IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-00553-COA

B.E.G. **APPELLANT**

v.

R.C., AS NATURAL MOTHER AND BEST FRIEND OF J.L.C. AND BEST FRIEND OF A.L.G.C. **APPELLEE**

DATE OF JUDGMENT:	02/22/2018
TRIAL JUDGE:	HON. JOHN S. PRICE JR.
COURT FROM WHICH APPEALED:	WARREN COUNTY YOUTH COURT
ATTORNEY FOR APPELLANT:	W. RICHARD JOHNSON
ATTORNEY FOR APPELLEE:	JAMES L. PENLEY JR.
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
DISPOSITION:	AFFIRMED - 07/16/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE J. WILSON, P.J., WESTBROOKS AND McDONALD, JJ.

McDONALD, J., FOR THE COURT:

¶1. B.E.G.[1] appeals the Warren County Youth Court's denial of his Mississippi Rule of Civil Procedure 60(b) motion for relief from the judgment terminating his parental rights. We find no error and affirm.

FACTS AND PROCEDURAL HISTORY

¶2. B.E.G. and R.C. were married, though the date of their divorce is not reflected in the record. B.E.G. was the legal father of both J.L.C., born in April 2016, and A.L.G.C., born in June 2012.

[1] We use shortened pseudonyms to protect the identity of the minors.

¶3. Pursuant to a Warren County Youth Court's order, the minor children were placed in the care and custody of the Warren County Department of Child Protective Services on or about May 2, 2016. On June 7, 2016, the court determined that the children had been abused and neglected on the basis of both parents' drug use. The children were placed in their maternal grandparents' custody and ultimately returned to R.C. on September 8, 2016, when she successfully completed drug treatment.

¶4. On May 16, 2017, R.C. filed a petition in the Warren County Youth Court to terminate the parental rights of B.E.G. She alleged that she was awarded custody and that a no-contact order had been entered against B.E.G. R.C. further alleged that B.E.G. had abandoned her and their daughter prior to the birth of their son. The matter was set for a hearing.

¶5. R.C. averred that B.E.G. could not be found. Therefore, service of process was accomplished by publication in The Vicksburg Post of Warren County on May 18, 2017; May 25, 2017; and June 1, 2017, notifying B.E.G. of the June 27, 2017 hearing.

¶6. On June 22, 2017, the court appointed a guardian ad litem to represent the children's best interest.

¶7. On June 27, 2017, a termination hearing was held in the youth court. B.E.G. appeared and objected to R.C.'s petition to terminate his parental rights. The guardian ad litem requested that the judge continue the hearing because she had not interviewed everyone in order to make a report and recommendation. The court announced the date of the hearing and had B.E.G. repeat the date to make sure he understood that the hearing was rescheduled for August 14, 2017, at 10:30 a.m. The court also informed B.E.G. that no further process

or notice would be given to him.

¶8. A hearing was held on August 14, 2017, and B.E.G. did not appear. R.C. and her father testified. R.C. testified that B.E.G. had never seen the youngest child, J.L.C., and had not seen A.L.G.C. in over fourteen months. R.C. further testified that B.E.G. never provided any support for the children and that he had an ongoing drug problem. R.C.'s father testified that R.C. had lived with him and his wife for over a year. He also testified that they had not seen B.E.G. and that B.E.G. had not provided any financial or medical support for the children. In its ruling from the bench, the court stated it considered the guardian ad litem's report and the testimony of the witnesses. The court ruled that R.C. had proven at least one ground for the termination of parental rights, and B.E.G.'s parental rights were forever terminated as to J.L.C. and A.L.G.C. The court entered a written order on August 15, 2017.

¶9. Nearly six months later, on February 13, 2018, B.E.G., through counsel, filed a motion to set aside the order terminating his parental rights or, alternatively, reopen the time for an appeal. B.E.G. argued that the order should be set aside pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure because he was not afforded all of his rights under Mississippi Code Annotated section 93-15-113 (Rev. 2013). Additionally, he argued that the order was void because: (1) it included both children in one action; (2) it did not include specific findings as to the best interest of the children; (3) it did not state the grounds for termination; and (4) there was a possibility of reunification.

¶10. On February 22, 2018, the Warren County Youth Court found that it had no authority to enlarge the time for appeal or to reopen the case and therefore denied B.E.G.'s motion.

On March 20, 2018, B.E.G. orally made the same motion. The court heard the motion and again denied the suggested relief in an order entered on the same day.

