RENDERED: AUGUST 10, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002516-ME

P.W. APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 06-AD-00017

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES, AS NEXT FRIEND FOR G.N.J.,
A CHILD; AND G.N.J., A CHILD APPELLEES

OPINION AND ORDER
1. DENYING MOTION TO CLARIFY
AND PRESENT NEW EVIDENCE, AND
2. AFFIRMING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

VANMETER: P.W. appeals *pro se* from a judgment entered by the Graves Circuit Court ordering the involuntary termination of parental rights (TPR). We affirm.

Appellant P.W. is the natural mother of a daughter, G.N.J., who was born in March 1999. The child's father is deceased. In October 2005, a Cabinet for Health and

[1] Senior Judge John William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Family Services (Cabinet) child neglect investigation revealed that the child resided with appellant and appellant's then-husband, P.G., a convicted child sex offender. Concerns also were expressed about the physical condition of the home, as well as the fact that within the child's reach were pornographic materials and numerous weapons. Child pornography was found on the computer. The child was placed into foster care, and appellant and P.G. evidently were arrested for endangering the welfare of a minor and distributing obscene matter to a child.

Indiana child welfare authorities subsequently contacted the Cabinet and provided information regarding appellant and her three older children. The oldest child was in the custody of appellant's mother, while parental rights to the two younger children had been involuntarily terminated approximately a year before G.N.J.'s birth. Further, custody of G.N.J. had been sought by her father, and then by a paternal uncle after the father's death. After the uncle died several days before an Indiana court awarded custody to him, appellant and the child moved to Kentucky.

The record is clear that before the child was placed in foster care, she swam nude with P.G. at a nudist camp, showered with appellant and P.G., and had her genitals washed by P.G. The child also sat unsupervised on P.G.'s lap while he viewed unknown computer websites. Appellant was aware of these activities and knew P.G. was a convicted sex offender, but she testified that P.G. abused her, and that she thought he would be "pacified" and refrain from other sexual activities with the child if he was permitted to engage in the described activities.

A social worker and a therapist who worked with the child, as well as the child's foster father, testified regarding her adjustment and improved behavior after entering foster care. Further, they testified regarding the child's regression after visits with appellant, resulting in the cessation of visits between February 2006 and the hearing. Appellant then testified regarding the allegations, her efforts to improve her own life, and her ability to properly care for her child.

On November 3 the trial court entered findings and conclusions including:

> [8] . . . [Appellant] has visited the child; however, the visitation was deemed not to be in the child's best interest, based upon written recommendations made by her therapist . . ., and the visitation was terminated. [Appellant's] case plans with the Cabinet have recommended several options for successful reunification with the child; however, upon further information obtained by the Cabinet after beginning reunification efforts – the child's best interests being paramount in every instance – the Cabinet determined that the relationship between this mother and her child was one that could never be safely maintained in a way that would benefit [the child] and guarantee a safe and nurturing home. This conclusion is drawn based upon both [appellant's] past history of neglect and placing her daughter in dangerous situations, as well as the present decisions she is making regarding companions and roommates. She will likely continue to associate with people who do not value [the child] as an innocent child, who are not committed to ensuring she grows up safely and appropriately, and who only have their own interests in mind when making choices. Reunification under these circumstances is inappropriate and should not occur.
>
> 9. Appellant, for reasons other than poverty alone, has continuously and repeatedly failed or refused to provide or is incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the child's well-being and there is no reasonable expectation of significant improvement in the parent's

