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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000613-ME

B. J. B., A/K/A T. — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 08-AD-00015

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

CAPERTON, JUDGE: This is an appeal from a March 5, 2009, order of the Shelby Family Court, terminating the parental rights of Appellant, BJB, the biological mother of CPB, following a trial. BJB now asserts that the court below relied on hearsay testimony in making its decision to terminate parental rights, and

[1] Senior Judge Michael L. Henry 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.

further, that the termination of parental rights was not supported by clear and convincing evidence. After a thorough review of the record, the arguments of the parties, and the applicable law, we reverse and remand for additional proceedings not inconsistent with this opinion.

BJB and EEB, one of the respondents alleged to be a father in the action below, were married in 2004, and had one child, CPB, on February 21, 2007. At that time, BJB had five other children, four of whom were residing with a former husband in Kentucky and one of whom was residing with another former husband in Tennessee. After giving birth to CPB, BJB later claimed that CL, the other respondent father in this action, was the father of this child. CL and CPB submitted to DNA testing and it was determined that CL was in fact the biological father of the child.

The Cabinet for Health and Family Services first received a report pertaining to CPB on March 27, 2007. The reporting source alleged that BJB and EEB were using drugs, including marijuana, cocaine, and crack cocaine, and that BJB was breastfeeding CPB while under the influence of drugs. CPB was removed from the home on that date, and at that time, BJB was arrested for flagrant non-support, a charge to which she eventually pled guilty, and for which she was incarcerated at the Shelby County Detention Center and the Kentucky Correctional Institute for Women until June of 2008.

On March 29, 2007, the Cabinet filed a Petition for Abuse, Dependency and Neglect in the Shelby Family Court, alleging that CPB was a

neglected child because her parents had been arrested, her mother had admitted to breastfeeding the child and using marijuana and crack cocaine, and because the mother had reported that the father also used cocaine and crack cocaine.

The Shelby Family Court held an emergency custody hearing and entered an order on March 29, 2007, placing CPB in the emergency custody of the Cabinet. On March 30, 2007, the court conducted a temporary removal hearing and entered an order on that date placing the child in the temporary custody of the Cabinet.

Thereafter, on April 11, 2007, the court held an adjudication hearing on the Cabinet's petition, at which time BJB and EEB were still incarcerated. At that time, the parents stipulated to neglect of CPB. The court accordingly entered an April 12, 2007, order adjudicating the child as neglected, and ordering her to remain in the custody of the cabinet. On June 15, 2007, following a disposition hearing, an order was issued committing the child to the Cabinet, where she remains at present.

Subsequently, on July 9, 2008, the Cabinet filed a petition for involuntary termination of parental rights against the "parents" of CPB, to include EEB, BJB, and CL. Separate counsel was appointed for each parent, and trial was held in this matter on January 15, 2009, and February 23, 2009.[2] During the trial, the court heard testimony from Dr. Paul Ebben, a psychologist who evaluated BJB and EEB; Gail Birkholz, a child support worker with the Shelby County Attorney's

[2] The trial began on January 15, 2009, and was continued to February 23, 2009, in order for the Cabinet to subpoena a witness to testify as to two of BJB's positive drug screens.

Office; Stacy McClure and Emily Thomas, social service workers for the Cabinet; Leilani Churchman, a probation supervisor for the Kentucky Alternative Program; Dena Riley, the foster mother of the child; Angela Haggard, the sister of EEB, and BJB herself.

Counsel stipulated as to Dr. Ebbens's credentials as an expert witness and as a qualified mental health professional pursuant to KRS 600.020(48)(c). Dr. Ebben received a referral from the Cabinet to evaluate BJB and EEB for purposes of determining their ability to parent CPB and any risk factors that might affect their parenting abilities. Dr. Ebben testified that he was somewhat hampered in his evaluation of EEB because he had no records from the Cabinet to review and had to rely solely on self-reports from EEB. Dr. Ebben met with EEB on September 13, 2007, and October 30, 2008, and issued reports after each examination.

