RENDERED: MAY 28, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001344-MR

R.R. APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 01-AD-00036

CABINET FOR FAMILIES AND CHILDREN; R.E.R., A CHILD APPELLEES

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND GUIDUGLI, JUDGES.

BARBER, JUDGE: R.R. appeals, pro se, from an order of the Kenton Circuit Court terminating his parental rights to his child, R.E.R. The trial court's order terminating custody is supported by clear and convincing evidence that the child is abused or neglected and that it is in the child's best interest to have his father's parental rights terminated. Accordingly, we affirm.

R.E.R. was born on April 23, 1990, in Hamilton County, Ohio. R.R. and J.H. are the natural parents of the child. Both the appellant and J.H. have engaged in criminal lifestyles which has resulted in their repeated incarcerations. Prior to his most recent incarceration the appellant had custody of R.E.R. During this period, the appellant left the child with numerous caretakers and failed to seek proper medical treatment when the child was accidentally shot in the eye with a BB gun. When R.R. was incarcerated in August 1999, temporary custody of the child was given to his paternal grandparents. On January 18, 2000, R.E.R. was committed to the custody of the Cabinet for Families and Children (Cabinet) by order of the Kenton District Court. The child was placed in foster care, where he has since remained.

On May 10, 2001, the Cabinet filed a petition for the involuntary termination of the parental rights of R.R. and J.H. in Kenton Circuit Court. The matter was heard on January 25, 2002. On May 20, 2002, the circuit court issued findings of fact and conclusions of law and an order terminating the parental rights of the appellant and the child's mother. On May 21, 2002, the circuit court entered supplemental findings of fact in support of its decision. This appeal followed.[1]

[1] J.H. did not appeal the termination of her parental rights.

First, the appellant argues that the trial court erred in terminating his parental rights because the Cabinet failed to meet the standard of clear and convincing evidence as required by the principal parental rights termination statute, KRS[2] 625.090.

KRS 625.090(1) 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 (1) the child is an abused and neglected child as defined in KRS 600.020(1), and (2) that termination of those rights would be in the child's best interest. In addition, KRS 625.090(2) provides that at least one or more of the various grounds listed in KRS 625.090(2)(a) - (j) must also be proven by clear and convincing evidence before a termination of parental rights may be ordered.

KRS 600.020(1) defines an abused and neglected child as follows:

> (1) "Abused or neglected child" means 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:
>
> (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;

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[2] Kentucky Revised Statutes.

(b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than 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(12);

(d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

. . .

(g) Abandons or exploits the child; or

(h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or

(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;

In its order of May 20, 2002, the circuit court made findings that the appellant had abandoned R.E.R. for periods not less than ninety days; that the appellant had failed to protect and preserve R.E.R.'s fundamental right to a safe and nurturing home; and that R.E.R. was neglected while in the care of the appellant by his failure to provide appropriate supervision and needed medical treatment for the child. In its supplemental findings of fact included in its May 21, 2002 order, the circuit court made the additional finding that R.R. has repeatedly failed to provide for the child and has on two occasions abandoned the child to the care of others due to his incarceration for felony convictions.

The trial court has broad 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 review in a termination of parental rights action is confined to the clearly erroneous standard in CR[3] 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. V.S. v. Commonwealth, Cabinet for Human Resources, Ky. App., 706 S.W.2d 420, 424 (1986). "Clear and

[3] Kentucky Rules of Civil Procedure.

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., 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

Evidence was presented at trial which clearly and convincingly demonstrates that R.E.R. is an abused and/or neglected child. Among the evidence presented was evidence that the appellant has a history of substance abuse, including the abuse of crack cocaine and alcohol; that the appellant has an extensive criminal history including convictions for first-degree burglary, receiving stolen property (four counts), third-degree burglary, theft by unlawful taking, fourth-degree assault and persistent felony offender; that appellant has been incarcerated numerous times during which time he was unable to provide appropriate care for the child; that the appellant has numerous parole violations which have led to additional periods of inability to care for the child; and that R.R.'s minimum expiration date pursuant to his current incarceration is October 3, 2009; that the appellant had on occasions left the child with his girlfriend while he went out to drink; that the appellant on at least one occasion left the child alone in his vehicle while he went into a bar to drink; that the appellant had driven while drinking with the child in the vehicle; that the appellant

failed to seek proper medical care when the child accidentally shot himself in the eye with a BB gun; and that on the day the child was scheduled to have his eye operated on as a result of the BB gun accident, the appellant attempted suicide.

Based upon the foregoing the trial court's finding that R.R. is an abused or neglected child was not clearly erroneous under the clear and convincing evidence standard.

