

RENDERED: JANUARY 29, 2010: 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000433-ME

B.B., MATERNAL GRANDMOTHER

APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 05-J-00640

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; J.T., AN INFANT; G.S.
AND V.S., GUARDIANS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; LAMBERT,¹ SENIOR
JUDGE.

LAMBERT, SENIOR JUDGE: The Campbell Family Court terminated B.B.'s
grandparent visitation rights without opportunity for a meaningful hearing and

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

without legally sufficient notice. We reverse and remand this matter to the trial court for further consistent proceedings.

S.B. is the natural parent of J.T. S.B.'s parental rights were terminated and J.T. was committed to the custody of the Cabinet for Health and Family Services. J.T. was ultimately placed in foster care with G.S. and V.S. appointed as custodians. On October 30, 2007, B.B. was granted visitation rights as J.T.'s grandparent.

When the foster family began to deny or failed to cooperate in visitation, B.B. hired counsel. Counsel attempted to contact the foster family and J. T.'s *guardian ad litem* (GAL). The response was a motion to terminate B.B.'s visitation rights brought by the GAL on June 16, 2008. The motion was sent by United States mail to both B.B.'s former counsel and to a new attorney who undertook the representation. A hearing on the motion was set for the following day, June 17, 2008, at 3:30 p.m. B.B.'s counsel did not receive the notice until June 18, 2008, the day following the hearing. At the hearing, B.B. was not present nor represented by counsel, and the trial court, after receiving evidence from the GAL, terminated B.B.'s visitation rights.

Notice of a hearing must be served on opposing counsel "a reasonable time before the time specified for the hearing[.]" Kentucky Rules of Civil Procedure (CR) 6.04(1). It is patently unreasonable to file a motion and designate

a hearing on that motion for the next day unless by agreement of opposing parties or where some truly extraordinary circumstance exists. The unreasonableness is magnified when the moving party mails the notice with knowledge that the mail cannot be received until the next day. In such circumstances, an inference would arise that the moving party intended to circumvent the Rules of Civil Procedure and due process of law. *See Koehler v. Commonwealth*, 432 S.W.2d 397 (Ky. 1968).

B.B. moved to vacate the judgment. The motion was denied with the trial court noting that S.B.'s parental rights had been terminated. This purported justification was notwithstanding the fact that B.B. already had visitation rights by the trial court's order of October 30, 2007. The law is clear that "Once a grandparent has been granted visitation rights . . . those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter[.]" KRS 405.021(1). The termination of S.B.'s parental rights should have no bearing on B.B.'s visitation rights.

Notice and an opportunity to be heard are fundamental requirements of procedural due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652,656, 94 L.Ed 865 (1950). B.B. had neither. The prior order establishing grandparent visitation rights and relevant statutory provisions were sufficient to create standing to be heard in any attempt to terminate those rights. *See City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327,

329 (Ky. 1992). B.B.'s procedural due process rights required notice of the hearing and an opportunity to be heard on the merits.

The judgment of the Campbell Family Court is reversed and this matter is remanded for further consistent proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

No appellee brief filed.

John C. Hayden
Newport, Kentucky