

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001190-ME

L.R.M.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 13-AD-500317

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND C.L.J. (A CHILD)

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

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

ACREE, JUDGE: L.R.M. (Mother) appeals from the June 18, 2015 order and judgment of the Jefferson Circuit Court involuntarily terminating her parental rights. Mother's sole argument on appeal is that the circuit court's decision must

be reversed because the court conducted the termination trial despite the absence of Mother's counsel violative of her due process rights. We affirm.¹

The family at the center of this case became involved with the Cabinet in 2008. Child, born in 2002, was determined by the Jefferson Circuit Court in 2008, 2011, and again in 2012 to be an abused and neglected child within the meaning of KRS 600.020(1) after dependency, neglect, and abuse petitions were filed by the Cabinet and subsequent written stipulations to that effect were provided by the parents. Since the 2012 dependency action, Child has remained in the custody of the Cabinet.

The petition for termination of Mother's and Father's² parental rights to Child was filed on August 13, 2013. The initial trial date was set for November 12, 2013. However, the matter went on to be rescheduled several more times on February 19, 2014, April 24, 2014, and March 2, 2015. Attorney Michael James entered his appearance on behalf of Mother on March 2, 2015, and requested a continuance of the trial. Prior to this, Mother had been represented by court-

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 Father's parental rights to Child were also terminated. However, Father is not a party to this appeal.

appointed counsel. The court granted the continuance, and the parties agreed upon a fifth trial date of May 13, 2015.

Mr. James and Mother failed to appear at the trial as scheduled. The trial was set to begin at 9:00 A.M. The court's secretary informed the court that Mr. James had advised her that morning that he could not appear for the termination trial due to a scheduling conflict with a criminal jury trial that began the day before in circuit court. The court then attempted to contact Mr. James. He could not be reached, but the court left him a voicemail stating that he had not been excused from the termination proceeding and requested his appearance. The court decided to take a short recess. During that time, the court's secretary contacted Mr. James' office to request his presence in family court or to get an associate to appear on Mother's behalf at the termination trial. The court also attempted to locate Mr. James in circuit court where he stated he was in trial, but was unsuccessful. Also, Mother still had yet to appear.

Court resumed at 9:24 A.M. The court heard the testimony of Laura Pettit, Child's therapist at Maryhurst Academy, and Jennifer Bourgeois, the Cabinet's assigned caseworker.

Ms. Pettit testified Child had been at Maryhurst since 2012 when Child was hospitalized at an acute psychiatric facility after a disruption in Child's foster home. Child presented with violent and aggressive behavior, self-induced vomiting, and verbal and physical aggression toward others. Ms. Pettit testified that Child suffered from post-traumatic stress disorder (PTSD), attention deficit

hyperactivity disorder, and mood disorder. The source of Child's PTSD was from Child's unsafe home environment in which Child observed Mother and Father fighting and in which she was struck with a belt by Mother. Ms. Pettit stated that Child employed self-induced vomiting as a coping mechanism in reaction to the unsafe home environment.

Since Child's arrival at Maryhurst, Ms. Pettit testified Child's aggressive behavior and need for physical restraints has decreased. She also reported fewer incidents of self-induced vomiting. Ms. Pettit testified that Child attends school at Maryhurst, and there is consideration being given to place Child in a less restrictive environment in the community for school as her behaviors improve. Also, the Cabinet and Maryhurst hope to see the Child placed in a foster to adopt home in the future. Ms. Pettit testified that Mother was inconsistent and sporadic in her visitation with Child, and Father failed to visit with Child at Maryhurst.

Jennifer Bourgeois, the Cabinet's assigned caseworker, testified to the family's history with the Cabinet in the dependency actions as well as Mother's and Father's performance of their court-approved case treatment plans. Ms. Bourgeois testified that Mother and Father failed to make satisfactory progress on their case plans to allow for the safe return of Child to parental custody.

