

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001404-ME

C.J. AND J.S.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 13-J-501500

CABINET FOR HEALTH AND FAMILY
SERVICES, COUNTY OF JEFFERSON,
COMMONWEALTH OF KENTUCKY; HON.
PAULA SHERLOCK, JUDGE, JEFFERSON
FAMILY COURT; A.J., A MINOR CHILD;
P.N.; AND J.N.

APPELLEES

OPINION
REMANDING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Mother and Father appeal the Jefferson Circuit Court's order in a dependency, neglect, and abuse action awarding permanent custody of Child to Maternal Grandparents. After thorough review of the record, we remand

this case with instructions to make specific factual findings supporting the permanent custody determination.

I. Factual and Procedural Background

The child at the center of this action was born in August 2012. Child was transported to Cincinnati Children's Hospital in December 2012 to receive treatment for very serious medical issues resulting in a diagnosis of Failure to Thrive.¹ An Emergency Custody Order was issued on December 28, 2012, which granted temporary custody to Child's Maternal Grandmother.

The Cabinet had been notified that Child was the victim of abuse and neglect involving unmet medical needs. The Cabinet investigated the report, and on January 4, 2013, filed a dependency, neglect, and abuse petition.² The petition alleged that Child had severe medical issues for which Mother was not able to secure treatment, and Child had tested positive for opiates at birth.³ The petition also stated that Mother tested positive for opiates, marijuana, and heroin. Paternity

¹ Child's medical problems cannot be definitely attributed to Mother's drug abuse during pregnancy. Child's issues relate to her bowels and have resulted in several surgeries and extended hospitalizations. Throughout the proceedings, Child's physical condition improved significantly. At the time of the permanent custody hearing in July 2014, Child was using a feeding tube for approximately only seven hours per day.

² The petition also noted Mother's history with the Cabinet dating back to 2005. Allegations include drug use, poor caretaking, abandonment, environmental neglect, and substance abuse allegations throughout her pregnancy. Mother also had referrals from Adult Protection Services listing her as the victim. The petition also listed Mother's criminal background.

³ Apparently, Mother had a legal prescription which prevented Child Protective Services from being notified when Child tested positive for opiates at birth.

for Child had not yet been established. J.S. was listed as Mother's paramour on the petition.

Mother waived a temporary removal hearing and allowed Child to be placed in the temporary custody of Maternal Grandparents. The trial court ordered Mother to have a University of Kentucky Targeted Assessment Program (UK-TAP) assessment and to follow all recommendations, take random drug screens, and follow any treatment recommended by the Cabinet. Mother was granted supervised visitation with Child. Counsel was appointed to represent her.

A pre-trial hearing was held in February 2013. Mother and Grandparents were ordered to cooperate with hospital policies regarding visiting the Child. J.S. was named Child's putative father. The trial court ordered that J.S. was to have no contact with Child until paternity was established. Mother was ordered to cooperate with the County Attorney in pursuing paternity of Child.

Mother completed the UK TAP assessment in March 2013. Initially, UK TAP did not recommend further substance abuse treatment. However, Mother's subsequent drug screen was positive for oxycodone, hydrocodone, heroin, and marijuana. UK TAP then recommended outpatient substance abuse treatment. Child remained in the temporary custody of Grandparents, and Mother was allowed supervised visitation. Mother stipulated to abuse and risk of neglect of Child in April 2013.

At the disposition hearing in June 2013, Mother requested unsupervised visits with Child. The Child remained in the hospital. The Cabinet

could not recommend unsupervised visits because of concerns over Mother's substance abuse issues. The trial court continued its prior orders for Grandparents' temporary custody and Mother's visitation.

Mother requested unsupervised visitation again in October 2013. Her requested was denied due to the Cabinet's concern about her continued use of narcotics, her sporadic inappropriate behavior, and her inability to maintain an apartment or otherwise manage her finances. Mother was ordered to continue her program with Alcoholics Anonymous and to obtain and maintain suitable housing and employment.

Child's Guardian Ad Litem (GAL) filed a motion requesting that Grandparents cooperate with the County Attorney's office for paternity to be established and to schedule a "First Steps: the Early Intervention Program" evaluation for Child. The GAL was concerned about Child's medical needs since leaving the hospital in October 2013. The court report the social worker had submitted to the court indicated Grandparents were avoiding paternity testing for Child. The GAL shared the social worker's concerns, reported from the hospital staff, about Grandparents ability to provide adequate care for Child's extensive medical needs on a long-term basis. In January 2014, the trial court ordered Grandparents to cooperate with paternity testing and for the parties to continue compliance with all prior consistent orders.

Grandmother then filed a *pro se* motion for permanent custody of Child in April 2014. The motion was originally scheduled to be heard on July 10, 2014.

