

RENDERED: JULY 11, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002451-ME

BERNARDO SANDOVAL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT FAMILY COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 07-AD-00020

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY; K.B.H.S., AN INFANT

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,¹ SPECIAL
JUDGE.

¹ Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

ROSENBLUM, SPECIAL JUDGE: Bernardo Sandoval appeals the November 9, 2007, order of the Fayette Circuit Family Court, terminating his parental rights of his infant child, K.B.H.S. We affirm.

On December 24, 2005, K.B.H.S. was born. After testing positive for cocaine at birth, she was placed into foster care that same day by the Cabinet for Health and Family Services (CHFS). Over the next two years, CHFS offered services to K.B.H.S.'s mother, Lourdes Hernandez, and father, Bernardo Sandoval. On January 8, 2007, K.B.H.S.'s permanency plan was changed to adoption. At that time, Hernandez had unsuccessfully worked her treatment plan with CHFS and Sandoval had failed to begin his treatment plan. There was a history of domestic violence between Sandoval and Hernandez, and Hernandez continued to test positive for drugs and alcohol. Furthermore, there was a history of Sandoval permitting Hernandez to reside with him while she continued to abuse drugs and alcohol.

On September 12, 2007, the trial court conducted a hearing to determine if the parental rights of Hernandez and Sandoval, with respect to K.B.H.S., should be terminated.² At the close of the hearing, the trial court announced its findings from the bench and indicated that the parental rights of Hernandez would be terminated but that Sandoval's rights would not be terminated. Instead, the court sought to offer Sandoval another opportunity to

² Also before the trial court at this hearing was the issue of parental rights termination of another child of Hernandez but who was not a child of Sandoval. The parental rights with respect to that child are not on appeal here.

work his case plan. The court indicated to Sandoval that its decision was influenced by his affirmation that he was no longer involved with Hernandez, he had ceased communicating with her, and he was unaware of her whereabouts or the whereabouts of her recently born baby. In making this decision, the court stated that the finding was “for now” and that Sandoval would be on a “tight leash.” The court also stated that it wanted to know soon if Sandoval was going to be successful in severing his relationship with Hernandez, because K.B.H.S. deserved permanency. The court concluded by telling Sandoval that if there was any indication that Hernandez was involved in his life, then his parental rights would be terminated.

On September 21, 2007, the trial court held a supplemental hearing. At that time, it was revealed to the court that Hernandez had been present at a visit scheduled only for Sandoval. The court also heard testimony that Hernandez’s most recently born child was in fact the child of Sandoval and that it appeared that Sandoval had misled the court about his relationship status with Hernandez. In a final effort to maintain a relationship between Sandoval and K.B.H.S., the court ordered a permanency mediation between Sandoval and K.B.H.S.’s foster parents. The court stated that it would not rule on terminating Sandoval’s parental rights until the mediation had taken place and it had been determined if something, namely an open adoption, could be worked out amongst Sandoval and the foster parents. A mediation was held on October 18, 2007, and on November 9, 2007, a

report was filed with the court indicating that no agreement had been reached between the parties.

On November 9, 2007, the trial court entered its findings of facts and conclusions of law, finding that K.B.H.S. was an abused or neglected child as defined in Kentucky Revised Statutes (KRS) 600.020(1). Finding that the relationship between Sandoval and Hernandez had “continued unabated,” the court concluded that termination of Sandoval’s rights was in the best interest of K.B.H.S. Concurrent with its findings of fact and conclusions of law, the court entered an order terminating the parental rights of Sandoval and Hernandez. This appeal, brought only in regard to Sandoval and not Hernandez, followed.

Sandoval argues that the trial court committed reversible error by failing to comply with applicable statutes and rules, resulting in a manifest injustice by wrongfully terminating his parental rights. In support of this argument, Sandoval cites the following language from *Gullion v. Gullion*, 163 S.W.3d 888 (Ky. 2005):

Although a trial court may grant a CR 59.05 motion if the movant presents newly discovered evidence that was not available at the time of trial, newly discovered evidence must be of facts existing at the time of trial. If it were grounds for a new trial that facts occurring subsequent to the trial have shown an inaccurate prophecy, litigation would never come to an end. Thus, it is improper for a trial court to rely upon evidence of events that occurred subsequent to the trial in ruling on a CR 59.05 motion.

In the present case, the trial court is to be commended for reviewing the evidence before the domestic relations commissioner; however, the trial court committed

reversible error when, in changing custody, it relied in part on facts that occurred subsequent to the custody trial.

Id. at 894 (citations omitted).

Sandoval's reliance on *Gullion* is misplaced because CR³ 59.05 is inapplicable to the case *sub judice*. The rule states: “[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.” CR 59.05. No CR 59.05 motion was filed at the trial court level, nor was it required.

It has long been established that, regardless of when a judgment or order is rendered, it is the notation of the judgment or order in the docket by the clerk which constitutes “entry” of the document, and the document is not effective until after it has been entered by being noted in the docket.

Staton v. Poly Weave Bag Co., Incorporated/Poly Weave Packaging, Inc., 930 S.W.2d 397 (Ky. 1996) (citing CR 58(1)). Because the trial court had not yet entered a judgment prior to November 9, 2007, it had not lost jurisdiction and was free to change its initial findings of facts and conclusions of law at its own will. The court was not bound by its September 12, 2007, decision to give Sandoval another chance at completing his case plan with CHFS because no judgment had yet been entered to that effect. In fact, the trial court's decision to rescind its prior decision came only after discovering that its reasons for giving Sandoval another chance were based on duplicitous behavior and testimony.

The trial court has a great deal of discretion in determining whether the child fits within the abused or

³ Kentucky Rules of Civil Procedure.

neglected category and whether the abuse or neglect warrants termination. This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 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.*

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.

M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116-17 (Ky.App. 1998)

(emphasis added) (citations omitted).

We hold that the trial court's findings were supported by substantial proof under the clear and convincing evidence standard. The court provided extensive findings that Sandoval had failed to provide essential parent care and protection for K.B.H.S. We are further persuaded by the trial court's decision to give Sandoval a final opportunity to comply with his case plan and reunite with K.B.H.S. Sandoval's failure to comply with this last chance effort, as well as his deceptive behavior towards the court, served as additional fodder in showing that there was no reasonable expectation of improvement in his parental care and protection of K.B.H.S.

For the foregoing reasons, the November 9, 2007, Fayette Family Court order terminating Sandoval's parental rights of K.B.H.S. is affirmed.

ALL CONCUR.

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