Dr. Ebben also conducted a clinical interview with and took a social history from BJB on October 30, 2008. BJB apparently described a "fairly significant substance abuse history that has complicated her life and has affected her ability to independently function as a parent."[3] BJB also stated that she "started using and abusing marijuana when she was 15 years of age and used it on a daily basis"[4] until she was arrested in 2007. Further, BJB stated that she used "cocaine or crack on a daily basis from age 28"[5] until she was arrested in 2007.

[3] *See* Petitioner's Exhibit #2 at 2.

[4] *Id.* at 5.

[5] *Id.*

BJB apparently obtained money for her drugs by sleeping with strangers, cleaning houses, and stealing from her mother.

Dr. Ebben administered several tests to BJB, including a structured interview which he created consisting of questions designed to assess 57 variables which would evaluate risk factors associated with child maltreatment. Dr. Ebben testified that he devised this test himself because he could not find anything in the literature which would assist him in making this determination. Dr. Ebben testified that BJB responded positively to nine variables, including past drug abuse, inability to feel like a parent with her child, inability to report age-appropriate chores/expectations for a child, and inability to articulate appropriate and effective methods to solve conflicts with a child. Dr. Ebben also administered a Personality Assessment Inventory. He testified that the validity scales from that inventory indicated that BJB was "highly defensive …reflect[ing] a significant distortion and minimization of problems in certain areas."[6] Dr. Ebben also noted that BJB reported a "history of antisocial behavior, distrust, suspiciousness, irrational fear, drug abuse and dependence, and poor control over anger."[7]

Following his evaluation, Dr. Ebben recommended that BJB meet with a child psychologist or family therapist to address her parenting issues. He also recommended that she continue receiving substance abuse assistance through Alcoholics Anonymous and Narcotics Anonymous, and that she continue to have

[6] Petitioner's Exhibit #2 at 9.

[7] *Id.*

random drug screens to ensure that she remained drug-free for at least one year from the last date that she used drugs. Dr. Ebben also stated that if BJB and EEB lived together, they both needed to be compliant with their case plans. As a result of Dr. Ebben's recommendation, BJB enrolled in an Early Childhood Intervention Program through Seven Counties Services in LaGrange.

At trial, BJB objected to the first paragraph of Dr. Ebben's report, which contained information supplied by the Cabinet from its initial investigation because she claimed it contained "double hearsay," as the person who collected the information was not present to testify about it. In addressing the issue, the court below held that Dr. Ebben was an expert witness, and that it had already read the report because it had been introduced into evidence in the underlying dependency action. Accordingly, the Court overruled BJB's objection and admitted the report.

Gail Birkholz, a caseworker with the Child Support Division of the Shelby County Attorney's Office, also testified at trial. Birkholz testified that she had been in her position for the past 15 years, and that her duties included monitoring child support payments. Birkholz testified that BJB had a child support obligation of $195.00 per month, effective March 29, 2007. Birkholz testified that BJB had not made any of her scheduled support payments.

Stacy McClure, a social worker with the Cabinet, testified that she has been employed by the Cabinet for almost nine years. McClure was assigned to BJB and her family between March of 2007 and April of 2008. McClure was

involved in the early stages of the investigation of BJB and EEB, and was present when Sarah Long, the investigating social worker, spoke to BJB in jail.

McClure testified that at that time, BJB admitted to using a significant amount of drugs before going to the hospital to give birth to one of her other children who lived in Tennessee. BJB apparently also admitted to using drugs early in her pregnancy with CPB, as well as after she was born. BJB apparently told the social worker that she used marijuana one week after CPB was born, and crack cocaine five weeks after she was born. BJB also admitted to using drugs while breastfeeding CPB, and that she and EEB would use drugs while the baby slept. BJB apparently also admitted that she was nervous and smoking cigarettes while she was in the park with the baby because she had been "on the run" for three years after leaving a treatment program that she was required to attend as a result of her conviction for non-support of her four oldest children. Finally, BJB admitted to the social worker that she could stay clean and sober for about nine months at a time, but would then return to using drugs.