¶11. On April 5, 2018, B.E.G. timely appealed the youth court's March 20, 2018 order on the following grounds:

> (1) The August 15, 2017 order terminating his parental rights is void for lack of personal jurisdiction.
>
> (2) The petition to terminate his parental rights is flawed and any order generated therefrom is void.
>
> (3) The order is void for not identifying and reciting the specific reason for termination of his parental rights.
>
> (4) The involuntary termination of his parental rights was manifestly wrong and clearly erroneous based on the lack of supporting evidence.

STANDARD OF REVIEW

¶12. We review a trial judge's refusal to grant relief under Mississippi Rule of Civil Procedure 60(b) under an abuse-of-discretion standard. *M.A.S. v. Miss. Dep't of Human Servs.*, 842 So. 2d 527, 530 (¶12) (Miss. 2003). "Rule 60(b) is not an escape hatch for litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies." *Id*. (quoting *City of Jackson v. Jackson Oaks Ltd. P'ship*, 792 So. 2d 983, 986 (¶5) (Miss. 2001)). "Further, Rule 60(b) motions should be denied where they are merely an attempt to relitigate the case." *Id*. (quoting *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984)).

DISCUSSION

¶13. Rule 60(b)(4) provides for relief from a void judgment. Generally, the grant or denial

of a Rule 60(b) motion is within the trial court's discretion. *Clark v. Clark*, 43 So. 3d 496, 501 (¶21) (Miss. Ct. App. 2010). But if the judgment is void, the trial court has no discretion and must set the void judgment aside. *Id*. In defining a void judgment, our courts have stated that "a judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *Overbey v. Murray*, 569 So. 2d 303, 306 (Miss. 1990); *Clark*, 43 So. 3d at 501 (¶21).

I. Whether the August 15, 2017 order terminating Grant's parental rights is void for lack of personal jurisdiction.

¶14. "Whether the chancery court had jurisdiction to hear a particular matter is a question of law, to which this Court must apply a de novo standard of review." *Simmons v. Harrison Cty. Dep't of Human Servs.*, 228 So. 3d 347, 350 (¶9) (Miss. Ct. App. 2017). Mississippi Code Annotated section 93-15-107(1)(b) (Supp. 2017) provides that service may be perfected by publication if, after a diligent search, the party's address is still unknown. Mississippi Rule of Civil Procedure 4(c)(4)(B) provides that "[t]he publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county where the . . . petition . . . is pending" and that the "defendant shall have thirty (30) days from the date of first publication in which to appear and defend."

¶15. R.C. served B.E.G. by publication in compliance with section 93-15-107 and Mississippi Rule of Civil Procedure 4. In R.C.'s petition she averred that B.E.G. had left the state and that after a diligent search and inquiry he could not be found. This assertion renders service by publication proper. The publication ran in The Vicksburg Post on May 18, 2017; May 25, 2017; and June 1, 2017. The publication summoned him to appear on June 27,

2017, and defend against a complaint or petition filed against him.

¶16. Additionally, when B.E.G. appeared at the June 27, 2017 hearing, the court continued the case. The court informed B.E.G. that he would not receive any additional notice and reiterated the importance of appearing at the August 14, 2017 hearing. An excerpt of the transcript provides:

> COURT: . . . Ms. Walker is the attorney and guardian ad litem for the children. She has requested a continuance. She has not interviewed everybody, and the guardian ad litem is a critical person in a termination of parental rights case. Sir, are you alright?
>
> B.E.G.: Yes, sir.
>
> COURT: Okay. And so I've got to continue the case based on the . . . request of the guardian ad litem. She's required, under law, to do the investigation. She's the most essential personal in this case. Okay? Now what I'm going to do this morning – Do you live in Vicksburg?
>
> B.E.G.: No, sir.
>
> COURT: Okay, this case is going to be set for August the 14th, 2017, at 10:30 in this courtroom.
>
> B.E.G.: Yes, sir.
>
> COURT: Did you hear me?
>
> B.E.G.: Yes, sir.
>
> COURT: What did I just say?
>
> B.E.G.: You said it was continued–
>
> COURT: No, what date?
>
> B.E.G.: I'm sorry. I'm very nervous about this.

COURT: Okay. Don't be nervous. I'm going to set this case for August 14, 2017, at 10:30 in this courtroom. What did I just say?

B.E.G.: August 14, 2017, in this courtroom at 10:30.

COURT: That's right. There will be no further notice. So Mr. Penley is not going to be required to send you a summons or anything. If you want a lawyer, you need to get it right now.

B.E.G.: Yes, sir.

. . . .

COURT: You need to stay in touch with her because you're not going to get any further summons or subpoena from this Court. Do you understand that?

B.E.G.: Yes, sir, I understand.

