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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001398-ME

R.P. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN P. SCHRADER, JUDGE
ACTION NO. 11-AD-00164

COMMONWEALTH OF KENTUCKY,
THE CABINET FOR HEALTH AND FAMILY SERVICES;
AND H.O.B., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: R.P.[1] (Mother) appeals from an order entered by the Fayette Circuit Court terminating her parental rights (TPR) to her minor daughter, H.B. (Child). Having reviewed the record, the law and the briefs, we affirm.

FACTS

[1] The parties in such cases are identified by initials only pursuant to Court policy.

A non-English speaking native of Ghana, Africa, Mother gave birth to Child in her homeland in July 1997. Mother and her daughter came to the United States in 2008 and took up residence with Mother's brother, I.S., who provided food and shelter for them. Mother's sister, N.K., and nephew, P.O., were also members of the extended household. Mother's 19-year-old son, G.B, who came to America about a year before Mother and Child, was a high school senior at the time of trial in 2012. Upon G.B.'s arrival in America, he, too, lived with I.S. and still received mail at his uncle's address.

Both Mother and Child have mental health issues. On January 13, 2010, the Cabinet for Health and Family Services (Cabinet) became aware of the family through a referral of N.K.'s mistreating P.O. When N.K. was admitted to Eastern State Hospital and diagnosed with psychotic disorder not otherwise specified, P.O. was left in Mother's care. However, it was soon discovered Mother also suffered from an untreated mental illness and had been found to have neglected P.O. and Child in 2009. According to the emergency custody order entered in Child's juvenile case, the social worker was "unable to conduct background checks on [Mother] as she was not oriented to person, place, or time and could not tell worker her date of birth or social security number." Child, now sixteen, was removed from the home for neglect that day and placed in foster care.

At an adjudication hearing in April 2010, Child was found to be a dependent child. After a disposition hearing in July 2010, she was committed to

the Cabinet's custody as a dependent child. Following a permanency hearing in July 2011, the goal for Child was changed from reunification to adoption.

On October 12, 2011, the Cabinet petitioned for TPR.[2] Trial was scheduled for January 13, 2012, but that date was continued to allow the Cabinet to personally serve Mother. When court convened on February 10, 2012, Mother was absent, but the brother with whom she lived, a non-lawyer claiming to hold her power of attorney, was present on her behalf. Being mindful of the prior continuance, the court continued the proceeding again to ensure Mother knew she was entitled to counsel and could request legal representation if desired. Before concluding the matter for the day, at the Cabinet's suggestion, the court took judicial notice of its own record in the juvenile case and appointed Hon. Thomas Chapuk to represent Mother.

When the case was next called on February 27, 2012, Mother was present with an interpreter.[3] Chapuk began by noting Mother has mental problems and was found incompetent to stand trial in a criminal case in 2010. Chapuk stated he did not think Mother understood the TPR proceeding and acknowledged she had not been helpful in preparing the case. He requested a continuance stating his belief that with medication, his client would improve. Although noting that Mother talked to herself almost continually and doubting there was any reason to think Mother would act differently than she had on prior occasions, the court stated

[2] H.B.'s father was not before the trial court. He was believed to be in Africa.

[3] The interpreter was present and active at all future hearings.

it would begin hearing evidence and consider granting a continuance if warranted by the testimony of the mental health professionals.

The sole witness called by the Cabinet was Rachelle Henson, the Cabinet social worker assigned to the family in August 2011. She testified Child was placed in the Cabinet's care in January 2010 due to Mother's mental health issues. Henson stated Mother had visited her daughter in foster care only once and that visit occurred before Henson was assigned to the case. Henson further testified: Mother, with an interpreter, attended one team meeting in November 2010, but had not completed any portion of her treatment plan; no one had requested that Mother be allowed to visit her daughter; Child had been living in the same foster home throughout her commitment; her cousin, P.O., was placed in the same home; Child was making progress in the foster home and her grades were improving with afterschool tutoring; while Child was bonding with her foster father, she remained highly guarded; the foster family was not a prospective adoptive family and Henson was unaware of any potential relative placement. Henson went on to say there was no reasonable expectation of significant improvement by Mother in the near future; the Cabinet had adequate facilities to care for Child; and, if the court deemed TPR appropriate, a special needs adoption would be attempted.

