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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000599-ME

J.W.S.

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE MICHAEL L. MCKOWN, JUDGE
ACTION NO. 05-AD-00016

COMMONWEALTH OF KENTUCKY, CABINET FOR
HEALTH AND FAMILY SERVICES; T.W.S., A CHILD; AND
H.L.M.S.

APPELLEES

AND: NO. 2007-CA-000627-ME

H.L.M.S.

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE MICHAEL L. MCKOWN, JUDGE
ACTION NO. 05-AD-00016

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; T.W.S., A CHILD; AND J.W.S.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Appellants J.W.S. (“father”) and H.L.M.S. (“mother”) are the natural parents of T.W.S. (“child”) born on March 16, 2000. Following a bench trial held on November 9, 2006, the Ohio Circuit Court issued an order terminating the parental rights of the mother and father and committed the child to the custody of the appellee, Cabinet for Health and Family Services (“Cabinet”). Both the mother and father have appealed.¹ Because we find that the court's order is supported by clear and convincing evidence that the child is abused and neglected and that it is in his best interest that his parents' rights be terminated, we affirm.²

The Cabinet's initial contact with the family was in 2001 when it responded to allegations that the mother had contacted her social worker in Florida, her former state of residence, and reported that she was having difficulty coping with the child and his two-year old sibling. Earlier in 2001, the mother and father were involved with Florida Social Services in an effort to address the couple's parenting of the child and his three siblings. The child is the only biological child of the father.

¹ The cases were assigned to this panel to be heard together.

² Following the entry of the court's order, the appellants filed a joint motion for a new trial or, in the alternative to alter, amend or vacate the order. The case was transferred to the newly established Ohio Circuit Family Court which denied the motion.

Florida Social Service records and court documents indicated that the children were dirty, had burn marks on their legs, had missed medical appointments, and one child had herpetic lesions on her genital and was uncommunicative. Two of the children were placed with relatives and have not been returned to the mother's custody. The remaining two children, including the child, remained in the mother and father's custody.³ The mother and father failed to complete the case plan prepared by the Florida Social Services and, in 2001, moved the family to Kentucky.

After the move to Kentucky, the Cabinet assigned social worker Elizabeth Travis to assist the family and provide services to address issues concerning proper supervision of the children, the mother's mental health, and maintaining a suitable home for the children. In November 2003, the Cabinet determined that the family's progress was sufficient and closed its case.

In August 2004, the Cabinet again became involved with the family when the child and his five-year old sibling were discovered outside their home, unsupervised, and playing on a busy highway. At that time, removal was not requested due to the expressed willingness of the parents to cooperate with the Cabinet. However, in October 2004, the children were again discovered, unsupervised, on a busy highway. The mother was asleep in the home. The father was at work. He later admitted that he was aware that the mother was not properly taking her prescribed medications when he left her alone with the children. The children were then removed from the home pursuant to an

³ Only one child is involved in this termination case.

emergency custody order entered on October 21, 2004. A temporary order was entered on October 27, 2004.

In May 2005, the Ohio County District Court found that the child and his sibling were neglected children and on June 13, 2005, the child was committed to the Cabinet. Following the removal, Ms. Travis again worked with the family and made referrals for mental health counseling, parenting classes, and arrangements for supervised visits.

In July 2005, the Cabinet investigated and substantiated that the father had sexually abused an unrelated child. He was charged with two counts of sexual abuse in the first degree and eventually entered a guilty plea to an amended charge of sexual misconduct and was from November 2004 to July 2005, incarcerated in Florida. The mother confided to Ms. Travis that the father had sexually abused the child's sibling. Referrals were then made for the father to receive a sex offender assessment and sex offender treatment. He submitted to a sex offender assessment evaluation and it was recommended that he complete sex offender treatment. At the time of trial, however, he had not attended any treatment program.

The father did not initiate a psychological evaluation until May 2005 and the mother did not initiate an evaluation until August 2005.

Dr. Linel Phelps diagnosed the father with adjustment disorder with depressed mood, self-defeating personality traits, depressive personality, and schizoid personality traits. He strongly recommended that the father attend psychotherapy.

Joyce Evitts, a therapist at River Valley Behavioral Health, counseled the father monthly from February 2005 to July 2005. However, he did not attend counseling again until November 2005 and, in the months that followed, failed to attend all sessions. He expressed to Ms. Evitts that he had trouble keeping employment, was frustrated with the mother's failure to take her medication and her violence. Nevertheless, she reported that the father was cooperative and she had no concerns regarding his ability to appropriately parent the child.

Ms. Travis testified that the father completed the majority of his case plan but was often defiant, refused to sign case plans or releases, displayed threatening behavior, and would not supply her with requested documents. She expressed concern about the father's refusal to submit to sex offender treatment and his pattern of leaving the child alone with the mother. After the child had been in the Cabinet's care, the father made sporadic child support payments only when his wages were garnished.

