RENDERED: MAY 8, 2020; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000578-ME

T.S. APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 15-J-00187-002

COMMONWEALTH OF KENTUCKY;
AND K.S., A CHILD APPELLEES

AND
NO. 2019-CA-000579-ME

T.S. APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 14-J-00250-003

COMMONWEALTH OF KENTUCKY;
AND A.S., A CHILD APPELLEES

OPINION AND ORDER
DENYING REINSTATEMENT

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; K. THOMPSON AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: The underlying cases are dependency, neglect, and abuse (DNA) actions brought by the Cabinet for Health and Family Services in Carter County. Appellant, who is the grandmother and custodian of the children at issue, was named as the person responsible for the alleged neglect or abuse. The Carter Circuit Court found that the children were abused and Appellant appealed.

On October 22, 2019, the Court ordered Appellant to show cause why these appeals should not be dismissed for Appellant's failure to name an indispensable party, the Cabinet for Health and Family Services. *Commonwealth, Cabinet for Health and Family Services v. Byer*, 173 S.W.3d 247, 249 (Ky. App. 2005). The Court noted that the Cabinet was not named in either the body or the captions of the notices as required to bring them within the Court's jurisdiction. *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). Appellant responded conceding that the Cabinet should have been named but argued against dismissal. On December 20, 2019, by a unanimous order, this Court dismissed the

appeals for Appellant's failure to name an indispensable party, the Cabinet for Health and Family Services.

On January 24, 2020, Appellant tendered a joint motion entitled "motion to reinstate appeal[s]." The Clerk of this Court treated the filing as an untimely motion for reconsideration pursuant to CR[1] 76.38 and returned it to Appellant. Thereafter, Appellant filed a motion for enlargement and re-tendered her initial motion. No response to the motions was filed.

The Court notes that the tendered motion does not cite to CR 76.38 and clearly seeks reinstatement of the appeals pursuant to *Commonwealth v. Wine*, 694 S.W.2d 689, 694 (Ky. 1985) and *Hollon v. Commonwealth*, 334 S.W.3d 431, 438 (Ky. 2010). Accordingly, the Court erred in designating the motion as one for reconsideration. Further, as the civil rules do not set a deadline for seeking reinstatement of an appeal, no motion for enlargement was required. Accordingly, the motion for an enlargement of time is DENIED and the Clerk of the Court is DIRECTED to file the tendered motion for reinstatement of these appeals.

In *Wine* and *Hollon* the Kentucky Supreme Court held that a belated or reinstated appeal could be had under certain conditions in criminal cases. Appellant contends that the underlying civil proceedings are quasi-criminal in nature and, accordingly, reinstatement is an available remedy. The Court finds this

[1] Kentucky Rules of Civil Procedure.

argument to be unavailing. Appellant has presented no authority or argument for extending belated or reinstated appeal procedures to civil cases and this Court will not create one for Appellant.

To the extent that Appellant's motion appears to argue that the Cabinet's actual notice of the appeals is sufficient to render them parties hereto, the Court rejects this argument. *Stallings*, 795 S.W.2d at 957. Further, the Court reaffirms its holding that, under the facts of these cases, the Cabinet for Health and Family Services is an indispensable party to these appeals and dismissal is required due to Appellant's failure to name the Cabinet in the notices of appeal.

Therefore, the Court, having considered the motion and being in all ways sufficiently advised, hereby DENIES the motion for reinstatement.

CLAYTON, CHIEF JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

THOMPSON, K., JUDGE, CONCURRING IN RESULT ONLY: While I concur in the result reached by the majority, I write separately because this case involves a recurring issue, specifically, whether the words "Cabinet for Health and Family Services" must be used in the notice of appeal in dependency, neglect, and abuse (DNA) cases and termination of parental rights cases. I also write to further comment on the majority's conclusion that reinstatement of the appeals is

not appropriate because a DNA proceeding is a civil action.

Grandmother sought reinstatement of her appeals pursuant to *Commonwealth v. Wine*, 694 S.W.2d 689, 694 (Ky. 1985), *overruled on other grounds in Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010). As the majority notes, *Wine* was a criminal case. However, I cannot agree that the same remedy could not apply to a DNA case merely because it is a civil action.

