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COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2022-SC-0383-DE
COURT OF APPEALS CASE NO. 2021-CA-1249-ME

COMMONWEALTH OF KENTUCKY,
 CABINET FOR HEALTH AND FAMILY SERVICES, ET AL.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. GINA K. CALVERT
ACTION NO. 21-AD-500216T

V.

M.Q.M., et. al.

APPELLEES

BRIEF OF APPELLANT,
CABINET FOR HEALTH & FAMILY SERVICES

Respectfully submitted,

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CERTIFICATE OF SERVICE

The above-signed, as counsel for the Appellee, Cabinet for Health & Family Services, hereby certifies that this Brief for the Appellant has been served upon the following: Hon. Joseph Elder, Hon. Pamela Workhoven, Hon. Judge Gina G. Calvert, Kentucky Court of Appeals Clerk, on this 10th day of April 2023. The Appellant further certifies that the certified record was not withdrawn.

INTRODUCTION

This case asks whether a non-custodial parent, who is not named as an alleged perpetrator of abuse or neglect, is entitled to appointed counsel in a dependency, neglect, or abuse action, such that failure to do so results in a due process violation in any subsequent termination of parental rights action, requiring reversal of judgment in the termination action. The Court of Appeals mechanically applied case law in an overly broad manner, contrary to this Court's guidance and other decisions of the Court of Appeals. Its order should thus be reversed, and the trial court's judgment be reinstated.

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Appellant respectfully defers to the sound discretion of this Court on whether oral argument would be beneficial to the Court's exploration of the statutory framework, and constitutional issues at stake.

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STATEMENT OF THE CASE

In May 2021, the Cabinet filed a petition to involuntarily terminate M.Q.M.'s ("father") parental rights to his child, and, on September 16, 2021, the Jefferson Circuit Court held a final hearing. Father was personally served with the petition, attended the termination hearing, and was appointed counsel to represent him at all times during these proceedings.

The Cabinet first became involved with the family in 2012 when the child's mother and her paramour were involved in a domestic violence incident where the child was injured. An emergency custody order issued on April 9, 2012, placing child in emergency custody of the Cabinet. Father was not a named perpetrator in the neglect petition but was appointed counsel. He was later given unsupervised visits with the child. Father was also asked to drug screen but he failed to comply.

In November 2013, the child was placed in the custody of an aunt. Father agreed with this placement decision instead of seeking placement himself. In August 2015, the relative placement filed a dependency petition stating she was no longer willing or able to maintain custody, so child was placed with the maternal grandmother. Father was not named as a perpetrator in the August 2015 action as he was incarcerated. The maternal grandmother was awarded permanent custody in August 2016. Father remained incarcerated at that time, and he agreed to the permanent custody arrangements.

In July 2019, a third petition was filed alleging neglect by maternal grandmother and mother, and then in September 2019, the child entered the Cabinet's custody after a

fourth petition was filed. Father was not named as a perpetrator in either petition, and thus not appointed an attorney. The child has remained in the Cabinet's custody continuously since September 2019. Moreover, the child has never resided with father, and father has never stepped forward to assert any custodial rights to the child.

After the child entered foster care, the Cabinet made efforts to engage father in services. In April 2020, father received a case plan, but he failed to complete any of the tasks. In May 2021, the Cabinet attempted to facilitate therapeutic visits between father and the child. However, he failed to stay in regular contact with the worker, and did not regularly attend court proceedings.

At the conclusion of the termination hearing, the trial court entered findings of fact and conclusions of law, and an order and judgment for the child. The court made specific factual findings that the child was adjudged to be a neglected or abused child in the termination action by clear and convincing evidence. Specifically, the trial court found father failed to provide any type of essential parental care for the child since 2012 (KRS 600.020(1)(a)(4)); failed to maintain contact or visit with his child for years until the Cabinet initiated therapeutic visits (KRS 600.020(1)(a)(7)); failed to comply with court orders or complete any case plan tasks, including drug screen, substance abuse evaluation and treatment, mental health treatment, and parenting classes (KRS 600.020(1)(a)(4)); engaged in a history of criminal convictions involving violent offenses and drug offenses and tested positive for marijuana and oxycodone (KRS 600.020(1)(a)(3)); and, did not provide adequate housing or financial support care (KRS 600.020(1)(a)(8)).

