

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002867-MR

O. S.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 95-AD-00175

CABINET FOR HUMAN RESOURCES

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. O.S. appeals from an order of the Jefferson Circuit Court that terminated her parental rights to her children, J.M.M. and C.V.S. O.S. argues that the circuit court erred by finding that she failed to obtain medical care for her children and that no evidence existed indicating the children should be returned to her, and that the court improperly admitted opinion testimony. After reviewing the record, the applicable law, and the arguments of counsel, we affirm.

O.S. is the biological mother of J.M.M., born May 4, 1991, and C.V.S., born May 13, 1992. In January 1994, when the family was first investigated by the Cabinet for Human Resources

(CHR), O.S. was living with R.M., C.V.S.'s biological father. CHR was contacted after a doctor examined J.M.M. and discovered extensive contusions on her buttocks. In February 1994, a medical examination of C.V.S. revealed: contusions on his eye, ear, cheeks, chest, back, buttocks, and thighs; abrasions on his forehead, arm, and hand; a laceration in the upper lip; an x-ray of the right distal femur showed a healing fracture; and a report by a radiologist of a basilar skull fracture. J.M.M. and C.V.S. were immediately removed from the home and placed in foster care.

On June 7, 1994, O.S. and R.M. stipulated in Jefferson Family Court that the children were "abused and neglected in that both J.M.M. and C.V.S., while in the custody of O.S. and R.M., received physical injuries by other than accidental means. . . ." On November 17, 1995, CHR petitioned the Jefferson Circuit Court to involuntarily terminate O.S.'s parental rights to J.M.M. and C.V.S. On October 10, 1997, the circuit court terminated O.S.'s parental rights pursuant to Kentucky Revised Statutes (KRS) 625.090. This appeal followed.

KRS 625.090 permits the involuntary termination of parental rights only upon clear and convincing evidence that the child is abused or neglected and that termination is in the best interests of the child. In addition, the court must find by clear and convincing evidence the existence of one or more of the facts described in KRS 625.090(1)(a)-(f). In considering the best interests of the child, the court must consider the factors set forth in 625.090(2)(a)-(f). "Civil Rule 52.01 provides in part that findings of fact will not be set aside unless clearly

erroneous, with due regard given to the opportunity of the trial judge to view the credibility of the witnesses." Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); V.S. v. Commonwealth, Cabinet for Human Resources, Ky. App., 706 S.W.2d 420, 424 (1986).

On appeal, O.S. argues that there was insufficient evidence to find that she had failed to obtain medical care for the children. The circuit court specifically found that "a Court of competent jurisdiction adjudged the children to be abused or neglected. This burden was met by the September 20, 1994 Order of Judge Fitzgerald based upon the [June 7, 1994] stipulation of [O.S.]." The circuit court then found:

1. [O.S.] inflicted or allowed to be inflicted upon [C.V.S.], by other than accidental means, serious physical injury [KRS 625.090(1)(b)].
2. [O.S.] had continuously or repeatedly inflicted or allowed to be inflicted upon [J.M.M.], by other than accidental means, physical injury [KRS 625.090(1)(c)].
3. That while [O.S.] has shown some progression through treatment and counseling, she has continually or repeatedly failed to obtain medical care necessary and available for the well being of the children and that there is no reasonable expectation of significant improvement...[KRS 625.090(1)(f)].

Even if we were to assume that the circuit court erred in the third finding, O.S.'s argument would not form a proper basis upon which to reverse the circuit court's decision. Because the June 7, 1994 stipulation entered into by O.S. is sufficient to support the first and second findings, the circuit court did not err in

finding that at least one of the factors set forth in KRS 625.090(1)(a)-(f) was present by clear and convincing evidence.

Second, O.S. argues that the circuit court erred in finding that no evidence existed indicating that the children should not be returned to her. O.S. relies on a letter written by Judy Eubank, a Psychological Associate who worked with the family for over a year. In the letter, Judy Eubank recommended increased visitation for O.S. in preparation for the return of full custody. The circuit court found that "[n]o social worker or therapist, nor the guardian ad litem for the children recommended returning the children to [O.S.]..." Taken in context, the circuit court was obviously referring to the recommendations of the people currently participating in the treatment of the family. The pertinent hearings for this case took place in March and May of 1997, while Judy Eubanks ceased working with the family in August 1995.

Third, O.S. argues that the circuit court improperly admitted opinion testimony. The circuit court, in its findings of fact, made reference to a video taped deposition of the medical examiner that was not introduced into evidence and adopted a portion of the family court order which utilized the video taped deposition in evaluating the injuries to the children.

The Kentucky Supreme Court, in Prater v. Cabinet for Human Resources, Ky., 954 S.W.2d 954, 959 (1997), stated that, "Admission of incompetent evidence in a bench trial can be viewed as harmless error, but only *if the trial judge did not base his decision on that evidence*, G.E.Y. v. Cabinet for Human Resources, supra, at 715, Holcomb v. Davis,

Ky., 431 S.W.2d 881, 883 (1968), or *if there was other competent evidence to prove the matter in issue, Escott v. Harley, 308 Ky. 298, 214 S.W.2d 387, 389 (1948).*" (Emphasis original)

In this case, the matter in issue concerned the opinion of the medical examiner on whether C.V.S.'s injuries were the result of abuse or neglect. Because the injuries were adequately proven to be the result of abuse or neglect by the family court stipulation entered into by O.S., any error committed by the circuit court in reciting the family court's order containing such conclusions is harmless.

O.S.'s final argument is without merit as it attempts to recite the previous three arguments and advance a notion of a cumulative effect on the circuit court's order. Since we have addressed each argument individually we see no reason why we should re-address them in a cumulative manner.

For the following reasons, the order of the Jefferson Circuit Court terminating the parental rights of O.S. is hereby affirmed.

ALL CONCUR.

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