McClure testified that she held the first case treatment planning meeting on April 4, 2007, at which time she developed a case treatment plan for BJB and EEB to regain custody of CPB. McClure testified that she wanted each parent to have a psychological and parenting assessment with Dr. Ebben, and to follow all of his recommendations. In addition, she wanted each parent to have a chemical dependency assessment and to follow all recommendations of that assessment, including submitting to random drug screens at the request of the

Cabinet. McClure also wanted each parent to create a list of "triggers" that made that parent want to use drugs. She wanted each parent to visit with CPB on a regular basis, to develop a budget, and obtain stable housing and employment for a minimum of six months.

McClure testified that BJB was incarcerated for the entire time that McClure worked with the family. McClure encouraged BJB to attend AA and NA meetings while in jail, which BJB began doing in September of 2007. McClure recommended that BJB complete the chemical dependency program offered by Seven Counties Services, Inc., which BJB started in early 2008. BJB also enrolled in and completed parenting classes while in jail. McClure arranged for the foster parents to bring CPB to the jail to visit with BJB on a weekly basis. BJB apparently did not have any drug screens while she was incarcerated, other than her initial drug screen upon entry into the facility.

Emily Thomas, also a social worker with the Cabinet, testified that she has been employed by the Cabinet since 2007, and was assigned to the family of BJB in May of 2008. At that time, BJB remained incarcerated, and the whereabouts of EEB were unknown. Thomas testified that when BJB was released from jail on June 2, 2008, she went to live at a friend's house in Carrollton, Kentucky. Thomas had her first home visit with BJB at that house on July 1, 2008, at which time she learned that BJB resided there with EEB. At that time, EEB apparently told Thomas that he was not going to work on the case treatment plan,

although he later changed his mind, telling Thomas in February of 2009 that he did want to work on the plan.

Thomas also testified that BJB moved several times during the time that she monitored her, sometimes residing with EEB, and sometimes not. Thomas testified that BJB had held several jobs since being released from jail in June of 2008. At the time of the trial on February 23, 2009, BJB was doing odd jobs for her landlord on the farm where she lived to pay the rent. Thomas testified that BJB did not provide her with any proof of her income. Thomas also testified about BJB's visits with CPB. Thomas testified that BJB has seen CPB regularly on a weekly basis, the visits initially being supervised in June of 2008, and later unsupervised in September of 2008. They were again supervised in November and December of 2008, and unsupervised again thereafter.

Thomas also testified about BJB's various convictions, at which time certified copies of those convictions were introduced into evidence. Thomas testified that BJB was convicted of flagrant non-support of her four oldest children, for which she was sentenced to five years, probated for five years, in June of 2000. BJB was also convicted of Theft by Deception under $300 in November of 2008, for which the court ordered her to pay restitution, fees, and costs. Thomas admitted that BJB began seeing a counselor at Seven Counties Services, Inc. for drug and alcohol treatment starting on July 1, 2008, and that she also went to that center for counseling on certain parenting issues after she was released from jail.

Thomas also admitted that she sent BJB for 16 drug screens since July of 2008. Two of those screens were positive for marijuana in November of 2008.

Both McClure and Thomas testified that CPB's parents did not provide any child support or other financial assistance for her while she was in the care of the Cabinet, nor did they provide any food, clothing, shelter, care, or support for her while she was in the care of the Cabinet, other than snacks during visits and a few articles of clothing.

Leilani Churchman, a probation supervisor and office manager for the Kentucky Alternative Program, also testified in this matter, stating that she monitors people on probation and administers drug screens. Churchman testified that BJB submitted to 16 drug screens in her office, starting on July 16, 2008. Churchman testified that BJB's specimens indicated the presence of marijuana on November 12, 2008, and November 17, 2008, although the earlier specimen was slightly below the threshold for a positive drug screen. BJB's specimen was negative for marijuana on November 26, 2008. Churchman testified that another employee collected the urine from BJB for these two screens and then mailed the urine samples to a lab out of state where the screens were analyzed. The results of those screens were then faxed to the Kentucky Alternative Program office in Shelbyville.

