RENDERED: SEPTEMBER 20, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001288-ME
AND
NO. 2012-CA-001289-ME
AND
NO. 2012-CA-001290-ME

C.A.C. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN P. SCHRADER, JUDGE
ACTION NOS. 12-AD-00047, 12-AD-00048, 12-AD-00049

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; J.D.S.C., J.B.J.C., AND J.B.J.C.
(MINOR CHILDREN) APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, C.A.C. appeals from an order of the Fayette Circuit

Court terminating her parental rights to her four minor children. Finding no error, we affirm.

Appellant and her husband, E.D.C.,[1] now deceased, are the adoptive parents of four minor children, J.B.J.C., J.D.S.C., J.B.J.C. and A.E.L.C., ranging from twelve to seventeen years old. In 2010, all four children were removed from Appellant's home and placed in foster care amid allegations of abuse. Subsequently, both parents were charged with numerous criminal offenses relating to the abuse of the children. On March 2, 2012, the Cabinet filed petitions to terminate Appellant's parental rights. Appellants thereafter filed a joint *pro se* response and request for counsel on March 27, 2012. Counsel was appointed for each Appellant the following day.

A trial was held on June 14, 2012. Therein, the trial court interviewed each child privately in chambers, while allowing counsel and Appellant to view the interviews on a monitor in the courtroom. Counsel was also permitted to submit questions for the trial judge to ask the children. The children all recounted instances of abuse, primarily administered by C.A.C., including being forced to jump off of a garage roof, being placed in dog cages with the family's Doberman Pinschers, being hit with a hot skillet, nearly being drowned, having a paper bag placed over their heads as punishment, and having their hands tied together and their mouths and heads covered with duct tape. It was clear from the children's

[1] E.D.C. was initially a named Appellant in this matter. However, he passed away in April 2013 and counsel subsequently filed a motion to remove him from the appeal. By Order entered September 5, 2013, E.D.C. was removed as a party.

testimony that a large part of the abuse was directed at A.E.L.C.[2] and her sister. Further, the children all confirmed that E.D.C. witnessed the abuse but did not protect them or report the abuse out of fear of C.A.C. The children also testified that C.A.C. took and dealt drugs, with one child stating that C.A.C. even made him help count pills. Although a couple of the children expressed an interest in seeing E.D.C. to say goodbye, all of them stated that they wished to be adopted by their foster parents.

Following the children's testimony, the Cabinet called two social workers, Margie Dillow and Amy Lainhart, as witnesses. Dillow testified that she had been assigned to the family when the children were removed from the home and worked with them until she left the case in August 2011. Dillow testified that Appellant was not cooperative with any treatment plans the Cabinet established. Dillow recounted the one supervised visit that was arranged between Appellant and the children during which Appellant seemed to make a big show of bringing food and making many promises to buy things for the children when she returned home. Dillow stated, however, that she observed very little, if any, real affection and it was not a typical interaction between parents and children that had not seen each other for a while.

Finally, Lainhart testified that she began working with the family in August 2011. Lainhart explained that the children had been placed in separate foster

[2] A.E.L.C. was the only adopted female child. Apparently, C.A.C. also had a biological daughter who is not the subject of this appeal because the Cabinet was able to place her with her biological father.

homes because of their sexual "acting out" with each other. However, she reported that all were doing "exceptionally well" and wished to be adopted by their respective foster parents.

At the close of evidence, the trial court made its findings of fact and conclusions of law from the bench that all four children were abused and neglected as defined by KRS 600.020 and that termination of Appellant's parental rights was warranted. On June 29, 2012, the trial court entered detailed written Findings of Fact and Conclusions of Law in accordance with its oral ruling. This appeal ensued.[3]

We are wholly mindful that termination of parental rights is a serious matter that must be afforded the most meticulous due process protection. Therefore, "[t]hey can be involuntarily terminated only if there is clear and convincing evidence that the child has been abandoned, neglected, or abused by the parent whose rights are to be terminated, and that it would be in the best interest of the child to do so." *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006). On appeal, this Court applies the clearly erroneous standard of review under CR 52.01. Consequently, the trial court's factual findings must be upheld as long as they are supported by substantial evidence in the record. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

[3] The Notice of Appeal named all four adopted children as parties. However, in August 2013, C.A.C. moved to dismiss her appeal as to A.E.L.C. By Order entered September 5, 2013, A.E.L.C. was removed as a party.

