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Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0941-ME

G.M.A.; AND M.A. APPELLANTS

v.

APPEAL FROM GALLATIN FAMILY COURT
HONORABLE ACENA J. BECK, SPECIAL JUDGE
ACTION NO. 21-J-00033-001

COMMONWEALTH OF KENTUCKY;
D.S.; N.E.A; AND S.E.A., A MINOR
CHILD APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ECKERLE, LAMBERT, AND KAREM, JUDGES.

ECKERLE, JUDGE: Appellants, the married couple of G.M.A. and M.A. (collectively, "Grandparents"), appeal from orders of the Gallatin Family Court holding that they (1) are not parties to the Dependency/Neglect/Abuse ("DNA")

Petition concerning their grandchild, Appellee, S.E.A., a Minor Child ("Grandchild"); (2) are excluded from filing substantive motions or having access to evidence in the case file; and (3) are dismissed from the DNA Petition without affording them notice or an opportunity to be heard. We conclude that Grandparents, as petitioners and custodians of Grandchild, were entitled to status as parties to the proceedings. Consequently, they were entitled to notice, access to the case file as appropriate, and an opportunity to be heard and to present substantive motions on matters concerning compliance with the informal adjustment. But, as parties only to the informal adjustment, Grandparents were not entitled to bring motions for child support, discovery, or permanent custody during the period that the informal adjustment was in effect. Hence, we affirm in part, vacate in part, and remand for additional proceedings.

On July 13, 2021, Grandparents filed a DNA Petition on behalf of Grandchild, who was born in April 2021 to Appellees, N.E.A. ("Father") and D.S. ("Mother"). Grandparents are the parents of Father and the paternal grandparents of Grandchild. The Petition alleged that Grandchild had been living with Grandparents at their home since shortly after her birth. The Petition further alleged that Father and Mother asked Grandparents to care for Grandchild due to their mental-health and substance-abuse issues.

On July 15, 2021, the Family Court granted temporary custody of Grandchild to her Grandparents.[1] In a subsequent order, the Family Court granted supervised visitation to Father and Mother. On September 8, 2021, Grandparents propounded interrogatories to Father and Mother regarding their respective incomes.

At a hearing on September 17, Grandparents moved to establish child support. The Family Court questioned whether they were parties and entitled to propound interrogatories. Subsequently, Father and Mother filed a motion for a protective order barring further discovery. They argued that the Commonwealth, through the County Attorney's Office ("Commonwealth"), was the only real party in interest and the Grandparents had no rights as petitioners and custodians to seek discovery.

In an order entered on October 20, 2021, the Family Court concluded that KRS[2] 620.070 and 620.100(5) do not confer party status to interested persons who file a DNA Petition or to relatives caring for a child. Consequently, the Family Court granted Father's and Mother's motion for a protective order and

[1] In subsequent pleadings, both Appellants, G.M.A. and M.A., were listed as Petitioners, and both are named Appellants in this appeal. Although M.A. was not a named party to the Petition, and no one made a motion before the Family Court to add her as a party, the Court will refer to both of them collectively in this appeal for ease and simplification, unless context requires otherwise.

[2] Kentucky Revised Statutes.

denied the motion to establish child support. But in a separate order, the Family Court set temporary child support payments for Father and Mother at $60 per month. Grandparents filed a motion to alter, amend, or vacate this order, which the Family Court denied on December 13, 2021.

One day after the order was entered declaring Grandparents non-parties relative to protective orders and child support, on October 21, 2021, the Family Court entered an "Agreed Order of Informal Adjustment" and a "Protective Order." The Agreed Order was drafted by G.M.A.[3] and signed by him, as well as an Assistant County Attorney, the Grandchild's Guardian *ad litem* ("GAL"), and counsel for Father and Mother. The Protective Order mandated that Father and Mother refrain from additional abuse or neglect of Grandchild, abstain from alcohol and other drugs, successfully complete parenting courses and evaluations, and provide their complete medical records. In that same Order, all parties agreed to four requirements. First, Father and Mother stipulated that grounds had existed for a finding of dependency, neglect, or abuse. Second, the DNA action would be dismissed in one year if no motion was brought for violation of the protective order; however, if a motion were brought within that time, the Family Court could consider other dispositional alternatives. Third, Father's and Mother's visitation

[3] G.M.A. is a licensed attorney.

would remain supervised until they successfully completed all evaluations. Unsupervised visitation would solely be governed by the recommendations in those evaluations. Finally, once all tasks were completed, Father and Mother could move for a return of custody.[4]

Thereafter, the Gallatin County Attorney's Office filed a motion to intervene to set child support. The Family Court granted the motion on March 4, 2022, requiring Mother to pay child support in the amount of $284 per month and Father to pay child support in the amount of $524 per month.

Shortly before the entry of that order, on February 24, 2022, Grandparents filed a motion for permanent custody and for a finding that they were the *de facto* custodians of Grandchild. On May 16, 2022, the Family Court denied the motion, concluding that the matter was not ripe for adjudication due to the Agreed Order. Grandparents also filed a separate motion, to intervene as *de facto* custodians, which the Family Court denied on June 10, 2022, for the same reason.

