

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-0509-ME

G.G.-C.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA JOHNSON, JUDGE
ACTION NOS. 19-J-502833 AND 19-J-502833-001

E.A.; J.A., A CHILD; AND K.W.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, K. THOMPSON, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: G.G.-C. (hereinafter referred to as Father) appeals from an order granting permanent custody of his minor child, J.A. (hereinafter referred to as Child), to K.W. (hereinafter referred to as Custodian).¹ Father argues that the trial court erred in denying his motion for a continuance. We affirm.

¹ As this case concerns the neglect of a child, we will not utilize the names of the parties.

FACTS AND PROCEDURAL HISTORY

A dependency, neglect, and abuse petition was filed on behalf of Child on December 12, 2019. Mother and Father were identified as the people responsible for the neglect because both had substance abuse problems and Child was born with drugs in her system. At the time the case came before the court, Father did not make an appearance, had made no contact with the Cabinet for Health and Family Services (the Cabinet), and was not in contact with Mother. Also, Father was identified as the putative father as there had been no DNA test to confirm a biological connection. The court ordered that Father was to have no contact with Child until he presented himself to the court. Soon thereafter, the COVID-19 pandemic shut down most Kentucky services.

On December 1, 2020, the Jefferson County Attorney's Office dismissed the neglect petition against Father on the condition that he have no contact with Child. Sometime later, the Cabinet resumed offering paternity testing and Father took a paternity test on March 17, 2021. A permanent custody hearing was scheduled for April 6, 2021. At that time appointed counsel for Father moved to withdraw due to a breakdown of the attorney-client relationship. Father agreed. New counsel was appointed to Father and a new hearing was set for April 20, 2021.

At the beginning of the April 20 hearing, new counsel for Father moved for another continuance because the DNA testing results had not been received. The motion was denied and the permanency hearing took place. Mother stipulated that Custodian would be the best person to have permanent custody of Child. In addition, the Cabinet social worker and Custodian testified. At the end of the hearing, the trial court granted Custodian permanent custody of Child over Father's objection.

Father then filed the underlying appeal. Two weeks later, Father received the results of the DNA test which proved he was the biological father of Child. Father then filed a Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate the permanent custody order. The appeal was held in abeyance pending the outcome of that motion. The CR 60.02 motion was ultimately denied and this appeal was moved out of abeyance.

ANALYSIS

With respect to the denial of a continuance, our standard of review is whether the court abused its discretion. The court's discretion has been described as "a liberty or privilege allowed to a judge, within the confines of right and justice, to decide and act in accordance with what is fair, equitable, and wholesome as determined by the peculiar circumstances of the case[.]"

Our Supreme Court has set forth various factors for us to consider when reviewing the denial of a continuance. At the threshold, the Court first admonishes

that “[w]hether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case.” The factors are:

- 1) length of delay;
- 2) previous continuances;
- 3) inconveniences to litigants, witnesses, counsel, and the court;
- 4) whether the delay is purposeful or is caused by the accused;
- 5) availability of other competent counsel;
- 6) complexity of the case; and
- 7) whether denying the continuance will lead to identifiable prejudice[.]

Guffey v. Guffey, 323 S.W.3d 369, 371 (Ky. App. 2010) (citations omitted).

As previously stated, counsel for Father requested a continuance in order to obtain the results of the DNA testing. After reviewing the factors set forth above, we believe they weigh in favor of granting the continuance; however, we conclude that the court’s failure to grant a continuance was harmless error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the

proceeding which does not affect the substantial rights of the parties.

CR 61.01. “When considering a claim of harmless error under CR 61.01, the court determines whether the result probably would have been the same absent the error or whether the error was so prejudicial as to merit a new trial.” *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 69 (Ky. 2010) (citations and footnotes omitted).

Here, Father was present for the hearing and heard all the testimony. Father’s counsel was also present, presented evidence, questioned witnesses, and was able to raise objections. For all intents and purposes, the trial court treated Father as if he was the biological father of Child. We do not believe the outcome of the permanency hearing would have been different if the hearing had been postponed until the DNA results were available.

Father has not lost his parental rights. Now that he has been shown to be the biological father of Child, he may make motions with the court for visitation and custody.

CONCLUSION

Based on the foregoing, we affirm the judgment of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES.

Bethanni Forbush-Moss
Louisville, Kentucky