

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-002342-ME  
AND  
NO. 2005-CA-002612-ME

J.D.

APPELLANT

APPEALS FROM JEFFERSON FAMILY COURT  
v. HONORABLE KEVIN L. GARVEY, JUDGE  
ACTION NO. 05-AD-500197

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND FAMILY  
SERVICES, AND  
A.D., the minor child

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: This is an appeal from a judgment and orders of the Jefferson Family Court by a natural mother whose parental rights in her child were terminated in an action filed by the Cabinet for Health and Family Services (Cabinet). We affirm.

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

J.D., the natural mother of A.D., has struggled with substance abuse and criminal problems since before A.D.'s birth. She refused to take advantage of the treatment programs offered. Further, while felony charges were pending in a prior case, J.D. was arrested for shoplifting. Ultimately, she was incarcerated.

Given J.D.'s complete lack of progress with her reunification plan objectives, the Cabinet sought the involuntary termination of her parental rights. The court agreed that the Cabinet had established the statutory requirements under Kentucky Revised Statute (KRS) 625.090, and it entered an order terminating J.D.'s parental rights.<sup>2</sup> J.D. appealed from this order. While this appeal was pending, J.D.'s Kentucky Rule of Civil Procedure (CR) 60.02 motion to vacate the judgment was denied. J.D. also appealed from this order, and the two appeals have been combined for our review.

A.D. was born on April 14, 2004. Her parents are J.D., her natural mother, and J.S., her natural father. At her birth, A.D. tested positive for marijuana. The Cabinet became involved with J.D. at that time. Rather than remove the child, the Cabinet directed J.D. to seek drug treatment through the Jefferson Alcohol and Drug Abuse Center (JADAC). J.D. completed an assessment with JADAC on June 29, 2004. Because no beds were

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<sup>2</sup> The termination order also terminated the rights of A.D.'s father, J.S. J.S. has made no response to this appeal, nor has he challenged the termination of his parental rights.

available for in-patient treatment, JADAC scheduled J.D. for space in the Women's Intensive Outpatient Program (WIOP). J.D. was scheduled to begin the program on July 5, 2004. However, she failed to show up. JADAC then offered her a second space in WIOP, scheduling her to begin on July 27, 2004. Again, J.D. failed to appear.

In fact, J.D. was arrested on that day for shoplifting diapers. At the time of her arrest, she was under the influence of crack cocaine. At the time of this offense, J.D. had 13 counts of possession of a forged instrument pending against her. On August 4, 2004, J.D. entered a guilty plea to all 13 counts. Under the terms of the plea agreement, J.D. faced two years in prison on each count, to be served concurrently. She was sentenced on August 7, 2004.

On August 2, 2004, shortly after J.D.'s shoplifting arrest and prior to her plea on the felony counts, the Cabinet paid her a home visit. When the Cabinet asked J.D. to take a drug screen, she informed them she would test positive for marijuana. In fact, the test came back negative for marijuana but positive for cocaine.

The facts set out above formed the basis for an abuse/neglect petition that was filed by the Cabinet in the Jefferson Family Court on August 5, 2004. A temporary removal

hearing was held a week later. At the conclusion of the hearing, the court placed A.D. in the temporary custody of the Cabinet. Following removal, it was recommended that J.D. comply with the recommendations of the JADAC, complete the WIOP and any recommended aftercare, and exercise visitation provided she met the case plan objectives and remained clean and sober.

On November 18, 2004, J.D. appeared in court for an evidentiary hearing on the abuse/neglect allegations. At that time, she stipulated to the facts set out above and in the abuse/neglect petition. J.D. stipulated that A.D. was born testing positive for marijuana as a result of J.D.'s drug dependency and that A.D. was a victim of neglect as set forth in the Cabinet's petition.

On November 11, 2004, J.D. was granted shock probation. At the time of her release, J.D. did not attempt to visit A.D., nor did she contact the Cabinet to check on A.D.'s status. As a result of the choices she made following her release, J.D.'s probation was revoked. In an order entered on January 13, 2005, the court revoking her probation found that, notwithstanding the needs of her child, J.D. had violated the terms of her probation.

Subsequent to the revocation of her probation, J.D. appeared before the Jefferson Family Court for a disposition

hearing in the abuse/neglect case. At that time A.D. was placed in the care of the Cabinet. By causing herself to be placed in custody yet again, J.D. had placed herself in a position where she could not obtain the services necessary to continue working toward reunification. As a result of her past history and her present status, on May 24, 2005, the Cabinet filed a petition to involuntarily terminate J.D.'s parental rights.

A termination hearing was held September 27, 2005. At the hearing, the Cabinet introduced J.D.'s criminal record, as well as the dependency/neglect/abuse action previously filed in this case. In addition, the Cabinet testified to the services offered. On cross-examination, J.D. admitted to the factual basis underlying the dependency/neglect/abuse action. She also admitted that she had been offered substance abuse help through JADAC on two separate occasions, yet had neglected to take advantage of either. Further, J.D. admitted to the choices she had made that led to her current incarceration. Finally, she admitted that by causing herself to be placed in custody yet again, she had placed herself in a position that precluded the substance abuse treatment she needed.

