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In re Adoption of Amea R., a minor child. Ethel S. and Edward S., Sr., appellees, v. Edward S., Sr., an incapacitated person, by and through Edward S., Jr., his son and next friend, appellant.

807 N.W.2d 736

Filed December 2, 2011. No. S-10-1163.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
4. **Final Orders: Adoption.** Adoption proceedings are special proceedings.
5. **Interventions.** Under Neb. Rev. Stat. § 25-328 (Reissue 2008), an intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.
6. **Guardians and Conservators: Words and Phrases.** A next friend is one who, in the absence of a guardian, acts for the benefit of an infant or incapacitated person.
7. **Guardians and Conservators.** A next friend must have a significant relationship with the real party in interest, such that the next friend is an appropriate alter ego for the party who is not able to litigate in his or her own right.
8. **Courts: Guardians and Conservators: Guardians Ad Litem: Estates.** It is a court's duty as the general conservator of the estates of all persons under disabilities to see that an incapacitated party's rights and estate are protected, either by a general guardian or by a next friend or guardian ad litem appointed by the court for the purposes of the action.
9. **Guardians and Conservators: Mental Competency.** Even when a person is not completely incompetent, but is incapable, through age or weakness of mind, of conducting his or her affairs, it is within the discretion of the trial court to permit a suit to proceed in his or her behalf through a next friend.
10. **Courts: Guardians Ad Litem: Mental Competency.** A court has discretion to appoint a guardian ad litem for a litigant when the litigant is not mentally competent to comprehend the significance of legal proceedings, or is unable to intelligently and understandingly participate in the protection of his or her best interests, and such a guardian is needed to protect those interests.
11. **Courts: Guardians and Conservators.** A next friend is under control of the court and can be removed if, in the court's discretion, the next friend is unsuitable.

12. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
13. **Final Orders: Words and Phrases: Appeal and Error.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is not affected when that right can be effectively vindicated in an appeal from the final judgment.

Appeal from the County Court for Douglas County: CRAIG Q. MCDERMOTT, Judge. Appeal dismissed.

Susan J. Spahn, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellant.

William M. Lamson, Jr., Anne Marie O'Brien, and Gage R. Cobb, of Lamson, Dugan & Murray, L.L.P., for appellees.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

This is an adoption case involving the petition of a married couple to adopt the wife's biological granddaughter. The husband has Alzheimer's-type dementia, so his adult son sought to participate in the adoption proceedings on his behalf and object to his mental capacity to pursue the adoption. The question presented in this appeal is whether the son can stand as his father's "next friend" and participate in such a proceeding. But we do not reach that issue, because we conclude that the son's appeal was not taken from a final, appealable order.

BACKGROUND

Ethel S. and Edward S., Sr. (Edward Sr.), a married couple, filed a petition for adoption in the county court on December 19, 2007, seeking to adopt then-6-year-old Amea R. Amea's biological father is Ethel's son and Edward Sr.'s stepson. On the same day, in a separate proceeding, Edward S., Jr. (Edward Jr.), was appointed temporary conservator of Edward Sr.'s estate. Edward Jr. is Edward Sr.'s son and Ethel's stepson. The conservatorship was based upon Edward Jr.'s allegation that Edward Sr. suffered from dementia and lacked capacity to make financial decisions for himself, and specific allegations that Ethel was misusing a power of attorney to divert Edward Sr.'s assets for personal use.

Edward Jr. filed a "Petition in Intervention and Objection to Petition for Adoption" in the county court adoption case, alleging that he had standing to participate pursuant to his appointment as temporary conservator and as Edward Sr.'s son and next friend. Edward Jr. alleged that Edward Sr. suffered from Alzheimer's-type dementia and possessed neither the mental capacity to care for Amea nor the capacity to consent to the adoption. The county court entered an order on February 7, 2008, based in part on "the agreement of the parties," permitting Edward Jr. to participate.

But on February 19, 2008, Edward Sr. and Ethel answered Edward Jr.'s petition and alleged that he lacked standing to object to the adoption. (We recognize that the parties also dispute whether Edward Sr. has the capacity to retain counsel and whether those who purport to represent his interests are actually doing so. Our description of the pleadings as having been filed by Edward Sr. is based on the representations they make on their face, and should not be construed as a conclusion on the merits of the parties' arguments about Edward Sr.'s representation.)

After several delays, Edward Jr. moved for a summary judgment dismissing the petition for adoption. Edward Sr. and Ethel in turn filed a motion for partial summary judgment seeking to have Edward Jr. removed from the proceedings for lack of standing.

