

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000426-ME

M.H.

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 13-AD-00004

A.H., A MINOR; AND COMMONWEALTH
OF KENTUCKY, CABINET FOR HEALTH
AND FAMILY SERVICES

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

ACREE, JUDGE: M.H. (Father) appeals from the February 24, 2015 judgment of the Breckinridge Circuit Court involuntarily terminating his parental rights.

Father's sole argument on appeal is that the circuit court's termination decision

must be overturned because Father was denied counsel during critical stages of the underlying dependency action. We affirm.¹

Father is the biological father of A.H., born October 7, 2007 (Child). In August 2009, the Cabinet for Health and Family Services discovered Child's natural mother, J.A.S. (Mother), was attempting to care for Child while under the influence of drugs and/or alcohol. The Cabinet removed Child from Mother's care, and initiated a dependency, neglect, and abuse action against Mother in Breckinridge District Court. Child has resided in foster care continuously ever since.² Mother stipulated to dependency at a subsequent adjudication hearing a few days later. The permanency goal, at that time, was to return Child to parent.

It is unclear what role, if any, Father played in Child's life in 2009. He admitted at the termination hearing that he has never had legal custody of Child. The record reflects Father did not attend the temporary removal or

¹ Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

² In 2013, the district court ordered that Child's paternal grandmother be granted custody. That placement was quickly terminated, and Child returned to foster care, when the paternal grandmother violated court orders by allowing Child to visit Mother unsupervised, during which time Child sustained a relatively minor injury.

adjudication hearings, but did attend the disposition hearing two weeks later. He also attended the first permanency hearing in July 2010.

The district court action lingered for several years, with annual permanency hearings in 2011, 2012, and 2013; Father did not attend the 2011 and 2012 hearings, but did attend the 2013 hearing. During the 2011 hearing, Child's permanency goal was changed to adoption. At no point was Father appointed counsel to represent him during the dependency proceedings. At no point did Father request counsel, either.

Also in 2011, Father, upon being released from incarceration, contacted the Cabinet. The social worker assigned to Child's case created a case plan for Father to foster reunification. Father worked his case plan sporadically over the years.

In November 2013, the Cabinet filed a petition in Breckenridge Circuit Court requesting the involuntary termination of Father's parental rights. The circuit court appointed Father counsel, who represented Father throughout all of the circuit court proceedings.

The termination hearing was held on September 15, 2014. Father testified on his own behalf. He stated he began parenting classes prior to his most recent arrest, and intended to start classes again in the near future. Father testified he was unemployed, but submitted a post-trial affidavit indicating he had obtained part-time employment at Burger King. Father admitted he was behind on child

support, but testified he intended to stay out of jail and obtain his GED because Child needed him.

Tiffani Bland, currently a supervisor for the Breckinridge County DCBS³ office, testified she was the case worker for Child's case from 2011 through March 2012. Bland testified Father failed to attend any of the three case planning conferences held by the Cabinet. Bland stated she created a case plan for Father in 2011, but he failed to complete it. She testified she often struggled to contact Father, as his phone number would frequently change or be disconnected, and he often went months without contacting her.

Jennifer Morgan, a social worker with the CHFS, took over for Bland in 2012. Morgan testified Father has started, and stopped, working his case plan on several occasions. Father never made meaningful progress. Morgan also testified Father has not been able to maintain stable housing or employment, and has inconsistently visited with Child over the years. Morgan clarified that there have been periods of over ninety days in which Father failed to maintain contact with Child. Father has also drug tested inconsistently and admitted to using cocaine in August 2013.

Morgan testified Child has shown marked improvement while in foster care. Child has responded to the routine and stability of her foster home, and her behavior has noticeably improved. Child is bonded to and secure with her foster parent, who is willing to adopt Child.

³ Department of Community Based Services.

The circuit court entered factual findings and legal conclusions on February 13, 2015, and a judgment on February 24, 2015, terminating Father's parental rights to Child. The circuit court found clear and convincing evidence that Child was neglected consistent with KRS⁴ 600.020(1)(a) – (i); that termination was in Child's best interest; and that Father was unfit to parent Child because: (a) he has abandoned Child for a period of not less than ninety days; (b) he has failed to provide basic necessities for Child; (c) he has failed to offer essential parental care and protection for Child; and (d) Child has been in foster care for fifteen of the most recent twenty-two months preceding the filing of the termination petition. Father appealed.

This Court shall only disturb a family court's decision to terminate a person's parental rights if clear error occurred. If there is substantial, clear, and convincing evidence to support it, the decision stands. KRS 625.090(1); *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). The clear and convincing standard does not demand uncontradicted proof. All that is needed "is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citation omitted).

As always, questions of law are reviewed *de novo*. *Council on Developmental Disabilities, Inc. v. Cabinet for Health and Family Serv.*, 473 S.W.3d 597, 600 (Ky. 2015).

⁴ Kentucky Revised Statutes.

