

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001760-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES

APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 03-AD-00014

K.B.H.

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: The Commonwealth of Kentucky, Cabinet for Health and Family Services ("the Cabinet") appeals from an order of the Grayson Circuit Court that assessed against the Commonwealth attorney's fees incurred by KBH in appealing the Cabinet's termination of her parental rights of an infant. KBH was not entitled to appointed counsel under the provisions of either the state or the federal constitution; and attorney's

fees may be awarded against the state only where such fees have been expressly provided for by statute. However, after our review of the unique facts in this case, we agree that the trial court was correct in ordering the Cabinet to provide payment for appellate counsel. Therefore, we affirm. As we shall explain later, we vacate in part and remand as to the amount to be allowed to counsel.

KBH is the natural mother of DTH, born August 23, 2002. At the time of the birth of this baby boy, KBH was being housed at the Grayson County Detention Center in Leitchfield, Kentucky, where she was awaiting trial for her alleged murder of an infant born to her months earlier. Her parental rights to three other children had been terminated in an action instituted by the Texas Department of Protective and Regulatory Services. Thus, immediately after his birth, DTH was removed from his mother's custody and was placed in foster care.

In April 2003, the Cabinet (then known as the Cabinet for Families and Children) filed a petition for the involuntary termination of KBH's parental rights to DTH. A local attorney was appointed to act as guardian *ad litem* for the infant. Pursuant to KRS¹ 625.080(3), another local attorney, Phillip Smith, was appointed by the circuit court to represent KBH. Smith filed an answer to the termination petition on June 26,

¹ Kentucky Revised Statutes.

2003. KBH was found guilty at her trial for murder and was sentenced to life in prison on November 5, 2003.

Since it had become apparent that KBH was either unable or unwilling to complete the family case plan devised by state social workers, the Cabinet filed a memorandum seeking to finalize the termination of her parental rights to DTH. In April 2004, the circuit court conducted a termination hearing pursuant to the provisions of KRS 625.080(1). KBH was represented by Phillip Smith. On May 6, 2004, the Grayson Circuit Court entered its findings of fact, conclusions of law, and judgment terminating KBH's parental rights. Smith filed a motion requesting: (1) that KBH be permitted to proceed *in forma pauperis* and (2) that he be relieved as counsel as soon as he filed the notice of appeal on her behalf.

On June 2, 2004, Smith filed the notice of appeal in the Grayson Circuit Court. On that same date, the court entered an order directing the Cabinet to "provide for payment of counsel to be appointed to represent the interests of [KBH] on [her] appeal, as . . . Phillip W. Smith, shall be relieved of further duties. . . ." Mr. Smith did not file a motion for any fees incurred in his work on behalf of KBH as noted by the trial court: "Interestingly enough, Mr. Smith has not filed an Affidavit or motion for attorney fees even though the time expended in the circuit court termination proceedings easily

merits the award of a \$500.00 fee." Opinion and Order entered July 27, 2004, p.2.

On June 14, 2004, the Cabinet filed a motion pursuant to CR² 59.05 to alter, amend, or vacate the order permitting Smith to withdraw as counsel and directing that the Cabinet provide payment for appellate counsel.³ On July 27, 2004, the Grayson Circuit Court entered an order denying the CR 59.05 motion. The court determined that KBH was entitled to appointed counsel on her appeal and ordered the Cabinet to pay the additional fees of appellate counsel. The court reasoned as follows:

The court is well aware of the Cabinet's legitimate concern about the filing of frivolous appeals by counsel for indigent and/or incarcerated parents which will in essence be funded by the taxpayers of the Commonwealth through the Finance and Administration Cabinet.

In fairness and practicality the Court must also weigh the basic right of a parent to their child(ren). The Cabinet's argument for a cap for attorney's fees of \$500 in essence tells each parent that if they expend the time at the circuit court level to attempt to retain their parental rights and defend the Cabinet's petition to involuntarily terminate their parental rights, which defense the award of a \$500.00 counsel fee (sic), that they are really not entitled to reasonable legal representation to have

² Kentucky Rules of Civil Procedure.

³ On our own motion, this court ordered the appeal which was filed on June 2, 2004, held in abeyance for sixty (60) days pending a ruling by the circuit court on the CR 59.05 motion.

that circuit court proceeding reviewed at the appellate level. There is a fundamental flaw and constitutional unfairness in this scenario.

* * * * *

This Court inquired of Hon. Charles Mattingly III, attorney at law, if he would consent to substitute as counsel for [KBH] to review the proceedings as guardian ad litem for her on appeal to advise her of the merits of an appeal or to file a motion to be relieved as counsel because of his determination that there are no reversible errors which he can present with merit. Mr. Mattingly agreed that any fee on appeal would be limited to a maximum of \$500.00 and may end up being less if there is no legitimate basis for appeal.

The Cabinet's appeal followed.

By our own order, we consolidated KBH's appeal from the order terminating her parental rights with the Cabinet's appeal from the order directing it to pay a fee to the attorney handling the appeal. On March 16, 2005, appellate counsel for KBH filed a motion to dismiss her appeal of the termination order. Consequently, only the Cabinet's appeal remains for our consideration. No brief has been filed on behalf of KBH.