But by this time, Edward Jr. was no longer Edward Sr.'s temporary conservator. The separate guardianship and conservatorship case had proceeded to trial, and an independent lawyer had been appointed as Edward Sr.'s conservator. The court found from the evidence that Ethel "may have not acted reasonably in making certain financial decisions that clearly affected" Edward Sr. The court found that a third-party conservator was necessary because of animosity between Ethel and Edward Jr. But the court declined to appoint a guardian, "because it appears that [Edward Sr.] can still somewhat function on his own and also does have his wife to take care of him on a day-to-day basis." And Ethel and Edward Jr. each had power to act as Edward Sr.'s attorney in fact for health care decisions, pursuant to a durable power of attorney that was

"now effective because [Edward Sr.] has been diagnosed with dementia and is therefore incapacitated."

Then, before the parties' motions for summary judgment were heard, the county court judge entered an order recusing himself from the adoption case. The court acknowledged "the ever present debilitating effect of [Edward Sr.'s] Alzheimer's disease as opposed to [his] condition when the adoption proceedings first began." And the court explained that "any and all proceedings need to be absolutely free from any bias and to safeguard such from arising, particularly due to facts and acts by parties that were revealed and noted by the court in related proceedings under [the guardianship/conservatorship case]." So, the court concluded, "the parties would best be served by a neutral magistrate with a fresh perspective of the facts as related solely in the adoption."

A replacement judge was appointed in the case. Edward Jr. filed a motion to disqualify the law firm purporting to represent Ethel and Edward Sr., contending that Edward Sr. lacked capacity to retain counsel. Edward Jr. also filed a "Motion to Compel [Edward Sr.] to Appear and to Dismiss," which sought an order compelling Edward Sr. to appear before the court "and answer nonleading questions and to dismiss this proceeding." The motion to compel was styled, however, as having been filed by Edward Sr. "by and through" Edward Jr. as his next friend.

After a hearing, the court took the standing issue under advisement and entered an order finding that Edward Jr. did not have standing in the adoption case. The court therefore denied all the motions filed by Edward Jr. and held over the adoption petition for further hearing. And a few days later, the court appointed an attorney to act as guardian ad litem to represent Edward Sr.'s interests in the adoption proceeding. Edward Jr. appeals.

ASSIGNMENTS OF ERROR

Edward Jr. assigns that the court erred in (1) determining that Edward Jr. was required to have standing, personally, and in removing him from these proceedings and granting the motion objecting to standing; (2) failing to find that Edward

Jr. was involved in these proceedings based upon Edward Sr.'s standing; and (3) dismissing the pleadings filed by Edward Sr. by and through Edward Jr., including, but not limited to, the "Motion to Compel [Edward Sr.] to Appear and to Dismiss."

Edward Sr. and Ethel do not cross-appeal, but they do contend in their brief that the order effectively dismissing Edward Jr. from the case was not a final, appealable order.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[1]

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[2] As noted, Edward Sr. and Ethel argue that we lack appellate jurisdiction, because Edward Jr.'s appeal was not taken from a final, appealable order.[3]

[3,4] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.[4] The first and third categories are not at issue here, so the question is whether the county court's order affected a substantial right and was made in a special proceeding. Specifically, because adoption proceedings are special proceedings,[5] the question is whether the order affected a substantial right. We find that it did not. But explaining that conclusion will require an examination of some of the principles underlying the merits of Edward Jr.'s

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[1] *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

[2] *In re Interest of D.I.*, 281 Neb. 917, 799 N.W.2d 664 (2011).

[3] See *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[4] *Id.*

[5] See *id.*

arguments, because those principles clarify the nature of the order from which Edward Jr.'s appeal was taken.

[5] To begin with, it is important to note that Edward Jr. does not claim that he should have been permitted to intervene in the adoption proceeding and participate as a party. Although his initial motion was styled as a "motion to intervene," it did not seek intervention in the usual sense, because Edward Jr. did not seek to join the proceedings in defense of his own rights or interests. Nor could he have—he was not a real party in interest. The Nebraska adoption statutes[6] have no specific provision that would permit his intervention, and under the general intervention statute,[7] an intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.[8] So, while an order denying intervention as a real party in interest might be a final order for purposes of appeal,[9] the court's November 1, 2010, order in this case was not such an order.

[6,7] Instead, Edward Jr. claims that he should have been permitted to participate in the proceedings in a representative capacity as "next friend" of Edward Sr. A next friend is one who, in the absence of a guardian, acts for the benefit of an infant or incapacitated person.[10] It is generally recognized that a next friend must have a significant relationship with the real party in interest, such that the next friend is an appropriate

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[6] See Neb. Rev. Stat. § 43-101 et seq. (Reissue 2008).

[7] See Neb. Rev. Stat. § 25-328 (Reissue 2008).

