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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-001105-ME

D.J.S. APPELLANT

v.

APPEAL FROM HENDERSON FAMILY COURT
HONORABLE SHEILA NUNLEY-FARRIS, JUDGE
ACTION NO. 04-AD-00019

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES, As Next Friend of
A.N.S., A Child APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND VANMETER, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: D.J.S. appeals from a final order of the Henderson Family Court granting the Cabinet for Health and Family Services' petition to involuntarily terminate her parental rights to her daughter, A.N.S. D.J.S. has struggled with drug addiction since the birth of A.N.S. After numerous attempts at sobriety, D.J.S. suffered a relapse in August of

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

2003, which resulted in A.N.S.'s placement with the Cabinet. The Cabinet continued to have custody of A.N.S. through October of 2004 when it filed a petition to involuntarily terminate D.J.S.'s paternal rights.[2] Subsequent to a hearing, the court entered an order terminating D.J.S.'s parental rights. Challenging the sufficiency of the evidence, D.J.S. has appealed this order.

A.N.S. was born on November 1, 2002. At birth, the child tested positive for cocaine. As a result of this, the Cabinet became involved with A.N.S. However, because D.J.S. had agreed to go to Oasis for an in-patient treatment program immediately upon being discharged from the hospital, A.N.S. was allowed to remain with D.J.S. As a result of this incident, on February 13, 2003, D.J.S. was adjudged to be a neglected child.

D.J.S. would thereafter enter six separate in-patient drug treatment programs between November 1, 2002, the date of A.N.S.'s birth, and December of 2004. D.J.S. attended four separate in-patient programs through Oasis and two separate programs through Lincoln Trail. In each case, D.J.S. would successfully complete the 30-day in-patient programs, only to relapse within a month or two of the program. Evidence presented before the court indicated D.J.S. had abused crack

[2] T.W.S., A.N.S.'s father, filed a petition for voluntary termination of his parental rights. The order terminating his parental rights has not been challenged.

cocaine for the past ten years and had abused alcohol since the age of 17.[3]

As a result of one of D.J.S.'s relapses, A.N.S. was removed from her custody on August 12, 2003. Subsequent to her removal, A.N.S. was again adjudged to be a neglected child. Further, the child was committed to the care of the Cabinet. In turn, the Cabinet placed A.N.S. in a foster home where she has remained ever since.

D.J.S.'s last in-patient treatment program with Lincoln Trail took place in September of 2004. Given D.J.S.'s inability to stay sober and drug free and her inability to substantially complete any of the services offered by the Cabinet, the Cabinet filed a petition to involuntarily terminate D.J.S.'s parental rights on October 14, 2004.

On December 16, 2004, D.J.S. entered her seventh in-patient treatment program since A.N.S.'s birth. This program, 100 days in duration, was provided through Progressive Health Center in Zachary, Louisiana. D.J.S. successfully completed the program and was released on March 25, 2005. A hearing on the Cabinet's petition was held 35 days later on April 29, 2005.

[3] A byproduct of D.J.S. substance abuse has been an extensive criminal record. D.J.S.'s actions have resulted in various sentences both in and out of Kentucky. At the time of the hearing, D.J.S. presented evidence suggesting she had resolved the actions pending in Kentucky, but had one action remaining in Indiana.

The court entered an order terminating D.J.S.'s parental rights on May 4, 2005. In its order, the court found:

- [A.N.S.] has been in foster care under the responsibility of the Cabinet for Health and Family Services for fifteen (15) months preceding the filing of the Petition to terminate parental rights.

- [A.N.S.] was adjudicated as a neglected child by Order of the Henderson Family Court, Juvenile Action No. 03-J-00003-003.

- [A.N.S.] is a neglected child as defined in KRS[4] 600.020.

- It is in the best interests of [A.N.S.] that the parental rights of [D.J.S.] be terminated.

Based on these findings, the court concluded the threshold requirements of KRS 625.090(1) were met. Turning to the final prong under KRS 625.090(2), the court found the Cabinet had established at least one of the required factors. In particular, the court concluded:

- [D.J.S.] had abandoned [A.N.S.] for a period of not less than ninety (90) days. KRS 625.090(2)(a)

- [D.J.S.], 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 [A.N.S.] and there is no reasonable expectation of improvement in parental care and protection, considering the age of the child. KRS 625.090(2)(e)

[4] Kentucky Revised Statutes

- [A.N.S.] has been in foster care under the responsibility of the Cabinet for Health and Family Services for fifteen (15) months preceding the filing of the Petition to terminate parental rights. KRS 625.090(2)(j)

- [D.J.S.] 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 there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child. KRS 625.090(2)(g)

It is from this order that D.J.S. appeals.

Kentucky law has long recognized that "[t]he 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." R.C.R. v. Commonwealth, Cabinet for Human Resources, 988 S.W.2d 36, 38 (Ky.App. 1999), *citing* Department of Human Resources v. Moore, 552 S.W.2d 672, 675 (Ky.App. 1977). This case was tried before the court without a jury. As such, the trial court heard the evidence and entered its findings of fact and conclusions of law. On review, such "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See* CR[5] 52.01. In addition, in reviewing findings of fact by the

[5] Kentucky Rules of Civil Procedure.

trial court, "the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that [s]he abused [her] discretion." Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982). Thus, a court's findings cannot be disturbed unless there is no substantial evidence in the record to support them. R.C.R., 988 S.W.2d at 38. This court in R.C.R. further stated that:

> 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.

