

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re the Adoption of S.K.

Court of Appeals No. L-12-1234

Trial Court No. 2011 ADP 000028

DECISION AND JUDGMENT

Decided: February 12, 2013

* * * * *

Phillip Maurice Hicks, pro se appellant.

Neva Grace Kyser, pro se appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} P.H., the natural father of S.K., appeals a judgment of the Lucas County Court of Common Pleas, Probate Division, granting adoption of S.K. to her step-father, M.K. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On February 23, 2011, M.K. filed a petition for step-parent adoption. In that petition, he indicated that he was married to N.K., S.K.'s birth mother. Additionally, M.K. indicated that S.K. had been placed in his home for adoption on November 7, 2009. Along with the petition for adoption, M.K. also filed a consent to adoption in which N.K. waived notice of the adoption hearing and consented to the adoption.

{¶ 3} On February 28, 2011, the probate court issued a judgment entry scheduling the adoption hearing for May 9, 2011. Since P.H. lived in South Carolina, the court mailed the entry containing the notice of the hearing to the sheriff department in the county in which P.H. lived. On March 8, 2011, a deputy sheriff attempted to serve P.H. with the adoption hearing notice, but was unsuccessful in doing so. The deputy stated that the man living at the address would not answer the door, despite the deputy having seen him inside the home.

{¶ 4} After being notified that personal service had failed, the court ordered service by certified mail. Once again, service was unsuccessful.

{¶ 5} Having unsuccessfully attempted to serve P.H. with notice of the adoption proceedings on two separate occasions, M.K. filed an affidavit with the court on April 4, 2011, in which he requested service by publication. The following day, the court approved service by publication and changed the date of the hearing to June 2, 2011. Notice of the adoption proceedings was subsequently published in the Toledo Legal News on three consecutive Thursdays between April 14 and April 28.

{¶ 6} The notice published in the Toledo Legal News included information concerning the pendency of the adoption proceeding, the allegation of P.H.’s failure to communicate with S.K. or provide support for her, and the date and time of the hearing on the matter.

{¶ 7} After allegedly learning of the adoption proceedings through an internet search, P.H. filed a letter with the court on May 23, 2011. In that letter, P.H. essentially contested the adoption and made numerous statements to support his position, most of which were irrelevant to the adoption proceedings. During the period between P.H.’s initial response to the court and the date of the hearing, P.H. filed several documents with the court relating to his work “fighting fraud” as a CPA. Notably, he failed to notify the court of his whereabouts or oppose the adoption. In addition, P.H. failed to appear for adoption hearing. On July 18, 2011, the probate court issued its final decree of adoption after finding that P.H.’s consent was not required under R.C. 3107.07 because P.H. had not maintained contact or supported S.K. for at least one year. P.H. has now appealed the court’s decision to grant the adoption.

B. Assignments of Error

{¶ 8} P.H. assigns the following errors for our review:

I. BECAUSE APPELLANT WAS NOT PROPERLY NOTIFIED OF THE FINAL HEARING WITH DUE PROCESS, THE PROBATE COURT ERRED WHEN IT GRANTED THE PETITION FOR ADOPTION.

II. BECAUSE APPELLANT WAS IN FACT ALIENATED FROM MINOR CHILD FOR MANY YEARS IN A CLEAR CASE OF PARENTAL KIDNAPPING, THE PROBATE COURT ERRED WHEN IT RELIED UPON MISREPRESENTATIONS AND PERJEROUS STATEMENTS BY RESPONDENTS.

III. BECAUSE APPELLANT WAS SUBJECT TO FRAUD AND EXTORTION BY RESPONDENTS WITH RESPECT TO CHILD SUPPORT ENFORCED WITHOUT DUE PROCESS, THE PROBATE COURT ERRED WHEN IT GRANTED THE PETITION FOR ADOPTION SPECIFICALLY CITING CHILD SUPPORT.

IV. BECAUSE APPELLANT INFORMED THE PROBATE COURT OF HIS FINANCIAL HARDSHIP WELL IN ADVANCE OF ATTENDING ANY OHIO HEARING, THE PROBATE COURT ERRED IN NOT PROVIDING ANY PROCEDURAL SAFEGUARDS IN ORDER TO PREVENT A *PER SE* ILLEGAL ADOPTION.