J.S. filed a *pro se* motion in May 2014 requesting visitation with Child. A hearing was held on his motion on May 22, 2014. The Cabinet did not have any objection to Father visiting with Child as long as he submitted clean drug screens. The report from the social worker stated that Grandparents had previously stated they would allow Father to visit with Child. However, unsupervised visitation could not be recommended as Father had not had any instruction on caring for Child's medical issues.

Eventually, the trial court entered an order finding J.S. to be the father of Child. He was ordered to take random drug screens and permitted to have supervised visitation with Child. Counsel was appointed to represent Father.

Mother filed a motion in June 2014, styled "Motion for Return"; however, the body of the motion requested unsupervised visitation with Child. She stated in the affidavit submitted with her motion that her relationship with Child's Grandparents had deteriorated since Child had been released from the hospital and resided with Grandparents. Mother maintained she had completed all tasks that had been asked of her and was prepared to continue to do so.

Grandparents filed another motion, this time through counsel, for permanent custody of Child. This prompted the trial court to order that all motions

were to be heard on July 17, 2014; until then, all prior consistent orders were to remain in effect.

Mother, Father, and Grandparents were all present for the hearing and all represented by counsel. The court heard from the GAL and took testimony from Grandparents, Mother, Mother's older child, and the Cabinet. The trial court concluded the hearing by awarding Grandparents permanent custody of Child. Mother was ordered to begin unsupervised visitation to be tightly monitored by the Cabinet, and Father was ordered to continue supervised visitation. Mother and Father now appeal.

II. Standard of Review

This Court's standard of review of a family court's award of child custody in a dependency, neglect, and abuse action includes whether the factual findings of the trial court are clearly erroneous. *L.D. v. J.H.*, 350 S.W.3d 828, 829–30 (Ky. App. 2011); Kentucky Rules of Civil Procedure (CR) 52.01. "If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed absent an abuse of discretion." *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). "An abuse of discretion occurs when a trial court enters a decision that is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010).

III. Analysis

A dependency, neglect, and abuse action is not necessarily the proper forum for determining permanent custody issues as the purpose of the statute is to “provide for the health, safety, and overall wellbeing of the child.” *S.R. v. J.N.*, 307 S.W.3d 631, 637 (Ky. App. 2010). However, “such a hearing and an award of custody are not precluded by the structure of KRS^[4] Chapter 620, so long as the proper procedures are followed.” *N.L. v. W.F.*, 368 S.W.3d 136, 147 (Ky. App. 2012) (citing *London v. Collins*, 242 S.W.3d 351, 356 (Ky. App. 2007)).

On appeal, both Mother and Father argue they were denied due process at the July 17, 2014 hearing. Specifically, Mother asserts she did not realize the court would be considering permanent custody, but thought it would only be deciding whether she could have unsupervised visitation with Child. Father argues he did not have the opportunity to present evidence regarding his fitness as a parent. He further argues he was denied counsel at all critical stages of the dependency action. Lastly, Mother and Father argue the trial court failed to make any specific findings supporting its award of permanent custody to Grandparents.

Fair procedures are especially significant when there is potential interference with the parent-child relationship. *P.J.H. v. Cabinet for Human Resources*, 743 S.W.2d 852, 853 (Ky. App. 1987).

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to

⁴ Kentucky Revised Statutes.

the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753–754, 102 S.Ct. 1388, 1394–1395, 71 L.Ed.2d 599 (1982) (footnote omitted). “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 346 (Ky. 2006).

Mother’s due process argument is without merit. Mother had been appointed counsel who represented her effectively throughout all of the proceedings since the first one in January 2013. Mother’s original counsel did withdraw from her case on July 10, 2014, but Mother was appointed new counsel that same day. Furthermore, Mother was on notice of Grandparents’ motion for permanent custody as she herself had requested it be continued. At the beginning of the hearing on July 17, 2014, in Mother’s presence, the trial court stated that it was considering Mother’s motion for unsupervised visitation as well as permanent custody. There was no protest. Mother testified at the hearing about her clean drug screens, completion of her tasks, the fact that she was employed, her knowledge of Child’s health needs and medical issues, and her housing arrangements.

Mother asked the court that the permanent custody hearing be continued because she had made so much progress and there was a delay in her receiving treatment through no fault of her own. Mother made the motion with the support of the Cabinet and GAL. The trial court also asked the Cabinet and GAL for recommendations as to the permanent custody of Child.

Both the Cabinet and GAL told the trial court that they had serious concerns about the effect awarding permanent custody to Grandparents might have on the relationship between Mother and Child. The Cabinet stated that normally at this point in the case, considering the amount of time Child had been out of Mother's custody, the Cabinet would recommend a permanent placement. However, the Cabinet worker testified that in this particular case, there were delays – not of Mother's making – in her treatment for substance abuse. Both the Cabinet worker and the GAL stated that Mother had been compliant with her tasks and had been making satisfactory progress. They were aware of the strained relationship between Mother and Grandparents. The court took into consideration these recommendations as well as the other testimony presented and awarded Grandparents permanent custody of Child.

