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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001344-ME

S.G. APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 19-AD-00016

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES, as Next Friend of
L.W.G., a Child APPELLEE

AND NO. 2019-CA-001345-ME

S.G. APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 19-AD-00017

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES, as Next Friend of
E.A.G., a Child APPELLEE

AND NO. 2019-CA-001346-ME

S.G. APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 19-AD-00018

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES, as Next Friend of
S.T.G., Jr. a Child APPELLEE

AND NO. 2019-CA-001347-ME

S.G. APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 19-AD-00019

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES, as Next Friend of
B.H.G., a Child APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: S.G. has filed this consolidated appeal of four orders of the McCracken Family Court granting petitions of the Cabinet for Health and Family Services to terminate her parental rights with respect to her four minor children: E.A.G.; L.W.G.; S.T.G., Jr.; and B.H.G. S.G. does not contest the family court's predicate determinations that each of her four children qualified as abused or neglected pursuant to Kentucky Revised Statute (KRS) 600.020(1)(a)1., 3., 4., 8., and 9., due to: (1) S.G.'s ongoing and significant mental health and substance abuse issues; (2) "basic, general neglect of [their] wellbeing at the hands of [S.G.]"; and (3) repeated exposure to domestic violence between S.G. and their biological father, S.T.G.[1] Rather, she argues the family court's orders were in error because, in her view, she was deprived of effective counsel during the underlying

[1] The children's father, S.T.G., voluntarily terminated his parental rights. S.G. listed him as an appellee in the caption of her appellate brief, but she did not include him in any notice of appeal and he is therefore not a party to these proceedings.

proceedings. Further, she asserts the Cabinet failed to make reasonable efforts to facilitate the reintegration of her family. She also argues that when the family court assessed whether to terminate her parental rights in its various orders, it based its conclusions on "hypotheticals"; assigned too little weight to the fact that she suffered from domestic abuse; and overlooked improvements she had made in treating her mental health and substance abuse issues. Upon review, we affirm.

We begin with S.G.'s contention that she was denied effective assistance of counsel. At the start of the August 9, 2019 termination hearing in this matter, S.G.'s attorney, Nancy Barnes, moved to withdraw on the basis that her attorney-client relationship with S.G. had become "irretrievably broken." The family court then heard arguments from the parties regarding the substance of Barnes' motion; considered relevant testimony from Barnes and S.G.; and denied the motion from the bench. In its subsequent written order to that effect, the family court accurately and succinctly related the parties' arguments, Barnes's and S.G.'s testimony, and the substance of its findings and conclusions in relevant part as follows:

> 2. The Court heard testimony from Nancy Barnes, Esq. as well as [S.G.] as to the breakdown in the attorney client relationship. Ms. Barnes testified that while preparing for Court and interviewing witnesses, [S.G.'s] sister became irate and blamed Ms. Barnes for not providing suitable counsel. No comments had ever been made to Ms. Barnes prior to this nor had [S.G.] ever expressed similar dissatisfaction with Ms. Barnes. Ms.

Barnes talked to her client about the sister's comments and she agreed that she wished some things had been handled differently in the underlying case. Ms. Barnes further testified that she was prepared to proceed with the hearing and felt as though she could adequately protect her client's legal interest.

3. [S.G.] testified that when Ms. Barnes called her and suggested that she could withdraw if there was a breakdown, it showed to her that Ms. Barnes was not willing to defend her to the best of her ability and since that call last night she has decided she can't trust Ms. Barnes anymore. She admitted that she has never addressed her concerns or this issue prior to the night immediately prior to the final hearing. [S.G.] felt as if Ms. Barnes did not give the witnesses enough time to prepare.

4. The Court heard arguments from the Counsel for the Cabinet and the Guardian ad Litem relating to the Motion. The Cabinet is concerned with gaining permanency for the children and that allowing Ms. Barnes to withdraw will cause a continuance in this case and to get another all-day hearing will be several months away. There was a pre-trial conference in April and Ms. Barnes is ready to proceed. Further, the Cabinet has numerous witnesses prepared and under subpoena. The Guardian ad Litem feels it is in the best interest of the children to proceed with the hearing as scheduled today as they have stress relating to the hearing and a right to permanency.

