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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000164-ME

H.C. APPELLANT

v. APPEAL FROM HARRISON FAMILY COURT
HONORABLE HEATHER FRYMAN, JUDGE
ACTION NO. 17-J-00016-001

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY; AND L.E., A CHILD APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: H.C. (the mother) conditionally stipulated to neglect of her child, and she now seeks review of the Harrison Family Court's decision that she, as an indigent person, was not entitled to funding for an expert witness in a dependency, neglect, and abuse (DNA) case because there was no statutory

mechanism to award such funds. The Cabinet for Health and Family Services (the Cabinet) agrees with the mother's argument that such funds should be available under Kentucky Revised Statutes (KRS) Chapter 31 based upon fundamental fairness because DNA cases are similar in nature to criminal actions. We agree; hence, we vacate the family court's order.

The mother and M.E. (the father) are the natural parents of L.E. (the child), born in 2012. The underlying action began with the filing of a juvenile DNA petition by Ashley Hill of the Department for Community Based Services (DCBS) on February 7, 2017. The petition alleged as follows:

> On January 31, 2017, CHFS received a report that [the father] is using drugs intravenously while in the caretaking role. On February 1, 2017, [the mother and the father] denied any drugs being in their system and submitted to a drug screen at their expense. [The mother's and the father's] urine tested at low gravity and positive for Buprenorphine. RS[1] voiced concerns that [the father] will do anything to clean his system out and is using multiple substances. Both parents were dishonest about their drug use and [the father] has visible track marks that he reported as being cat scratches. [The mother] denies that she or [the father] have a prescription for Buprenorphine and are purchasing this illegally. CHFS is concerned that due to [the mother's and the father's] past substance abuse history that they will continue using while in the caretaking role. CHFS is requesting the child be placed in the maternal grandmother, [E.C.'s] temporary custody. CHFS is also requesting that [the father and the mother] submit drug screens regularly at CHFS discretion and expense.

[1] RS is not identified.

The court deemed both parents to be indigent as defined in KRS 31.110 and appointed separate counsel to represent them. Temporary custody of the child was awarded to the maternal grandparents, and drug screens were ordered. The mother consistently tested positive for Buprenorphine (suboxone) over the following months.

The mother sought funds to retain an expert focusing on addiction and requested that the cost of the expert be paid from the indigent funding pool administered by the Finance and Administration Cabinet under KRS 31.185 and 31.110. She argued that DNA cases included constitutional implications subject to protection, asking the court to extend the holdings of *Ake v. Oklahoma*, 470 U.S. 68, 82, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and *Hicks v. Commonwealth*, 670 S.W.2d 837, 838 (Ky. 1984), to DNA cases. She should therefore be entitled to access to experts who could aid her in her trial preparation. She noted that Kentucky lacked a statutory method to provide funding for indigent parents in proceedings where their parental rights were implicated, as in KRS 31.110, which provides expert witness funds for indigent people, but only applies in criminal actions. An expert witness would help her establish her defense that suboxone, at the levels found in her system, does not impair a person's ability to parent. The mother intended to hire Dr. Kelly J. Clark.

At the adjudication hearing on November 9, 2017, the parties addressed the mother's motion for expert witness funding. Following these arguments, the court made an oral ruling. The court noted that the mother's physician was avoiding being served with the subpoena to testify, leaving her no option but to hire a medical expert to defend her medical treatment with suboxone. It went on to recognize that the statutory scheme set forth in KRS Chapter 31 applied only to criminal proceedings and that it considered DNA proceedings to be quasi-criminal actions because the issues in such cases go to the protected constitutional right to parent a child. Nevertheless, the court was forced due to the express wording of KRS Chapter 31 to deny the motion because it did not provide for funding in this situation. Therefore, experts would not testify because they would not be paid. This, in the court's opinion, directly impacted due process. Without funding for expert witnesses when appropriate, such as in complex situations addressing medically-assisted treatment issues, the individuals accused of being unfit would not be able to properly defend themselves. The family court did not believe it had the authority to authorize the request.

