

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001431-ME

B. G. D.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 14-AD-00266

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
D. Y., THE BIOLOGICAL FATHER; AND
M. G. D., A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; NICKELL AND THOMPSON, JUDGES.

KRAMER, CHIEF JUDGE: B. G. D. appeals the Fayette Circuit Court's judgment terminating her parental rights to her minor child, M. G. D. After a careful review of the record, we affirm because B. G. D.'s right to counsel was not

violated, and the circuit court properly terminated her parental rights concerning M. G. D.

I. FACTUAL AND PROCEDURAL BACKGROUND

A petition to terminate the parental rights of B. G. D., the mother to minor child M. G. D., was filed on October 8, 2014.¹ M. G. D. is a female child with a birthdate of April 8, 2004. The petition stated that the child was placed in foster care from January 12, 2013, until she was briefly returned to the mother's custody around November 4, 2013. The child was then removed from the mother's custody again on December 3, 2013, and placed in foster care, where she remained at the time the petition was filed in October 2014. The petition alleged, *inter alia*, that the mother had failed to protect the child's right to a safe and nurturing home; that the mother, for periods not less than six months, had failed to provide essential parental care and protection for the child and there was no reasonable expectation of improvement in parental care and protection; and that the child had resided in foster care for more than fifteen of the most recent twenty-two months prior to the petition being filed.

¹ The mother has another child, A. R. C., who is the younger half-sister of the child involved in the present appeal. A petition to terminate the mother's parental rights to A. R. C. was filed at the same time as the petition in the present case. The appeal in that case, 2015-CA-001432-ME, as well as the appeal of A. R. C.'s father's termination of parental rights case, 2015-CA-001634-ME, have been consolidated with the present appeal to the extent that they are being reviewed by this same appellate panel. However, we will enter separate opinions in those cases.

A non-jury trial was held. Following the trial, the circuit court entered its findings of fact and conclusions of law. Ultimately, the court entered its judgment terminating the mother's parental rights to M. G. D.²

The mother now appeals, contending that: (a) her Fourteenth Amendment due process rights were violated when she did not have access to counsel; and (b) the judgment terminating her parental rights to M. G. D. was not supported by substantial evidence. Further facts will be set forth *infra*, as necessary in order to review the mother's claims.

II. ANALYSIS

A. RIGHT TO COUNSEL

The mother first alleges that her Fourteenth Amendment due process rights were violated when she did not have access to counsel at one point during the underlying juvenile proceeding. Specifically, she contends that she had private counsel during portions of the underlying juvenile action, but that counsel had withdrawn prior to the court hearing in which the mother regained custody, and no new counsel was appointed for that hearing. The mother argues that although “withdrawn counsel was privately retained, the mandate of the Fourteenth Amendment and KRS^[3] 620.100(1) required the court to determine whether [she] could afford counsel, and if not, appoint an attorney for her.” She also notes “that the court has found [her] to be indigent at various points, including during the

² The parental rights of D. Y., who is M. G. D.'s father, were also terminated by the circuit court. However, D. Y. has not appealed the termination of his parental rights.

³ Kentucky Revised Statutes.

underlying juvenile proceeding, the termination proceeding, and the pendency of this appeal.”

This Court has held,

pursuant to both the [D]ue [P]rocess [C]lause of the Fourteenth Amendment to the United States Constitution and KRS 625.080(3) and 620.100(1), . . . 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. This includes all critical stages of an underlying dependency proceeding in district court, unless it can be shown that such proceeding had no effect on the subsequent circuit court termination case.

R. V. v. Commonwealth, Dept. for Health and Family Services, 242 S.W.3d 669, 672-73 (Ky. App. 2007).

Representation for indigent parents in termination cases is outlined in KRS 625.080(3), wherein it is provided that counsel shall be appointed for indigent parents in termination and dependency cases.

* * * *

Kentucky jurisprudence mandates that an indigent parent has the right to the appointment of counsel at all critical stages of the underlying dependency proceedings. *See R. V.*; KRS 625.080(3). This right to counsel, however, is limited if it can be shown that the dependency proceeding, wherein the parent was not represented, had no effect on the subsequent circuit court case. *R. V.*, 242 S.W.3d at 673.