On appeal, father argued the termination should be overturned as he was not appointed counsel during the neglect proceedings, specifically the goal change hearing, and thus his due process rights were violated. There is no dispute that father was a noncustodial parent in each of the four petitions filed and was not a named perpetrator of abuse or neglect. At the time each petition was filed, father was either incarcerated, about to be incarcerated, or agreed to his child being placed in the custody of a relative. Accordingly, after the initial DNA action, he was not appointed an attorney until the termination of parental rights petition was filed in 2021. Despite those facts, the Court of Appeals agreed with father and reversed the trial court, finding father was entitled to counsel at the “goal change” hearing despite being a noncustodial parent.

The Cabinet timely moved for discretionary review, which this Court granted on February 8, 2023.

ARGUMENT

I. KENTUCKY LAW PROVIDES A STATUTORY RIGHT TO COUNSEL IN TPR ACTIONS, AND FOR CUSTODIAL PARENTS IN DEPENDENCY, NEGLECT, AND ABUSE ACTIONS.

Kentucky law provides for the routine appointment of counsel for parents in some, but not all, child welfare proceedings. This includes both involuntary termination of parental rights actions, and juvenile dependency, neglect, and abuse (DNA) actions. In termination of parental rights (TPR) proceedings, the trial court must determine whether a parent is indigent pursuant to KRS Chapter 31. If so, the court must inform

the parents of their eligibility for appointed counsel, paid for by the Finance and Administration Cabinet. KRS 625.080(3).

A similar provision is made for parents in DNA actions. Pursuant to KRS 620.100(1)(b), if the court determines further proceedings beyond a temporary removal hearing are required, it shall advise the parent or other person exercising custodial control or supervision of their right to appointment of separate counsel. “The court shall appoint separate counsel for the parent who exercises custodial control or supervision if the parent is unable to afford counsel pursuant to KRS Chapter 31.”

As the plain language makes clear, the appointment of counsel in either type of proceeding is not intended to be automatic. Rather, there are two limiting principles. First, for both types of proceedings, the parent must be found indigent to qualify for appointed counsel. It follows that a parent generally must appear in court, or at least complete an affidavit of indigency, to allow the court to make the necessary inquiry and finding. Otherwise, the court would have no basis to determine whether the parent is indigent.

The second limitation is regarding DNA actions. In those cases, the provision of appointed counsel only applies to “the parent who exercises custodial control or supervision.” The legislature’s clear intent was that indigent custodial parents would have access to court-appointed counsel. Conversely, noncustodial parents are not provided appointed counsel.

The language evidences a clear intent by the legislature to provide appointed counsel only to those parents with custodial control or supervision of the child. This

distinction recognizes that a parent’s right to custody is “a protected liberty interest”, and that “when the Commonwealth moves to intervene in the parent-child relationship, it must provide the parents with fundamentally fair procedures.” *CHFS v. K.S.*, 610 S.W.3d 205, 212, citing *Troxel v. Granville*, 530 U.S. 57, 65, (2000), and *CHFS v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014), internal quotations omitted. In a DNA action, there is a direct intervention of the parent-child relationship and the custodial interest of the parent who has custody or supervision. The same cannot be said for parents who did not have custody prior to commencement of a DNA action.

II. THE STATUTORY SCHEME FOR APPOINTED COUNSEL COMPORTS WITH DUE PROCESS PROTECTION

This Court has not previously been tasked with directly addressing whether a parent has a due process right to appointed counsel in termination of parental rights and other child welfare proceedings. However, the Court discussed the issue in a 2020 case holding that indigent parent have a right to state-funded expert witness under certain circumstances. *CHFS v. K.S.*, *supra*. That discussion is informative to the central issues in this case.