On August 1, 2022, Grandparents filed a motion alleging violation of the Protective Order. On September 20, 2022, the Family Court denied the motion, again concluding that Grandparents were not parties to the case and lacked

[4] G.M.A. filed a notice of appeal on December 17, 2021. This Court dismissed the appeal as interlocutory, concluding that the Order of Informal Adjustment was not a final and appealable order. *G.M.A. v. D.A.* [*Mother*], No. 2021-CA-1510-ME (Order Dismissing entered June 6, 2022) (citing *Commonwealth v. C.J.*, 156 S.W.3d 296, 298 (Ky. 2005)).

standing to file substantive motions. On September 21, 2022, the County Attorney's Office filed a motion for the Cabinet for Health and Family Services ("Cabinet") to become involved in the case.

In November of 2022, G.M.A. was elected as Gallatin County Attorney, taking office in January 2023. On January 10, 2023, the Family Court issued an order recusing the Gallatin County Attorney's Office from further involvement with the case and directing G.M.A. to notify the Attorney General of the disqualification. Subsequently, the Kenton County Attorney's Office was appointed to represent the Commonwealth in this matter. In a separate order entered the same day, the Family Court sealed the file, granting only the parties and their counsel access. That order also referred the matter to the Cabinet "for investigation and possible ongoing assistance."

On April 4, 2023, Father and Mother filed a motion to dismiss the DNA action, stating that they had complied with all provisions of the informal adjustment. G.M.A. renewed Grandparents' motions to intervene and for permanent custody. On July 17, 2023, the Family Court "reserved" the motion for permanent custody and declined to address the motion to intervene. Thereafter, the Commonwealth filed a motion to dismiss the petition. The Family Court issued the order of dismissal on July 17, 2023. This appeal followed. Additional facts will be set forth below as necessary.

A DNA Petition is filed "in the interest of" the child and without formal designations of a party-plaintiff and a party-defendant. But like most other actions, it is fundamentally an adversarial proceeding, although not with respect to the child. *See Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 27-28, 101 S. Ct. 2153, 2160, 68 L. Ed. 2d 640 (1981). The Commonwealth takes the position that only it, through the Cabinet or the County Attorney's Office, can prosecute a DNA action. A petitioner other than the Commonwealth is merely a "complaining witness." The Family Court concluded that the Grandparents had no standing to participate in the action as a party or to file substantive pleadings. We disagree.

KRS 620.070(1) provides that "[a] dependency, neglect, or abuse action may be commenced by the filing of a petition *by any interested person* in the juvenile session of the District Court." (Emphasis added.) When the Cabinet files a dependency action, it is, in fact, the plaintiff and a party to the action. *Commonwealth, Cabinet for Health & Fam. Servs. v. Byer*, 173 S.W.3d 247, 249 (Ky. App. 2005) (citing *Cabinet for Human Resources v. Howard*, 705 S.W.2d 935, 937 (Ky. App. 1985)). *See also Cabinet for Health & Fam. Servs. v. Marshall*, 606 S.W.3d 99, 103 (Ky. App. 2020), and *M.M. v. Allen Cnty. Attorney's Off.*, 590 S.W.3d 836, 838 (Ky. App. 2019).

Although DNA Petitions are typically filed by the Commonwealth, either through a County Attorney or by the Cabinet, the statute clearly allows filing by Grandparents in this case, as they are interested parties who are custodians and who have filed the instant Petition.[5] The Gallatin County Attorney was named on the service list for the Petition, and it appears that the County Attorney's Office has appeared since the commencement of this action. The County Attorney's Office also signed the Agreed Order of Informal Adjustment. However, the Gallatin County Attorney did not file a formal motion to intervene until January 22, 2022 – after entry of the informal adjustment. Furthermore, the Family Court appointed the Grandchild a GAL, who has also appeared at all proceedings. Indeed, during the early part of these proceedings, the Grandparents and the GAL were, in fact, the only "parties" who were actively representing Grandchild's interests.

In light of the clear language of the statute and the practice of this case, we conclude that, when filed by an "interested person" with proper standing, the petitioner in a DNA action is accorded the status of party-plaintiff. The Commonwealth does not contest Grandparent's standing to file the Petition. Thus, we disagree with the Commonwealth that it has the exclusive role as party-plaintiff in all DNA proceedings.

Grandparents also refer to KRS 620.100(5), which provides,

[5] Interestingly, there appears to be no case law on this point.

> Foster parents, preadoptive parents, or relatives providing care for the child shall receive notice of, and shall have a right to be heard in, any proceeding held with respect to the child. This subsection shall not be construed to require that a foster parent, preadoptive parent, or relative caring for the child be made a party to a proceeding solely on the basis of the notice and right to be heard.

