RENDERED: SEPTEMBER 18, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001832-ME

M. A. B. APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE MICA WOOD PENCE, JUDGE
ACTION NO. 19-AD-00029

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND
FAMILY SERVICES APPELLEE

AND NO. 2019-CA-001834-ME

M. A. B. APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE MICA WOOD PENCE, JUDGE
ACTION NO. 19-AD-00030

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND

FAMILY SERVICES APPELLEE

OPINION AND ORDER[1]
DISMISSING

** ** ** ** **

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

GOODWINE, JUDGE: M.A.B. (Mother) appeals the Barren Circuit Court's orders terminating her parental rights to her two children, M.L.D.M. and J.A.M. (twins). M.A.B. failed to name the children as parties anywhere in the notices of appeal, although the certificates of service included the children's guardian *ad litem* in a handwritten notation by the clerk. In response to a show cause order issued by this Court M.A.B. indicated she was confused whether to name the children because they were not listed as parties in the caption of the family court's order. By order entered February 25, 2020, a motion panel of this Court, in a split 2-to-1 vote, found M.A.B. had shown good cause why the appeal should not be dismissed for failure to name an indispensable party. This was an interlocutory order.[2]

[1] Parties should take note that this decision is designated an "opinion and order" and, therefore, falls under Kentucky Rules of Civil Procedure (CR) 76.38. Thus, petitions for rehearing are not authorized under CR 76.32(1)(a).

[2] "[T]here is neither reason nor authority for treating decisions on [the Court of Appeals'] motion panel which make no final disposition of the case any differently than interlocutory orders in the trial court." *Knott v. Crown Colony Farm, Inc.*, 865 S.W.2d 326, 329 (Ky. 1993). "Such an order is by its nature subject to further review in the court where the case is still

Pursuant to CR 73.03(1), a notice of appeal shall specifically identify all appellants and all appellees. It is well-settled that "[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court." *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). "[F]ailure to name an indispensable party in the notice of appeal is 'a jurisdictional defect that cannot be remedied[.]'" *Browning v. Preece*, 392 S.W.3d 388, 391 (Ky. 2013) (quoting *Stallings*, 795 S.W.2d at 957).

In Kentucky, children are indispensable parties to an appeal from an order terminating their parent's rights. *R.L.W. v. Cabinet for Human Resources*, 756 S.W.2d 148 (Ky. App. 1988). In a subsequent case, *R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36, 40 (Ky. App. 1998), this Court distinguished the facts of *R.L.W.*, finding that dismissal was not required where the children were named in the caption of the notice of appeal and the guardian *ad litem* was served with the pleadings. The Kentucky Supreme Court later cited *R.C.R.* with approval in *Morris v. Cabinet for Families and Children*, 69 S.W.3d 73, 75 (Ky. 2002), holding, "the inclusion of the child's name in the caption, coupled with the child's guardian having been served with the relevant pleadings, is more than sufficient to provide the parties with notice and to satisfy CR 73.03."

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pending, either at the request of a party or sua sponte, until a final, appealable decision has been entered, whether by judgment, order or opinion." *Id.*

In contrast, in *A.M.W. v Cabinet for Health and Family Services*, 356 S.W.3d 134, 135 (Ky. App. 2011), this Court dismissed an appeal where, although the child was named in the caption, the guardian *ad litem* was not served with a copy of the notice of appeal.

Here, unlike *R.C.R.* and *Morris*, the notices of appeal did not name the children in either the caption or the body of the notices of appeal. The notice of appeal "places the named parties in the jurisdiction of the appellate court." *Stallings*, 795 S.W.2d at 957. Although the children's guardian *ad litem* was handwritten by the clerk on the certificate of service, we cannot conclude that serving the guardian *ad litem* was sufficient to transfer jurisdiction over M.L.D.M. and J.A.M. to this Court. The children were necessary and indispensable parties to these appeals, and the failure to name them in the notices of appeal requires dismissal of these appeals. *See A.M.W.*, 356 S.W.3d at 135. Consequently, this Court lacks jurisdiction to consider these appeals.

For the foregoing reasons, the Court ORDERS that these appeals be DISMISSED.

L. THOMPSON, JUDGE, CONCURS.

K. THOMPSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

ENTERED: Sept. 18, 2020

Pamela R. Gorbuirke

JUDGE, COURT OF APPEALS

THOMPSON, K., JUDGE, DISSENTING: I respectfully dissent because the majority opinion and order is elevating form over substance. While I agree that children are indispensable parties, by giving notice to the guardian *ad litem* (GAL), their interests are being represented. I agree with the motion panel and would allow the case to be considered on the merits.

Just as parents have a superior right to raise their children over all others, children have a superior right to be raised by fit parents over all others. "[T]he child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky v. Kramer*, 455 U.S. 745, 760, 102 S.Ct. 1388, 1398, 71 L.Ed.2d 599 (1982).

> The seriousness of the ramifications of terminating a parent's rights to custody and care of a child cannot be overstated. "The rights to conceive and to raise one's children have been deemed essential, basic civil rights of man, and rights far more precious than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (internal quotations and citations omitted). For this very reason, the termination of parental rights has been called "the family law equivalent of the death penalty in a criminal case." *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (1991).