Specifically in regard to Mother, her case plan services included: treatment for mental health services at Seven Counties Services, Inc., psychological evaluation, therapy services, taking prescribed medication, in-home

services, and visitation services. Mother failed to fully comply with her case plan. She either refused to attend Seven Counties Services, Inc. or did so inconsistently, failed to take her medication as prescribed, sporadically visited with Child, did not obtain employment or establish housing, and continually violated the no-contact order between herself and Father. As a result, Child has remained in the Cabinet's care and custody for not less than twenty-two consecutive months. Ms. Bourgeois further testified that throughout the proceedings, Mother has presented with her own mental health issues including paranoia, cannabis use disorder, and histrionic personality disorder. She expressed further concern that Mother continues to have a relationship with Father despite a long history of domestic violence, which has taken a devastating emotional toll on Child. Ms. Bourgeois testified that Mother had provided clothes to Child once or twice, but has not demonstrated the ability or made the necessary changes to care for Child's extreme emotional needs.

The court interrupted the testimony of Ms. Bourgeois and took another brief recess at 10:04 A.M.

When court reconvened at 10:12 A.M., Mother and Father appeared. When the court asked Mother if she wished to offer an excuse for her tardiness, Mother responded that she had overslept because she had worked late. The court then asked Mother if she knew why her attorney was not present. Mother responded that the last time she spoke with Mr. James he informed her he would be at trial. Ms. Bourgeois finished her testimony. The court then took another brief

recess to allow Father to confer with his counsel as he had just arrived at court as well.

Court resumed at 10:36 A.M. Mother stated she had called Mr. James' office and spoke with a staff member who said they would try to locate him. Mother further stated that she went to circuit court to attempt to locate him, but was unsuccessful. Mother spoke with Mr. James' office again. The court allowed Mother some time to secure someone from Mr. James' office to appear on her behalf. Mother was advised by her attorney's office to ask the court for a continuance. The court denied Mother's request. The court explained that it had previously denied Father's counsel's request for a continuance as Father was also absent at the beginning of the proceeding.

The trial resumed. The court asked Mother if she wanted to testify, she stated that she did and her testimony followed. The court provided Mother with a brief synopsis of the proof that had been put on, and allowed Mother to make a statement to the court under oath followed by questioning by the attorney for the Cabinet and *guardian ad litem*. After the questioning, the court provided Mother the opportunity to explain anything further to the court that was brought up during her testimony. Mother declined. The court did not find Mother's testimony to be credible.

The court took the matter under advisement and issued findings of fact and conclusions of law and a separate order of judgment terminating Mother's and Father's parental rights to Child on June 18, 2015. Mother subsequently filed

a motion to alter, amend, or vacate the court's judgment. In support of her motion, Mother included her own affidavit and the affidavits of her counsel, Michael James, and a colleague of James, attorney Timothy Denison.

After review, the court concluded that the motion only generally argued that the court's denial of Mother's motion to continue the trial to a later date so that her counsel could be present violated her due process rights. The court denied the motion finding that the legal proceedings had been pending for nearly twenty-one (21) months as of the date of trial, and this was the fifth trial date set in the matter due to previous continuances. Mr. James agreed to the May 13, 2015 trial date with the knowledge that he could have a potential conflict. The parties, witnesses, counsel, and court were continuing to be burdened by the delays, and the child was entitled to have permanency. The court gave Mr. James and Mother the opportunity to appear in the matter and offer a defense or provide an associate to do so. The court further found that Mother was not prejudiced by the denial as she could not change the facts of the case upon which the termination decision was based. Additionally, the court was not persuaded by the statements made in the affidavits, and expressed concern as to their trustworthiness.

This appeal followed.

Mother now asserts to this Court that the circuit court violated her due process rights by denying her motion to continue the termination trial and conducting the trial without her counsel present. Mother has not contested any of the family court's findings of fact or conclusions of law which pertain to the

statutory bases for terminating parental rights, so there is no need for us to undertake a review of them.

This Court will only disturb a family court's decision to terminate a person's parental rights if clear error occurred. Kentucky Rule of Civil Procedure (CR) 52.01; *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 211 (Ky. 2014). 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). And a court's ruling upon a motion to continue is reviewed for abuse of discretion. *Guffey v. Guffey*, 323 S.W.3d 369, 371 (Ky. App. 2010). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (citation omitted).