On October 13, 2005, the court entered findings of fact and conclusions of law in the termination action. In its findings, the court set out the facts surrounding J.D.'s

substance abuse problems, her decisions not to take advantage of the WIOP offered through the JADAC, her criminal lifestyle choices which resulted in her present incarceration, and her inability when not in custody to obtain employment and to establish a stable home. The court, which had denied J.D.'s motion for a continuance, was aware that a hearing was scheduled for October in another court to address J.D.'s continued incarceration. In its separate conclusions, the court found the elements set out in KRS 625.090 had been met. Based on its findings of fact and conclusions of law, the court then entered an order terminating the parental rights of J.D. and J.S. J.D. appealed the court's decision.

While this appeal was pending, J.D. was released from custody. Based on her release, J.D. filed a CR 60.02 motion. In an order entered November 12, 2005, the court denied the motion. In entering its order, the court set forth two grounds for its denial. First, the court concluded that based on KRS 625.110, a CR 60.02 motion is not available in a termination action. Second, to the extent the motion was available, the court concluded it offered no new evidence warranting relief. The court noted that, in its initial judgment, it had already taken into consideration the possibility that J.D. would be released. J.D. also appealed from this order.

Kentucky law has long recognized that "[t]he 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." R.C.R. v. Commonwealth, Cabinet for Human Resources, 988 S.W.2d 36, 38 (Ky.App. 1999), *citing* Department of Human Resources v. Moore, 552 S.W.2d 672, 675 (Ky.App. 1977).

This case was tried before the court without a jury. As such, the trial court heard the evidence and entered its findings of fact and conclusions of law. On review, such "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See CR 52.01.

In addition, in reviewing findings of fact by the trial court, "the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion." Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982). Thus, a court's findings cannot be disturbed unless there is no substantial evidence in the record to support them. R.C.R., 988 S.W.2d at 38. See also M.P.S. v. Cabinet for Human Resources, 979 S.W.2d

114, 116 (Ky.App. 1998). This court in R.C.R. went on to state that:

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.

Id. at 38-9, quoting Rowland v. Holt, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

The grounds for the involuntary termination of parental rights are set out in KRS 625.090. As noted by this court in Cabinet for Families and Children v. G.C.W., 139 S.W.3d 172, 175-76 (Ky.App. 2004),

Before a circuit court may terminate such rights, it must find--by clear and convincing evidence--(1) that the child is an "abused or neglected child, as defined by KRS 600.020(1)" and (2) that termination would be in the child's best interest. KRS 625.090(1). After that threshold is met, the court must find the existence of one of the numerous grounds recited in KRS 625.090(1) (including abandonment, infliction of serious physical injury or emotional harm, sexual abuse, or neglect in providing access to basic survival needs) in order to terminate parental rights.

The statute sets forth two parts that must be satisfied before termination can be considered:

The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds



from the pleadings and by clear and convincing evidence that:

(a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; **or**

3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; **and**

(b) Termination would be in the best interest of the child. (Emphasis added.)

See KRS 625.090(1). If the threshold requirements are met, the court must then find by clear and convincing evidence that one or more of the grounds listed in section two are present before termination can be ordered. The grounds found by the court to be applicable to J.D. include:

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

(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;

(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.

See KRS 625.090 (2).

J.D. first argues that the court erred in finding A.D. was abused or neglected. In support of her argument, J.D. points out that the testimony of A.D.'s foster mother and the testimony of the caseworker for the Cabinet did not provide evidence in support of this finding. In making this argument, J.D. ignores evidence presented to the trial court unfavorable to her position. In particular, J.D. ignores the facts underlying the records of the abuse/neglect action filed in this case. Likewise, she ignores the fact that she admitted to all of these facts on cross-examination during the termination hearing.

Based on the record, the court found the evidence supported findings under KRS 625.090(1)(a) and (b). The first part is satisfied by the fact that A.D. was found to be abused or neglected in a prior proceeding. This alone is sufficient to

satisfy the statutory requirement. Further, the second part, that A.D. is found to be abused or neglected in this proceeding, is supported by evidence of J.D.'s substance abuse, her failure to take advantage of treatment programs on two occasions, and her criminal lifestyle choices that led to her continued incarceration.

The definition of an abused or neglected child is contained in KRS 600.020(1). J.D.'s incapacity due to substance abuse falls within KRS 600.020(1)(c); her criminal lifestyle choices and repeated incarceration falls within abandonment as set out in KRS 600.020(1)(g); and her past history and continued failure to provide adequate care, supervision, food, clothing, shelter, and education, falls within KRS 600.020(1)(h). Each of these findings is supported by substantial evidence in the record. Thus, any argument that the court erred in this regard is without merit.

In order to terminate parental rights, the court must first reach a threshold finding under KRS 625.090(1). The first part, that A.D. is, or has been found to be, abused or neglected satisfies KRS 625.090(1)(a). The second part of the threshold finding, that termination would be in A.D.'s best interests has not been challenged by J.D. on appeal. This then satisfies KRS 625.090(1)(b). Once the threshold requirements are met, we must

turn to the additional requirement that one or more of the statutory grounds set out in KRS 625.090(2) are present.

