

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001086-ME

T.A.

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 16-J-00098-001

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND R.C.A.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

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

ACREE, JUDGE: The issue presented in this appeal is whether the family court erred in overruling a motion by T.A. (Mother) to dismiss the dependency, neglect, and abuse petition brought against her for failing to conduct the adjudication hearing and final disposition within forty-five days from the date of removal of

Mother's child (R.C.A. or Child) from the home in violation of KRS¹ 620.090(5) and FCRPP² 23(1). We affirm.

Factual and Procedural Background

On March 3, 2016, the Cabinet for Health and Family Services (the Cabinet) filed a dependency, neglect, and abuse petition on behalf of R.C.A. Police referred the matter to the Cabinet after conducting a welfare check at Mother's home to find the eight-year-old, autistic child alone. There was also drug paraphernalia found inside the home, and Mother could not be located. The petition noted that the parents have a history of substance abuse and domestic violence. The Cabinet requested emergency custody of the child. Child was placed with the paternal grandparents.

The parents waived the temporary removal hearing through their respective counsel, and an adjudication hearing was set for March 30, 2016.

Due to a conflict, counsel for Mother filed a motion to continue the adjudication hearing beyond the 45-day window for conducting the hearing after Child's removal from the home. Mother's request was granted and the hearing continued to April 27, 2016, based upon the agreement of all parties. The order noted that the guardian *ad litem* (GAL) agreed to waive the time limits.

On April 27, 2016, the parties entered an Agreed Order, again continuing the adjudication to May 18, 2016. The reason for this continuance was

¹ Kentucky Revised Statutes.

² Family Court Rules of Practice and Procedure.

the investigative worker's unavailability due to a death in her family. Again, the GAL agreed to waive time limitations regarding conduct of the hearings.

On May 18, 2016, the case was called at approximately 12:40 P.M. Because of the volume of the docket that day, there was insufficient time to conduct the adjudication hearing. Another docket of a different division of family court was scheduled to begin in the same courtroom at 1:30 P.M. An order was entered continuing the matter to June 24, 2016.

Notwithstanding her original request to schedule the hearing outside the 45-day window and her agreement to subsequent continuances, Mother filed a motion to dismiss the case because the adjudication hearing was set in violation of KRS 620.090(5) more than forty-five days after Child was removed from the home. She also based her motion on the family court's non-compliance with FCRPP 23 requiring the court to provide oral or written findings on the record that "the continuance is necessary in the best interest of the child, for discovery or presentation of evidence or witnesses, to protect the rights of a party, or for other good cause shown." FCRPP 23.

The court denied Mother's motion to dismiss and made the following findings:

This matter came before the Court on June 15, 2016 on counsel for the natural mother's Motion [to] dismiss this action under KRS 620.090(5) and FCRPP 23. The Court conducts a [dependency, neglect, and abuse] docket every Wednesday from 8:30 a.m. to 1:00 p.m., this schedule is contained in the local rules. The Court has another docket that starts at 1:30 p.m. Wednesday

afternoons which prevents dockets from overlapping. [. . .] The Court had 41 cases assigned on that day and this case was not called until approximately 12:39 p.m. ostensibly after it was conferenced by the assistant county attorney. The Court advised Counsel for the natural mother that the Court had limited [time] in which to conduct an adjudication before the afternoon docket was to start since there was only about 20 minutes remaining in which to conduct a hearing. Counsel for the natural mother has not filed a Response to the Petition, has failed to state any defenses which would be contained in a written response, which are all required under the Rules of Civil Procedure which apply to [dependency, neglect, and abuse] cases. KRS 610.080, CR 7[.]

Therefore, the Court being otherwise duly and sufficiently advised[:]

It is hereby ordered that the Motion to dismiss this action is overruled as the Guardian Ad Litem had previously waived times acknowledging that continuances were in the best interest of the child considering the complexities of the case including completion of discovery. Furthermore, Counsel for Natural Mother, had in effect waived the 45 day period when he sought or agreed to prior continuances. Furthermore, the GAL was not present when the Court called the hearing on May 18, 2016, since the GAL was under the mistaken impression that all counsel had agreed that because of the number of witnesses the Court would have sufficient time on a regular docket day to conduct an adjudication a continuance was necessary not only for the [b]est interest of the minor child but also to protect the due process rights of all parties. However, the Court clearly indicated on the record that an adjudication could not be conducted absent the GAL, insufficient time left on the Court's docket that day, the number of witnesses expected to be called by counsel for the natural mother, and other due process considerations. On May 18, 2016, when the Adjudication Hearing was previously scheduled, the Court's docket was unusually large with 41 cases scheduled, one county attorney conferences the case while the Court conducts hearings, and given the time

constraints the Court has to hear its cases on Wednesday's docket, the case was unable to be heard, given the number of witnesses.

