RENDERED: MARCH 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000742-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES, AS NEXT
FRIEND OF C.J.W., A CHILD — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES V. BOTELER, JR., JUDGE
ACTION NO. 03-AD-00007

K.L.E.; S.W.; AND
C.J.W., A CHILD — APPELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Commonwealth of Kentucky, Cabinet for Health and Family Services (hereinafter "the Cabinet"), as next friend of C.J.W., a child, appeals from a judgment of the Hopkins Circuit Court that dismissed its petition for involuntary

[1] Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

termination of parental rights. Having thoroughly reviewed this matter, we are compelled to dismiss the appeal.

The Cabinet filed a petition for involuntary termination of parental rights against K.L.E. and S.W. on March 19, 2003. On November 14, December 4, and December 11, 2003, the circuit court heard evidence in this matter. Post-trial briefs were filed by the parties and the Hopkins Circuit Court entered a judgment dismissing the petition on March 18, 2004. The Cabinet appealed that judgment. The Cabinet argued in its brief that the trial court erred by not terminating the parental rights of K.L.E. and S.W. The Cabinet contends it proved its case by clear and convincing evidence that the child was a neglected child, that the parents had abandoned the child, that the parents had failed to provide the necessities of life and that termination was in C.J.W.'s best interest. The guardian ad litem for the child agreed with the Cabinet that the trial court had erred and that this Court should reverse the judgment and remand for an order granting involuntary termination. S.W. did not file an appellate brief. On appeal, K.L.E. argued that there is substantial evidence in the record to support the judgment and that it should be affirmed.

However, before the briefs were filed, K.L.E. filed a motion to dismiss the appeal pursuant to KRS 625.110. KRS 625.110, which became effective on April 10, 1988, states:

> **Appeals**
>
> Any order for the involuntary termination of parental rights shall be conclusive and binding on all parties, except that an appeal may be taken from a judgment or order of the Circuit Court involuntarily terminating parental rights in accordance with the Kentucky Rules of Civil Procedure.

K.L.E. argued that the Cabinet was not permitted to appeal the dismissal of an involuntary termination of parental rights petition. Neither the Cabinet nor the guardian ad litem filed a response to K.L.E.'s motion. On June 16, 2004, a motion panel of this Court, without reference to the Kentucky Constitution, the statute in question, or any case law or rule, denied the motion. But the ruling of a motion panel of this Court is not binding upon the "merits" panel.[2] Following briefs being filed in this matter, this Court, on its own motion, ordered the parties to file supplemental briefs addressing this issue. The parties have complied and have filed supplemental briefs specifically addressing KRS 625.110.

In her supplemental brief, K.L.E. continues to argue that the statute is clear that the legislative intent is to permit an appeal only when involuntary termination is granted. Specifically, she states on pages two and three of her supplemental brief:

[2] Knott v. Crown Colony Farm, Inc., 865 S.W.2d 326, 329 (Ky. 1993).

> The clear intent of this Statute is to allow appeals to be taken from any judgment which involuntarily terminates parental rights. Obviously one of the most severe measures imaginable is to have a child removed permanently from the entire family. It is quite logical for the parents to have a full review of a decision involuntarily terminating parental rights.
>
> On the other hand, if the trial court does not terminate parental rights, the Order is conclusive and binding on all parties. Obviously, if an involuntary termination of parental rights petition has been filed and taken to trial, the parents have serious problems. If the parents do not successfully resolve their problems, they will be back in Court and the child, or children, will continue in foster care. A subsequent trial for involuntary termination for parental rights will probably occur. By contrast, once parental rights are finally terminated, there is no second chance.
>
> There is a reason for a different appellate practice depending on the outcome of a trial to involuntarily terminate parental rights.

In its response, the Cabinet relies on Section 115 of the Kentucky Constitution, which grants the right of appeal in all civil and criminal cases, except from a judgment of acquittal in a criminal case and from a judgment dissolving a marriage.[3] The Cabinet further contends that denying it the right to an appeal would be in violation of Section 2 and Section 28 of the Kentucky Constitution, which prohibit the exercise of absolute and arbitrary power by one department over

[3] Section 115 became effective on January 1, 1976.

another. Next, the Cabinet argues that KRS 620.155 as applied to KRS 610.010(1)(c) supports its position. We believe that the statute (KRS 620.155) dealing with dependent, neglected or abused children is inappropriate and if anything, supports K.L.E.'s position. Finally, the Cabinet points out several cases which it contends permit the Cabinet to appeal from an involuntary termination proceeding. We shall address each of the cases cited by the Cabinet.

