

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000424-ME

A.K.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT, FAMILY DIVISION
v. HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 06-J-503893-002

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH & FAMILY SERVICES
AND F.J., MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: HOWARD,¹ NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: A.K. brings this appeal from a January 24, 2007, order of the Jefferson Circuit Court, Family Division, placing physical custody of A.K.'s biological child, F.J., with the maternal grandmother and granting A.K. supervised visitation. We affirm.

¹ Judge Howard concurred in this opinion prior to Judge Michael Caperton being sworn in on December 7, 2007 as Judge of the Third Appellate District, Division 1. Release of this opinion was delayed by administrative handling.

On July 10, 2006, the Commonwealth of Kentucky, Cabinet for Health and Family Services, (Cabinet) filed a petition for dependency, neglect, and abuse, (original petition) as to the minor child, F.J., in the Jefferson Circuit Court, Family Division. The Cabinet alleged that the child's biological mother, A.K., had abused or allowed others to abuse F.J. In its petition, the Cabinet particularly alleged:

On July 6, 2006 an ECO [Emergency Custody Order] was obtained on the above named [F.J.] based on the following: On 7/6/06, [A.K.] reported to Affiant that while she was bathing [F.J.], she observed MU [maternal uncle] watching from doorway, dressed in boxer short, and masturbating. MU is [G.L.] and he resides in the home. [A.K.] reported MU drinks alcohol daily. Further, [A.K.] reported [F.J.] has been "pooping in her pants" and this is a new behavior of appx[.] "1 week or so." [A.K.] reported [F.J.] is crying and screaming when she attempts to clean [F.J.'s] anal area and she observed redness in area. [A.K.] is observed to have anger control issues and functioning below normal level; requires a payee for her SSI [social security income]. Further, [F.J.] is developmentally delayed and nonverbal. [F.J.'s] level of functioning is observed to be appx[.] 2 y/o range. On 7/6/06, Affiant instructed [A.K.] to bring [F.J.] to Children's First for SA exam. During clinical interview [A.K.] reported having observed additional incident involving same MU; MU sitting on bed with [F.J.] facing him as [F.J.] stood with her underwear pulled down to ankles and her shirt pulled up to shoulders. [A.K.] reported [F.J.] is having nightmares, enuresis, and encopresis on a daily basis[.] Further, [A.K.] reported a neighbor recently found [F.J.] appx[.] 2 blocks from home. [A.K.] reported upon [F.J.] being returned she was unaware of how long [F.J.] had been away from home due to her not realizing [F.J.] was gone until neighbor returned her.

[F.J.'s] physical exam at Children's First is reported as "suspicious" due to observed injuries to anal area, which include: infection present with dry and open sores, 2 significant splits to skin, swelling, redness, pain, and STD

culture ordered to rule out Herpes. Results from culture are pending but doctor has already prescribed topical and oral medications to address the observed “infection in [F.J.'s] anal area.” Further, doctor reported [F.J.] has numerous “insect bites, probably fleas” over both legs, which appeared to be infected and untreated. [A.K.] reported she believed MU has not harmed [F.J.] and was unable to explain doctor's observations during [F.J.'s] physical exam, [F.J.'s] recent behaviors, or MU's intentions based on her reports. Further, [A.K.] reported she has not sought any medical attention for [F.J.'s] anal injuries, infections, and soreness even though she has been aware of these prior to Children's First exam. [F.J.] was observed to walk and sit with difficulty and pain. CACU referral has been submitted.

The above allegations occurred during an active investigation due to a prior report made on 5/31/06, which alleged; [A.K.] came to caller's home, with [F.J.], and broke out a window in caller's home. [A.K.] threw a wooden board and broke window which [F.J.] was standing in harm's way. Further [A.K.] leaves [F.J.] home alone while she goes to bingo. [F.J.] cannot talk and still wears diapers. Caller feels [F.J.] is being neglected. Caller strongly believes [A.K.] is making [F.J.] perform sex acts for drugs. Caller has no evidence for aforementioned claim. Further, [A.K.] calls [F.J.] “N” word and verbally abuses [F.J.] regularly.

On July 11, 2006, the court placed F.J. in the temporary custody of the Cabinet and granted A.K. supervised visitation. The court appointed F.J. a *guardian ad litem* and appointed A.K. counsel. In the July 11, 2006, order, the court specifically set the next hearing for August 30, 2006.

At the August 30, 2006, hearing, A.K. moved to dismiss the petition under Kentucky Revised Statutes (KRS) 620.090(5). Specifically, A.K. argued that KRS 620.090(5) required a final disposition within forty-five days after the child's removal from the home. In this case, A.K. maintained that the the forty-five day time limit in

KRS 620.090(5) expired, thus mandating dismissal of the petition. By order entered August 30, 2006, the family court dismissed the original petition for failure to comply with the forty-five day time limit of KRS 620.090(5).

