

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2007-CA-001593-ME

COMMONWEALTH OF KENTUCKY, CABINET  
FOR HEALTH AND FAMILY SERVICES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DOLLY W. BERRY, JUDGE  
ACTION NO. 06-AD-500174

D.C.W.R.Z.; AND  
Z.Z.R.Z., A CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: The Kentucky Cabinet for Health and Family Services (Cabinet) appeals from orders entered by the Jefferson Circuit Court, Family Division, denying the Cabinet's petition seeking the involuntary termination of D.C.W.R.Z.'s parental rights to her young child.<sup>1</sup> We affirm.

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<sup>1</sup> The child's father, Z.Z., is a convicted sex offender who has not appealed from the trial court's termination of his parental rights.

The child was born in May 2005 to D.C.W.R.Z. and Z.Z. while D.C.W.R.Z. was incarcerated. Both the mother and the child tested positive for cocaine, and the newborn child was placed in her paternal grandmother's care in Ohio. After the Cabinet was advised by Ohio authorities that the placement was inappropriate and unsafe, an emergency custody order was issued. Cabinet employees retrieved the child and placed her into foster care. She was committed to the Cabinet in March 2006.

In May 2006, the Cabinet filed a petition seeking to terminate the parental rights of D.C.W.R.Z. and Z.Z. A hearing was conducted on March 16, 2007. On May 2, the court entered extensive findings of fact and conclusions of law, including the following:

[D.C.W.R.Z.] is 39 years old and the mother of six children. They range in age from 24 years to two. All but [the child] live either with the maternal grandmother, on their own, or with [D.C.W.R.Z.] (even though the maternal grandmother has legal custody).

[D.C.W.R.Z.] has a significant legal history that goes back to 1991. Most of the charges involve shoplifting, criminal possession of a forged instrument, and she has drug-related offenses. She has been in and out of prison the last several years. She had a parole violation in May 2005 for a "dirty urine" that sent her to KCIW. In November 2005, she was transferred to Otter Creek.

[D.C.W.R.Z.] was paroled in August 2006.

From the beginning, there was substantial conflict between [D.C.W.R.Z.] and social services. [D.C.W.R.Z.] claims that the Cabinet refused to respond to most of her correspondence regarding her child. She actively pursued visitation, even while incarcerated. Her family members actively campaigned for placement of the child. [D.C.W.R.Z.] was convinced that her baby had been "given" to a specific foster family (a woman who had worked in the corrections department who "befriended" [D.C.W.R.Z.]

there) with the goal of adoption and all efforts at relative placement and reunification were merely cursory.

The Cabinet's ability to assess [D.C.W.R.Z.'s] treatment progress was thwarted by the on-going worker's illness (Ms. Holt was off work for approximately eight months) and [D.C.W.R.Z.'s] refusal to cooperate.

The treatment plan for [D.C.W.R.Z.] was for her to remain clean and sober, discontinue her "criminal lifestyle," obtain appropriate housing and employment, complete parenting classes, cooperate with Probation and Parole (to ensure that she would not be re-incarcerated), and successfully support herself and her child financially and otherwise.

While incarcerated, [D.C.W.R.Z.] attended parenting classes, began taking college-level courses, attended substance abuse treatment and domestic violence classes. When she was released, she had a JADAC assessment but was told that since Probation and Parole already had her set up with Seven Counties' Services, she should continue her treatment there. Since September 2006, she had been in a dual-diagnosis program bi-weekly addressing her mental health and substance abuse issues. [D.C.W.R.Z.] said she is regularly drug tested and has consistently been clean.

[D.C.W.R.Z.] has never signed releases for the Cabinet so that they could verify her compliance with treatment.

Ms. Holt indicated that she had not had any interviews with [D.C.W.R.Z.] since she (Ms. Holt) had returned to work, but she said [D.C.W.R.Z.] was very consistent with visiting the baby and did a good job of caring for the child while there. There are also regular, well-attended visits for the siblings of [the child] and the maternal relatives with the child.