5. The Court finds that the convenience of the witnesses does NOT outweigh [S.G.'s] right to adequate counsel. However, a continuance in this matter would be detrimental to the children as the children deserve permanency and it is in their best interest for this matter to be resolved as scheduled. The children have struggled and discussed the final hearing for months in counseling. Furthermore, Ms. Barnes has represented [S.G.]

> throughout the underlying juvenile action. The Court has observed Ms. Barnes to go above and beyond in representing [S.G.] Ms. Barnes has been a zealous and vigorous advocate for her client from the beginning. She has filed motions for return to parent and has participated fully in all hearings, been prepared, and been adequate and effective counsel for [S.G.]
>
> 6. The Court finds that this request would not have been made if Ms. Barnes had not brought it up to [S.G.] The Court finds it is a last ditch effort on behalf of [S.G.] to delay the termination hearing. The Court does not find that there has been a breakdown in the attorney/client relationship.
>
> 7. Ms. Barnes's Motion to Withdraw as Counsel is hereby DENIED. The Court will allow [S.G.] the opportunity throughout the final hearing to ask questions and present evidence in addition to Ms. Barnes if [S.G.] so chooses. The Court will allow [S.G.] to request the opportunity to leave the record open at the end of the hearing in order to supplement the record with additional information.

Consistently with paragraph "7" of its order, the family court provided S.G. the opportunity to ask additional questions of each witness during the hearing and permitted her to read a letter she had written to the court on her own behalf. Upon the conclusion of the hearing, the family court also asked S.G. whether S.G. wished to supplement the record with any evidence in addition to what Barnes had adduced on her behalf. S.G. indicated she did not. Citing these facts, as well as its own observations that S.G.'s counsel had filed numerous motions on S.G.'s behalf and had otherwise vigorously and zealously represented S.G.'s efforts to be

reunited with her children, the family court determined in its final order in this matter that S.G. had received adequate and aggressive representation.

Now on appeal, S.G. contends she was denied effective assistance of counsel because the family court required Barnes to continue representing her, despite what she and S.G. had asserted was the "irretrievably broken" state of their attorney-client relationship. Further, she asserts in her brief that "[n]one of her therapists or counselors were called as a witness despite her request that they be subpoenaed," and "[h]ad they been present, there may have been more insight into the improvements S.G. made prior to the termination hearing."

This Court has recognized the right to effective assistance of counsel in termination of parental rights proceedings. In *Z.T. v. M.T.*, 258 S.W.3d 31 (Ky. App. 2008), this Court stated:

> It is logical that the parent's right to counsel includes effective representation. However, it does not derive from the Sixth Amendment nor can RCr[2] 11.42 be invoked. We hold that if counsel's errors were so serious that it is apparent from the record that the parent was denied a fair and meaningful opportunity to be heard so that due process was denied, this Court will consider a claim that counsel was ineffective.

Id. at 36. The *Z.T.* Court continued, however, to "caution future litigants and their counsel that the burden is onerous." *Id*. at 37; *see also T.W. v. Cabinet for Health*

[2] Kentucky Rule of Criminal Procedure.

& Family Servs., 484 S.W.3d 302, 306 (Ky. App. 2016) (reversing for ineffective assistance of counsel in a termination proceeding involving a conflict of interest).

Upon review, we find the family court's decision well-reasoned, legally sound, and consistent with the record. S.G. is incorrect if she is arguing the family court erred merely because it required her to proceed with the termination hearing while being represented by appointed counsel she was unhappy with. *See Sykes v. Commonwealth*, 553 S.W.2d 44, 46 (Ky. 1977). As the family court indicated, of paramount concern in this context is whether her counsel was nevertheless a zealous and vigorous advocate.