¶17. B.E.G. knew that he was not going to receive notice of the August 14, 2017 hearing. B.E.G. even repeated this information to the court. Additionally, Rule 22(a) and (b) of the Mississippi Uniform Rules of Youth Court Practice states that the clerk does not need to issue summons to:

> (i) any person who has already been served with process or who has already appeared in court proceedings in the cause; and
>
> (ii) who has received sufficient notice of the time, date, place and purpose of the adjudication hearing.

¶18. B.E.G. appeared at the June 27, 2017 hearing because of the publication summons. Thus, B.E.G.'s argument that the court lacked personal jurisdiction over him because he was not served is without merit.

¶19. B.E.G. also argued that the youth court did not follow the mandated procedure set out in Mississippi Code Annotated section 93-15-113 for the termination of parental rights

during the August 14, 2017 hearing. This assertion is without merit as well.

¶20. Section 93-15-113 provides:

> (2)(a) At the beginning of the involuntary termination of parental rights hearing, the court shall determine whether all necessary parties are present and identify all persons participating in the hearing; determine whether the notice requirements have been complied with and, if not, determine whether the affected parties intelligently waived compliance with the notice requirements; explain to the parent the purpose of the hearing, the standard of proof required for terminating parental rights, and the consequences if the parent's parental rights are terminated. The court shall also explain to the parent:
>
> (i) The right to counsel;
>
> (ii) The right to remain silent;
>
> (iii) The right to subpoena witnesses;
>
> (iv) The right to confront and cross-examine witnesses; and
>
> (v) The right to appeal, including the right to a transcript of the proceedings.
>
> (b) The court shall then determine whether the parent before the court is represented by counsel. If the parent wishes to retain counsel, the court shall continue the hearing for a reasonable time to allow the parent to obtain and consult with counsel of the parent's own choosing. If an indigent parent does not have counsel, the court shall determine whether the parent is entitled to appointed counsel under the Constitution of the United States, the Mississippi Constitution of 1890, or statutory law and, if so, appoint counsel for the parent and then continue the hearing for a reasonable time to allow the parent to consult with the appointed counsel. The setting of fees for court-appointed counsel and the assessment of those fees are in the discretion of the court.

¶21. At the beginning of the parental termination hearing on August 14, 2017, the court determined whether all necessary parties were present and identified all persons participating in the hearing. Because B.E.G. was not present, the court ordered the deputy sheriff to call B.E.G. three times in the hallway but to no avail. We do not know if the court would have

provided these rights to B.E.G. because he did not appear at the August 14, 2017 termination hearing. Consequently, the court was under no duty to address any further requirements of the statute. The purpose of the statute is to explain the depth and seriousness of the proceeding, as well as to inform the affected parent of his or her rights. B.E.G. was not present to warrant giving such an explanation.

¶22. Additionally, there was no need for the court to address the requirements of the statute when B.E.G. appeared at the June 27, 2017 hearing because that hearing was not the termination hearing. The statute specifically provides for the judge to inform the parent whose rights are to be terminated of five specific rights "at the beginning of the involuntary termination of parental rights hearing." B.E.G.'s termination hearing was continued in an effort for the GAL to interview everyone—including him—in order to make a thorough recommendation to the court. The GAL first spoke with B.E.G. at the June 27, 2017 hearing and obtained two phone numbers for him; but she could not obtain his address. The GAL's attempts to reach B.E.G. after the hearing were unsuccessful. Then, B.E.G. failed to appear at the August 14, 2017 termination hearing. Had B.E.G. appeared at the August 14, 2017 hearing, the court would have had an opportunity to address these rights. But because he did not appear we will not speculate as to what the court would have done.

¶23. Accordingly, the court did not err in refusing to grant relief under Rule 60(b)(4) for these assertions because the court properly exercised its jurisdiction.

II. Whether the petition to terminate B.E.G.'s parental rights is flawed because both minors were included in one petition.

¶24. B.E.G. argues that the petition for termination of parental rights was statutorily and

procedurally flawed because it identified two children in the same petition, instead of separate petitions being filed for each child. Therefore, B.E.G. argues that the judgment that resulted in an order terminating his parental rights from the petition was void. This Court has upheld petitions to terminate parental rights when there has been one petition and multiple children. The law does not require a petition to be filed for each child. *In re K.D.G.*, 68 So. 3d 748, 750 (¶8) (Miss. Ct. App. 2011) (affirming an order terminating the father's parental rights when DHS filed one petition for two children as opposed to filing separate petitions for each child).