The Cabinet contends that the trial court erred by ordering the payment of fees incurred as a result of KBH's appeal of the termination order. The Cabinet argues that under both the state and federal constitutions, due process does not require the appointment of appellate counsel. It also argues

that long-standing case law holds that a trial court has no authority to assess against the Commonwealth the costs of attorney fees exceeding an amount provided by statute. The Cabinet is correct on both points.

Our discussion of the constitutional issue presented by this case begins with a review of the United State Supreme Court decision in Lassiter v. Dep't. of Social Services, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). Lassiter involved the appointment of counsel for indigent persons seeking to contest the involuntary termination of parental rights by the state. The Court underscored the importance of the interest of parents in their children as being so fundamental as to come within the scope of those liberty interests protected by the Fourteenth Amendment. Observing that "[f]ew consequences of judicial action are so grave as the severance of natural family ties," it nonetheless concluded that appointment of counsel was not to be granted as a matter of course in order to assure a fair adjudication in termination proceedings. It held that a determination of the right to counsel should be made on a case-by-case basis. See M.L.B. v. S.L.S., 519 U.S. 102, 117 S.Ct. 555, 135 L.Ed.2d 473 (1996). The Court emphasized that an appointment of counsel would be required where warranted by the character and difficulty of the case. Lassiter, 452 U.S. at 31-32, 101 S.Ct. at 2161-2162.

Our General Assembly has gone a step beyond Lassiter in providing for the routine appointment of counsel to represent indigent parents in termination proceedings. Attorneys accepting such appointments are to be compensated according to the provisions of KRS 625.090(3). The statute provides for a fee to be set by the court not to exceed the sum of \$500.00 and makes no distinction between the trial and the appellate stages of a proceeding. Thus, an indigent parent in a termination action brought pursuant to the provisions of KRS 625.050 is entitled to court-appointed counsel not because of the dictates of due process under the Kentucky or United State Constitutions, but due to the policy adopted by our legislature to guarantee the assistance of counsel to an indigent parent. Courts are thus spared the rigorous case-by-case determination set forth in Lassiter. However, the amount of \$500 provided by KRS 625.080 is the statutory maximum that may be awarded to appointed counsel in termination proceedings -- regardless of whether the services are rendered at trial, on appeal, or in the course of both stages of litigation. Commonwealth v. Coleman, 699 S.W.2d 755 (Ky. App. 1985).

This issue was addressed and clarified by our holding in M.S.M. v. Dep't for Human Resources, 663 S.W.2d 752 (Ky. App. 1983). In M.S.M., an indigent mother appealed from a judgment terminating her parental rights and argued that she was entitled

to a court-appointed attorney to pursue her appeal. Citing our earlier holding in Dep't for Human Resources v. Paulson, 622 S.W.2d 508 (1981), we reiterated that "the [circuit] court has only the authority given it by the legislature to assess a fee against the Commonwealth." The statute governing appeals in involuntary termination of parental rights actions makes no provision for an attorney's fee. Therefore, we held that the trial court had no authority to assess one.

In the case before us, KBH was entitled to appointed counsel before the trial court by the provisions of KRS 625.090(3). Counsel is entitled to an award of fees in an amount determined by the court not to exceed \$500.00. An order awarding a larger sum is unauthorized by the clear wording of the statute.

Kentucky Rule of Professional Conduct 1.16 impliedly protects an indigent parent from having to choose between advocacy at trial or on appeal. As the comment to Rule 1.16 stresses, "A lawyer should not accept representation in a matter unless it can be performed . . . to completion." Completion presumes seeing the case through an appeal if so desired by the client. Except under very limited circumstances, the Rules of Professional Conduct allow for a lawyer's permissive withdrawal from representation only if there will not be material adverse impact on the client.

Upon undertaking the representation in this case, appointed counsel was bound by the attorney-client relationship to see it through to completion. Trial counsel had notice of the limited fee available at the time he accepted the appointment. Noting that he knew of no grounds for appeal, he sought to be relieved of his obligation to pursue an appeal, duly filing a notice of appeal on behalf of his client. As he sought no fee whatsoever for his services, the \$500 fee allotted for KBH's right to counsel was never exhausted and remained available for counsel appointed to maintain the appeal. Since the court has not ordered the payment of fees in an amount exceeding the statutory maximum in this case, we cannot say that it has exceeded its authority.

We have carefully reviewed the final order of the trial court in this case in which it pondered the injustice of not mandating access to a meaningful appeal in termination matters of indigent parents by providing a fee for appointed counsel at the appellate stage. It also expressed concern that the \$500 ceiling has not been upgraded by the legislature to keep pace with inflation. While we share its concerns policy-wise, we cannot intrude upon the legislative prerogative and function to legislate. We note -- as did the Cabinet in its brief -- that the General Assembly failed in its 2004 session to enact into law a proposal to amend KRS 625.080(3) allowing an

additional fee of \$500 for representation in an indigent parent's first matter-of-right appeal. We cannot by judicial *fiat* compel what the General Assembly refrained from enacting.

Consequently, we carefully circumscribe and restrict our holding to the unique facts of this case. We affirm the order of the Grayson Circuit Court in allowing a fee to be paid to appellate counsel in this case as the \$500 maximum available was not exhausted by trial counsel. However, we vacate that portion of the order awarding the full \$500 for a more explicit determination of the value of the services actually rendered by appellate counsel, noting that counsel did not file a brief on behalf of the appellee.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Richard G. Sloan
Elizabethtown, KY