[8] See, *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005); *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002).

[9] See *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985).

[10] See, *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000); *State on behalf of B.A.T. v. S.K.D.*, 246 Neb. 616, 522 N.W.2d 393 (1994). See, also, *T.W. by Enk v. Brophy*, 124 F.3d 893 (7th Cir. 1997); *Miller v. Miller*, 677 A.2d 64 (Me. 1996); *Dye v. Fremont County School Dist. 24*, 820 P.2d 982 (Wyo. 1991).

alter ego for the party who is not able to litigate in his or her own right.[11]

[8] We have recognized the general rule that where a person is under disability, but has not been judicially so declared, a suit may be maintained on his or her behalf by a next friend.[12] Under Nebraska law, an action does not abate by the death or other disability of a party, if the cause of action survives; instead, "[i]n the case of the death or other disability of a party, the court may allow the action to continue by or against his or her representative or successor in interest."[13] In such a situation, it is the court's duty as the general conservator of the estates of all persons under disabilities to see that the incapacitated party's rights and estate are protected, either by a general guardian or by a next friend or guardian ad litem appointed by the court for the purposes of the action.[14]

[9-11] And even when a person is not completely incompetent, but is incapable, through age or weakness of mind, of conducting his or her affairs, it is within the discretion of the trial court to permit a suit to proceed in his or her behalf through a next friend.[15] But that is clearly discretionary, and the court also has discretion to appoint a guardian ad litem for a litigant when the litigant is not mentally competent to comprehend the significance of legal proceedings, or is unable to intelligently and understandingly participate in the protection of his or her best interests, and such a guardian is needed to protect those interests.[16] A next friend is under control of the court and can be removed if, in the court's discretion, the next friend is unsuitable.[17] And there is no substantial difference between

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[11] See *Brophy, supra* note 10.

[12] *Stephan v. Prairie Life Ins. Co.*, 113 Neb. 469, 203 N.W. 626 (1925).

[13] Neb. Rev. Stat. § 25-322 (Reissue 2008).

[14] See *Simmons v. Kelsey*, 72 Neb. 534, 101 N.W. 1 (1904).

[15] See, *Westerdale v. Johnson*, 191 Neb. 391, 215 N.W.2d 102 (1974); *Fiala v. Tomek*, 164 Neb. 20, 81 N.W.2d 691 (1957); *Stephan, supra* note 12.

[16] *In re Interest of D.A.*, 239 Neb. 264, 475 N.W.2d 511 (1991).

[17] See, *Miller, supra* note 10; *In re Estate of Beghtel*, 236 Iowa 953, 20 N.W.2d 421 (1945); *Wager v. Wagoner*, 53 Neb. 511, 73 N.W. 937 (1898).

a guardian ad litem and a next friend except that historically, a guardian ad litem represented a defendant and a next friend represented a plaintiff.[18]

We have explained that when an alleged incompetent controverts the right of the next friend to act in his or her behalf, the next friend must plead and prove that the incompetent on whose behalf the suit is brought does not reasonably understand the nature and purpose of the suit, does not reasonably understand the effect of his or her acts with reference to the suit, and does not have the will to independently decide whether or not the suit should be brought and prosecuted.[19] And we assume, without deciding, that there does exist some degree of mental incapacity that would prevent a person from being able to join in a petition for adoption. While the Nebraska adoption statutes do not expressly address mental capacity, there are well-established general principles of law regarding the effect of mental incapacity on the power to enter into legal transactions, such as contracts and marriages.[20] Although we expressly do not decide the extent of disability that would be necessary to preclude adoption,[21] it is apparent from those assumptions that the adoption court's discretion would permit the court to inquire into a prospective adoptive parent's competency[22] and to appoint someone to represent that person's interests while inquiring into competency.

But the jurisdictional issue in this appeal does not depend on evidence of Edward Sr.'s alleged incompetency, because the order from which Edward Jr.'s appeal was taken did not determine whether or not Edward Sr. was incompetent. The court's order simply determined that Edward Jr. was not an appropriate person to protect Edward Sr.'s interests. And a subsequent

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[18] *Dye, supra* note 10.

[19] See *Dafoe v. Dafoe*, 160 Neb. 145, 69 N.W.2d 700 (1955).

[20] See, *Edmunds v. Edwards*, 205 Neb. 255, 287 N.W.2d 420 (1980); *Taylor v. Koenigstein*, 128 Neb. 809, 260 N.W. 544 (1935).

[21] Compare *Edmunds, supra* note 20.

[22] See *Fiala, supra* note 15.

order determined that a neutral guardian ad litem was. So, the question is: Whose substantial right, if any, was affected?

