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Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-0286-ME

F.E. APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE MICHAEL L. MCKOWN, JUDGE
ACTION NO. 16-J-00052-001

E.B. AND T.S., A CHILD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

JONES, JUDGE: This dependency, neglect, or abuse ("DNA") action was originally commenced when F.E. ("Aunt") filed a petition alleging her nephew, T.S. ("Child"), was at risk because his mother, E.B. ("Mother"), was facing drug-related criminal charges and unable to provide him a stable home life. During the course of the DNA proceedings, Aunt received custody of Child. Eventually, however, Mother regained custody of Child with Aunt receiving visitation. This

arrangement remained in place for some time; however, Mother eventually moved the family court to terminate Aunt's visitation. Following a hearing, the family court granted Mother's motion after it determined that Aunt did not have standing to seek visitation. This appeal followed. Having reviewed the record and being otherwise sufficiently advised, we reverse and remand for further proceedings.

I. BACKGROUND

Child was born in June of 2014. He remained in Mother's care until just before his second birthday. At that time, Mother took Child to live with Aunt because she was facing drug charges and Child's father was incarcerated. Mother asked Aunt to keep Child for an undefined period of time telling Aunt that she believed Child needed a more stable home than she could provide him at that time. Aunt agreed to keep Child, and subsequently commenced the underlying DNA action by filing a petition on Child's behalf pursuant to KRS[1] 620.070.

Thereafter, the family court conducted a temporary removal hearing ("TRH") pursuant to KRS 620.080. During the TRH, Mother testified that she was not fit to care for Child. She explained that she did not have a job and was facing criminal charges. Given her circumstances, Mother believed Child would be better off living with Aunt. Following the TRH, on June 21, 2016, the family court entered an order granting Aunt temporary custody of Child. *See* KRS 620.090.

[1] Kentucky Revised Statutes.

A short time later, Mother stipulated to dependency. As a result, the family court entered an adjudication order finding Child dependent and continued custody of Child with Aunt. Approximately a month later, the family court held a disposition hearing. Pursuant to the family court's disposition order, Child was to remain in Aunt's custody. Mother was ordered to work with the Cabinet for Health and Family Services ("Cabinet").

The matter next came before the family court for a progress review in December of 2016 at which time it was determined that Child should remain in Aunt's custody. In July of 2017, Mother petitioned the family court for visitation. *See* KRS 620.150. In October of 2017, pursuant to the parties' agreement, the family court granted Mother visitation with Child every Thursday evening for four hours and every weekend from Friday evening through Sunday evening. Mother's visitation was expanded in late November of 2017 such that she had visitation each week from Thursday evening through Sunday evening. The family court set the matter for a hearing in January of 2018 for the purpose of determining whether Child should be returned to Mother's custody.

Following the January 2018 hearing, the family court entered an order on January 22, 2018, returning Child to Mother's custody. The order also provided that Aunt was to receive visitation with Child every other weekend. There is no indication in the record that Mother objected to Aunt receiving

visitation before the family court or that she filed a notice of appeal as related to the award of visitation to Aunt.

For the next two years the parties operated under the family court's January 22, 2018 order with Aunt having visitation with Child. However, on February 24, 2020, Mother filed a motion for review of visitation. Therein, she asked the family court to terminate Aunt's visitation on the basis that it was no longer beneficial to Child. The family court appointed counsel to assist Aunt and set the matter for a hearing.

At the hearing, Mother did not offer any specific reason for wishing to end Child's visitation with Aunt. She simply testified that she no longer desired Child to visit with Aunt. In contrast, other witnesses testified that Aunt and Child had a close relationship, Child was close to Aunt's son, and Child enjoyed visiting with Aunt. Following the hearing, the family court entered an order on October 21, 2020, granting Mother's motion to terminate visitation on the basis that Aunt did not have standing to seek visitation with Child. Aunt filed a CR[2] 59.05 motion to alter, amend, or vacate directing the family court's attention to KRS 403.320.[3] Aunt asserted that she had properly been granted visitation with Child pursuant to

[2] Kentucky Rules of Civil Procedure.