At the end of Henson's testimony, the Cabinet closed its case. Chapuk moved to dismiss the petition arguing there had been no proof of reasonable efforts at reunification by the Cabinet; no case plan had been offered;

no proof had been offered that relative placement had been explored; and there was no proof about the visitation between Mother and Child that preceded Henson's assignment to the family. The Cabinet responded that the prior court record established reasonable efforts at reunification had been made and Henson's testimony established Mother had abandoned the child for more than ninety days; no other family member had been proposed as a custodian for Child; and Child was making strides in her foster home despite cultural difficulties and behavioral issues.

Thereafter, the court denied the motion to dismiss finding a *prima facie* case had been established. Specific findings included: Child was a neglected child under KRS[4] 600.020 since she had been in foster care fifteen of the last 22 months before the filing of the petition; Mother had not visited the child nor made reasonable progress on her case plan to allow for the safe return of the child to her; based upon the juvenile court record, Mother had been disoriented during a hearing on February 3, 2010, and could not effectively participate in a team meeting due to that disorientation; the Cabinet's reunification efforts included establishment of a case plan and an offer of a TAP assessment[5] to help Mother complete the plan; the plan was translated into Mother's native tongue so she would know what was expected of her and the Cabinet would be able to assist her if she was willing to

[4] Kentucky Revised Statutes.

[5] Targeted Assessment Program. An interdisciplinary evaluation of an individual with obstacles that interfere with parental responsibilities. The program is a joint effort of the Cabinet and the University of Kentucky Center on Drug and Alcohol Research.

participate; an AFSA[6] exemption had been granted to allow Mother additional time to complete the case plan but she had taken no significant steps towards completing the plan; and, no reasonable alternative placement for Child had been identified.

Chapuk renewed a prior motion to dismiss arguing KRS 625.090(1)(a) had not been satisfied because while Child had been found to be dependent in June 2010, there had been no finding of abuse or neglect as statutorily required. The court denied the motion, stating that under KRS 625.090(2) it was sufficient that the court find Child was a neglected child during the current hearing without reliance on the prior finding of dependency.

Chapuk then began Mother's case by calling her son, G.B. He testified he never saw his mother abuse Child and admitted Mother "sees" things. G.B.'s testimony was interrupted by telephonic testimony from Dr. Donald Crowe, a psychologist, and Dr. Sulpicia Marca, a psychiatrist, both of whom had worked with Mother when she was referred to Eastern State Hospital for a trial competency[7] determination. Mother was admitted on August 5, 2010, (after Child had been removed from the home) and remained one month. Upon her arrival at the hospital, she had a language barrier; was not oriented to her environment; showed inappropriate emotion; laughed inappropriately; appeared to hallucinate;

[6] Adoption and Safe Families Act of 1997 (AFSA), 42 U.S.C § 671 et. seq. (2010).

[7] Mother had been charged with assault in the third degree involving a police officer and resisting arrest.

spoke to people who were not there; and was agitated. During her stay, Dr. Marca diagnosed her with psychotic disorder not otherwise specified. Her condition improved while she was there and receiving medication. Prior to discharge, she showed awareness when nurses communicated with her and was able to groom herself, but she was still deemed incompetent to stand trial. She was discharged with a prescription for risperdal (daily pill) and invega sustenna (monthly injection) and was to have follow-up appointments with Bluegrass Comp Care.