As the *K.S.* court noted, there is no doubt that a parent’s custodial rights are well-established as a protected liberty interest. As a result, interference with the parent-child relationship requires fundamentally fair procedures. The court went on to explain that “[t]wo strands of case law – one federal and one unique to Kentucky – define the scope of procedural protections afforded to parents in child welfare proceedings.” *Id.* at 212. The court pointed out that the United States Supreme Court has held that the state

must show that a parent is unfit before placing a child in foster care. *Stanley v. Illinois*, 405 U.S. 645 (1972). Further, a termination of parental rights requires the government prove a parent is unfit by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982).

However, the right to counsel is not absolute. As the K.S. court correctly noted, the US Supreme Court has declined to find a categorical right to counsel in termination of parental rights cases. *Lassiter v. Department of Social Services*, 452 U.S. 18, 31-32. This holding recognized “due process does not lend itself to categorical rules, stating that “[due process] is not a technical conception with a fixed content unrelated to time, place, and circumstances” *K.S.*, supra at 213, (internal quotations omitted). Therefore, *Lassiter* counsels that due process requirements for appointed counsel is determined on a case-by-case basis by the trial court, based on the facts and circumstances of each case.

Of course, in lieu of a case-by-case analysis by the trial judge, Kentucky has opted to provide indigent parents appointed counsel in all termination cases. As previously discussed, it has done the same for custodial parents in DNA cases. The application of this statutory framework leads to the Kentucky line of cases regarding the scope of a parent’s right to counsel.

In *R.V. v. Dept. for Health & Family Svcs.*, the Court of Appeals reversed a judgment terminating parental rights. 242 S.W.3d 669 (Ky. App. 2007). During the underlying DNA action, the district court appointed counsel for each parent. At a later review hearing,

the court relieved both attorneys from further obligation. Subsequently, the court held a permanency hearing. At that hearing, the court made an erroneous finding that the child had been in foster care for 15 of the last 22 months, and changed the permanency goal to adoption. *Id.*, at 670.

In its review of the termination action, the Court of Appeals first held that “the custodial parent or parents [are] absolutely entitled to counsel in both” DNA and TPR actions. It further held “that the parental rights of a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings. This includes all critical stages of an underlying dependency proceeding..., unless it can be shown that such proceeding had no effect on the subsequent” TPR. *Id.*, at 673. Applying this rule, the Court of Appeals stated that it was unable to find that the lack of representation in the DNA action in that case had no effect on the TPR – citing the district court’s erroneous factual finding that was “directly significant” to the TPR. *Id.*

Analyzing both the federal and Kentucky cases, the *K.S.* court identified three general principles. *Supra*, at 214.

First, a parent’s right to custody and care of his or her children is a uniquely important liberty interest. Second, federal and state courts, in response to the special nature of this liberty interest, impart significant procedural protections to parents in child welfare proceedings. While these procedures are less protective than criminal proceedings in which physical liberty is at stake, they are more significant than cases involving property rights. Third, process depends on context. The foundational principle of procedural due process—fundamental fairness—requires courts to resist mechanical application of its prior case law. Instead, courts must appraise the value of specific procedures in light of the particular facts of the case.

These principles, elucidated by this Court in 2020, illustrate that Kentucky's statutory scheme for appointed counsel in child welfare cases comports with due process. Starting with the last principle, the context of a DNA action is that the Commonwealth is stepping in and generally asking the court to intervene in the parent-child relationship. Very often these cases involve one parent that is exercising custodial control or supervision, and another that is not. The statute recognizes this contextual difference. By providing appointed counsel to the indigent custodial parent, it ensures that parent's "uniquely important liberty interest" in custody is guarded. Conversely, a DNA action does not interfere with the custodial interest of a parent who is not exercising custodial control or supervision prior to state action. In that context, there is no state interference in that parent's right to custody and care of his child. The liberty interest at stake is thus vastly different.