[3] The family court's original order cited KRS 405.021, a statute granting grandparents the right to petition for visitation rights.

this statute because she was related to Child and had previously been granted temporary custody of Child during the original DNA proceedings. While the family court acknowledged the potential applicability of KRS 403.320, it nevertheless concluded that Aunt had not properly invoked the statute because she had neither moved to intervene in the DNA action nor commenced an original action seeking visitation. As such, the family court denied Aunt's motion to alter, amend, or vacate, reiterating its conclusion that Aunt did not have standing to seek visitation.

This appeal by Aunt followed.[4]

II. STANDARD OF REVIEW

The family court's decision to terminate Aunt's visitation was based on its conclusion that Aunt lacked standing. "The [family] court's ultimate determination on the standing issue is a pure legal question[,]" which we review *de novo*. *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d

[4] In her notice of appeal, Aunt identified the judgment at issue as the family court's January 27, 2021 order denying her motion to alter, amend, or vacate. "Unlike a ruling denying a motion for relief under CR 60.02, a ruling on a CR 59.05 motion is not a final or an appealable order." *Mingey v. Cline Leasing Serv., Inc.*, 707 S.W.2d 794, 796 (Ky. App. 1986). Since the family court's order denying Aunt's CR 59.05 motion is not a final order, we do not have jurisdiction to consider it on appeal. However, this defect in Aunt's notice of appeal does not require dismissal of the appeal. When a trial court denies a CR 59.05 motion, and a party erroneously designates that order in her notice of appeal, we utilize a substantial compliance analysis and consider the appeal properly taken from the final judgment that was the subject of the CR 59.05 motion. *Ford v. Ford*, 578 S.W.3d 356, 366 (Ky. App. 2019). Accordingly, we construe Aunt's appeal as seeking review of the family court's October 21, 2020 order.

107, 111 (Ky. App. 2014). Under *de novo* review, we owe no deference to the family court's application of the law to the established facts. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

III. ANALYSIS

A. Briefing Issues

Before delving into the legal issue presented by this appeal, we must briefly address the appellate briefing in this case. Aunt timely submitted her appellant brief asking us to reverse the family court and restore her visitation with Child per the family court's January 2018 order. Child's guardian *ad litem* ("GAL") filed an appellee brief on Child's behalf. The GAL agrees with Aunt that we should reverse the family court's order; however, the GAL argues that we should not simply reverse. The GAL explains that the better course is remand the substantive issue of whether Aunt's visitation should be terminated with instructions for the family court to make that determination consistent with Child's best interest.

While the Cabinet was named as an appellee, it filed a motion with this Court requesting its dismissal. In support of its motion, the Cabinet explained that it had not been actively involved in this matter since January 2018 when custody was returned to Mother, and it took no position with respect to the

visitation issue. In September of 2021, prior to submission to this panel, this Court granted the Cabinet's motion.

Aunt also named Mother as an appellee in her notice of appeal. A review of the docket indicates that Mother was served with the notice of appeal and with Aunt's appellant brief. However, Mother did not file an appellee brief, and she has not taken any other action with respect to this appeal. If an appellee brief has not been filed within the time allowed, the Court may:

> (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

CR 76.12(8)(c). "The decision as to how to proceed in imposing such penalties is a matter committed to our discretion." *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). While we could impose a penalty, we do not deem it necessary. The standing issue is relatively straightforward and the facts as related to that issue are uncontested. As such, we have elected to review the appeal on its merits despite the fact Mother failed to file a brief.

