

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002447-ME

J.R.W.

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE MARGARET HUDDLESTON, JUDGE
ACTION NO. 07-AD-00010

E.W.C.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL, MOORE, AND STUMBO, JUDGES.

NICKELL, JUDGE: J.R.W. (hereinafter Mother) appeals the judgment of the Warren Circuit Court terminating her parental rights. After reviewing the record in its entirety, we affirm.

Mother and E.W.C. (hereinafter Father), respectively, are the biological mother and father of two minor daughters. When their marriage dissolved, they agreed to share joint custody of the girls with equal timesharing.

Both Mother and Father have since remarried. In September 2005, Father was granted emergency custody of the girls. Mother's last contact with them was a telephone call in January of 2006. Since that time she has provided no support of any kind to the girls.

Mother is an admitted alcoholic who has participated in various sobriety treatment programs without success. She is an educated woman, having earned both a bachelor's degree and a master's degree from Western Kentucky University in social work. At one point she was a member of the permanency team for the Cabinet for Health and Family Services ("Cabinet") working with dependent, abused and neglected children. In 2005 she began a downward spiral resulting in her arrest for driving under the influence on January 24, 2006, her arrest for other crimes in February of 2006, and her hospitalization on at least two occasions for excessive drinking. One of her hospital stays was termed a suicide attempt by Dr. Bruce Fane ("Dr. Fane"), a licensed psychologist who evaluated Mother at the request of the Cabinet. Since abandoning her Bowling Green, Kentucky, home and losing it to foreclosure, Mother has been living in South Carolina. As of August 30, 2007, she was residing with another alcoholic and anticipated beginning another 28-day treatment program the next week.

In March of 2007, Father petitioned the court to involuntarily terminate Mother's parental rights to both girls. On April 26, 2007, the court issued an order saying KRS¹ 625.060 required both the Cabinet and the children to

¹ Kentucky Revised Statutes.

be joined as parties. On May 3, 2007, with the court's permission, Father filed an amended petition for involuntary termination of parental rights listing both the children and the Cabinet as parties.

On April 26, 2007, Mother filed a verified response to the petition saying she had successfully completed drug and alcohol rehabilitation and was now healthy. She denied abandoning the children and explained her lack of contact with them since January 2005 was in their best interest while she was getting sober.

Father filed a trial memo in which he acknowledged having sole custody of the children. In support of termination, he stated: while the girls were in Mother's custody she drank until incapacitated; she drank within a couple days of leaving the Lighthouse treatment facility; and, she acknowledged the statutory requirements for termination of her parental rights had been satisfied.

A guardian *ad litem* (GAL) was appointed for the two girls. He reported the children did not desire contact with Mother and there was no likelihood Mother would improve. He recommended the court sustain Father's petition to terminate Mother's parental rights.

A lengthy hearing occurred August 30, 2007. Those testifying were Father and his current wife, Leslie; Mother and her estranged husband Bruce; Dr. Fane; and, Shameika Frazier, a social services clinician with the Cabinet from Muhlenberg County who investigated the case since Mother was a Cabinet employee. Following brief closing arguments by counsel for Father and Mother

and the GAL, the court issued verbal findings from the bench in which she terminated Mother's parental rights and awarded custody of the girls to Father and his wife, Leslie. On September 10, 2007, the court entered formal findings of fact, conclusions of law, and the judgment from which we now quote:

FINDINGS OF FACT

1. The Petitioner, [Father], is the biological father of the subject children, [N.D.C.], DOB 03-05-90 and [M.K.C.] DOB 07-14-00.
2. The Petitioner has sole custody of the minor children pursuant to previous order of this Court in Civil Action number 02-CI-00065.
3. The Petitioner and the children have at all times resided in Warren County Kentucky, and jurisdiction and venue is therefore proper in this Court.
4. The Respondent, [Mother], is the biological mother of [N.D.C.] and [M.K.C.].
5. The Petitioner and Respondent were divorced in the Warren Circuit Court, Civil Action No. 02-CI-00065.
6. The Respondent, [Mother] has failed to maintain any contact with the minor children for a period of time greater than one year.
7. The Respondent has failed and refused to provide any monetary support or other parental support whatsoever for the children for reasons other than poverty alone for more than six months.
8. The Respondent has abandoned the children for more than ninety days.
9. The Respondent, [Mother], has repeatedly exhibited a pattern of substance abuse behavior, which is detrimental to the interests of the children.

10. While in Respondent's care, the children have been exposed to incidents of domestic violence and the Respondent has been intoxicated to the point of incapacitation.
11. The Respondent was offered services and failed to avail herself thereof, and likewise has failed to avail herself of available court processes to attempt to have contact with the children.
12. The Respondent has exhibited a settled purpose to forego her parental duties and is by her own admission incapable of caring for the children.
13. The Respondent remains in a state of transition or flux, having last relapsed by her own admission in July 2007.
14. The Respondent made a conscious decision not to go into rehab immediately after her July relapse, instead expressing an intention to do so after the trial of this matter.
15. The Respondent, [Mother], has failed to protect and preserve [N.D.C.] and [M.K.C.]'s fundamental rights to a safe and nurturing home. The children are found by this Court to be neglected by the Respondent within the meaning of the Kentucky Revised Statutes.
16. There is no reasonable expectation of improvement in parental care and protection on the part of the Respondent, [Mother], considering the age of the children and the length of abandonment.
17. Considering the children's mental development and ages, the Court finds they need permanency, which the stepmother is willing and quite capable of providing and in fact has been providing.
18. The best interests of the children dictate termination of Respondent's parental rights.