In this regard, J.D. argues the court erred in concluding she had abandoned A.D. J.D. suggests the court made this determination based solely on her incarceration. Further, she suggests she did all she could to meet the Cabinet's reunification plan while in custody. In support of this argument, J.D. points out that she took advantage of the programs available to her while in custody. Specifically, J.D. notes she attended Alcohol Anonymous meetings.

As J.D. principally focuses on abandonment, we will begin our analysis there. J.D.'s argument ignores the actual findings of the court. While it is true that this court in J.H. v. Cabinet for Human Resources, 704 S.W.2d 661, 663 (Ky.App. 1985), concluded that "incarceration alone can never be construed as a abandonment as a matter of law[,] " the court in the case *sub judice* did not base its finding of abandonment solely on J.D.'s incarceration. Rather, it merely considered her criminal lifestyle choices as one of several factors in reaching a determination on abandonment. As noted by the court in J.H., "absence, voluntary or court-imposed, may be a factor to consider in determining whether the [child has] been neglected[.]" Id. This position was reiterated by Kentucky's highest court in Cabinet for Human Resources v. Rogeski, 909

S.W.2d 660 (Ky. 1995). In that case the court stated that incarceration for an isolated criminal offense may not alone justify the termination of parental rights, but it is a factor to be considered. Id. at 661. See also M.P.S., 979 S.W.2d at 114. Under these circumstances, we cannot say the court erred in considering J.D.'s history of criminal choices and the resulting incarceration as a factor in making its decision.

Further, we note that J.D.'s argument once again ignores the evidence as a whole. While she can point to the fact that she took part in the programs available while incarcerated, she ignores the complete lack of effort on her part when programs were offered while she was not in custody. Further, J.D. conceded on cross-examination that, through her choices and actions, she placed herself in a position that precluded her from participating in substance abuse programs. Given these facts, we must determine whether the court erred in finding the existence of one or more of the statutory factors set out in KRS 625.090(2).

The court, after considering the evidence before it, reached conclusions as to the existence of three of the statutory factors listed in KRS 625.090(2). In its findings, the court set out the facts surrounding J.D.'s substance abuse problems, her decisions not to take advantage of the WIOP offered through the JADAC, her criminal lifestyle choices which

resulted in her history of incarceration, and her inability when not in custody to obtain employment and establish a stable home. As these findings were supported by substantial evidence, we cannot say the court was clearly erroneous. Further, the findings support the court's conclusions under KRS 625.090(2). As only one of the statutory factors is necessary, the existence of three more than supports the court's decision to terminate J.D.'s parental rights.

The final issue raised by J.D. concerns the court's decision to deny her motion seeking to continue the termination hearing. J.D. filed her motion on August 30, 2005, seeking to continue the hearing scheduled for September 27. As the basis for her motion, J.D. noted that she was scheduled for a hearing in circuit court on October 26 concerning her continued incarceration. The court denied the motion on September 6, 2005.

The decision to grant a continuance lies solely within the discretion of the trial court. Snodgrass v. Commonwealth, 814, S.W.2d 579, 581 (Ky. 1991), *overruled in part on other grounds by* Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). See also Williams v. Commonwealth, 644 S.W.2d 335, 336-37 (Ky. 1982). The court in Snodgrass noted that "[w]hether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of the case." Id. One of the

factors the court is to consider is whether denying the continuance will lead to identifiable prejudice." Id. In this case, J.D.'s motion was based solely on the fact that her continued custody would be reviewed before the circuit court on October 26. The possibility of J.D.'s continued custody was before the court during the termination hearing. Further, it was only one of several factors the court considered in reaching its decision.

A decision to deny a continuance is reviewed for abuse of discretion. See Wells v. Salyer, 452 S.W.2d 392, 395-96 (Ky. 1970). See also Williams, 644 S.W.2d at 337. In this case, J.D. has failed to show any identifiable prejudice followed from the court's denial of her motion. In light of the fact that the court took into account the possibility of her release, and the fact that it was only one of several factors upon which the court based its decision, we conclude that the court did not abuse its discretion in this regard.

As to J.D.'s appeal of the termination of her parental rights, we find no error. The court correctly applied the statutory factors set out in KRS 625.090. A review of the record demonstrates that substantial evidence exists to support the court's conclusion that A.D. had been found previously, and was currently found, to be abused or neglected as defined in KRS

600.020. Likewise, the court did not err in finding A.D. was abandoned.

As to J.D.'s appeal of the denial of her motion under CR 60.02, we note that the court set forth two grounds to support its decision. First, the court questioned whether, in light of KRS 625.110, CR 60.02 even applied to termination actions under KRS 625.090. Assuming that CR 60.02 did apply, the court rejected J.D.'s contention that her release provided a basis to set aside the judgment under CR 60.02. The court noted that it had considered the possibility of her release in its original order. While J.D. timely appealed the order denying her CR 60.02 relief, she has made no arguments to this court concerning the court's decision. In light of these circumstances, we conclude the appeal was waived.

The judgment and orders of the Jefferson Family Court are affirmed.

ALL CONCUR.

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