Dr. Crowe stated that talking to one's self, saying nonsensical things, and not following what is happening in one's surroundings are indicators of being off one's medication. When asked about the role of her brother, I.S., in Mother's treatment, Dr. Crowe said I.S. was uninterested in helping because he did not believe in mental illness, preferring to believe Mother and her sister, N.K., were possessed by spirits. No other family members were suggested as potential caretakers for Mother. Dr. Crowe stated that if Mother resumed taking her medication, she could improve. When questioned by the court about the reasonable probability of improvement while on medication, Dr. Crowe stated Mother would be better oriented to her environment and he would expect the same type of improvement she had achieved during her prior commitment. On redirect, Dr. Crowe stated Mother would be more successful if she needed only the monthly injection and could forego the daily pill.

Dr. Marca echoed much of Dr. Crowe's testimony. She testified that while medicated, Mother improved to the point that she could manage her daily

hygiene but still lacked insight. Dr. Marca stated that if medicated, Mother could care for her 13-year-old daughter.

At the end of the medical testimony, G.B. was briefly recalled to the stand. He testified his mother improved while on medication in Ghana. He was unaware of Mother ever abusing H.B, and Mother had seen Child only once since she entered the Cabinet's care, about two months earlier. G.B. testified he was willing to help his mother with medical appointments and taking medication. He mentioned an aunt in New York was willing to take custody of Child and P.O., but she could not accept them immediately due to a month-long visit she was making to Africa. He confirmed that I.S. believes in Satanic spirits, but G.B. said he believes people can be mentally ill.

Following G.B.'s testimony, the court proposed delaying the matter to see if Mother would improve while on medication as predicted by the two doctors. Neither the Cabinet nor the Guardian *ad litem* (GAL) objected to the delay, but the GAL stated she could not see Mother continuing to live with I.S. given his view of her mental health. The GAL also posited that taking medication consistently might not be the only barrier to Mother being able to care for her daughter. At that point, the hearing was postponed to: remove I.S. as an impediment to Mother's mental health; give G.B. an opportunity to help his mother improve; and to have Mother undergo a new mental evaluation to show the effects of medication.

When the parties reconvened on April 16, 2012, Mother was present but she had not been evaluated. Chapuk moved for another continuance, which the

Cabinet opposed, stating this was already the third hearing date and Mother needed ongoing treatment and intervention. The Cabinet argued the case would never end if there were continuing delays for Mother to receive treatment. Chapuk explained that the evaluation was scheduled four days hence, on April 20, 2012. He stated that G.B. had accepted responsibility for his mother's care, but Comp Care had not understood the urgency of the evaluation until Chapuk, who lacked medical authorization for Mother, contacted them personally and explained the situation. Within 24 hours of Chapuk's phone call, Comp Care contacted G.B. and the evaluation was scheduled. Chapuk argued it was in Child's best interest for Mother to be stabilized and G.B. had exhibited extreme responsibility in caring for his mother.

While recognizing the Cabinet's concern, the court stated it needed to give Mother every reasonable opportunity to receive mental health care. The court also stated its concern that without an adoptive home placement, Child's options for permanency were hopeless. At that point, the GAL noted two families were considering adopting Child and P.O. together, but no decision could be made until the TPR petition was resolved. The court again commented on the length of the delay but stated there was still a need to see whether Mother would respond to medication. At that point, the GAL questioned whether the inevitable was just being delayed because Mother's mental health was only one factor in the TPR equation. The GAL questioned Mother's housing situation.

The court stated that since the adjudication hearing on April 29, 2010, there had been many attempts at stabilizing Mother. The court then set a hearing date of June 25, 2012, and announced it had no expectation of another delay.

On June 25, 2012, the case was called and the court and attorneys immediately went to another room where the proceedings were not recorded. When the court and attorneys returned to the courtroom, the court summarized what had transpired—Chapuk had requested yet another delay, stating that Mother was doing better; a question had been raised about whether Mother had visited Child in recent months; both the GAL and Henson were unaware of any recent visits; if any visits had occurred, testimony was needed about how they went and whether the Child desired more visits. The court stated it would begin hearing testimony, observe Mother, and determine whether another delay was appropriate.

