RENDERED: OCTOBER 25, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000172-ME

K.S., MOTHER — APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE ROBERT D. MATTINGLY, JR., JUDGE
ACTION NO. 16-J-00151-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY,
CALLOWAY COUNTY, KENTUCKY;
D.M., A MINOR CHILD; AND L.M., FATHER — APPELLEES

AND NO. 2018-CA-000173-ME

K.S., MOTHER — APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE ROBERT D. MATTINGLY, JR., JUDGE
ACTION NO. 17-J-00093-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY,
CALLOWAY COUNTY, KENTUCKY;
N.M., A MINOR CHILD; AND L.M., FATHER — APPELLEES

AND NO. 2018-CA-000174-ME

K.S., MOTHER APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE ROBERT D. MATTINGLY, JR., JUDGE
ACTION NO. 16-J-00150-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY,
CALLOWAY COUNTY, KENTUCKY;
L.M., A MINOR CHILD; AND L.M., FATHER APPELLEES

AND NO. 2018-CA-000175-ME

L.M., FATHER APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE ROBERT D. MATTINGLY, JR., JUDGE
ACTION NO. 16-J-00151-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY,
CALLOWAY COUNTY, KENTUCKY;
D.M., A MINOR CHILD, AND K.S., MOTHER APPELLEES

AND NO. 2018-CA-000176-ME

L.M., FATHER APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE ROBERT D. MATTINGLY, JR., JUDGE
ACTION NO. 17-J-00093-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY,
CALLOWAY COUNTY, KENTUCKY;
N.M., A MINOR CHILD; AND K.S., MOTHER APPELLEES

AND NO. 2018-CA-000177-ME

L.M., FATHER APPELLANT

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE ROBERT D. MATTINGLY, JR., JUDGE
ACTION NO. 16-J-00150-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY,
CALLOWAY COUNTY, KENTUCKY;
L.M., A MINOR CHILD, AND K.S., MOTHER APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

COMBS, JUDGE: This case involves six appeals, which have been consolidated for our review. Appellant, K.S. (Mother), and Appellant, L.M. (Father), are the biological parents of three minor children. They have each appealed from adjudication orders of the Calloway County Circuit Court finding the children to be neglected or abused. Mother appeals on the ground that the family court erred in denying her request to appoint a medical expert. Father's counsel has filed an *Anders*[1] brief and a motion to withdraw.

We refer to the record only as necessary to resolve the issues before us. Mother and Father are the biological parents of three minor children, D.M., born in 2015; L.M., born in 2016; and N.M., born in 2017.

In 2016, the Cabinet filed juvenile dependency, neglect or abuse (DNA) petitions alleging physical abuse of L.M. and risk of harm or neglect to D.M. based upon the alleged physical abuse to L.M. After N.M. was born in 2017, the Cabinet also filed a DNA petition alleging risk of harm to N.M. based upon the

[1] *Anders v. State of Cal.*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

alleged physical abuse to L.M. All three children were removed and placed in the temporary custody of the Cabinet.

The parents requested that the family court appoint a medical expert for them. By order entered on March 6, 2017, the court explained that:

> It was agreed at the [pretrial] conference for the court to appoint the Pediatric Medical Team out of Louisville, Kentucky to review the findings of Vanderbilt and submit an assessment. The court has been in contact with Dr. Vinod Rao from the forensic pediatric team and after he consulted Dr. Melissa Currie, the court was advised that the team would not conduct an evaluation of Vanderbilt, nor would they complete a medical assessment.
>
> The court has also contacted legal counsel for the [Cabinet] regarding the payment of expert fees for parents in Dependency, Neglect and Abuse cases to retain their own medical experts and advised that there is not a statute that would allow such fees.

On December 4, 2017, the family court conducted an adjudication hearing. Mother and Father appeal from the adjudication orders entered on December 12, 2017, finding that each child was neglected or abused as defined in KRS[2] 600.020(1). An addendum with findings of fact provides in relevant part:

> 3. On October 15, 2016, three (3) month old [L.M.] was brought into the emergency room at Murray-Calloway County Hospital in respiratory distress and was observed to have bruising above his right eye. He was later taken to Vanderbilt Hospital.

[2] Kentucky Revised Statutes.

> 4. As testified to by the pediatric physician at Vanderbilt Hospital, Dr. Cody Penrod, the Pediatric Medical Team assigned to [L.M.,] tests and evaluations disclosed bruising around the left eye, a left fourth rib fracture in the process of healing, a recent subdural brain hemorrhage, and a second older brain hemorrhage.
>
> 5. The parents did not present a plausible explanation as to the possible cause of such injuries . . . .

