

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001731-ME

J.C.

APPELLANT

v.

APPEAL FROM SPENCER FAMILY COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 10-J-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
REVERSING AND REMANDING

** ** *

BEFORE: DIXON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: J.C. (father) appeals the family court's order that his son be placed in the permanent custody of child's former foster parents following dependency, abuse and neglect proceedings.

On March 10, 2010, child, then five years old, was removed from father's custody by the Cabinet for Health and Family Services through an *ex parte*

emergency custody order based upon allegations that father had neglected and sexually abused him. Child had been living with both father and mother, but mother was frequently incarcerated and was incarcerated at the time of the removal.

The following day at a temporary removal hearing, child was placed in the Cabinet's temporary custody. Father was granted supervised visitation and ordered to undergo random drug screening and a drug abuse assessment. An assessment of father established that he had a history of alcohol abuse and lacked appropriate parenting skills.

Child was initially placed with a foster family and, in early July, was transferred to a Seven Counties Crisis Stabilization Unit. On July 12, 2010, child was placed through Sunrise Children's Services (SCS) with foster parents in Hardin County (foster parents). Child would ultimately be placed in the permanent custody of foster parents.

On July 19, 2010, at the adjudication hearing, father stipulated to one count of neglect because child was present during an act of domestic violence where father was the victim and mother was the aggressor. The Cabinet withdrew its sexual abuse allegations. The family court concluded child was neglected, ordered that child remain in the temporary custody of the Cabinet and ordered father to comply with the case plan.

Father complied with the case plan by participating in individual and family therapy sessions, participating in substance abuse counseling, submitting to

random and non-random drug screenings all of which were negative, holding stable housing, holding stable employment and attending supervised visitation. However, concerns were raised that father had trouble parenting child.

Following the disposition hearing, on December 21, 2010, child was continued in the custody of the Cabinet and father was granted unsupervised visitation. A number of times it appeared that child was on the verge of being placed back with father, but circumstances interfered including child's hospitalization for suicidal ideation in March 2011, and father suffering a serious chain saw accident in the fall of 2011.

While child was in the custody of the Cabinet, mother alternated between incarceration and substance abuse treatment programs. Depending upon her status, she was sometimes able to engage in supervised visitation with child. After failing two treatment programs, mother began to have success in her third treatment program, provided at the Healing Place. Starting in January 2012, mother remained in compliance with this program and was making appropriate progress.

Because of the passage of time, the guardian ad litem (GAL) for child and the Cabinet sought a goal change. The GAL proceeded to file motions with the family court to have the goal changed from reunification to permanency. On March 14, 2012, in its annual permanency review, the Cabinet recommended that the goal be changed to adoption.

On March 13, 2012, child was removed from a nearly two-year placement in foster parents' home due to substantiated claims of neglect against another foster child in their care. Foster parents were removed from the list of eligible foster families by SCS. Child was placed in another home under the Cabinet's supervision.

On May 1, 2012, father filed a motion to terminate the Cabinet's custody of child, claiming the Cabinet engaged in a pattern of behavior designed to deny father his parental rights and acted contrary to child's best interest. He requested the immediate termination of the Cabinet's temporary custody of child. Mother also filed a motion for visitation.

On May 8, 2012, the family court heard the GAL's motion for a goal change and father's motion to terminate. During this lengthy hearing, the family court heard testimony about whether the goal should be changed from reunification and whether child should be in the custody of the Cabinet, father or mother. The court heard testimony from Sandra Mattingly, the Cabinet's caseworker, and Fallon Birch, the counselor working with father and child.

Mattingly and Birch testified that father was complying with the case plan but had not made sufficient progress to resume custody of child because he continued to have problems developing adequate parenting skills such as setting boundaries and enforcing rules. They also testified that child could manipulate father and sometimes child acted as more of the parent in the relationship.