Commonwealth, Cabinet for Health and Family Services v. S.H., 476 S.W.3d 254, 259 (Ky. 2015).

In Kentucky, the fundamental right of a parent in the parental relationship is so sacred that parents have the right to counsel when the government seeks to interfere with that right. Kentucky Revised Statutes (KRS) 625.080(3). In *R.V. v. Commonwealth, Department for Health & Family Services*, 242 S.W.3d 669, 673 (Ky.App. 2007), this Court held:

> parental rights [to] a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings. This includes all critical stages of an underlying dependency proceeding in district court, unless it can be shown that such proceeding had no effect on the subsequent circuit court termination case.

Unfortunately, appointed counsel is often overworked and almost always underpaid as KRS 625.080(3) authorizes only a $500 maximum fee for appointed counsel in termination of parental rights cases which is to cover services rendered at both trial and on appeal. *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361, 366-67 (Ky.App. 2012). While I believe that amount is woefully low, that is a matter for the legislature to correct. However, a parent should not be denied appellate review because counsel made an error in the notice of appeal.

In civil suits where legal malpractice occurs foreclosing a meritorious claim, monetary damages may be sought against the attorney to make a party

whole. In criminal cases where ineffective assistance of counsel takes place, the defendant may receive a new trial or other appropriate relief. However, in a termination of parental rights case, there is no adequate redress for a dismissed appeal which finalizes the termination and conclusively ends all parental rights. Should fit parents be thereby permanently separated from their children, such deprivation harms both parents and children as "custody of a child by a suitable natural parent and best interest of the child are one and the same." *McNames v. Corum*, 683 S.W.2d 246, 247 (Ky. 1984).

Unfortunately, errors in failing to name all the appropriate parties on appeal are all too common in termination of parental rights cases. We do a disservice to the parents and children involved when we fail to review whether parental rights were properly terminated by applying a hyper-technical interpretation to the invocation of our appellate jurisdiction which elevates form over substance. Instead, we should follow a substantial compliance approach so as to: "achiev[e] an orderly appellate process, decid[e] cases on the merits, and see[] 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 substantial compliance policy was applied in *Lassiter v. American Express Travel Related Services Co., Inc.*, 308 S.W.3d 714 (Ky. 2010), and *Flick v. Estate of Wittich*, 396 S.W.3d 816 (Ky. 2013), when the precise parties were not named.

While it would be an extension of the existing substantial compliance approach to apply it to the situation where the children are not named in the notice of appeal at all, I believe the naming of the children is not essential so long as the GAL receives appropriate notice. As explained in *Morris v. Cabinet for Families and Children*, 69 S.W.3d 73, 74 (Ky. 2002), "[t]he principal objective of a pleading is to give fair notice to the opposing party." I am confident that this objective is adequately served where the GAL receives service. If anyone is to file a brief on the children's behalf, it would be their GAL.

Therefore, I disagree with our unpublished cases which have held that service on the GAL alone is insufficient to confer jurisdiction and requires dismissal as I believe them to be wrongly decided. *See S.D.B. v. Commonwealth*, Nos. 2018-CA-000127-ME, 2018-CA-000128-ME, and 2018-CA-000703-ME, 2019 WL 1868913, at *2 (Ky.App. Apr. 26, 2019) (unpublished); *A.A.W.S.L. v. Cabinet For Families And Children*, No. 2004-CA-001129-MR, 2004 WL 2674366, at *2 (Ky.App. Nov. 24, 2004) (unpublished).

An appropriate approach, given the important interests involved in termination cases, would be for our Court to identify the problem and permit counsel to amend the notice of appeal to properly name all the indispensable parties. The Court in *Flick*, 396 S.W.3d at 823, while not reaching the issue of whether a motion to amend a notice of appeal and join parties should have been

granted, noted that while Kentucky Rules of Civil Procedure (CR) 15.01, which provides that leave to amend "shall be freely given when justice so requires," does not apply to a notice of appeal as it is not a pleading, its "liberal amendment policy is instructive. Courts allow parties to conform their pleadings to the evidence by virtue of amended pleadings where there is no real surprise or detriment to the opposing party."

There is another and more expedient way to resolve this issue other than through judicial opinion. Amendment of our civil rules would apply to all notices of appeal and decrease the needless dismissal of appeals based on perceived technical deficiencies. I submit that in light of the adoption of the substantial compliance rule, Kentucky should follow the federal rule as to the content of a notice of appeal.

Federal Rules of Appellate Procedure (Fed.R.App.P.) 3(c)(1) requires that the notice of appeal contain the following:

> **(A)** specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";
> **(B)** designate the judgment, order, or part thereof being appealed; and
> **(C)** name the court to which the appeal is taken.

The federal rule "contains no requirement that the notice of appeal contain the names of the appellees[.]" *Int'l Union, United Auto. Aerospace & Agr. Implement Workers of Am. v. United Screw & Bolt Corp.*, 941 F.2d 466, 471 (6th Cir. 1991). Based on the parties listed in the judgment or order appealed, "[t]he district clerk must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record--excluding the appellant's[.]" Fed.R.App.P. 3(d)(1). Reflecting the policy of substantial compliance, Fed.R.App.P. 3(c)(4) states: "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Such a measured approach would serve justice and protect the fundamental rights of parents and children.

Accordingly, I dissent.

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