Since her release from prison in August 2006, [D.C.W.R.Z.] has obtained stable housing, and two of her children are living with her (even though the maternal grandmother is the legal custodian). She works part-time for an attorney as an "assistant," and she is working on other ways of increasing her income. She visits with [the child] as often as allowed. She has repeatedly tried to increase the amount of contact for herself and her family. She has

separated from [Z.Z.] and intends to get a divorce so that she can regain custody of [the child].

(After her release, [D.C.W.R.Z.] was charged with Harassment and Harassing Communications by the foster parents for acts that occurred while [D.C.W.R.Z.] was incarcerated. A jury trial resulted in a guilty finding.)

.....

The maternal relatives, specifically the maternal grandmother, have actively pursued contact with [the child]. The maternal grandmother has legal custody of three of the child's siblings. There is some dispute over whether she initially refused to take custody of [the child] as well as if other maternal relatives vacillated on assuming custody. Regardless, the maternal relatives have consistently visited with the child and expressed interest in obtaining custody if the child is not returned to her mother.

[The child] has remained in the same foster home since she was placed there in June 2005. She is reportedly thriving. She may have asthma and receives breathing treatment. By all accounts, she is doing very well, and there is a strong likelihood that this family would adopt her if parental rights are terminated.

#### Conclusions of Law

.....

In this matter, the parents stipulated to the abuse and/or neglect of [the child] on October 13, 2005. She has, therefore, been adjudged to be an abused or neglected child as defined in KRS 600.020(1) by a court of competent jurisdiction. Since the child has been in the same foster home for most of her life, there is a strong argument that it would be in [the child's] best interest to remain with the family with whom she has bonded.

However, KRS 625.090(3) states that in determining the best interest of the child and the existence of a ground for termination, the Court is to consider "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.” The Court is also to consider testimony concerning [“]reunification services offered by the Cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.” [Footnote to KRS 625.090(4).]

KRS 625.090(2) also requires that the Court, in a situation where there has been no injury to or abandonment of a child, make specific findings about the “reasonable expectation of improvement in parental conduct.”

Due to the serious nature of termination of parental rights, very specific findings must be made. The Court cannot find that any of the grounds enumerated in KRS 625.090(2) have been proven against either parent by a clear and convincing standard. [D.C.W.R.Z.] has been out of prison since August 2006, and she appears to be making substantial progress. She is currently substance-free and employed. Her mother has allowed two of [D.C.W.R.Z.’s] children to return to their mother’s home. While there are no guarantees, if [D.C.W.R.Z.] can remain out of prison, there is no reason she could not parent [the child]. She has the support of a large family that has assisted her with raising her children in the past. She is actively involved in treatment services.

.....

What is most regrettable is that the child has been in what appears to be an appropriate, loving home with the foster parents for such a long time. Legitimate efforts directed toward reunification should have been made immediately upon [D.C.W.R.Z.’s] release from incarceration or as soon as (or everytime) a viable relative was available. As difficult as [D.C.W.R.Z.] has been, the Cabinet still had an obligation to pursue reunification or relative placement until they were no longer options. It is not simply a choice of who could provide a better home for the child. The involuntary termination statutes are very clear as to what must be proven.

The court dismissed the termination petition and ordered the child to remain committed to the Cabinet. The court directed that a transition schedule should be implemented, that

all parties should cooperate, and that the child should return to D.C.W.R.Z.'s custody as soon as appropriate "and upon verification that there are no safety concerns."

On August 1, 2007, the court altered the May 2 order to the extent necessary to terminate the parental rights of Z.Z. The court directed that "[a]ll other portions of the Order remain unaltered." Further, the court supplemented its previous order, finding that the child had remained in the same "concurrent planning" foster home since she was three weeks old, and that:

Since the beginning of the Cabinet's involvement with this child, there has been a dispute between the Cabinet and the family members concerning relative placement. Relatives came to the hearings on the dependency/neglect petition, requesting that they be considered as temporary custodians for the child. The Cabinet indicated that they had considered the relatives and deemed them inappropriate. There were also allegations that the foster mother had known the birth mother prior to [the child's] birth and had acted as a type of "counselor" to her in the Corrections department. The birth mother believed the Cabinet was a party to a conspiracy to keep her baby with this particular foster family so that they could adopt her child. Ultimately, a formal complaint was filed with internal affairs, and the foster mother was cleared of any wrongdoing. The foster parents also allegedly called the child by a different name than her birth name, further inciting the biological relatives.