Mattingly and Birch agreed that the interested party review boards consistently found that father was meeting expectations and making progress towards achieving permanent reunification. However, they disagreed that his progress was satisfactory because there was no improvement in his parenting.

Father testified he believed the counseling sessions were going reasonably well. He learned to set limits with child, child obeyed him and child did not tell him what to do. He also testified when Mattingly and Birch tell him he is doing something wrong, he corrects his actions.

Although the family court stated it considered the previous dismissal of sexual allegations to be dispositive, Mattingly and Birch also reasserted the allegation that father had sexually abused child based on the child's statement at age five describing inappropriate touching by father. They testified the Cabinet made an administrative finding substantiating abuse, which father had not challenged. *See* 922 KAR 1:330 §1(9)(c) and §10; 922 KAR 1:480 (establishing an administrative procedure for substantiating child abuse outside of judicial proceedings, which can be challenged by requesting an administrative hearing and appeal). Father denied abusing son and offered testimony explaining why his failure to appeal this finding should be excused. Mattingly testified that child's previous sexual reactivity stopped. Birch testified she believed that child had been subjected to multiple inappropriate sexual encounters on a regular basis, but had not observed anything in her interactions between father and child to suggest that he was the source.

Mattingly and Birch also raised concerns that father was abusing his prescription medications or using alcohol. However, they agreed that all of father's alcohol and drug tests were negative.

Father testified he takes medication for chronic pain from a ruptured disk in his back. He explained that following his chainsaw accident, which deeply cut his leg, he was prescribed additional pain medication and took his medication more frequently than prescribed. However, after his leg healed, he took the prescribed dose, was prescribed lower doses and now only takes his medicine as prescribed. He is seeking other options to resolve his back pain, including possible surgery.

Father questioned the stability of child's placement with the Cabinet and whether custody by the Cabinet was in child's best interest. Mattingly acknowledged that while in the Cabinet's custody, child had two admissions to psychiatric hospitals and three foster family placements. Mattingly explained that child was in a stable foster care placement with foster parents for most of the time he was in the Cabinet's custody and was doing well in that placement. The Cabinet continued this placement following an unsubstantiated referral for physical abuse of another foster child. However, once SCS substantiated a neglect charge involving another foster child and closed the home, the Cabinet could not leave child in what was no longer a qualified foster home.

Placement with mother was explored. Mattingly testified that mother was doing well in her third treatment program and was progressing according to

schedule. She questioned whether this treatment program would be successful given mother's past history. She testified that mother would not be able to have child in her custody at the Healing Place for at least three months.

At the close of the hearing, the family court orally denied the motion for a goal change and took father's motion under submission. The family court also urged the parties to look at potential family placements for child.

At the June 4, 2012, case review hearing, potential placements were discussed. Father explained that most of his family could not assist but his mother was willing to take care of child in his house, either with him or by herself. The parents requested a closer placement to allow easier visitation. The GAL stated that foster parents (whose home child had left more than two months earlier) were willing to take custody of child. The GAL did not know whether foster parents were willing to continue contact with the parents but agreed to seek clarification of this issue.

Also at this hearing, the Cabinet asked the court to complete annual permanency paperwork. Although the Cabinet recommended that the parents' rights be terminated and the permanency goal be changed to adoption, the court found this permanency goal not in child's best interest. The court declined to change the goal and ordered the permanency plan to remain reunification.

At the July 2, 2012, case review hearing, the parties stated they had no agreement on placement. Mother was progressing well in her treatment program. However, she would not be able to have child live with her at the Healing Place

until August. Father agreed with this placement option. The GAL recommended placement with foster parents. The Cabinet noted that child's current foster family, who had previously provided respite care for child before he was placed with them, was willing to adopt him. The Cabinet urged that a placement decision be made before school resumed.

Foster parents did not request, nor were they made parties to the dependency, neglect and abuse case. They were not present at the May, June or July hearings.