B. Standing

We begin with KRS 403.320(4)[5] which provides:

[5] KRS 403.320 was amended effective June 29, 2021, while this appeal was pending. The amendment did not affect the substance of the subsection at issue; however, it did result in a

> Under circumstances where the court finds, by clear and convincing evidence, it is in the best interest of the child, any relative, by blood or affinity, that was previously granted temporary custody pursuant to the provisions of KRS 620.090 may be granted reasonable noncustodial parental visitation rights by a Circuit Court or Family Court as an intervenor or by original action. Once the relative has been granted visitation pursuant to this subsection, those rights shall not be adversely affected by the termination of custodial or parental rights of an individual who has permanent custody of the child unless the court determines that termination of the visitation rights are in the best interests of the child. The action shall be brought in the county in which the temporary or permanent custody order was entered or where the child resides.

The parties agree that Aunt is related to Child by blood or affinity, and Aunt was previously granted temporary custody of Child pursuant to KRS 620.090 as part of the DNA action. In its order denying Aunt's motion to alter, amend, or vacate the family court focused on the fact that Aunt neither intervened in the DNA action nor filed an original action to support its conclusion that Aunt lacked standing to seek visitation. While this may be technically correct, we cannot appreciate why Aunt would have needed to formally intervene in the DNA action at the time she was awarded visitation. She filed the DNA petition, she was given notice of all the DNA proceedings, and she had custody of Child. For all intents and purposes, she was already involved in the DNA action.

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renumbering of the subsection from KRS 403.320*(5)* to KRS 403.320*(4)*. This Opinion cites to the current codification of the statute.

However, we need not dwell on the issue of whether Aunt should have been required to formally intervene in the DNA action because it is undisputed that Aunt was awarded visitation by the family court when it returned Child to Mother's custody in January of 2018. Specifically, pursuant to the family court's January 22, 2018 order, Aunt received visitation with Child every other weekend. Mother neither raised the standing issue before the family court in 2018 nor appealed the January 22, 2018 order granting visitation to Aunt. "Since a lack of [statutory] standing does not deprive a trial court of subject-matter jurisdiction, a party's failure to raise timely his or her opponent's lack of standing may be construed as a waiver." *Harrison v. Leach*, 323 S.W.3d 702, 709 (Ky. 2010).[6]

Mother waived her right to contest Aunt's statutory standing to seek visitation when she failed to appeal the January 2018 order. *Id.* at 708 ("[A] right to contest [statutory] standing may be waived, even in child custody cases."). The January 2018 order had been final for almost two full years and was still operative

[6] In *Commonwealth Cabinet for Health and Family Services, Department for Medicaid Services v. Sexton by and through Appalachian Regional Healthcare, Inc.*, 566 S.W.3d 185, 191 (Ky. 2018), the Kentucky Supreme Court clarified that the rule it crafted in *Harrison* related to only statutory standing. *Id.* The Court explained that statutory standing pertains to the issue of "whether [the legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury." *Id.* (quoting *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 295 (3d Cir. 2007)). It went on to note that in this respect the defense of statutory standing is more analogous to a motion to dismiss for failure to state a claim than to the more traditional notion of constitutional standing in which we ask whether the plaintiff has presented a justiciable cause (actual case or controversy with attendant injury). *Id.* For this reason constitutional standing, which relates to the court's subject matter jurisdiction, can be raised at any time whereas statutory standing, which relates only to particular case jurisdiction, must be raised in a timely manner before the trial court.

when Mother filed her 2020 motion seeking to terminate Aunt's visitation. Instead of recognizing that Aunt's statutory right to visitation had already been established by the January 2018 order, the family court treated Mother's motion to terminate Aunt's visitation as if Aunt were seeking visitation for the first time. However, Aunt was not seeking visitation in 2020. She had already been awarded visitation by the family court in 2018. Rather, in 2020, Mother was seeking to terminate Aunt's visitation over Aunt's objection.

