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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002193-ME

B.R. APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 09-AD-00022

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND S.R., A JUVENILE APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HENRY, SENIOR JUDGE: This is an appeal from a judgment of the Kenton Family Court, which involuntarily terminated the parental rights of the appellant mother and her husband to their daughter. The husband is not a party to this appeal, and the judgment terminating his parental rights is final. The mother argues that there was insufficient evidence in the record to support the family court's findings, and that the Cabinet for Health and Family Services failed to exercise reasonable efforts to reunify the family. We affirm.

The mother gave birth to the child on April 23, 2006, when she was sixteen years of age. She and the child's father were married shortly afterwards. The Cabinet filed two petitions on behalf of the child, on October 12 and October 13, 2006, following an incident in which the Covington police were dispatched to the couple's residence because someone was banging on their door using a gun. The child was discovered in a room which also contained marijuana and scales. Several minors were in the residence with alcohol and marijuana present. The father was arrested and convicted of possession of marijuana, drug paraphernalia and wanton endangerment of a minor.

In its petitions, the Cabinet alleged that the parents were neglectful as a result of the father's drug use and the mother's alcohol consumption. The case worker expressed concern about domestic violence, and noted that the family had failed to comply with her case plan recommendations. The Cabinet also alleged that the child was in danger due to her mother's refusal to distance herself from the father and the criminal activity in the home. The father ultimately admitted that

the child was dependent and she was put in the joint custody of her mother and maternal grandmother. The mother was ordered to participate in parenting classes, and to undergo a psychological and parenting assessment.

About one month later, the Cabinet filed for a review of the joint custody order, requesting that custody of the child be temporarily awarded to the maternal grandmother and that visitation with the father be supervised. After the Cabinet filed the review request, the mother distanced herself from the father, and began a relationship with another man, A.A. She filed a domestic violence petition against the father in Kenton District Court, alleging that he had threatened to find her, knock out her teeth and kill her. She further alleged that he had entered her home and broken many objects. The Kenton Family Court entered a domestic violence order against the father on March 19, 2007. The mother ended her relationship with A.A. shortly afterwards, and reconciled with the father. She filed a motion to amend the domestic violence order, claiming that it was no longer necessary as she and her husband had worked things out and come to an agreement. The family court granted the motion. The father continued to have problems, however. In 2007, he was convicted on two separate occasions of use/possession of drug paraphernalia, then in 2008 of cultivating marijuana, possession of drug paraphernalia, disorderly conduct and possession of marijuana.

On April 10, 2008, the couple's second child, a son, was born. About one month later, the mother obtained another domestic violence order against the father, alleging that he was angry and violent, broke dishes, threw things around

and raised his fist. After the father moved out of the residence, the mother resumed her previous relationship with A.A., who moved in with her and the two children. The mother's father also lived in the residence.

In June 2008, the Cabinet filed a petition in the family court on behalf of the children, based on a report that the daughter had slap marks on the corner of her mouth, that the mother had said she beat the daughter, and that the mother refused to make contact with the assigned case worker.

Before this petition could be heard, the infant son died as a result of injuries inflicted by A.A. on August 1, 2008. These injuries included a skull fracture, brain bleeding, leg fractures, a wrist fracture, multiple rib fractures and bruising all over his body. The autopsy showed that he had also suffered numerous prior injuries. The Cabinet filed a petition on behalf of the daughter, alleging that she was at risk for physical abuse. The petition reported that the daughter told the Cabinet workers that A.A. had hit her on the head, that she was afraid of him, and was afraid of being locked in a room. A.A., on the other hand, claimed that the mother was physically aggressive towards the daughter.

The Cabinet worker assigned to investigate the death of the infant son spoke with the mother regarding his injuries. The mother said she had noticed some redness in his eyes. On the day he died, she reported that he had been sick, crying and throwing up. The mother had nonetheless gone out to get her nails done, leaving the baby with her father, who she admitted was a violent man, although she claimed that he only becomes abusive when he is drunk. A.A.

returned home while she was out, and inflicted the injuries which ultimately led to the infant son's death. A.A. eventually admitted that he had caused the baby's injuries by pulling and shaking him, hitting his head on a door frame and falling down the stairs. The mother denied any awareness of the child's healing fractures. According to the Cabinet worker, the mother showed little emotion after A.A. was indicted for murder in the death of her son. She continued to visit him in jail, purchased a telephone card for him and accepted at least five calls from him. She also contacted his family on his behalf. She eventually stopped accepting the calls because she believed that jail personnel were monitoring and recording their conversations. When she was questioned about maintaining contact with A.A., she explained her actions by stating that A.A.'s family "did a lot for her." The mother eventually reunited with her husband in the fall of 2008.