On July 17, 2012, without changing the permanency goal, holding a permanency hearing, or establishing father's unfitness, the family court ordered that foster parents be granted permanent custody of child. The court detailed father's stipulation to neglect, ongoing concerns with father's ability to parent child, lack of progress and possible prescription drug dependence. The court explained that it was now well past time for permanency for child and found that child thrived in foster parents' care. It determined the violation of foster parents' agreement was minor, not justifying the placement of child with another foster family. The court determined child's best interest would be served by placing him in the permanent custody of foster parents, which would allow father and mother continued contact with child under appropriate circumstances. The order contained the recitations that it is a final and appealable order and there is no just cause for delay in its entry and execution.

Father and mother filed separate CR 59.05 motions to vacate. Mother withdrew her motion. Father's motion was denied and father appealed.

Father argues that he was denied due process by the family court's *sua sponte* entry of the permanent custody order without notice or an opportunity to be heard regarding changing the goal from reunification and by the family court's failure to hold a permanent custody placement hearing. Father also argues that his due process rights were violated because the family court did not comply with *Forester v. Forester*, 979 S.W.2d 928 (Ky.App. 1998), when it failed to find by clear and convincing evidence that he was unfit to parent and whether such a placement was in child's best interest. Father argues that the family court failed to follow and make specific findings in accordance with the best interest analysis of KRS 403.270(2) as required by KRS 620.027. Alternatively, father argues even if the placement was intended to be temporary, the family court did not establish that such a placement satisfied child's best interest.

The GAL and the Cabinet argue that the family court's order granting permanent custody did not constitute a custody decree under KRS Chapter 403 or an involuntary termination of parental rights under KRS Chapter 625 and, therefore, is an interlocutory order requiring dismissal of this appeal. They claim the order is not permanent because it did not terminate father's parental rights and simply defined physical custody during the dependency proceedings.

We disagree that the order is interlocutory. All indications from the record are that the family court intended the grant of custody to foster parents to be a

permanent solution. The family court's opinion repeatedly stated that the court was placing child in the permanent custody of foster parents. The family court's opinion noted the time for permanency was well past and made its order final in an attempt to give child permanence in accordance with KRS 620.020(9).

Additionally, the court orally noted during the hearing on the motion to vacate that it carefully considered the best outcome for child and the parents, and determined this solution would resolve the case, subject to appeal.

The GAL and the Cabinet's reliance on a recent unpublished opinion for the proposition that the permanent custody order in this case is interlocutory is misplaced. In *T.B. v. S.G.*, 2012-CA-000454-ME, 2012 WL 4464646 (Ky.App. 2012) (unpublished), our Court dismissed the appeal of a permanent custody order adopted after a permanency hearing as interlocutory. *T.B.* is factually distinguishable from the case before us. In *T.B.*, the child was in the custody of his grandparents, the order continued that placement, the court anticipated further proceedings regarding custody, the court was not altering the rights of the parties and did not make the recitations needed for finality. It appears that in *T.B.* what was called permanent custody by the family court was not intended to be permanent.

We are satisfied that the family court's order awarding permanent custody of child to foster parents was intended to be a final and appealable custody decree which we may review. See *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008); *Gates v. Gates*, 412 S.W.2d 223, 224 (Ky. 1967); *N.B. v. C.H.*, 351 S.W.3d

214, 219 (Ky.App. 2011). Permanent custody can be granted in a dependency action through a permanency order which qualifies as a custody decree. *N.L. v. W.F.*, 368 S.W.3d 136 (Ky.App. 2012); *London v. Collins*, 242 S.W.3d 351, 356 (Ky.App. 2007); KRS 620.027. The granting of permanent custody has serious implications because while non-custodial parents may still have visitation rights, they lose their superior right to custody of the child and custody can subsequently only be modified under certain circumstances under KRS 403.340. *Forester*, 979 S.W.2d at 930; *London*, 242 S.W.3d at 356. Accordingly, the permanent custody order must be appealable because “it divests a party of a right in such a manner as to remove from the court the power to return the parties to their original condition.” *Druen v. Miller*, 357 S.W.3d 547, 549 (Ky.App. 2011).

