RENDERED: June 19, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-001413-MR

IN RE: THE INTEREST OF T.E.M., A Child

L.B. APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE RICHARD FITZGERALD, JUDGE
ACTION NO. 96-FC-1875

CABINET FOR FAMILIES AND CHILDREN
COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

AFFIRMING

* * * * *

BEFORE: COMBS, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, JUDGE. This is an appeal by L.B. from a Jefferson Family Court order terminating her parental rights to her son, T.E.M. L.B. alleges that the trial judge should have recused himself from hearing the case and that the evidence was insufficient to support an order terminating her parental rights. We affirm.

T.E.M. was born out of wedlock on December 26, 1986. His parents are L.B. and T.M.[1] In April 1991, L.B. began physically abusing T.E.M. Since then the courts and child protective services agencies have been extensively involved in the situation. On two occasions (March 1994 and September 1995) T.E.M. was removed from his mother because he had been physically abused. As a result of the September 1995 incident, L.B. pled guilty to fourth-degree assault. On March 28, 1996, the Cabinet for Families and Children filed a petition for involuntary termination of L.B.'s parental rights to T.E.M. Hearings on the matter were held on November 1, 1996, and January 9, 1997. On May 20, 1997, the trial court terminated L.B.'s parental rights to T.E.M. This appeal followed.

In conjunction with a conference held on February 2, 1996, a Department for Social Services form entitled "Case Plan/Out of Home Care" was completed by an unidentified conference participant. The form includes the notation "[t]he court recommends that as a permanency plan for T.E.M. that the Cabinet pursue a relationship for [the] child other than reunification with the mother while at the same time providing the mother due process to give her [a] full opportunity to achieve reunification." L.B. argues that trial judge Richard J. Fitzgerald should have recused himself from the case on the basis that this recommendation created the appearance of a conflict of interest.

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[1] In a separate action, T.M. has acknowledged the child as his own and consented to a voluntary termination of his parental rights.

Ky. Rev. Stat. (KRS) 26A.015(2)(e) requires a judge to disqualify himself "[w]here he has a personal bias or prejudice concerning a party, . . . or has expressed an opinion concerning the merits of the proceeding." Canon 3C(1) of the Code of Judicial Conduct, Sup. Ct. R. (SCR) 4.300, contains a similar provision. The burden of proof required to demonstrate that recusal of a trial judge is mandated is an onerous one. It must be shown that the trial judge is prejudiced to such degree that he cannot be impartial. Johnson v. Ducobu, Ky., 258 S.W.2d 509, 511 (1953); Brand v. Commonwealth, Ky. App. 939 S.W.2d 358, 359 (1997). In order to successfully seek recusal of a judge, there must be a showing of facts "of a character calculated seriously to impair the judge's impartiality and sway his judgment." Foster v. Commonwealth, Ky., 348 S.W.2d 759, 760 (1961); Miller v. Commonwealth, Ky., 925 S.W.2d 449, 452 (1995). The mere fact that the trial judge has indicated or stated his belief in the guilt of the defendant is not enough to disqualify the judge. Nelson v. Commonwealth, Ky., 258 S.W. 674 (1924). There must be a showing of bias or prejudice against, or hostility towards, the defendant. Stamp v. Commonwealth, Ky., 243 S.W. 27 (1922); White v. Commonwealth, Ky., 310 S.W.2d 277, 278 (1958).

L.B. has failed to meet her burden of showing that Judge Fitzgerald was prejudiced to such a degree that he was incapable of being impartial. The language attributed to the trial court, when read in its entirety, belies L.B.'s contention. Judge Fitzgerald, in fact, admonished the Cabinet to "provid[e] the mother due

process to give her [a] full opportunity to achieve reunification." In view of this, we find nothing in the record impugning the trial judge's impartiality and indicating that his decision not to recuse himself was clearly erroneous. Judge Fitzgerald was in the best position to determine whether questions raised regarding his impartiality were reasonable. We see no reason to second-guess his decision. Jacobs v. Commonwealth, Ky. App. 947 S.W.2d 416 (1997).[2]

L.B. argues that the trial court erred in terminating her parental rights due to insufficiency of the evidence. The parental rights termination statute, KRS 625.090, provides, in pertinent part, that:

> 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 the child has been adjudged to be an abused or neglected child by a court of competent jurisdiction or is found to be an abused or neglected child by the circuit court in this proceeding and that termination would be in the best interest of the child. No termination of parental rights shall be ordered unless the circuit court also finds by clear and convincing evidence

[2] L.B. could have sought disqualification of the trial judge pursuant to Ky. Rev. Stat. (KRS) 26A.020, but did not. This statute provides a separate and distinct opportunity to a party who believes he or she will not receive a fair and impartial trial. Nichols v. Commonwealth, Ky., 839 S.W.2d 263 (1992). L.B.'s failure to pursue this opportunity does not, however, affect our review on appeal.

the existence of one (1) or more of the following grounds:

. . . . .

(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;

(d) 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;

. . . . .; or

(f) 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.

