

RENDERED: OCTOBER 20, 2023; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2022-CA-0314-ME

J.R.M.

APPELLANT

APPEAL FROM WAYNE CIRCUIT COURT  
FAMILY COURT DIVISION

v. HON. JENNIFER UPCHURCH EDWARDS, FAMILY COURT JUDGE  
ACTION NO. 21-J-00074-001

THOMAS G. SIMMONS, WAYNE COUNTY  
ATTORNEY; COMMONWEALTH  
OF KENTUCKY, CABINET FOR  
HEALTH AND FAMILY SERVICES; AND  
O.H.M., A MINOR CHILD

APPELLEES

OPINION AND ORDER  
DISMISSING

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BEFORE: CALDWELL, JONES, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: J.R.M. (Father) and R.M. (Mother) are divorced, but shared joint custody of their minor daughter, O.H.M. (Child). On August 6, 2021, Father initiated dependency, neglect, and abuse (DNA) proceedings in Wayne Circuit Court, Family Court Division, against Mother, alleging Child to be the victim of Mother's supervisory neglect. The family court ultimately adjudicated Child "neglected" within the meaning of Kentucky Revised Statutes (KRS) 600.020(1) due to Mother's conduct while Child was in her custody by order entered November 2, 2021. In its disposition order, entered February 16, 2022, the family court also declined to grant custody of Child to Father, the nonoffending parent, and instead committed Child to the custody of the Cabinet for Health and Family Services (Cabinet), who placed Child with the maternal grandfather. Father now appeals, arguing the family court: (1) improperly failed to rule on his December 6, 2021, motion to withdraw and dismiss his DNA petition against Mother and his December 3, 2021, motion for immediate custody of Child;<sup>1</sup> (2) lacked sufficient evidence to adjudicate the Child was neglected due to Mother's conduct; and (3) erred by committing custody of Child to the Cabinet, rather than to Father.

Upon review, and for the reasons discussed below, we dismiss Father's appeal.

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<sup>1</sup> Presumably, this motion was filed pursuant to Kentucky Revised Statutes 620.110. The motion was amended on February 14, 2022.

Regarding Father's first argument, the family court did not rule on Father's pending motions upon entry of the disposition order on February 16, 2022. Thereafter, Father did not bring these matters to the family court's attention by post-judgment motion, but rather, filed his notice of appeal on March 18, 2022. The disposition order is the final order from which an appeal may be taken in DNA cases. *J.E. v. Cabinet for Health and Fam. Servs.*, 553 S.W.3d 850, 852 (Ky. App. 2018). As a general rule, the Court of Appeals, as an intermediate appellate court, is an error correcting court and a nonruling by the court below cannot be erroneous when the error below has not been brought to the attention of the family court. *See Hatton v. Commonwealth*, 409 S.W.2d 818, 819-20 (Ky. 1966). Additionally, Father's motion for immediate custody of Child as amended, is moot as the temporary order of removal was superseded by the disposition order which Father appealed. *See Anderson v. Cabinet for Health and Fam. Servs.*, 643 S.W.3d 109, 112-14 (Ky. App. 2022).

Regarding Father's second argument, we are aware of no authority, and Father cites none, supporting that his status as the nonoffending parent and complainant below provides him constitutional standing<sup>2</sup> to contest the family

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<sup>2</sup> We have raised the issue of constitutional standing *sua sponte*. *See Commonwealth, Cabinet for Health & Fam. Servs. v. Sexton*, 566 S.W.3d 185, 188 (Ky. 2018) (“[A]ll of Kentucky’s courts have the responsibility to ascertain, upon the court’s own motion if the issue is not raised by a party opponent, whether a plaintiff has constitutional standing, an issue not waivable, to pursue the case in court.”).

court's finding that Mother neglected Child while in her care – particularly where, as here, Mother did not appeal that finding herself. The family court's finding in this respect was not averse to Father's interests, and he has failed to allege an injury sufficient to invoke this Court's jurisdiction. *See Lawson v. Office of the Att'y Gen.*, 415 S.W.3d 59, 67 (Ky. 2013).

Father's third and final argument, which relates to custody of Child, also suffers from a defect that affects the entirety of his appeal and precludes our review: Father failed to list Mother as a party in his notice of appeal or otherwise provide her adequate notice that she was or should have been a party before this Court.

