

RENDERED: OCTOBER 23, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-000258-ME

J.M., NATURAL MOTHER

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE VIRGINIA WHITTINGHILL, JUDGE  
ACTION NO. 08-AD-500273

CABINET FOR HEALTH AND FAMILY SERVICES,  
COMMONWEALTH OF KENTUCKY; S.M.M., AN INFANT;  
B.N.M., AN INFANT; AND C.L.M., AN INFANT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: J.M. (mother) appeals from a Jefferson Family Court order terminating her parental rights to her children, S.M.M., B.N.M., and C.L.M. Although the father's parental rights were also terminated, he did not appeal. The sole issue presented is whether the family court's order terminating mother's

parental rights and transferring custody to the Cabinet for Health and Family Services (Cabinet) is supported by clear and convincing evidence that the children were abused and neglected and that it was in their best interest to have their mother's rights terminated. We conclude that the record amply supports the court's order and affirm.

The Cabinet became involved with the family in April 2006, when it filed an initial verified dependency action regarding S.M.M., born on December 15, 1996, and B.N.M., born on December 20, 1999. At that time, C.L.M. was not yet born. It was alleged that both children had excessive school absences. After the mother agreed to ensure that the children would have no additional absences except when excused by a physician's note, the children were permitted to remain in her care and custody.

On July 6, 2006, the Cabinet filed its second petition in which it alleged that the Cabinet received a police report that on May 22, 2006, the father entered the mother's home and placed his hands around her neck. Although she was temporarily able to escape, the father dragged the mother inside the home and, in the children's presence, an altercation ensued. The petition further alleged that the parents had not been cooperative with the Cabinet and that neither attended the scheduled court date regarding the initial petition.

A temporary removal hearing was held and the family court again returned the children to the mother. It further ordered that the mother obtain an Emergency Protective Order (EPO) and a Domestic Violence Order (DVO), to

have counseling at the Center for Women and Families and counseling through Seven Counties for victims, and to cooperate with the Cabinet and secure regular employment. The father was ordered to have no contact with the mother and the children until further order of the court and to enroll in and complete all domestic violence counseling. The children were to be assessed for counseling at Seven Counties Services and all recommendations completed.

The mother entered, and the family court accepted, a stipulation that the children were abused and neglected children within the meaning of Kentucky Revised Statutes (KRS) 600.020(1), that the children were educationally neglected, and that the domestic violence occurred as stated in the July 2006 petition.

In April 2007, the Cabinet filed a third dependency petition stating that since March 26, 2007, S.M.M. had missed forty-eight days of school and that the situation had not improved. It further stated that the mother failed to comply with the Cabinet's request that the child be medically evaluated. According to the petition, the father had been noncompliant with prior court orders, with the Cabinet's directives, and had a history of assault, domestic violence and drug charges.

At the temporary removal hearing, the family court again allowed the children to remain in the custody of the mother and further ordered that the mother: (1) ensure the children attend school; (2) ensure that the children are assessed for counseling and follow the Cabinet's recommendation; (3) secure employment; (4) obtain a psychological evaluation and follow all recommendations; and (5)

cooperate with in-home service providers and the Cabinet's treatment plan. On June 12, 2007, the mother entered, and the family court accepted, a written stipulation that the children were victims of educational neglect.

After C.L.M's birth, on November 26, 2007, the Cabinet filed its fourth dependency petition. In addition to alleging that the mother had been noncompliant with previous court orders, the petition stated that C.L.M. tested positive for cocaine at the time of birth and that the mother failed to comply with the court's prior orders. At that time, the father was incarcerated on drug-related charges.

Following a temporary removal hearing, the children were placed in the temporary custody and care of the Cabinet. The mother was ordered to: (1) enroll in individual counseling; (2) enroll and complete drug treatment; (3) maintain independent housing; (4) establish paternity for the infant; (5) secure regular employment; (6) submit to random drug testing; and (7) pay child support in the amount of \$50 per week.

On December 18, 2007, the parents entered, and the family court accepted, a written stipulation in the pending dependency action that the children were abused and neglected within the meaning of KRS 600.020(1) and further that:

M.'s (mother's) substance abuse resulted in birth of child with cocaine in its system, domestic violence at hands of father, who also has substance abuse issues. Family has not been properly supervised and children . . . have had excessive absences from school.

The children were committed to the care and custody of the Cabinet on February 19, 2008.

In July 2008, the Cabinet filed an action to terminate the parental rights of the mother and father to S.M.M., B.N.M. and C.L.M. A hearing was held at which time the family court heard testimony from therapists from Seven Counties Services, representatives of the children's school, the foster parent, the Cabinet worker assigned to the case, the parents' therapist, and the parents.

Sandra Freeman, B.N.M.'s therapist, testified that B.N.M. suffers from anxiety, worry, and memories of domestic violence. She testified that the child has become more outspoken and gained self-confidence since therapy began. Although B.N.M. has a favorable prognosis, if returned to her parents, her prognosis is poor.

