RENDERED: NOVEMBER 13, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000986-ME

MARGARET ANN LINDSEY — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 06-J-00735-001

CABINET FOR HEALTH AND FAMILY SERVICES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

NICKELL, JUDGE: Margaret Ann Lindsey (Lindsey), *pro se*, has appealed from the Campbell Family Court's March 21, 2008, order denying her motion to rescind

[1] Senior Judge Joseph E. Lambert 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.

the commitment of her minor grandson, N.F.,[2] to the Cabinet for Health and Family Services (Cabinet) and grant her custody of the child, or alternatively, to grant her visitation. For the following reasons, we affirm.

N.F. was born on November 1, 2005. On September 7, 2006, an Emergency Custody Order was entered as a result of the child sustaining a skull fracture, a bilateral subdural hematoma and bruising to the neck, all at the hands of his father. As a result of his injuries, N.F. is developmentally delayed and requires ongoing medical treatment and therapy. The trial court found the father physically abused the child and the mother neglected the child by allowing the father into the home in spite of an existing Domestic Violence Order (DVO). N.F. was subsequently placed in the temporary custody of the Cabinet.

In late January 2007 the child was transitioned into Lindsey's home and custody was transferred to her in February. At the time of placement and change of custody, the Cabinet workers assigned to N.F.'s case were unaware of Lindsey's extensive prior history of Cabinet involvement with her own children. Forty-six days after custody was transferred to her, Lindsey relinquished custody to the Cabinet citing health concerns. N.F. has thus resided in a foster home since his removal from his birth mother except for this forty-six day period.

After Lindsey relinquished custody, the child was committed to the Cabinet on March 13, 2007. The Cabinet reported to the Court that Lindsey could

[2] Pursuant to the policy of this Court, to protect the privacy of minor children, we refer to them only by their initials.

not care for the child "on a long-term basis." Lindsey did not dispute this assertion and later testified that the statement was true in light of her own physical ailments.

On June 1, 2007, the Cabinet moved the court to change the goal from reunification of the family to adoption, and the Interested Party Review Board (Board) concurred in the recommendation after a hearing. Lindsey informed the Board she was disabled and unable to meet the child's needs, she did not visit because she felt to do so would interfere with the child's stability, and N.F. had stability in his foster mother and his therapy. Following a hearing on September 4, 2007, the court changed the goal to adoption and the Cabinet filed a petition for termination of parental rights. Lindsey attended the hearing but did not request a return of the child to her custody.

On October 19, 2007, N.F.'s mother, J.E., requested that the trial court review N.F.'s foster placement and asked for the child to be placed in Lindsey's custody if her own rights were ultimately terminated. Several lengthy hearings were conducted on the Cabinet's motion for termination of rights, J.E.'s motion to rescind the child's commitment and grant custody to Lindsey, and Lindsey's subsequent motion to rescind the child's commitment and for visitation. Numerous witnesses testified at these hearings including J.E., Lindsey, another of Lindsey's daughters, the child's foster mother, and the child's Cabinet workers.

The court determined J.E. had not completed her treatment plan as she had failed to complete parenting classes, complete a substance abuse evaluation, obtain her GED, maintain independent housing, maintain employment, visited only

sporadically with the child, and had missed most of the child's doctor's visits. The court also found J.E. had been diagnosed with psychological issues which remained untreated and unresolved. Although J.E. testified she wished for Lindsey to have custody of N.F., she also stated Lindsey had been a serious alcoholic, had physically abused one of J.E.'s siblings, and had allowed J.E. to be sexually abused while she was in Lindsey's custody. J.E. stated she had not allowed Lindsey to see N.F. for over six months "because she did not trust her." Shortly before N.F.'s birth, Lindsey forced J.E. to leave her home. As a result, the child was born while J.E. was residing in a hotel room. Finally, the court found the child's father had perpetrated acts of domestic violence upon J.E. and that Lindsey had refused to provide her a place to stay when trying to extricate herself from that abusive situation.

Lindsey testified she neither worked nor drove due to her physical disabilities. She stated she had been an alcoholic, but had been sober since approximately the time of N.F.'s birth. She admitted to having been treated for psychological issues along with her physical disabilities. She testified she did not agree with some of the treatment N.F. was receiving and did not believe he needed special care in spite of his physical and developmental handicaps. She admitted telling the child's guardian *ad litem* that she could not adequately care for N.F.