Naturally, the context of a termination of parental rights requires a different balance. In those actions, a judgment against a parent severs the parent-child relationship permanently. The parent loses any ability to seek custody or timesharing in the future, along with all parental authority. Thus, there is a much greater liberty interest at stake. In this context, the *K.S.* guiding principles suggests at least a heightened sensitivity to procedural protections for parents. Even still, as both *Lassiter* and *K.S.* inform us, due process does not absolutely mandate appointed counsel in all such cases. Due process would suggest that a trial court must consider the question "in light of the particular facts of the case." *Id.*

The Kentucky legislature, in its wisdom, has removed that burden from the trial court by choosing to provide appointed counsel to all indigent parents in TPR actions. This legislative decision, however, should not lead the courts to extend protections beyond the legislative intent by creating new categorical rules. Doing so is exactly what *K.S.* warned courts not to do, when it said “due process requires courts to resist mechanical application of its prior case law.” *Id.*

III. THE *R.V.* RULE ADEQUATELY BALANCES THE NATURE OF THE LIBERTY INTEREST WHILE AVOIDING UNNECESSARY MECHANICAL APPLICATION.

The general rule of *R.V.*, when applied appropriately, adequately balances the significant liberty interest of a TPR, while avoiding an unnecessary “mechanical application” of case law. In that case, there was no dispute about whether the parents were entitled to appointed counsel in the underlying DNA case, or in the TPR action itself. This is clear because when the DNA action commenced, the court appointed counsel for both parents pursuant to KRS 620.100(1)(b). The issue arose when the court relieved counsel of their duties while the case remained active. Thus, the *R.V.* court started with recognizing that “the custodial parent or parents were absolutely entitled to counsel in both the [DNA case] and [TPR case].” *Supra*, at 672. The question before the court was not about eligibility for appointed counsel in a DNA case, but about the scope of duties of said counsel.

Therefore, any suggestion that *R.V.* requires appointment of counsel for noncustodial parents in a DNA action is erroneous. Given that the application to noncustodial parents was unnecessary to resolve that case, there was no need for that

court to reach that question, and it did not do so. Further, the *R.V.* court recognized the distinct eligibility requirements for the statutory right of appointed counsel in DNA actions, as opposed to TPR actions. If the ruling applied to noncustodial parents in DNA actions, it would have created a *new* categorical right to appointed counsel for all parents in those cases. Doing so would have exceeded the legislative intent. Furthermore, as *Lassiter* made clear, there is no such categorical right in TPR actions. Given that, it would simply be untenable to find such a right in a DNA action. Such a position would also defy the *K.S.* principles that warn against categorical rules and mechanical applications. To be consistent with those same principles, this Court should adopt *R.V.* to only apply to custodial parents in DNA actions.

A close look at the *R.V.* holding also reveals another way that it sought to avoid a mechanical application of its rules. The court first found that an indigent custodial parent's right to counsel in a DNA action includes all critical stages of that action. It went on to say that where that right is violated, that parent's rights to a child may not be terminated "unless it can be shown that such proceeding had no effect on the subsequent termination case." *Id.*, at 673.

The quoted portion is critical because it means that a failure concerning appointed counsel in a DNA action is not automatically fatal to a termination of parental rights. This approach prevents a mechanical application of the rule. Although the *R.V.* court didn't label it as such, the exception also makes sense as an application of the harmless error rule pursuant to CR 61.01:

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.

“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). If, as the *R.V.* court articulated it, the lack of counsel during a DNA proceeding had no effect on the TPR, it is another way of saying the result would have been the same. It is indeed a harmless error.

IV. The Court of Appeals holding in this case erroneously extends *R.V.*, creating an overly broad interpretation and mechanical application.

Turning to the instant case, the Court of Appeals created an overly broad interpretation of *R.V.* In so doing, it applied *R.V.* in a way that creates a categorical right where none exists, and mechanically applies case law inconsistent with this Court’s guidance in *K.S.*

First, the court below interprets *R.V.* to necessarily apply to noncustodial parents. The panel acknowledged that the *R.V.* court referred to custodial parents at one point, but states that “this court does not continue such distinction throughout its holdings in that opinion”. Opinion below, *at 4*. The panel goes on to say that “severance of the parent/child relationship would apply to all parents – custodial and noncustodial –

because non-custodial parents' rights must also be terminated to finalize an adoption.”