[12] Edward Jr. had no substantial right that could be affected. A substantial right is an essential legal right, not a mere technical right.[23] Edward Jr. does not claim to have any direct interest in the adoption proceedings, so any right he has to participate or appeal is vicarious. And he does not argue otherwise. Instead, his jurisdictional argument rests on the contention that because the court's order affected *Edward Sr.'s* substantial right, it was appealable.

But the only purported right of Edward Sr. that was affected by the court's orders was the right to have a next friend, rather than a guardian ad litem, independently protecting his interests. In the procedural context of this case, because the adoption itself remained pending, the court's order was not appealable. Our decision in *In re Adoption of Krystal P. & Kile P.*[24] has some bearing here. In that case, the Nebraska Department of Social Services sought to intervene in an adoption proceeding and challenge the validity of the biological parents' relinquishments and consents to adoption. The county court found that the relinquishments and consents were valid, and the Department of Social Services appealed.[25] We dismissed the appeal for lack of a final, appealable order, concluding that the court's order had not affected a substantial right.[26] We reasoned that the validity of the relinquishments and consents was only one of the matters which must be determined in an adoption proceeding.[27] The court's order had done nothing more than permit the county court to entertain the adoption proceedings.[28]

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[23] *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010).

[24] *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995).

[25] See *id.*

[26] See *id.*

[27] See *id.*

[28] See *id.*, citing *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988).

Our decision in *In re Estate of Isaac*[29] is also pertinent here. In that case, a guardian ad litem was appointed to represent the interests of a decedent's widow, who was alleged to be incompetent. A guardian ad litem was appointed, who elected on the widow's behalf to take an elective share of the decedent's estate. When the decree of distribution was finally made, the widow was awarded her elective share. On appeal, the authority of the guardian ad litem to elect on behalf of the widow was questioned, but it was argued that the order appointing the guardian ad litem could not be attacked because it had been a final order from which no appeal had been taken.[30]

We disagreed, concluding that the order appointing the guardian ad litem "does not fall within the statutory definition of a final order."[31] Such an order, we explained, "is merely an incident in the proceedings, and of itself affects no substantial right, although such rights may be affected by subsequent action, or omission to act, by the appointee."[32] So, we found, "[t]he authority of the appointee to act may be challenged at the time of the final hearing, and may be reviewed in an appellate court."[33]

[13] Those principles are applicable here. Under *In re Estate of Isaac*, it is clear that Edward Sr. could not have himself appealed from the court's order on the ground that a guardian ad litem was appointed. The authority of the guardian to act would instead be challengeable on an appeal from the court's final decree.[34] And a substantial right under § 25-1902 is not affected when that right can be effectively vindicated in an appeal from the final judgment.[35] An order appointing a guardian ad litem in lieu of a next friend is, similarly, not appealable. In short, the court's orders merely permitted the

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[29] *In re Estate of Isaac*, 108 Neb. 662, 189 N.W. 297 (1922).

[30] See *id.*

[31] *Id.* at 665, 189 N.W. at 298-99.

[32] *Id.* at 665, 189 N.W. at 299.

[33] *Id.* at 665-66, 189 N.W. at 299.

[34] See § 43-112.

[35] *In re Estate of Muncillo, supra* note 23.

court to evaluate Edward Sr.'s competency with the assistance of a guardian ad litem, and perhaps to continue entertaining the adoption proceedings.[36] And if Edward Sr. could not have appealed, it is axiomatic that Edward Jr. cannot appeal, when Edward Jr.'s only claim to standing is based upon standing in Edward Sr.'s shoes.

We note, in passing, Edward Jr.'s argument that the pleadings purportedly filed on Edward Sr.'s behalf should be stricken because Edward Sr. does not have the capacity to retain counsel. We do not consider this argument for two reasons. First, it is intertwined with the merits of the dispute, over which we have no jurisdiction.[37] Second, Edward Jr. does not dispute that Ethel has capacity to retain counsel and standing to litigate as a party to these proceedings, so the disputed pleadings were properly filed at least on her behalf.

CONCLUSION

For the foregoing reasons, we conclude that Edward Jr.'s appeal was not taken from a final, appealable order. Edward Jr. could not appeal on his own behalf because he has asserted no personal stake in this controversy. And Edward Jr. could not appeal on Edward Sr.'s behalf because the court's dismissal of Edward Jr. did not affect any of Edward Sr.'s substantial rights. Therefore, we lack jurisdiction over this appeal, and it is dismissed.

APPEAL DISMISSED.

WRIGHT, J., not participating in the decision.

HEAVICAN, C.J., not participating.

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[36] See *In re Adoption of Krystal P. & Kile P., supra* note 24.

[37] Cf. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).