RENDERED: FEBRUARY 18, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000596-ME

T. W. (FATHER) APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 01-J-501306

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; AND A. N. (MOTHER) APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

MOORE, JUDGE: T. W., Father, appeals from an order of the Jefferson Circuit Court, Family Division, returning permanent custody of his minor daughter to

[1]Senior Judge Sheila R. Isaac 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.

A. N., Mother, in an action that originated with a petition against Mother for neglect on behalf of Child pursuant to KRS[2] 620.070 and KRS 610.020. Deciding that the family court violated Father's due process rights and acted without jurisdiction, we vacate.

At the outset we note that neither Mother nor the Cabinet filed a brief in this matter. Accordingly, we may accept Father's statement of facts as correct. CR 76.12(8); *see also Scott v. Scott*, 80 S.W.3d 447, 481 (Ky. App. 2002), *overruled on other grounds by Vibbert v. Vibbert*, 144 S.W.3d 292, 294-95 (Ky. App. 2004). Nonetheless, having thoroughly reviewed the record, Father's recitation of the facts is in accord with the record.

Mother and Father, who were not married and who did not live together at any time relevant to the disposition of this matter, are the parents of Child born on December 8, 2000.[3] Child lived with Mother. From the record, it appears that paternity was not established until sometime in mid-2004. Father paid child support.

The genesis of facts surrounding the issues before us is a petition filed on July 23, 2007,[4] by the Cabinet for Health and Family Services for neglect

[2] Kentucky Revised Statutes.

[3] Mother has other children, all younger than Child and who were also the subjects of DNA petitions and who have been taken out of the care of Mother at various times. These children are not Father's.

[4] The first petition filed against Mother on behalf of Child for neglect was on July 31, 2001. At the time that petition was filed, Child's father was listed as unknown. Another petition was filed against Mother on September 20, 2004, for dependency and neglect on behalf of Child. Since 2001, depending on Mother's status, Child has been removed from Mother's home on several occasions.

against Mother on behalf of Child.[5] Child was thereafter removed from the care of Mother and placed in a foster home.

On August 10, 2007, Father filed a pro se motion in the DNA action for temporary custody of Child, which was continued twice. On October 23, 2007, a disposition hearing was held, and Father was given temporary custody of Child under the conditions that he: (1) remain clean and sober;[6] (2) subject himself to random drug screens; (3) cooperate with the Cabinet; and (4) follow all recommendations.

On February 26, 2008, Father filed a pro se motion for permanent custody of Child but failed to properly notice all of the parties. Thus, the hearing was continued. At a hearing held on April 22, 2008, the court considered Father's motion for permanent custody. Mother was not present. But, she was represented by counsel, who objected to Father's motion on her behalf. The Cabinet worker present was in agreement with the motion and stated that the Cabinet's "plan was to close this child out." The court inquired whether Father was prepared to raise Child until she was eighteen, to which Father agreed. The court signed an order granting Father permanent custody of Child, which included:

> The court having considered the length of time the child(ren) has/have been in the care of The Temporary Custodian(s), the stable relationship existing, the current inability of the parent(s) to provide for the child(ren).

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[5] The petition alleged and mother admitted to drug use while pregnant with Child's sibling after Mother tested positive for marijuana, cocaine and opiates.

[6] Father had a prior drug charge.

> The need for permanency for the child(ren) and all other relevant factors pursuant to KRS Chapter 403, and having found pursuant to KRS 620.027 that it is in the best interest of the child(ren) that Permanent custody be granted.
>
> Wherefore, IT IS HEREBY ORDERED that the Permanent Care, custody and control of the child(ren) be granted to [T.W.] Subject to the parent(s) visitation rights as otherwise ordered by this court.

Mother did not file a motion to vacate, alter or amend the order or a motion for additional findings of facts. Nor did she object to the custody proceedings having taken place in her absence, and she did not appeal the court's award of permanent custody to Father.[7]

On June 25, 2008, Mother filed a pro se motion. Attached to the motion was a sworn statement as follows: "I petition the court to get my visitation rights back." She, however, listed on the notice that Father was "c/o" of his attorney, but she listed the attorney's address incorrectly on the notice. The record contains a notice filed by Father's attorney of the attorney's new address. The record also contains the returned, undelivered envelope to Father's attorney of notice of the motion and hearing.