¶25. Our courts have stated that "a judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *Overbey v. Murray*, 569 So. 2d 303, 306 (Miss. 1990); *Clark*, 43 So. 3d at 501 (¶21). B.E.G.'s argument does not fall under either of these categories.

¶26. This issue is without merit. The court did not err in refusing to grant relief under Rule 60(b)(4).

III. Whether the order is void for failing to identify and recite the specific reason for termination of B.E.G.'s parental rights.

¶27. Again, "a judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *Overbey*, 569 So. 2d at 306; *Clark*, 43 So. 3d at 501 (¶21).

¶28. Although the order did not identify the specific reasons for the termination of B.E.G.'s parental rights, the GAL's report did. During the August 14, 2017 hearing, the court made a bench ruling and incorporated the GAL's report into its findings:

> The Court finds as a matter of fact by clear and convincing evidence after considering the written report of the guardian ad litem, which will be made a part of this record, which I have reviewed, and the testimony of the parties, I find by clear and convincing evidence that the Petitioners have proven at least one ground for the termination of parental rights; therefore, the parental rights of [B.E.G.] are hereby forever terminated.

¶29. Although lack of specificity of a youth court's order does not constitute grounds for a void judgment, the GAL's report, which the court incorporated into its bench ruling, was specific. Accordingly, this issue is without merit.

IV. Whether the involuntary termination of B.E.G.'s parental rights was manifestly wrong and clearly erroneous because of the lack of supporting evidence.

¶30. Although B.E.G. does not specify which subsection of Rule 60 entitles him to relief on this issue, his claims will be considered under Rule 60(b)(6)—"any other reason justifying relief from the judgment." But "[r]elief under Rule 60(b)(6) is reserved for extraordinary and compelling circumstances." *Briney v. U.S. Fid. & Guar. Co.*, 714 So. 2d 962, 966 (¶12) (Miss. 1998).

¶31. Additionally, our courts follow the criteria below when determining Rule 60(b) motions:

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) [relevant only to default judgments]; (6) whether if the judgment was rendered after a trial on the merits-the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

M.A.S., 842 So. 2d at 530 (¶16); *accord Carpenter v. Berry*, 58 So. 3d 1158, 1162 (¶18)

(Miss. 2011); M.R.C.P. 60(b) advisory committee's note.

¶32. When balancing each of these factors, we find that the youth court did not err in denying B.E.G. relief on this issue. B.E.G. has not identified any extraordinary or compelling circumstances entitling him to relief. B.E.G. has not raised any viable issues to support disturbing the final judgment. B.E.G. had notice and a fair opportunity to present his defense to R.C.'s petition. B.E.G. also had the right to appeal the youth court's judgment terminating his parental rights, but he failed to do so.

¶33. Further, it appears that B.E.G. is using Rule 60 as a substitute for an appeal. On appeal, B.E.G. even urges the application of the standard of review for termination of parental rights. There must be a balance between substantial justice and finality of judgments. B.E.G. was given an opportunity to reunify with his children, but he failed to complete the drug program as required. B.E.G. had only seen A.L.G.C. a couple of times prior to her first birthday, and he had never seen J.L.C. B.E.G. failed to provide any financial assistance or any parental attention for either child for at least fourteen months. B.E.G. has not provided any exceptional circumstances warranting relief from the judgment. Although parental rights are fundamental, they are not absolute. *Barnes v. McGee*, 178 So. 3d 801, 803 (¶1) (Miss. Ct. App. 2013). "By statute, a parent may lose his parental rights if he fails to make any contact with his child for more than a year or causes his relationship with his child to substantially erode, at least in part, through his own serious neglect, prolonged and unreasonable absence, or unreasonable failure to visit or communicate." *Id*. Thus, the GAL's report properly identified three of the grounds listed in Mississippi Code Annotated section

93-15-121 (Supp. 2017) justifying the termination B.E.G.'s parental rights:

> (c) The parent is suffering from habitual alcoholism or other drug addiction and has failed to successfully complete alcohol or drug treatment;
>
> (d) The parent is unwilling to provide reasonably necessary food, clothing, shelter, or medical care for the child; reasonably necessary medical care does not include recommended or optional vaccinations against childhood or any other disease;
>
> (e) The parent has failed to exercise reasonable visitation or communication with the child. . . .

¶34. Accordingly, this issue is without merit because there are no extraordinary and compelling circumstances as required under Rule 60(b)(6).

CONCLUSION

¶35. B.E.G. failed to show that the judgment terminating his parental rights was void or that any extraordinary and compelling circumstances warranted relief from the judgment. For these reasons, we find that the youth court did not abuse its discretion when it denied B.E.G.'s Rule 60(b) motion. Therefore, we affirm the judgment of the Warren County Youth Court.

