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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-0552-ME

S.M. APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE MICA WOOD PENCE, JUDGE
ACTION NO. 19-AD-00024

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND
FAMILY SERVICES; AND B.K.M., A
CHILD APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND K. THOMPSON, JUDGES.

CALDWELL, JUDGE: S.M. ("Mother") appeals from the involuntary termination of her parental rights to B.K.M. ("Child").[1] We vacate and remand with directions to dismiss the petition for termination.

[1] The parental rights of Child's father are not at issue in this appeal. Child's biological father was determined to be a man who died prior to Child's birth. Another man who was married to

Mother's attorney filed an *Anders* brief[2] and a motion to withdraw as counsel, stating there were no meritorious grounds for appeal. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d. 493 (1967). *See also A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361, 371 (Ky. App. 2012) (recognizing ability of counsel to file *Anders* briefs in involuntary termination of parental rights cases in Kentucky, provided that certain requirements are met, and setting forth "a procedural blueprint to assist the bar in cases in which an *Anders* brief is warranted.").

We have exercised our duty to independently examine the record to determine if counsel is correct in arguing there are no non-frivolous grounds for appeal. *See A.C.*, 362 S.W.3d at 371-72 (citing *Anders*, 386 U.S. at 744, 87 S. Ct.

Mother at the time of Child's birth was dismissed from the termination proceedings on request and waived any rights to Child.

[2] The *Anders* brief filed by Mother's attorney notes requirements that "the *Anders* brief must conform with [Kentucky Rules of Civil Procedure] CR 76.12 by including *inter alia*, statements regarding whether the argument was preserved regardless of its lack of merit, a thorough recitation of the facts, a concise and well-reasoned analysis of the issues, and appropriate citations to the record and law." (*Anders* brief, p. 7). Nonetheless, the *Anders* brief filed contains no statement about preservation of any arguments identified and contains no specific citations to any page number in the written record and no specific citations to any date and time in any recordings of hearings. *See* CR 76.12(4)(c)(v). Though we vacate the family court's judgment for reasons not discussed in either appellate brief filed in this case, we urge Mother's attorney to take greater caution to comply with appellate brief requirements in the future as we have the authority to impose sanctions including striking briefs and reviewing issues only for manifest injustice for failure to comply with the requirements of CR 76.12. *See Hallis v. Hallis*, 328 S.W.3d 694, 696-97 (Ky. App. 2010). We direct counsel's attention to our *Basic Appellate Handbook* provided at https://kycourts.gov/Courts/Court-of-Appeals/Documents/P56BasicAppellatePracticeHandbook.pdf (last visited June 10, 2021).

at 1400). In so doing, we have discovered an error by the family court which was not brought to the family court's attention by the parties nor discussed in the parties' appellate briefs but which—though unpreserved—demands that the March 2020 termination judgment be vacated with directions to dismiss the petition.

Kentucky Revised Statutes (KRS) 625.090(6) provides:

> Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:
>
> (a) Terminating the right of the parent; or
>
> (b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

In the present case, the family court conducted a trial on September 9, 2019. But after the proof concluded, the family court deferred ruling on the termination petition and held the record open pending further proceedings ordered by the family court. Therefore, it failed to either terminate parental rights or dismiss the petition within thirty days of the conclusion of proof. We held that a similar deferral of ruling on a petition to terminate parental rights pending further hearings violated KRS 625.090(6) and resulted in the need to vacate a judgment terminating parental rights—rendered following unauthorized further proceedings—in *K.M.J. v. Cabinet for Health and Family Services*, 503 S.W.3d 193, 196-97 (Ky. App. 2016).

Following the presentation of proof on the scheduled October 2014 trial date in *K.M.J.*, the family court "passed the issue of termination of Mother's parental rights for a review six months later" deeming this a "deferral of the pending action" and instructing the Cabinet to work with the mother on a case plan and rebuilding her life. *Id.* at 195. Although the parent/appellant failed to show where the issue was preserved for review as required by CR 76.12(4)(c)(v), we vacated the family court's 2015 judgment terminating parental rights because the trial court had deferred ruling on the termination petition in October 2014 following the conclusion of proof for further hearings—a process not expressly allowed by KRS 625.090(6). *Id.* at 197.

We rejected the Cabinet's assertion that the proof had not really closed so there would be no violation of KRS 625.090(6). Noting "the record reflects that the trial court took the matter under submission at the close of the 2014 trial" and thus proof was closed, we concluded: "the trial court's dispositional options were limited to the two provided in the statute." *K.M.J.*, 503 S.W.3d at 197. We vacated the October 2015 judgment terminating parental rights and remanded the case with directions to dismiss the petition "based upon that court's prior conclusion of law that the Cabinet failed at trial to prove an essential statutory element, that there is no reasonable expectation of improvement in parental care and protection." *Id.* at 197 (internal quotation marks omitted).

Especially considering the close factual similarity between the present case and *K.M.J.*, we are bound by our precedent in *K.M.J.* We must vacate the March 2020 termination judgment here because of the family court's unauthorized, though well-intentioned, September 2019 deferral of ruling on the petition for further hearings. Here, as in *K.M.J.*, the family court failed to either terminate or dismiss within thirty days after the conclusion of proof on the original September 2019 trial date. This violated the clear language of KRS 625.090(6), making further proceedings unauthorized. *K.M.J.*, 503 S.W.3d at 197. So, the family court's March 2020 judgment terminating parental rights must be vacated.

The instant case was set for trial on September 9, 2019, and both parties presented evidence on this date. Neither party requested a continuance to present additional proof on future dates from our review of the trial recording. However, after the presentation of evidence as the parties were getting ready to present closing arguments, the family court judge orally stated her assessment of the proof and her plan for further proceedings instead of immediately hearing oral arguments. When she began to discuss reasonable prospects for improvement, Mother's attorney stated he would address this issue in his argument, but the family court judge stated she wanted to say something first.