Churchman admitted on cross-examination that marijuana can stay in a person's system for about 30 days, and admitted that the results of her test on November 17 2008, were invalid due to "possible oxidant activity." Churchman

also admitted that a person can take medication which would dilute a drug screen, resulting in a negative screening like that conducted on November 26, 2008.

BJB objected to the introduction into evidence of Churchman's testimony, as well as the results of the drug screens, arguing that the evidence must be presented by the person who conducted the tests. The Court overruled the testimony and admitted the drug screens.

Dena Riley, the foster mother of CPB, also testified at trial, stating that she and her husband have two children of their own, in addition to being foster parents for two years. Riley testified that CPB has resided in their home since March of 2007. Riley testified that at that time, CPB was very dirty, and weighed only eight pounds, which was only nine ounces more than her birth weight five weeks prior to placement.

Riley also testified that while BJB and EEB were incarcerated, she brought CPB to visit at the jail every week on Sunday. Riley testified that after EEB was released from jail, he visited CPB at the Cabinet office, but that his visits became sporadic in early 2008, and stopped all together in February or March of 2008.[8] Riley testified that they continued to take CPB to the jail to visit with BJB. She stated that although she attempted to leave CPB and BJB alone, BJB would come out in the hall and visit with them also.

[8] For the record, we note that in its March 5, 2009, order, the court below found that respondent fathers EEB and CL had abandoned CPB for a period in excess of ninety days. The respondent fathers do not appeal the termination of their rights and, accordingly, we do not address that issue further herein.

Riley further testified that after BJB was released from jail, she initially had weekly supervised visits with CPB at the Cabinet office. Riley stated that during some of those visits, BJB gave CPB soda, tea, and Cheetos, so Riley began packing healthy snacks for CPB in her diaper bag. Riley stated that BJB started having weekly unsupervised visits with her child in August or September of 2008. Nevertheless, Riley testified that in spite of those weekly visits, CPB never talks about her parents while in Riley's home, nor has Riley heard CPB call BJB anything, such as "mother."

Riley also testified that BJB told her that she had used drugs on the day that CPB was removed from her care. Riley also stated that BJB told her that she didn't know why she used drugs, that she had slept with people and stolen property in order to obtain drugs, and that she was not depressed when she used drugs. Riley testified that since being released from jail in June of 2008, BJB has rarely called the foster parents about CPB, and has only spoken to CPB one time on the telephone.

BJB also testified at trial. She stated that she is now forty years old. She had four children with her first husband. BJB began seeing these children again in December of 2008, ten years after her divorce from her first husband in 1998. BJB admitted that she owed over $35,000 in child support for these children, and that the government had recently intercepted her income tax return as partial payment toward that obligation. BJB also testified that she had one child

with her second husband, and that they reside in Tennessee. BJB has not seen that child since 2005, and has not paid child support for that child or CPB.

BJB also admitted to smoking marijuana in the past, and to using crack cocaine beginning in 1996, sometimes on a daily basis. BJB claimed that the last time she used drugs was when she was arrested in March of 2007. Although BJB admitted going to a party in November of 2008, she denied that anyone was smoking marijuana at the party.

BJB testified that she has held several jobs since being released from jail in June of 2008. She held a seasonal job as a cook at a country club between June and November of 2008. She also worked at Waffle House for one month, but left because her employer would not give her two days off during the week to visit with her child and attend therapy. BJB also stripped tobacco for about one month, and at the time of trial, was doing odd jobs for her landlord. BJB testified that she has resided at the same address since October of 2008. She denied that EEB was living with her, but admitted that he was helping her with her bills.

BJB testified that she has "grown up" and "turned her life around."[9] She stated that she stopped using drugs in March of 2007 and has maintained her sobriety. BJB testified that she was willing to do what needed to be done to get CPB back.