Mother is clearly an indispensable party in this case as she has an interest that is 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 Dep't of Alcoholic Beverage Control*, 458 S.W.3d 814, 817 (Ky. App. 2014) (internal quotation marks and citation omitted). Each of the arguments raised by Father either concern whether Mother was properly found to have neglected Child, or whether custody of Mother's and Father's Child was appropriately decided. As noted by the Kentucky Supreme Court, "under the Due Process Clause of the Fourteenth Amendment, parents have a fundamental liberty interest in the care, custody, and control of their children." *Walker v. Blair*, 382

S.W.3d 862, 868 (Ky. 2012) (citing *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000)); *see also Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010).

Accordingly, Mother’s fundamental liberty interest in the custody of Child remains viable in this appeal.

The absence of an indispensable party is considered fatal to our jurisdiction because we cannot adjudicate the rights of a nonparty; thus, their absence would effectively prevent us “from granting complete relief among those already parties[.]” *Braden v. Republic-Vanguard Life Ins. Co.*, 657 S.W.2d 241, 243 (Ky. 1983). We are cognizant that the jurisdictional trap presented by this rule has been largely obviated with respect to all proceedings in actions brought on or after January 1, 2023 – the effective date of our new Kentucky Rules of Appellate Procedure (RAP) – and with respect to further proceedings in actions then pending. *See* Kentucky Rules of Civil Procedure (CR) 86(2). Under the new rules, all parties to the underlying proceedings except those who have been dismissed in an earlier final and appealable order – indispensable or not – are automatically before this Court upon the filing of the notice of appeal. *See* RAP 2(A)(2).<sup>3</sup>

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<sup>3</sup> Kentucky Rules of Appellate Procedure 2(A)(2) provides in relevant part:

Upon timely filing of the notice of appeal from a final and appealable order on all claims in an action, all parties to the proceedings from which the appeal is taken, except those who have been dismissed in an earlier final and appealable order, shall be parties before the appellate court. . . .

However, the new appellate rules are not retroactive and therefore do not apply to this case because all the relevant proceedings in this matter occurred well before January 1, 2023. This case originated on August 6, 2021; the family court entered its final and appealable judgment (its disposition order) on February 16, 2022; and Father filed his notice of appeal on March 18, 2022. *See, e.g., Gholson v. Simmons*, 267 S.W.2d 720 (Ky. 1954) (explaining that where the action was tried prior to the date on which new Rules of Civil Procedure became effective, and the appeal also had been filed prior thereto, the new rules were not applicable). As such, we must apply the civil rules that were previously in effect; and the most applicable of those rules – CR 73.03(1), as well as our related jurisprudence – required notices of appeal to identify, within the time allotted for filing the notice, all indispensable parties to effectively place them within our jurisdiction. *See City of Devondale v. Stallings*, 795 S.W.2d 954, 956-57 (Ky. 1990), *superseded by rule as stated in Mahl v. Mahl*, 671 S.W.3d 140 (Ky. 2023).

In this case, Father’s notice of appeal wholly omitted Mother. While a notice from the eFiling system indicates the notice was “sent” to Mother and her attorney via first class mail on March 18, 2022, we must also assume the notice was sent as-is, with no mention of Mother in regard to the notice’s certificate of service. For purposes of fair notice, this was inadequate. Indeed, any suggestion that Father’s notice apprised Mother within the time specified by the rule that she

was or should have been considered a party to Father's appeal is belied not only by the fact that Mother has never filed anything with this Court, but also by a handwritten note Mother filed with the family court's record on March 30, 2022, in which she stated:

I, [Mother], am requesting to be included in the appeal of [Father] in our case. To proceed forma pauperis.

Record at 112.

There is no indication that Mother's note had any effect upon the course of these proceedings. Likewise, there is no indication from the record that Father has ever considered Mother to be a party to this appeal. For example, in response to a show cause order from this Court, Father later filed an "amended notice of appeal" on April 28, 2022, to rectify his omission of Child's GAL from his original notice; but his amended notice also excluded any mention of Mother. He likewise omitted Mother from service of his briefs, his motions for additional time to file his briefs, and each of his other filings before this Court. Following his lead, the Cabinet and this Court have consequently never served Mother with any papers during the course of this appeal.

And, as noted, this appeal was filed on March 18, 2022. Throughout the pendency of this matter, there has been no indication that Mother has ever been afforded fair notice of her right to participate in these proceedings; and, considering she did not appeal the family court's disposition order, we must

presume that her interests are averse to Father's. Accordingly, dismissal of this appeal is in order. However, this dismissal shall not preclude or prejudice Father from immediately seeking custody of Child in the family court.

For the reasons set forth above, we therefore DISMISS this appeal.

ALL CONCUR.

ENTERED: \_\_\_\_\_

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JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE, CABINET  
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