> conduct in the immediately foreseeable future, considering the age of the child. The mother has an obligation to provide appropriate housing, clothing and other daily needs for [the child]. On many occasions in the past, she has failed to do so.
>
> 10. [Appellant's] parental rights to other children have been involuntarily terminated; [the child] was born subsequent to the pendency of the previous terminations; and the conditions or factors which were the basis for the previous termination findings have not been corrected. . . . The circumstances of [appellant's] life that warranted termination of parental rights – failure to protect her children from dangerous living circumstances, environmental neglect, and living with neglectful or non-nurturing partners – are still present and not corrected. [Appellant] appeared, based upon her relationships with abusive and inappropriate partners, to be unable to make changes in her everyday existence to benefit her older children, and the same is true for this child . . . . [Appellant's] inability to care for her daughter persists and necessitates a finding that circumstances leading to the previous termination have not been corrected.
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> 11. The Cabinet . . . has attempted to render services to [appellant] in an effort to keep the family together including attempting to work with the mother while the child was placed in foster care. Relative placement options did not exist for [the child], based upon the history of the case in the Indiana Court system. The efforts made with [appellant] have not resulted in her regaining custody of [the child], even though consistent attempts to offer opportunities for change have been made by the Cabinet's representatives assigned to help [appellant].

The court found that the child was neglected and sexually abused, that the Cabinet had "rendered or attempted to render" all reasonable services to appellant, and that it was in the child's best interest that parental rights be terminated. This appeal followed.

KRS 625.090(1) provides that a circuit court may involuntarily terminate parental rights if it finds, based on the pleadings and on clear and convincing evidence,

that a child is abused or neglected as defined in KRS 600.020(1), and that termination would be in the child's best interest. KRS 625.090(2) requires the court to also find, by clear and convincing evidence, the existence of one or more of several enumerated grounds for termination, including in pertinent part:

> (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
>
> . . . .
>
> (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;
>
> (f) That the parent has caused or allowed the child to be sexually abused or exploited;
>
> (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child; [or]
>
> (h) That:
>
> (1) The parent's parental rights to another child have been involuntarily terminated;
> (2) The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
> (3) The conditions or factors which were the basis for the previous termination finding have not been corrected[.]

KRS 625.090(3) requires the circuit court to consider certain factors when determining a child's best interest and the existence of grounds for termination, including

> (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
>
> (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;
>
> (d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;
>
> (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered[.]

Finally, KRS 610.127(4) specifies that the "circumstances enumerated in KRS 610.127 for not requiring reasonable efforts" may include a determination that a parent has "[h]ad their parental rights to another child terminated involuntarily[.]"

Our review of the record, including the videotape of the hearing, demonstrates that clear and convincing evidence regarding the Cabinet's services and reasonable efforts, appellant's efforts, and the child's circumstances supported the trial court's finding that the child was neglected, and that the child's best interest justified TPR based on the grounds set out in KRS 625.090(2)(e), (f) and (h). Since appellant's parental rights to two older children were involuntarily terminated before G.N.J. was born, the

usual requirement that the Cabinet show reasonable efforts before the circuit court could terminate appellant's parental rights to G.N.J. did not apply. KRS 625.127(4) and KRS 625.090(3)(c). Further, as appellant raised no constitutional challenges below, her statutory constitutional challenges on appeal are not properly before us.

Finally, we cannot grant appellant's pending motion seeking to clarify and present on appeal new evidence in the form of expert testimony and testimony "about a current relationship." On March 28, 2007, the motion was passed to the panel determining the merits of this appeal. Our review of the record demonstrates that appellant was vigorously represented by counsel below. She testified and was provided the opportunity to present witnesses on her own behalf. At no point did she request a continuance or seek supplementation of the record. As this court is limited on appeal to reviewing the record as presented and tried in the court below, appellant's motion to clarify and to present new evidence cannot be granted. *See Stuber v. Snyder's Comm.,* 261 Ky. 338, 87 S.W.2d 614, 617 (1935). It is therefore ORDERED that the motion be DENIED.

The circuit court's judgment is affirmed.

ALL CONCUR.

ENTERED: August 10, 2007 /s/ L B VanMeter
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

P.W., *Pro se*
Mayfield, Kentucky

BRIEF FOR APPELLEE:

Dilissa G. Milburn
Cabinet for Health and Family Services
Mayfield, Kentucky