C. J. M. v. Cabinet for Health and Family Services, 389 S.W.3d 155, 163 (Ky. App. 2012).

In the present case, the mother does not allege that she was without counsel during the termination proceedings; rather, she only alleges that she was

without counsel during the hearing in the underlying juvenile action when her children were returned to her custody. She acknowledges in her appellate brief that the counsel at issue was privately retained. The mother testified during trial in the present termination proceedings that her counsel in the underlying juvenile action had withdrawn because counsel had moved. Counsel withdrew prior to the court hearing in November 2013, in which the child in the present appeal, as well as her half-sister, were returned to the mother. The mother attested in the present proceeding, however, that she was merely given a piece of paper for each child that stated the child was being returned to her—the papers did not have any conditions or restrictions written on them stating that the fathers of the children were to have no contact with the children. The order that was entered by the family court when the child at issue in the present appeal was returned to the mother in the underlying juvenile proceeding is in the record before us, and it reflects the mother's allegations about a lack of conditions, *i.e.*, the order rescinding the Cabinet's custody and granting custody to the mother merely states: "It is hereby ORDERED AND ADJUDGED that the Cabinet for Health and Family Services' custody of the above-listed child is rescinded. Custody of said child is hereby granted to [the mother], whose address is [redacted]." The order is then simply signed by the family court and dated. The mother contends that she should have had counsel during that hearing because counsel could have told her that she and the children were to have no contact with the fathers of the children. Because she was allegedly unaware of this, there was contact with one of the fathers, resulting

in the children being taken away from her and returned to foster care.

However, because counsel was privately retained, and the mother does not allege that she could not afford counsel at the time that counsel withdrew, the mother has not shown, nor does she allege, that she was an indigent parent at the time that the children were returned to her in the underlying proceeding. Therefore, she was not entitled to the appointment of counsel at that time, and her claim lacks merit.

B. SUBSTANTIAL EVIDENCE

The mother next contends that the judgment terminating her parental rights to M. G. D. was not supported by substantial evidence. With regard to the appellate standard of review concerning termination of parental rights cases, this Court has noted that:

The trial court has broad discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. This Court's review in a termination of parental rights action is confined to the clearly erroneous standard in CR^[4] 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.

In a trial without a jury, the findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be clearly erroneous. This

⁴ Kentucky Rules of Civil Procedure.

principle recognizes that the trial court had the opportunity to judge the witnesses' credibility.

W. A. v. Cabinet for Health and Family Services, Commonwealth of Kentucky, 275 S.W.3d 214, 220 (Ky. App. 2008) (internal quotation marks and citations omitted).

Additionally, this Court has held as follows:

KRS 625.090 provides that parental rights may be involuntarily terminated only if, based on clear and convincing evidence, a circuit court finds: (1) that the child is abused or neglected as defined in KRS 600.020(1); (2) that termination is in the child's best interests; and (3) the existence of one or more of ten specific grounds set out in KRS 625.090(2).

W. A., 275 S.W.3d at 220 (internal quotation marks and citation omitted).

In the present case, the mother testified during the trial in these proceedings that she had stipulated that the children were neglected prior to the first time the children were removed from her custody. Therefore, the first part of the three-part test for involuntary termination was met.

With regard to the second part of the test, *i.e.*, whether there was clear and convincing evidence for the circuit court to find that termination was in the child's best interests, we find that there was such evidence. KRS 625.090(3) provides:

In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

(a) Mental illness as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently

unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

KRS 625.090(3)(c), (d), and (e) are applicable in this case. With regard to KRS 625.090(3)(e), Lindsey Dodgen, who is a case manager for Necco Foster Care, testified that both children were thriving and doing excellent in foster care. As for the child in the present case, Ms. Dodgen specifically stated that the child was "coming into her own"; finding that she is "extraordinarily athletic"; "gaining a lot of self-confidence"; "maturing in her own self-regulation and emotional reactions"; and "adjusted and making friends [and] being happy." Ms.