The second element of KRS 625.090(1) requires a finding 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 following factors set forth in KRS 625.090(3):

> (a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) 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 as defined in KRS 600.020(1) toward any child in the family;
>
> (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts

> have been substantiated in a written finding by the District Court;
>
> (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.

In its order of May 21, 2002, in addition to the parental shortcomings of R.R. previously discussed, the trial court made the following findings of fact relating to whether it was in R.E.R.'s best interest that the parental rights of R.R. be terminated:

> 4. Although the child loves his father and has a desire to be with him, this Court is persuaded that it would be in the child's best interest to terminate the father's rights so that the child can be adopted and given a permanent, stable home. The evidence is clear and compelling, particularly from the testimony of psychologist Richard Flesch, that this child needs a family that he can count on to be there for him. The Respondent has been in and out of the child's life and has demonstrated the lack of true commitment to be a responsible parent.
>
> 5. This Court is not basing its decision solely on the Respondent's status as an

> inmate, but rather on the totality of the evidence and the fact that the Respondent had custody of his son when he chose to commit crimes that resulted in the abandonment of his parental obligations.
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> 6. This child, who is not 12 years of age, deserves to have a stable home. The Respondent's history belies his ability to provide it. It is this Court's hope that it is not too late for the child to experience a loving, supportive, permanent family relationship.
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> 7. Placement for adoption would clearly be in the child's best interest.

We see no basis to conclude that the trial court erred in determining that it was in the best interest of R.E.R. that the appellant's parental rights be terminated. In a trial without a jury, 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; R.C.R. v. Cabinet for Human Resources, Ky. App., 988 S.W.2d 36, 39 (1998). This principle recognizes that the trial court had the opportunity to judge the witnesses' credibility. Without the rule, actions would be tried anew upon appeal. Id.

At the January 25, 2002, hearing on the Cabinet's petition ample testimony was presented supporting the trial court's conclusion that it would be in the best interest of the child for appellant's parental rights to be terminated. Testimony was presented that R.E.R. has a need for consistency

and structure which could best be achieved through adoptive placement; that Bobby has a good prognosis for adoptive placement; that the child is currently bonded with his current foster parents, who would be eligible as prospective adoptive parents if termination of parental rights is ordered; and that the child is showing tremendous improvement in his current foster home.

Based upon these factors, among others, the trial court's determination that it would be in the best interest of R.E.R. if the appellant's parental rights were terminated was supported by clear and convincing evidence. While the appellant may disagree with the conclusions of the circuit court, when the testimony is conflicting we may not substitute our decision for the judgment of the circuit court. Wells v. Wells, Ky., 412 S.W.2d 568, 571 (1967).

Finally, KRS 625.090 requires a finding by clear and convincing evidence that one of the factors set forth in KRS 625.090(2) is present. These factors include:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
>
> (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 has been convicted of a felony that involved the infliction of serious physical injury to any child;

(e) 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;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(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;

In its May 20, 2002, order the circuit court specifically determined that the grounds set forth in subsections (a), (e), and (g) were present.

Based upon the trial evidence previously discussed, there is substantial evidence to support the trial court's determinations. Thus, we cannot conclude that its findings are

clearly erroneous. Nor can we say, after review of the record and the findings of fact made by the trial court, that the Cabinet has failed to meet its burden of proving its case by clear and convincing evidence as required by KRS 625.090. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (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). Accordingly, we reject R.R.'s argument that the evidence did not clearly and convincingly support a finding that one of the factors enumerated in KRS 625.090(2) existed.

Next, R.R. contends that the records submitted by the Cabinet were inadmissible hearsay evidence.

As noted by the Commonwealth, R.R. has failed to comply with CR 76.12(4)(c)(iv) by providing references to the record showing that this issue is preserved. Furthermore, R.R. does not specify which of the records introduced at the January 20, 2002, trial he believes were inadmissible hearsay.

Because of the foregoing deficiencies we are under no obligation to review this argument. However, we note that the Cabinet introduced 21 numbered exhibits at the trial. The exhibits introduced either were not hearsay or were admissible under one of the exceptions to the introduction of hearsay evidence. To the extent that any material included in the

exhibits should have been excluded under the hearsay rules, the error was harmless. CR 61.01.

Finally, R.R. contends that the various errors throughout the trial of this case created a manifest miscarriage of justice to the appellant and the child.

R.R. does not identify any specific errors which, together, would result in a manifest miscarriage of justice. However, we have extensively discussed the findings of the circuit court, the evidence presented, and our standard of review of the circuit court's decision. The Cabinet met its burden of proof by clear and convincing evidence, and the circuit court's decision did not result in a manifest injustice.

For the foregoing reasons the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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