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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000058-ME

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES, AS NEXT FRIEND OF J.T.C., A CHILD, AND T.S.C., A CHILD — APPELLANTS

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 09-AD-00014

T.E.C., MOTHER AND C.L.C., FATHER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Cabinet for Health and Family Services, Commonwealth of Kentucky (hereinafter the "Cabinet") appeals from the trial court's grant of T.E.C.'s motion to set aside the judgment terminating parental rights of September 7, 2010, pursuant to Kentucky Rules of Civil Procedure (CR)

60.02. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

On October 26, 2011, the trial court entered its CR 60.02 order setting aside its prior judgment of September 7, 2010, wherein the trial court terminated the parental rights of T.E.C. In so doing, the trial court relied upon CR 60.02(f) in concluding that there were extraordinary reasons justifying relief. Specifically, the court cited two reasons for its decision. First, the extraordinary circumstances surrounding the coerced issuance of the September 7, 2010 judgment which was recited in the judgment itself. The court reiterated in the CR 60.02 order that the Cabinet refused to place the children for adoption unless and until the judgment terminating parental rights was entered, effectively strong-arming the court into granting the judgment. Second, in view of the fact that T.E.C. was now released from prison and the bleak prospect for adoption of the two minor children given their institutionalized residence, the court concluded that the mother was the only chance the children had of living outside of an institution despite the fact that the mother was dysfunctional. Finding extraordinary reasons justifying relief, the court granted the CR 60.02 motion, setting aside its prior judgment terminating parental rights. It is from this order that the Cabinet now appeals.

On appeal, the Cabinet presents a sole argument: namely, that the findings of the trial court may be disturbed if they are clearly erroneous; in support thereof, the Cabinet argues that the trial court was clearly erroneous in its

application of CR 60.02 to set aside its previous judgment terminating parental rights.

At the outset we note that our review of the trial court's grant of a CR 60.02 motion is for an abuse of discretion. *See Kurtsinger v. Board of Trustees of Kentucky Retirement Systems,* 90 S.W.3d 454, 456 (Ky. 2002). The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky. 2000).

CR 60.02 provides:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Moreover, we must bear in mind that CR 60.02 operates as a safety valve, allowing a court to correct errors in its final judgment, order, or proceeding. *See Kurtsinger, supra,* at 456 and CR 60.02. Accordingly, CR 60.02 lends itself to the broad

discretion of the trial court and for that reason decisions rendered thereon are not disturbed unless the court has abused its discretion. *Kurtsinger* at 456.

As set forth in Kentucky's termination statute, Kentucky Revised Statutes (KRS) 625.090,[1] a court may involuntarily terminate parental rights if the

[1] KRS 625.090 sets forth:

> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
>
> 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
>
> 3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and
>
> (b) Termination would be in the best interest of the child.
>
> (2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:
>
> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
>
> (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
>
> (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
>
> (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

court finds by clear and convincing evidence that a three-prong test has been met. First, the child must have been found to have been an abused or neglected child as defined by KRS 600.020[2], or the circuit court must find that the child's parent has been criminally convicted of abusing any child and that the abuse or neglect is likely to occur to the child that is the subject of the instant termination action if the

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> (f) That the parent has caused or allowed the child to be sexually abused or exploited;
> (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;
> (h) That:
> 1. The parent's parental rights to another child have been involuntarily terminated;
> 2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
> 3. The conditions or factors which were the basis for the previous termination finding have not been corrected;
> (i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or
> (j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.
>
> (3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:
>
> (a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;
> (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
> (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in

parental rights are not terminated. KRS 625.090(1)(a). Secondly, the court must find that at least one of a number of specified grounds of parental unfitness exists. KRS 625.090(2). Finally, termination of parental rights must be in the child's best interest. KRS 625.090(1)(b).

KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;
(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

(4) If the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.
(5) If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights.
(6) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:
(a) Terminating the right of the parent; or
(b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

[2] KRS 600.020(1) sets forth the definition of an abused or neglected child:

(1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:

We also note that the trial court has a great deal of discretion in an involuntary termination of parental rights action. *M.P.S. v. Cab't for Human Resources*, 979 S.W.2d 114, 116 (Ky.App. 1998). Thus, the findings of the court below will not be disturbed unless no substantial evidence in the record exists to support its findings. *Id*.

(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

(1.) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;

(2.) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;

(3.) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;

(4.) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

(5.) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

(6.) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;

(7.) Abandons or exploits the child;

(8.) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or

(9.) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months. . . .