(R. 96-7).

The adjudication hearing was held on June 24, 2016. An order was entered on July 7, 2016, finding that Mother and Father had neglected or abused the minor child. The disposition hearing was held August 10, 2016, and an order entered thereafter. This appeal followed.

Mother's sole argument on appeal is that the family court erred in overruling her motion to dismiss the dependency petition. We do not agree.

KRS 620.090(5) requires the family court to conduct the adjudication hearing and make a final disposition of a dependency action within forty-five days of the child's removal from home. The family court may extend the forty-five-day time frame through written findings establishing the need for the extension of time, including that the extension is in the child's best interest. Further, FCRPP 23 provides that if the family court grants any extension of time for any hearing (other than the annual permanency hearing), the court shall make written or oral findings on the record of why the continuance is necessary and in the best interest of the child or other good cause shown.

In this case, the record indicates Child was removed from the home on March 3, 2016. Therefore, to be within the forty-five-day statutory period, the adjudication hearing and disposition would have had to occur before April 17, 2016. The matter was originally scheduled to occur within the prescribed time

frame. Counsel for Mother filed a motion to continue the adjudication hearing because of a conflict, and suggested a date in compliance with the time frame provided in the statute. However, the adjudication hearing was re-scheduled for April 27, 2016, which is outside the forty-five-day period, with no objection.

The adjudication hearing was again re-scheduled to May 18, 2016, at the urging of all parties because of the unavailability of a fundamental witness. It was not until after the re-scheduling of the May 18, 2016 adjudication that counsel for Mother took issue with the forty-five-day time limit.

We believe Mother's failure to object to the adjudication hearing date first set outside the forty-five-day time limit of KRS 620.090(5) constituted a waiver to the statutory time period. A party should not be permitted to agree to set the matter outside of the time limit and later claim error by the court on the issue for doing so. This is especially the case where the circumstances giving rise to the action persist and have not been resolved as the purpose of the dependency, neglect, and abuse statute is to "protect and preserve the rights and needs of children[.]" KRS 620.010. We also briefly mention that the unpublished opinion Mother relies on, *T.S.M. v. Cabinet for Health & Family Servs.*, 2007-CA-002223-ME, 2008 WL 4822511, at *1 (Ky. App. Nov. 7, 2008), is factually distinguishable from this case because there was no prior waiver to the forty-five-day period by the party later objecting to it.

In another unpublished case, this Court held "failure to object to the hearing date being set outside the forty-five day time limit before expiration

thereof constituted a waiver. As such, we conclude that [Mother] waived the forty-five day time limit of KRS 620.090(5).” *A.K. v. Commonwealth, Cabinet for Health & Family Servs.*, 2007-CA-000424-ME, 2007 WL 4277915, at *2 (Ky. App. Dec. 7, 2007).³ In the case before us, Mother did more than fail to object. Before the expiration of the forty-five-day period, Mother subsequently urged that the hearing be conducted beyond on a date beyond that window. Continuances subsequent to mother’s waiver of the time limit did not violate the statute. While expeditious adjudication was certainly in Child’s best interests (in everyone’s best interests), there is no suggestion that any of these delays worked a detriment upon or disadvantaged anyone.

Further, the General Assembly has mandated “best interest” representation of children in dependency actions as well as parental rights termination cases through KRS 387.305(5) through the appointment of a GAL. *Morgan v. Getter*, 441 S.W.3d 94, 115 (Ky. 2014); KRS 387.305. The family court specifically noted on the docket sheet and in its order continuing the hearing for the first time to April 27, 2016, that the GAL waived the time limits, indicating the GAL’s belief that continuance was in Child’s best interest.⁴ We also point out that once the argument was made by Mother to the family court, the court explained the reasoning for the May 18, 2016 continuance in a written order and

³ We do not cite these unpublished cases as precedent. At most, the rationale of an unpublished case can be persuasive. We cite this case to demonstrate consistency in this Court’s decisions, even of the unpublished variety.

⁴ The GAL also agreed to waive the time limits in the April 28, 2016 Agreed Order to continue the adjudication to May 18, 2016.

noted the parties had waived the forty-five-day statutory period through the prior sought and agreed to continuances.

Accordingly, the decision of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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