With respect to standing, the only issue Mother could raise in 2020 was whether Aunt had constitutional standing. "[A] person usually has [constitutional] standing if that party has a substantial interest in the subject matter of the litigation and they will be aggrieved by an adverse ruling by the court." *Riehle v. Riehle*, 504 S.W.3d 7, 9 (Ky. 2016). Aunt had an substantial interest in the litigation by virtue of the January 2018 order and since Mother sought to terminate the visitation Aunt stood to be negatively impacted by a ruling adverse to her.

The family court should not have allowed Mother to belatedly raise Aunt's standing to obtain visitation some two years after the visitation order was final. Since Aunt had already been awarded visitation with Child in 2018, the family court should have limited itself to the question of whether Mother

established that modification and/or termination of visitation with Aunt was in Child's best interest. KRS 403.320(3).

While the GAL agrees with Aunt that we should reverse the family court's dismissal, the GAL asks us to remand to the family court with instructions to determine whether termination of Aunt's visitation is in the best interest of Child. Citing various portions of the hearing testimony, Aunt argues that a remand is unnecessary because Mother failed to meet her burden of demonstrating that termination of Aunt's visitation was in child's best interest. To this end, Aunt points out that the family court's order denying her motion to alter, amend, or vacate specifically noted that the family court held a best interest hearing at which Mother "offered no explanation to the Court as to why she wanted visitation to stop." In contrast, Aunt asserts that she offered evidence that she and Child enjoy a close bond, which developed during the two years she had custody of Child; Child enjoys visiting with Aunt and her son, who he considers a brother; and removing Aunt from Child's life would negatively impact Child.

Certainly, the evidence suggests that Child has benefited from his close relationship with Aunt, and termination of his visitation would cause Child distress. However, as pointed out by Child's GAL, because the family court found that Aunt lacked standing to contest Mother's motion, it did not make specific findings with respect to the best interest factors. Accordingly, we agree with the

GAL that remand is most appropriate. On remand, based on the testimony and evidence adduced at the prior hearing, the family court should determine whether Mother met her burden of showing termination of visitation was in Child's best interest.

We reiterate that the family court is not presently tasked with making an initial determination regarding whether Aunt should be awarded visitation with Child. If this were the case, the family court would be required to presume that Mother was acting in Child's best interest in accordance with *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). *Troxel* is predicated on the notion that the State should not ordinarily "inject itself into the private realm of the family to further question the ability of [the] parent to make the best decisions concerning the rearing of that parent's children." *Id*. at 68-69, 120 S. Ct. at 2061. However, once the State has injected itself into the family through a valid visitation order granting a nonparent visitation with Child, modification of that order should simply be governed by the best interest factors as applied in any case involving modification of visitation. *See, e.g.*, *Lovlace v. Copley*, 418 S.W.3d 1, 30 (Tenn. 2013) ("[W]e hold that when a grandparent or a parent initiates a proceeding to modify or terminate court-ordered grandparent visitation, the burdens of proof and the standards to be applied are the same as those typically applied in parent-vs-parent visitation modification cases."); *Rennels v. Rennels*,

127 Nev. 564, 572, 257 P.3d 396, 401 (2011) ("When a nonparent obtains visitation through a court order or judicial approval, they have successfully overcome the parental presumption and are in the same position as a parent seeking to modify or terminate visitation. Declining to apply the parental presumption once the court has approved nonparental visitation not only gives deference to a court's order, but it also promotes the important policy goal of stability for the child."). As the party seeking to modify the current visitation order, Mother bore the burden of proof. Should the family court determine Mother did not meet her burden, it should deny Mother's motion to terminate Aunt's visitation.

IV. CONCLUSION

For the reasons set forth above, we reverse the Butler Circuit Court's October 21, 2020 order which concluded Aunt lacked standing and remand for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jonathan L. Sacks
Bowling Green, Kentucky

BRIEF FOR APPELLEE T.S.:

Thomas Vallandingham
Owensboro, Kentucky

NO BRIEF FILED FOR APPELLEE E.B.