Id.

This view is inexplicably contrary to other decisions by the Court of Appeals. Most notably, *B.L. v. J.S.* is a published case by a noncustodial father challenging an involuntary judgment of adoption because he was not appointed counsel in the underlying DNA action. 434 S.W.3d 61,66 (Ky. App. 2014). Finding first that the *R.V.* standards apply to parents whose rights are terminated via an adoption, the court found no error. Father was determined not to be exercising custodial control or supervision of the child. “Therefore, we conclude that the trial court was not required to appoint counsel for Biological Father during the neglect proceedings and there was no error mandating reversal of the adoption based on this issue.” *Id.*

In another case, “[b]ecause father was not the custodian from whose home child was removed in the DNA action and no findings from the DNA action were used against father, father is incorrect that he was entitled to court-appointed counsel in the DNA case.” *A.M.S. v. CHFS*, 2020-CA-0616-ME (Ky. Ap. 2021)(unpublished). Similarly, in *R.R. v. CHFS*, a father appealed a TPR action based on failure of the court to appoint counsel in the DNA action. In affirming the judgment, the Court of Appeals found that because father was a noncustodial parent, he was not deprived of due process in the DNA action. 2013-CA-000175-ME (Ky. Ap. 2013)(unpublished).

Finally, on February 10, 2023, the Court of Appeals decided *M.P. v. CHFS*. Much like the instant case, a neglect action was filed against mother. Father was not accused of

neglect or abuse, and did not have custody of the child. After a judgment terminating parental rights, father appealed. The Court of Appeals cited *B.L.*, noting that “[o]ur case law is clear that counsel need not be appointed for a parent in DNA proceedings when that parent has not been accused of neglect or abuse and is not the custodial parent.” 2021-CA-0927-Me, 12 (Ky. Ap. 2023)(unpublished).

Despite this “clear” case law, the panel in this action took the opposite approach. Where the *R.V.* court struck a balance, the result of the panel’s position in this case would be a new categorical rule in sharp contrast from precedents in both federal and state courts. As stated herein and acknowledged by *R.V.*, the DNA statutes provide appointed counsel only to indigent custodial parents. The panel’s application creates an absolute right that exceeds the statutory mandate, and flies in the face of the *K.S.* principle of disfavoring mechanical application of case law. Further, since case law makes clear that there is no absolute due process right in the context a termination of parental rights action, there must not be one in a DNA action.

In this case, the court below also erroneously created a mechanical application of rules in its handling of the *R.V.* exception or harmless error rule. The Cabinet argued that father’s lack of counsel had no impact on the TPR. Instead of analyzing the facts and circumstances of the case, the panel stated that “we cannot reconcile such arguments with this Court’s clear directive in *R.V.*, that permanency hearings, at which the goal is changed to adoption, significantly impact parental rights.”

This view of *R.V.*'s holding is again overly broad and incorrect. The *R.V.* court never articulated a rule that lack of counsel at a permanency hearing is *per se* fatal to a TPR. Instead, after that court identified the rule, it analyzed the permanency hearing in that case, noting the erroneous factual findings made by the district court in that hearing, and found that the "finding was directly significant to the later termination of their parental rights." *Supra*, at 673.

Again, in this case, the panel's treatment of this exception is contrary to other appellate decisions. In determining if DNA proceedings influenced the termination case, the Court of Appeals will uphold termination cases in instances where the trial court does not solely rely on a finding of neglect, in accordance with KRS 625.090(1)(a)(1), but instead makes independent factual findings from the evidence presented in the termination case. See *B.L. v. J.S.*, *supra*; *F.H. v. CHFS*, 2018-CA-000755-ME, (Ky. App. 2019)(unpublished); *L.S.C. v. CHFS*, 2019-CA-001530, (Ky. App. 2020)(unpublished), and; *A.M.S. v. CHFS*, 2020-CA-0616 at 23(Ky. App. 2021)(unpublished).

