

UNPUBLISHED

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building
in the City of Richmond on Friday the 13th day of February, 2009.

**Sean-Karl Eugene Mitchell, et al., Appellants,
against
Kelly O'Brien, Appellee.**

Record No. 072633

Court of Appeals No. 1548-06-4

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, the briefs, and the argument of counsel, the Court is of opinion that there is no error in the judgment of the Court of Appeals.

After a two-day hearing in this case, the circuit court granted Kelly and Daniel O'Brien's petition to adopt the daughter (the child) of Sean-Karl Mitchell (Mitchell) over Mitchell's objection. The circuit court determined that the 21-day notice of the adoption proceeding was mailed to Mitchell at his last known address, but that Mitchell failed to file a written objection to the adoption within the 21-day period specified in Code § 63.2-1233(1)(a)(iii). Applying that provision, the circuit court determined that Mitchell's consent to the adoption was not required. The circuit court further determined that even if Mitchell's consent were required, he was withholding that consent contrary to the best interests of the child.

The circuit court also denied a petition for custody filed by Mitchell's mother, Barbara Mitchell. The circuit court considered the testimony of the parties and the guardian ad litem and determined that granting Barbara Mitchell custody would “clearly be detrimental to the child.” The circuit court memorialized these rulings in a May 12, 2006 order. Although the Mitchells were given the opportunity to appear on that date and note their objections to the order, they did not do so. The Mitchells appealed from the circuit court's judgment to the Court of Appeals but neither Mitchell nor his mother filed a transcript or written statement of facts as provided for by Rule 5A:8. *See Twardy v. Twardy*, 14 Va. App. 651, 658, 419 S.E.2d 848, 852 (1992) (en banc) (appellant has burden to provide sufficient record for determination of issues on appeal). The Court of Appeals dismissed the appeals on the ground that a transcript or written statement of facts was “indispensable to a determination of the questions presented.” *Mitchell v. O'Brien*, 07 Vap UNP 1548064, Record No. 1548-06- 4 (March 19, 2007). The Court of Appeals also denied the Mitchells' motion for court-appointed counsel, holding that no statute or constitutional provision required the appointment of counsel in this custody and adoption proceeding. *Id.*

We hold that the Court of Appeals did not err. The Court of Appeals did not, as the Mitchells assert, dismiss the appeals because the Mitchells could not afford to pay for a copy of the trial transcript. The Court of Appeals dismissed the appeals because the Mitchells filed neither a transcript nor a written statement of facts. Absent one of those accounts of the trial proceedings, the record on appeal was insufficient to determine whether the circuit court's findings were plainly wrong. Even assuming that the Court of Appeals had the authority to order the circuit court to provide a trial transcript to the Mitchells, as they suggest, the Court of Appeals had no reason to grant that request because the Mitchells had the opportunity to file a written statement of facts, which would not have entailed any expense on their part.

The Court of Appeals also did not err in denying the Mitchells' request for court-appointed counsel. The Court of Appeals is not authorized by statute to appoint counsel in such a case and is not constitutionally required to do so. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25-26, 31-32 (1981).

We do not reach Barbara Mitchell's assignment of error regarding the July 2006 order of the circuit court. She asserts that the July 2006 order affected her right to appeal the denial of her petition for custody. In fact, the July 2006 order merely precluded her from filing additional motions in the circuit court after that court's previous denial of her petition for custody. Even if error properly had been assigned to the May 2006 custody ruling, the Court of Appeals did not err in dismissing Barbara Mitchell's appeal, because the Court could not have decided the matter without a written statement of facts or a trial transcript. *See Smith v. Commonwealth*, 32 Va. App. 766, 772, 531 S.E.2d 11, 15 (2000); *Anderson v. Commonwealth*, 13 Va. App. 506, 508-09, 413 S.E.2d 75, 77 (1992); *Turner v. Commonwealth*, 2 Va. App. 96, 99, 341 S.E.2d 400, 402 (1986) ; *see also McDonald v. National Enterprises, Inc.*, 262 Va. 184, 195, 547 S.E.2d 204, 211 (2001) (record insufficient on appeal absent transcript or statement of facts required by Rule 5:11).

We also do not address Mitchell's sixth and final assignment of error because he did not timely assign the jurisdictional question as error in this Court. The Mitchells' petition for appeal to this Court assigned five errors and only those errors assigned are properly before this Court for decision. Rule 5:17(c); *Friedline v. Commonwealth*, 265 Va. 273, 278-79, 576 S.E.2d 491, 494 (2003).

Accordingly, the judgment appealed from is affirmed. The appellants shall pay to the appellee thirty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Fairfax County.

A Copy,
Teste:
Clerk