On the order regarding Mother's motion, the Cabinet's recommendations included that "visitation was suspended for non-compliance w/ drug tx; no

[7] We note this because there appeared to be irregularities with this hearing. No sworn testimony was taken. However in making a determination pursuant to KRS 403.270 that it was in Child's best interest for Father to have permanent custody, the court certainly could take judicial notice of Mother's continued failure to comply with the Cabinet's plan for her, the number of DNA petitions filed against her on behalf of Child, and the fact that Child had had several out of home placements. In any case, Mother did not timely appeal or otherwise move to set aside or modify the court's ruling.

employment, stable housing or drug screens." The court ordered that Mother could have visitation with Child, but no overnight visits, conditioned on strict compliance with the Cabinet's treatment plan. The court granted the Cabinet the authority to suspend visitation pending the next court date if Mother became non-compliant.

Mother filed another pro se motion; this time seeking overnight visitations. She again listed an incorrect address for Father's attorney. At a hearing held on June 9, 2009, a notation was made on the Dependency Calendar, signed by the court, that the Cabinet was to "re-open" the case as to Child, although permanency had been established and there was not a new petition filed on behalf of Child. Neither Father nor his attorney was present, not having received notice of the hearing.

At a review hearing held on June 30, 2009, neither Father nor his attorney was present because they again had not been provided notice. Mother alleged Father was using illegal drugs, and the court ordered that Father undergo drug tests. Mother was granted overnight visits with Child.

The next review hearing was held on July 28, 2009, and Father was present but without counsel. The Cabinet reported "unsubstantiated 115 on [Father]-although [Father] tested positive for illegal drug use."

Mother then filed a pro se motion on September 14, 2009. She attached a sworn statement to the motion, stating that she was seeking the return of Child because she had been "clean and sober" for over a year and because Father had been in contempt for failing a drug screening. She further stated that Father had

interfered with visitation. This time she properly listed the address for Father's attorney, but only gave a partial address for Father on the notice.

At a hearing held on Mother's motion on October 13, 2009, Father's attorney attacked Mother's motion on a number of grounds. He argued that (1) there had never been a DNA petition filed against Father; (2) the Cabinet was not moving for removal from Father; (3) Mother's motion was in fact one for a change in custody between parents, which should have been filed in a circuit court action; and (4) Mother's motion was not properly before the court in an action originating with a DNA petition. Mother's attorney responded that Mother was seeking return of Child because Mother had met all terms placed on her by the Cabinet. Child's GAL informed the court that while Child was in Father's care, she was "thriving" and "doing well." The court questioned the Cabinet whether a case had even been "re-opened" in reference to Child and Father. The Cabinet responded that it had provided services to Father. In denying Mother's motion, the court referenced that Father had been given permanent custody of Child; consequently, he was the permanent custodian of Child. The court also noted that in a DNA case, the court can establish permanency for a child when, as in this case, the parent fails to fulfill the Cabinet's treatment plan within six months. The court in concluding the hearing, stated that permanency had been achieved for Child, that "this case is basically dead," and "there is nothing more to do." Thereafter the court stated that the Father is the permanent custodian and if Mother wants to change custody, she needed to file a custody action outside the DNA case. The written order in the case

includes that "custody as follows: [permanent custody] granted to [Father] 4/22/08; [Mother] has no protective issues, remand."

Despite the court's ruling, Mother filed another pro se motion on February 19, 2010. She incorrectly listed Father's attorney's address on the notice and only included a partial address for Father. In her sworn statement attached to her motion, Mother stated that she had completed all court orders and treatment and custody of her other children had been returned to her.

At the hearing on Mother's motion, held March 2, 2010, neither Father nor his attorney was present, not having been served with the motion. The Cabinet was in agreement with Mother's motion. The GAL stated that the Cabinet was investigating Father although no petition had been filed, but if custody was returned to Mother, they would not have to "go through with the time and expense associated with a new petition." In a very brief hearing, at which no sworn testimony was taken or evidence admitted and in the absence of Father, who did not have notice of the hearing, the court set aside all prior custody orders and gave Mother custody of Child.

Father timely appealed the court's order. We find this appeal well taken for several reasons.

Before we review the merits, we note that neither Mother nor the Cabinet filed an appellee brief. Pursuant to CR 76.12(8) and numerous cases, we are granted a great deal of discretion in reviewing cases in the absence of appellee briefs. As earlier noted we may accept Father's factual statements as true. Further,

we may also accept his issues as correct, reverse or vacate the judgment if we believe Father's brief supports the relief he seeks. Additionally, we may treat the Cabinet and Mother's failure to file a brief as a confession of error and reverse the judgment without reaching the merits of the case. Because of the irregularities in the proceedings in this case, particularly the hasty change in custody without any evidential proof in a proceeding lasting only a few minutes, we are tempted to exercise our discretion and conclude that the failure to file appellee briefs is a confession of error. However, given that this appeal involves the custody of a minor child, we will address the merits.

