

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000389-ME

J. S.

APPELLANT

v.

APPEAL FROM POWELL FAMILY COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 14-AD-00014

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND N. A. S. C., AN INFANT

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: J. S. (mother) appeals the judgment terminating her parental rights to N. A. S. C. (child) on the basis that the University of Kentucky Comprehensive Assessment & Training Services (CATS) assessment was not

properly admitted into evidence and was the primary evidence justifying termination. For the following reasons, we affirm.

In 2006, child was born to mother. Child had both a legal father (who was married to mother) and putative father (who was named on child's birth certificate). Child has three older brothers, who have different fathers.

Child and her brothers were removed from mother's custody on October 11, 2011, after mother violated a safety plan designed to keep child and her brothers safe. Mother contested violating the safety plan.

Child was placed in the custody of the Cabinet for Health and Family Services and the family court adjudicated that mother neglected child. Mother was assigned several case plan tasks and granted supervised visitation.

On September 5, 2014, the Cabinet filed a petition for termination of parental rights.¹ At the termination hearing, only social worker Theresa Brand testified.

Brand testified she was child's ongoing worker for the past two years and was familiar with the case from its inception. The Cabinet investigated mother's treatment of her children in 2005. It also opened another investigation in 2008-2009, which was closed. In 2011, the Cabinet again became involved with the family after learning that child's older siblings had juvenile records and were allowed to roam the streets at night. Mother agreed to follow a safety plan so that

¹ Both legal father's and putative father's parental rights were terminated and they have not appealed. Therefore, we omit the evidence and rulings as they pertain to them.

her children would not be removed. The safety plan required mother to supervise her children at all times when they were out of school and to stop using marijuana.

Brand testified child came into the Cabinet's care after mother violated the safety plan. The police found one of child's brothers at the high school participating in an extra-curricular activity without his mother being present, which was a violation of the safety plan. Mother admitted to using marijuana but stated the children were usually gone while she used. Mother's drug screens were positive for THC.

Brand acknowledged that after child was removed, mother made a good effort to follow her case plan and completed almost all of it: mother quit using marijuana, completed mental health and substance abuse assessments, enrolled in Advancing Solution, completed parenting classes, submitted to random drug testing and had not had a positive screen since April 2013.

Brand testified mother only failed to complete the case plan task of achieving stable housing. Brand testified the last time she tried to see mother's mobile home, mother would not let her in because of her dogs. On her previous visit, she saw mother's mobile home was dilapidated. It had particle board on the floor with no floor covering, patched walls that had not been painted and personal belongings piled on the living room floor. From her glimpse in the door, it did not appear that the house had undergone any further repair since her last visit. Mother admitted her mobile home was not appropriate for children.

Brand was also concerned because mother lived with a man who had a history of high risk behaviors and a criminal record check revealed he had a history of substance abuse.

Brand testified mother did not work but had income from social security disability benefits because of a learning disability. Mother had trouble budgeting and was sporadic in paying child support.

When Brand was questioned about the results of the CATS assessment, mother immediately objected to its admission or any testimony being provided by Brand because she was not qualified to testify about it. The Cabinet argued that because the CATS assessment was the result of a court-ordered evaluation, it could be admitted under Kentucky Rules of Evidence (KRE) 706(a). The family court overruled mother's objection and allowed Brand to testify about the results of the CATS assessment and admitted it into evidence.

Brand testified that according to the CATS assessment, mother was operating at her optimum level and had made considerable effort but it was not enough to meet her children's needs. Child had an attention deficit hyperactivity disorder and possible conduct disorder and mother was unable to provide adequate care. According to the CATS assessment, returning child to mother would be high risk.

Brand testified that currently none of child's three brothers were living with mother. Two of the brothers had a goal of emancipation. One of them

was originally in the custody of his father, but in February 2014, he lived with mother and was later found on the street by the police at 4 a.m. Mother had not supervised him appropriately or made sure he took his medication. A dependency action was filed, the court determined father had neglected child and child was placed with the Cabinet. Another brother also had a goal of emancipation because he was in the custody of the Department of Juvenile Justice. The third brother was living with his biological father.

Brand testified mother was inappropriate during visitation with her children. When visiting with her sons, she would jump in their arms, sit in their laps and social workers caught mother leaving cigarettes for her sons under a garbage can. Mother had trouble setting boundaries and following through on discipline.