N.F.'s social worker, Nycole Brundidge, testified he was developmentally delayed, sees a physical therapist and a neurologist, and was physically abused by his father. Further, N.F. suffers from asthma and receives

treatment from the "High Risk Clinic" at Cincinnati Children's Hospital.[3] The worker testified that Lindsey had indicated she was unable to care for the child on a long-term basis. One of the biggest concerns Brundidge expressed was that J.E. was again living in Lindsey's home, so placing N.F. there would be tantamount to placing the child back in his biological mother's care.

The court heard extensive testimony regarding Lindsey's prior contact with the Cabinet in relation to her own children. Both J.E. and her sister had been removed from Lindsey's custody, and Lindsey had failed to adequately participate in her case plans for the children. In addition, there was a pattern of domestic violence in Lindsey's home, and the unsafe environment was aggravated by alcohol abuse. Both children were hospitalized for suicide attempts based on "abandonment issues." Lindsey had very limited contact with her daughters while they were in the Cabinet's care, she did not participate in family therapy, and neither child was returned to her care.

Finally, the court found that although Lindsey had "made an enormous turnaround in her personal life" and had been sober for over two years, it was not in the child's best interest to be placed in her home. The court based this finding on Lindsey's continued physical disabilities, her history with her own children, her self-admitted inability to adequately give long-term care for N.F., and her current husband's extensive criminal history and history of domestic violence.

[3] The court noted Lindsey admitted to smoking approximately two to three packs of cigarettes daily.

For these reasons, on March 21, 2008, the trial court entered an order denying the motions to rescind custody and to place N.F. in Lindsey's care. On May 23, 2008, the trial court terminated J.E.'s parental rights to N.F. and no appeal has been taken from that now final order. It is from the March 21, 2008, order that Lindsey has appealed. We affirm.

Before this Court, Lindsey sets forth twenty-five allegations of error, the majority of which concern what Lindsey terms as "false and misleading information presented to court" and "not in concurrence with testimony." However, after a careful review of the record and her brief, we conclude Lindsey presents three basic arguments. First, the trial court's findings of fact were unsupported by substantial evidence and thus clearly erroneous. Second, the trial court erred in applying the law and the best interest standard in making its ultimate decision. Finally, the trial court erred in failing to rule on her motion for grandparent visitation rights. We reject all three allegations.

We note that in contravention of CR 76.12(4)(c)(v), Lindsey does not cite us to the record indicating the factual basis supporting her legal arguments, and further cites no legal authority supporting her position. Her brief contains only bare allegations that the evidence presented was insufficient to support the trial court's findings of fact and conclusions of law. She provides no citation to the record indicating how, if at all, her arguments were preserved for our review. Further, she attempts to introduce new evidence from outside the record and from events occurring subsequent to the termination of the proceedings below.

However, in spite of these failings, and because of the lenience we afford to *pro se* litigants, *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct 594, 30 L.Ed.2d 652 (1972), and the importance of the matter at bar, we will review her claims even though we have scoured the record and uncovered no support for Lindsey's contentions of error.

First, Lindsey contends the evidence presented to the trial court was insufficient to support its findings of fact. However, she fails to point to any erroneous conclusions reached by the trial court. A trial court's findings of fact will not be disturbed on appeal unless they are clearly erroneous, that is, if they are unsupported by substantial evidence. CR 52.01; *Moore v. Asente,* 110 S.W.3d 336 (Ky. 2003), *Sherfey v. Sherfey,* 74 S.W.3d 777 (Ky. App. 2002). If substantial evidence supporting the findings of fact exists in the record, such findings are not clearly erroneous and will not be set aside. CR 52.01; *R.C.R. v. Commonwealth, Cabinet for Human Resources,* 988 S.W.2d 36 (Ky. App. 1999); *V.S. v. Commonwealth, Cabinet for Human Resources,* 706 S.W.2d 420 (Ky. App. 1986). We note that clear and convincing evidence must not necessarily be uncontradicted proof, but rather it must be "proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *R.C.R.*, 988 S.W.3d at 38 (quoting *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)).