The most noticeable reason for finding error is because Father was denied a meaningful opportunity to be heard as he did not receive notice of the hearing on March 2, 2010,[8] and because the swift decision to change custody of Child was made without any sworn testimony or evidence being presented. *See Wright v. Wright*, 181 S.W.3d 49, 53 (Ky. App. 2005) (citing *Lynch v. Lynch*, 737 S.W.2d 184, 186 (Ky. App.1987)). Consequently, it was not only error that Father was not given notice and an opportunity to be heard, resulting in a manifest violation of his due process rights, but the decision to change custody was made void of any sworn testimony.

Further, we are compelled to comment on the unsworn statements made by the GAL in regard to the Cabinet's investigation into Father's alleged illegal drug

[8] The record bears that Mother incorrectly listed Father's attorney's address on the notice and only provided a partial address for Father. Father contends he did not receive notice of the hearing. There being no appellee briefs filed in this appeal, we may accept Father's statements as true. CR 76.12(8).

use. Specifically, the GAL stated that "if the mother is appropriate, we return today rather than go through the time and expense associated with a new petition." Although the record contains at least three petitions by the Cabinet in regard to DNA actions filed against the Mother on behalf of Child and her siblings, there are no such petitions filed against the Father. Skipping the procedural steps of filing a petition against Father pursuant to KRS 620.070 (if one was justified as nothing was said--sworn or otherwise-- regarding whether Child was abused neglected or dependent while in Father's care) was also a blatant violation of his due process rights. Courts cannot circumvent justice in an effort to save time and expense; to do so is to ignore fundamental constitutional rights.

Next, we turn to Father's argument that permanency had been established in this matter. His argument is fully supported by the family court's previous statement and order of October 13, 2009, when Mother moved for custody. The court stated that nothing was left to be done, *i.e.,* "the case is basically dead", and "[t]here are no further orders in this case." The order granting Father's permanent custody provided the case was "remanded." While we strongly disagree with the family court's decision of March 2, 2010, we equally strongly agree with the court's statements and order from the October 13, 2009 hearing. Permanency for Child was achieved. Pursuant to KRS 620.020(8), "'[p]ermanence' means a relationship between a child and an adult which is intended to last a lifetime, providing commitment and continuity in the child's relationship and a sense of

belonging."[9] During the hearing wherein the court granted permanent custody to the Father, the court inquired of Father whether he was prepared to care for Child until she was eighteen; to which Father replied "yes." This was a permanent custody order made in a situation between two biological parents, with proper jurisdiction pursuant to KRS 620.027.

Pursuant to KRS 620.027, the family court has jurisdiction

> to determine matters of child custody and visitation in cases that come before the [family court] where the need for a permanent placement and custody order is established as set forth in this chapter. The [family court], in making these determinations, shall utilize the provisions of KRS Chapter 403 relating to child custody and visitation. . . .

The family court, relying on this statute and KRS 403, granted permanent custody to Father, noting that Mother had failed to comply with the plans of the Cabinet. An order awarding the permanent custody of a child is a final and appealable order, even if the order does not so recite. *Gates v. Gates*, 412 S.W.2d 223 (Ky. 1967). Mother did not appeal from this grant of permanent custody to Father. Rather, she attacked it through the DNA case–and untimely at that. We believe the family court was initially correct when it stated that if Mother sought a change in custody, she needed to file a circuit court action instead of a motion in the DNA case. Consequently, when the family court later changed course on this at the March 22, 2010 hearing, it lacked jurisdiction to do so.

[9] Certainly, custody, visitation and other matters dealing with this family are subject to modification, but only if and when appropriate procedures are followed. Here, they were not.

Finally, we agree with Father that Mother's attempt to change custody within two years required affidavits in conformance with KRS 403.340. Mother failed to meet this requirement. Her one sworn statement attached to her motion only stated that she had met all court orders and treatment. Alternatively, even if the family court could have entertained her motion–which we believe it could not– Mother's failure to comply with KRS 403.340 was yet another reason the court lacked jurisdiction to hear the motion. *See Robinson v. Robinson*, 211 S.W.3d 63 (Ky. App. 2006).

We pause to note that this case involves the biological parents of a child, and no other parties are involved. The court in awarding permanent custody to Father included in its order that this was in the child's best interests. Accordingly, under these circumstances, *i.e.,* parent versus parent and when a DNA action is only against the parent who lost custody, we believe that the parameters of KRS 403.340 are triggered in an attempt to modify custody within two years.

For the reasons stated, the Jefferson Family Court's order of March 22, 2010, setting aside its prior order of permanent custody to Father is hereby vacated. This matter is remanded for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Ryan N. Pogue Louisville, Kentucky	None filed.