Dodgen attested that when the child first entered her current foster care situation, she was friendly and “spunky,” but she “would experience moments of dysregulation.” Ms. Dodgen explained that the child would have “visceral reactions” to situations, in that she would “throw herself on the floor like a three-year-old,” despite the fact that she was ten years old, and the adult responsible for her would have to “wait it out” until she calmed down and the adult could have a discussion with her. Ms. Dodgen testified that it had been months since the child had such a tantrum. When Ms. Dodgen first met the child, the child had a poor self-image: she thought she was “ugly and fat.” Ms. Dodgen attested that the child now plays many different sports and her doctor told her that her body type is exactly as it is supposed to be and that she is very healthy. Academically, Ms. Dodgen testified that the child was “doing great,” and that although the child had always been smart, this year, she had “kicked it into high gear.” Ms. Dodgen further stated that if parental rights were terminated, she believed the child would continue to progress and she would be fine. Consequently, there was clear and convincing evidence that it was in the child’s best interest to terminate the mother’s parental rights pursuant to KRS 625.090(3)(e).

As for KRS 625.090(3)(d), the mother testified that she had undergone an assessment, seen many therapists and counselors, and attended cognitive behavioral classes, which resulted in the children being returned to her custody in November 2013. However, due to violating a no-contact order by allowing the children to have contact with the father of the mother’s other child

(the father of that other child is R. T. C.), the children were again removed from the mother's custody and placed in foster care, where they remained at the time of trial. Additionally, the mother continued to violate the no-contact order by continuing to see R. T. C., signing a lease for a house with him, and having another baby with him. Further, the mother and R. T. C. continued to engage in domestic violence incidents, and at the time of trial in the present case, the mother was in jail due to one such incident, and she was due to be released from jail the following month. Therefore, the mother had not made the necessary efforts and adjustments to her circumstances, conduct, or conditions to make it in the child's best interest to return her to her mother's home within a reasonable period of time. Consequently, there was clear and convincing evidence that it was in the child's best interest to terminate the mother's parental rights pursuant to KRS 625.090(3)(d).

Further, regarding KRS 625.090(3)(c), Nakia Walker, the Cabinet's social worker for the family, testified that the Cabinet had established a case plan with the mother, which required her to: maintain employment and provide employment verification; maintain appropriate housing and provide housing verification; use her personal plan to address her domestic violence history; attend parenting and domestic violence assessments and follow through with the recommendations that would be provided following those assessments; not reside with R. T. C. because, according to the mother, it was not safe; comply with the family court's no-contact order; remain drug and alcohol free and submit to drug

screens per the Cabinet's order; participate in supervised visits with the children and demonstrate appropriate parenting at all times; participate in monthly contact with the Cabinet; attend all doctor appointments with the children; continue to attend therapy to address her history with violence and life choices; and develop a plan with her therapist and use court orders to establish the plan. The Cabinet attempted to reunite the children with the mother when it recommended the court order the children to be returned to her after a successful trial visit. However, after the children were returned to the mother's custody, she continued to allow the children to have contact with R. T. C., despite the no-contact order, and she also continued to have contact with him herself, despite the order. Thus, the Cabinet made reasonable efforts prior to the filing of the petition to reunite the child with the mother, pursuant to KRS 625.090(3)(c).

Additionally, the mother contends that the Cabinet did not adequately provide reunification services pursuant to KRS 625.090(4), which provides: "If the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent." In the present case, however, a case plan was established for the mother, she attended some of the classes required to complete the case plan, and the children were returned to her, yet she continued to violate the no-contact order by not only having contact with R. T. C., but by signing a lease for a house with him and having another baby with him. Furthermore, the mother

violated the EPO/DVO order by engaging in domestic violence incidents with R. T. C., which resulted in her being put in jail for approximately nine months. Therefore, the Cabinet has shown that additional services would not likely bring about lasting parental adjustment enabling the child to be returned to the mother, considering the child was returned to her, but the mother's poor behavior and further violations of various court orders resulted in the child being removed from her custody again.