¶36. **AFFIRMED.**

BARNES, C.J., CARLTON AND J. WILSON, P.JJ., GREENLEE, WESTBROOKS, TINDELL, LAWRENCE AND C. WILSON, JJ., CONCUR. McCARTY, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY WESTBROOKS AND TINDELL, JJ.; McDONALD AND LAWRENCE, JJ., JOIN IN PART.

McCARTY, J., SPECIALLY CONCURRING:

¶37. I agree with the majority's conclusion that the heavy burden of termination was met in this case. My concern is that we must fully advise parents facing the termination of their

parental rights about the safeguards the law provides them. The failure to do this can constitute reversible error.

¶38. In 2016 the Legislature decreed that parents would be informed that they have five specific rights in a termination hearing:

> The court shall also explain to the parent:
>
> (i) The right to counsel;
>
> (ii) The right to remain silent;
>
> (iii) The right to subpoena witnesses;
>
> (iv) The right to confront and cross-examine witnesses; and
>
> (v) The right to appeal, including the right to a transcript of the proceedings.

Miss. Code Ann. § 93-15-113(2)(a) (Supp. 2017). To be clear, these rights already existed. The Legislature just codified a mechanism to inform the parents of those rights.

¶39. The law requires the notice of rights to be provided "[a]t the beginning of the involuntary termination of parental rights hearing . . . ." *Id*. The court hearing the matter must also perform several other duties at this point, including "explain[ing] to the parent the purpose of the hearing, the standard of proof required for terminating parental rights, and the consequences if the parent's parental rights are terminated." *Id.*

¶40. The statute places heavy duties upon the trial court performing this function. But it is done in the furtherance of the high value we place upon parenting, and the cautious approach we take toward termination of the fundamental interest of parents in their children. As our Supreme Court has phrased it, "[b]ecause parental rights are so important, we sharply

limit the circumstances under which can be terminated by the government." *Gunter v. Gray*, 876 So. 2d 315, 317 (¶3) (Miss. 2004); *accord Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("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 the State.").

¶41. In this case, the decision had already been made by the trial court to continue the hearing based upon the request by the GAL to finish interviewing those involved. Since this was not the hearing terminating the rights per se, the law to inform parents of their rights was not technically triggered.

¶42. Yet it is troubling that the anxious parent was not told of his five rights. Instead, he was told to memorize and repeat back the date that the subsequent hearing would be. When he stumbled in repeating back the date to the court, the father said, "I'm sorry. I'm very nervous about this." Within a jumble of other information about how there would not be further notice or summonses, the trial court informed him, "If you want a lawyer, you need to get it right now."

¶43. It would have been far better for the trial court to inform the parent of his rights. He was not told he had the right to a lawyer but only that if he wanted one he should get one. He was not told that he could bring his own witnesses, not testify, or appeal. Strictly speaking, the law does not require this, but the law is only a *minimum* of what is required. It is the duty of those who have this specialized legal knowledge to inform those who do not and phrase it into language that can be understood. Indeed, lawyers are required by our Rules

of Professional Conduct to translate the legal system to their clients. Miss. R. Prof. Conduct 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decision regarding the representation.").

¶44. The Legislature bridged a wide canyon in implementing the law to inform parents of their rights, and the careful structure of the law better protects fundamental liberty interests. The canyon is a lack of information; we possess safeguards from the seizure of our property and family, but we often do not know or understand them. This is the same reason why we have *Miranda*[2] warnings in the context of arrests.

¶45. Nor are these duties discretionary. "A basic tenet of statutory construction constrains us to conclude that, unlike the discretionary nature of "may," the word "shall" is a ***mandatory*** directive." *Ivy v. Harrington*, 644 So. 2d 1218, 1221 (Miss. 1994) (emphasis in original). Because the Code repeatedly directs the trial court by use of the word "shall," if the information about the rights is not provided, it can be reversible error.

¶46. The ample facts in this case outside of the hearing assure that the burden of termination was met, as the father did not give the GAL an address, and he never answered any of the phone numbers he provided to even speak to them. Nonetheless, the lack of information provided to him is concerning in light of the importance of the proceeding. In order to protect those essential rights possessed by all parents, they should be well informed as possible at all stages of a termination case about the right to counsel, to remain silent, to cross examine witnesses, subpoena witnesses, and the right to appeal. For the foregoing

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

reasons, I specially concur.

WESTBROOKS AND TINDELL, JJ., JOIN THIS OPINION. McDONALD AND LAWRENCE, JJ., JOIN THIS OPINION IN PART.