Close consideration and fundamentally fair procedures are especially significant when there is interference and potential termination of the parent-child relationship. *Santosky v. Kramer*, 455 U.S. 745, 753–754, 102 S.Ct. 1388, 1394–1395, 71 L.Ed.2d 599 (1982); *P.J.H. v. Cabinet for Human Resources*, 743 S.W.2d 852, 853 (Ky. App. 1987). This means parents are "entitled to a meaningful opportunity to be heard, including the right to consult with counsel[.]" *R.V. v. Commonwealth, Dep't for Health & Family Servs.*, 242 S.W.3d 669, 672 (Ky. App. 2007). However, the trial court did not deprive Mother of her right or ability to consult with counsel; that was a failure of counsel himself.

Mother relies on the opinion of *R.V. v. Commonwealth, Dep't for Health & Family Servs.*, 242 S.W.3d 669 (Ky. App. 2007) for its holding that “pursuant to both the due process clause of the Fourteenth Amendment to the United States Constitution and KRS 625.080(3) and 620.100(1), that the parental rights of a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings.” *Id.* at 673. Mother cites this case out of context. *R.V. v. Commonwealth* “hold[s] that *indigent parents* are entitled to representation during the entire dependency proceedings.” *Id.* at 671 (emphasis added). The case expresses our Constitution’s intolerance for the lack of legal representation in cases such as this when the reason is indigency alone. In this case, Mother was represented by private counsel.

This case is a civil case. The right to counsel of a non-indigent parent in civil cases is neither constitutional nor statutory. *Parsley v. Knuckles*, 346 S.W.2d 1, 3 (Ky. 1961) (“There is nothing, however, in the common law that requires counsel in civil cases and any step toward that end must be made by the legislature.”). Mother chose to dismiss her court-appointed counsel and privately retain the services of Mr. James. Despite Mr. James’ awareness and agreement of the trial date (and the conflicting criminal jury trial dates), he failed to appear to zealously represent Mother’s parental rights at such a critical stage of her case. We decline to place the responsibility on the family court for the conduct of counsel. Doing so could open the door to abuse. A future counsel could cite such a ruling for the proposition that an attorney’s mere failing to show up in court on an agreed

upon date and time could be enough to compel a continuance. We will not open that door.

Furthermore, it is certainly within the authority of the family court to deny Mother's motion to continue. A trial court has broad discretion to control proceedings before them. *Transit Authority of River City (TARC) v. Montgomery*, 836 S.W.2d 413 (Ky. 1992). Moreover, there are several factors to consider when reviewing the denial of a motion for a continuance. Those factors include: "1) length of delay; 2) previous continuances; 3) inconvenience to litigants, witnesses, counsel and the court; 4) whether the delay is purposeful or is caused by the accused; 5) availability of other competent counsel; 6) complexity of the case; and 7) whether denying the continuance will lead to identifiable prejudice." *Guffey v. Guffey*, 323 S.W.3d 369, 371 (Ky. App. 2010) (quoting *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991)). Consideration of the totality of the circumstances must also be given. *Id.*

In this case, we cannot say the family court abused its discretion when it denied Mother's motion to continue. It is clear from our review of the hearing as well as review of the court's denial of Mother's motion to vacate the judgment that the court considered all of the various factors listed above. The proceedings had been pending for almost two years due to numerous previous continuances. The parties and counsel had agreed upon the fifth trial date two months prior despite Mr. James' cognizance that he may have a potential conflict with the date. The court provided Mr. James the opportunity to either appear or to provide an

associate on Mother's behalf, but he failed to do so. The court's concern was apparent provided the age of the case, the number of previous continuances, and its effect on Child's future. The court made an extra effort to assist Mother during the trial due to her lack of counsel, and afforded her the chance to testify on her own behalf. Mother was not compelled to testify as is suggested in her brief. And lastly, Mother failed to articulate any identifiable prejudice as a result of the denial. She does not specify any testimony or evidence she would have offered to the family court that would have made a difference in the outcome. In sum, considering the totality of the circumstances, we cannot say the family court abused its discretion when it denied Mother's motion to continue the termination trial because her counsel failed to appear.

For these reasons, the June 18, 2015 findings of fact, conclusions of law, order and judgment of the Jefferson Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael L. James
Louisville, Kentucky

BRIEF FOR APPELLEE, CABINET
FOR HEALTH AND FAMILY
SERVICES:

Mary Stewart Tansey
Louisville Kentucky