On appeal, Appellant first argues that the trial court erred in interpreting KRS 621.080(5) as requiring a hearing to be held within sixty days of the Cabinet's motion for a hearing on the petition. Appellant contends that the right to have a hearing within sixty days is a right of the parents, not the Cabinet. As such, they complain that the trial court abused its discretion in denying their motion for a continuance. We disagree.

The Cabinet filed its motion to set a hearing date on April 23, 2012. However, at a subsequent pretrial hearing, the Cabinet made a request to postpone the proceedings because the criminal investigation was ongoing and additional charges were going to be brought against Appellant. At the same time, Appellant also moved to continue the trial on the grounds that the pending criminal charges created a conflict between the right to defend themselves in the termination proceeding and their right to remain silent on the criminal charges. Further, Appellant claimed that counsel needed additional time to review the voluminous record. The guardian ad litem objected to the request, voicing concerns as to the best interests of the children and their need for permanency. The trial court ruled that the Cabinet could withdraw its motion for a hearing date and re-file it at a later time but that KRS 625.080(5) requires that a termination of parental rights hearing be conducted within sixty days of the motion. The Cabinet withdrew its request for postponement and agreed to move forward with the original June 14, 2012 hearing date and, as such, the trial court denied Appellant's request for a continuance.

KRS Chapter 625 governs parental termination cases. KRS 625.080(5) specifically states, "The hearing under this chapter *shall* be held within sixty (60) days of the motion by a party or the guardian ad litem for a trial date." (Emphasis added). As Appellant, the Cabinet, and the children are all parties to a termination action, subsection (5) clearly mandates a hearing within 60 days upon a motion by any one of them or by the guardian ad litem. Furthermore, contrary to Appellant's argument, we find no language within KRS 625.080(5) that would limit the right to a hearing only to the parents.

Appellant cites to several unpublished decisions of this Court wherein the trial court's noncompliance with KRS 625.080 was not raised and the issue concerning the appropriateness of a continuance was decided upon the circumstances of each case. We find Appellant's citations unpersuasive, and do not cite to them herein, because none addressed the language of KRS 625.080(5). As the trial court herein noted, just because other courts failed to follow the law does not change the law. Quite simply, the language "shall be held" in KRS 625.080(5) can be interpreted in no other manner than requiring a hearing within 60 days of a motion by any party.

Even if we were to ignore the language of KRS 625.080(5) and decide this issue solely upon the trial court's discretion to grant a continuance, we would be compelled to conclude that the trial court did not abuse that discretion. Relevant factors to be considered in deciding whether to grant a continuance include: (1) the length of the delay; (2) whether there have been any other previous

continuances; (3) the inconvenience to the litigants, witnesses, counsel and the court; (4) whether the delay is purposeful or caused by the accused; (5) the availability of competent counsel, if at issue; (6) the complexity of the case; and (7) whether denying the continuance would result in any identifiable prejudice. *Anderson v. Commonwealth*, 63 S.W.3d 135, 138 (Ky. 2001); *Eldred v. Commonwealth*, 906 S.W.2d 694, 699 (Ky. 1994), *overruled on other grounds in Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003).

The attorneys initially appointed for Appellant were those that had represented them during the prior dependency and neglect proceedings and, thus, were thoroughly informed about the facts of the case. Although E.D.C. was subsequently appointed a different attorney, it is apparent that she worked closely with C.A.C.'s counsel. Moreover, although Appellant argues that the voluminous record hampered their attorneys' ability to adequately prepare, a review of such reveals that the majority of each child's file consists of lifetime medical records which were not directly relevant to the instant proceedings. Certainly, the record was easily reducible to a manageable level and did not equate to the complex case Appellant attempts to establish.

Of even more importance is the effect delaying the proceedings would have on the parties herein, particularly the children. Appellant contends that the termination proceedings should be continued until the criminal charges against them are resolved. In all reality, the criminal action could drag on for years, during which time the children are left without any sense of permanency.

It is fundamental law that the request for a continuance is addressed to the sound discretion of the trial court. *Crane v. Hall*, 165 Ky. 827, 178 S.W. 1096 (1915). Under the circumstances presented herein, the trial court did not abuse its discretion in denying Appellant's request for a continuance.

