

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000221-ME

C.L.G.C.

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE GENE CLARK, JUDGE
ACTION NO. 07-AD-00003

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY;
D.M.C., A CHILD; AND I.M.C., A CHILD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: CAPERTON, KELLER, AND NICKELL, JUDGES.

NICKELL, JUDGE: C.L.G.C. (“Mother”)¹ has appealed from the Jackson Family Court’s October 25, 2007, order involuntarily terminating her parental rights to two of her children, D.M.C. and I.M.C.² For the following reasons, we affirm.

¹ Pursuant to the policy of this Court, in termination of parental rights cases, to protect the privacy of minors and their parents, we refer to them only by their initials.

² Although the parental rights of Mother and the fathers of the two children involved were terminated, only Mother has appealed the family court’s decision.

A petition seeking termination of parental rights was filed on March 30, 2007, and a hearing on the petition was held on October 9, 2007. Violet Cain (“Cain”), the family’s social worker, testified regarding the family’s history, her involvement with the family and the services rendered. The Cabinet for Health and Family Services (“Cabinet”) first became involved with Mother in 2003 in relation to Mother’s oldest child, C.C.³ That referral did not result in a substantiation of abuse or neglect, but during the investigation, Mother and her husband, R.M.C., admitted using and abusing illegal drugs and prescription pills. A referral later that same year was substantiated based on R.M.C. cutting his throat in front of C.C. following a fight with Mother. A third referral that year resulted in a substantiation of neglect when Fayette County police discovered Mother and two men were smoking crack cocaine in C.C.’s presence. Further investigation resulted in C.C.’s removal from the home and ultimate adjudication as a neglected child in late 2003. The Cabinet continued to provide services to Mother and R.M.C. in an attempt to reunify the family. Mother and R.M.C. failed to comply with the requests the Cabinet made and failed to follow their case plan.

D.M.C. was born to Mother and R.M.C. on February 18, 2005, when Mother was 19 years of age. The Cabinet provided ongoing services to the family until mid-2005 when it filed a petition seeking court intervention in the Jackson Family Court because Mother and R.M.C. were not complying with their case plan

³ C.C. is not the subject of this termination proceeding. However, the Cabinet’s previous involvement with Mother and her children is pertinent to the proper resolution of the instant matter. Mother does not have custody of this child.

and continually changed residences between Jackson and Owsley Counties.

Around that same time, Mother filed a domestic violence complaint against R.M.C. alleging he had threatened her and had bitten D.M.C. At the temporary removal hearing, Mother tested positive for methadone. D.M.C. was removed from the home and placed with his maternal grandparents for a short period of time. He was removed from that home following his grandparents' arrest for writing bad checks and possessing marijuana plants in their home. D.M.C. entered foster care on July 12, 2005, where he remained throughout the pendency of the instant action. He was committed to the Cabinet as a neglected child on August 30, 2005. The Cabinet continued to provide reunification services to the family, but those efforts were hampered by Mother's frequent changes of residence without notifying Cain, her ongoing case worker.

I.M.C. was born to Mother and her paramour, M.L.C., on May 12, 2006, when mother was 20 years of age.⁴ Mother and child tested positive for methadone and benzodiazepines just after the birth. I.M.C. suffered seizures as a result of the presence of the drugs and was transferred to a Lexington children's hospital for twelve days of treatment shortly after his birth. The Cabinet immediately filed a dependency, neglect and abuse petition in the Jackson Family Court. I.M.C. was placed in foster care on May 23, 2006, and has remained there during the pendency of the instant action. I.M.C. was adjudicated as a neglected child on June 27, 2006, and the family court suspended reunification efforts for

⁴ Paternity of this child was established in the Jackson Family Court on July 24, 2006.

R.M.C. that same date. I.M.C. was committed to the Cabinet on August 24, 2007, and reunification efforts were suspended for Mother at that time. The children progressed normally while in foster care, except for health problems I.M.C. experienced due to his drug-induced post-birth seizures.

During the period of commitment, Mother's visitation and contact with the children was sporadic. Mother initially visited D.M.C. once per week. She was allowed to visit I.M.C. at the hospital, but visited only once for a short amount of time. Several periods in excess of ninety days passed without Mother having any contact with either of the children. The Cabinet increased visitation to two hours, three times per week, eventually increasing to five times per week. Mother and M.L.C. complained the frequent visitation was unreasonable and interfered with the other things they had to do. Mother did not visit D.M.C. between September 2005 and June 2006, and visited neither child after July 12, 2006. She sent no cards, gifts or letters and did not attempt telephonic contact. Mother, R.M.C. and M.L.C. were severely delinquent in their court-ordered child support payments. Mother had several periods of incarceration during the children's lives because of her drug use. She was incarcerated at the time the termination hearing was held on October 9, 2007.

