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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001115-ME

M.M. APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NOS. 14-AD-500339 AND 14-AD-500340

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
C.S.B.-M., A CHILD; Z.J.M., A CHILD; AND A.M. APPELLEES

AND NO. 2015-CA-001116-ME

A.M. APPELLANT

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HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 14-AD-500340

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
C.S.B.-M., A CHILD; AND M.M. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

[1]MAZE, JUDGE: M.M. (hereinafter "Mother") and A.M. (hereinafter "Father"),[2] appeal from orders of the Jefferson Family Court terminating their parental rights to their respective children. Mother and Father argue that the trial court committed clear error in finding that the statutory prerequisites for termination were met. They also argue that KRS[3] 625.090(1)(a)(1) is unconstitutional. As we conclude that no violation of due process occurred in this case, and that substantial evidence existed to support the trial court's decision, we affirm.

Background

[1] Pursuant to 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 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] A.M. is the biological father of only one of the children involved in the cases which comprise this appeal. However, the other child's biological father, C.M. entered into a voluntary termination of his parental rights to C.B. and is not a party to those cases or this appeal. Therefore, in an effort to avoid the "alphabet soup" which so often accompanies appeals in confidential cases, we identify A.M. as "Father" for purposes of this appeal.

[3] Kentucky Revised Statutes.

Mother gave birth to C.B. on February 19, 1999, and to Z.M. on February 12, 2008. In September 2012, the trial court removed the children from Father's care due to an allegation of an inappropriate relationship between Father and C.B. The Commonwealth filed a second petition a month later, alleging that Mother violated a trial court order that Father was to have no contact with either child. In light of the allegations in the second petition, the trial court placed the children in the temporary custody of the Cabinet. Father subsequently stipulated to having abused or neglected both children as a result of his inappropriate relationship with C.B. Mother also stipulated that she failed to protect both children "when she allowed the children to have continued contact with [Father][.]"

Pursuant to orders of the trial court, Mother attended protective parenting classes, Father underwent a sex offender risk assessment, and both parents underwent psychological evaluations. Dr. Ida Dickie conducted Father's psychological evaluation over three visits with Father. Dr. Dickie issued a report dated March 20, 2013, which stated her observations and conclusions based upon her examination of Father, including that Father had expressed anger regarding "people standing in his and [C.B.]'s way of pursuing their relationship," and that Father expressed elation during his interviews "consistent with someone who [was] 'in love'…." The report continued that, as of the date of the report, Father "very much believes he is in love with [C.B.] and that she is in love with him." Dr. Dickie ultimately concluded that "[Father] represents a high risk of engaging in

sexually abusive behaviors with [C.B.]. His risk for engaging in sexual behavior with other female pubescent children outside the familial setting is lower at this time." Finally, Dr. Dickie recommended continued sex offender treatment "to manage his likelihood of sexually abusive behaviors."

Again pursuant to court orders, Father attended the Transitions Sex Offender Treatment Program at Seven Counties Services (hereinafter "Seven Counties") in Louisville. During nine individual sessions with Seven Counties staff, Father made "no significant progress" according to a February 2014 report entered as evidence at the termination hearing. During these sessions, Father blamed C.B., Mother, and others for "turning his life upside down." When Father began group sessions, he frequently told other participants that their victims were also to blame. Like in his psychological assessment, Father was "exhilarant" when discussing his relationship with C.B. during treatment sessions. The February 2014 report concluded that "[Father] continues to maintain a romantic interest in [C.B.]. … [sex offender treatment] was not successful as an agent of change for Father…." Seven Counties subsequently closed its case with Father as "non-compliant."

Mother attended protective parenting classes at Seven Counties; however, she initially and repeatedly denied failing to protect her children. After a meeting with social workers, Mother admitted permitting the children to have contact with Father and allowing C.B. to pick up "love letters" Father had written for C.B. After months of treatment, Mother still proved unable to state why she

was in treatment and refused to take responsibility. Mother also blamed others, including C.B. Seven Counties eventually removed Mother from protective parenting counseling due to lack of progress. Mother also failed to complete domestic violence counseling, against the trial court's order and despite a history of Father's violence against her, including incidents in front of the children.