As indicated, the only specific criticism S.G. makes of her counsel's advocacy relates to a purported failure to subpoena witnesses. However, "[d]ecisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000) (citation omitted), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). Here, S.G. merely speculates that "[h]ad they been present, there *may* have been *more* insight into the improvements S.G. made prior to the termination hearing." (Emphasis added.) S.G. does not identify any favorable testimony these potential witnesses[3]

[3] S.G. does not identify any of these potential witnesses by name in her brief. During the hearing, S.G. only identified two individuals named "Brittany" and "Lisa" whom she represented were her former treatment counselors.

would have provided at trial. And at best, S.G.'s statement indicates testimony from these witnesses would have been *cumulative*: S.G.'s "improvement" (*i.e.*, progress with her parenting plan and substance abuse treatment) was thoroughly considered and discussed throughout the hearing. *See Halvorsen v. Commonwealth*, 258 S.W.3d 1, 5 (Ky. 2007) ("Failure to identify additional witnesses to present cumulative testimony cannot be regarded as prejudicial.").

Apart from that, the family court specifically allowed S.G. "to request the opportunity to leave the record open at the end of the hearing in order to supplement the record with additional information." Thus, if S.G. wished to adduce evidence from these witnesses into the record after the hearing, the family court provided her an opportunity to do so. However, S.G. made no such request. In short, with respect to the family court's decision to overrule her counsel's motion to withdraw, S.G. has not identified, nor have we otherwise discerned, any error "so serious that it is apparent from the record that [S.G.] was denied a fair and meaningful opportunity to be heard so that due process was denied[.]" *Z.T.*, 258 S.W.3d at 36.

With that said, we now proceed to the remaining issues S.G. has raised in this appeal. As indicated, S.G. asserts that the Cabinet failed to make reasonable efforts to facilitate the reintegration of her family. Further, she argues that when the family court assessed whether to terminate her parental rights in its

various orders, it based its conclusions on "hypotheticals"; assigned too little weight to the fact that she suffered from domestic abuse; and overlooked improvements she had made in treating her mental health and substance abuse issues in the months leading to the August 9, 2019 termination hearing. We disagree.

As to S.G.'s contention that the Cabinet failed to make reasonable efforts to facilitate the reintegration of her family, she supports her statement with no citation to the record or further elaboration. It is enough to say that, as set forth in the family court's final orders, the record provides clear and convincing evidence that the Cabinet provided S.G. considerable resources during the roughly eighteen months of these proceedings.

Moreover, the family court did not base its decision to terminate S.G.'s rights with respect to each of her children upon "hypotheticals." Rather, as demonstrated by its final orders in this matter, the family court based its decision upon reports, expert opinions and firsthand observations; and much of that evidence concerned S.G.'s domestic violence issues, her progress with her parenting plan, and her progress with her mental health and substance abuse treatment. The relevant findings and conclusions of the family court's final orders with respect to each of S.G.'s children were as follows:

> 7. . . . [S.G.] and her four children were referred by the Cabinet to the UK Center on Trauma and Children for a

CATS Assessment.[4] The CATS team was asked to assess [S.G.'s] protective factors, her mental health, and whether she recognizes the impact the domestic violence and substance abuse by her and [S.T.G.] has on her children. The clinician from the UK Center on Trauma and Children, Megan Kohler, testified via telephone regarding the CATS Assessment that was administered on the family. She explained that the CATS testing includes a variety of procedures, interviews of the parents and children, collateral information received from various resources such as counselors, foster parents, and the Cabinet, as well as a multitude of personality-like tests. The evaluation is conducted by a group of professionals so the result is not just the opinion of one evaluator. They evaluated the risk factors, the parent's history, domestic violence relationships, substance abuse, mental health, the needs of the children, and other factors.

