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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001168-ME

D.L.B., III — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE JEFF MOSS, JUDGE
ACTION NO. 19-J-00061-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND K. THOMPSON, JUDGES.

CALDWELL, JUDGE: Appellant, D.L.B., III (Father),[1] has filed an appeal challenging the trial court's finding that he physically abused his son, D.L.B., IV (Child). As Father has failed to name the Cabinet for Health and Family Services

[1] To protect the privacy of the minor child, we do not refer to the minor child or his natural parents by their names.

(the Cabinet) as an appellee on his notice of appeal and appears to appeal solely from a non-final order, we dismiss his appeal.

Failure to Name the Cabinet as Party to Appeal.

Father's notice of appeal was filed July 18, 2019. The caption of his notice of appeal lists "In Re: [D.L.B., IV], a minor child" and "Commonwealth of Kentucky, Cabinet for Health and Family Services" as "Petitioners[.]" The body of the notice of appeal names Father as the appellant and "the Commonwealth of Kentucky" as the appellee. The certificate of service lists the assistant county attorney who litigated the dependency, neglect, and abuse (DNA) case among those receiving service. It appears that the trial judge, Child's guardian *ad litem*, and the attorney for Child's Mother (who was also a party to the trial court proceedings)[2] were also listed in the certificate of service. However, we find no indication that any representative of the Cabinet would receive notice of the appeal from our examination of the certificate of service. We further note that no brief was filed in this appeal by the Cabinet, although the assistant county attorney who litigated the case in the trial court filed a "Reply Brief for the Commonwealth." In short, the Cabinet has not participated in this appeal and likely has not received actual notice of this appeal despite the reference to the Cabinet as a petitioner in the caption of the notice of appeal.

[2] The Mother is not a party to this appeal.

We have recently held that failure to name the Cabinet as a party in the notice of appeal of a DNA case can merit dismissal of the appeal for failure to name an indispensable party in *M.M. v. Allen County Attorney's Office*, 590 S.W.3d 836 (Ky. App. 2019). We dismissed the appeal of the DNA disposition order in *M.M.* for failure to name an indispensable party in the appeal since there was no reference to the Cabinet on the notice of appeal, and the appellant failed to respond to this Court's order to show cause why the appeal should not be dismissed, after discussing relevant precedent:

> We have previously held "the Cabinet is in fact 'the plaintiff'" when it files a dependency action. *Commonwealth, Cabinet for Health and Family Services v. Byer*, 173 S.W.3d 247, 249 (Ky. App. 2005) (quoting *Cabinet for Human Resources v. Howard*, 705 S.W.2d 935, 937 (Ky. App. 1985)). The Cabinet may not be considered a "nominal party" in such cases. *Id.* Based on this rationale, we have dismissed dependency, neglect, and abuse cases in which the Cabinet was erroneously omitted as a party. "[F]ailure to name an indispensable party in the notice of appeal results in dismissal of the appeal." *Slone v. Casey*, 194 S.W.3d 336, 337 (Ky. App. 2006); *see also City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990).

Id. at 838-39 (footnote omitted).

Unlike *M.M.*, Father at least referred to the Cabinet in the caption of his notice of appeal albeit as a "Petitioner" rather than as an appellee. However, there is no indication that the Cabinet received notice of the appeal since no Cabinet representative was listed on the certificate of service on the notice of

appeal. Given the lack of any indication that the Cabinet received actual notice, we cannot say that just including the Cabinet in the caption of the notice of appeal amounted to substantial compliance with the requirements of Kentucky Rules of Civil Procedure (CR) 73.03. *See A.M.W. v. Cabinet for Health and Family Services*, 356 S.W.3d 134, 135-36 (Ky. App. 2011) (dismissing appeal in involuntary termination of parental rights case for failure to join the child as a party to the appeal because the child was not listed as an appellee in the body of the notice of appeal and the child's guardian *ad litem* did not receive a copy of the notice of appeal, thus, there was no substantial compliance with CR 73.03 despite reference to the child in the caption of the notice of appeal).

Appeal of Non-Final Order.

Father states in his notice of appeal that he "appeals from the Order of the Jessamine Family Court entered on June 18, 2019 pertaining to the Finding of Abuse . . . ." His brief refers to a Jessamine Family Court trial held June 18, 2019, concerning allegations of abuse and an order entered following that hearing containing a finding that Father abused Child, which he refers to as Exhibit 1. The appendix to his brief contains two documents: 1) the trial court's docket sheet entered June 20, 2019, containing a finding that Father physically abused the child, and 2) an "Order Adjudication Hearing" entered June 20, 2019, adjudging Child to be neglected or abused and containing a finding that Father had physically abused

the child. Thus, it appears that he is appealing from the trial court's adjudication order in this DNA case. Adjudication orders in DNA cases are not final and appealable orders. *J.E. v. Cabinet for Health and Family Services*, 553 S.W.3d 850, 852 (Ky. App. 2018) (dismissing appeal from DNA adjudication order where no disposition order had been entered as "the Court holds that a disposition order, not an adjudication order, is the final and appealable order with regard to a decision of whether a child is dependent, neglected, or abused").