Brand testified mother had not visited with child since December 2013, because child said she did not want to see mother and was fearful of visiting with her. Child last saw mother at her grandmother's funeral in May 2014 while living in a relative placement with her cousins. Afterward, child had nightmares mother would come and take her away, began wetting the bed and became withdrawn. Following a sibling visitation, she acted out: hitting, kicking and biting. Child required mental health counseling and had a brief period of institutionalization for stabilization. In July 2014, the cousins asked that child be placed back into foster care because they could not meet her needs. Child had five different placements

but was doing well in her current placement and had successfully resumed sibling visitation.

Brand testified despite mother making efforts to complete her case plan, Brand did not believe mother had sufficient caregiving abilities to provide for her children's needs. She previously left her children unsupervised and then again left child's brother unsupervised resulting in his being found on the street at night. Child's needs were significant and included acting out and a need for counseling. Brand did not believe mother was capable of meeting child's ongoing needs.

Following the conclusion of the hearing, the family court terminated mother's parental rights. In the family court's findings of fact and conclusions of law, the family court found child was removed from mother's custody after mother violated the terms of a safety plan regarding supervision of her children and admitted to marijuana use. The family court found as follows:

[Mother] has made a good faith effort to complete her [Cabinet] case plan. The Cabinet worker, Teresa Brand, testified that [mother]: submitted to a mental health and substance abuse assessment; enrolled in Advanced Solutions Program administered by Kentucky River Community Care; has submitted to random drug screens and pill checks; and submitted to a court ordered CATS assessment. However, Ms. Brand testified that [mother] has failed to maintain a stable home. Ms. Brand testified that on her last home visit at [mother's] mobile home, there were two dogs in the home and particle board on the floor with no floor coverings. The walls had been patched but not painted. There were personal belongings piled in the living room. Ms. Brand testified that [mother] admitted to her that the home was not

appropriate for her minor daughter. In addition, there was someone living in the home with [mother]. Ms. Brand testified that she suspected it was [mother's] paramour, []. Ms. Brand testified that if it is [mother's paramour], he needed to be assessed by the Cabinet due to his criminal history regarding substance abuse.

A Comprehensive Assessment and Training Program ("CATS") was conducted on [mother]. The CATS assessment noted that [mother] appeared to love and appreciate her children and had made considerable effort to enhance for functioning; there still remained a poor fit between the extensive caregiving needs of the children and the caregiving capacity of [mother]. The assessment found that Respondent mother: 1) has not yet achieved stability; 2) lacks insight into caregiving deficits and the impact her caregiving has had on her children; 3) is not prepared to meet her children's mental health needs due to her own unaddressed trauma; 4) is not prepared to meet her children's mental health needs due to her minimization of their experiences; 5) does not have insight into the impact of her relationship choices on her children; 6) does not have insight into underlying factors impacting her relationship choices or a plan for preventing future unhealthy relationships; 7) does not have insight into factors impacting her misuse of substances as a means of coping and therefore has no solid prevention plan; 8) has strained relationships with her children and limited capacity for meeting their needs simultaneously; 9) continues to struggle with meeting her children's physical safety needs even during supervised visitation; 10) and has received numerous services to enhance her functioning and still has limits in insight that pose risk to her children if returned to her care.

Accordingly, the CATS team could not recommend reunification and this Court concurs. While this Court acknowledges that the Respondent mother has made efforts to work her case plan, the Court does not find that [mother] has made the necessary changes in her circumstances and conditions to allow [child] to be safely returned to her care.

[Mother has] failed to protect and preserve [child's] fundamental right to a safe and nurturing home[.]

The family court found child was abused and neglected and it was in her best interest that parental rights be terminated. It concluded:

[(1)] [Mother] for a period of not less than six months, [has] continuously failed or refused to provide or [has] been substantially incapable of providing essential parental care and protection for the child . . . and there is no reasonable expectation of improvement in parental care and protection, considering the age of the child.

[(2)] [Mother] for reasons other than poverty alone, [has] continually failed or refused 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 there are no reasonable expectation of significant improvement in the parents' conduct in the immediately foreseeable future, considering the age of the child.

[(3)] [Child] has been in foster care under the responsibility of the Cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights in this action.

The family court determined the Cabinet had provided all reasonable services and it was in the best interest of child that mother's parental rights be terminated and child be placed for adoption.