Ms. Kohler testified that [S.G.] reported a substantial amount of trauma from her childhood that impacts and affects her capacity to safely parent her children. She testified that there were severe concerns with [S.G.'s] mental health. [S.G.] has been diagnosed with schizophrenia and Ms. Kohler observed [S.G.] to be in active psychosis on the day of testing. [S.G.] stated to Ms. Kohler that she heard voices "all day, every day" and that to minimize the effect of the voices she would just "not give them a name" so as to minimize their power over her. In fact, [S.G.] blames the voices for her last meth use. She described to Ms. Kohler that there were two voices arguing in her head. She chose to listen to the voice telling her to use meth so she could prove to that voice that she could use meth once and then refrain in the future, thereby proving to the voice that she isn't an addict. [S.G.] reported delusions, auditory hallucinations, paranoid thoughts, anxiety and periods of severe depression. [S.G.'s] ongoing substance abuse

[4] University of Kentucky Comprehensive Assessment & Training Services (CATS) assessment.

greatly affects and exacerbated the severity of her mental health symptoms.

All four children participated in the extensive CATS testing process. Ms. Kohler testified that the older two children shared their feelings and memories about [S.G.] hearing voices and their observations of her behaviors. Due to her mental instability, her state of active psychosis, and the danger it presents for the children, the CATS team made the decision not to allow [S.G.] to participate in the second day of testing and observation. After the first round of testing, the CATS team expressed concerns to the Cabinet that the visits should not be so loosely supervised because of the high level of their concern for the children.

According to the CATS assessment, given the chronic nature of [S.G.'s] mental health history and substance abuse history, as well as the severity of the problems, she will never be a safe or stable caregiver for her children. The CATS report indicates that [S.G.] shows a profound lack of empathy for children's chronic exposure to substance abuse and domestic violence. Her poor judgment and lack of insight and inability to take appropriate responsibility for the current situation suggests she is a high risk for recreating abuse, neglect, or maltreatment if the children were returned to her care. Furthermore, despite there being a DVO, her children being removed from her care, and the Cabinet and Court repeatedly telling her that the children would not be returned if she was with [S.T.G.], she continued to have contact with him throughout the case.

Ms. Kohler testified that [S.G.] was not a safe and stable caregiver for her children. Further, the CATS team could not recommend any further case planning services or treatment recommendations for the reunification of this family. CATS recommended permanency for [the children] with an alternate, suitable caregiver through adoption or other means.

8. [S.G.] also testified at the hearing. The Court finds that [S.G.] has little to zero credibility with the Court due to the magnitude and number of her lies throughout the underlying juvenile action. [S.G.] was almost able to manipulate the Court, her advocate at the Merryman House Domestic Crisis Center, the jail staff and personnel, her social worker, and other individuals involved in her case planning tasks on multiple occasions and using various schemes. For example, she actively participated in treatment at the Merryman House Domestic Crisis Shelter. Her advocate came to a hearing and testified that [S.G.] was one of her most engaged and eager participants and that she truly believed that she understood the impact of the domestic violence on the children and the importance of not returning to her abuser, [S.T.G.] During that very hearing, it was made known to the Court (and the advocate) that she had been deceiving the Merryman House and the Court and [S.T.G.] and [S.G.] were seeing each other on a regular basis using a scheme they created where [S.G.] was picking up [S.T.G.] from jail for 'work duty'. Many months later [S.G.] again passionately described not having contact with [S.T.G.] after another brutal attack only for the Court to be shown a multitude of messages between the two that appeared on the child's phone through a shared account. Not only did this discredit [S.G.'s] testimony, but the messages were seen by the child and caused the child great distress. [S.G.] was never honest with any mental health assessor, domestic violence counselor, or most importantly, the Court. While saying the right things in Court, she was still having contact with [S.T.G.] and using methamphetamine, despite her insistence that she was not. There were court orders in place prohibiting contact between [S.T.G.] and [S.G.] and yet she was communicating with him on the phone, via Facebook, and sneaking him out of jail. The Court puts little to no weight on her testimony in this hearing.