On appeal, Mother contends that the court erred in denying funds for an independent medical evaluation or expert witness and that "the parents' indigence prevented them from mounting a meaningful defense thus violating their Sixth Amendment rights to due process." Mother likens her case to *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), where the issue was whether and under what circumstances the State must provide an indigent defendant with access to competent psychiatric assistance in preparation of a defense. In *Ake*, the United States Supreme Court determined that three factors were relevant:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is 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. See *Little v. Streater*, [452 U.S. 1, 6, 101 S.Ct. 2202, 2205, 68 L.Ed.2d (1981)]; *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

Id., 470 U.S. at 77, 105 S.Ct. at 1093. The Court held that where the defendant shows that his sanity at the time of the offense will be a significant factor at trial, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.*, 470 U.S. at 83, 105 S.Ct. at 1096.

Mother also relies upon *Binion v. Commonwealth*, 891 S.W.2d 383, 386 (Ky. 1995) (Appointment of neutral mental health expert insufficient to satisfy due process; services of mental health expert should be provided to permit expert to conduct appropriate examination and assist in the defense); and *Little v. Streater*, 452 U.S. 1, 16-17, 101 S.Ct. 2202, 2211, 68 L.Ed.2d 627 (1981) (Connecticut paternity proceedings quasi-criminal in nature; statute requiring the requesting party to bear cost of blood test violated the Fourteenth Amendment due process guarantee when applied to indigent defendants).

Mother argues that the criteria of KRS Chapter 31[3] should apply to her case, citing *Sommers v. Commonwealth*, 843 S.W.2d 879, 885 (Ky. 1992), in which the Kentucky Supreme Court held that the denial of a defense motion for funds to provide assistance of experts was prejudicial error.

[3] KRS Chapter 31 is entitled "Department of Public Advocacy."

The Cabinet argues, *inter alia,* that the specific issue of the applicability of KRS Chapter 31 was not preserved for review because neither parent's counsel "requested that the Family Court rely on KRS Chapter 31 as a means to issue public funds for any sort of expert witness." However, as the Cabinet acknowledges, Father's counsel orally requested funds at the pretrial conference to hire his own medical expert, and Mother's counsel joined in his request. We consider the issue sufficiently preserved.

Shortly after the parties submitted briefs, another panel of this Court addressed the very issue that Mother raises on appeal. In *H.C. v. Cabinet for Health & Family Services*, No. 2018-CA-000164-ME, rendered August 17, 2018, the indigent mother appealed from the family court's determination that she was not entitled to funding for an expert witness in a DNA case because there was no statutory mechanism to authorize such funds. In a split decision, this Court held 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 [31.110](1)(b)." On February 7, 2019, our Supreme Court granted discretionary review. Pending the outcome of the Supreme Court decision, we held these cases informally in abeyance in order to benefit from the guidance of our Supreme Court.

On August 29, 2019, the Supreme Court rendered its decision in *Cabinet for Health & Family Services v. H.C.*, ___ S.W.3d ___, 2019 WL 4073380 (Ky. Aug. 29, 2019), and explained that:

> The Court of Appeals vacated the family court's order, finding that H.C.'s due process rights were impacted by her inability to hire an expert in her DNA case. The timeliness of the appeal was addressed only briefly in a footnote. . . .
> . . .
>
> The Cabinet then initiated this appeal. In addition to its position that the Court of Appeals' decision should be reversed on the merits, the Cabinet also argues that H.C.'s failure to timely appeal requires dismissal.

Id. at *2. The Supreme Court held that this Court lacked jurisdiction because H.C.'s appeal was untimely, vacated our decision on that basis alone, and reinstated the order of the family court. However, it never reached the merits of the substantive issue before it. It is now incumbent upon us to decide the issue that Mother has raised without the guidance of the Supreme Court.

KRS 600.010 is Kentucky's Unified Juvenile Code. KRS 600.010(2)(g) declares that "[i]t shall further be the policy of this Commonwealth to provide judicial procedures in which rights and interests of all parties, including the parents and victims, are recognized and all parties are assured prompt and fair hearings." With that policy objective in mind, we turn to the issue before us.

In *R.V. v. Commonwealth, Department for Health and Family Services*, 242 S.W.3d 669 (Ky. App. 2007), this Court held that indigent parents are entitled to representation during the entire dependency proceedings:

> [P]arental rights are "essential" and "basic" civil rights, "far more precious . . . than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972) (citations and internal quotation marks omitted).
>
> In *Santosky v. Kramer*, 455 U.S. 745, 753-754, 102 S.Ct. 1388, 1394-1395, 71 L.Ed.2d 599 (1982), the United States Supreme Court stated,
>
> > 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.
>
> The United States Supreme Court has also held, however, that no absolute due process right to counsel exists in termination of parental rights actions, but that, from a constitutional standpoint, appointment of counsel may be determined on a case-by-case basis. *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); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996).
>
> Our state's legislature alleviated the need for a court to make case-by-case determinations, however, by providing in KRS 625.080(3) for routine appointment of counsel to represent indigent parents in termination cases . . . [and] in dependency cases, [in] KRS 620.100(1) . . . .

Id. at 671-72.