The testimony before the trial court regarding Lindsey revealed numerous episodes of sexual abuse and exploitation or the risk thereof, emotional abuse, medical neglect, abandonment, domestic violence, neglect, alcohol abuse,

and refusal to cooperate with the Cabinet to regain custody of her own children. Further, testimony was given about Lindsey evicting her pregnant daughter, refusing to provide a safe living environment for J.E. and N.F. when N.F.'s father became abusive, her history with domestically violent spouses or paramours including her current husband, and her voluntary relinquishment of custody of N.F. In light of these numerous and serious episodes and the otherwise overwhelming evidence presented to the trial court, we are convinced the trial court committed no clear error in making its findings of fact supporting its denial of Lindsey's motion for custody.

Second, Lindsey argues the trial court erred in its application of the law and the best interest standard. Determinations of the best interest of a child in custody matters will not be disturbed unless they constitute an abuse of discretion. *Sherfey v. Sherfey,* 74 S.W.3d 777, 782-83 (Ky. App. 2002). Trial courts are vested with broad discretion in matters concerning custody and visitation. *See Futrell v. Futrell,* 346 S.W.2d 39 (Ky. 1961); *Drury v. Drury,* 32 S.W.3d 521, 525 (Ky. App. 2000). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Sherfey* at 783. Essentially, while "[t]he exercise of discretion must be legally sound," *Id.,* in reviewing the decision of the trial court, the test is not whether we, as an appellate court, would have decided the matter differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion. *Cherry v. Cherry,* 634 S.W.2d 423, 425

(Ky. 1982). Our review of the record does not reveal an abuse of the trial court's broad discretion.

KRS 620.023(1)(b) expressly requires a trial court to consider relevant evidence pertaining to any prior acts of abuse or neglect perpetrated against any child. Clearly, the trial court was correct in refusing to overlook Lindsey's past acts in relation to her own children, including their removal from her home by the Cabinet, her pattern of abuse of those children, her abandonment of them while they were in foster care, and her unwillingness to fully participate with the Cabinet in order to facilitate her children's return to her custody. KRS 620.023(1)(d) requires the court to consider acts of domestic violence when making its determination. Lindsey admitted involvement in at least six relationships marked by domestic violence, including three marriages. At the time of the instant hearing, Lindsey was married to a man who had been convicted of aggravated assault and spousal abuse. However, she testified these facts neither bothered nor concerned her. Undoubtedly, the trial court was required to find these actions militated against granting Lindsey custody of N.F.

The trial court also considered evidence of Lindsey's rehabilitative and recovery efforts as permitted by KRS 620.023(2), and commended her on her sobriety and "enormous turnaround in her personal life." However, the court found such improvements were insufficient to overcome the great weight of her negative history with respect to her own children and her resulting inability or unwillingness to provide a safe and stable home for them. Additionally, such

improvements could not negate Lindsey's physical disabilities and her self-admitted inability to care for N.F. on a long-term basis. Thus, the record before us clearly demonstrates the trial court's full consideration of N.F.'s best interest in making its custody decision. We are unable to discern any arbitrary or capricious actions on the part of the trial court, nor do we find its decision to be unsound, unreasonable or unfair. There was no abuse of discretion.

Finally, Lindsey contends the trial court erred in failing to rule on her motion for grandparent visitation rights. We are unable to locate within the record any such motion or petition pursuant to KRS 405.021 that was ever filed before the trial court. Further, no determination has been made by the trial court that such visitation would be in the child's best interest, as required under KRS 405.021, and no request for a hearing on this issue is found on the face of the record. "Appellate courts review only claims of error which have been presented to trial courts." *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998). The failure to raise an issue deprives a trial court of the opportunity to rectify an alleged error and rule accordingly. Our role as an appellate court is not to undertake the review of new arguments which is akin to giving a litigant a second opportunity to be heard as if in a trial court. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 607 (Ky. App. 2006). As the clear mandates of KRS 405.021 were not followed, the trial court had nothing to rule upon and Lindsey cannot now be heard to complain. There simply was no error.

For the foregoing reasons, the order of the Campbell Family Court denying Lindsey's motion to rescind commitment of N.F. to the Cabinet is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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