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Commonwealth Of Kentucky

Court Of Appeals

1997-CA-002427-MR (Direct Appeal)

S.T.L. APPELLANT

APPEAL FROM HENDERSON CIRCUIT COURT
v. HONORABLE STEPHEN HAYDEN, JUDGE
ACTION NO. 95-AD-00005

B.M. and A.P.L. APPELLEES

AND 1997-CA-002801-MR (Cross-Appeal)

B.M. CROSS-APPELLANT

CROSS-APPEAL FROM HENDERSON CIRCUIT COURT
v. HONORABLE STEPHEN HAYDEN, JUDGE
ACTION NO. 95-AD-00005

A.P.L. and S.T.L. CROSS-APPELLEES

AND 1997-CA-002756-MR

S.T.L. APPELLANT

APPEAL FROM HENDERSON CIRCUIT COURT
v. HON. STEPHEN HAYDEN, JUDGE
ACTION NO. 97-CI-000659

B.M. APPELLEE

OPINION AND ORDER AFFIRMING IN
1997-CA-002427-MR AND 1997-CA-002801-MR
AND
DISMISSING APPEAL IN 1997-CA-002756-MR

* *

BEFORE: BUCKINGHAM, EMBERTON, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: S.T.L. appeals from an order of the Henderson Circuit Court granting B.M. relief from a judgment terminating B.M.'s parental rights in his daughter, A.P.L. We affirm.

A.P.L. was conceived during a casual sexual encounter between S.T.L. and B.M., and their contact during S.T.L.'s pregnancy was apparently limited to a few phone calls. A.P.L. was born on November 27, 1994, and B.M.'s paternity was established in the Henderson District Court a few months after A.P.L.'s birth.

In the spring of 1995, S.T.L. retained an attorney to contact B.M. regarding the voluntary termination of his parental rights. After meeting with B.M. and ascertaining his willingness to terminate his rights, the attorney filed a joint petition on behalf of S.T.L. and B.M. for the voluntary termination of B.M.'s parental rights. A guardian ad litem was appointed to represent the child's interest, and the guardian ad litem filed an answer stating that A.P.L. "has not sufficient information or knowledge to form a belief as to whether or not the termination of parental rights would be in the best interest of the child."

On May 15, 1995, the Henderson Circuit Court held a hearing regarding the joint petition. At this hearing, the attorney and the trial court both questioned S.T.L. and B.M. regarding their understanding of the consequences of this action and their continued desire to proceed. Further, S.T.L. testified that she and her family would be able to fully support the child without assistance from B.M. The guardian ad litem did not attend this hearing and never filed a report or other pleadings.

Immediately following the hearing, the trial court entered an order terminating B.M.'s parental rights, finding such an action to be in the child's best interest.

On December 31, 1996, B.M. filed a Kentucky Rule of Civil Procedure (CR) 60.02(f) motion to set aside the judgment terminating his parental rights, alleging that he had developed a relationship with the child with S.T.L.'s knowledge and consent. S.T.L. objected to this motion, arguing that B.M.'s actions at the time of the termination were voluntary and that the judgment terminating his parental rights was conclusive, binding, and not subject to collateral attack upon the grounds cited by B.M. The trial court denied B.M.'s motion, finding that he failed to demonstrate any circumstance of an extraordinary nature justifying relief.

B.M. then filed a motion requesting the court to make additional findings of fact, in particular regarding the child's best interest, pursuant to CR 52.02 and to reconsider its denial of his CR 60.02 motion. The trial court then set a hearing to determine whether the termination of B.M.'s parental rights was in the child's best interest at the time of the termination and whether the child's best interest was appropriately represented at the termination hearing. A new guardian ad litem was appointed to represent the child.