Angela Haggard, the sister of EEB, testified that BJB and EEB lived with her when CPB was born. Haggard was aware the two had used drugs in the

[9] VR no. 2:02/23/09; 17:02:30 and 17:03:45.

past, but denied reporting them to the Cabinet. Haggard testified that she has permitted BJB to visit with CPB in her home for the past 10 visits, and that she has observed BJB teaching CPB words and showing her animals on the computer. Haggard also testified that she has observed CPB calling BJB "Mama."

As noted, the Shelby Family Court ultimately granted the Cabinet's Petition for Involuntary Termination of Parental Rights, and entered its Findings of Fact and Conclusions of Law on March 5, 2009, along with an order terminating parental rights on the same date. It is from that order that BJB now appeals to this Court.

At the outset, we note that on review of a decision to terminate parental rights, this Court must determine if the family court's conclusion was based upon clear and convincing evidence and, in so doing, must apply the clearly erroneous standard of appellate review. Kentucky Rules of Civil Procedure (CR) 52.01; *JMR v. Commonwealth of Kentucky, Cabinet for Health and Family Services*, 239 S.W.3d 116, 120 (Ky. App. 2007). "Clear 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." *M.P.S. v. Cabinet for Human Resources,* 979 S.W.2d 114, 117 (Ky.App. 1998), citing *Rowland v. Holt,* 253 Ky. 718, 70 S.W.2d 5, 9 (Ky.App. 1934). Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family court's findings and

should not interfere with those findings unless the record is devoid of substantial evidence to support them. *K.R.L. v. P.A.C.,* 210 S.W.3d 183, 187 (Ky.App. 2006).

The trial court's standard for involuntary termination of parental rights is set out in KRS 625.090. The statute creates a three-prong test whereby the Cabinet must prove, and the court must determine that: 1) the child is abused or neglected; 2) termination would be in the child's best interest; and 3) one of several listed grounds exists. In deciding whether the child is abused or neglected, the trial court may base its finding on a prior dependency finding or upon independent findings under the definition set out in KRS 600.020(1).

As her first basis for appeal to this Court, BJB argues that the family court erred in admitting hearsay evidence on behalf of the Cabinet at trial. Specifically, BJB asserts that the court erred in admitting the lab reports pertaining to BJB's drug screens, and in allowing Churchman to testify as to the results of those screens.

In support thereof, BJB asserts that the crux of the Cabinet's case for termination of her parental rights was her history of substance abuse. However, BJB states that the only evidence of her relevant drug use was that she tested positive for marijuana twice in November of 2008, which she states discredited her efforts to show compliance with the case plan, and was most prejudicial to her case at trial. BJB argues that the Kentucky Alternative Program did not do the analysis on the urine specimens itself, but instead mailed the samples and requested an analysis from Medtox Laboratories, Inc.

As noted, BJB objected to the admission of this report at trial. The court admitted the reports under the business records exception of Kentucky Rules of Evidence (KRE) 803(6), ruling that the reports and the testimony of the probation officer would be allowed as it was in the normal course of business for the Kentucky Alternative Program to collect such reports. BJB asserts that the reports are not part of the normal course of business for the Kentucky Alternative Program, but was instead the regularly conducted business activity of Medtox Laboratories, Inc., which had no representatives present at trial. BJB asserts that the Kentucky Alternative Program is not in the regular practice of preparing drug analysis reports and did not make the report that was presented. Accordingly, BJB argues that the report did not meet the criteria of the business records exception and, therefore, the court erred in admitting it.

As support for her argument, BJB cites this Court to the Texas decision rendered in *In re KCP,* 142 S.W.3d 574 (Tex.App. 2004). In that case, as in the matter *sub judice*, the mother objected to introduction of positive drug tests under the business records exception, on the ground that the entities providing the records were not the entities who actually conducted the tests.

In *KCP*, each record had an attached affidavit from the custodian stating that the records were business records. The Texas appellate court ultimately held that the trial court abused its discretion in admitting the test results with no information as to the qualifications of the person or equipment used, the method of administering the test, and whether the test was a standard test for the

particular substance at issue. Ultimately, however, the Texas court found the error not to be reversible, finding that admission of the evidence likely did not cause the rendering of an improper verdict, in light of other evidence establishing ongoing drug usage by the mother, including track marks on her arms, personal admissions, and admissions to a counselor that she was continuing to use drugs.

