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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000002-ME

M.R.

APPELLANT

v. APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 07-AD-00044

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES as Next Friend of
J.M.Q., A CHILD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: This is an appeal of a termination of parental rights matter by M.R. (Mother), the natural mother of J.M.Q. (Son). Mother argues that the trial court erred in finding against her, as there was insufficient evidence to terminate her rights to her child.

After careful review, we hold that the trial court did not abuse its discretion and that the evidence was sufficient to warrant the judgment.

FACTS

Mother, her daughter (Daughter), and Son lived in Oregon. In early March, 2006, Mother, Daughter, and Son fled Oregon and moved to Kentucky to escape from Mother's then-boyfriend (Boyfriend 1), who is Daughter's father. Mother moved with her children to Kentucky not only to escape Boyfriend 1, but so that she could live with her new paramour (Boyfriend 2).

Approximately three weeks after Mother and her children moved in with Boyfriend 2, the Cabinet for Health and Family Services (the Cabinet) responded to a report that Mother and Boyfriend 2 were abusing Son. The Cabinet then took protective custody of Son on March 30, 2006. At or near that time, Boyfriend 1 came to Kentucky, regained custody of Daughter, and returned with Daughter to Oregon. Mother, describing her move to Kentucky as having jumped from the "frying pan into the fire," then found herself in the position of having to choose between remaining in Kentucky and working with the Cabinet to regain custody of Son or returning to Oregon to maintain a relationship with Daughter.

Mother initially chose to remain in Kentucky, and she cooperated with the Cabinet for approximately six months in an attempt to regain custody of Son. However, after obtaining a domestic violence order against Boyfriend 2, mother left Kentucky and moved to Illinois. Boyfriend 2 followed Mother to Illinois,

found her, and harassed her. Mother, who was then pregnant with another daughter (Daughter 2), moved back to Oregon.

When she returned to Oregon, Mother lived in a shelter for three months before reuniting with Boyfriend 1. Mother attempted to regain custody of Son but the Cabinet would not return Son to Mother because of Boyfriend 1's prior drug abuse and history of domestic violence. Mother, who gave birth to Daughter 2 after reuniting with Boyfriend 1, kept in contact with Son by means of twice monthly telephone calls. After a lengthy period of time, the Oregon Department of Human Services and Child Welfare (DHS), performed a home study and indicated that Mother had made progress in parenting her two daughters and in completing her treatment plan. Despite this finding by the Oregon DHS, the Cabinet, in September 2007, petitioned to involuntarily terminate Mother's parental rights to Son. While that action was pending, Mother married Boyfriend 1 (in December 2007), separated from Boyfriend 1 (February 2008), moved with her daughters to an apartment, and found a job at Office Max. We note that, while Mother was at work, Boyfriend 1 or a babysitter cared for the two daughters.

In October 2008, a second home study by the Oregon agency revealed that Mother had engaged in therapy and successfully completed her treatment plan. Despite this finding, the Kentucky termination proceeding went forward.

A trial was held in November 2008, wherein the court heard testimony from social workers from Kentucky and Oregon, Son's therapist, and Mother. Mother testified to, among other things, the behavioral issues of Daughter 1, and

acknowledged that a great amount of emotional damage had been done to Son prior to his removal from her care. Mother also testified that some of the initial allegations which led to the child being removed were not true. Mother did admit, though, that she had failed to protect Son from abuse by Boyfriend 2.

Son's therapist testified that he requires constant supervision due to Attention Deficit Hyperactivity Disorder and Reactive Attachment Disorder. Son's social worker testified that he is making progress in his current foster home, although his behavior remains explosive and unpredictable. The therapist noted instances in which Son behaved inappropriately were due to his anxiety about being abandoned and "replaced" by other children. The consensus of the testimony from both Son's therapist and the social worker was that in order to continue making progress and to protect other children from his outbursts, Son should only be placed in a home that does not have any other children present.

In its findings, the court noted that Mother had taken appropriate steps to remain involved in therapy and to end her relationship with Boyfriend 1. However, the court took into account that they continue to share custody of Daughter 1. The court also found that the initial removal from Mother had occurred because of her failure to protect Son from physical abuse by Boyfriend 2. The court found that Son's father had abandoned him and that both Mother and Father had failed or refused to provide essential parental care and protection for Son. Given the current situation, the court found that there was no reasonable expectation of improvement. Further, the court found that the Cabinet had made

reasonable efforts to reunite the family. The court found credible the testimony of Son's therapist and social worker that Son would be best served by remaining in a family where he is the only child in the residence due to his extensive behavioral problems. The court stated:

In consideration of his current mental health needs, and the description by the mother of his sisters' behaviors and needs, it would not be in [Son's] best interest to return to his mother's home . . . the Court finds that there is no reasonable expectation that [Mother] can safely resume parenting [Son], given his age and the circumstances.