The Cabinet directs this Court to our decision in *Cabinet for Families and Children v. G.C.W.*, 139 S.W.3d 172, 177-78 (Ky.App. 2004), wherein we addressed adoption and the termination of parental rights:

> By enacting time limits to conform to the AFSA, [Adoption and Safe Families Act of 1997] it is clear that our legislature intended to leave children in foster care for as brief a time as possible. The time limits within which parents must make the necessary changes for reunification of the family (or risk possible termination of their rights) are applicable regardless of the age of their child in foster care. The Cabinet correctly argues that although T.L.M. and M.L.M. are teenagers, their right to a safe and stable home should be afforded no less consideration than that afforded to a child of tender age. The statute does not place any age limit on the right of a child to have his best interests weighed in the balance.
>
> The court's finding that adoption of the children is unlikely is not a relevant consideration. Nor is it supported by the evidence. As we have already stated, the record establishes that there is a strong likelihood that T.L.M. may be adopted by his foster parents. Even though there was no similar evidence as to M.L.M., the testimony established that it was in the best interest of both children to be free of their ties to G.C.W. in order to be eligible for adoption.
>
> The court also found that termination was not psychologically capable of solving the children's problems, addressing the standard contained in KRS 625.090(3)(e). We agree that termination alone cannot undo the harm suffered by T.L.M. and M.L.M. However, the evidence before the court, particularly from Dr. Fane, indicated that termination was at least one part of the solution. On the contrary, no evidence indicated any benefit to the children as a result of maintaining a legal tie with their mother.

Cabinet for Families and Children v. G.C.W., 139 S.W.3d 172, 177-78 (Ky.App. 2004).

The Cabinet interprets *G.C.W.* as always prohibiting the trial court from assessing the likelihood of adoption in determining the child's best interest. We do not read *G.C.W.* so broadly. As the *G.C.W.* Court noted, the trial court's finding that adoption of the children was unlikely was not supported by the evidence. Instead, the evidence presented in *G.C.W.* supported the finding that one of the children would be adopted by his foster parents, that it was in the best interest of both children to terminate the parental relationship with G.C.W. and there was no evidence that a relationship with G.C.W. would benefit the children.

Sub judice, the trial court was presented evidence that the children had not fared well while in custody of the Cabinet because of the necessity for multiple social workers and their various commitments to institutions. Indeed, the trial court took a personal interest in seeing that the Cabinet made every effort to have these children adopted. As the *G.C.W.* Court noted, the legislature intended to leave children in foster care for as brief a time as possible. *Sub judice,* when it became apparent that the children would not live outside an institution and the mother had been released from prison, coupled with the trial court's hesitance in the first place to terminate the mother's parental rights and the Cabinet's strong-arm tactics of refusing to place the children for adoption until the rights were

terminated,[3] the court found extraordinary reasons justifying relief from the prior judgment.

We do not find that the court abused its discretion in so finding and, accordingly, affirm.

LAMBERT, JUDGE, CONCURS.

VANMETER, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. As an initial matter, the majority misapplies the standard of review. The trial court granted T.E.C.'s CR 60.02 motion for "extraordinary reasons." This seems to fall under CR 60.02(f). The standard of review for relief under CR 60.02(f) is abuse of discretion. *Bethlehem Minerals Co. v. Church & Mullins, Corp*., 887 S.W.2d 327, 329 (Ky. 1994) (citations omitted). "Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made." *Bishir v. Bishir*, 698 S.W.2d 823, 826 (Ky. 1985). The two factors for the trial court to consider in exercising its discretion are "(1) whether the moving party had a fair opportunity to present his claim at the trial on the merits and (2) whether the granting of CR 60.02(f) relief would be inequitable to other parties." *Bethlehem*, 887 S.W.2d at 329 (citing *Fortney v. Mahan*, 302 S.W.2d 842 (Ky. 1957)). Furthermore, because

[3] We find the Cabinet's argument that the only coercion was an ex parte communication relied upon by the trial court to be unsupported by the record as disingenuous. The original judgment terminating parental rights highlighted the trial court's doubts regarding terminating parental rights, discussed the Cabinet's position and ultimately terminated the rights in order to get the children placed for adoption. If the Cabinet had an issue with the trial court's reliance on an ex parte communication in terminating parental rights, it would have been appropriate to address it after issuance of said order.

of the desirability of according finality to judgments, CR 60.02(f)'s provision that a judgment may be set aside for a reason of an extraordinary nature justifying relief "must be invoked only with extreme caution, and only under most unusual circumstances." *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959).