The mother and the father ultimately entered a stipulation of neglect or abuse, with the mother's stipulation conditioned on the right to appeal the expert funding issue. The family court found the child to be abused or neglected pursuant to KRS 600.020(1), that the parents were incapable of caring for the child due to

their drug abuse, that reasonable efforts had been made to prevent the child's removal, and that there were no less restrictive alternatives than removal. In the docket order, the family court addressed the expert funding issue, ruling that it was denying the mother's motion for funding "as no statutory provision exists for payment of an expert's fees." However, the court agreed that the mother's due process rights were impacted. Following the disposition hearing on December 21, 2017, the court ordered the child to remain in the custody of the maternal grandparents. This appeal by the mother now follows.[2]

The sole issue raised in this appeal is whether an indigent parent is entitled to funding for an expert witness in a DNA case pursuant to the Due Process Clause. In this case, the mother sought to demonstrate through expert testimony that the suboxone levels in her system did not impair her ability to parent or put her child at risk of neglect. Because this issue represents a question of law, we shall review the family court's ruling *de novo*. *See Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003) ("Because an issue of law rather than an

[2] The family court extended the time for the mother to file an appeal pursuant to Kentucky Rules of Civil Procedure (CR) 73.02(d), which provides that "[u]pon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time." While the mother used the wrong mechanism and moved for a belated appeal – which must be filed, in this instance, in the Court of Appeals rather than the family court – and based the motion on a mistake in reading the date of the final order rather than failing to learn of its entry, we shall accept the court's ruling in this case and retain jurisdiction to decide the issue raised in the appeal.

issue of fact is involved, this court is not bound by the circuit court's decision and will review the matter *de novo*.").

The United States Supreme Court has recognized, on multiple occasions, the fundamental interest natural parents have in raising their children:

> [T]he relationship between parent and child is constitutionally protected. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is now firmly established that freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.

Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 554-55, 54 L.Ed.2d 511 (1978) (internal citations and punctuation omitted). And in *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982), a case addressing the termination of parental rights, the United States Supreme Court emphasized the fundamental nature of the liberty interest natural parents have in raising their child:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into

> ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. [Footnote omitted.]

With these pronouncements in mind, we shall review the mother's argument.

The mother argues that the United States Supreme Court's test for the appointment of counsel in termination proceedings as set forth in *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed. 2d 640 (1981), should be extended to the funding of expert witnesses for indigent parents in DNA cases. The Supreme Court recognized what it must consider when considering due process:

> The case of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

Lassiter, 452 U.S. at 27. The Supreme Court then adopted the standard in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), and opted to "leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review." *Lassiter*, 452 U.S. at 32.

In addition, the mother asserts that the rationale in *Ake v. Oklahoma*, *supra*, and *Hicks*, *supra*, should be extended to this case. In *Ake*, the United States Supreme Court addressed expert funding in a criminal action, specifically, "whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question." *Ake*, 470 U.S. at 70, 105 S.Ct. at 1089. The Court first stated,

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Id., 470 U.S. at 76, 105 S.Ct. at 1092. The Supreme Court went on to state that

> fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," [*Ross v. Moffitt*, 417 U.S. 600, 612, 94 S.Ct. 2437, 2444, 41 L.Ed.2d 341 (1974)]. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Ake, 470 U.S. at 77, 105 S.Ct. at 1093.

Finally, the Supreme Court listed the three factors that must be considered when determining whether a defendant was entitled to access to psychiatric assistance in preparing his defense. These factors are: 1) "the private interest that will be affected by the action of the State[,]" 2) "the governmental interest that will be affected if the safeguard is to be provided[,]" and 3) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Id*. The Court ultimately determined that Ake was entitled to the requested funding based upon the application of the standards to the facts in the case.

In *Hicks*, decided the year before *Ake*, the Supreme Court of Kentucky applied a "reasonably necessary" standard to determine whether a defendant was entitled to the appointment of an expert witness pursuant to Kentucky Rules of Criminal Procedure (RCr) 9.46 and KRS 31.110. *Hicks*, 670 S.W.2d at 838. KRS 311.110 provides in relevant part:

> (1) A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, or who is accused of having committed a public or status offense or who has been committed to the Department of Juvenile Justice or Cabinet for Health and Family

> Services for having committed a public or status offense as those are defined by KRS 610.010(1), 610.010(2)(a), (b), (c), or 630.020(2) is entitled:
>
> > (a) To be represented by an attorney to the same extent as a person having his or her own counsel is so entitled; and
> >
> > (b) Except as provided in subsection (2)(c) of this section, to be provided with the necessary services and facilities of representation, including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.