The mother did not initiate a psychological evaluation until August 4, 2005. Dr. Phelps diagnosed delusional (paranoid) disorder, bipolar I disorder, personality disorder, narcissistic personality traits, antisocial personality traits, and negativistic personality features. He further stated that with an IQ of 73, she functions in the borderline range of intellectual functioning. She had been hospitalized in a psychiatric facility on two occasions. Dr. Phelps recommended lifelong medication and therapy. He stated that the mother would require constant supervision to care for her children.

Ms. Evitts testified that the mother had been relatively consistent in attending her counseling sessions. Although Ms. Evitts stated that the mother demonstrated some improvement, she struggles with maintaining her medication. She noted that the mother has “limited insight,” “below average functioning,” “poor judgment,” and “low frustration tolerance.”

Ms. Travis testified that the mother completed parenting classes, was fairly consistent with counseling, and visited the child regularly. However, she was concerned about the mother's mental stability, her ability to maintain her medications, and ability to comprehend information from parenting classes. She was further troubled by the mother's lack of concern regarding the father's past sexual abuse and molestation charges, her failure to express herself during counseling, and her dependency on the father. She stated that the mother did not demonstrate appropriate parenting skills during visits with the child and characterized her behavior as “child-like.” The mother, who receives disability payments, made no child support payments since the child entered the Cabinet's custody.

The child's therapist, Patricia Derosiers, testified that the child suffers from severe developmental delays in speech, education, and motor and social skills. Since his commitment to the Cabinet, however, he has improved rapidly. The child was diagnosed with disruptive behavior disorder, attention deficit hyperactivity disorder, borderline intellectual functioning, and physical abuse and neglect. She opined that the child had been largely ignored in the early years of his life which causes him to experience

nightmares and anxiety. Ms. Derosiers explained that the child requires a consistent routine and structure and because of his special needs, it will take extra effort to parent him. His prognosis for improvement if he remains in a consistent, stable environment is “great.”

The trial court found the child to be neglected pursuant to KRS 625.090(1). It also found that there was clear and convincing evidence that termination was warranted pursuant to KRS 625.090(2)(e) and (g) which states the following grounds for termination:

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;

(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.

The trial court further found that the parents failed to make reasonable efforts or adjustments in the child's best interest to return him home within a reasonable time and that the Cabinet had made reasonable efforts to reunite the family. Finally, the court found that it was in the child's best interest that the parental rights be terminated.

A proceeding to terminate parental rights requires adherence to all Constitutional safeguards. The rights of the parents can be involuntarily terminated only if the following is established by clear and convincing evidence: (1) that the child is abused or neglected; (2) that termination is in the child's best interest; and (3) one or more of the facts set out in KRS 625.090(2) are present. *R.C.R. v. Cabinet For Human Resources*, 988 S.W.2d 36, 39 (Ky.App. 1998). Clear and convincing evidence does not require that the proof be uncontradicted. “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.” *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky.App. 1998) (quoting *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934)). This court will not disturb the trial court's findings of fact unless there is no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky.App. 1986). When the evidence is conflicting, we cannot substitute our judgment for that of the trial court. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

The mother and father argue that there was not clear and convincing evidence to support a finding of the grounds set forth in KRS 625.090(2)(e) or (g) and that termination was in the child's best interest.

KRS 625.090(3) sets forth numerous factors that the trial court must consider when determining the best interest of the child and existence of a ground for termination. Those include but are not limited to: the mental illness of the parents; the

mental and emotional condition of the child; the efforts by the Cabinet and the family to reunite the family; and the abuse or neglect of any child in the family. There is ample evidence in the record to support the trial court's conclusion that the Cabinet proved by clear and convincing evidence the factors set forth in subsection (e) and (g) and that it was in the child's best interest that his parents' rights be terminated

The family has had a long history with the Cabinet which was preceded by their contact with Florida Social Services. Both parents suffer from mental illness. The mother's illness is severe enough that medication is required yet she consistently fails to take the medication as prescribed. Assuming that in the future she maintains the correct dosage, there is expert testimony that she is incapable of caring for the child without assistance. The father, aware of the mother's inability to care for the child, has repeatedly left the child and his sibling in her care. The father has been convicted of sexual misconduct and the mother stated that he had sexually abused the child's sibling. Although referred to sex offender treatment, he refused to attend. As a consequence of repeated neglect, the child has special needs that neither parent is capable of satisfying. The parents repeated failure to complete their case plans demonstrates that there is no reasonable expectation of improvement in the future.

Moreover, the evidence supports the trial court's finding under KRS 625.090(g). Despite his employment, the father has made only sporadic child support payments while the child has been in foster care. The mother receives disability payments, yet failed to pay any child support since the child's placement.

For the foregoing reasons, the order of the Ohio Circuit Court terminating the mother's and father's parental rights to the child is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLANT, H.L.M.S.:

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