The birth mother had an extremely poor relationship with her social worker. [D.C.W.R.Z.] is paranoid, refused to sign releases, or cooperate on any significant level. She wanted her child with her relatives, and she would constantly attempt to communicate regarding placement and visitation, even while she was incarcerated.

The Cabinet's efforts to address reunification were hampered by the ongoing social worker's extended absence due to illness. Even though a supervisor assumed responsibility for the case, all indications are that there was little, if any, contact with the biological family during this eight-month stretch. The child was reportedly doing quite well. But, the mother was released from incarceration during

this time. . . . There were issues involving family visitation which were brought to court, but other than that, there is no indication that the Cabinet made any steps to try to reunify the child with her mother or place the child back with family in anticipation of the mother's return of custody. (It is significant that the maternal grandmother had always been approved for placement of the mother's children in the past. In fact, at the time of the petition, the maternal grandmother had custody of three of [D.C.W.R.Z.'s] children.)

The Cabinet changed the goal from reunification to adoption in late February 2006.

[D.C.W.R.Z.] was released from custody in August 2006. The on-going social worker was on medical leave from July 2006 until March 2007; however, she said she stayed in close contact with her supervisor. The social worker also admitted that, since returning to work in March, she had not contacted [D.C.W.R.Z.].

The worker was unaware at trial if [D.C.W.R.Z.] had complied with her treatment plan. The treatment goals had been for [D.C.W.R.Z.] to remain clean and sober, complete substance abuse treatment, have appropriate housing, employment, complete parenting classes, comply with probation and parole, have no further criminal activity, remain out of incarceration, and be capable of financially supporting the child.

[D.C.W.R.Z.] had refused on several occasions to sign releases to enable the Cabinet to monitor her compliance with treatment goals. She said she was afraid they would manipulate anything they had so that it would be used against her.

At trial, [D.C.W.R.Z.] testified that of her six children, only [the child] was in foster care. Two of her children were currently living with her, although they were in the legal custody of her mother. She said they were doing very well, and her mother verified that she saw the family daily. [D.C.W.R.Z.] stated that she could not always get responses or answers to her calls and letters. She said she wrote asking for information about her child and said the Cabinet would not communicate with her.

While incarcerated, [D.C.W.R.Z.] attended parenting classes, domestic violence classes, and substance abuse classes. Since her release in August, she had a JADAC assessment, but Probation & Parole already had her set up with 7 Counties and a dual diagnosis counselor. She said she had continued to see her counselor every other week for paranoia and substance abuse issues. She is working, has passed all her drug screens, and has maintained visitation. The social worker reported that all visits with [the child] went well.

[D.C.W.R.Z.] contacted the foster parents repeatedly by telephone while she was incarcerated. After her release, there was an incident where she photographed their home. She was charged with Harassing Communications and Harassment. She was sentenced to 60 days to serve, beginning on April 5, 2007, which ran with a concurrent parole violation. Other than the ongoing problems with the foster family, she has not had any new criminal charges.

The basis for the Cabinet's motion is that [D.C.W.R.Z.] continues her "criminal lifestyle" and she is, therefore, unavailable to provide for her child's needs. The child has been in a loving, appropriate home for most of her life and the foster family would likely adopt the child if termination were granted.

As stated in the original Findings of Facts and Conclusions of Law, KRS 625.090(2) states that termination shall not be ordered unless specific grounds are found. In this case, the only grounds that could apply to [D.C.W.R.Z.] are in subsection (e): "That the parent, for a period of not less than six months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential care and protection for the child and there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;" or subsection (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."