Regarding the third part of the test for termination of parental rights, *i.e.*, whether there was clear and convincing evidence for the circuit court to find the existence of one or more of ten specific grounds set out in KRS 625.090(2), we find that there was such evidence. KRS 625.090(2) provides as follows:

No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

- (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
- (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
- (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
- (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;

(e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

(h) That:

1. The parent's parental rights to another child have been involuntarily terminated;

2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and

3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

The circuit court found KRS 625.090(2)(e) was applicable in this case. In regard to that statute, the evidence in the record establishes that the history of domestic violence between the mother and R. T. C. dates back to at least 2010, with multiple DVO/EPO violations between them since then. Ms. Walker testified that despite there being a no-contact order in place, the mother and R. T. C. signed a lease for a home together and they had another child. Additionally, Ms. Walker attested that there continued to be domestic violence incidents between the mother and R. T. C., including allegations of domestic violence incidents between them in October 2014, November 2014, and December 2014. In fact, the mother acknowledged during her testimony in this case that she was presently incarcerated due to one of those domestic violence incidents, and she was due to be released from jail the following month. She attested that at the time of her release, she would have been in jail for nine months. As mentioned above, KRS 625.090(2)(e) provides that parental rights may be terminated upon a showing by clear and convincing evidence

[t]hat the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child.

Because there were multiple DVO/EPO violations between R. T. C. and the mother, as well as multiple assault convictions by R. T. C. upon the mother over

the course of a four-year period between 2010 and 2014, this established the existence of the ground for terminating the mother's parental rights under KRS 625.090(2)(e). Additionally, although the mother attended some of the classes required by her case plan, she did not complete all of the required classes, according to the Cabinet's social worker's testimony. Further, the mother did not satisfy her case plan because it required her to stay away from R. T. C. pursuant to the no-contact order, yet she continued to have contact with him, including signing a lease for a home with him and having another baby with him. Therefore, the relationship between R. T. C. and the mother continued to be a domestic violence threat, which rendered the mother unable to provide protection to her child.

The circuit court also found, pursuant to KRS 625.090(2)(j), that the child had been in foster care under the responsibility of the cabinet for fifteen of the most recent twenty-two months preceding the filing of the petition to terminate parental rights. The social worker in this case, Ms. Walker, testified that the child had been placed in foster care in January 2013, returned to the mother in November 2013, then removed from the mother's custody and placed into foster care again in December 2013, due to the violation of a no-contact order. Ms. Walker stated that the children had remained in foster care since that time. The petition to terminate parental rights was filed in October 2014. Therefore, it is apparent based upon Ms. Walker's testimony that clear and convincing evidence was presented to show that the child was under the responsibility of the Cabinet and in foster care for at least fifteen months of the twenty-two months preceding

the filing of the petition. Consequently, the circuit court properly based the termination of the mother's parental rights on KRS 625.090(2)(j). Accordingly, the elements of KRS 625.090(2) were met in this case.⁵

The mother also alleges that the Cabinet should have placed the child with a relative, rather than terminating her parental rights. However,

[u]nder KRS Chapter 625, proof that this alternative has been considered is not required to terminate parental rights. 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.

R. C. R. v. Commonwealth, Cabinet for Human Resources, 988 S.W.2d 36, 40 (Ky. App. 1998), *as modified* (Ky. App. 1999). Therefore, the Cabinet was not required to place the child with a relative, and the mother's claim lacks merit.

Accordingly, the judgment of the Fayette Circuit Court terminating the mother's parental rights to M. G. D. is affirmed.

ALL CONCUR.

⁵ We note that the circuit court also found that it was proper to terminate the mother's parental rights based upon KRS 625.090(2)(g), because the mother for reasons other than poverty alone, [had] continuously or repeatedly failed to provide or [is] incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the well-being of [the child], and there is no reasonable expectation of significant improvement in the parents' conduct in the immediately foreseeable future, considering the age of the child.

The Cabinet's social worker testified that the child's daily needs were provided by the Cabinet and/or the foster parent. However, the social worker also attested that the mother had provided clothing for the child and gift cards, although the witness did not specify the amount of the gift cards or to which stores the gift cards pertained. Regardless, because we conclude that the court properly found KRS 625.090(2)(e) and KRS 625.090(2)(j) to be applicable to this case, we need not address whether it was proper to also base the termination of the mother's parental rights on KRS 625.090(2)(g).

BRIEF FOR APPELLANT:

Joseph P. Schuler
Lexington, Kentucky

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

Kristin Wehking
Lexington, Kentucky

BRIEFS FOR APPELLEES, D. Y.
AND M. G. D.

N/A