In this case, the trial court made specific factual findings that the child was adjudged to be a neglected or abused child in the termination action by clear and convincing evidence. Specifically, the trial court found father failed to provide any type of essential parental care for the child since 2012 (KRS 600.020(1)(a)(4)); failed to maintain contact or visit with his child for years until the Cabinet initiated therapeutic visits (KRS 600.020(1)(a)(7)); failed to comply with court orders or complete any case plan tasks, including drug screen, substance abuse evaluation and treatment, mental health treatment, and parenting classes (KRS 600.020(1)(a)(4)); engaged in a history of criminal

convictions involving violent offenses and drug offenses and tested positive for marijuana and oxycodone (KRS 600.020(1)(a)(3)); and, did not provide adequate housing or financial support care (KRS 600.020(1)(a)(8)).

The trial court did not rely on any finding in the DNA action, and the DNA action had no effect on the TPR. Yet, instead of analyzing the trial court's findings in the termination case, the Court of Appeals simply noted that father was not represented at the permanency hearing and thus found reversible error. The Court of Appeals did not acknowledge the trial court's independent findings or application of the *R.V.* exception. Instead, the Court of Appeals created an overly broad interpretation of *R.V.*, where all indigent parents, custodial or non-custodial, present or not present, must be represented at all times during the underlying DNA matter in order for a termination hearing to be upheld. This interpretation cannot be sustained in consideration of the *K.S.* principles.

The Court of Appeals' interpretation also puts too much emphasis on the "goal change" hearing in a DNA case, by finding it to be a critical stage that necessarily effects TPR actions. During a DNA case, the trial court is required to conduct a permanency hearing no later than twelve (12) months after a child has entered foster care. KRS 610.125. The trial court is further required to make a written order determining the permanency plan for the child. KRS 610.125(6). However, if a trial court changes a permanency goal from reunification to adoption in accordance with KRS 610.125(1), the parent still retains their parental rights to the child unless a petition to terminate parental rights is filed and adjudicated. Beyond a statement that petitions to terminate

parental rights are often filed after a permanency hearing, there is no evidence these hearings impact the termination proceedings. This is because goal change hearings and termination hearings are separate and distinct actions, and the trial court is required to issue a judgment in a termination action based on clear and convincing evidence, and cannot simply rely on the evidence presented at the goal change hearing. There is no requirement that the goal be changed to adoption prior to the filing of a termination action, and a goal change order cannot be appealed as it is interlocutory. See *CHFS v. C.V.*, 192 S.W.3d 703, 704 (Ky. App. 2006) and *Murty Bros. Sales, Inc. v. Preston*, 716 S.W.2d 239, 241 (Ky. 1986), and *L.G.M. v. CHFS*, 2020-CA-1387-ME, 6-7 & 9 (Ky. App. 2021)(unpublished). Moreover, a goal change to adoption does not foreclose a parent's ability to continue working a case plan and be reunified with their child, prior to a TPR judgment.

Even if this Court finds that a permanency hearing is always a critical stage of a DNA action, it should reject the view of the court below that it always has an effect on the subsequent TPR action. Here, father fails to point to any evidence presented at the goal change hearing that influenced or was relied on by the trial court in the termination case. Unlike the circumstances of *R.V.*, there was no factual error made at the goal change hearing that impacted the TPR. The court below erred by reading *R.V.* to mean that a goal change hearing is *per se* deemed to impact the TPR action. *R.V.* did not so hold, and it would be a mistake for this Court to apply *R.V.* in that way.

CONCLUSION

To harmonize the plain language of the statute and existing case law, including the principles elucidated by this Court in *K.S.*, this Court should adopt *R.V.* to apply only in situations where a custodial parent was present for a DNA hearing, and demonstrates indigency. Further, this Court should maintain the exception where a TPR will be upheld where it is shown that an error in the DNA action had no impact on the subsequent termination of parental rights action. The Cabinet respectfully asks this Court to reverse the Court of Appeals, and reinstate the trial court's judgment.

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