

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000237-ME
&
NO. 2011-CA-000238-ME
&
NO. 2011-CA-000239-ME

A.H.

APPELLANT

CONSOLIDATED APPEALS
FROM KENTON FAMILY COURT, SECOND DIVISION
v. HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NOS. 10-AD-00086, 10-AD-00087, & 10-AD-00088

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY
SERVICES, and S.S.H., A.W.H, and
E.A.D.K., infants

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, MOORE, AND NICKELL, JUDGES.

COMBS, JUDGE: A.H. (Mother) appeals orders of the Kenton Family Court terminating her parental rights to her children.¹ After our review of the record and the law, we affirm.

¹ The court also terminated the rights of the children's father and of a putative father of one child; however, they are not parties to this appeal.

Mother's three children were the subjects of the underlying proceeding. At the time of the termination hearing on December 3, 2010, her daughter was five years of age. The two sons are separated by only ten months, and they were both four years of age. The children had been removed from their home in May 2009 following the arrest of their mother and their father. Initially, they were placed with relatives. However, in June 2009, the relatives remanded the children to the custody of the Cabinet for Health and Family Services. In August 2009, the family court found that the children were neglected.

Mother testified at length at the hearing. She admitted that she had been an addict since she was fifteen years of age. She had used pain pills, heroin, and methadone. Her heroin use began after the birth of the children. Mother testified that she completed the in-patient portion of a recovery program, that she has had multiple consecutive clean drug tests, that she attends Alcoholics Anonymous and Narcotics Anonymous meetings three times per week, and that she has been sober for eleven months.

Mother further testified that in the past, she had filed charges of domestic abuse against the children's father because he had beaten her while she was holding one of the children.² However, she also testified that he is an excellent father. While she denied that the father continued a pattern of violent behavior, she admitted that he slapped her and pulled her hair from time to time. When prodded, she said that she "guessed" that the slapping and hair-pulling could be

² This child is not a subject of the termination action. Born while the appellant was a minor, this child was raised by a grandparent.

considered to be violent. The father, who attended the hearing by telephone from federal prison, testified that upon his release from prison in 2012, he plans to return to Covington and to live with the children.

Mother testified that she has been diagnosed with several mental illnesses, including bi-polar and multiple personality disorders. However, she stated that she is not taking any prescribed medications because she believes that she does not need medication. Mother acknowledged that several mental health practitioners have terminated their care of her because she has behaved aggressively in their offices.

Mother has never had a job and receives approximately six hundred dollars per month from Social Security. She lives in a four-bedroom home with three other people, but she testified that the home would sufficiently accommodate the three children as well. Mother had last visited with the children approximately five months before the hearing. During that visit, she was arrested for a parole violation. She claimed that the violation consisted of falling asleep during a group therapy session.

The children's case worker from the Cabinet testified. She stated that although Mother had successfully completed the in-patient portion of a treatment program, she was terminated from the after-care because she had fallen asleep in a group therapy session and then tested positive for marijuana. As noted earlier, this incident occurred approximately **five months** prior to the termination hearing in contradiction of Mother's claim of **eleven months** of sobriety.

The case worker disclosed that Mother had never taken steps to address the domestic abuse situation, nor had she completed any parenting classes. The Cabinet had advised her to complete a mental health assessment at the beginning of its involvement with her children, but she did not do so until approximately two weeks prior to the termination hearing. In the case worker's experience, Mother had always required medication for her mental illnesses in order to function.

The case worker also testified that the children had adjusted very well to the foster home. The daughter was progressing in therapy. The Cabinet was reluctant to allow Mother to have visitation with the children because of behavior issues that occurred after her visits with them.

Following the hearing, the trial court issued its findings of fact and conclusions of law and determined that Mother's rights should be terminated. This appeal follows.

Mother's first argument is evidentiary – that the family court erred when it allowed the Cabinet to introduce the reports from the Dependency, Neglect, Abuse proceedings in juvenile court; she alleges that they contained hearsay. We disagree.

Our standard of review for evidentiary issues is whether the trial court abused its considerable discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (*overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008)). Our Supreme Court has defined abuse of discretion a court's acting arbitrarily, unreasonably, unfairly, or in a manner "unsupported by

sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Our court has recently addressed this evidentiary argument (albeit in an unpublished opinion). *R.S. v. Cabinet for Health and Family Services*, 2011 WL 1327665 (Ky. App. April 8, 2011). In that case, we concluded that because the court had already used the records in another proceeding, they became subject to judicial notice. *See* Kentucky Rule[s] of Evidence (KRE) 201. We noted that prior to the expansion of KRE 201, judicial notice of court records had been limited to records in the same court involving the same parties and issues. *See Collins v. Combs*, 320 S.W.3d 669, 678 (Ky. 2010). In *R.S.*, we held that the family court did not err in utilizing juvenile court records in a later termination proceeding regarding the same children. We hold that use of the records was not error in this case.