The Court has carefully reviewed the trial testimony and motion to alter, amend or vacate. This has been an especially difficult case. The animosity between the birth parents and the Cabinet and foster parents has hampered efforts to reunify and monitor progress. The relationship, whatever it may have been, between the foster mother and the birth mother prior to the child's birth casts an "appearance of impropriety" over the child's placement in that home. [D.C.W.R.Z.'s] paranoia about the Cabinet's actions and her incessant attempts to force contact with her child have worked against her.

Regardless, the Court cannot find that either KRS 625.090(2)(e) or (g) are grounds for termination of [D.C.W.R.Z.'s] parental rights. While her lack of cooperation clearly hindered the Cabinet's verification of her compliance, the evidence was that she had complied with the treatment plan. The Court cannot find, by a clear and convincing standard, that there is no reasonable expectation of improvement in her ability to provide parental care and protection, or that there is no reasonable expectation of significant improvement in her parental conduct. While there is a valid argument that a strict "best interests" finding might require that [the child] remain in her current placement (given the length of time she had been there), the Court believes that there have been less restrictive placements available that would have provided the child with much greater access to her mother for some time.

This appeal followed.

The Cabinet contends that the trial court erred by failing to find that clear and convincing evidence showed that the statutory requirements were satisfied, that there was no "reasonable expectation of significant improvement in the immediately foreseeable future," and that D.C.W.R.Z.'s parental rights should be terminated. *See* KRS 625.090. *See also Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). However, our review of the entire record, including the videotape of the March 2007 hearing, demonstrates that substantial evidence supports the trial court's

findings of fact. In view of those findings, the trial court did not err by denying the Cabinet's petition to terminate D.C.W.R.Z.'s parental rights. *See* CR 52.01.

KRS 625.090 permits a circuit court to involuntarily terminate parental rights only if it finds "from the pleadings and by clear and convincing evidence" that the child is abused or neglected as defined in KRS 600.020(1), and that termination would be in the child's best interest. The child's best interest must be determined in light of the factors set out in KRS 625.090(3), which for purposes of this proceeding include consideration of both the Cabinet's reasonable efforts to reunite the child with the parent, and the parent's efforts to make reunification be in the child's best interest. KRS 625.090(3)(c) and (d). Further, even if the court finds that the child was abused or neglected, and that termination would be in the child's best interest, parental rights may not be involuntarily terminated unless the court also finds the existence of one or more of the grounds set out in KRS 625.090(2). As noted by the trial court, for purposes of this proceeding the relevant grounds are:

(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;

. . . [or]

(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[.]

KRS 625.090(2).

Here, as the trial court noted, in October 2005 the parents stipulated to abusing and/or neglecting the child. Further, the record supports the trial court's comment that "a strong argument" exists that it would be in the child's best interest to remain with the foster family with whom she has lived and bonded since the age of three weeks. Nevertheless, the record also supports the trial court's finding that clear and convincing evidence did not show the absence of a reasonable expectation of significant improvement in D.C.W.R.Z.'s efforts and conduct, so as to permit the termination of her parental rights. KRS 625.090(2)( e) and (g).

Although it was undisputed that she used drugs during her pregnancy and was imprisoned at the time of the child's birth, D.C.W.R.Z. adduced substantial evidence to support the trial court's finding that "she appears to be making substantial progress." As noted by the court, at the time of the hearing D.C.W.R.Z. was employed and substance-free. Two of her children had been permitted to return to her home, she was actively involved in treatment services, and multiple family members were available to provide support. Moreover, evidence in the record showed that D.C.W.R.Z. visited with the child as often as possible, that she interacted appropriately with the child, and that she had complied with the requirements of the Cabinet's treatment plan. The court found that "[w]hile there are no guarantees, if [D.C.W.R.Z.] can remain out of prison, there is no reason she could not parent" the child. Further, the court found that the Cabinet had not satisfied its "obligation to pursue reunification or relative placement until they were no longer options." *See* KRS 625.090(3)(c) and 625.090(4). As stated by the trial court, "[t]his has been an especially difficult case." However, substantial evidence supported

the court's finding that there was not clear and convincing evidence to show the absence of a reasonable expectation of significantly improved parental conduct, and the court did not err by dismissing the termination petition against D.C.W.R.Z.

The court's order is affirmed.

ALL CONCUR.

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