RENDERED: OCTOBER 7, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001570-ME

COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH AND FAMILIES SERVICES; AND
COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH AND FAMILIES SERVICES AS
NEXT FRIEND OF B.A.C., AN INFANT — APPELLANTS

APPEAL FROM WARREN CIRCUIT COURT
DIVISION III – FAMILY COURT
v. HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 01-AD-00057

D.C. AND B.R.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: The Commonwealth of Kentucky, Cabinet for Health and Family Services and the Commonwealth of Kentucky, Cabinet for Health and Family Services as next friend of B.A.C., an infant, (collectively referred to as the Cabinet) appeal from a judgment of the Warren Circuit Court, Family Court, dismissing

its petition for involuntary termination of the parental rights of D.C. and B.R.C. as to their minor child B.A.C. We affirm.

B.A.C. was born on June 25, 1997. She was the fifth child born to D.C. and B.R.C. The couple's first child, A.C., suffers from a mental disability. The couple's second child, S.K.C., lived only 7 weeks. The death certificate indicated the cause of death was Sudden Infant Death Syndrome (SIDS); no autopsy was performed. The couple's third child, A.R.C., lived only 5 weeks. The death certificate indicated that SIDS was the provisional cause of death as the autopsy report was still pending. The couple's fourth child, T.B.C., lived just over 5 months. The death certificate indicated that T.B.C.'s death could not be attributed to any anatomic, metabolic, or toxicological cause; thus, the cause of death could not be determined.

Because of the suspicious circumstances surrounding the deaths of B.A.C.'s three siblings, the Cabinet conducted a "child fatality multidisciplinary team meeting." The team determined that B.A.C. "was at risk of harm" and two days after her birth B.A.C. was placed in the custody of the Cabinet.[1]

On November 15, 2001, the Cabinet filed a petition on behalf of B.A.C. seeking involuntary termination of D.C. and

[1] Upon removal by the Cabinet from D.C. and B.R.C., B.A.C. was immediately placed in a foster home where she presently resides. D.C. and B.R.C. have continued to exercise regular visitation and have financially supported B.A.C.

B.R.C.'s parental rights. On May 7, 2004, the Findings of Fact and Conclusions of Law and Judgment were entered by the Warren Family Court denying the Cabinet's petition for involuntarily termination of parental rights. The court found, however, that B.A.C. would be at a potential risk of harm if returned to the home of D.C. and B.R.C. and ordered that custody of B.A.C. be "permanently committed to the Cabinet" and further ordered structured visitation.

Following motions filed pursuant to Ky. R. Civ. P. (CR) 59.05, to alter, amend or vacate, the court entered Amended Findings of Fact and Conclusion of Law and Judgment on June 24, 2004. The court again recognized the existence of "potential harm" to B.A.C. if she was returned to D.C. and B.R.C. The court ordered that custody of B.A.C. "shall be determined through proper motions and Orders in the juvenile action pending in the Warren Circuit Court." The order also directed that reunification efforts should continue. This appeal follows.

The Cabinet contends the family court erred by excluding certain testimony of Dr. Tracey Corey Handy. Dr. Handy conducted the postmortem examination of B.A.C.'s sibling, T.B.C. B.R.C. filed a motion *in limine* seeking to limit Dr. Handy's testimony. In its order granting the motion, the family court stated that pursuant to its pretrial order the Cabinet had been directed to provide "all pertinent information" relating to

any expert witness that would offer an opinion on the deaths of B.A.C.'s three siblings. Relevant to Dr. Handy's testimony, the Cabinet only provided the postmortem examination. The family court ordered that Dr. Handy's testimony should thus "be limited to the information contained in the post mortem report."

It is within the court's discretion to establish a pretrial order governing pretrial procedure. CR 16. CR 16 specifically provides that where a pretrial order has been entered, it "controls the subsequent course of the action, unless modified." It is also well-established that the parties are bound by such orders. Commonwealth *ex rel.* Marcum v. Smith, 375 S.W.2d 386 (Ky. 1964)(citing Sapp v. Massey, 358 S.W.2d 490 (Ky. 1962)). Our review is limited to whether the family court abused its discretion by requiring the Cabinet to comply with its pretrial order.

In the case *sub judice*, the Cabinet was ordered to provide "all pertinent information" regarding any expert witness it intended to call at trial. The Cabinet provided Dr. Handy's postmortem report but did not provide any information regarding other opinions that Dr. Handy might testify to. Under these facts, we do not believe the family court abused its discretion by limiting Dr. Handy's testimony to the information contained in the postmortem report. As such, we view the Cabinet's contention on this issue to be without merit.

The Cabinet also argues that the family court erred by excluding a forensic psychiatric examination and testimony of Dr. David J. Kapley. Following B.R.C.'s motion *in limine*, the family court ordered that the Cabinet was "prohibited from using any portion of Dr. David J. Kapley's 1998 forensic examination or testimony regarding the same."

On appeal, the Cabinet appended Dr. Kapley's forensic psychiatric examination to its brief but failed to indicate whether the document had been entered into the family court record. We have been unable to locate the document in the record. It is improper to append a document to an appellate brief that was not part of the record below. Croley v. Alsip, 602 S.W.2d 418 (Ky. 1980)(citing CR 75.01; CR 76.12(4)(a)(vi)).

The Cabinet also failed to offer by avowal Dr. Kapley's forensic psychiatric examination and the testimony related to that examination. It is well-established that evidence excluded by the family court cannot be reviewed on appeal where there was no avowal of the proposed evidence by the witness. Ky. R. Evid. 103(a)(2); Commonwealth v. Ferrell, 17 S.W.3d 520 (Ky. 2000). Accordingly, we must summarily affirm the family court's exclusion of Dr. Kapley's forensic examination and testimony regarding the same. See Noel v. Commonwealth, 76 S.W.3d 923 (Ky. 2002).

The Cabinet next contends that the family court's "judgment (on the issue of abuse and neglect) is against the weight of the evidence." Specifically, the Cabinet contends the family court erred by not finding that B.A.C. was an abused and neglected child pursuant to KRS 600.020(1)(b) and (i). The Cabinet asserts that D.C. and B.R.C. created a risk of physical injury to B.A.C. and did not comply with the treatment plan established by the Cabinet.

The standard of review in a termination of parental rights action requires us "to accord considerable deference to the findings of the trial court." Commonwealth, Cabinet for Families and Children v. G.C.W., 139 S.W.3d 172, 175 (Ky.App. 2004)(citing V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420 (Ky.App. 1986)). The court's findings of fact will not be disturbed on appeal "unless there is no substantial evidence in the record to support them." Id. at 175 (citing R.C.R. v. Commonwealth, Cabinet for Human Resources, 988 S.W.2d 36 (Ky.App. 1998)).

The family court's findings on this issue were both thorough and exhaustive, being some sixteen pages in length. The court made very specific findings of fact upon each factor set forth in KRS 600.020(1). There appears substantial evidence in the record to support these findings.

Accordingly, based upon the Cabinet's failure to properly preserve the before mentioned evidentiary issues and upon the limited evidence presented, we conclude, albeit reluctantly, that the family court made no error in finding that B.A.C. was not an abused or neglected child.

For the foregoing reasons, the judgment of the Warren Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mary Gaines Locke
Cabinet for Health and
Family Service
Munfordville, Kentucky

BRIEF FOR APPELLEE D.C.:

David Keen
KEEN & HARDIN, LLP
Bowling Green, Kentucky

BRIEF FOR APPELLEE B.R.C.:

Terry B. Boeckmann
TODD & BOECKMANN
Bowling Green, Kentucky