V. BECAUSE APPELLANT CONTINUES TO HAVE A CLEAR RIGHT TO PETITION THE SOUTH CAROLINA FAMILY COURT FOR VISITATION WITH MINOR CHILD, THE PROBATE COURT ERRED WHEN IT GRANTED THE PETITION FOR ADOPTION.

VI. BECAUSE THE RESPONDENTS ENTERED INTO THE COURT OF EQUITY WITH *UNCLEAN HANDS*, THE PROBATE

COURT ERRED BECAUSE THE RESPONDENTS ARE PRECLUDED FROM RECOVERING IN A COURT OF EQUITY WHEN TAINTED WITH INEQUITABLENESS OR BAD FAITH RELATIVE TO THE MATTER IN WHICH THEY SEEK RELIEF.

II. Analysis

{¶ 9} In P.H.'s first assignment of error, he argues that he was denied due process because he never received notice of the adoption hearing. Essentially, P.H. challenges the validity of the notice by publication.

{¶ 10} The requirements for process by publication in the probate division of the court of common pleas are set forth in Civ.R. 73(E)(6), which provides:

(E) Service of notice

In any proceeding where any type of notice other than service of summons is required by law or deemed necessary by the court, and the statute providing for notice neither directs nor authorizes the court to direct the manner of its service, notice shall be given in writing and may be served by or on behalf of any interested party without court intervention by one of the following methods:

* * *

(6) By publication once each week for three consecutive weeks in some newspaper of general circulation in the county when the name, usual place of residence, or existence of the person to be served is unknown and cannot with reasonable diligence be ascertained; provided that before

publication may be utilized, the person giving notice shall file an affidavit which states that the name, usual place of residence, or existence of the person to be served is unknown and cannot with reasonable diligence be ascertained.

{¶ 11} In the present case, M.K. made three attempts to serve P.H. First, he attempted personal service at P.H.'s last known address. When that was unsuccessful, M.K. attempted to serve P.H. via certified mail. Finally, M.K. completed service by publication pursuant to the provisions of Civ.R. 73. In doing so, he first filed an affidavit with the court, which stated that P.H.'s usual place of residence of the person was "unknown and [could not] with reasonable diligence be ascertained." In addition, M.K. stated in his affidavit that he attempted to locate P.H. in the following ways:

We tried locating [P.H.] through acquaintances and Yahoo People Search and Ancestry.com, but found nothing. Even his relatives are unable to be located through the above means. My wife and I contacted possible places of employment such as local gyms where he would possibly be employed, but to no avail. Also, we went to the Ohio Child Support Enforcement Agency, to find him, but his whereabouts are unknown even to the Child Support Enforcement Agency because they have only an address he lived at in 2007. He no longer lives there. He doesn't pay any support.

Finally, we located an attorney who is currently involved in a legal matter [in] which [P.H.] is a party. The attorney gave us an address in

South Carolina where he was fairly certain [P.H.] was living. However, Sherriff's service failed as no one would answer the door. Later Certified Mail failed because no one signed or acknowledged that [P.H.] resided there.

Our only recourse is to publish, because [P.H.] either lives at the residence where service failed, but does not wish to be officially located, or truly [his] whereabouts [are] unknown.

{¶ 12} Finding that M.K. satisfied the requirements of Civ.R. 73(E)(6), and that service by publication was warranted in this case, the probate court granted M.K.'s motion and published notice of the hearing in the Toledo Legal News on three consecutive Thursdays.

{¶ 13} That publication was made once each week for three consecutive weeks in a newspaper of general circulation in Lucas County is undisputed. The only dispute here concerns the efforts M.K. used to affect service by non-publication means. M.K.'s "reasonable diligence" in attempting to determine P.H.'s usual place of residence is supported by the affidavit. Notably, P.H. has produced no evidence that would call such efforts into question. Having fully reviewed the record, we conclude that M.K. complied with the requirements of Civ.R. 73(E)(6) and adequately effectuated notice of the adoption proceedings. Accordingly, P.H.'s first assignment of error is not well-taken.

{¶ 14} We find that P.H.'s remaining assignments of error lack merit, because they are supported by information that was not entered into evidence in the probate court. Under App.R. 9(A), such evidence is not part of the record and cannot be considered on

appeal. *See State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. Accordingly, P.H.'s remaining assignments of error are not well-taken.

III. Conclusion

{¶ 15} The judgment of the Lucas County Court of Common Pleas, Probate Division, is affirmed. Costs are assessed to P.H. pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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