The majority opinion relies on *Kurtsinger v. Bd. of Trs. of Kentucky Ret. Sys*., 90 S.W.3d 454, 456 (Ky. 2002), as setting forth a generic standard of review for abuse of discretion. While the standard stated in *Kurtsinger*, in and of itself, does not contradict other case law, the facts of *Kurtsinger* are distinctive in that the trial court therein determined that by virtue of the trial court's error, one of the parties had not received notice of the entry of a final judgment. The result of the error was that the party was going to be deprived of an opportunity to file a motion to alter, amend or vacate and an appeal.

In this case, T.E.C. was present at the August 20, 2010 hearing at which the trial court addressed terminating parental rights. She was represented by counsel. The court was aware that T.E.C. was incarcerated, and was to become eligible for parole in April 2011. The court entered extensive findings of fact and conclusions of law. The trial court obviously was not pleased with the Cabinet's actions regarding these two children, but the trial court also recognized the unsuitability of T.E.C. as a continuing placement for them, AND that "[d]ue to their ages and behavioral problems, prospects for adoption are not bright." Then, in vacating its order terminating parental rights, the trial court noted that T.E.C. was now out of prison, and that little possibility exists that the children will be

adopted. Other than T.E.C. being released on parole, nothing had changed between the dates of the two orders.

The trial court failed to consider the two factors set forth in *Bethlehem*, 887 S.W.2d at 329; *Fortney*, 302 S.W.2d at 842. T.E.C. had fair opportunity to present her claim on the merits, and in my view, the granting of relief in this instance is inequitable not only to the Cabinet, but also to the children. By setting aside the termination, the trial court has placed the children in a sort of legal limbo: in Cabinet's custody, T.E.C. is unsuitable, cannot go back, cannot go forward.

Even analyzing this case under a more generic standard of review, as the majority opinion does, an abuse of discretion is a decision that is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted). In this instance, the trial court's decision is unsupported by sound legal principles.

Pursuant to KRS 625.090, a trial court may either terminate parental rights or dismiss the petition to terminate, and in the latter event shall state whether the child is to be returned to the parent or remain in the custody of the state. KRS 625.090(6). *See also Cabinet for Human Res. v. J.B.B.*, 772 S.W.2d 646, 647 (Ky. App. 1989). KRS 625.090 provides that before a trial court may involuntarily terminate parental rights, it must find by clear and convincing evidence that (1) the child is an abused or neglected child, as defined in KRS 600.020(1) and (2) termination would be in the child's best interest. KRS 625.090(1). After that

threshold is met, the court must also find by clear and convincing evidence the existence of one or more of the grounds enumerated in KRS 625.090(2) (including abandonment, infliction of serious physical injury or emotional harm, sexual abuse, or neglect in providing access to basic survival needs). The prospect of possible adoption of the children is not a relevant consideration in a termination action. *Cabinet for Families & Children v. G.C.W.*, 139 S.W.3d 172, 178 (Ky. App. 2004); *see also R.C.R. v. Commonwealth, Cabinet for Human Res.*, 988 S.W.2d 36, 40 (Ky. App. 1998) (noting that "[o]nce the conditions of terminating parental rights are met, it is the duty of the Cabinet to then act in the best interests of the children[]").

In the present case, the trial court found in its September 7, 2010 judgment terminating parental rights that grounds for termination under KRS 625.090 were met, and that "terminating parental rights is in the best interest of the children only if adoption soon follows." The court terminated parental rights, and ordered the Cabinet to immediately initiate the process of finding adoptive parents for the children, noting that because of the children's ages and behavioral problems, prospects for adoption were not bright. At the time of entry of the final judgment, the mother was incarcerated, to become parole eligible in April 2011.

Thereafter, on October 26, 2011, the trial court entered an order setting aside its final judgment under CR 60.02 on the basis that little hope for adoption of the children existed and the children's mother, now released from prison, while "likely dysfunctional in many respects, is the only hope these children have of living

outside of an institution." The court stated that part of its reason for setting aside its prior judgment was due to the extraordinary circumstances surrounding the coerced issuance of the final judgment; that is, the Cabinet's refusal to place the children for adoption unless and until the judgment terminating parental rights was entered. The court noted that the effect of the judgment terminating parental rights was to eliminate the children's contact with their natural mother without any real prospect of future adoption.

In my view, the trial court engaged in judicial parenting that is not provided for by the legislature in KRS 625.090(6). *See J.B.B.*, 772 S.W.2d at 647. Specifically, the trial court improperly centered its decision on the prospect of adoption of the children. *G.C.W.*, 139 S.W.3d at 178. Though the trial court may have sought to order what it believed would be in the best interests of all parties, the court exceeded its authority as granted by KRS 625.090(6).

I would reverse the Logan Circuit Court's order setting aside its September 7, 2010 judgment, and remand this matter to that court with instructions to deny T.E.C.'s CR 60.02 motion.

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