

RENDERED: NOVEMBER 18, 2022; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2022-CA-0189-ME

J.S.

APPELLANT

v. APPEAL FROM ALLEN FAMILY COURT  
HONORABLE G. SIDNOR BRODERSON, JUDGE  
ACTION NO. 20-J-00065-002

M.M.; S.P.; THE COMMONWEALTH  
OF KENTUCKY; CABINET FOR  
HEALTH AND FAMILY SERVICES;  
AND S.M., A MINOR CHILD

APPELLEES

OPINION AND ORDER  
DISMISSING

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BEFORE: CETRULO, COMBS, AND GOODWINE, JUDGES.

CETRULO, JUDGE: J.S. (“Mother”) appeals a post-dispositional order of the Allen Family Court denying her motion to have her minor daughter, S.M.

(“Child”), placed with S.M.’s paternal great-aunt and great-uncle, Beth and Stanley

Waterson. Because the Watersons' interests would be affected by the outcome of this appeal, and because they are not parties herein, we dismiss.

The relevant facts and procedural history are as follows. Child was born November 25, 2019. Her father is M.M. ("Father"). In May 2020, Father attacked and cut Mother with a knife in a motel room while Child was present. Consequently, Father was arrested and charged with second-degree assault, and the Cabinet for Health and Family Services ("Cabinet") later filed a dependency, neglect, and abuse ("DNA") action against Father in Allen Family Court (No. 20-J-00065-001). On or about September 1, 2020, the Cabinet then filed a DNA action against Mother in Allen Family Court (No. 20-J-00065-002) based upon environmental neglect, as well as Mother's violation of a protective order prohibiting Father from being in contact with Child. The family court entered an emergency custody order, and Child was placed in the emergency custody of the Cabinet. On September 4, 2020, following a temporary removal hearing, the family court then placed Child in the temporary custody of the Cabinet.

The Watersons made their appearance in this matter on September 14, 2020, by submitting an *ex parte* letter to the family court asking for temporary custody of Child. The family court regarded their letter as a motion for temporary custody, filed it with the record, and entered an order scheduling their motion to be heard during the upcoming September 29, 2020 adjudication hearing. The Allen

Circuit Clerk, consistent with the family court's directive, then served copies of the Watersons' motion, along with the family court's scheduling order, upon the Watersons and the parties.

While the Watersons were effectively permitted to intervene in this matter, they were not granted temporary custody of child. On October 1, 2020, following the adjudication hearing, the family court entered an order determining Child had been neglected by both parents, and that Child was to remain in the temporary custody of the Cabinet. However, the family court also scheduled a disposition hearing for October 20, 2020; and it ordered the Cabinet to consider recommending the Watersons for relative placement in its disposition report. In other words, the family court indicated it would consider placing Child with the Watersons as a dispositional alternative to committing Child to the Cabinet's custody.<sup>1</sup>

The Cabinet filed its report on October 19, 2020. Recommending against placing Child with the Watersons, its report stated in relevant part:

Child is currently with fictive kin. The Cabinet has given consideration to another family, the Watersons. This family was denied an ICPC<sup>[2]</sup> by Florida within the last 2 months due to having too many children in the home, one

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<sup>1</sup> Kentucky Revised Statute ("KRS") 620.140 sets forth the dispositional alternatives available to the court in a DNA case. Depending on the child's best interests, the family court may order removal of the child to the custody of an adult relative. KRS 620.140(1)(c). Or, among other alternatives, it may commit the child to the Cabinet's custody. KRS 620.140(1)(d).

<sup>2</sup> Interstate Compact on the Placement of Children.

in particular having special needs. Additionally, the Warren County [Department of Community Based Services] who conducted the home evaluation reported the family would not work well with [the Cabinet] recommendations or with the birth parents. This could pose delays in permanency.

The disposition hearing was continued to December 8, 2020. There, the family court considered the Cabinet's recommendations set forth in its October 19, 2020 disposition report, as well as other recommendations the Cabinet made in a December 7, 2020 dispositional review report. It is unclear whether the Watersons attended the hearing, which was held by teleconference. However, the family court asked Mother and Father<sup>3</sup> if they objected to any of the Cabinet's findings and recommendations, and neither raised any objection to the Cabinet's recommendation regarding Child's placement with the Watersons. On December 9, 2020, the family court entered its dispositional order adopting the Cabinet's report and recommendations. Importantly, the dispositional order committed Child to the Cabinet's custody.

