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OPINION OF JULY 28, 2023, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-1319-ME

W.R.G. APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE JAMES R. REDD, III, JUDGE
ACTION NO. 22-AD-00005

K.C. APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND KAREM, JUDGES.

GOODWINE, JUDGE: W.R.G. ("Father") appeals from the judgment of the Caldwell Circuit Court granting the adoption of his biological minor child by K.C. ("Stepmother"). After careful review, we vacate and remand for a new hearing on the petition.

BACKGROUND

On March 29, 2022, Stepmother filed a petition to adopt her wife's minor child without the consent of the Father under KRS[1] Chapter 199. On April 4, 2022, the petition was served on Father at a halfway house in Paducah, Kentucky.[2] Despite being mailed for restricted delivery, the return receipt attached to the summons in the record appears to have been signed by someone other than Father. On April 18, 2022, Father filed a *pro se* answer objecting to the adoption.

On July 12, 2022, a report from the Cabinet for Health and Family Services ("Cabinet") was filed in the record. The Cabinet worker noted that forms mailed to Father had been returned as undeliverable. On the same day, Stepmother moved for a final hearing. Her counsel mailed a copy of the motion for Father to the halfway house. At motion hour, counsel informed the court that the copy was returned as undeliverable. Counsel argued it was Father's responsibility to inform the court and opposing counsel of any change to his address. The court agreed it was "not up to [counsel or the court] to track him down." Video Record ("VR") at 8/22/2022, 8:37:51-53.

[1] Kentucky Revised Statutes.

[2] It is unclear from the record whether Father resided at the halfway house at any time during the pendency of this matter. However, he was released from prison shortly before the petition was filed.

The court entered a trial order on August 9, 2022. A copy of the order addressed to Father was mailed to the halfway house. It was returned to the circuit court clerk marked as "not deliverable as addressed" and "unable to forward." Record ("R.") at 31. According to Stepmother's counsel, the witness and exhibit lists he mailed to Father before the final hearing were also returned as undeliverable.

On the day of the final hearing, Father did not appear. At the outset, the court noted that all mail, including the trial order, sent to Father had been returned as undeliverable. However, the court found "no choice" but to proceed because the trial order was mailed to Father's last known address. At trial, Stepmother entered a copy of the Father's sexual offender individual record from the Kentucky Sex Offender Registry listing an address other than the halfway house. R. at 70.

The circuit court granted the adoption after brief testimony from A.C. ("Mother") and Stepmother. Findings of fact, conclusions of law, and a judgment of adoption were entered on October 13, 2022.

This appeal followed.

STANDARD OF REVIEW

Father has requested review for palpable error, acknowledging he did not raise his arguments before the circuit court or preserve them for review by this Court.

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

CR[3] 61.02. A palpable error is "easily perceptible, plain, obvious, and readily noticeable." *Rice v. Rice*, 372 S.W.3d 449, 452 (Ky. App. 2012) (citation omitted). It is an error that "seriously affect[s] the fairness to a party if left uncorrected." *Hibdon v. Hibdon*, 247 S.W.3d 915, 918 (Ky. App. 2007) (citation omitted).

ANALYSIS

On appeal, Father argues: (1) service of process was improper; (2) he was not provided adequate notice of the final hearing under CR 5.02(1); (3) the circuit court failed to determine whether Father was entitled to appointed counsel; (4) the court failed to appoint a guardian *ad litem* for the child; (5) the court's findings of fact were unsupported by substantial evidence; (6) the court allowed inadmissible evidence into the record; (7) the court improperly delegated its fact-

[3] Kentucky Rules of Civil Procedure.

finding authority to counsel; and (8) the court failed to enter a separate judgment terminating Father's parental rights.

"The involuntary termination of parental rights is a scrupulous undertaking that is of the utmost constitutional concern." *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014) (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 119-20, 117 S. Ct. 555, 565, 136 L. Ed. 2d 473 (1996)).[4] The United States Supreme Court has declared parental rights essential civil rights "far more precious . . . than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972) (citations omitted). Termination of parental rights is so severe it has been characterized as the death penalty of family law. *Commonwealth v. S.H.*, 476 S.W.3d 254, 259 (Ky. 2015) (citation omitted).