Our review of the record and specifically, the July 17, 2014 hearing does not reveal any violation of Mother's due process rights.

On appeal, Father contends he did not have the opportunity to present evidence at the permanent custody hearing as to whether he was fit to parent Child.

He asserts his counsel was unable to effectively represent him at the July 17, 2014 hearing because she was unaware the court would be deciding permanent custody.

We find this contention disingenuous. At the previous hearing when Father was granted supervised visitation, the trial court informed Father and his counsel that permanent custody would be addressed during the hearing on July 17, 2014.

At the July 17 hearing itself, Father elected not to testify or call witnesses. Father's counsel chose not to cross-examine witnesses. Instead, Father's counsel stated Father exercised all the supervised visitation with Child he could, but that time was limited because of the demands of his employment. Counsel further stated Father was encouraged to visit more often with Child and that it had been recommended that Father seek training in order to more adequately care for Child and her medical issues. When the court twice asked the parties for recommendations on permanent custody, Father's counsel made none. Only after the court awarded permanent custody to Grandparents did Father's counsel make an objection.

Father also claims his due process rights were violated because he was denied counsel in the dependency proceeding. We disagree. Father's brief relies on the requirement that counsel be appointed to parents in termination of parental rights cases, including all critical stages of the underlying dependency action, unless it can be shown that such proceeding had no effect on the subsequent termination case. *R.V. v. Com., Dept. for Health and Family Services*, 242 S.W.3d

669, 673 (Ky. 2007). While this is not a termination of parental rights action, we acknowledge that dependency, neglect, and abuse actions unquestionably interfere with parent and child relationships. Thus, we are mindful of the importance of fundamentally fair procedures which must be afforded parents in cases such as this.

Nevertheless, we are unable to conclude that Father was denied due process rights. He was appointed counsel when entitled to it. *See* KRS 620.100. Upon establishment of his paternity, Father was appointed counsel and granted visitation. This occurred approximately two months prior to the permanent custody hearing.

The record is not clear as to why it took so long to establish Father's paternity. Father was aware that Child was taken to Cincinnati Children's Hospital in December 2012. He was named Child's putative father by Mother at the pre-trial hearing in February 2013. The trial court ordered Father to have no contact with Child until his paternity was established. The trial court further ordered Mother to cooperate with the County Attorney's Office to establish paternity of Child. Yet, there was a delay in the establishment of Child's paternity.

Father stated at the hearing on May 22, 2014, that he had been tested for paternity in May 2013, but Child had not been tested until January 2014. Father did not explain this delay. There were allegations Grandparents were avoiding testing Child. However, Child was very fragile and had spent a substantial amount of time in the hospital over the course of the proceedings. Paternity was not confirmed to the trial court until May 22, 2014. The Cabinet

stated at the hearing that it did not know what to ask of Father other than take random drug screens prior to his supervised visitation because he had never presented himself to the Cabinet. Additionally, the record does not indicate that Father ever exercised any supervision or custodial control over Child prior to the dependency petition. As soon as Father's paternity was established, he was granted supervised visitation with Child and was appointed counsel. As a result, Father was not denied due process as counsel was appointed to him as soon as the appointment was warranted.

Lastly, Mother and Father contend the Jefferson Circuit Court erred by failing to make specific findings pursuant to Kentucky Rule of Civil Procedure (CR) 52.01 in its written order awarding permanent custody to Grandparents. "CR 52.01 requires that the judge engage in at least a good faith effort at fact-finding and that the found facts be included in a written order. Failure to do so allows an appellate court to remand the case for findings, even where the complaining party failed to bring the lack of specific findings to the trial court's attention." *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011).

Our Supreme Court has emphatically directed trial courts "to include in all orders affecting child custody the requisite findings of fact and conclusions of law supporting its decisions." *Keifer v. Keifer*, 354 S.W.3d 123, 125 (Ky. 2011). "[E]specially in family law cases, [the order of the trial court] often serves as more than a vehicle for appellate review." *Id.* at 126.

We find the trial court's July 17, 2014 order to be in violation of CR 52.01 because it fails to make specific findings of fact relating to the applicable statutory standards of KRS Chapter 403 supporting its custody decision. The trial court's order is nothing more than a standardized, conclusory document declaring in a few short paragraphs to have considered the relevant statutory factors, but does not detail any factual findings specific to these parties before awarding permanent custody to Grandparents. Therefore, we are compelled to remand for specific factual findings to justify the permanent custody determination based upon the evidence presented at the hearing on July 17, 2014.

IV. Conclusion

For the reasons stated above, this case is remanded to the Jefferson Circuit Court to make specific findings of fact and conclusions of law to support its permanent custody determination.

ALL CONCUR.

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