In analogizing the *KCP* case to her own, BJB argues that the drug screens in the matter *sub judice* were improperly admitted under the business records exception because no one from the lab where the records were actually created was available to testify. Accordingly, BJB asserts that it was impossible for the family court to know whether the person conducting the test followed standard operating procedure, whether the equipment used for the testing was in good working order, or if the person conducting the testing had been properly trained. BJB therefore asserts that the court below committed reversible error in admitting the drug screens.

In response, the Cabinet disputes BJB's contention that her drug usage was the crux of its case, and cites to many other factors as well, including inability to hold a permanent job, inability to support herself or any of her other children, and frequent changes of residence. Further, the Cabinet states that the drug tests were only part of the evidence establishing BJB's drug usage, stating that other overwhelming evidence existed, including Appellant's own testimony that she had used marijuana in the past and had started using cocaine, sometimes on a daily basis in 1996; her testimony that she had used drugs while pregnant and

breastfeeding; her admissions to a social worker that she had previously relapsed after nine months; and that she used drugs on the day CPB was removed from her home. The Cabinet also states that BJB told her social worker that drugs came into the prison, and conceded that she did not take any drug screens while incarcerated. Finally, the Cabinet notes that although BJB denied that anyone was smoking marijuana at a party she attended in November of 2008, she did admit to eating some brownies.[10]

In addition, the Cabinet states that Churchman testified about the procedures which were followed to collect a urine specimen from BJB and to ensure that the urine was not mixed up with other specimens, and that the specimens were returned from the lab in 24 hours. The Cabinet also notes that the Court was already aware of the drug screens in question because the Cabinet had presented evidence of them to the Court in the underlying dependency action in order to temporarily suspend BJB's unsupervised visits with CPB. Thus, the Cabinet asserts that the court was able to weigh the trustworthiness and reliability of the evidence presented, and that competent evidence beyond the drug screens existed to establish BJB's ongoing drug usage.

Having reviewed the arguments of the parties, and the applicable law, we are of the opinion that the court below improperly admitted the drug screens under the business records exception. The Cabinet itself concedes that, although the urine specimen itself was collected by Kentucky Alternative Program, the

[10] We presume that these were brownies containing marijuana.

sample was tested, and the report prepared, at Medtox Laboratories. No Medtox representative was available to testify at trial, thereby preventing the Cabinet from establishing a chain of custody in this matter.

The importance of the chain of custody evidence is two-fold. First, as BJB argues, there was no representative of Medtox to testify to the procedure used or the test performed on the sample. *See* KRE 901 (b)(9). Secondly, the lack of chain of custody evidence deprived the trial court of evidence which it could have considered in determining identification and integrity of the sample. *See* KRE 901(a) and Robert Lawson, *The Kentucky Evidence Law Handbook*, §11.00 [2] and [3], pp. 840-846 (4th Ed. Matthew Bender 2003). Accordingly, we believe the court interpreted our jurisprudence too broadly in admitting test records, which would be hearsay under the business records exception, without the test records qualifying under a hearsay exception. *See* KRE 805.

Under the business records exception to the hearsay rule, the facts *sub judice* present a classical case for the application of KRE 805, and the application of that rule requires each level of hearsay to conform to a hearsay exception. The drug screen report is hearsay as are the business records, and just as the business records must conform to a hearsay exception to be admissible into evidence, so must also any hearsay contained within them. In that the drug screens do not conform based on the facts *sub judice* to any hearsay exception, they are proscribed by KRE 802[11] and not admissible.

[11] Certainly such tests can be admissible but, to be admissible, consideration must be given to identification, integrity and other appropriate testimony.