The family court judge orally stated that requirements for termination were met but that the family court declined to terminate at that point because of

evidence indicating recent improvement by Mother. The family court stated its intent to set the case for further review in three months and to give Mother a chance to prove that she could sustain recent improvements. The family court further indicated it would enter an order establishing clear requirements for both Mother and the Cabinet moving forward.

The attorneys, Mother, and the social worker engaged in discussion with the family court, although the parties did not formally present closing arguments before proceedings concluded that day. After some discussion with the social worker, the family court made a verbal statement that "testimony had closed." The parties discussed their availability for another hearing with the family court and did not object to the family court declining to either terminate or dismiss the petition at that point in favor of further proceedings.

The family court judge made some oral statements indicating that the evidence was insufficient, that the Cabinet's proof was incomplete, and that the Cabinet had not met its burden of proof. These statements appeared to be based in part on Child's therapist not providing much helpful information due to testifying without access to treatment records and a lack of evidence of Mother's missing more than one scheduled appointment over the last couple of months. The judge also made some potentially inconsistent oral statements, such as stating that all criteria for termination were satisfied.

The judge orally took note of evidence that Mother had made significant improvements in the past two months and indicated that the judge was not sure that there were no reasonable expectations of improvement. But she expressed a desire to see if Mother could show that she could sustain improvement and prove that she could improve enough to be entrusted with Child's care.

The family court entered a written order on September 9, 2019. The family court found therein that all statutory requirements for termination were met[3] but that the family court was giving Mother "an opportunity to prove that there is a possibility of improvement given the age of the child." To the extent that anything in the written order conflicts with oral statements by the family court judge, written statements control over conflicting oral statements. *Younger v. Evergreen Group, Inc.*, 363 S.W.3d 337, 340 (Ky. 2012).

The written order further provided that Mother must comply with its terms and her case plan "for the court to find that there is a possibility of improvement . . . ." The order then set forth certain requirements for Mother and the Cabinet going forward such as Mother maintaining employment and attending therapy and Cabinet personnel sending text reminders of appointments to Mother.

[3] The family court found Child "has been in foster care for fifteen of the past twenty-two months" (Record on Appeal ("R."), p. 257)—thus possibly alluding to a former version of KRS 625.090(2)(j) in effect prior to July 14, 2018. But the September 2019 order did not find, by clear and convincing evidence, any or all statutory requirements for termination stated in KRS 625.090(1)-(3). For example, there was no finding, by clear and convincing evidence, of any ground of parental unfitness stated in KRS 625.090(2).

The family court apparently held two interim hearings in December 2019 and February 2020. In March 2020, the family court again heard evidence. In late March 2020, it entered findings of fact and conclusions of law and an order terminating Mother's parental rights. But under *K.M.J.*, no further proceedings were authorized under KRS 625.090(6) after it failed to either terminate or dismiss the petition within thirty days of the conclusion of proof on September 9, 2019, so the March 2020 termination judgment must be vacated. *See K.M.J.*, 503 S.W.3d at 197.

Though we anticipate that some might argue that KRS 625.090(6) did not come into play because the attorneys did not engage in formal oral arguments or that the parties tacitly agreed that the proof had not been completed in discussing availability for further hearings without lodging any objection, the procedural facts of this case appear almost identical to those in *K.M.J.* The family court's decision to defer ruling on the termination petition and hold the proof open pending further hearings was clearly contrary to our holding in *K.M.J.*, and the later termination judgment following unauthorized further hearings must be vacated.

As we made clear in *K.M.J.*, the family court had two choices under KRS 625.090(6)—either terminate parental rights or dismiss the petition within thirty days of the conclusion of proof. *K.M.J.*, 503 S.W.3d at 197. It is not for the

family court to expand or contract the options for ruling as set out by statute. The family court did not terminate parental rights nor dismiss the petition within thirty days following the conclusion of proof on September 9, 2019. And although the family court did not explicitly find that the Cabinet failed to meet its burden of proof in its September 2019 written order, it also did not make the required findings—by clear and convincing evidence—of the statutory requirements for termination of parental rights stated in KRS 625.090(1), (2), and (3). *See also Santosky v. Kramer*, 455 U.S. 745, 769-70, 102 S. Ct. 1388, 1403, 71 L. Ed. 2d 599 (1982) (holding due process requires proof by at least clear and convincing evidence for state-initiated termination of parental rights).

Although we recognize the family court's well-intentioned efforts, we must vacate the family court's March 2020 judgment to terminate Mother's parental rights—which was rendered after further proceedings clearly held to be unauthorized in *K.M.J.*—and we direct the family court to dismiss the petition in accordance with the requirements of KRS 625.090(6). As in *K.M.J.*, "[t]he Cabinet, of course, may bring a new petition if it believes termination remains in the child's best interest." 503 S.W.3d at 197. We express no opinion on the merits of any future petition for termination of Mother's parental rights.

For the foregoing reasons, the judgment terminating Mother's parental rights to Child is vacated, and the matter is remanded for entry of an order

dismissing the Cabinet's petition for involuntary termination of parental rights and further stating whether Child shall be returned to Mother or shall remain in the custody of the state. *See* KRS 625.090(6)(b). As we vacate and remand for further proceedings, Mother's attorney's motion to withdraw is denied by separate order.

ACREE, JUDGE, CONCURS.

THOMPSON, K., JUDGE: CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

THOMPSON, K., JUDGE, CONCURRING: I concur but state that the trial judge was acting in total good faith.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

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