In summary, the statute requires a finding, supported by clear and convincing evidence, (1) that the child is an abused or neglected child;[3] (2) that the termination would be in the best interest of the child; and (3) that one or more of the factors set out in subsection (1)(a)-(f) are present. In its order terminating parental rights, the trial court found that T.E.M. was an abused and neglected child and made additional findings, based on clear and convincing evidence, supporting this conclusion. The record is replete with evidence of incidents in which L.B. had physically abused T.E.M. In April 1991, L.B. hit T.E.M. across his back and legs with a metal fly swatter handle. L.B. admitted that on this occasion she lost control while disciplining T.E.M. and administered the swats hard enough to cause discoloration. In December 1991 a social worker observed T.E.M. with blood encrusted about his nostrils and abrasions near his right eye and left cheek. T.E.M. reported that L.B. had kicked him in the nose; L.B. stated that she had hit T.E.M. on the left side of his face with her hand causing the child to fall against a bed and injuring the right side of his face near the eye. Following this incident, L.B. signed an agreed

[3] KRS 600.020(1) defines "abused or neglected child" as: "a child whose health or welfare is harmed or threatened with harm when his parent, guardian or other person exercising custodial control or supervision of the child: inflicts or allows to be inflicted upon the child physical or emotional injury by other than accidental means; creates or allows to be created a risk of physical or emotional injury to the child by other than accidental means;...does not provide the child with adequate care, supervision, food, clothing, shelter and education or medical care necessary for the child's well-being."

order that she would refrain from any further corporal punishment of T.E.M.

However, in February 1994, a social worker observed bruising, swelling, redness and a cut around T.E.M.'s left eye. T.E.M. reported that L.B. had hit him in the eye; L.B. admitted that she had done this. L.B. also admitted that in September 1995 she grabbed T.E.M.'s face and caused bruises to the left side of his face. As a result of this incident, L.B. pled guilty to fourth-degree assault. T.E.M. reported that on another occasion his mother hit him with a hair brush causing a small knot on his head.

The trial court has considerable discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. Department for Human Resources v. Moore, Ky. App., 552 S.W.2d 672, 675 (1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in Ky. R. Civ. Proc. (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 them. V. S. v. Commonwealth, Cabinet for Human Resources, Ky. App., 706 S.W.2d 420, 424 (1986). "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." Rowland v. Holt, Ky., 70 S.W.2d 5, 9 (1934). The record

contains substantial evidence to support the findings of the trial court that T.E.M. is an abused or neglected child. The numerous instances of physical abuse convince us that the trial court did not clearly err when it determined that T.E.M. was an abused or neglected child.

The second prong of KRS 625.090 requires a determination that the termination of parental rights would be in the best interest of the child. In determining the best interest of the child and the existence of a ground for termination, the circuit court is required to consider the factors set forth in KRS 625.090(2):

> (a) Emotional illness, mental illness or mental deficiency of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;
>
> (b) Acts of abuse or neglect toward any child in the family;
>
> (c) If the child has been placed with the cabinet or a child-placing agency or child-caring facility, whether the cabinet has rendered or attempted to render all reasonable services to the parent which reasonably might be expected to bring about a reunion of the family, including the parent's testimony concerning such services and whether

additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within a reasonable period of time, considering the age of the child;

(d) The efforts and adjustments the parent has made in his circumstances, conduct or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

(e) The physical, emotional and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

The findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be "clearly erroneous." CR 52.01; Stafford v. Stafford, Ky. App., 618 S.W.2d 578 (1981). This principle recognizes that the trial court alone had the opportunity to judge the witnesses' credibility. Without the rule, actions would be tried anew upon appeal. Id. at 579. The trial court did not err in its determination that it was in the child's best interest that L.B.'s parental rights be terminated. In addition to the physical abuse previously detailed testing has shown L.B. to be an intellectually compromised

individual. Her I.Q. scores place her in the mid-range of mild mental retardation. As a result, L.B. has not benefited from parenting classes and social services counseling. In addition, L.B. has been consistently unable to care for the immediate behavior management and emotional needs of the child for a period of time in excess of two years. While L.B. obviously disagrees with the trial court's findings, when the evidence is conflicting, we cannot and will not substitute our judgment for that of the trial court. Wells v. Wells, Ky., 412 S.W.2d 568, 571 (1967).

The final prong of KRS 625.090 requires a finding by clear and convincing evidence of one of the factors set forth in KRS 625.090(1)(a)(f). In this case, the trial court specifically found that the grounds set forth in (c), (d) and (f) are present. There is substantial evidence to support the trial court's determination. The Cabinet has met its burden to establish grounds for termination by of clear and convincing evidence as required by KRS 625.090. Santosky v. Kramer, 455 U.S. 745 (1982); O. B. C. and F. D. C. v. Cabinet for Human Resources, Ky. App., 705 S.W.2d 954 (1986); and V. S. and H. S. v. Commonwealth Cabinet for Human Resources, Ky. App., 706 S.W.2d 420 (1986).

Finally, the Cabinet alleges that the notice of appeal filed by L.B. was defective and did not transfer jurisdiction of an indispensable party to this Court. It argues that this defect requires dismissal of the appeal. True enough, a child is an indispensable party to an appeal concerning the termination of his or her parents' parental rights, and the failure to name that child

as a party to such an appeal is grounds for dismissal of the appeal. R. L. W. v. Cabinet for Human Resources, Ky. App., 756 S.W.2d 148 (1988). See also City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990). The instant proceeding, however, involves a situation which is distinguishable.

As in R. L. W., and Stallings, supra, the child was not listed as a party in the body of the notice of appeal. However, unlike the situations in R. L. W. and Stallings, the child was named in the caption of the notice of appeal as being the child "in the interest of" whom the appeal was filed. Moreover, the notice was served on the child's guardian ad litem. Obviously, L.B.'s notice of appeal was poorly drafted. Nevertheless, Blackburn v. Blackburn, Ky., 810 S.W.2d 55 (1991), relaxed the standards for compliance with the requirements of CR 73.03, and so we are compelled to conclude that the inclusion of the child's name in the caption of the notice of appeal was sufficient to confer upon us jurisdiction over the child, to provide the parties with fair notice of the appeal, and to identify the parties thereto.

The judgment is affirmed.

ALL CONCUR.

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