

RENDERED: AUGUST 13, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-002054-ME

J.W.

APPELLANT

v. APPEAL FROM CLARK FAMILY COURT  
HONORABLE JEFFREY M. WALSON, JUDGE  
ACTION NO. 08-AD-00014

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND FAMILY  
SERVICES; Z.L.W., AN INFANT;  
AND M.E.W., AN INFANT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: J.W. (“hereinafter “Mother”) appeals the judgment and order of the Clark Family Court involuntarily terminating her parental rights to

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

her biological daughter and son. She alleges that her appointed guardian *ad litem* provided ineffective assistance of counsel. After our review of the facts and the record, we affirm.

In early 2007 Mother's home was comprised of Mother, Father, Stepdaughter, Stepson, Daughter and Son. Father is the biological parent of all the children except Stepson. Mother is the biological parent of Daughter and Son. Father and Mother were given custody of Stepdaughter and Stepson when they were removed from the home of their mother and her paramour sometime in 2006. At the times relevant to this case Stepdaughter was 10 years old, Daughter was 7 and both Stepson and Son were 5. Stepdaughter suffered from borderline mental retardation.

On March 11, 2007, police were called to a public park where a child fatality had been reported. Mother and Father told police that Stepdaughter had been injured when she fell down some stairs. An investigation revealed that Stepdaughter had suffered severe injuries, some old and some recent, including broken ribs and vertebrae. The injuries were consistent with repeated severe beatings. Both Mother and Father were eventually tried and convicted of murder for Stepdaughter's death. They are each serving a life sentence. The parental rights of both Mother and Father to Daughter and Son were terminated in a

subsequent proceeding which disclosed that among other things the children witnessed the beating of Stepdaughter.

Mother's *pro se* appeal argues that the guardian *ad litem* appointed to represent her in the dependency and termination proceedings failed to adequately advise her of court dates and the results of hearings that led to the termination of her parental rights. She relies on Supreme Court Rule (SCR) 3.130(1.1) and SCR 3.130(1.4), which define the duties and obligations an attorney owes a client. She acknowledges her incarceration makes it impossible for her to retain custody of the two children but argues that absent the attorney's failures, she would have been able to have the children placed with relatives instead of in foster care.

The Supreme Court Rules govern the behavior of attorneys. When a breach of those rules is reported the Kentucky Bar Association may in its discretion commence an investigation that could result in lawyer discipline, but this does not directly affect the judgments or orders of a court. On the other hand, improper or ineffective assistance of counsel has developed as a body of case law which in a proper case could affect a judgment. Because Mother requests that the order terminating her parental rights be vacated and her parental rights restored, we will review this matter as if it were a claim of ineffective assistance of counsel.

The United States Supreme Court has found no absolute right to counsel in parental rights termination cases under the United States Constitution. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). But our General Assembly has provided for the appointment

of counsel for indigent parents in termination and dependency cases by enacting KRS 625.080(3). *Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky. App. 2008). And while, as we have previously recognized, a right to counsel logically assumes a right to effective counsel, this right in termination and dependency cases does not derive from the Sixth Amendment. Thus, a different standard of review is employed in these cases than in criminal cases. *Id.* We will only consider a claim of ineffective assistance of counsel in a case such as this when a claimant shows that counsel's errors "were so serious that it is apparent from the record that the parent was denied a fair and meaningful opportunity to be heard so that due process was denied." *Id.* at 36-7.

Mother's specific complaints are that counsel did not meet with her sufficiently or keep her apprised of the ongoing court schedule, that she was not allowed to be present at the trial and that, had she had constitutionally effective assistance of counsel, she could have explored options for placing the children with family rather than having her parental rights terminated and having the children placed for adoption.

The cabinet presented its evidence and as the trial court found, provided compelling evidence on a number of grounds that the parental rights should be terminated. We need not detail each of those findings for purposes of this appeal. Additionally, the court found it very unlikely that Mother would be released from incarceration before the children attain the age of majority as her first scheduled meeting with the parole board will not occur until after that time.

Mother admits that counsel did in fact meet with her repeatedly and counsel provided information to the court during the hearing that he continued to communicate with her by mail after she was transferred to a distant state penal institution. While it may not have been all of the attention Mother desired, it was not constitutionally deficient.

The record discloses that the trial court telephoned the penal institution where Mother was incarcerated and used a speaker-phone during the hearing. Mother was able to hear all witnesses and communicate with counsel. While she was not in fact physically present, her presence by telephone was sufficient.

Finally, we address Mother's contention that she could have arranged for a family member to take custody of the children as an alternative to having her parental rights terminated. The record reveals that the cabinet did investigate family members as caregivers. Some family members were rejected by the cabinet because of their involvement in violent incidents. Others were rejected because they did not have the ability to care for the special needs of the children. The trial court considered the evidence presented and found termination of Mother's parental rights was in the best interests of the children. Placement with a family member was considered and rejected. "Once 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. Placement with relatives may be an option for consideration but nothing

more.” *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d 420, 426 (Ky. App. 1986).

Mother has failed to carry her burden of showing that her appointed counsel’s assistance was deficient at all, much less that it was so deficient that it resulted in a proceeding which was fundamentally unfair or unreliable or that due process was denied. The trial court considered and rejected Mother’s desire to have the children placed with family members, deciding that was not in the children’s best interest. We can find nothing that indicates her attorney rendered ineffective assistance of counsel.

The judgment of the Clark Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J.W., *pro se*  
Pewee Valley, Kentucky

BRIEF FOR APPELLEE,  
COMMONWEALTH OF  
KENTUCKY, CABINET FOR  
HEALTH AND FAMILY  
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