We are not satisfied that father was provided with due process before his rights to child were altered. “[P]arental rights are so fundamentally esteemed under our system that they are accorded due process protection under the Fourteenth Amendment of the United States Constitution.” *M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 853 (Ky.App. 2008). Minimum due process requires notice and an opportunity to be heard. *P.J.H. v. Cabinet for Human Resources*, 743 S.W.2d 852, 853 (Ky.App. 1987). This includes “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).

The mere discussion of placement possibilities at status hearings father attended did not provide father with notice that custody could be changed permanently to a placement with nonparties. In fact, given the previous denial of a goal change, the family court's action could not be reasonably anticipated to occur without further process. Furthermore, father was not provided an opportunity to be heard at an appropriate hearing on whether he was unfit and placement with foster parents was in the best interest of child. *See P.J.H.*, 743 S.W.2d at 853-854.

Additionally, the process used during the May 8, 2012, hearing did not sufficiently develop the record for the family court to make the findings necessary to permanently change custody. Parents have a superior right to custody over non-parents who are not *de facto* custodians, subject to exceptions for unfitness or waiver of this right. *Moore v. Asente*, 110 S.W.3d 336, 359 (Ky. 2003). Foster parents were never found to be *de facto* custodians. Accordingly, because father did not waive his superior right to custody, the court could not award permanent custody to foster parents without establishing by clear and convincing evidence that father was an unfit parent. *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010).

Parental unfitness can be shown by meeting the criteria of KRS 625.090 and establishing by clear and convincing evidence there are sufficient grounds for termination. *Leach v. Harrison*, 337 S.W.3d 646, 650-651 (Ky.App. 2011); *Forester*, 979 S.W.2d at 929-930. "Only after making such a threshold showing

[of unfitness] would the court determine custody in accordance with the child's best interest." *Moore*, 110 S.W.3d at 360.

The family court's denial of the motion to change the goal to termination appears to suggest the Cabinet failed to establish father was an unfit parent. Additionally, although the family court expressed concerns with father's conduct and lack of progress, the family court failed to make findings in its order that father was unfit.

Without a finding of unfitness, the family court could not be justified in moving forward to determine the best interest of the child. Additionally, the record did not support a finding that the child's best interest would be served by permanent placement with foster parents because that issue was not explored at the May 8, 2012, hearing.

Based on these deficiencies, we must reverse the permanency order. While appropriate process was not given to father, this does not mean that child should be returned to father at this time. We are satisfied that the evidence presented at the May 8, 2012, hearing raised sufficient concerns as to father's ability to parent child to justify child's continued removal from father's home and temporary placement outside of father's custody with a third party under the supervision of the Cabinet. *J.M. v. Commonwealth, Cabinet For Health & Family Servs.*, 325 S.W.3d 901, 903 (Ky.App. 2010); KRS 620.140(1)(c).

On remand, the family court may continue to pursue family reunification or change the permanency goal. The family court shall hold a hearing to determine

custody with visitation, or determine whether to institute termination proceedings so that child can be adopted.

Pending additional process to establish child's ultimate placement, the family court must determine what temporary placement is appropriate for child. Because the placement with foster parents was made for the protection of child and we do not want child to be summarily returned to the custody of the Cabinet and placed in yet another home, IT IS HEREBY ORDERED that this judgment shall be stayed for ninety (90) days following the issuance of this Opinion to allow the family court time to determine appropriate temporary placement pending further proceedings.

Accordingly, we reverse the Spencer County Family Court's permanency order and remand for the family court to hold an appropriate hearing.

ALL CONCUR.

Entered: September 13, 2013

/s/ Kelly Thompson
JUDGE, COURT OF APPEALS

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