The premise of *Wise* and *Hollon*, which followed, is that a criminal defendant is entitled "effective assistance of counsel not only at trial, but during a first appeal as of right." *Hollon*, 334 S.W.3d at 434 (citations omitted). As explained in *Hollon*, "[t]he botched appeal scenario is one instance in which it does not seem unreasonable to expect counsel to admit, if appropriate, a procedural mistake that had the effect of aborting the client's appeal and, in those cases, the appellate court is in the best position to assess whether relief is warranted." *Id*. at 438. That relief may be in the form of reinstatement of the appeal.

While the United States Supreme Court has held that a parent has no absolute due process right to counsel in termination of parental rights actions, appointment of counsel may be determined on a case-by-case basis. *Lassiter v. Dep't of Social Services of Durham County, N.C.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). In Kentucky, that right is absolute. Kentucky Revised Statutes (KRS) 625.080(3). In *R.V. v. Commonwealth, Department for Health &*

Family Services, 242 S.W.3d 669, 673 (Ky.App. 2007), this Court held that under the Constitution and Kentucky statutory law, parental rights to a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings. This includes all critical stages of an underlying dependency proceeding in district court, unless it can be shown that such proceeding had no effect on the subsequent circuit court termination case.

In this case, Grandmother's attorney concedes that the notices of appeal were dismissed because he neglected to include the Cabinet due to no fault of Grandmother. If the appellant was a parent who faced possible termination of parental rights and the appeals were dismissed because of ineffective assistance of counsel in filing the appeal, I would deem reinstatement appropriate. However, this case involves a grandmother and the DNA proceeding could not lead to termination of parental rights. Therefore, the same constitutional considerations are not present and the reasoning of *Wine* and *Hollon* cannot be soundly applied. For that reason, I agree with the majority that the reinstatement of the appeals is not an available remedy.

While there is no relief that can be afforded Grandmother, I write to advocate for a definite statement of the law either by this Court or our Supreme Court on whether naming the Commonwealth in the notice of appeal is sufficient to include the Cabinet as a party in a DNA or termination of parental rights case. I

point out that the attorney in this case is not the first to omit words "Cabinet for Health and Family Services" in a notice of appeal. *See K.H. v. Commonwealth*, No. 2017-CA-001863-ME, 2018 WL 5310145, at *1 (Ky.App. Oct. 26, 2018) (unpublished) (footnote omitted) ("naming of the Commonwealth of Kentucky rather than the Cabinet is insufficient as a matter of law"); *J.M. v. Commonwealth*, No. 2019-CA-000046-ME, 2020 WL 1655976, at *1 (Ky.App. Apr. 3, 2020) (unpublished) (failure to name the Cabinet was fatal to the appeal).

Although the unpublished cases cited are contrary to my view, I believe those cases were wrongly decided. As here, the panels in those cases relied heavily on *Commonwealth, Cabinet for Health and Family Services v. Byer*, 173 S.W.3d 247, 249 (Ky.App. 2005), wherein this Court stated that in a DNA case, the Cabinet is the plaintiff and is an indispensable party. However, *Byer* did not concern the adequacy of the notice of appeal. The issue in *Byer* was whether the Cabinet could be ordered to pay fees for a court-appointed expert, not whether an appeal should be terminated in a DNA case because of the failure to use the words "Cabinet for Health and Family Services" in the notice of appeal.

To be clear, the issue is not whether the Cabinet is an indispensable party. The issue is whether listing the Commonwealth of Kentucky in the notice of appeal includes the Cabinet.

The motion panel that dismissed this case also relied on *City of*

Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990). In that case, the Court decided that Kentucky Rules of Civil Procedure (CR) 73.02(2), the "substantial compliance" rule, does not apply when a notice of appeal is timely filed, but omits the names of indispensable parties. Importantly, the unnamed indispensable parties were the City of Louisville and Jefferson County, undeniably separate legal entities from the named appellee, City of Devondale. There was no contention, nor could there be, that naming the City of Devondale included the City of Louisville and Jefferson County. Here, the Cabinet is an agency of the Commonwealth.

In *Lassiter v. American Express Travel Related Services Company, Inc.*, 308 S.W.3d 714 (Ky. 2010), the State Budget Director appealed from an opinion of this Court dismissing the Budget Director's appeal from a Franklin Circuit Court decision. The circuit court ruled "that a provision in the 2006-2008 Executive Branch budget bill shortening the escheat period for unredeemed traveler's checks from fifteen years to seven years for the two-year budget period was unconstitutional." *Id.* at 715. This Court dismissed the appeal holding that the Budget Director failed to name the State Treasurer, an indispensable party to the appeal. *Id.* at 716.