> KRS 625.080(3) provides that:
>
> The parents have the right to legal representation in involuntary termination actions. The Circuit Court shall determine if the parent is indigent and, therefore, entitled to counsel pursuant to KRS Chapter 31. If the Circuit Court so finds, the Circuit Court shall inform the parent; and, upon request, if it appears reasonably necessary in the interest of justice, **the Circuit Court shall appoint an attorney to represent the parent pursuant to KRS Chapter 31 to be provided or paid for by the Finance and Administration Cabinet** a fee to be set by the court and not to exceed five hundred dollars ($500)[.]

(Emphasis added).

> KRS Chapter 620 governs dependency, neglect and abuse. KRS 620.100 provides in relevant part:
>
> (1) If the court determines, as a result of a temporary removal hearing, that further proceedings are required, the court shall advise the child and his parent or other person exercising custodial control or supervision of their right to appointment of separate counsel:
> . . .
> (b) **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**. The clerk of the court shall arrange for service on all parties, including the local representative of the Cabinet for Health and Family Services, of the order appointing counsel. **The parent's counsel shall be provided or paid for by the Finance and Administration Cabinet**. The fee to be fixed by the court shall not exceed five hundred dollars ($500); however, if the action has final disposition in the District Court, the fee shall not exceed two hundred fifty dollars ($250)[.]
>
> …
>
> (2) If the court determines that further proceedings are required, the court also shall advise the child and his parent or other person exercising custodial control or supervision that they have a right to not incriminate themselves, and a right to a full adjudicatory hearing at which they may confront and cross-examine all adverse witnesses, present evidence on their own behalf and to an appeal.

(Emphases added).

"Under our principles of due process and under Chapter 31, constitutionally adequate legal representation entails **certain necessary expenses**." *McCracken Cty. Fiscal Court v. Graves*, 885 S.W.2d 307, 312 (Ky. 1994) (emphasis added).

In relevant part, KRS 31.110 provides that:

> (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.

(Emphasis added).

In *Benjamin v. Commonwealth*, 266 S.W.3d 775 (Ky. 2008), our Supreme Court explained that:

> KRS 31.110(1)(b) establishes that a needy defendant charged with serious crimes "is entitled . . . 'to be provided with the **necessary services** and facilities of representation including investigation and other preparation.'" *Hicks v. Commonwealth*, 670 S.W.2d 837, 838 (Ky. 1984) (*quoting* KRS 31.110(1)(b)). Additionally, in *Young v. Commonwealth*, 585 S.W.2d 378, 379 (Ky. 1979), we recognized that "indigent defendants are entitled to **reasonably necessary expert assistance**." Thus, while it is settled law that indigent defendants are entitled to funding for expert assistance, the dilemma of under what circumstances and to what extent such funding should be provided has elicited considerable deliberation.
> …

> [T]he appropriate test for determining when an indigent defendant is entitled to receive funding for expert witnesses under KRS 31.110(1)(b), will consider 1) whether the request has been pleaded with requisite specificity; and 2) whether funding for the particularized assistance is "reasonably necessary"; 3) while weighing relevant due process considerations.

Id. at 788-89 (emphases added).

In *Z.T. v. M.T.*, 258 S.W.3d 31 (Ky. App. 2008), this Court explained as follows:

> The law in this Commonwealth is that the due process clause, 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. This includes all critical stages of an underlying dependency proceeding in district court.

Id. at 36 (citation omitted).

We are persuaded that an indigent parent's right to counsel includes the means necessary to properly defend a case. The Legislature provided for the appointment of counsel in KRS 625.080(3) and KRS 620.100(1) "pursuant to KRS Chapter 31." We conclude indigent parents are also entitled to funding for reasonably necessary expert assistance under KRS 31.110(1)(b).

Accordingly, we reverse the adjudication orders entered in these six cases[4] and remand them to the family court for a determination of whether the parents are entitled to expert funding under the test set forth in *Benjamin* and for further proceedings consistent with its determination. We are not aware of the current status of these cases and acknowledge that conceivably the issue before us could have become moot. Nonetheless, we have elected to address this issue of first impression because it is "capable of repetition, yet evading review." *Rodney P. v. Stacy B.*, 169 S.W.3d 834, 835-36 (Ky. 2005) (quoting *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658, 661 (Ky. 1983)).

To recapitulate, we REVERSE the orders of the Calloway Circuit Court and REMAND these cases for its further consideration as directed by this opinion.

ALL CONCUR.

[4] Father's counsel filed a motion to withdraw and an *Anders* brief. Thus, "we are obligated to independently review the record and ascertain whether the appeal is, in fact, void of nonfrivolous grounds for reversal." *A.C. v. Cabinet for Health & Family Servs.*, 362 S.W.3d 361, 372 (Ky. App. 2012). *See N.S. v. Cabinet for Health & Family Servs.*, Nos. 2016-CA-001091-ME and 2016-CA-001092-ME, 2017 WL 3834858 (Ky. App. Sept. 1, 2017) (Filing of *Anders* brief appropriate in DNA case). In light of our decision herein, we believe it appropriate to deny the motion to withdraw filed by Father's counsel. The proper and necessary criteria for withdrawal have not been met upon our finding that this is a meritorious appeal. We do so by separate order.

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