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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-1249-ME

M.Q.M. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 21-AD-500216T

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES AND M.Q.R.L.-M., A CHILD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; CETRULO AND K. THOMPSON, JUDGES.

CETRULO, JUDGE: Appellant M.Q.M. ("Father") appeals the order of the Jefferson Circuit Court ("family court") terminating his parental rights as to his minor child, M.Q.R.L.-M. ("Child"). T.L., Child's mother ("Mother"), voluntarily terminated her parental rights and is not a party to this appeal.

The Cabinet for Health and Family Services, through the Department for Community Based Services, Division of Protection & Permanency ("Cabinet") became involved with Child in 2012. Throughout the course of these proceedings – specifically, 2012 to 2019 – Child had been involved in four DNA[1] petitions and had resided in two relative placements and one fictive kin placement, where Child currently resides.

When the Cabinet became involved, in April 2012, Mother and her paramour were involved in a domestic violence dispute that had injured Child.[2] A few days later, the family court issued emergency custody to the Cabinet following its first DNA petition, and Mother and paramour stipulated to abuse and neglect. Father was involved in those proceedings and the family court had appointed him counsel, but he was not a named perpetrator in the petition. Father's legal counsel remained appointed through 2016.

Following the first DNA petition, in its August 2012 order, the family court emphasized that Father was not named in that petition and that no parties objected to him retaining unsupervised visitation with Child. As such, the family court permitted unsupervised visitation; however, Child entered a relative

[1] Dependency, Neglect, and Abuse.

[2] Mother's paramour had hit Child in the face with a diaper bag and caused Child's nose to bleed.

placement with an aunt. Father testified that at that time, he had violated his probation and knew he would soon be back in prison to finish serving his term. Therefore, he agreed to allow Child to live with the aunt instead of seeking full custody at that time. By January 2013, Father was in prison for the probation violation. Child continued to reside with the aunt but, unfortunately, the DNA petitions continued.

In August 2015, the second DNA petition was entered when the aunt was no longer willing to care for Child and the Cabinet found out that Child had been living with the maternal grandmother ("Grandmother"). The family court's corresponding order provided custody to Grandmother at that time. Again, Father was not listed as a perpetrator on that petition and was still serving his state prison sentence for the probation violation. Father testified at the termination proceeding that he was contacted regarding the relative placement with Grandmother and had agreed to the arrangement because he was incarcerated and was told that agreeing would not terminate his parental rights.

Father testified that upon his release in 2017, he began having visits with Child. He explained that Mother had told him she was working to get custody back, so he did not pursue custody himself but continued to see Child regularly and had Child stay with him on weekends. According to Father, toward the end of 2019, he had difficulty maintaining those visits with Child because Mother and

Grandmother were "giving him the runaround." It had turned out, he explained, that Grandmother had relapsed, and Child was then living with a fictive kin placement.

It was around that time, in 2019, that Child's interactions with the Cabinet began again. The third DNA petition was entered in July 2019 and the corresponding order found Grandmother and Mother to be responsible for Child's abuse or neglect because Grandmother allowed Mother to contact Child when she was not sober, in defiance of the January 2019 order. Like the first and second DNA petitions, Father was not listed as a perpetrator nor adjudicated to have abused or neglected Child. The third petition did, however, state that Father had *not* been contacted for placement of Child and was *not* considered for placement because he "has a history of domestic violence with previous romantic partners" despite nothing in the record indicating such a history.[3] At the July 31, 2019 temporary removal hearing, the family court appointed counsel for Mother and Grandmother. An attorney was not listed for Father for those proceedings.[4]

[3] Although there is no indication of such a history for Father, there was a history of domestic violence between Mother and her paramour. It is not clear whether the Cabinet inadvertently referred to the paramour's criminal history instead of Father's.

[4] The attorney who the family court had appointed for Father from 2012 through 2016, and who the family court would later appoint to represent Father in the termination proceedings, was appointed to represent Grandmother on July 31, 2019.

On September 23, 2019, the fourth and final DNA petition was entered. The corresponding court order found that Grandmother had relapsed on drugs and alcohol and admitted she was no longer able to provide care for Child. The petition stated that Child had been in the care of fictive kin since late August 2019. Again, Father was not listed as a perpetrator on the petition, and it stated that he had not been contacted for placement and was not considered for placement because he "has a history of domestic violence." Again, there is no indication of such history in the record.

