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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000419-ME

T.B. APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 11-J-00091

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; E. O., A CHILD; AND E. P. APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: T.B., the father, appeals from an order of the Shelby Circuit Court, Family Division, denying his motion to alter, vacate, or amend an order, which followed a disposition hearing that awarded custody of T.B.'s minor daughter, E.O., to her half-siblings' father, E.P. The action originated with a

petition against P.O., the mother, for neglect of the child. Deciding that the family court violated father's due process rights, we vacate.

T.B. is the natural father of E.O., who was born on February 5, 2002. From the record, it appears that paternity was not established until sometime in 2005 at which time T.B. began paying child support. The mother is incarcerated at the Shelby County Detention Center. E.O. has two half-siblings, whose natural father, E.P., was in a relationship with the mother at the time the dependency, neglect, and abuse petition was filed against her. On April 29, 2011, the Cabinet for Health and Family Services (hereinafter "the Cabinet") filed a petition and a motion for an emergency custody order on E.O.'s behalf. Separate petitions were also filed for E.O.'s siblings. In the petition, the Cabinet alleged neglect on the part of the mother. E.O.'s petition left blank the space for "legal father." The petition stated that the Cabinet had found the home of the children to be filthy on several occasions, and alleged medical neglect, and educational neglect. It also noted that the natural father of the two younger children was on probation, his paternity had not been established, and he did not have a stable home. On that same day, the Shelby Family Court entered an emergency custody order and placed the children in the Cabinet's custody.

Next, on May 3, 2011, a temporary removal hearing was held. The child was again placed in the temporary custody of the Cabinet. Separate counsel was appointed for the child, the mother, and the father of E.O.'s two siblings. In addition, the family court entered an order on May 4, 2011, that appointed a

warning order attorney for T.B. The Cabinet provided the warning order attorney an address for the father that was in Bradenton, Florida, even though the court order entered on May 3, 2011, had deleted the Florida address and had written "Maryland.".

Then, on May 9, 2011, the Cabinet filed another juvenile dependency, neglect and abuse petition on behalf of E.O.'s siblings but did not name E.O. in the amended petition. The petition named E.P., her half-siblings' father, as the person believed responsible for the neglect, alleging a history with drugs and a failure to protect the children from the mother's alleged neglect. Significantly, the Cabinet never filed a dependency, neglect, or abuse petition against T.B.

On June 6, 2011, a warning order attorney report on T.B. was filed. The report stated that the warning order attorney's attempt to contact T.B. at his last known address in Florida was unsuccessful. In addition, the warning order attorney was unable to locate him through an internet search. This report was the only one filed by the warning order attorney.

During the summer, several scheduled adjudication hearings were canceled because the mother failed to appear. Additionally, on July 3, 2011, the family court ordered that E.P. undergo drug testing, submit to a drug assessment, submit to a parenting and psychological assessment, and cooperate with the Cabinet's case planning. The adjudication hearing was finally held on November 1, 2011. At the hearing, E.O.'s custody remained with the Cabinet.

A pre-dispositional report was given to the family court by the Cabinet on January 18, 2012. On the front page of the report, T.B. was now listed as the biological father of E.O. (Despite T.B.'s contact with the Cabinet, the listed address on the petition was incorrect.) Although the report does not discuss T.B. as a possible placement for E.O., it does note that an Interstate Compact on the Placement of Children (ICPC) study was requested but the results had not been received. On the same day that the report was submitted, a disposition hearing was held. Following that hearing, E.O.'s custody, as well as her siblings, was awarded to E.P.

Two days after the hearing, T.B. was told by the Cabinet about the custody decision in his daughter's case. This information was given to him when he contacted the Cabinet. According to the motion to vacate, T.B. learned on January 20, 2012, that E.O. had been placed with E.P. and also that he had a warning order attorney. T.B. immediately contacted the attorney, who on January 24, 2012, filed a motion to alter, amend or vacate the order emanating from the disposition hearing. E.P. responded to this motion by explaining that the child should remain with him because T.B. had not been a part of her life, had not appeared in court, had a child support arrearage, and because E.P. thought of her and treated her as his own child.

T.B. argued that the family court's disposition order should be vacated because the Cabinet had known his whereabouts since summer 2011. Even so, according to the motion to vacate, the first address provided by the Cabinet to the

warning order attorney was in Florida and incorrect. Then, on August 18, 2011, the warning order attorney was contacted by the Cabinet, which gave her another address for T.B. and the Cabinet's caseworker had been in touch with T.B. The new address was in Maryland; however, it too was an incorrect address and the letter sent to it was returned as "attempted, not known."

At no time did the Cabinet ever tell T.B. the dates for the hearings concerning E.O. Meanwhile, T.B. and his wife had been preparing to take custody of E.O. for some time. A home study had been completed, and they had submitted fingerprints for criminal background checks. Nonetheless, on February 15, 2012, the family court denied T.B.'s motion to alter, amend, and vacate the disposition order. He now appeals from these orders.