Tyler Horn, S.M.M.'s therapist, testified that S.M.M. also suffers from anxiety and S.M.M. admitted that he had experienced sexual abuse while in his mother's custody. The therapist explained that because of S.M.M.'s anxiety regarding the abuse, at the time of the trial it had not been fully explored. Because of the complexity of S.M.M.'s mental health, Horn recommended continued therapy.

The mother's therapist, Linda Leavitt, diagnosed mood disorder, attention deficit disorder (ADD), victim of domestic violence and of neglect to her children. The mother takes Cymbalta for depression, Strattera for ADD, and Seroquel as needed for sleep.

The trial court also heard testimony from the principal of the children's school, Tiffany Gerstner. She was aware of the children's excessive absenteeism and testified that school personnel had attempted to intervene through the family resource coordinator who worked with the family. She recalled that the children lacked personal hygiene and were withdrawn while in their mother's care. She also recalled that S.M.M. had difficulty staying awake in class. She testified that the children were now outgoing, engaged in extracurricular activities, and excited about school.

Barb Kissell, the school's family resource coordinator, has known the children since they began attending school. She dealt with the children concerning head lice, attendance, and academic struggles. She testified that the children were frequently absent. After she became suspicious that some of the physicians' excuses were computer generated, she contacted the various physicians who purportedly signed the notes to validate the excuses, but only some were validated. She agreed with Ms. Gerstner that the children were now outgoing and had blossomed socially.

The children's foster mother testified that when the children were initially placed in her care, B.N.M. had extensive head lice causing sores on her head. S.M.M. was withdrawn. The children's foster mother was given bottles containing medication for the children, which included Clonidine, Seroquel and Topomax. Concerned about the medications, she scheduled an appointment for the children with a psychiatrist who instructed that the children not be administered

any of the medications. After the children were no longer medicated, the children were noticeably more alert. Soon after the children arrived at the foster home, B.N.M. was treated for severe ear wax and both of the older children were treated for extensive dental decay. The infant suffers from the effects of the mother's drug use during pregnancy and receives occupational, physical and speech therapy.

The foster mother testified that the children were anxious when they arrived at her home and frightened that the father would injure the mother. While living with their mother, the children's diet consisted primarily of cereal and ramen noodles. It was not until June 2007, that B.N.M. told the foster mother that she and S.M.M. had been sexually abused by Paul, a forty-year old babysitter.

B.N.M. relayed that there were numerous parties at her parents' home and she saw her parent's engage in drug-related activity. Upon further inquiry, she told the foster mother that Paul touched her in her "private areas" and that S.M.M. was forced to watch. She decided not to question S.M.M. but instead called the child abuse hotline and the family's social worker. The foster mother confirmed the consensus of the school personnel that the children had improved physically and mentally since their arrival to her home.

The family's social worker, Kay Collins, testified that she first met the family in 2005, when a final notice of truancy was served by a school official. She described the mother's cycle of noncompliance with case treatment plans and court orders. She testified that the mother would comply with the plans and orders just prior to a court date, but returned to noncompliance soon after the proceedings

ended. She further testified that since the children's commitment to the Cabinet, the mother has not provided support for the children. She recommended that the parental rights be terminated to eliminate further damage to the children.

Amy Age began treating the parents three months prior to the September 2008 trial. She testified that the parents had been compliant and that the parents were on the fourth step of a twelve-step program but stated that fewer than 5 percent of first-time participants complete the program.

The mother testified that she attributed her drug use during pregnancy to depression. She denied over-medicating her children and minimized the domestic violence.

On appeal the mother contends that the family court's findings, that termination of her rights was in the children's best interest and that termination was warranted under KRS 625.090, were not supported by clear and convincing evidence. We are not persuaded that the family court erred.

Our standard of review in termination of parental rights cases is confined to Kentucky Rules of Civil Procedure (CR) 52.01, based upon clear and convincing evidence. We 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). "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 the 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).

The findings of the family court were extensive and included the abundant services offered by the Cabinet to the family. It found that the parents’ recent efforts to reunite the family were “too little too late” and that the children’s interest “would not be served by hoping their parents can get it right this time.” Ultimately, the family court concluded that the Cabinet had proven by clear and convincing evidence that termination was warranted and that the children’s best interests were served by termination.

The family court found that the condition specified in KRS 625.090(2)(e) had been met by clear and convincing evidence. That statute provides:

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[.]

In addition, KRS 625.090(1)(b) requires that the court find by clear and convincing evidence that termination is in the child’s best interest.

The evidence clearly demonstrated that the mother failed to provide essential care and support for her children over a time span much longer than six months. The children suffered physical and mental neglect and were exposed to physical violence, sexual abuse, drug abuse, and were themselves unnecessarily

medicated. Despite the repeated attempts by the Cabinet and the court, the mother refused to consistently participate in the services offered to ensure the protection of her children. It was not until the Cabinet sought termination of her parental rights that she took steps to comply with treatment plans.

We conclude that there is clear and convincing evidence that the children's best interest are served by termination. The judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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