Two days later, on September 25, 2019, the family court held a temporary removal hearing in which it gave temporary custody to the Cabinet and reappointed counsel for Mother and Grandmother,[5] but did not appoint counsel for Father. The family court's October 2019 order found that the Child had been "abused and neglected based upon [Grandmother] relapsing, drinking and no longer caring for [Child]." Further, the order stated that Child was to be committed to the Cabinet that day.

Father testified that during that time, he was not aware of the extent of the abuse and neglect alleged in those proceedings. Further, he testified that from September 2019 to April 2020, he had been in contact with Nicole Whetstone, a social worker with the Cabinet ("SW Whetstone"), to determine how to get

[5] This was the same attorney who was appointed to represent Grandmother on July 31, 2019.

visitation back. Father further testified that he had shown up for one of the proceedings in late 2019, but a court worker informed him that he did not need to be there because he was not named in the petition. Father testified that he did not have an attorney with him that day and the family court's dependency calendars for 2019, 2020, and 2021 do not list an attorney for Father.

In January 2021, the family court reappointed counsel for Grandmother and Mother. The next month, on February 12, 2021, the family court entered an order changing the permanency plan for Child to adoption and noted that the case was being "audited for termination." The family court's dependency calendar from that date showed it held an annual review and that Father was not present nor represented by counsel. Further, there is no indication that Father was served or provided notice of those proceedings.

Then, in May 2021, the Cabinet filed a petition to terminate Father's parental rights. However, it was not until the pre-trial conference on June 9, 2021 – four months after the permanency goal changed to adoption – that the family court appointed an attorney to represent Father.[6] The attorney appointed by the family court was the same attorney who had been appointed to represent Grandmother in January 2021, but Father waived any conflict that the appointment

[6] The family court's order dated June 11, 2021, referred to the pre-conference hearing and appointment of counsel for Father.

may have created. Prior to that order, there is no indication that the family court had appointed an attorney to represent Father throughout the permanency and goal change proceeding, nor that Father was put on notice of those proceedings.

In September 2021, the family court tried the Cabinet's petition to terminate parental rights without a jury. SW Whetstone, who had been involved with the case from 2012 until at least 2019, was not available to testify at the time of the termination proceeding. Therefore, the Cabinet presented Mary Williamson, Child's case worker, to testify using the Cabinet's files and SW Whetstone's records. Father's counsel called only Father to testify.

The family court then entered findings of fact, conclusions of law, and order of judgment of termination for Child, which terminated Father's parental rights. Father appealed, arguing the family court erred when it (1) failed to appoint counsel for him during the permanency and goal change proceeding, violating his due process rights; and (2) failed to prove the three-pronged test to involuntarily terminate his parental rights under KRS[7] 625.090 by clear and convincing evidence.

We find Father's first claim to have merit; therefore, we need not consider his second claim at this stage. *R.V. v. Commonwealth, Dep't for Health*

[7] Kentucky Revised Statute.

and Fam. Servs., 242 S.W.3d 669, 673 (Ky. App. 2007) ("Because we are reversing and remanding for the failure of the district court to provide counsel . . . it is unnecessary for us to consider the appellants' other arguments.").

Father argues that he was not properly represented by counsel during the full termination proceedings, including all stages of the underlying dependency proceedings; therefore, he claims, the family court violated his due process rights. Importantly, he claims that he was not represented at the permanency proceeding, at which time the family court changed the goal to adoption.

Our precedence regularly details the immense protections allotted for parents: "constitutional jurisprudence holds that parental rights are 'essential' and 'basic' civil rights, 'far more precious . . . than property rights.'" *A.P. v. Commonwealth*, 270 S.W.3d 418, 420 (Ky. App. 2008) (citing *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972) (internal quotation marks and citations omitted)). Therefore, "there is no greater sanction to the parent/child relationship than the involuntary termination of a parent's rights. If the state seeks to terminate this sacrosanct relationship, parents are entitled to fundamentally fair procedures." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)).