Having so found, we are also of the opinion that the improper admission of the failed drug tests was prejudicial to BJB. As the Cabinet correctly notes, the admission of incompetent evidence in a bench trial may be viewed as harmless error but only if the Court did not base its decision on that evidence or if there was other competent evidence to prove the matter in issue. *See Prater v. Cabinet for Human Resources, Com. of Ky.*, 954 S.W.2d 954 (Ky. 1997), citing *GEY v. Cabinet for Human Resources*, 701 S.W.2d 713 (Ky.App 1985), *Escott v. Harley*, 308 Ky. 298, 214 S.W.2d 387 (Ky. 1948), and KRE 103.

Unfortunately for the Cabinet in this instance, we are of the opinion that the other evidence which it has offered, while competent, establishes BJB's past drug usage, and not ongoing drug usage after the time that she began attempting to comply with the case plan. The copies of the laboratory reports and the testimony of Churchman were the only evidence relating to the drug screen results which would tend to show ongoing usage.

In so finding, we recognize the Cabinet's assertion that BJB's substance abuse was not the crux of its case. Although we recognize that the Cabinet made a number of arguments for termination, including inability to hold a permanent job, changing of residence, and inability to parent appropriately, issues of ongoing substance abuse were certainly of central importance of trial, to the extent that we cannot say for certain that the Court did not, at least in part, base its decision on that evidence. Accordingly, because we do not believe these screens

were properly admitted for the foregoing reasons, we are compelled to reverse on this issue.

Having so found, we now turn to BJB's second basis for appeal, namely, her argument that the testimony and report of Dr. Ebben were erroneously admitted by the trial court because they contained double hearsay. BJB asserts that Dr. Ebben should not have been allowed to testify as to allegations he learned from reading the Cabinet's records, nor should his report, which contained references to the Cabinet's records, have been admitted. BJB asserts that Dr. Ebben's testimony and the statements contained in his report were double hearsay. BJB notes that in his report, Dr. Ebben made numerous citations to the Cabinet's records, stating, for example, that "there was also an allegation that the caregivers were 'blowing smoke in the baby's face and would leave the baby lying on the bench while they walked around.'"[12]

BJB asserts that such statements made by Dr. Ebben were gleaned from his review of the Cabinet records. BJB argues that other than the factual observations of social workers, the Cabinet's report provided to Ebben was inadmissible hearsay. In support of that argument, BJB directs the attention of this Court to *Prater v. Cabinet for Human Resources, Com. of Ky.*, 954 S.W.2d 954 (Ky. 1997).

[12] Another example of a statement included in Dr. Ebben's report was, "It was noted that she went from church to church while residing in Tennessee asking for money for assistance and she would put dirt on the children and dress them up in the worst clothes she could find in order to look sad and hopeless in order to get money." (Dr Ebben's report, Plaintiff's Exhibit 2, p. 1).

In *Prater*, the Cabinet filed a termination action against the parents of three children and the case proceeded to trial. The mother's niece, who was unavailable for the termination trial, had made statements accusing the parents of physically and sexually abusing the children in question. During the trial, a social worker testified about a Cabinet case report regarding sexual abuse of the children, which included statements made by the niece. Another social worker testified that the report accurately reflected the statements made to her by the niece.

On appeal in that case, the Cabinet argued that the case report was properly admitted as a business record pursuant to KRE 803(6). In addressing that argument, our Supreme Court held that KRE 803(6) does not authorize a carte blanche admission of each individual entry contained in a report, and found that KRE 803(6) and KRE 803(8) only satisfy the hearsay aspects of the business or public record itself. Thus, the Supreme Court held that if a particular entry in the record would be inadmissible for another reason, it does not become admissible just because it is included in a business or public record. *See Prather* at 958.

Having so held, the Supreme Court therefore found that the social worker's report containing the statements made by the niece were hearsay, and that the other social worker's testimony about the accuracy of the statements themselves was double hearsay. Nevertheless, the Court held that the admission of the statements and report was not reversible error because there was other competent evidence to prove the matter at issue.

Based upon the foregoing precedent, BJB asserts that inadmissible testimony should not become admissible simply because it is memorialized in the Cabinet's case report, and therefore argues that the first paragraph of Dr. Ebben's report setting out the allegations against BJB should have been redacted.

