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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000475-ME

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES, IN THE INTEREST OF R.M.B., A MINOR CHILD — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JULIE PAXTON, JUDGE
ACTION NO. 05-AD-00008

W.L.M.B.; R.B.; AND R.M.B., A MINOR CHILD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: The Cabinet for Health and Family Services appeals from a judgment of the Magoffin Family Court dismissing the Cabinet's petition for an involuntary termination of parental rights. Finding no error, we affirm.

W.L.M.B. and R.B. were married on December 17, 2003. On August 25, 2004, the minor at issue herein, R.M.B., was born. The parents and child lived together for approximately one month following R.M.B.'s birth before the couple separated.

In November 2004, W.L.M.B. asked her cousin, Wilma Gibson, to watch the then-four-month-old R.M.B., while W.L.M.B. went to the emergency room. Although she was supposed to pick up the infant later that day, W.L.M.B. did not return for several days. And shortly thereafter, W.L.M.B. brought R.M.B. back to Gibson and said that she would sign papers so that Gibson could keep R.M.B.

In January 2005, Gibson contacted social services because she was unable to care for R.M.B. in addition to her own children. On January 10, 2005, social worker Sandy Reynolds sought and was granted an emergency custody order from the Magoffin District Court placing R.M.B. in the Cabinet's temporary custody. Apparently, R.B., who was living with his parents, declined to take custody of R.M.B. and she was thereafter placed in foster care. R.B. did participate in monthly supervised visitation with R.M.B. and, in July 2005, began making child support payments through a deduction from his social security benefits.

Meanwhile, social services unsuccessfully attempted to assist W.L.M.B. with enrolling in a drug treatment program. In December 2005, W.L.M.B. pled guilty in the Magoffin Circuit Court to trafficking in a controlled substance within a 1000 yards of a school. She was sentenced to five years imprisonment, with two to serve.

On July 5, 2005, the Cabinet filed a petition for involuntary termination of parental rights against W.L.M.B. and R.B. Following a trial on February 7, 2006, the Magoffin Family Court entered an order denying the Cabinet's petition on the grounds that it had failed to meet the requirements set forth in KRS 625.090 and KRS 600.020(1) by clear and convincing evidence to warrant an involuntary termination of parental rights.

This appeal ensued.[1]

The Cabinet argues that the trial court's judgment is not supported by substantial evidence. The Cabinet recites the history of the parents and their lack of interaction and support of R.M.B. as evidence that they abandoned and neglected her. To be sure, we agree with the Cabinet that R.B. and W.L.M.B. have not demonstrated capable parenting skills thus far. Nevertheless, we cannot conclude that the Cabinet has proved by clear and convincing evidence that termination of R.B.'s and W.L.M.B.'s rights is warranted at this point in time.

KRS 625.090(1) provides that a circuit court may involuntarily terminate parental rights if it finds by clear and convincing evidence that the child is abused and neglected as defined in KRS 600.020(1), and that termination would be in the child's best interests. Further, KRS 625.090(2) provides in relevant part:

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[1] Although not acknowledged by the Cabinet, we would point out that at the time this appeal was filed, KRS 625.110 prohibited an appeal from the denial of a petition for the termination of parental rights. However, in *K.R.L. v. P.A.C.*, 2006-CA-000364-ME (December 1, 2006), this Court declared KRS 625.110 unconstitutional:

> [§ 115 of the Kentucky Constitution] unequivocally mandates that all parties in all civil and criminal cases have a constitutional right to one appeal. In addition, Section 115 provides for only two exceptions: 1) the Commonwealth may not appeal from a judgment of acquittal and 2) the General Assembly has the power to prohibit a party from appealing the dissolution portion of a decree dissolving a marriage. These exceptions are very specific, and neither applies to the denial of a petition to terminate parental rights. Therefore, we must conclude that KRS 625.110, as currently written, is unconstitutional to the extent that it prohibits the right of appeal from the denial of a petition to terminate parental rights.

> (2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:
>
> > (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
> >
> > . . . .
> >
> > (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;
> >
> > . . . .
> >
> > (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 trial court has broad discretion in determining whether a child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, 552 S.W.2d 672 (Ky. App. 1977). This Court's review in a termination of parental rights action is governed by CR 52.01, which provides that findings of fact shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to view the credibility of the

witnesses. Such findings will not be disturbed unless there exists no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420 (Ky. App. 1986). Further, "[c]lear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (Ky. 1934).

At trial, Cabinet representatives testified that because R.B. told them on several occasions that he was unable to care for R.M.B., the Cabinet interpreted such to mean that R.B. wished to terminate his rights to R.M.B. Kathy Prater, the social worker assigned to R.M.B., stated that no services were offered to R.B. nor were any efforts made to reunite him with R.M.B. because of his insistence that he could not care for her. R.B., however, testified that he never intended to terminate his parental rights to R.M.B. R.B. explained that he lived with his parents and that his mother helped him take care of his other child. But because R.B.'s father had been seriously ill, R.B. did not feel like he or his mother would have been capable of caring for another child. R.B. stated that he wanted his children to be raised together but that, during the period of his father's illness, he thought R.M.B. was better off in foster care. R.B.'s mother also testified and confirmed that she helps R.B. take care of his other child and would be willing to assist him with R.M.B. as well.

W.L.M.B. testified at the hearing and admitted that she was incarcerated on a felony drug conviction. At the time of trial, she had served seven and one half months

of a two year sentence and was scheduled to appear before the parole board in March 2006. W.L.M.B. testified that she was drug free and had been attending Narcotics Anonymous classes in jail. W.L.M.B. admitted that when she left R.M.B. with her cousin she was having a rough time, but contended that she had no intention of abandoning her.

At the conclusion of the trial, the court determined that although W.L.M.B. had previously been found by the court under KRS 600.020(1) to have neglected R.M.B., she had not had her rights to any other children terminated; had not abandoned R.M.B. for more than 90 days; and had not been convicted of any crimes relative to child abuse or sexual abuse. With respect to R.B., the trial court noted that he had not been previously found to have neglected either of his children; had no mental illnesses; had not been convicted of any felonies; had not had his parental rights to his other child terminated; had not abandoned R.M.B. for more than 90 days; and had not been convicted of any crimes relative to child abuse or sexual abuse.

In *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003), the Supreme Court of Kentucky addressed an appellate court's standard of review, noting

> [T]he dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence · · · has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the

> opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

With this standard in mind, we are compelled to conclude that the trial court's findings herein are supported by substantial evidence. Given the testimony presented at trial, we are persuaded that the Cabinet failed to prove by clear and convincing evidence that "there is no reasonable expectation of improvement in parental care and protection." KRS 625.020(2)(e). As such, we cannot find that the trial court's judgment and order were clearly erroneous.

The judgment and order of the Magoffin Circuit Court denying the Cabinet's petition for an involuntary termination of parental rights are affirmed.

ALL CONCUR.

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