In *R.V.*, this Court further detailed the "fundamentally fair procedures" required for Kentucky parents. 242 S.W.3d at 672. This Court

acknowledged that *Santosky* did not provide an "absolute due process right to counsel . . . in termination of parental rights actions[,]" but that "appointment of counsel may be determined on a case-by-case basis." *Id*. Further, the Kentucky legislature had codified[8] a parent's right to counsel during the dependency and termination proceedings. *Id*. Therefore, this Court concluded that to maintain a fundamentally fair procedure, as required by the U.S. Constitution and Kentucky statutes, "the parental rights of a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings." *Id.* at 673. *See also Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky. App. 2008).

In *R.V.*, during the underlying dependency proceedings, "the district court appointed counsel for [the parents], but then relieved those attorneys of their duties of representation after the initial disposition order . . . when critical stages of the dependency action remained." 242 S.W.3d at 672. Specifically, the parents did not have representation during the permanency hearing, at which the goal was changed to adoption. *Id.* at 670. This Court explained that "critical stages" of the proceedings included "all critical stages of an underlying dependency proceeding . . . unless it can be shown that such proceeding had no effect on the subsequent

[8] KRS 620.100 and KRS 625.080.

circuit court termination case." *Id.* at 673.[9] This Court clarified that "[p]arents are entitled to a meaningful opportunity to be heard, including the right to consult with counsel, at goal change and permanency hearings" because "approving adoption as a permanency goal significantly increases the risk that parental ties will be severed." *Id.* at 672. Because the lower court had relieved the parents' counsel when critical stages of the proceedings remained – the permanency hearing that changed the goal to adoption – this Court found the lower court had violated the parents' due process rights and reversed that court's order terminating their parental rights. *Id.*

While the Cabinet does correctly note that this Court at one point referred to the custodial parents in *R.V.*, this Court does not continue such distinction[10] throughout its holdings in that opinion. This Court acknowledged that a goal change to adoption is a critical stage because it significantly increases the chances the parental ties would be terminated. *Id.* at 672. Such severance of the parent/child relationship would apply to all parents – custodial and non-custodial – because non-custodial parents' rights must also be terminated in order to finalize

[9] *See also Z.T.*, 258 S.W.3d at 34 ("Although a dependency action does not terminate parental rights, it is an interference with the parental relationship and often a precursor to the permanent termination of parental rights. The parents must, therefore, be afforded the same fundamentally fair procedures.").

[10] Custodial parents versus non-custodial parents.

an adoption. Therefore, based on this Court's reasoning in *R.V.*, we hesitate to conclude that both parents are not granted the constitutional protections Kentucky precedence has mandated. *Id.* at 673.

Here, the family court's orders do not list an attorney for Father for the goal change proceedings entered in February 2021,[11] nor does the record indicate service to Father or that he was notified of that proceeding. Because this proceeding was critical in the termination proceedings, and because we cannot say from the record whether Father was given the opportunity to be heard at such proceeding, we cannot deny his claim that his due process rights were violated.

The Cabinet argues that the underlying dependency proceedings and permanency hearing had no effect on the subsequent termination case. It further claims that because Father was not a named perpetrator in any of the DNA petitions, was never adjudicated to have abused or neglected Child, and was not the custodial parent, none of the findings therein significantly impacted his status as a parent. However, we cannot reconcile such arguments with this Court's clear directive in *R.V.*, that permanency hearings, at which the goal is changed to adoption, significantly impact parental rights. *Id.* at 672. Indeed, the fact that he was not a named perpetrator in any of the prior DNA actions, even though those

[11] The record indicates that the family court did not appoint counsel for Father until June 9, 2021, four months after it had changed the permanency goal to adoption.

proceedings greatly affected the subsequent termination proceedings, is of concern. As such, we are not persuaded by the Cabinet's arguments.

Based on the limited caselaw presented and the record before us, we cannot say Father was afforded a fundamentally fair proceeding, as the U.S. Constitution and Kentucky precedence and statutes mandate. Therefore, we reverse and remand the case for further proceedings consistent with these findings.[12]

Again, this Court has determined that it is unnecessary to consider the remaining arguments. *Id.* at 673. Therefore, we need not consider Father's arguments regarding KRS 625.090.

CONCLUSION

The family court judgment terminating Father's parental rights is reversed, and this action is remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph S. Elder II
Louisville, Kentucky

BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

Dilissa G. Milburn
Mayfield, Kentucky

[12] *See Z.T.*, 258 S.W.3d at 34.