The seriousness and finality of termination of parental rights "require[] complete deference to providing for all the parent's due process rights." *A.P. v. Commonwealth*, 270 S.W.3d 418, 422 (Ky. App. 2008). "It is a fundamental principle of our jurisprudence that the minimum requirements of due process require adequate notice and a meaningful opportunity to be heard." *P.J.H. v. Cabinet for Human Resources*, 743 S.W.2d 852, 853 (Ky. App. 1987) (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *Boddie*

[4] "An adoption without the consent of a living biological parent is, in effect, a proceeding to terminate that parent's parental rights." *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014) (citation omitted).

v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)). Where someone is not properly served, there is no notice or compliance with his or her due process rights. *Lynch v. Commonwealth*, 610 S.W.2d 902, 907 (Ky. App. 1980).

First, Father waived any alleged service of process issue when he filed his answer. Where a court has subject matter jurisdiction, "a general appearance by the defendant waives all defects in the process or in the service of the process, or even the service of process at all." *Lawrence v. Bingham Greenebaum Doll, L.L.P.*, 599 S.W.3d 813, 822 (Ky. 2019) (citation omitted). The circuit court has subject matter jurisdiction over adoptions. KRS 199.470(1). Furthermore, Father's answer, although *pro se*, cannot be read as an objection to service, nor does he raise any objection to the circuit court's jurisdiction over him on appeal. Instead, his answer is a general appearance of responding to the merits of the petition for adoption. Having generally appeared, he cannot now claim any alleged defect in service of process violated his due process rights.

We now turn to Father's argument that service was insufficient under CR 5.02(1) because the court and Stepmother's counsel knew he had not received copies mailed to the halfway house. "Every order required by its terms to be served, . . . every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar papers shall be served upon each

party[.]" CR 5.01. Before 2014, service was complete under CR 5.02 upon mailing a copy of the document to the party or counsel at his or her last known address. *Honeycutt v. Norfolk Southern Ry. Co.*, 336 S.W.3d 133, 135-36 (Ky. App. 2011). It was irrelevant whether the party actually received the copy so long as it was mailed. *Benson v. Benson*, 291 S.W.2d 27, 29 (Ky. 1956). CR 5.02 was amended to its current form by order of the Supreme Court of Kentucky in 2013.[5] The 2013 amendment supersedes the prior version of CR 5.02 and all related case law.

> In the relevant part, the rule now mandates
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> > [e]xcept as provided in paragraph (2) of this rule, service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the last known address of such person; or, if no address is known, by leaving it with the clerk of the court. **Service is complete upon mailing unless the serving party learns or has reason to know that it did not reach the person to be served**.

CR 5.02(1) (emphasis added).

Although the rule was amended nearly a decade ago, appellate courts have addressed the "learns or has reason to know" language in CR 5.02(1) in only three unpublished opinions.[6] First, in *Holloway v. Myers*, No. 2015-CA-000932-

[5] The amendment became effective on January 1, 2014. Supreme Court of Kentucky Administrative Order 2013-12.

[6] A fourth opinion, *Minix v. Stone*, No. 2017-CA-001154-MR, 2019 WL 4565543, at *2 (Ky. App. Sep. 20, 2019), also addresses the language, but found the appellant's arguments failed

MR, 2017 WL 652140, at *3 (Ky. App. Feb. 17, 2017), a panel of this Court held Holloway had "insufficient legal notice of the proceedings" under CR 5.02(1) where Myers knew she no longer lived at the address to which he sent a motion to change custody. This Court found Myers "did not act in good faith to provide notice to [Holloway] and cannot benefit from his insufficient effort." *Holloway*, 2017 WL 652140, at *3. This Court vacated all orders resulting from the improperly noticed motion. *Id.* at *4.