On that same day, August 30, 2006, the Cabinet secured an emergency custody order, which placed F.J. in the emergency custody of the Cabinet. On September 1, 2006, the Cabinet filed a second petition for dependency, neglect and abuse as to the minor child, F.J. The Cabinet alleged that the mother of the child, A.K., the putative father, P.J., and the maternal uncle, G.L., abused or allowed others to abuse F.J. A.K. sought dismissal of the second petition. She argued that the second petition merely restated the allegations of abuse contained in the original petition. The family court declined to dismiss the second petition. Following a dispositional hearing, the family court ordered that custody of F.J. be with the maternal grandmother and granted A.K. supervised visitation. This appeal follows.

A.K.'s sole issue on appeal is that the “[c]ourt erred as a matter of law in finding that the Commonwealth could prosecute an identical case after dismissal of the first by the Court.” More specifically, A.K. argues that “dismissal of an action with prejudice precludes another action of the same matter.” A.K. believes that dismissal of the original petition for violation of the forty-five day time limit in KRS 620.090(5) operated to preclude the Cabinet from filing the second petition. Under the circumstances of this case, we disagree.

The original petition was filed on July 10, 2006. In the July 11, 2006, order granting the Cabinet temporary custody of F.J., the court specifically set the next hearing for August 30, 2006. A.K., who was represented by counsel, did not object to the hearing date of August 30, 2006, before expiration of the forty-five day time limit. Instead, at the August 30, 2006, hearing and for the first time, A.K. raised the issue of the forty-five day time limitation in KRS 620.090(5) and moved to dismiss the original petition. We believe A.K.'s failure to object to the hearing date being set outside the forty-five day time limit before expiration thereof constituted a waiver. As such, we conclude that A.K. waived the forty-five day time limit of KRS 620.090(5).

Even if we did not conclude that A.K. had waived the forty-five day hearing requirement under KRS 620.090(5), the dismissal of the first petition was not an “adjudication on the merits” sufficient to preclude the Cabinet's filing of this action. A.K. argues that the issue raised in this case is identical to that in *Commonwealth v. Hicks*, 869 S.W.2d 35 (Ky. 1994), which supports dismissal of this action. We disagree and believe A.K.'s reliance on *Hicks* is totally misplaced. In *Hicks*, the defendant was charged with D.U.I. whereupon the charges were dismissed when the Commonwealth was not prepared to go forward with its case on the day of trial. The trial court in *Hicks* refused to grant a continuance. Upon the subsequent refiling of the D.U.I. charge, the complaint was ultimately dismissed on the grounds of double jeopardy, which barred the subsequent refiling and prosecution of criminal action based on the same charges.

Hicks is clearly distinguishable from this case insofar as it involves criminal charges against an individual defendant, whereas the case before this Court on appeal involves the neglect and abuse of a minor child. The child was not a criminal defendant before the court below and there was no adjudication on the merits of any of the claims asserted in the petition as concerns the alleged neglect or abuse of the child.

The distinction between *Hicks* and this case is further amplified by the stated legislative purpose of the dependency, neglect and abuse statutes as set forth in KRS 620.010, in part, as follows:

Children have certain fundamental rights which must be protected and preserved, including but not limited to, the rights of adequate food, clothing and shelter; the right to be free from physical, sexual or emotional injury or exploitation; the right to develop physically, mentally, and emotionally to their potential; and the right to educational instruction and the right to a secure, stable family. It is further recognized that upon some occasions, in order to protect and preserve the rights and needs of children, it is necessary to remove a child from his or her parents.

The stated purpose of KRS 620.090(5) is without question for the protection of dependent, neglected or abused children. The circumstances surrounding the allegations that gave rise to the petition as concerns the alleged neglect and abuse of F.J. were not resolved on the dismissal of the first petition. Since there was no adjudication on the merits at the time of dismissal of the first petition, and the same circumstances giving rise to the neglect or abuse of F.J. continued to exist, we do not believe “double jeopardy” has attached in any form to the subsequent petition filed by the Cabinet in this action.

Similarly, there being no adjudication on the merits, the doctrine of *res judicata* is also

not applicable to these proceedings. *See Yoeman v. Commonwealth*, 983 S.W.2d 459 (Ky. 1998).

For the foregoing reasons, the order of the Jefferson Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John H. Helmers, Jr.
Troy DeMuth
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

John H. Helmers, Jr.
Louisville, Kentucky

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

David A. Sexton
Special Assistant Attorney General
Assistant Jefferson County Attorney
Louisville, Kentucky

BRIEF FOR F.J., MINOR CHILD:

Cathy I. Wallace
Guardian Ad Litem
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE,
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH & FAMILY
SERVICES:

Brandon Yarborough
Assistant Jefferson County Attorney
Louisville, Kentucky