Mother next contends that the Cabinet did not provide the court with clear and convincing evidence that the children were abused or neglected.

We are wholly mindful that termination of parental rights is a grave matter that must be afforded the most meticulous due process protection. Therefore, “[t]hey can be involuntarily terminated only if there is clear and convincing evidence that the child has been abandoned, neglected, or abused by the parent whose rights are to be terminated, and that it would be in the best interest of the child to do so.” *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 324 (Ky. 2006). An appellate court accords to a family court much discretion

and applies the clearly erroneous standard of review under Kentucky Rule[s] of Civil Procedure (CR) 52.01. As long as the record contains substantial evidence to support a family court's findings, they must stand. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

It is essential for us to examine the statutes that govern termination actions. Kentucky Revised Statute[s] (KRS) 625.090 provides in pertinent part as follows:

- (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
 - (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction . . . and
 - (b) Termination would be in the best interest of the child.

KRS 625.090(1). Mother contends that it was error for the court to rely on the previous findings which had adjudged the children to be neglected. On the contrary, the statute clearly states that a **previous adjudication** is a **prerequisite** for a finding of termination.

Ample evidence of neglect was presented at the hearing. KRS 600.020(1) defines *abused or neglected child* in pertinent part as:

- a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control of supervision of the child:
 - (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
 - (b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child other than by accidental means;

- (c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
- (d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
- (h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care for the child's well-being.
- (i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months.

Both Mother and the children's father testified that they had used drugs while the children were in their custody. This conduct exposed the children to a risk of harm. Furthermore, even though Mother testified at the hearing that the children's father had beaten her and one of their children, she had the domestic violence petition dismissed so that she and the children could remain with him. She and the children remained in the home with the father until the two adults were arrested.

Mother has never worked; her income is inadequate to provide for herself and her three children. She has acknowledged that she had not provided any support for the children since they were in foster care because "they only asked me to take drug tests." Furthermore, the children had been in foster care for eighteen months prior to the hearing, and the case worker testified that Mother had not completed **any** of the objectives in her case plan. Therefore, we are unable to conclude that the family court erred in finding abuse and neglect.

Mother also alleges that the family court committed error when it failed to recognize the progress that she has made in recovering from addiction. KRS 625.090(3)(d) requires the court to consider what effort that a parent has made toward reunification of the family.

It is noteworthy that Mother has endeavored to make progress. However, at the hearing, she claimed to have been sober for **eleven** months; but the case worker testified that she had tested positive for marijuana **five** months before the hearing. Mother does not deny that she delayed in taking a mental health assessment for months and then completed it only weeks before the hearing. The case worker testified that she has not completed **any** objectives in her case plan – despite her testimony that she has attended some parenting classes. The court had substantial evidence to support its findings, and we are cannot conclude that it committed error.

Mother did not present her final argument in her brief; she reserved it for her reply brief. Therefore, we are not required to address the issue. *Catron v. Citizens Union Bank*, 229 S.W.3d 54, 59 (Ky. App. 2006). Nonetheless, we shall examine it in light of the seriousness of an action terminating parental rights.

Mother argues that the trial court erroneously found that the children were **abandoned**. We agree.

KRS 625.090(2) provides that termination shall not be ordered unless **at least one** of a list of factors is present. In this case, the trial court found that three of them were applicable:

- (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
- (c) [t]hat 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.

Mother contends that she did not abandon the children as contemplated by (a). It is true that she has been separated from the children. However, they were initially removed from her because she was incarcerated. This court has unequivocally declared that incarceration “can never be construed as abandonment as a matter of law.” *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985). To clarify, we have explained that, “abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child. Non-support does not itself constitute abandonment[.]” *D.S. v. F.A.H.*, 684 S.W.2d 320, 322 (Ky. App. 1985). (*quoting O.S. v. C.F.*, 655 S.W.2d 32 (Ky. App. 1983)).

The family court did not state the reasons for finding that Mother had abandoned the children other than mentioning that she had not provided any support since they were in foster care. No evidence was presented at trial to

indicate that she had sought to forego her parental duties. She testified that before she and the children were separated, she spent a great deal of time at Children's Hospital because of one of her son's heart condition. Since the children have been in foster care, she has consistently called the foster home. Neither the Cabinet nor the guardian *ad litem* disputed her allegations. Therefore, we agree with Mother that it was error for the trial court to find that she had abandoned the children.

Nevertheless, KRS 625.090(2) requires that only one of the statutory criteria be present in order to warrant and sustain a termination of parental rights. Because the court found two of those factors upon which it properly relied, we hold that the error as to abandonment was harmless.

We affirm the Kenton Family Court.

ALL CONCUR.

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