The court found that for reasons other than poverty alone, Mother failed to provide the necessities of life for Son. Finally, the court found that Mother failed to prove that Son would not continue to be abused and neglected if returned to her care.

Accordingly, the court found that termination was in Son's best interest.

Mother now argues that there was insufficient evidence to terminate her parental rights; we now turn to our standard of review for this matter.

STANDARD OF REVIEW

We have consistently held that Kentucky Rule of Civil Procedure (CR) 52.01 applies to termination proceedings. It instructs that an appellate court shall give due deference to the trial court's determinations and judgments on the witnesses before it. "Findings 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.” Only if no substantial evidence supports the findings can the trial court’s judgment be reversed.

The standard of proof required in termination proceedings is that of clear and convincing evidence, and the 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. *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977); *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986).

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. *Rowland v. Holt*, Ky., 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

R.C.R. v. Commonwealth, Cabinet for Human Resources, 988 S.W.2d 36, 38-9 (Ky. App. 1999).

ANALYSIS

With the clearly erroneous standard in mind, we now turn to its application to this case. The trial court is bound by the statute found in Kentucky Revised Statute (KRS) 625.090, which outlines the process and grounds for involuntary termination. In part, the trial court must find by clear and convincing evidence that the child has been adjudged to be an abused or neglected child by a court of competent jurisdiction. In this matter, the McCracken Family

Court committed Son as such in May 2006. The removal took place due to neglect and physical abuse by Boyfriend 2. There was no appeal by Mother of that determination.

Further, KRS 625.090 instructs that termination shall not be ordered unless the court finds by clear and convincing evidence that one of the factors found in sections KRS 625.090(2)(a)-(j) exist. The trial court herein found that four grounds existed, although, as previously stated; only one factor is required. The trial court found: (a) that the Son's father, (Father), had abandoned Son for a period of not less than ninety days; (b) that Mother and Father, for a period of not less than six months, continuously or repeatedly failed or refused to provide or had been substantially incapable of providing essential parental care and protection for Son and that there was no reasonable expectation of improvement in parental care and protection, considering Son's age; (c) that Mother and Father, for reasons other than poverty alone, continuously or repeatedly failed to provide or were incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for Son's well-being and that there was no reasonable expectation of significant improvement in the parents' conduct in the immediately foreseeable future, considering Son's age; (d) that Son had been in foster care under the responsibility of the cabinet for fifteen of the most recent twenty-two months preceding the filing of the petition to terminate parental rights.

Moreover and in addition to the above, the trial court must also find that termination would be in the best interest of the child. KRS 625.090 requires

that when making the determination regarding whether or not the best interest of the child is indeed termination of parental rights, factors (3)(a)-(f) of KRS 625.090 shall be considered.

Pursuant to KRS 625.090(3)(b), the trial court must consider prior abuse of the child. The court did this, finding that given the circumstances of the prolonged absence of Mother from Son's life and his relationship with his foster family, his mental health and behavioral issues, and the continued involvement of Boyfriend 1 in Mother's life, among other things, supported the finding that termination would be in the best interest of Son.

KRS 625.090(3)(d) requires the court to consider: "The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child." The court herein noted the achievements and progress made by Mother in improving her life situation, but also noted the continued stress and upheaval present in Mother's life. The court also took note of Son's siblings and the added stress that he would invariably create if returned to the care of Mother

KRS 625.090(3)(e) mandates the court consider: "the physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered." In this matter, the court heard from Son's therapist and social worker that his behavior was improving and that he required constant and consistent supervision in order to remain mentally healthy

and physically safe. The court also heard evidence that the best situation for Son was to be in a family who had no other children to compete for attention. Given the most recent incident of domestic violence, the trial court found that Mother could not prove by a preponderance of the evidence that Son will not continue to be an abused or neglected child as is required by KRS 625.090(5).

The trial court also found that the Cabinet had made reasonable efforts to unite the family, despite the testimony regarding the initial delay in a home study. The court cited Mother's removal of herself from Kentucky and the services provided to her by the Oregon social service agency.

Given the above evidence heard by the trial court and the findings of fact and conclusions of law presented in the court's order, we cannot say that the judgment to terminate Mother's parental rights was clearly erroneous. As we must, we defer to the trial court's judgment as to the credibility of the various witnesses. We note that the weight of the evidence provided that while Mother had made great strides in improving her situation in life, the balance in favor of her continued progress is precarious. Moreover, while Son has likewise progressed in his development, it is clear that this is still a fragile little boy who requires special and undivided attention.

We therefore hold that there existed substantial evidence from which the court could reasonably find grounds for termination. Thus, the judgment of the McCracken Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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