[S.G.] testified at the hearing that she was not currently having contact with [S.T.G.], she was treating her mental health issues, and had been clean and sober since March of 2019. Her last positive drug screen for methamphetamine was March 22, 2019. She has not had six consecutive months of clean drug screens since this case began. [S.G.] believes she as completed her case plan. However, her testimony at this hearing is almost identical to the testimony she gave in May of 2018 at a return to parent hearing. When asked what she had learned from her domestic violence classes she stated "that a victim will return to their abuser seven times before leaving for good" and "it's not my fault." Incredibly, both things that she has learned justify her actions for continuing contact and communication with her abuser.

9. [S.G.] for a period of not less than six months, has continuously or repeatedly failed or refused, or ha[s] been substantially incapably of providing essential parental care and protection for [her children]. While [S.G.] believes she has completed all tasks on her case plan, the Court strongly disagrees. The Court finds that [S.G.] has not made any progress on her case plan throughout the duration of this case. Other than the CATS assessment, [S.G.] has not been honest with any of her assessors. She has not been honest about her substance abuse. She does not understand the impact that the severe domestic violence has had on her children, despite the fact that at least two of them have been injured physically in the altercations. [S.G.] has manipulated the system to make it look as though she has completed tasks on her case plan while she has continued to have contact with [S.T.G.], test positive on drug screens, and lied to the Court.

10. Termination of parental rights of [S.G.] is in the best interest of the child[ren.] The Court has considered the factors listed in KRS 625.090(3). The child[ren's] improvements while out of the care of the parents, the

circumstances that led to [their] entry into foster care, and [S.G.'s] current status of failing to bring about lasting and permanent changes have contributed to the decision that termination is best. Furthermore, the acts of abuse and neglect [S.G.] committed necessitate permanent separation. [S.G.] has not successfully completed her mental health treatment. She does not acknowledge or take responsibility for the risks to the children. She has continually lied to the Court throughout the duration of this case.

The Mother has been consistent with her statements throughout the case that the children have been physically abused in foster care. She presented evidence of a bruise on [E.A.G.'s] face, which she felt was caused by someone grabbing her face. The child's therapist, Ms. Hailey Cardin, testified that [E.A.G.] will grab her own cheeks, pull down, and say "my mommy, my mommy."

These children have experienced significant abuse, neglect and maltreatment. The children suffered extreme behaviors when coming into care such as extreme aggression, being quick to anger, and throwing fits and tantrums. They have had multiple foster care placements disrupt[ed] due to their extreme behaviors. The children have discussed with their therapist and the CATS assessor witnessing lots of fighting, drug use, witnessing criminal activity, being told to evade police, and were given alcohol at a very young age. At a family therapy session on July 30, 2019, [S.G.] tried to normalize with the therapist the children being given alcohol. It is apparent to the Court that [S.G.] does not understand the implications of her actions with the children and is still justifying the abuse and neglect just days before the hearing to terminate her parental rights.

Since entering foster care, the children have made vast improvements. [B.H.G.] and [S.T.G., Jr.] are no longer aggressive. They are now able to express their feelings. [E.A.G.'s] tantrums and aggression has decreased.

> 11. The Court finds by clear and convincing evidence that substantial evidence exists that any additional services provided by the Cabinet to the mother would have little to no success in bringing about lasting parental adjustment in achieving reunification and would simply have had the effect of delaying permanency for the child[ren]. The Cabinet has provided considerable resources over the last 18 months. The mother has not been able to bring about any lasting or permanent change and the CATS Assessment does not recommend any further case planning efforts.

These findings accurately relate the substantial evidence of record, and amply support the family court's conclusion that terminating S.G.'s parental rights conformed with the best interests of her children.

In short, the breadth of S.G.'s arguments lack merit. Furthermore, the McCracken Family Court's termination orders were based upon substantial evidence; do not reflect an abuse of the family court's discretion in these matters; and are otherwise consistent with the applicable law. Therefore, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

Heather L. Jones
Paducah, Kentucky

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES:

Dilissa G. Milburn
Mayfield, Kentucky