We note that the Jessamine Family Court held a disposition hearing in this case on July 18, 2019, and entered a disposition order that same day—which was also the same day that Father filed his notice of appeal. Disposition orders in DNA cases are final and appealable orders. *Id*. The disposition order entered by the trial court accepted and incorporated the Cabinet's DNA Dispositional Report and provided that the child was removed from the home and placed with relatives. It further provided for another hearing to be held in the case on August 15, 2019.

Had Father properly named the Cabinet in his notice of appeal, perhaps we could construe his appeal to be from the final DNA determination following adjudication and disposition. However, since the Cabinet was not properly joined as a party and as he apparently appeals solely from a non-final order, we must dismiss his appeal.

ACREE, JUDGE, CONCURS.

THOMPSON, K., JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, K., JUDGE: Respectfully, I dissent. The omission of the words "Cabinet for Health and Family Services" in the caption of the notice of appeal does not require dismissal.

"There is no subject of more importance in the administration of justice than the welfare of children." *Campbell v. Campbell*, 452 S.W.2d 412, 413 (Ky. 1970). And, there is no right more fundamental than for a parent "to be free from governmental interference when parenting a child." *Z.T. v. M.T.*, 258 S.W.3d 31, 33 (Ky.App. 2008). As we held in *Z.T.*:

> Although a dependency action does not terminate parental rights, it is an interference with the parental relationship and often a precursor to the permanent termination of parental rights. The parents must, therefore, be afforded the same fundamentally fair procedures.

Id. at 34.

In Kentucky, the fundamental right of a parent in the parental relationship is so sacred that parents have the right to counsel when the government seeks to interfere with that right. Kentucky Revised Statutes (KRS) 625.080(3). In *R.V. v. Commonwealth, Dep't for Health & Family Servs*., 242 S.W.3d 669, 673 (Ky.App. 2007), this Court held that 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.

Unfortunately, appointed counsel is often overworked and almost always underpaid as KRS 625.080(3) authorizes only a $500 maximum fee for appointed counsel in termination of parental rights cases whether the services are rendered at trial, on appeal, or in the course of both. *Commonwealth, Cabinet for Health & Family Servs. v. K.B.H.*, No. 2004-CA-001760-ME, 2005 WL 2108126, *3 (Ky.App. Sept. 2, 2005). While I believe that amount is woefully low, that is a matter for the legislature to correct. However, a parent should not be denied appellate review because counsel did not include use the words "Cabinet for Health and Family Services" in the notice of appeal. Most importantly, those words are unnecessary.

There are a number of unpublished opinions dismissing cases for not referring to the Cabinet in the notice of appeal. *See K.H. v. Commonwealth*, No. 2017-CA-001863-ME, 2018 WL 5310145, *1 (Ky.App. Oct. 26, 2018) (unpublished) ("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 (Ky.App. Apr. 3, 2020) (unpublished) (failure to name the Cabinet was fatal to the appeal); *A.S.-H. v. Commonwealth*, No. 2019-CA-001097-

ME, 2020 WL 598229, *1 (Ky.App. Feb. 7, 2020) (unpublished) (naming the "Commonwealth of Kentucky" as an appellee in the caption and body of the notices of appeal was not sufficient to include the Cabinet and fatal to the appeals); *R.W. v. Commonwealth*, No. 2019-CA-000274-ME, 2019 WL 6681868, *1 (Ky.App. Dec. 6, 2019) (unpublished) (naming "the Commonwealth of Kentucky, Allen County Attorney's Office" without mentioning the Cabinet in the notice of appeal was fatal to the appeal).

I note many more termination of parental rights and DNA cases have been dismissed for this same reason by motion panel orders which never appear for view of the public or the practicing bar. I know this because I have sat on over ten panels in the past year where the same perceived mistake has resulted in the dismissal of appeals.

In addition to the unpublished opinions cited and the numerous orders dismissing, there is, as the majority notes, one published case addressing the issue. In *M.M. v. Allen County Attorney's Office*, 590 S.W.3d 836 (Ky.App. 2019), the appeal of a DNA disposition order was dismissed for failure to name an indispensable party because there was no reference to the Cabinet in the notice of appeal *and* the appellant failed to respond to this Court's order to show cause why the appeal should not be dismissed.

I will explain why the reasoning in *M.M.* and the unpublished cases cited is flawed but first point out that *M.M.* does not apply to this case. This is not a situation as in *M.M.* where there was no reference to the Cabinet in the notice of appeal. The Cabinet was named as a "Petitioner" in the caption of Father's notice of appeal. This alone distinguishes *M.M.* from this case. However, even without naming the Cabinet in the caption, naming the Commonwealth of Kentucky in the notice of appeal is sufficient.

The appeals in the cases cited, including *M.M.*, were dismissed in reliance 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 dependency, neglect, or abuse (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 dismissed in a termination of parental rights or DNA appeal because of the failure to use the words "Cabinet for Health and Family Services" in the notice of appeal.