Father's sole argument on appeal is that he was denied procedural due process and the assistance of counsel during critical stages of the dependency proceedings. Father contends the district court's failure to appoint him counsel violated both the due process clause of the Fourteenth Amendment to the United States Constitution and KRS 620.100(1), and, therefore, the circuit court's termination order must be reversed.

This Commonwealth strongly values the fundamental liberty interest a parent has in the care and custody of his or her child. *Cabinet for Health and Family Serv. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). Interference with the parent-child relationship demands fair procedures. *P.J.H. v. Cabinet for Human Resources*, 743 S.W.2d 852, 853 (Ky. App. 1987). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Cabinet for Health and Family Serv. v. A.G.G.*, 190 S.W.3d 338, 346 (Ky. 2006).

Father, in making his due process argument, relies heavily on this Court's opinion in *R.V. v. Commonwealth, Department for Health and Family Services*, 242 S.W.3d 669 (Ky. App. 2007). There, we held that due process and KRS 625.080(3) and 620.100(1) require "that the parental rights of a child not be terminated unless the parent has been represented by counsel at every critical stage of the proceedings." *Id.* at 672-73. "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.”

Id. (emphasis added).

Father claims the dependency proceeding constituted a major factor leading to termination. He argues that, without the assistance of counsel during the underlying dependency action, the termination of his parental rights was a foregone conclusion. This is not so.

Let us start with the statute referenced in *R.V.* and relied upon by Father in making his argument – KRS 620.100(1). That statute provides *custodial* parents the right to counsel in dependency proceedings.⁵ KRS 620.100(1)(b).⁶ By Father’s own admission, he has never had custody of or control over Child. Father was not a custodial parent. And, as explained in further detail below, he was not the parent subject of the dependency action. KRS 620.100(1) is inapposite. *See B.L. v. J.S.*, 434 S.W.3d 61, 66 (Ky. App. 2014) (“A plain reading of KRS 620.100 supports our view that the statute was intended to protect the rights of the parent involved in a dependency, neglect, or abuse case.”).

We are mindful that *R.V.* implied that the annual permanency hearing where the permanency goal is changed from reunification to adoption is a critical stage of the dependency action. 242 S.W.3d at 672. But, upon careful review of the facts

⁵ KRS 625.080(3), the other statute referenced in *R.V.*, provides routine appointment of counsel to represent indigent parents in termination cases. Father does not dispute that he was appointed counsel upon the filing of the termination petition in this case and that counsel represented his interests during the whole of the termination proceeding.

⁶ KRS 620.100(1)(b) reads, in relevant part: “The court shall appoint separate counsel for the parent who exercises custodial control or supervision if the parent is unable to afford counsel pursuant to KRS Chapter 31.”

of this particular case, we are convinced the dependency proceeding had no meaningful effect on the subsequent circuit court termination case.

The district court's finding of dependency had no bearing on the circuit court's subsequent termination decision, at least as it relates to Father. Father was not the subject of the dependency proceeding. He was not the parent exercising custodial control at the time Child was removed from parental care and placed in the Cabinet's custody. Mother, not Father, stipulated to dependency. No allegations of dependency or neglect were levied against Father in district court. "This court has previously upheld terminations of parental rights when a parent did not have counsel for an underlying abuse, dependency, or neglect case when the complaining parent was not the parent exercising custodial control or supervision or otherwise involved in the underlying case." *B.L.*, 434 S.W.3d at 66 (citing cases).

Further, to justify termination the appropriate court must first find that the child is an abused or neglected child. *K.H.*, 423 S.W.3d at 210 (the trial court must determine "whether the child qualifies as an abused or neglected child"); KRS 625.090(1). A finding of dependency is insufficient to support a termination decision.

While this Court is admittedly not privy to the full district court record, we discern from the record before us that Father attended only a handful of the dependency-related hearings. He did not consistently participate in the dependency proceedings. More importantly, Father has never claimed that he

requested and was denied counsel by the district court. He simply said nothing at all. The limited district court record available to us supports this.

Additionally, Father was appointed counsel in the termination proceeding shortly after the termination petition was filed. Father testified at length during the termination hearing regarding his personal status – housing, employment, and incarcerations – and his ability to parent Child. Father also, with the benefit of counsel, called multiple witnesses to testify on his behalf. The circuit court’s termination order relied solely on evidence presented during the termination hearing. Father was given the full opportunity to be heard and to defend himself against the allegations. The circuit court made independent and adequate findings of neglect and parental unfitness wholly removed from the district court proceedings against Mother. In other words, the circuit court did not rely on the district court proceedings or any evidence related to that matter in making its termination decision.

We acknowledge that dependency, neglect, and abuse actions interfere with parent and child relationships. Thus, we are mindful of the importance of fundamentally fair procedures which must be afforded parents in cases such as this. Nevertheless, for the reasons previously articulated, we are unable to conclude that Father’s due process rights were violated.

We affirm the Breckinridge Circuit Court’s February 13, 2015 Findings of Fact and Conclusions of Law and February 24, 2015 Order terminating Father’s parental rights.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brandon Edwards
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jennifer R. Hall
Leitchfield, Kentucky