Since the Cabinet had already closed its case, G.B. was recalled to complete the testimony he began on February 27, 2012. He testified his mother had seen a doctor and received two injections. G.B. said he had seen improvement in Mother, she understood more, her belongings were more organized, she responded when he spoke to her, and she had told him she visited Child two months ago. When asked about his sister, G.B. said he telephones Child weekly, he thinks she is doing "really well," and he believes she is happy in her foster home.

Mother was then called to the stand and testified for about fifteen minutes. Through the interpreter, she responded to specific questions with mostly

"Yes" or "No" answers in her native tongue. She testified she wanted Child back if the court would help her, but could not specify anything in particular the court should do. She agreed the medication was beginning to help her and said she would continue taking the medication. She did not know why her daughter was removed from her care and had not asked for an explanation.

Mother acknowledged she had always relied on I.S. for her own well-being and had never provided for herself. She said she could not currently provide for Child and could not say if that would change in the future. She testified she could not help Child with her education.

At the close of Mother's case, the Cabinet recalled Henson. She reiterated she had been assigned to the family in August 2011 and Mother had never visited her daughter during that time. Child had made significant progress in school and in her behavior since entering foster care. She receives one-on-one instruction with a special education teacher; has earned enough credits to advance to the tenth grade; maintains about a "C" average; and struggles with math, for which she receives tutoring.

When Henson visited with the child about two weeks before this hearing, she noticed Child was opening up and her self-esteem had grown tremendously. Child had become more attentive to personal hygiene and was beginning to form friendships with peers.

Henson testified Child receives therapy and her foster father has implemented consequences for bad behavior. Child and P.O. fight to control the

TV remote so the foster father created a schedule. Child now receives rewards for good behavior, goes shopping, has friends, and goes on family outings. Her current mental health diagnosis is adjustment disorder.

While adoptive homes were available, no prospective adoptive family had met Child or been identified. There were two potential pre-adoptive placements, but they could not accept both Child and P.O. and dual placement was the Cabinet's desire.

In closing, Chapuk asked that the TPR petition be dismissed because the only finding made in prior proceedings was that of dependency. He also argued Mother had not completed her case plan due to obstacles created by her brother. Those barriers were removed when her son accepted responsibility for her care. She is now seeing a therapist and receiving medication. With the benefit of only two injections, she testified that if she continues improving, in the future she can provide for Child.

Chapuk went on to say, Child has been in the Cabinet's custody for more than one year and due to her significant mental health and behavioral issues, whether any family would consider adopting her was questionable. Since no current placement was available, and the Cabinet could not show placement was likely in the future, Chapuk argued TPR was not in Child's best interest.

In its closing, the Cabinet emphasized different facts. Mother had seen Child only once since 2010. Despite the Cabinet's offer of services, the child had remained in care for fifteen of the last 22 months. Mother had been incapable

of providing for her daughter for a period of more than six months, and even Mother had testified she had not provided for the child and could not do so. Significant improvement in Mother's condition in the near future was not expected. Recently, Mother had begun to cook for herself and maintain her own personal space, but she was not currently providing for herself and had no means to do so. Child was progressing and improving in foster care, living in the same household with her cousin. The Cabinet's goal was to place Child and P.O. together. If that was not possible, the two children would remain in contact with one another. The Cabinet argued TPR was Child's only chance for permanency and it was clearly in her best interest. The GAL adopted the Cabinet's closing statement, noting that G.B. (and the social worker) had both testified Child was doing well in foster care, and TPR was recommended.