By adopting the Cabinet's recommendations and committing Child to the Cabinet's custody, the family court's dispositional order denied the Watersons' placement motion. The Watersons could have appealed, as the dispositional order in a DNA proceeding is a final and appealable order. *See J.E. v. Cabinet for*

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<sup>3</sup> Father did not attend the dispositional hearing but appeared by and through counsel.

*Health & Fam. Servs.*, 553 S.W.3d 850 (Ky. App. 2018). However, they did not do so. Instead, acting *ex parte*, they submitted several more documents to the family court, which the family court filed of record on January 14, 2021. The documents included a January 4, 2021 letter from the Watersons, stating in relevant part:

I Elizabeth and Stanley Waterson are asking the court to overturn the courts [sic] decision in letting us have temporary custody of our great niece [S.M.] based on the information handed to the court that wasn't true. I am including documents that proves this along with letters from family and friends who support and are willing to help us.

The Watersons' documents also included (1) a copy of the Cabinet's October 19, 2020 disposition report, with handwritten underlines emphasizing aspects of the Cabinet's findings and recommendation regarding the Watersons; (2) what purported to be an "adoption applicant review committee staffing report" of Family Support Services of North Florida, Inc.; and (3) several letters from the Watersons' friends and family attesting to their character and fitness as parents.

Consistent with the family court's directive, the clerk served copies of the Watersons' documents, as well as a notice that the next permanency progress review ("PPR") hearing would occur on March 2, 2021, upon all parties of record and specifically the Watersons. On February 23, 2021, the family court entered an order continuing the PPR hearing to March 23, 2021. It is unknown whether the

Watersons were served a copy of the February 23, 2021 order, as the family court generally directed the clerk to mail the order to “all parties,” rather than the Watersons in particular. Notably, however, the Watersons were listed as an “other party” on the family court’s PPR order of March 24, 2021. In that order, which resulted from the PPR hearing held the day before, the family court denied what it deemed was the Watersons’ January 14, 2021 “request for placement,” and directed the Cabinet to retain custody of Child.

It is important to bear three points in mind before proceeding further. First, the Watersons were *parties* below. Second, by effectively permitting the Watersons to intervene as parties to seek custody of Child in their own right, the family court recognized the Watersons were asserting their own independent interest relating to the transaction that was the subject of this action, and that the disposition of the action could impair or impede their ability to protect their interest. *See* CR<sup>4</sup> 24.01(1)(b). Indeed, Kentucky caselaw recognizes that in the context of DNA and consequent adoption proceedings, relatives of the children at issue have standing to intervene and assert their own interests. For example, when the “preference” for relative placement set forth in KRS 620.090 is in effect during the temporary removal phase of DNA proceedings, the court may permit relatives

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<sup>4</sup> Kentucky Rules of Civil Procedure.

of children at issue to intervene and assert their own “interest,” and, as discussed in *Cabinet for Health & Fam. Servs. v. Batie*, 645 S.W.3d 452, 465 (Ky. App. 2022),

the identified interest is the right of known relatives to be evaluated for relative placement, as mandated by the Cabinet’s own policies and regulations, after which the Cabinet can make an informed recommendation to the circuit court as to the best placement option for the child[.]

(Internal quotes and brackets omitted.) *See also J.M. v. Cabinet for Health & Fam. Servs.*, 325 S.W.3d 901 (Ky. App. 2010) (resolving intervening grandmother’s appeal, in her own right, of family court’s order denying her temporary custody of child at issue in ongoing DNA proceedings). Likewise, a relative may intervene during an adoption proceeding to seek custody if he or she

(1) is known to the Cabinet, KRS 620.090(2); (2) is “a relative who has been denied consideration” for placement, *Baker [v. Webb]*, 127 S.W.3d 622, 625 (Ky. 2004)]; and (3) asserts the interest while the child is still subject to an order of temporary custody under KRS 620.090(1) – *i.e.*, before the “present” interest under KRS 620.090(2) lapses. *Baker*, 127 S.W.3d at 624.

*Batie*, 645 S.W.3d at 468.

As for the third point to bear in mind, it is well-settled law in Kentucky that a person generally may not raise *another* person’s legal rights or interests. *Lawson v. Off. of Att’y Gen.*, 415 S.W.3d 59, 67 (Ky. 2013). That said, the last time the Watersons asserted any interest in this matter (in their own right) was when they submitted their additional *ex parte* documentation to the family

court in January 2021. They filed nothing thereafter. The Court adopted the recommendations of the Cabinet and scheduled the matter for review in March of 2021, but no timely motion to alter, amend or vacate was filed by Appellant/Mother, and no appeal was filed by the Watersons.