Our Supreme Court reversed. It began its analysis by noting that "the principal objective of a pleading is to give fair notice to the opposing party." *Id.* at 718 (citation omitted). The Court held that by naming the Department of Treasury,

"by functional equivalence, [the Budget Director] likewise named the Treasurer in his official capacity as a party to the appeal." *Id.* The Court reasoned this result was consistent with the rule that "the naming of the agency head in his official capacity in a lawsuit is the functional equivalent of naming the agency itself." *Id.* at 719 (footnote omitted). The Court concluded there was "no rational purpose" served by holding otherwise. *Id.*

Following *Lassiter*, our Supreme Court decided *Flick v. Estate of Wittich*, 396 S.W.3d 816 (Ky. 2013). The Court concluded that naming an estate in the notice of appeal included the co-administrators even though they were not separately identified. *Id.* at 823. The Court held that "our policy of substantial compliance ensures the survival of an appeal despite clerical errors when no prejudice results from those errors and notice is sufficiently conveyed to the necessary parties." *Id.* at 824.

In a case decided after *Lassiter* and *Flick*, this Court applied the same reasoning in *Tillman v. Commonwealth*, No. 2016-CA-001568-MR, 2017 WL 4082888 (Ky.App. Sept. 15, 2017) (unpublished). Although *Tillman* is unpublished, the alleged defect in the notice of appeal was similar to that which the majority concludes is fatal to this appeal and worthy of discussion.

Tillman appealed from an order of the Muhlenberg Circuit Court dismissing his petition for a declaration of rights alleging he was deprived of a

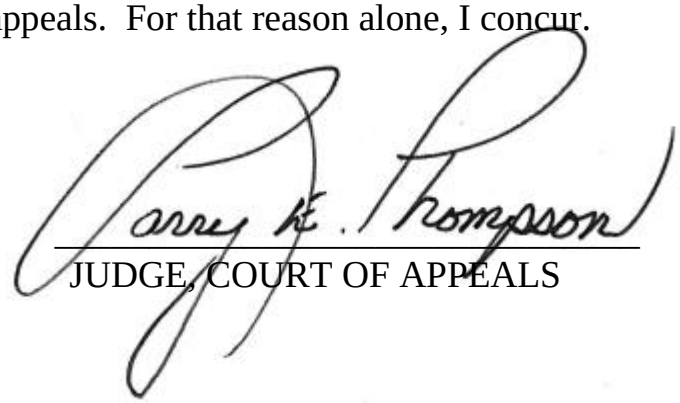
protected liberty interest as a result of his prison disciplinary case. Like the present case, Tillman's notice of appeal listed only the Commonwealth as the appellee. This Court noted that as a general rule, the warden of the prison is an indispensable party to an appeal from a declaratory judgment regarding a prison disciplinary action. *Id.* at *1 n.1. Nevertheless, citing *Lassiter* and *Flick*, this Court held that the deficiency in the notice of appeal was not fatal. Although Tillman only listed the Commonwealth in his notice of appeal, his notice of appeal was "minimally sufficient to bring all indispensable parties before the Court." *Id.*

Naming the Commonwealth of Kentucky is the functional equivalent of naming the Cabinet. The Cabinet is merely the agency through which the Commonwealth acts. From the notices of appeal, it is obvious that Grandmother appealed from the Carter Circuit Court's orders finding she abused or neglected her grandchildren and, therefore, there can be no rational argument that the Cabinet did not have notice of the appeals. There is "no rational purpose" for requiring that the words "Cabinet for Health and Family Services" follow Commonwealth of Kentucky in the notices of appeal.

Although DNA proceedings are not criminal matters, the stakes in such cases are high for the adult and the child. I do not believe that this Court should continue to deny judicial review of these cases merely because the notice of appeal did not include the words "Cabinet for Health and Family Services."

Unfortunately, there is simply no available avenue for Grandmother to correct the erroneous dismissal of her appeals. For that reason alone, I concur.

ENTERED: May 8, 2020



JUDGE, COURT OF APPEALS

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