Thereafter, the court entered the following pertinent findings of fact:

> 6. . . . the child is an abused or neglected child as defined in KRS 600.020. . . .
>
> 7. [Mother], for a period of not less than six months, has failed to provide and has been incapable of providing essential parental care and protection for the child, and there is no reasonable expectation of improvement in parental care and protection, considering the age of the child.
>
> 8. [Mother], for reasons other than poverty alone, has failed to provide and has been incapable of providing essential food, clothing, medical care, or education necessary and available for the child's well-being, and there is no reasonable expectation of significant improvement in the immediately foreseeable future, considering the age of the child. She has failed to

provide any portion of the care and maintenance of the child, due to inability because of her mental illness. It is not likely that she will ever be able to provide necessary care for the child.

9. [Mother] has failed to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the mother, resulting in the child remaining in foster care under the responsibility of the Cabinet for more than fifteen of the most recent twenty-two months prior to the filing of the petition to terminate parental rights.

10. The Cabinet for Health and Family Services has offered or provided all reasonable services to the mother, prior to the filing of the petition in this case, but she has failed or has been unable to make any changes in her circumstances, conduct or conditions which would allow the child to be safely returned to her care. The Court has considered the mental illness of the mother, based on the testimony of her attending physicians, and finds that her mental illness has played a substantial factor in her inability to provide for the child's needs for extended periods of time. The Court has ordered significant delays in these proceedings, to ensure that she received proper assistance to enable reunification. The Court has guided the efforts of the Cabinet to reunite the family, so that every measure would be taken so that she would have every opportunity to avail herself of reunification services. She hasn't been able to complete services successfully or to show that the child could ever be safe in her care. She has also admitted in her testimony that she has never provided and cannot provide for the educational needs of the child. The Court noted that she has gotten her nineteen year old son involved in her treatment, while he is barely (able to) provide for his own needs.

11. The Court has considered the evidence submitted and the following factors in determining the best interest of the child with regard to the proposed termination of [Mother's] parental rights and with regard to the existence of grounds for termination of their rights:

a. [Mother] suffers from mental illness which has played a substantial factor in her inability to provide for the child's needs for extended periods of time.

b. Neither of the respondent parents have committed acts of abuse or neglect towards other children in the family.

c. The Cabinet, prior to the filing of the petition herein, made reasonable efforts to reunite the child with the mother, and was unable to locate the father to offer services to him.

d. The Cabinet developed a treatment plan for [Mother], providing for appropriate services, but she has failed or been unable to follow through with the services offered, except that she has recently received treatment for her mental illness. Although she is now capable of meeting some of her own needs, she remains incapable of meeting the child's needs. She has become able to cook for herself and to provide for some of her personal needs. However, the Court has observed her demeanor at trial, her mumbling and agitation, talking to herself while the interpreter is translating questions for her response, so that her responses show that she is unable to focus and absorb what is being said. While she has made some progress, the Court doesn't believe that there is a reasonable prospect of improvement in her condition so that the child could safely be returned to her care within a reasonable period of time, considering the age of the child.

e. The child has mental health and behavioral issues, which require considerable insight on the part of her caretakers, a structured lifestyle and coordination of treatment with the child's custodian, school and mental health professionals. Because of [Mother's] mental health issues, she has been and is unable to provide for her own needs or the needs of the child. In foster care, the child's physical, emotional and mental health has improved, so that she exhibits better social skills, better hygiene, better self-esteem and better ability to develop

> friendships than before. All indications are that her welfare will be improved by termination of parental rights, so that permanent placement can be achieved through adoption. Given her age, even if an adoptive home is not identified, the Court believes that she will continue to improve, with the direction and guidance of the Cabinet.
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> f. [Mother] has failed to pay a portion of the substitute care for the child, but is unable to do so.
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> 13. Respondent father has abandoned the child for a period of not less than ninety days.
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> 14. [TPR] is in the best interest of the child, [Child], and the Cabinet for Health and Family Services has facilities available to accept the care, custody and control of [Child], and is the agency best qualified to receive custody.

Thereafter, the court drew conclusions of law consistent with the findings of fact and entered an order terminating Mother's parental rights to Child. The Child was adjudged a ward of the state. This appeal followed.