On June 22, 2021, *Mother* filed a post-disposition motion to have Child removed from the Cabinet and placed in the Watersons' custody. Mother asserted the Cabinet's reasons and evidence militating against placing Child with the Watersons, as set forth in the Cabinet's October 19, 2020 dispositional report, were insufficient. To that end, she argued that Florida's denial of placement of the Florida children was due to their particular situations and did not pertain to any other placement with the Watersons; that the Watersons were approved foster parents in Kentucky; and that "[t]he Watersons, both by virtue of their being approved foster parents and their years of appropriately caring for children in their home, are more than qualified to be awarded custody of [Child]." Mother also attached to her motion, as exhibits, many of the same documents that the Watersons had submitted to the family court in January 2021.

The family court ultimately considered Mother's motion during a January 18, 2022 hearing. From the bench, the family court explained that it had regarded the sum total of what the Watersons had submitted in January 2021 as a CR 59.05 motion for reconsideration of the December 9, 2020 dispositional order;



that it had denied the Watersons' CR 59.05 motion through its March 24, 2021 order; and that the basis of its denial was that their motion – which had only been served upon the family court, and served well beyond the ten-day period permitted by CR 59.05 – was untimely. The family court denied Mother's June 22, 2021 motion because, in the family court's view, Mother's motion was merely a reassertion of the Watersons' motion for placement – which it had already denied on December 9, 2020, and which had gone unappealed. The next day, the family court entered its order denying Mother's motion.

Now on appeal, Mother asserts the family court violated the Watersons' due process rights, and that it should accordingly be required to reconsider their placement request. In that vein, she argues the Watersons were not given proper notice of the December 8, 2020 disposition hearing; the Watersons' request for Child to be placed with them was not properly "mentioned" during that hearing; the family court's December 9, 2020 dispositional order failed to specifically address the Watersons' placement request; the family court failed to properly consider the documents the Watersons submitted in January 2021 in conjunction with their request; the Watersons were not present during the March 23, 2021 hearing, and were thus improperly deprived of an opportunity to present evidence and prove their case; and further, Mother argues the Watersons

were deprived of an opportunity to present any evidence during the January 18, 2022 hearing.

For its part, the Cabinet argues Mother's appeal is untimely because it effectively contests an order of the family court that became unappealable 30 days after December 9, 2020. *See* CR 73.02(1)(a) and (2). We agree. "Without the properly filed notice of appeal, the appellate court lacks jurisdiction to consider the matter." *Cabinet for Health & Fam. Servs. v. H.C.*, 581 S.W.3d 580, 583 (Ky. 2019) (citing *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990)). Therefore, "a party's failure to timely file a notice of appeal 'shall result in a dismissal or denial.'" *Id.* (quoting CR 73.02(2)). In other words, failing to file the notice within the 30-day period "is fatal to the action." *Id.* (quoting *Workers' Comp. Bd. v. Siler*, 840 S.W.2d 812, 813 (Ky. 1992)).

Further, Mother failed to name the Waterasons as parties to her appeal. "The test for determining whether a party is indispensable is whether that party would 'have an interest that would be affected by the decision of the Court of Appeals, regardless of whether that interest is affected adversely or favorably.'" *Liquor World of Corbin, LLC v. Commonwealth Dept. of Alcoholic Beverage Control*, 458 S.W.3d 814, 817 (Ky. App. 2014) (citing *Browning v. Preece*, 392 S.W.3d 388, 391-92 (Ky. 2013)).

Here, as we have endeavored to emphasize throughout this Opinion and Order, the Watersons *were* parties below. They had an interest in the subject matter of the proceedings (*i.e.*, they sought custody of Child). A final and appealable order was entered, and they failed to appeal in a timely manner. It is further apparent from the substance of Mother’s arguments that the Watersons’ interests would be affected by any decision of this Court regarding *their* right to custody of Child; and thus, the Watersons would be necessary parties for further proceedings in the family court if the judgment were reversed.

We recognize that the new Rules of Appellate Procedure, effective January 2023,<sup>5</sup> will not automatically require dismissal of appeals for failure to join necessary parties. However, the Watersons did not timely appeal, and this appeal must therefore be dismissed on that basis alone. Furthermore, as they were also indispensable parties to this appeal; relief cannot be obtained by the mother in their absence. Therefore, we must DISMISS this appeal.

ALL CONCUR.

ENTERED: 11-18-2022



JUDGE, COURT OF APPEALS

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<sup>5</sup> Proposed Rule of Appellate Procedure (“RAP”) 2 will no longer require the naming of appellees or other parties in the notice of appeal. That change has resulted in the new RAP 2(A)(2) and revised requirements for a notice of appeal in 2(B). The timeliness requirements remain unchanged under RAP 3.

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