Prior to the hearing, S.T.L. filed a motion in limine to exclude evidence pertaining to all circumstances which arose subsequent to the termination of B.M.'s parental rights. S.T.L. also filed a motion in limine to exclude all evidence of whether

the termination of B.M.'s parental rights was in the child's best interest. The trial court granted the former motion, but denied the latter. Following the hearing, the trial court granted B.M.'s motion to set aside the order terminating his parental rights on the grounds that the original guardian ad litem had failed to represent the child's best interest during the termination proceedings and that the termination of B.M.'s parental rights was not in the child's best interest. S.T.L. then filed a motion for reconsideration, which was denied by the trial court. These appeals followed.

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S.T.L.'s first argument is that B.M. lacked standing to bring a motion to set aside the termination of his parental rights based on the ground that the child's interests were not properly protected during the original proceedings. She argues that this issue could properly be raised only by the child, the child's guardian, or the child's next friend, and that B.M. could not raise the issue as he was a stranger to the child in the eyes of the law following the termination of his parental rights. S.T.L. also takes issue with the trial court's finding that B.M. had standing based upon his being a party to the termination action, contending that "the law is clear that one does not have standing to challenge a decision which was rendered at his request and in his favor" and citing Looney v. Justice, 299 Ky. 729, 730, 187 S.W.2d 289 (1945).

Although the trial court ultimately ruled that CR 60.02(f) relief should be granted because the child's

interests were not properly protected during the original proceedings, we agree with B.M. that his motion was brought on his own behalf, rather than on behalf of the child. B.M. had an interest in whether or not his parental rights were terminated, which would give him standing to move to vacate the termination order. See Stevens v. Stevens, Ky., 798 S.W.2d 136, 139 (1990), wherein the court stated that "[t]he requirement of standing is satisfied if it can be said that the plaintiff has a real and substantial interest in the subject matter of the litigation" and held that as a party to a contract, a mother had standing to sue her ex-husband and father of her child for breach of agreement to pay the child's college expenses despite the fact that the child, rather than the mother, was injured by the father's breach. In other words, B.M. had standing to bring his motion, and the trial court had the discretion to enter its ruling based upon whatever ground it found persuasive.

S.T.L.'s second argument is that an order for voluntary termination of parental rights is "conclusive and binding on all parties," Kentucky Revised Statute (KRS) 625.046, and that the order is res judicata as to the issue of the child's best interest, BTC Leasing, Inc. v. Martin, Ky. App., 685 S.W.2d 191, 197 (1984). She also argues that the trial court's reopening of the best interest determination "completely undermined the public's interest in bringing an end to litigation . . . ." While we do not question the res judicata effect of the trial court's initial judgment terminating B.M.'s parental rights, a judgment which is conclusive and binding and which would

otherwise be given res judicata effect may be vacated and the issues relitigated, provided one of the grounds listed in CR 60.02 is proved to the satisfaction of the trial court. Furthermore, other compelling interests may sometimes outweigh the interest in putting an end to litigation after a final judgment. See Spears v. Spears, Ky. App., 784 S.W.2d 605, 607 (1990) (reversing denial of a CR 60.02 motion to reopen a divorce decree's finding of paternity where later blood tests showed that the ex-husband was not the biological father of the child). We conclude that, under the facts of this case, the child's interest in being properly represented in a voluntary termination of parental rights proceeding constitutes a sufficiently compelling reason to override the normally conclusive res judicata effect of a voluntary termination judgment.

S.T.L.'s third argument is that B.M.'s testimony at the original hearing and his signing of the verified petition of voluntary termination wherein he stated that termination would be in the child's best interest constitute judicial admissions which preclude him from contending otherwise in a subsequent attack on the judgment terminating his rights. B.M.'s opinion and testimony concerning the child's best interest was not dispositive of the issue, however. Rather, this determination was one to be made solely by the trial court. While the position that B.M. took in the original proceeding concerning the best interest of the child may be a judicial admission which precludes him from contending otherwise, that does not preclude the trial court from determining the child's best interest in accordance

with all the evidence. The trial court had a responsibility to act in the best interest of the child regardless of the opinions and testimony of the parties, notwithstanding admissions by any parties.