ANALYSIS

Mother's first allegation of error is that the trial court erred in not granting another continuance. Whether to delay trial is a matter left to the trial court's sound discretion. *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991). To guide the trial court in deciding whether a continuance is appropriate, seven factors have been identified for consideration.

> (1) The length of delay; (2) Whether there have been any 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 lead to any identifiable prejudice.

Eldred v. Commonwealth, 906 S.W.2d 694, 699 (Ky. 1994).

Mother's TPR hearing had been continued four times before Chapuk requested a fifth delay—a request that was ultimately denied, but only after the trial court observed Mother for a lengthy period of time and watched her testify. The first continuance was requested by the Cabinet to ensure Mother could be personally served. The second delay was granted by the court to ensure Mother understood her right to legal representation. Chapuk then requested three continuances on Mother's behalf—first, because he believed Mother would improve with medication, and second, because Mother had begun receiving medication but an updated mental evaluation had not been performed. The last motion for a continuance was made by Chapuk on the day the taking of evidence concluded and the findings of fact and conclusions of law were dictated by the trial court.

A review of the record convinces us the trial court was exceedingly patient and cognizant of Mother's constitutional rights in resolving the TPR petition. Much time and energy was devoted to improving Mother's mental state—perhaps to the exclusion of considering other factors that might favor TPR. We are convinced there was no abuse of discretion in the trial court's decision to move forward after allowing several delays to give Mother the opportunity to take the

prescribed medication, wean herself from her brother's influence, and improve her mental health.

Mother's second allegation of error is that the trial court terminated her parental rights without clear and convincing evidence of neglect and reasonable efforts by the Cabinet to reunify the family under KRS 620.130.[8] We disagree.

Kentucky created family courts to eliminate "the fractionalization of family jurisdiction" and to "consolidate litigation and controversies related to a family into one court. . . ." *Wallace v. Wallace,* 224 S.W.3d 587, 591 (Ky. App. 2007). This case is a perfect example of the genesis of family court. During the

[8] The statute, titled "Alternatives to removal from custody" reads:

> (1) In any proceeding under this chapter, when the court is petitioned to remove or continue the removal of a child from the custody of his parent or other person exercising custodial control or supervision, the court shall first consider whether the child may be reasonably protected against the alleged dependency, neglect or abuse, by alternatives less restrictive than removal. Such alternatives may include, but shall not be limited to, the provision of medical, educational, psychiatric, psychological, social work, counseling, day care, or homemaking services with monitoring wherever necessary by the cabinet or other appropriate agency. Where the court specifically finds that such alternatives are adequate to reasonably protect the child against the alleged dependency, neglect or abuse, the court shall not order the removal or continued removal of the child.
>
> (2) If the court orders the removal or continues the removal of the child, services provided to the parent and the child shall be designed to promote the protection of the child and the return of the child safely to the child's home as soon as possible. The cabinet shall develop a treatment plan for each child designed to meet the needs of the child. The cabinet may change the child's placement or treatment plan as the cabinet may require. The cabinet shall notify the committing court of the change, in writing, within fourteen (14) days after the change has been implemented.

TPR hearing, the trial court took judicial notice of the record in the juvenile case over which it had presided in 2010. Thus, the trial court was intimately aware of two years in this family's life. Based upon Mother's own testimony, as well as that of the social worker assigned to the family, the trial court reasonably, and correctly, concluded Child had been neglected by her mother and abandoned by her father. Furthermore, the trial court was well aware of the Cabinet's attempts to reunify the family by offering a variety of services, such as developing a court-approved case plan that was translated into her native tongue (Twi) so Mother could understand what was expected of her and offering a TAP assessment, that unfortunately, Mother could not utilize because of her precarious mental health condition. In light of the unique circumstances of this case, we cannot say TPR was unsupported by clear and convincing evidence.

For the foregoing reasons, the Order Terminating Parental Rights and Order of Judgment entered by the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Thomas C. Chapuk Lexington, Kentucky	Terry L. Morrison Lexington, Kentucky