Following these, and other, services, the trial court changed the permanency goal for both children to adoption, and the Cabinet filed Petitions for Involuntary Termination of Parental Rights against Mother and Father on August 19, 2014. The trial court held hearings on these petitions on January 13, 2015 and February 13, 2015. Included as exhibits at trial were Mother's and Father's respective stipulations of abuse or neglect against both children, Dr. Dickie's report, and the report from Seven Counties. Additionally, the trial court heard testimony from Father, Mother, Dr. Dickie, the Cabinet social worker, and representatives of Seven Counties who worked with Mother and Father.

On May 12, 2015, the trial court entered its lengthy Findings of Fact, Conclusions of Law, and Order Terminating Father's and Mother's parental rights to their children. The trial court included among its bases for termination that Mother and Father had admitted to engaging in domestic violence in the presence of the children; that neither parent had contacted or inquired about their children for a period exceeding ninety days; that neither parent had made sufficient progress in various treatment programs upon which reunification with their children was conditioned; and that both children were abused or neglected based upon these

facts. Mother and Father now appeal from this Order, as well as from the trial court's pre-trial decision to overrule their constitutional challenge to KRS 625.090(1)(a)1.

Standard of Review

Trial courts enjoy "a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination." *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998) (citing *Department for Human Resources v. Moore*, 552 S.W.2d 672 (1977)). However, our review "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." *M.P.S.* at 116 (quoting *V.S. v. Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986)). Substantial evidence is that which is sufficient to induce conviction in the mind of a reasonable person. *See Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002).

Analysis

In addition to Mother and Father's arguments that insufficient evidence existed to support termination, they raise a constitutional challenge to Kentucky's termination statute. We elect to address this argument first.

I. KRS 625.090(1) and the Burden of Proof in Termination Cases

[4] Kentucky Rules of Civil Procedure.

Father argues that KRS 625.090(1)(a)(1) is "plainly unconstitutional" as a matter of law. The statute of which this provision is a part reads as follows:

> (1) 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.

KRS 625.090(1). In the interest of a parent's due process rights, a court must make these findings by "at least clear and convincing evidence." *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *see also J.E.H. v. Dep't for Human Resources*, 642 S.W.2d 600 (Ky. App. 1982). Father contends that KRS 625.090(1)(a)(1) impermissibly, and in contravention of due process, permits a court terminating parental rights to rely on the finding of another court made under a standard less rigorous than the "clear and convincing" standard mandated in *Santosky* and *J.E.H.*

This issue has arisen before and was briefly discussed in a similar, albeit unpublished, case. *See Cabinet for Health and Family Resources v. T.G.*, 2007-SC-000436-DGE and 2007-SC-000821-DGE, 2008 WL 3890033 (Ky., Aug.

21, 2008). In *T.G.*, a case originating from the same trial court, the Kentucky Supreme Court conceded that, had the family court relied exclusively on the previous finding in the underlying case as KRS 625.090(1)(a) permits, "T.G.'s argument regarding the statute's constitutionality would be relevant." *Id.* at *5. Nevertheless, because the trial court made an independent finding of neglect or abuse based upon evidence presented at the termination hearing, the Supreme Court concluded that father's constitutional argument was not properly before the Court. *Id*.

The trial court in this case made a finding that Z.M. "is an abused and neglected child" as defined in KRS 600.020. More importantly, like in *T.G.*, it is clear from the trial court's Findings of Fact and Conclusions of Law that this finding was, at least in part, expressly based upon evidence presented during the termination proceedings and adjudicated under the appropriate standard of proof. The trial court stated,

> … pursuant to KRS 625.090(1)(a)2, the Cabinet presented clear and convincing evidence, through the admission(s) of the parents and through the testimony of [the social worker] concerning the admission(s) of the parents, that the children have been abused or neglected within the meaning of KRS 600.020(1) as a result of being subjected to scenes of domestic violence in the home between the [Mother] and [Father] ….

This was sufficient to satisfy the standard mandated under *Santosky*, *J.E.H.*, and the due process clauses of the United States and Kentucky Constitutions.

Like the Court in *T.G.*, we would see relevance – even merit – in Mother's and Father's constitutional argument had the trial court relied exclusively upon a prior finding of neglect or abuse entered under a lesser evidentiary standard. However, that did not occur here, and we decline the opportunity to address the matter further, lest our analysis stray into abstractions or facts which are not before us.