Mother testified at the termination hearing that she had used illegal drugs for approximately eight years. She also admitted using drugs while she was pregnant with I.M.C. She testified she was aware of I.M.C.'s health problems but had never attended any of his doctor's visits. She acknowledged she had not

written letters or made phone calls to either of her children even though she was not prohibited from doing either. She asked the court to give her one more chance as she believed she would be a better mother as a result of the lessons she had learned while in prison. She believed the court should wait until sometime in 2009 when she was released from incarceration before terminating her rights.

The children's maternal grandmother testified on behalf of Mother. She stated she believed Mother had changed for the better and would be a better parent in the future.

The foster mother testified regarding the children's development and their attachment to the foster home. She stated D.M.C. had been in her care since he was three years of age, and I.M.C. had come into their care upon his release from the hospital soon after his birth. She also discussed I.M.C.'s medical history and frequency of his doctor's visits.

In addition to the above testimony, the family court received into evidence the juvenile records for the children, rejection of the Cabinet's services executed by both fathers, the criminal records of all three parents, and child support records for all three parents. At the end of the hearing, the family court indicated a termination of parental rights order would be entered. Orders terminating all parental rights for both children along with findings of fact and conclusions of law were entered on October 25, 2007. Mother filed a post-trial motion requesting rehearing and reconsideration which the family court treated as

a motion to alter, amend or vacate the judgment or for a new trial pursuant to CR⁵ 59.01, as well as a motion for visitation with I.M.C. These motions were denied by order entered on January 22, 2008. This appeal followed.

Mother raises three allegations of error in this appeal. First, she contends the family court erred in basing its decision to terminate her parental rights solely upon her “young age” or, alternatively, solely upon the basis of her incarceration. Mother next alleges the Cabinet failed to prove reasonable efforts had been made to reunify the family. Finally, she contends the Cabinet failed to present sufficient evidence to support the family court’s decision to terminate her parental rights. We disagree.

Mother first alleges the family court relied upon her incarceration as the sole basis for terminating her parental rights. As an alternative theory, she argues the trial court relied solely upon her “young age” as the basis for its decision.

The twelve-page findings of fact and conclusions of law entered by the family court included multiple specific findings supporting its determination that termination of parental rights was in the best interests of the children. The court analyzed the nine-part definition for a neglected child set forth in KRS⁶ 600.020(1) and found Mother’s actions had resulted in D.M.C. fitting five of the

⁵ Kentucky Rules of Civil Procedure.

⁶ Kentucky Revised Statutes.

definitions and I.M.C. fitting four.⁷ Both children were thus adjudicated to be neglected children. The court went on to analyze the grounds for termination of parental rights set forth in KRS 625.090 and found termination was in the children's best interest for many of the same reasons it had adjudicated them to be neglected. Mother contends these findings were impermissibly based solely upon her young age or, alternatively, because of her incarceration. After a careful review of the record and the family court's detailed oral and written findings, we hold both of these contentions to be without merit.

In reaching the decision to terminate Mother's parental rights, the family court specifically found Mother had abandoned her children for multiple periods in excess of ninety days. However, the court was careful to note these periods of abandonment predated Mother's present incarceration and included periods when Mother was not incarcerated. It is well-settled that incarceration alone is an insufficient basis upon which to base a decision to terminate parental rights, *J.H. vs. Cabinet for Human Resources*, 704 S.W.2d 661 (Ky.App. 1985), and the family court's detailed findings clearly indicated its awareness of this rule

⁷ In determining the children were neglected, the family court found Mother had: (1) abandoned both children for a period or periods in excess of ninety days, KRS 600.020(1)(g); (2) engaged in a pattern of conduct rendering her incapable of providing for the children's immediate and ongoing needs for a period or periods in excess of ninety days, KRS 600.020(1)(c); (3) continuously and repeatedly failed or refused to provide essential parental care and protection for the children, KRS 600.020(1)(d); (4) failed to provide the children with adequate care, supervision, food, clothing, shelter, and educational or medical care for a period or periods in excess of six months, KRS 600.020(1)(h); and (5) D.M.C. had been in foster care under the Cabinet's responsibility for fifteen of the immediately preceding twenty-two months, KRS 600.020(1)(i). The court also found D.M.C. and I.M.C. had previously been adjudicated neglected children.

of law. However, in *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995), our Supreme Court stated “[a]lthough incarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights, incarceration is a factor to be considered. . . .”