S.T.L.'s fourth argument is that the guardian ad litem adequately represented the interest of the child in the initial termination proceeding. In his testimony before the trial court on B.M.'s motion, the original guardian ad litem stated that he had not spoken with either S.T.L. or B.M. prior to the termination hearing and that he did not conduct any sort of independent investigation. He also acknowledged that he did not attend the termination hearing. CR 17.03(3) states that "[n]o judgment shall be rendered against an unmarried infant . . . until the party's . . . guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he is unable to make defense." Further, in Black v. Wiedeman, Ky., 254 S.W.2d 344, 346 (1953), the court held:

> [The guardian ad litem's] obligation is to stand in the infant's place and determine what his rights are and what his interests and defense demand. Although not having the powers of a regular guardian, he fully represents the infant and is endowed with similar powers for purposes of the litigation in hand.

Although Kentucky law concerning the duty of a guardian ad litem in a termination case is not specific, we conclude that the trial court did not clearly err in its determination that the guardian ad litem in this case did not adequately represent the interest of the child during the proceedings. He did not talk with either of the parents of the child, did not investigate whether the

termination was in the best interest of the child, did not file a report or other pleading except for an answer which stated that he had insufficient information or knowledge to form a belief concerning whether the termination would be in the best interest of the child, and did not attend the hearing. Also, we are unpersuaded by S.T.L.'s argument citing Vanhook v. Stanford-Lincoln County Rescue Squad, Inc., Ky. App., 678 S.W.2d 797, 799 (1984), for the proposition that the negligence of an attorney is imputable to the client and not ground for relief under CR 60.02(f). We agree with the trial court that Vanhook should not be held applicable to these facts, since the client was an infant child incapable of comprehending or even thinking about legal representation on a matter concerning her parentage.

S.T.L. also contends that any error regarding the representation of the guardian ad litem in the original termination proceeding was harmless because the evidence the guardian ad litem would have gathered would have supported the court's finding that the termination was in the child's best interest. Harmless error, by definition, "does not affect the substantial rights of the parties." CR 61.02. The child had a substantial right to have a guardian ad litem to serve as an advocate to protect her best interest before any decision was made to terminate the parental rights of her natural father. One can only speculate as to what the guardian ad litem might have discovered had he made some sort of independent investigation, and we cannot conceive how a guardian ad litem's failure to

independently assess the child's best interest can constitute harmless error.

S.T.L.'s final argument is that the trial court erred in granting CR 60.02(f) relief, as there was insufficient grounds of an "extraordinary nature" sufficient to warrant setting aside the order terminating B.M.'s parental rights. S.T.L. notes that the trial court found that the only grounds which could even arguably merit relief are whether the termination was in the child's best interest at the time and whether the child's interest was adequately represented. S.T.L. contends that the former is res judicata and that B.M. lacks standing to argue the latter. We have heretofore rejected these contentions.

A trial court's determination of whether CR 60.02(f) relief is merited is subject to an abuse of discretion standard. Fortney v. Mahan, Ky., 302 S.W.2d 842, 843 (1957). Given the complete lack of independent investigation into the child's best interest by the guardian ad litem, we conclude that the trial court did not err in vacating the original judgment pursuant to CR 60.02(f).

The judgment of the Henderson Circuit Court is affirmed.[1]

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S.T.L. also filed an appeal concerning an order entered by the trial court allowing B.M. to have visitation with the child during the pendency of the first appeal. This appeal has

[1] B.M.'s cross-appeal, 1997-CA-002801-MR, concerning the trial court's excluding evidence of events occurring subsequent to the termination hearing is moot.

now been rendered moot by our opinion in the first appeal, and it is hereby **ORDERED** that this appeal be **DISMISSED.**

ALL CONCUR.

ENTERED: April 2, 1999

/s/ David C. Buckingham
JUDGE, COURT OF APPEALS

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