The *Hicks* Court relied upon and confirmed its statement in *Young v. Commonwealth*, 585 S.W.2d 378, 379 (Ky. 1979), that "indigent defendants are entitled to reasonably necessary expert assistance."

The mother argued that her "fundamental right to family integrity was at stake" when the DNA petition was filed and that without expert testimony, she could not introduce any evidence to establish her defense that the suboxone level in her system did not impair her ability to parent the child. We agree with her, and the Cabinet, that due process rights may be at stake in such situations and therefore hold that upon a finding by the trial court that such expert funding is reasonably necessary to establish a defense to a DNA petition, funding for such expert fees shall be paid pursuant to KRS 311.110(1)(b). We note that the mother immediately put the family court on notice that expert assistance would be necessary to prove her defense and therefore did not waive this right. The family

court has already concluded – without objection on appeal – that the mother's due process rights had been impacted by the denial of her motion for fees, which equates to a finding that such expert testimony and funding was reasonably necessary. Because the mother's constitutional due process rights were violated by the family court's ruling that she was not entitled to funding for an expert witness, we are required to vacate the family court's finding of neglect and remand this matter.

For the foregoing reasons, the order of the Harrison Family Court is vacated, and this matter is remanded for further proceedings in accordance with this opinion.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

JONES, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JONES, JUDGE, DISSENTING: Respectfully, and with some reservation, I dissent. While I do not disagree that it would be wise to allow for expert funding in some DNA cases, I do not believe the constitution demands it. A DNA proceeding, while quasi-criminal in nature, does not implicate the liberty interests of the party, like a criminal action. Moreover, a DNA action, standing alone, cannot permanently deprive a parent of his or her right to parent. That can only be accomplished through termination of parental rights, which requires separate findings. *See M.H. v. A.H.*, 2015-CA-000426-ME, 2016 WL 3962285, at *4 (Ky.

App. July 22, 2016) (discussing differences between DNA actions and parental terminations vis-à-vis representation by counsel). A family court has a variety of options available to remedy abuse and neglect, if it finds such has occurred. Temporary separation of the parent and child is one of those options, but it is not the exclusive option.

I believe the matter of expert funding for an indigent parent in a DNA case is a matter that should be addressed by the General Assembly, not this Court. The majority holds that an indigent parent in a DNA case has the right to have expert funds paid for by the Commonwealth if it is reasonably necessary. However, the majority's holding raises more questions than it answers. Presumably, the majority has determined that representation entails expert investigation and testimony. However, the majority has not addressed how the $500 limit set forth in KRS 625.080(3) will apply when an expert is appointed. Does the $500 cap apply to the combined effort of the party's counsel and expert, thereby reducing the amount of the attorney fee? Is there a separate fee for experts? What is the cap on the fee? None of these questions are answered by the majority. Why? Because this is a matter that should be addressed by the General Assembly following debate and consideration of funding issues. It should not be dealt with by judicial fiat.

Likewise, I do not believe that the parties, or the family court, were left without any remedy for the conundrum this case presented. Kentucky Rule of Evidence 706 provides:

> (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may require the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
>
> (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. Except as otherwise provided by law, the compensation shall be paid by the parties in such proportions and at such time as the court directs, and thereafter charged in like manner as other costs.

KRE 706.

Mother, or the family court acting on its own motion, could have invoked KRE 706. If the family court believed it was reasonably necessary for an expert to testify regarding the suboxone issue, it could have appointed one pursuant to KRE 706. Moreover, if mother were not able to absorb any portion of the cost,

the family court could have directed the Cabinet to pay for compensating the expert. While this remedy might not be perfect, it is available until the General Assembly addresses the issue of expert funding in DNA cases more directly. *See Commonwealth, Cabinet for Health and Family Services v. Byer*, 173 S.W.3d 247, 249 (Ky. App. 2005) (holding that the Cabinet could be assessed expert fees under KRE 706(b) so long as the procedures in KRE 706(a) were properly followed).

BRIEF FOR APPELLANT:

Joshua A.K. McWilliams
Versailles, Kentucky

BRIEF FOR APPELLEE:

Brian K. Privett
Assistant Harrison County Attorney
Paris, Kentucky