Blackaby argued before the family court and now on appeal that the rationale of *Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989), carving out an exception for stepparent adoptions, should apply to this case. *Hicks* is Kentucky’s seminal case addressing grandparents’ statutory rights cut off by termination and adoption

⁴ This statute was amended by the General Assembly, effective July 14, 2018. It added: “(b) If the parent of the child who is the son or daughter of the grandparent is deceased, there shall be a rebuttable presumption that visitation with the grandparent is in the best interest of the child if the grandparent can prove a pre-existing significant and viable relationship with the child.” The amendment, however, did not change when a petition must be filed.

statutes.⁵ According to *Hicks*, the existence of a grandparents' right to visitation is exclusively the prerogative of the legislature and there are certain times when the court should summarily deny the grandparents' right to do so. *Id.* at 71.

“Litigation by grandparents, [of visitation with a child whose parents' rights were terminated,] would frustrate and circumvent the termination decree.” *Id.* The family court concluded that although T.B.'s rights were not terminated, and they lapsed by virtue of his death, there was an action pending before his death to terminate his rights, and Blackaby was aware of the proceeding. *R.* at 55.

Blackaby had an opportunity to petition the family court for visitation under KRS 405.021 prior to T.B.'s death but failed to do so.

Blackaby asked the family court to extend the stepparent exclusion found in *Hicks* to this case. The family court noted that it “would love nothing better than to preserve every familial relationship for the child at issue here. However, [its] hands are tied to the relevant case law, which is *Hicks*.” *R.* at 55. *Hicks* makes clear that “[g]randparents rights do not extend to adoptions which are not stepparent adoptions” *Id.* at 73. The family court acknowledged that “the biological relationship of the maternal grandmother's side of the family will

⁵ *E.D.*, 152 S.W.3d at 263, noted that the apparent purpose of the 1996 amendment to KRS 405.021 was “partially to abrogate the harsh rule established by [*Hicks*] that the termination of parental rights also terminates any grandparents' visitation rights.”

continue on, while the paternal side is forever cut off by the decision in this case, but the Court has no authority to conclude otherwise.” R. at 55.

Does the same rationale for a stepparent adoption not cutting off the tie to one side of the family, while preserving the other side, apply here? Perhaps, but that is a question the Kentucky Supreme Court will have to answer. For now, the only exception carved out by *Hicks* is for stepparent adoption, or where the grandparent has preserved their right utilizing a court under KRS 405.021. *E.D.*, 152 S.W.3d at 263.

Blackaby never preserved his right to have visitation with K.N.B. by pursuing same under KRS 405.021, and the facts of this case do not fall into the exception for stepparent adoptions created by *Hicks*. Thus, the family court did not palpably err by dismissing Blackaby’s petition for grandparent visitation.

CONCLUSION

Based on the foregoing analysis, we affirm the January 25, 2019 findings of fact, conclusions of law, and order of the Shelby Circuit Court dismissing Blackaby’s petition.

THOMPSON, K., JUDGE, CONCURS.

LAMBERT, JUDGE, CONCURS AND FILES A SEPARATE
OPINION.

LAMBERT, JUDGE, CONCURRING: I concur with the majority opinion because it follows the law in our Commonwealth as it presently exists under *Hicks*. However, the result here is quite harsh and, in my judgment, is not in the best interest of the child. I hope our Supreme Court will give this type of situation the long and hard look I believe it deserves.

BRIEF FOR APPELLANT:

Wesley E. Bright
Campbellsville, Kentucky

BRIEF FOR APPELLEE:

No brief filed.