In Cabinet for Human Resources v. J.B.B., 772 S.W.2d 646 (Ky.App. 1989), this Court reversed a circuit court's order, in which it found by clear and convincing evidence that parental rights should be terminated, but then failed to terminate. In reversing, this Court ordered the circuit court to conduct a hearing pursuant to KRS 625.080 and enter an order in strict compliance with KRS 625.090(4). Id. at 647-648. It must be noted that the issue raised herein challenging KRS 625.110 was neither raised nor addressed in that case. In Cabinet for Human Resources v. Rogeski, 909 S.W.2d 660 (Ky. 1995), Rogeski had appealed a judgment terminating his parental rights and this Court reversed. The Cabinet sought discretionary review, which was granted, and the Kentucky Supreme Court reversed and reinstated the trial court's judgment. That case is distinguishable and not controlling on the issue before this Court. Again, there is no mention that KRS 625.110 was raised

or addressed by the Court. Finally, the Cabinet cites Cabinet for Families and Children v. G.C.W., 139 S.W.3d 172 (Ky. App. 2004), to show that it has been permitted to appeal an adverse decision for an involuntary termination case. This case is factually similar to the case before us. But again, the issue of KRS 625.110 was not raised in that appeal. In fact, a good argument as to why the legislature enacted KRS 625.110, which does not permit the Cabinet to appeal, can be found in examining the result of that case.

In G.C.W., the trial court entered a judgment dismissing the Cabinet's petition to terminate the parental rights of G.C.W. The Cabinet appealed and G.C.W. did not file a brief. As is often the case in a termination case, the parents cannot afford to hire private counsel. Normally each parent and the child are represented by guardians ad litem. The guardians ad litem are paid a fee designated by statute to represent their client at trial. However, there is no provision for the guardians ad litem to be paid for appellate work.[4] For whatever reason (but assuming lack of financial resources to hire her own attorney and state law not providing for same), G.C.W. did not file a brief in response to the Cabinet's appeal. And she did not present her arguments as to why the court's order dismissing

[4] See M.S.M. v. Dep't for Human Resources, 663 S.W.2d 752 (Ky.App. 1983) citing Dep't for Human Resources v. Paulson, 622 S.W.2d 508 (Ky.App. 1981).

the termination petition should be affirmed. When this Court reversed the trial court's judgment, it held:

> In light of the absence of any evidence that the children and G.C.W. will ever be reunited, we hold that the children's best interest dictates that their mother's rights be terminated so that they are free for adoption.
>
> The judgment of the Daviess Circuit Court is reversed, and this matter is remanded for entry of a judgment consistent with this opinion.

The opinion of this Court became the law of the case. Upon remand to the circuit court, the judge was mandated to enter an order terminating G.C.W.'s parental rights. At this point, G.C.W. had no right to appeal. It appears that KRS 625.110 may have been enacted to protect indigent parents from this situation occurring. A parent could have his or her parental rights terminated (a right some may argue is more fundamental than the loss of liberty, i.e., imprisonment) without having an opportunity to pursue a meaningful appeal. There are other potential reasons why the legislature may have enacted KRS 625.110, (for example, as K.L.E. stated the Cabinet can always re-file its petition, or possibly the legislature viewed this procedure as quasi-criminal), but they need not be addressed in depth herein because we deem this case must be dismissed on other grounds.

Whenever the constitutionality of a statute is contested, the Kentucky Attorney General must be notified of the constitutional challenge. KRS 418.075(2) states:

> In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

There can be no doubt that the Cabinet and the guardian ad litem for C.J.W. each raised the issue that KRS 625.110 is unconstitutional in light of its apparent conflict with Section 115 of the Kentucky Constitution. But neither party notified the Attorney General. The appellate courts have addressed this issue on numerous occasions and the Court's position can be summed up as follows:

> Dr. Peasley has argued that the provisions of KRS 311.377 violate the Kentucky Constitution. However, Dr. Peasley failed to give notice to the Attorney General of the pendency of his constitutional challenge in violation of KRS 418.075 and Civil Rule 24.03[5] in either the

[5] **CR 24.03 Procedure**

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute givens a right to intervene. When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy

> Court of Appeals or this Court. Since the original action was filed in the Court of Appeals, it is considered the "trial court" for the purpose of applying the procedural mandate of Maney v. Mary Chiles Hosp., Ky., 785 S.W.2d 480 (1990). In Maney, supra, at 482, we held that the requirements of KRS 418.075 are mandatory in order for a court to consider the constitutionality of a statute and that strict enforcement of the statute will eliminate procedural uncertainty. Accordingly, we decline to consider that issue.

Adventist Health Systems v. Trude, 880 S.W.2d 539, 542 (Ky. 1994). See also Allard v. Kentucky Real Estate Com'n, 824 S.W.2d 884 (Ky.App. 1992); Stewart v. Estate of Cooper, 102 S.W.3d 913 (Ky. 2003); Popplewell's Alligator Dock v. Revenue Cabinet, 133 S.W.3d 456 (Ky. 2004); Preston v. Johnson County Fiscal Court, 27 S.W.3d 790, 795-98 (Ky. 2000) (Keller, J., Concurring).

As the Cabinet failed to comply with the notice requirements of KRS 418.075(2), we decline to address the issue of the constitutionality of KRS 625.110, and accordingly, dismiss the appeal.

EMBERTON, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

DATE: March 25, 2005

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

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of the pleading motion or other paper first raising the challenge upon the Attorney-General.

BRIEF AND SUPPLEMENTAL BRIEF FOR APPELLANT:

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Cabinet for Health & Family Services
Hopkinsville, KY

BRIEF AND SUPPLEMENTAL BRIEF FOR APPELLEE, K.L.E.:

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