T.B. maintains that the family court's decision to grant custody of E.O. to E.P. is in error because the family court failed to ensure that preference was given to available and qualified relatives as stated in Kentucky Revised Statutes (KRS) 620.090(2). The Cabinet counters that because the relevant custody decision was made by the family court at the disposition hearing, the pertinent statute is KRS 620.140 rather than the statute cited by Appellant. Based on that statute, the Cabinet contends that the family court's findings were not clearly erroneous, it applied the correct law, and was not an abuse of discretion.

In the instant case, we are, in essence, evaluating a custody decision. "When reviewing a decision in a child custody case, the test is whether the . . . [court's] decision constitutes an abuse of discretion." *Burton v. Burton*, 355

S.W.3d 489, 493 (Ky. App. 2011). And we review a family court's findings of fact for clear error. As explained in *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005):

> A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. 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. . . . [T]he test is . . . whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Id. at 219-20 (internal citations and footnotes omitted).

Keeping in mind our standard of review, we note that our analysis, however, differs from the arguments of both parties. We conclude the most persuasive reason for deciding that the family court erred in awarding custody to E.P. is that T.B. was denied a meaningful opportunity to be heard. First, he did not receive notice of any hearing until after a conclusive order had been issued following the disposition hearing. Second, he was undoubtedly participating in the process to obtain custody of his daughter by staying in contact with the Cabinet and requesting an ICPC study of home. While these factors seem contradictory on their face, they indicate that the Cabinet was aware of T.B.'s whereabouts and did not ensure the proper information was provided to his attorney. Clearly, he communicated with Cabinet personnel and received guidance from them on the necessary steps to be considered for custody.

In *S.R. v. J.N.*, 307 S.W.3d 631 (Ky. App. 2010), we addressed the differences between dependency, neglect, abuse cases and custody cases: "The purpose of the dependency, neglect, and abuse statutes is to provide for the health, safety, and overall well-being of the child. KRS 620.010. It is not to determine custody rights which belong to the parents." *Id*. at 637. Therefore, the Cabinet correctly observes that, under KRS 620.010, if a court decides that a child cannot adequately be protected, the child may be removed from the home; and, an adult relative, another person, a child-caring facility or child-placing agency, or the Cabinet for Health and Family Services may be granted custody. Further, although KRS 620.140 permits relative placement, it does not contain a preference for such care. But, as stated above, this statutory provision is not the issue in the case at hand.

The issue herein regards T.B.'s due process right to be heard in the dependency action. The family court recognized the importance of his involvement when it appointed a warning order attorney for him. Indeed, as noted in *A.P. v. Commonwealth*, 270 S.W.3d 418, 420 -21 (Ky. App. 2008), "the legislature mandates routine appointment of counsel to represent indigent parents not only in termination cases but also in dependency cases. *See* . . . KRS 625.080(3) and KRS 620.100(1)." It is true that KRS 620.100 merely provides custodial parents counsel during dependency proceedings. *R.V. v. Commonwealth, Dept. of Health and Family Services*, 242 S.W.3d 669, 672 (Ky. App. 2007). Still, the right to counsel is guaranteed in Kentucky to parents during an involuntary

termination proceeding. KRS 625.080(3). As a matter of fact, if termination proceedings are to be instituted, the right to counsel is even greater. KRS 620.100(1) states in part that:

> If the court determines, as a result of a temporary removal hearing, that further proceedings are required, the court shall advise the child and his parent or other person exercising custodial control or supervision of their right to appointment of separate counsel[.]

In the instant case, after the temporary removal hearing, the family court continued its jurisdiction over this case in the adjudication and disposition phases. A possibility existed that termination of parental rights could have eventually been implicated.

With regard to parental participation in such proceedings, in *R.V.*, 242 S.W.3d at 673, this Court held as follows:

> [T]he parental rights of a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings. This includes all critical stages of an underlying dependency proceeding in district court, unless it can be shown that such proceeding had no effect on the subsequent circuit court termination case.

Especially since this case ultimately could result in the termination of P.O.'s and T.B.'s parental rights, T.B.'s participation in the dependency action requires him to have counsel.

Here, however, we are discussing whether T.B. had the right to be heard at these hearings. Under these circumstances where he expressed an interest in being involved in his daughter's life and where the Cabinet had contact with him

but did not provide notice to the hearings, we believe this due process right was violated. This matter is particularly troubling in a situation where a child has been placed with a non-relative who was the subject of a dependency petition and has a biological parent wanting to be involved. In light of the family court's appointment of a warning order attorney and T.B.'s contact with the Cabinet, the Cabinet's efforts to include T.B. were not only non-existent but also nonchalant. And ultimately, the greatest harm may be to the child. Therefore, the family court erred when it denied the motion to alter, amend or vacate since T.B. was not given notice and an opportunity to be heard during the dependency proceedings, which resulted in a manifest violation of his due process rights.

Thus, the orders of the Shelby Family Court granting custody to E.P. and denying the motion to alter, amend, or vacate are vacated, and these matters are remanded to the family court for further proceedings in accordance with this opinion.

ALL CONCUR.

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