II. Evidence Supporting Termination

Before proceeding to the sufficiency of the evidence in this case, it is worth restating the Cabinet's burden of proof upon seeking termination. In addition to satisfying one of the three factors listed in KRS 625.090(1)(a), *supra*, and establishing that termination is in the best interest of the children per KRS 625.090(1)(b), the Cabinet was required to establish, by clear and convincing evidence, that one or more of the factors found in KRS 625.090(2) was present. These factors are:

> (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.

KRS 625.090(2). In its petition to terminate Mother's and Father's parental rights, the Commonwealth specifically alleged that subsections (a), (e), (f), (g), and (j) applied and justified termination.

Mother and Father each argue that the Cabinet failed to present substantial evidence to support the trial court's findings based upon all three statutory prerequisites, and that the trial court abused its discretion in granting the

petitions to terminate their parental rights. We review the trial court's findings and conclusions concerning each parent and the child or children involved.

A. Termination of Mother's Rights to C.B. and Z.M.

In its Findings of Fact and Conclusions of Law, the trial court held that the following facts proved sufficient under the above statutory factors to justify termination of Mother's parental rights to C.B. and Z.M.: that while Mother visited her children regularly between October 2012 and February 2013, regular visits ceased and the parents failed to inquire as to the children's well-being after the Cabinet ended visits due to parents' non-compliance; that Mother failed to participate in at least some services and failed to make sufficient progress with case plans the Cabinet offered in an effort toward reunification; that Father testified to Mother's knowledge of his inappropriate relationship with C.B., her subsequent failure to report the relationship, and that she permitted Father to be around both children despite this knowledge; and that, according to the Cabinet social worker and a medical professional, C.B. showed marked emotional improvement and had a close relationship with Z.M. while in Cabinet custody.

In arguing that the trial court's findings lacked support in the record, Mother points to the fact that she underwent required evaluations, cooperated with the Cabinet, and visited with her children and paid child support while her children were in the Cabinet's care. Mother also emphasizes the fact that she intervened in Father's and C.B.'s relationship as soon as she became aware of it – a fact which the trial court did not dispute. Indeed, there was testimony on the record in support

of these facts. However, that there was conflicting evidence in the record does not prevent evidence presented in favor of termination from being substantial. Rather, we agree with the Commonwealth that the trial court's findings as to each and every statutory prerequisite had the support of substantial evidence.

B. Termination of Father's Rights to Z.M.

Father argues that the evidence at trial almost exclusively concerned his abuse of C.B., and that this evidence was insufficient to support termination of his rights to Z.M. We disagree with both assertions.

The record contained, and the trial court's findings referenced, evidence that Father's actions concerning C.B. resulted in Z.M. being abused or placed at risk of abuse. The trial court held that *both* children were abused or neglected as defined in statute due to their exposure to domestic violence, Father's sexual abuse of C.B., and both parents' abandonment of both children. Specifically concerning Father and Z.M., these findings find support in the following evidence or testimony: the Seven Counties therapist testified to a history of domestic violence between Mother and Father in the presence of both children and to Father's participation in, but failure to complete, domestic violence counseling; the uncontroverted testimony of several witnesses, including Mother, that Father had an inappropriate sexual relationship with C.B.; that Mother permitted Father to have subsequent unsupervised contact with Z.M despite this inappropriate relationship; and that Father later failed to visit Z.M. for a period exceeding ninety days when the Cabinet permitted supervised visitation. These

facts constitute evidence of substance supporting the trial court's finding that Father neglected Z.M.

We acknowledge that the bulk of the Commonwealth's proof at trial concerned Father's direct and abusive actions toward C.B. and Mother's failure to prevent or report those actions. However, facts and evidence existed in the record which were specific to the effect of Father's actions upon Z.M. These facts were ultimately supportive of the trial court's finding of neglect or abuse without reliance upon Father's actions toward C.B. Therefore, we must disagree with Father that this finding was clearly erroneous or that the decision to terminate his rights to Z.M. constituted an abuse of discretion.