Id. at 38-9, *quoting* Rowland v. Holt, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

In Kentucky, KRS 625.090 governs the involuntary termination of parental rights. As noted by this court in Commonwealth, Cabinet for Families and Children v. G.C.W., 139 S.W.3d 172 (Ky.App. 2004), a court may not terminate a parent's rights over their objection unless it finds by clear and convincing evidence:

> (1) that the child is an "abused or neglected child, as defined by KRS 600.020(1)" and (2) that termination would be in the child's best interest. KRS 625.090(1). After that threshold is met, the court must find the existence of one of the numerous grounds recited in KRS 625.090[(2)][.]

Id. at 175-76.

D.J.S. argues the court erred when it found the Cabinet had established any of the grounds within KRS 625.090(2). Specifically, D.J.S. asserts that:

- The court was clearly erroneous in finding A.N.S. had been in the Cabinet's care for 15 months preceding the filing of the petition.
- There was no evidence of an intent to abandon A.N.S.
- As to (1) parental care and protection, and (2) essential food, clothing, shelter, medical care or education, the Cabinet failed to show, by clear and convincing evidence, that there was no reasonable expectation of improvement.

The Cabinet concedes that the court was clearly erroneous in finding A.N.S. had been in its care for 15 of 22 months immediately preceding the petition.[6] However, as to the remaining grounds, the Cabinet argues the court did not commit reversible error. Since any one of the grounds listed in KRS 625.090(2) is sufficient to satisfy the third prong of the analysis, the Cabinet asserts the court did not abuse its discretion in terminating D.J.S.'s parental rights.

KRS 625.090(2) sets out various grounds, one of which must be established by clear and convincing evidence before parental rights may be involuntarily terminated. One of the

[6] A.N.S. was removed from D.J.S.'s custody on August 12, 2003. The petition was filed October 14, 2004. In addition, A.N.S. had been removed for a 72-hour period in May of 2003. Thus, in the 22-month period preceding the petition, A.N.S. had been in the Cabinets care for 14 months and 5 days.

grounds concerns abandonment "for a period of not less than ninety (90) days[.]" In regard to abandonment, D.J.S. argues the Cabinet failed to introduce evidence of intent to abandon the child.

This court addressed the issue of abandonment in O.S. v. C.F., 655 S.W.2d 32 (Ky.App. 1983). In that case, this court noted that "abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." Id. at 34. This court addressed the issue again in a subsequent case, V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420 (Ky.App. 1986). In V.S., this court noted that "abandonment rests mainly upon intent." Id. at 424. In establishing intent, the court in V.S. recognized "[t]he proof in this case lies in past performance." Id. The court concluded the facts were sufficient such that "[t]he risks [were] too great to experiment further with the children's future." Id.

In reaching its conclusion as to abandonment, the court had extensive evidence before it concerning D.J.S.'s history of substance abuse. To begin with, D.J.S. had completed six previous in-patient drug treatment programs only to suffer relapses within a month or two. At the time of the hearing,

D.J.S. had just completed her seventh in-patient program, this one lasting 100 days.

D.J.S. has failed to show how the court abused its discretion in finding she had abandoned A.N.S. for a period of not less than 90 days. While D.J.S. attempts to cast her substance abuse as a medical condition, she ignores the fact that the choices she made resulted in the addiction, resulted in the various in-patient enrollments, and ultimately resulted in each relapse. Under these circumstances, we cannot say the court abused its discretion.

D.J.S. challenges the remaining two grounds with one argument. These grounds concern (1) providing parental care and protection, KRS 625.090(2)(e), and (2) providing essential food, clothing, shelter, medical care and education, KRS 625.090(2)(g). D.J.S.'s argument is directed at the court's conclusion that the Cabinet had proven by clear and convincing evidence that there was no reasonable expectation of improvement.

In reaching its conclusion as to these two grounds, the court had before it both evidence of D.J.S. past performance, as well as evidence of expected future performance. As to past performance, the court was faced with the fact that between A.N.S.'s birth in November of 2002 and the time the hearing was held on the petition for termination in April of

2005, D.J.S. had been in and out of in-patient drug treatment programs on seven different occasions. Following within a month or so of each of the first six programs, D.J.S. had suffered a relapse. In addition, D.J.S.'s substance abuse had resulted in various criminal violations. While D.J.S. has pointed to the fact that she had been clean and drug free since the last in-patient program, she also testified it would be at least six months before she would be ready to assume the care and custody of A.N.S. As for her legal problems, D.J.S. pointed out the fact that charges in Kentucky had been resolved. Having said that, she acknowledged charges remained to be resolved in Indiana.

In an attempt to deflect the impact of her continuing periods of incarceration and in-patient treatment, D.J.S. argues that these absences were not of her choice. Once again, this ignores the choices she made concerning substance use, her actions while under the influence, her election to seek in-patient care, and her choices that led to the many relapses. As noted by this court in J.H. v. Commonwealth, Cabinet for Human Resources, 704 S.W.2d 661, 663 (Ky.App. 1986), "absence, voluntary or court-imposed, may be a factor to consider in determining whether [a child has] been neglected[.]" Further, proof of past performance is a factor for the court to consider. *See* V.S., 706 S.W.2d at 424. Given the evidence before the

court, of both past and future performance, we cannot say the court abused its discretion in concluding the Cabinet had established, by clear and convincing evidence, that there was no reasonable expectation of improvement.

In appealing the court's order terminating her parental rights, D.J.S. has challenged only findings related to the third prong of the analysis under KRS 625.090. While D.J.S. was correct in noting the court 's finding was clearly erroneous as it related to A.N.S. having been in the Cabinet's care for 15 of 22 months proceeding the petition, she was not successful in her challenges as to the remaining grounds under KRS 625.090(2). As the statute requires the court to find the existence of "one or more," we find no abuse of discretion in the court's conclusion that D.J.S.'s parental rights should be terminated.

The order of the Henderson Family Court is affirmed.

ALL CONCUR.

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