On October 23, 2008, the mother admitted to neglect of her daughter in Kenton Family Court. The child was committed to the Cabinet and placed in foster care. The mother was allowed weekly visits with her daughter. The court ordered the parents to complete the services recommended in the Cabinet's court report. The mother was required to abide by all recommendations of Dr. James Rosenthal, a licensed psychologist, to submit to random drug screens, and to participate in parenting classes and demonstrate what she learned in those classes.

Dr. Rosenthal completed a psychological evaluation of the mother, and diagnosed her as having an adjustment disorder with depressed mood and anti-social personality traits. He opined that this diagnosis would affect her parenting

abilities in the following ways: she would not monitor her children closely, would expose them to dangerous situations, or leave them with people with whom the children would be at risk of harm. He recommended that she seek outpatient mental health treatment, and attend a support group for parents of deceased children.

The mother failed to complete the mental health counseling recommended by Dr. Rosenthal. She did attempt to attend a support group for bereaved parents, but was informed that it was for families only and that her daughter was too young to attend. The mother had completed parenting classes in 2006, and completed two more sessions of parenting classes after the removal of her daughter from her care in 2008, but according to the Cabinet's social worker, she failed to demonstrate improved parenting abilities during her supervised visitation with her daughter, on one occasion "cursing and throwing a fit" in front of the child. Her behavior was described as childish, and she was prone to saying inappropriate as well as hurtful things to her daughter during visitation. She also brought unauthorized guests and continued to use her cell phone during visitation. She continued to have contact with the father of her children and the relationship continued to be troubled. In June 2009, for example, he filed a domestic violence petition alleging that she was stalking him.

The Cabinet filed a petition to terminate the mother's parental rights and a trial was held on August 24, 2009, and September 25, 2009. On October 26,

2009, the family court entered an order terminating the parents' rights to their daughter. This appeal by the mother followed.

Involuntary termination proceedings are governed by KRS 625.090, which provides that a circuit court may involuntarily terminate parental rights only if the court finds by clear and convincing evidence that a three-pronged test has been met. First, the child must be deemed abused or neglected, as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination of parental rights must be in the child's best interest, and the court is provided with a series of factors that it shall consider when making this determination. KRS 625.090(1)(b); KRS 625.090(3). Third, the court must also find at least one of a number of grounds listed in the statute. KRS 625.090(2).

When we examine the family court's application of this three-pronged test, our review

> is confined to the clearly erroneous standard in [Kentucky Rules of Civil Procedure] 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 -117 (Ky. App. 1998) (internal citations and quotation marks omitted).

On appeal, the mother argues the following: (1) that she was not responsible for her son's death, and that his death should not be imputed to her for purposes of supporting a termination of her parental rights in her daughter; (2) that she had substantially complied with the December 2008 dispositional order of the court; (3) that it was not in the child's best interest to terminate the mother's parental rights; and finally (4) the Cabinet failed to exercise reasonable efforts to reunify the family.

The mother contends that the death of her infant son was unfairly used by the family court to justify terminating her parental rights in her daughter, even though on the day of his death she had left the baby with her father, not with A.A., and she was not present when the assault took place. She contends that she had no cause to believe that her boyfriend had any violent tendencies, and that the abuse of a child, standing alone, is not enough to justify the termination of parental rights to a different child. In its findings of fact, the family court observed only that the mother continued to have contact with A.A. after he apologized to her for killing the child. There is no other mention of the incident in the family court's findings, and there is no indication that the family court placed the blame for the infant's death on the mother, or that the incident was the sole or even the decisive factor in the court's decision to terminate parental rights.

Moreover, although the mother was not responsible for the death of the infant son, she exhibited poor judgment in leaving the child with her father, who in turn left him with A.A., the individual who inflicted the fatal injuries. Even

more troubling is the fact that the mother was apparently oblivious to the signs of previous abuse and injury that the baby had suffered, even though the physicians at the Cincinnati Children's Hospital, where he was examined and pronounced dead, said the child would have been showing symptoms of pain and distress.

> [W]hile abandonment or abuse of an older child alone is not clear and convincing evidence sufficient to support termination of parental rights to a younger child, such evidence coupled with other evidence of abuse or neglect of the younger child may be sufficient.