Appellant next challenges the trial court's decision to interview the children privately in chambers. Appellant contends that no determination was made that the children were unable to testify in the courtroom and that the procedure violated their confrontation rights. This claim is without merit.

KRS 625.080(3) provides in pertinent part:

> Upon motion of any party, the child may be permitted to be present during the proceedings and to testify if the court finds such to be in the best interests of the child. In its discretion, the Circuit Court may interview the child in private, but a record of the interview shall be made, which, in the discretion of the court, may be sealed to be used only by an appellate court[.]

Contrary to Appellant's claim, the constitutional right to personally confront and cross-examine witnesses is not required in an action to involuntarily terminate parental rights, because such is a civil, not a criminal, proceeding and thus the Sixth Amendment has no application. *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d at 347. Further, although the validity of a trial court excluding the parties and counsel in child interviews pursuant to KRS 625.080 has not been specifically addressed in Kentucky, having children testify in a family court's chambers in proceedings involving custody, visitation, or

timesharing is a common practice authorized under KRS 403.290(1).[4] *Parker v. Parker*, 467 S.W.2d 595, 597 (Ky.1971).

In *Couch v. Couch*, 146 S.W.3d 923 (Ky. 2004), our Supreme Court held that a family court has the discretion to interview a child outside of the presence of the parties and their counsel. *Id.* at 925. However, if that court accepts and acts upon testimony made by a child during an in-camera interview, minimum due process requires that the child's testimony, if not subjected to cross-examination, must be recorded and disclosed to the parties to provide them an opportunity for rebuttal. *Id.* The Court noted:

> We are cognizant of the fact that in many instances it may be helpful for the trial court to privately interview the child whose welfare is so vitally affected by the trial court's decision in an attempt to protect him or her from the pain of openly choosing sides. Nevertheless, it is the parties' constitutional right to hear all of the evidence offered in the case. . . .
>
> In striking the appropriate balance between the interests of children and the procedural rights of parents, we hold that while it is certainly within the discretion of the trial court to conduct an in camera interview in the absence of the parties and counsel, a record of such interview must be made so that the parties are afforded the subsequent opportunity to determine and contradict the accuracy of statements and facts given during the interview.

Id.

[4] KRS 403.290(1) provides: "The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case."

We certainly can perceive no reason why an in-camera interview in the absence of the parties and counsel would be appropriate in a custody action but not in a termination action. The trial court herein interviewed each child by closed-circuit television with Appellant and counsel having the opportunity to watch. The court solicited questions for cross-examination after each interview and even concluded each session with a second opportunity for follow-up questions.

We are of the opinion that the procedure utilized by the trial court herein complied with KRS 625.080 while also protecting Appellant's due process rights. Accordingly, we cannot conclude that the trial court abused its discretion in determining that it was in the best interest of the children that they not undergo the potentially traumatic experience of testifying in open court or in the presence of Appellant and counsel, particularly in light of the considerable evidence of neglect and abuse the children had suffered at Appellant's hands and the resulting fear that they felt towards their parents.

Finally, Appellant contends that the trial court erred in finding that there was clear and convincing evidence to support the termination of their parental rights. Appellant bases her argument, in part, on the fact that they were only permitted one supervised visit with the children and were never permitted to tell them that they "are and will always be very much loved by their parents."

A trial court has broad discretion in determining whether a child fits within the abused or neglected category and whether such warrants termination of parental rights. *R.C.R. v. Commonwealth, Cabinet for Human Resources,* 988

S.W.2d 36, 38 (Ky. App. 1998). On appeal, this Court reviews the trial court's findings of fact and will not set aside a decision unless clearly erroneous. *Id.*; CR 52.01.

The testimony of the children as to the repeated abuse and neglect they suffered at the hands of Appellant was more than sufficient to support the trial court's findings. The additional testimony of the social workers and other investigators served only to further corroborate the tragic situation these children were placed in. We must agree with the guardian ad litem that, based upon the evidence in the record, the one supervised visit was one too many. Without question, the trial court properly found there was clear and convincing evidence that the statutory requirements for termination of parental rights were met and that such was in the best interest of the children.

The Fayette Circuit Court's Findings of Fact and Conclusions of Law terminating Appellant's parental rights to the children named herein are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT C.A.C.:

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

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