The family court found the various periods of abandonment evidenced Mother’s intent to abandon her children prior to and during her incarceration. Further, the family court found Mother’s pattern of conduct toward the children was mainly caused by her drug use and her conduct rendered her incapable of providing for their appropriate care. The trial court also made findings as to Mother’s failure to provide essential supervision and care, including food, shelter, clothing, and medical and educational care. No evidence to the contrary was presented to the family court other than the self-serving testimony presented by Mother and the maternal grandmother. In light of the extensive findings made by the family court supporting its decision, and the weight and sufficiency of the evidence adduced at trial supporting such decision, we are unable to conclude the decision to terminate Mother’s parental rights was based solely upon her incarceration. The family court’s decision was based upon clear and convincing evidence as required by statute and will not be disturbed on this appeal.

We are also unable to discern from the record Mother’s basis for arguing the trial court based its decision solely upon her young age. It appears this argument has been created out of whole cloth. In contravention of CR 76.12(4)(c)(v), Mother does not cite us to the record indicating the factual basis

supporting this legal argument, and further cites no legal authority supporting her position. Further, we are concerned by Mother's reliance on multiple non-final unpublished opinions of this Court. Such reliance is inappropriate and cannot serve to support her argument. CR 76.28(4)(c); CR 76.30(2). In spite of these failings, we have reviewed the record and the only reference we are able to locate regarding Mother's age occurred at the end of the termination hearing when the court made a passing reference to Mother's relatively young age and indicating his hope she could turn her life around for the better. We have scoured the record and no other mention of Mother's age is to be found. The court's oral and written findings contain no indication Mother's age had any bearing on the decision to terminate her parental rights. Thus, Mother's contention is without merit and there was no error.

Next, Mother contends the Cabinet failed to prove reasonable efforts for reunification had been made. We disagree. In presenting this argument, Mother again fails to comply with the mandates of CR 76.12(4)(c)(v). Her brief contains only bare allegations that the evidence presented was insufficient to support the trial court's finding that reasonable efforts had been provided. She provides no citation to the record and again relies solely upon an unpublished decision for legal support of her argument in contravention of CR 76.28(4)(c). Our review of the record indicates there was substantial evidence presented that the Cabinet had been providing services aimed at reunifying this family for a substantial amount of time prior to the filing of the instant termination petition.

We are unable to discern any clear error in the family court's finding as to reasonable efforts, and as such, we will not disturb its finding. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986).

Finally, Mother alleges the Cabinet failed to meet its burden of proof to sustain the termination of her parental rights. Our review is limited to whether the trial court's findings were clearly erroneous; that is, whether they were supported by clear and convincing evidence. If so supported, the trial court's findings will not be disturbed on appeal. CR 52.01; *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 38 (Ky.App. 1999).

KRS 625.090(1) provides in pertinent part that a circuit court may involuntarily terminate all parental rights of a parent to a child if it finds by clear and convincing evidence the child is either now a neglected child as that term is defined by statute or has previously been adjudicated as such by a court of competent jurisdiction, and that termination is in the child's best interests. The court must also find by clear and convincing evidence the existence of at least one of ten listed grounds for termination set forth in KRS 625.090(2)(a)-(j).

In the case *sub judice*, the family court found the two children had previously been adjudicated as neglected. The court went on to find, as discussed earlier in this opinion, that both children currently satisfied the definition for neglected children and adjudicated them as such. After making additional findings, the family court found termination of parental rights was in the children's best interests.

A trial court has broad discretion in determining whether a child satisfies the definition of an abused or neglected child and whether such abuse or neglect is sufficient to warrant termination of parental rights. *See R.C.R., supra*, 988 S.W.2d at 38 (citing *Department of Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky.App. 1977)). We will not substitute our judgment for that of the family court unless there is no substantial evidence in the record to support such a finding. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky.App. 1986). We limit our review to the clearly erroneous standard set forth in CR 52.01. We note “[c]lear 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.” *R.C.R., supra*, 988 S.W.2d at 38 (quoting *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)).

The testimony before the family court revealed numerous instances of illicit drug usage, continuous failure to comply with requests made by the Cabinet, claims of domestic violence, and general neglectful behavior by Mother, all of which were appropriate for the family court to rely upon in making its determination. As a result, this testimony convinces us the family court was not clearly erroneous in concluding the children were neglected. After reviewing the statutory factors which must be considered prior to terminating parental rights, we are unable to hold the family court committed clear error in determining termination was in the best interests of the children. Although Mother disagrees

with the family court's decision, there was sufficient testimony adduced at trial to support the finding that four or more of the grounds for termination listed in KRS 625.090(2) existed. A finding of one of the grounds is all that is required. Even in light of the conflicting testimony and the differences of opinion of the parties, we will not substitute our decision for that of a trial court. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Therefore, as the evidence adduced at the termination hearing was sufficient to support the trial court's findings of neglect and to terminate Mother's parental rights, there was no clear error and we will not disturb the judgment on appeal. CR 52.01.

Therefore, for the foregoing reasons, the judgment of the Jackson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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