III. Prior Ruling in *A.C. v. Commonwealth*

Finally, counsel for Father urges this Court to revisit and revise that portion of its 2012 decision in *A.C. v. Commonwealth* which mandated that an indigent parent must receive counsel on appeal of a termination proceeding without additional compensation for appointed counsel. 362 S.W.3d at 364. Counsel takes issue with this Court's reading of KRS 625.080 to require appointment of counsel to include "the entire course of the termination proceedings[.]" *Id*. Nevertheless, we reaffirm that ruling today in the face of an unchanged legal landscape.

In *A.C.*, this Court balanced the individual's right to counsel during critical stages of termination proceedings with the very real burden upon appointed counsel which results from the disproportion between the work necessary to appeal such proceedings and the "rather meager compensation" permitted under the

statute. *A.C.* at 367, n 10. In implementing the procedures outlined in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), we read Kentucky law to favor the former. Four years after our decision in *A.C.*, the law remains unchanged, and so, too, must our analysis.

As we pointed out in *A.C.*, the individual's right to counsel during termination proceedings is a creature of statute, not the constitution. *A.C.* at 370 (citation omitted). Therefore, the General Assembly is free to clarify its intention, augment compensation for appointed counsel, or both. It has not done so. Unless or until such an amendment is enacted, it will continue to be the law of this Commonwealth that KRS 625.080(3) endows indigent parents with a right to counsel during all stages of termination proceedings.

Conclusion

Having concluded that Mother and Father were afforded due process and that trial court did not abuse its discretion in terminating their parental rights, the May 12, 2015, order of the Jefferson Family Court is affirmed.

KRAMER, CHIEF JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I fully concur with the majority opinion. I write separately to further recognize the hardship placed upon those attorneys who sacrifice to represent indigent clients at a fraction of the pay they should be receiving.

For more than four years, such attorneys have faithfully complied with the requirements of *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012). In that time, no effort has been made by the legislature to increase the statutory fee for such representation. KRS 625.080(3). In that time, no effort has been made by the Supreme Court to create a clear safe harbor in the Code of Professional Responsibility that would allow a lawyer to withdraw from a case without risking sanction for violating any of the Code's provisions, including a lawyer's duty to abide by the client's decision concerning objectives of the representation and to represent the client zealously.

While it is an enticement to rule that SCR[5] 3.130(1.16(a)(1))[6] permits withdrawal because to proceed would require the lawyer to violate SCR 3.130(3.1),[7] such a resolution is not as sure as it appears at first blush. The Supreme Court's commentary to the latter rule says "the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." SCR 3.130(3.1), Comment 1.

[5] Kentucky Supreme Court Rules.

[6] The pertinent part of this rule states that "a lawyer . . . shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct . . . ." SCR 3.130(1.16(a)(1)).

[7] The pertinent part of this rule states that "[a] lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ." SCR 3.130(3.1).

Furthermore, "[t]he lawyer's obligations under [SCR 3.130(3.1)] are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule." *Id*., Comment 3. When *A.C.* was decided, this Court had to assess whether the Supreme Court of Kentucky would rely on "that equality demanded by the Fourteenth Amendment [and hold] that denial of counsel to indigents on first appeal as of right amounted to unconstitutional discrimination against the poor[,]" notwithstanding the fact that while the indigent criminal defendant's right to counsel is constitutional, the right to counsel of an indigent whose parental rights are terminated is merely statutory under KRS 625.080(3).[8] *Pennsylvania v. Finley*, 481 U.S. 551, 554-55, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539 (1987). We concluded that our high court would not allow discrimination against the poor in violation of the Fourteenth Amendment no matter where the right to counsel derived. Therefore, we also had to conclude that SCR 3.130(3.1), by necessary implication, would be "subordinate to [that statutory right] to assistance of counsel in presenting a claim or contention that otherwise would be prohibited by [SCR 3.130(3.1)]."

Is it possible our analysis was wrong? Certainly. However, because this problem exists whether *A.C*. is right or wrong and is created by competing rules of attorney conduct, it is a problem for the Supreme Court to resolve. And,

[8] The pertinent part of the statute reads: "The parents have the right to legal representation in involuntary termination actions." KRS 625.080(3).

because it is unlikely any lawyer compelled to file an *Anders* brief in a TPR case would thereafter pursue discretionary review, the Supreme Court will have to resolve it by amending the Rules of Professional Conduct.

For the foregoing reasons and with the foregoing reservations, I concur.

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