19. The children need to maintain the stability they have achieved with their father and stepmother, who should retain custody of the children.

CONCLUSIONS OF LAW

1. This Court finds that by clear and convincing evidence that the children are the subject of this action are neglected by the Respondent, [Mother], as defined in KRS 600.020(1). Based on the Respondents (sic) failure to parent the children, termination of the Respondent's parental rights is in the children's best interest. The children's health and welfare have been harmed and or threatened with harm by the Respondent's engaging in a pattern of drug and alcohol abuse which has rendered her incapable of caring for the children's basic needs.

2. The Respondent as (sic) dedicated herself to a lifestyle of addiction to alcohol, which has resulted in her having no contact with the children for a period in excess of a year.

3. The Respondent's performance as a parent to the children that are the subject of this action has been grossly inadequate. For over a year, the children's food, clothing, shelter, medical care, and education have been totally provided and paid for by the Petitioner and [Leslie].

4. By clear and convincing evidence, this Court finds that the Respondent willfully abandoned the children who are the subject of this action and has made no effort to contact them or provide for any of their care.

5. The Respondent has continuously failed and/or refused to provide the children that are a subject of this action with adequate parental care, supervision, clothing, food, shelter, education and medical care necessary for their well being.

6. There is no reasonable expectation of improvement in the Respondent's conduct in the future.

7. It is in the best interest of the children that are the subject of this action that the Respondent's parental rights be terminated.

JUDGMENT DECREERING TERMINATION OF PARENTAL RIGHTS

It is therefore Ordered and Adjudged as follows:

1. The parental rights of [Mother] to the minor children that are the subject of this action are hereby terminated;

2. There being no just case (sic) for delay, this is a final and (sic) appealable (sic) Order and Judgment.

On September 20, 2007, Mother moved the court to alter, amend or vacate its prior judgment saying there was a likelihood she could be rehabilitated. Father responded saying Mother had offered no proof she would improve and numerous attempts to rehabilitate her had already failed. On October 31, 2007, the trial court entered an order overruling the motion to alter, amend or vacate because termination of the biological mother's parental rights was in the best interests of the children and the requirements of KRS 625.090 had been satisfied. This appeal followed attacking both the judgment and the order overruling post-judgment relief. We affirm.

As a threshold matter we must determine whether the errors alleged are properly before us for review. CR² 76.12(4)(c)(v) requires a statement at the beginning of each argument "with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." It is

² Kentucky Rules of Civil Procedure.

mandatory that an attorney cite to the record where the claimed assignment of error was properly objected to or brought to the attention of the trial judge. This amendment is designed to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal.” *Elwell v. Stone*, 799 S.W.2d 46, 47-8 (Ky.App. 1990) (citing 7 Bertelsman and Phillips (sic), Kentucky Practice, CR 76.12(4)(c)(iv) [now (v)], Comment 4 (4th ed. 1989 PP)).

If the required citation is not included in the brief for appellant, the omission may be cured by providing the citation in the reply brief for appellant. *Hollingsworth v. Hollingsworth*, 798 S.W.2d 145, 147 (Ky.App. 1990).

This is another in a long line of recent cases in which the brief for appellant does not conform to the requirements of CR 76.12(4)(c)(v) as it does not reveal whether or how either of the two claims argued to this Court were presented to the trial court. The brief for appellee does not comment on preservation. As a result of Mother’s noncompliance with the rule, we have the discretion to strike her brief and summarily affirm the trial court’s judgment. *Cornette v. Holiday Inn Exp.*, 32 S.W.3d 106, 109 (Ky.App. 2000). We also have the option of reviewing the complaints, determining whether they were argued to the trial court, and granting relief only if we are convinced manifest injustice has occurred. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky.App. 1990), quoting *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859 (Ky. 1940). Because of the seriousness of terminating parental rights we have chosen not to strike the brief for appellant.

Mother's first complaint is the trial court failed to explain why it found Mother had not demonstrated a reasonable expectation her conduct would significantly improve in the immediately foreseeable future. CR 52.04 directs:

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

After combing the record, we find no request for a specific finding on any issue.

While the motion to alter, amend or vacate filed on Mother's behalf says, "the Respondent states that there is a reasonable likelihood that she can be rehabilitated and be restored to a good and caring mother like she was during the marriage and initially after the divorce," it does not provide any support for the statement and it does not ask the court to explain why it reached a contrary conclusion. Mother may disagree with the trial court's decision, but she has not demonstrated it to be clearly erroneous as required for reversal under CR 52.01. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-7 (Ky.App. 1998). Thus, we affirm the judgment.

Mother's second complaint is the trial court failed to require the Cabinet to enter an appearance and participate in the proceedings. Father counters by noting there was no reason for the Cabinet's involvement because the children were never in the Cabinet's care. Furthermore, the Cabinet was added as a party at

the insistence of the trial court and a Cabinet employee, Shameika Frazier, testified at the August 30, 2007.

We have scoured the record and have located no mention of this alleged error during the trial court proceedings. As a reviewing Court, our consideration is limited to arguments raised in the trial court. *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky.App. 1980). Since the issue was not called to the trial court's attention and the trial court was not given an opportunity to rule upon it, we will not consider it for the first time on appeal.

For the foregoing reasons, the judgment of the Warren Circuit Court terminating Mother's parental rights and the order overruling a subsequent motion to alter, amend or vacate that judgment are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven O. Thornton
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Wesley V. Milliken
Bowling Green, Kentucky