Mother requests palpable error review of the family court's decision to admit the CATS assessment through Brand under KRE 706(a). She argues that although the error was not preserved through objection the CATS assessment could not be

admitted under KRE 706(a) because neither Brand, nor the person who wrote the CATS assessment was a proper court appointed expert. She argues the family court's error in admitting the CATS assessment affected the outcome of the termination hearing because the family court predominately relied on the CATS assessment in determining to terminate mother's parental rights.

The Cabinet notes mother properly objected to the admission of the CATS assessment through Brand, thus properly preserving this matter for appellate review. The Cabinet concedes the assessment could not properly be admitted under KRE 706(a).

However, the Cabinet argues that the CATS assessment was properly admitted because it was contained within the certified copy of the juvenile court record which was admitted without objection. Therefore, the admission of the CATS assessment through this method could only be erroneous if its admission constitutes palpable error. The Cabinet argues any error was not palpable because there was sufficient evidence admitted at trial so that the admission of the CATS assessment did not affect the outcome.

We agree with the Cabinet that because the CATS assessment was admitted as part of the certified copy of the juvenile court record, the family court's consideration of it, although it contained hearsay, could only justify reversal if its admission constituted palpable error. Although Brand's testimony concerning the CATS assessment was properly objected to and should have been excluded, the

family court did not rely on this testimony in its judgment. Therefore, we must determine whether the admission of the CATS assessment which contained hearsay through the juvenile court record constitutes palpable error.

Kentucky Rules of Civil Procedure (CR) 61.02 states as follows:

A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In interpreting the identical Kentucky Rules of Criminal Procedure (RCr) 10.26, the Court in *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), explained that “the required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.” Manifest injustice only exists when “the defect in the proceeding was shocking or jurisprudentially intolerable.” *Id.* at 4. Therefore, the admission of hearsay evidence in the CATS assessment could only result in palpable error if without it, there would be insufficient evidence to terminate mother’s parental rights.

“Admission of incompetent evidence in a bench trial can be viewed as harmless error . . . *if there was other competent evidence to prove the matter in issue[.]*” *Prater v. Cabinet for Human Res., Commonwealth*, 954 S.W.2d 954, 959 (Ky. 1997). “[I]f the quality and substantiality of competent evidence to support termination is abundantly sufficient, the admission of hearsay evidence is

nonprejudicial error.” *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky.App. 1998). See *Lambert v. Lambert*, 475 S.W.3d 646, 652 (Ky.App. 2015); *V.S. v. Commonwealth, Cabinet for Human Res.*, 706 S.W.2d 420, 426 (Ky.App. 1986). Compare with *G.E.Y. v. Cabinet for Human Res.*, 701 S.W.2d 713, 715-16 (Ky.App. 1985). Therefore, we may properly affirm if there is sufficient quality evidence present and relied upon by the family court to justify the termination of mother’s parental rights after omitting any consideration given to the CATS assessment in the family court’s findings and conclusions of law. Under such circumstances, there cannot be a palpable error in admitting hearsay evidence.

KRS 625.090 provides that parental rights may be involuntarily terminated only if, based on clear and convincing evidence, a circuit court finds: (1) that the child is abused or neglected as defined in KRS 600.020(1); (2) that termination is in the child's best interests; and (3) the existence of one or more of ten specific grounds set out in KRS 625.090(2).

M.B. v. D.W., 236 S.W.3d 31, 34 (Ky.App. 2007).

This Court’s standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings.

M.P.S., 979 S.W.2d at 116.

After omitting the CATS assessment results, clear and convincing evidence remained that child was abused and neglected, termination was in her best interest

and three specific grounds for termination were established. The family court properly found child was an abused and neglected child because mother failed to protect and preserve child's fundamental right to a safe and nurturing home by failing make the necessary changes in her circumstances and conditions to allow child to be safely returned to her care. This finding was amply supported by the evidence that mother failed to maintain a stable home based on her failure to adequately repair it and allowing her paramour, who had a criminal history regarding substance abuse, to occupy it. The lack of a stable home along with the length of time child was in foster care sufficiently established the three specific grounds the family court relied on for termination. The family court acted properly in terminating mother's parental rights pursuant to KRS 625.090.

Accordingly, we affirm the Powell Family Court's judgment terminating J. S.'s parental rights to N. A. S. C.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Kenniston
Irvine, Kentucky

BRIEF FOR APPELLEES:

Sheila F. Redmond
Cabinet for Health & Family Services
Lexington, Kentucky