City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990), has also been cited as precedent to dismiss appeals when the Cabinet is not specifically named. In *City of Devondale*, the Court held that the failure to name an indispensable party require dismissal of a timely filed appeal. *Id*. at 957.

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.

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. That issue must be resolved in light of our Supreme Court's adoption of the policy of substantial compliance in regard to notices of appeal. *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986). That policy "seek[s] to recognize, to reconcile and to further three significant objectives of appellate practice: achieving an orderly appellate process, deciding cases on the merits, and seeing to it that litigants do not needlessly suffer the loss of their constitutional right to appeal." *Id*. at 482.

The substantial compliance policy was applied in *Lassiter v. American Exp. Travel Related Services Co., Inc.*, 308 S.W.3d 714 (Ky. 2010). In *Lassiter*, 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 715-16.

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. 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 notice of appeal, it is obvious that Father appealed from the order finding he abused or neglected child. There is "no rational purpose"

for requiring that the words "Cabinet for Health and Family Services" follow Commonwealth of Kentucky in the notice of appeal.

As I write, I am not alone in my view. Recently, three of this Court's members expressed the same view. In *J.E. v. Lanphear*, No. 2018-CA-001376-ME, 2020 WL 2609974 (Ky.App. May 22, 2020), the notices of appeal contained various defects. Notably one such defect was that *neither* the Commonwealth nor the Cabinet was named in the notices of appeal. Rather than dismissing the appeals, this Court addressed the merits "in the interest of justice and judicial economy, as well as the best interests of the three children involved[.]" *Id*. at *1. To reach this result, the panel gave "a most liberal interpretation" to the Supreme Court's decisions *Lassiter* and *Flick*. *Id*. That liberal interpretation serves the important objective of appellate review on the merits.

In accordance with *Lassiter* and *Flick*, the failure to use the words "Cabinet for Health and Family Services" is not a jurisdictional defect. Because it is not a jurisdictional defect, "[d]ismissal is not an appropriate remedy for this type of defect so long as the judgment appealed from can be ascertained within reasonable certainty . . . and no substantial harm or prejudice has resulted to the opponent." *Ready*, 705 S.W.2d at 481-82.

If, as the majority believes, the Cabinet did not receive notice of the appeal, then Father should be permitted to amend his notice of appeal. As the

Court noted in *Flick*, Kentucky Rules of Civil Procedure (CR) CR 15.01 provides that leave to amend "shall be freely given when justice so requires." *Flick*, 396 S.W.3d at 823. The Court noted that "[a] notice of appeal is *not* a pleading because it is not identified in CR 7.01 but the liberal amendment policy is instructive. Courts allow parties to conform their pleadings to the evidence by virtue of amended pleadings where there is no real surprise or detriment to the opposing party." *Id*.

As a Court, we are divided on this issue meaning that the fate of any individual appeal depends on the panel to which the case is assigned. I am not aware of any appeal that was dismissed for failure to use the words "Cabinet for Health and Family Services" where a motion for discretionary review was filed. Until our Supreme Court speaks definitively on the issue, I fear panels of this Court will continue to deprive not only appellants in these cases the right to appeal but also neglect our duty to protect the welfare of the children.

There is another and more expedient way to resolve this issue other than through judicial opinion. Amendment of our civil rules would apply to all notices of appeal and decrease the needless dismissal of appeals based on perceived technical deficiencies. I submit that in light of the adoption of the substantial compliance rule, Kentucky should follow the federal rule as to the content of a notice of appeal.

Federal Rules of Appellate Procedure (Fed.R.App.P.) 3(c)(1) requires that the notice of appeal contain the following:

> **(A)** specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";
>
> **(B)** designate the judgment, order, or part thereof being appealed; and
>
> **(C)** name the court to which the appeal is taken.

The federal rule "contains no requirement that the notice of appeal contain the names of the appellees[.]" *Int'l Union, United Auto. Aerospace & Agr. Implement Workers of Am. v. United Screw & Bolt Corp.*, 941 F.2d 466, 471 (6th Cir. 1991). Based on the parties listed in the judgment or order appealed, "[t]he district clerk must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record--excluding the appellant's[.]" Fed.R.App.P. 3(d)(1). Reflecting the policy of substantial compliance, Fed.R.App.P. 3(c)(4) states: "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice."

In summary, I believe the Commonwealth of Kentucky includes the Cabinet in the notice of appeal and there is no jurisdictional defect. If there is a

concern about notice to the Cabinet, Father can amend his notice of appeal. I also believe that our civil rules should be amended to conform to the federal rule so that appeals are not dismissed based on perceived technicalities as reflected in our substantial compliance policy in regard to notices of appeal. For the reasons stated, I dissent and would consider the merits of Father's appeal.

ORDER

For the foregoing reasons, this appeal is hereby dismissed.

ENTERED: June 26, 2020

/s/ Jacqueline M. Caldwell
Judge, Court of Appeals

BRIEF FOR APPELLANT:

John M. Tranter
Nicholasville, Kentucky

BRIEF FOR APPELLEE:

Eric Paul Wright
Nicholasville, Kentucky