Cabinet for Health and Family Services v. A.G.G., 190 S.W.3d 338, 342 (Ky. 2006). The fact that the mother had not noticed the prior injuries inflicted on her infant son, that she had left him in her father's care in order to get her nails done, even though her father has violent tendencies and the child appeared to be ill, and her decision to maintain friendly contact with the man who admitted to inflicting the fatal injuries on her infant constitute substantial evidence to support the family court's conclusion that she had repeatedly failed to provide or was substantially incapable of providing essential parental care and protection.

Next, she argues that insufficient weight was given to the fact that she substantially complied with the family court's order of December 2008, which required her to submit to random drug screens, to comply with the recommendations of Dr. Rosenthal, and to complete parenting classes. She correctly states that she had no positive drug screens. She also explains that she was unable to follow Dr. Rosenthal's recommendation that she attend grief counseling at Fernside. As to Dr. Rosenthal's recommendation that she attend

mental health counseling, she explains that she had two therapists at Family First during her first five sessions. The second therapist then moved to Ohio. This would have meant she had to see a third therapist by her sixth visit, which she argues constituted noncooperation and inconsistency on the part of Family First, and justified her decision to stop attending therapy. She points out that she also completed parenting classes and attended four one-hour sessions at the Women's Crisis Center.

Although she did complete some parts of the family court's recommendations, her decision to stop attending her counseling program, simply because the therapists had changed, was significant in that she appears not to have accepted Dr. Rosenthal's diagnosis that she needs help for her mental problems. Furthermore, although she testified that Fernside turned her away, there is no indication that she sought assistance in finding a different grief counseling program. As to the parenting classes, the testimony from the Cabinet's workers indicated that she was unable to demonstrate that she had learned anything of benefit at the classes, and continued to display immature behavior at her meetings with her daughter.

Next, the mother disputes that she is incapable of providing essential parental care, and that her mental illness on its own is not enough to terminate parental rights. Furthermore, she argues that the Cabinet did not sufficiently perform its duty to ensure that she had access to appropriate and consistent mental health treatment. There is no indication that the family court terminated parental

rights solely on the ground of her mental illness. We agree that mental illness is not sufficient in itself to terminate parental rights, but it is certainly a factor that the court is directed to consider under KRS 625.090(3)(a). Although the change in therapists may have been inconvenient to the mother, it was not a sufficient reason to stop attending the counseling sessions, and certainly did not constitute any sort of "noncooperation" on the part of the counseling services.

The mother also disputes the family court's finding that she did not have the ability to provide food and clothing for her daughter. She acknowledges that there was testimony that she was in arrears for child support, but also states that the court referred to the existence of the docket sheet in the record indicating that the child support was set at "zero." The Cabinet acknowledges that the order to pay child support was not in the juvenile court record. (There is a child support arrears calculation sheet in the record, but it appears to pertain only to the father, not the mother.) The Cabinet also states that a certified copy of her child support record establishes that she had an arrearage. This copy is not in the record. Despite the conflicting evidence regarding child support arrears, it is undisputed that she has never paid child support. Furthermore, although the family court noted that she claims she works, there is no reference to evidence in the record to support this contention. The family court did not err in concluding that there was no reasonable expectation of significant improvement in this regard.

Finally, she argues that the Cabinet had no intention of reunifying the family. She contends that the reference by a Cabinet worker to a "foster-to-adopt"

family indicates that it was the worker's intent from the very beginning to place the child with a family that would permanently adopt her. The Cabinet worker also testified that it was inappropriate for the mother to criticize her daughter for calling her foster parents "mom" and "dad." The mother contends that the Cabinet worker was thus latently encouraging the child to see the placement with her foster family as permanent.

KRS 625.090(3) directs as follows: "In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:"

> (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

"Reasonable efforts" are defined as

> the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community in accordance with the state plan for Public Law 96-272 which are necessary to enable the child to safely live at home[.]

KRS 620.020(10).

The mother argues that the Cabinet failed to make "reasonable efforts" to reunify the family, and that none of the circumstances under KRS 610.127 were present to justify a waiver of the reasonable efforts requirement. Our review of the record indicates that the Cabinet did make reasonable efforts to

assist the family by referring the mother to various services. Although the mother did complete some of the services, she failed to show any improvement that would justify reunification of the family. Her continuing relationship with the father, and the fact that the violent nature of that relationship did not improve, also militated against reunification.

The findings of fact, conclusions of law and judgment of the Kenton Family Court terminating parental rights are therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Derek R. Durbin
Fort Thomas, Kentucky

BRIEF FOR APPELLEE:

Cynthia Kloeker
Newport, Kentucky