While this section does not require custodians to be made a party to the proceeding, it also does not preclude them from being recognized as parties. As "relatives providing care for the child," Grandparents clearly had a right to receive notice and to participate in hearings. Moreover, due process requires that all affected parties be given "the opportunity to be heard at a meaningful time and in a meaningful manner." *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). Thus, the Family Court clearly erred by depriving Grandparents of notice of hearings, an opportunity to be heard in those proceedings, and access to reports filed with the Family Court concerning Grandchild.

In the alternative, the Commonwealth argues that any error by the Family Court was harmless because Grandparents agreed to the informal adjustment of their DNA Petition and thus cannot thereafter object to its terms. Informal adjustment of a DNA petition is expressly authorized by KRS 620.140(1)(a). And, "when a court proceeds with an informal adjustment, an

agreed-upon resolution to the case occurs rather than an adjudicated disposition." *Q.M. v. Commonwealth*, 459 S.W.3d 360, 368 (Ky. 2015).

An informal adjustment is necessarily "an agreement reached among the parties[.]" KRS 600.020(36). The Commonwealth's position that Grandparents cannot be parties is inconsistent with its current position that they are bound as parties to the informal adjustment. Nevertheless, we agree with the Commonwealth that Grandparents are estopped from objecting to the terms of the informal adjustment to which they explicitly agreed. *Marshall*, 606 S.W.3d at 104.

Consequently, the Family Court properly denied Grandparents' motions to set child support, intervene as *de facto* custodians, and receive permanent custody. These matters were not ripe for adjudication while the informal adjustment was in effect. On the other hand, the Family Court abused its discretion by holding that Grandparents could not file motions to enforce the terms of the informal adjustment or to assert alleged violations of the informal adjustment. Likewise, we agree with Grandparents that the Family Court abused its discretion by entering the order denying them access to Dr. Connor's report concerning Grandchild. As parties to the proceedings and to the informal adjustment, we conclude that Grandparents had rights to file such motions and to access relevant reports concerning Grandchild.

The Commonwealth further argues that, even if Grandparents were parties to the action, they had no right to object to the dismissal of the DNA Petition. Nonetheless, and as previously noted, Grandparents still had due process rights to notice and an opportunity to be heard. The Family Court expressly excluded them from those proceedings and went so far as to seal the record and close the proceedings. Even if Grandparents' express consent was not required to dismiss the Petition after informal adjustment, they were still entitled to appear and state objections on the record. Grandparents were also entitled to request specific findings supporting the dismissal of the DNA Petition, although the Family Court bears the responsibility to state whether it believes its findings were sufficient. Under these circumstances, we cannot find that the error was harmless.

Lastly, Grandparents argue that the Family Court abused its discretion by disqualifying G.M.A. and the Gallatin County Attorney's Office following his election. The record does not disclose the basis for this motion. However, KRS 15.733(2)(a) requires the disqualification of a prosecuting attorney and the appointment of a special prosecutor "in any proceeding in which he . . . [i]s a party to the proceeding[.]" As a party to the proceeding, as well as the petitioner and custodian of Grandchild, who is the subject of the DNA action, G.M.A. was clearly disqualified from representing the interests of the Commonwealth. Therefore, while we do not approve of the apparently *ex parte* manner in which this ethical

issue was handled, we cannot find that the Family Court abused its discretion by disqualifying G.M.A. or the Gallatin County Attorney's Office from this matter.

In conclusion, we must emphasize that, in DNA actions, the fundamental rights of the parents and the statutory rights of custodians must be afforded substantial weight. However, the paramount concern must always be focused on the best interests of the child. The Family Court bears the ultimate responsibility to determine the best interests of the child based upon the evidence presented. The best interests of Grandchild are most served by having all interested parties represented before the Family Court. And this is true despite the underlying personality conflicts that appear to exist here and to have, at times, obscured the relevant inquiry into the best interests of Grandchild.

In almost all cases, the best interests of the child are adequately represented by the Commonwealth and the GAL. And, that ultimately may be the case here. Although G.M.A. is not entitled to control the outcome of that determination, he and his wife cannot and should not be excluded from the process, particularly since they, as Grandparents, were parties to the proceedings and the custodians of Grandchild. Because Grandparents were entitled to appear and be heard in those proceedings, we must vacate the dismissal of the DNA Petition and remand for additional proceedings at which they shall be entitled to participate as parties to this action.

Accordingly, we affirm in part, vacate in part, and remand this matter for additional proceedings. We vacate the July 17, 2023, order of the Gallatin Family Court dismissing the DNA Petition and the January 10, 2023, order to the extent that it prohibited Grandparents from accessing or viewing the file. On remand, Grandparents shall be entitled to appear, have access to the court files concerning Grandchild, and file substantive motions and present evidence concerning Mother's and Father's compliance with the terms of the informal adjustment. But Grandparents shall not be entitled to file substantive motions concerning child support or custody unless and until the Family Court determines that the informal adjustment should be set aside and the matter should proceed to a formal adjustment. Finally, we affirm the Family Court's order disqualifying the Gallatin County Attorney from this matter and directing the appointment of a special prosecutor.

ALL CONCUR.

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