In response, the Cabinet asserts that *Prather* is distinguishable from the matter *sub judice*, because in the matter *sub judice*, the information was not being offered for the truth of the matter asserted, but instead was used by Dr. Ebben to gauge the consistency of the information provided to him by BJB.

In support of its argument in that regard, the Cabinet notes that Dr. Ebben, after reviewing the records which were summarized in the first paragraph of his report, questioned BJB about the Cabinet's findings. He confirmed that the information she relayed to him correlated with the Cabinet's findings of a fairly significant substance abuse history that has complicated her life and her ability to independently function as a parent. Indeed, the Cabinet notes that Dr. Ebben described BJB as "honest and contrite while talking," and that she "admitted to past parenting problems."[13] Accordingly, the Cabinet argues that the information contained in the report and repeated in Dr. Ebbens's letter was not offered for the truth of its contents, but instead for purposes of consistency.

Having reviewed the arguments of the parties, the record, and the applicable law, we affirm the decision of the trial court to admit the report,

[13] VR No. 1:01/15/09; 09:42:20.

although not on the basis of the arguments made by the Cabinet. Having reviewed the record, we believe the facts or data, in this instance, are likely of the type of information reasonably relied upon by experts in Dr. Ebbens's field when drawing inferences or forming opinions on a particular subject.[14] As is established by KRE 703, when this is the case the facts or data itself need not be admissible into evidence;[15] accordingly, even though the information contained in the report is hearsay, we find no error on the part of the court below in admitting it, as it is allowed by KRE 703.

As her final basis for appeal, BJB asserts that the evidence presented at the hearing required a dismissal of the termination action because the Cabinet failed to meet its burden of clear and convincing evidence. BJB specifically asserts that the court erred in finding that there was no reasonable expectation of improvement in parental care and protection, considering the age of the child, nor was there any reasonable expectation of significant improvement in her conduct in the immediately foreseeable future insofar as providing food, clothing, shelter, medical care, or education for the child was concerned.

BJB argues that from the time of her release from the detention center in June of 2008, until the hearing in January of 2009, she found employment,

[14] We are unaware of any objections made to the admission of Dr Ebben's report or testimony on this basis.

[15] It is important to note that even though an expert may rely upon "hearsay" in forming his opinion, this does not admit the hearsay into evidence for substantive purposes. Further, the value of the expert's opinion is only as good as either the facts or methods upon which he relied in forming his opinion, and that "value" will be revealed upon cross-examination.

completed a psychological evaluation, and met the recommendations of the psychological evaluation by enrolling in an early childhood intervention program. BJB also points out that she enrolled in substance abuse counseling as soon as it was available to her. Further, BJB states that she missed only one visit with her child from March of 2007 through February of 2009. For these reasons, BJB argues that there was a reasonable expectation of significant improvement in her conduct in the immediately foreseeable future and that, accordingly, there was not clear and convincing evidence to support the court's finding.

In response, the Cabinet directs the attention of this Court to testimony and evidence which it asserts establishes that BJB had a significant drug problem, for which she "remains at risk for relapse,"[16] and for which she continued to receive treatment at the time of trial. Further, the Cabinet cites evidence establishing numerous residences and jobs held by BJB since her release in 2008, as well as the admission of BJB that she still relied upon her husband for support, although they were not living together. In addition, the Cabinet notes, BJB admitted owing more than $35,000 in support for her oldest children, and the fact that she had paid no support at all for her youngest children. Accordingly, the Cabinet asserts that the record clearly indicates that by clear and convincing evidence, it met its burden to prove parental neglect and that, accordingly, the trial court was correct in ruling as it did.

[16] Petitioner's Exhibit #2 at 12.

Having found that reversal is appropriate in this matter based on the aforementioned reasons, we need not address this argument at this time. Accordingly, we hereby reverse and remand to the Shelby Family Court for additional proceedings not inconsistent with this opinion.

All concur.

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