In *Kelley v. US Bank N.A.*, No. 2019-CA-1227-MR, 2021 WL 2385828, at *3 (Ky. App. Jun. 11, 2021), a panel of this Court found service of a master commissioner's report in a foreclosure action insufficient where it was returned to the circuit court clerk as undeliverable. Counsel for the Kelleys had not filed a formal notice of the address change. *Id.* Citing CR 5.02(1), this Court held return of the report gave the clerk reason to know it had not reached the Kelleys' counsel. *Kelley*, 2021 WL 2385828, at *3. Although the opinion ultimately affirms the judgment, this Court reviewed the merits of the Kelleys' arguments despite their failure to file objections to the master commissioner's report because of the court's inadequate service. *Id.*[7]

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because the motions at issue were filed and served in April 2013, prior to the amendment of CR 5.02(1).

[7] In foreclosure actions, objections to the master commissioner's report are necessary to preserve claims of error. CR 53.05(2); *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997).

Finally, in *L.G.M. v. Cabinet for Health and Family Services*, No. 2020-CA-1387-ME, 2021 WL 1235737, at *3 (Ky. App. Apr. 2, 2021), on appeal from a judgment terminating her parental rights, Mother alleged she did not receive notice of the permanency hearing in the underlying dependency, neglect, and abuse action because she had recently moved to a residential treatment facility. Mother admitted she did not inform the court or the Cabinet of her address change. The court was made aware of her lack of notice when she timely filed a CR 59.05 motion. *L.G.M.*, 2021 WL 1235737, at *3. Although the service issue was not determinative of the appeal, this Court determined, "upon Mother's motion, the family court learned its notice did not reach her. Therefore, the family court gave Mother inadequate notice of the permanency hearing and erred in denying her CR 59.05 motion." *Id.*

Here, the circuit court and Stepmother's counsel clearly knew Father was not receiving mail at the halfway house when they proceeded with the final hearing. At a minimum, the returned trial order marked "not deliverable" is irrefutable evidence of the court's knowledge that Father had not received notice. Stepmother's counsel also knew his motion and pretrial compliance did not reach Father but did nothing to ensure proper service. Despite her claim that the halfway house was Father's last known address, Stepmother entered evidence at the final hearing containing a different, likely more current, address for him from the

Kentucky Sex Offender Registry. Continuing to serve a party at an address only to have the mail repeatedly returned as undeliverable is entirely insufficient under CR 5.02(1).

Stepmother's reasoning that the burden is on the Father to inform the court of any address change is insufficient. In *Holloway*, *Kelley*, and *L.G.M.*, none of the parties or counsel who were not served notified the courts of the change in their addresses. While it is certainly best practice for parties and counsel to timely inform the court of address changes, this does not absolve parties or the court of compliance with the requirements of CR 5.02(1). The circuit court and Stepmother's counsel's violations of CR 5.02(1) constitute palpable errors mandating a new hearing on the petition.

As a practical matter, although it is the responsibility of both parties and courts to ensure service under CR 5.02(1), we acknowledge the likelihood that the serving party will become aware of a service issue before the court. Therefore, it is imperative that, upon discovering a new address for another party or learning that he or she is not receiving mail at their last known address, the serving party promptly inform the court of the newly discovered address or that the party's address is no longer accurate, and a new address is unknown.

Father's current address was available on his sex offender individual report. This issue could have been remedied earlier if either Stepmother's counsel

or the court followed CR 5.02(1). Remand of this matter for a new hearing is solely required because of the failure of counsel and the court to abide by the requirements for service and, in violating the rule, also violating Father's due process rights.

Because a new hearing on the petition is required in this matter, we need not address the merits of Father's remaining arguments. We must caution the parties that this Opinion does not address the merits of whether the adoption should be granted. We will not speak to the sufficiency of the evidence presented at the prior hearing nor speculate as to any party's likelihood of success on remand. However, nothing in this Opinion changes the child's day-to-day life or living arrangements, nor does it give Father any visitation or custodial rights.

CONCLUSION

Based on the foregoing, we vacate the judgment of the Caldwell Circuit Court and remand for a new hearing on the petition. The circuit court shall enter a new trial order to be served in compliance with CR 5.02(1).

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Bradly A. Miller Paducah, Kentucky	Barclay W. Banister Princeton, Kentucky