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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000946-ME

R.G.H. APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT V. COSTANZO, JUDGE
ACTION NOS. 09-AD-00022, 09-AD-00023, AND 09-AD-00024

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; H.L.H., A.G.H., and D.W.H., CHILDREN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: R.G.H. appeals from the Bell Circuit Court's March 4, 2010, orders terminating her parental rights to her three children, H.L.H.; A.G.H.;

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and D.W.H.[2] Because we hold that the trial court's findings are supported by substantial evidence, we affirm.

The Cabinet for Health and Family Services (Cabinet) began its involvement with Appellant in January 2007, when A.G.H. was born testing positive for benzodiazepines. At the same time, Appellant tested positive for THC. The Cabinet filed a neglect petition and A.G.H. and H.L.H. were placed in foster care on January 12, 2007. The children were returned to Appellant, by court order, on January 17, 2007. The Cabinet offered services to Appellant, including drug screens, referral to substance abuse treatment, and parenting classes, and the trial court monitored Appellant's progress.

On May 12, 2007, the children were again placed in foster care when appellant was found smoking marijuana while caring for the children. The Cabinet continued to offer services to Appellant and on August 1, 2007, the children were returned to Appellant. The Cabinet continued its services to the family and eventually the trial court dismissed the neglect action and the Cabinet closed its case with Appellant in December 2007.

On September 6, 2008, D.W.H. was born, tested positive for opiates, and was prescribed morphine sulfate to ease with his drug withdrawals. The Cabinet filed another petition and all three children were placed into foster care on September 19, 2008. Appellant was ordered to attend in-patient drug treatment and the Cabinet was ordered to make the children available for visiting with

[2] Those orders also terminated the parental rights of the three children's father. However, because he has not appealed, this opinion only addresses the orders with regard to Appellant.

Appellant as long as she was enrolled in the treatment. Appellant unsuccessfully attempted the treatment and disappeared from October of 2008, until March of 2009. In March of 2009, Appellant contacted her case worker with the Cabinet but did not disclose her whereabouts. In June of 2009, she was arrested and eventually sentenced for failure to pay child support. She was released in November of 2009.

During Appellant's incarceration, the Cabinet continued to offer her services and developed a case plan that she attend Reformers Unanimous meetings and provide documentation that she had done so. Although Appellant stated that she had attended the meetings, she failed to provide the required documentation. Also while incarcerated, Appellant tested positive for Oxycontin. In October of 2009, the trial court changed the permanency goal for the children from reunification with their parents to adoption. On October 7, 2009, the Cabinet filed petitions to terminate the parental rights of Appellant. Nonetheless, upon Appellant's release from jail in November, the Cabinet continued to offer services to Appellant.

During the hearing on the termination petition, Appellant's case worker testified because of Appellant's long-standing drug abuse and her inability to make more progress on her case plan, that reunification was not being recommended. The Appellant's minister and aunt testified on her behalf. Both testified that they had witnessed no evidence of drug use since Appellant had been released from jail. Appellant also testified that she had been drug free for four

months, that she was employed part-time, and that she was planning on obtaining her GED and becoming employed full-time.

On March 4, 2010, the trial court's findings of fact, conclusions of law, and orders terminating the parental rights of Appellant with regard to each of the three children were entered. Appellant filed a motion to alter, amend, or vacate those orders. That motion was denied in an order by the trial court entered on April 26, 2010. This appeal followed.

> This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR[3] 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.

M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116 (Ky. App. 1998) (footnote added) (*citing 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*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

Court-ordered termination of parental rights is governed by KRS[4] 625.090, which allows termination when:

> (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

[3] Kentucky Rules of Civil Procedure.
[4] Kentucky Revised Statutes.

> 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
>
> 3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and
>
> (b) Termination would be in the best interest of the child.

KRS 625.090(1). The statute further requires that the trial court find, by clear and convincing evidence, one or more of ten criteria which, in relevant part, are:

> 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;
>
> [or] . . .
>
> That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and *that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future*, considering the age of the child.

KRS 625.090(2) (e) & (g) (emphasis added).

In the action before us, the trial court made the following, relevant findings:

> [Appellant], for reasons other than poverty alone, [is] incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for [her] child's well-being, and there is no reasonable expectation of significant improvement in parental conduct in the immediately foreseeable future, considering the age of the child. . . .
>
> Although [Appellant] may have made some progress in overcoming her drug addiction and other problems recently, that progress has been limited to the past few months. Further attempts to reunify her with any of her children are inconsistent with their need for a permanent home. . . .
>
> The [children] [have] made substantial improvements while in foster care, and [are] expected to make more improvements upon termination of parental rights.

On appeal, Appellant argues that the Cabinet failed to prove, by clear and convincing evidence, that there is no reasonable expectation of improvement in Appellant's parental care and protection of her children. In support of this argument, Appellant maintains that she showed significant improvement over the three months between her release from jail and the termination hearing. She maintains that these changes were evidenced by her involvement with Reformers Unanimous, her regular church attendance, and her acquisition of a part-time job. Appellant also notes that the social worker assigned to her case testified that Appellant had been maintaining negative drug screens, attending her treatment program, and paying child support.

There is no denying that these types of cases are characteristically complicated and poignant. It is clear that each party submitted substantial evidence to the trial court in support of their position. However, it is not essential

that we examine the evidence and determine its weight or credibility. Nor is it essential that we determine whether we would have arrived at an identical decision had the evidence been presented to us for consideration. Instead, we are concerned only with whether or not the trial court's decision to terminate is supported by substantial evidence, and we hold that it is. Specifically, the record indicates that for the three years prior to the termination hearing Appellant continuously tested positive for drugs, including when she was pregnant and incarcerated; that she failed to attend parenting classes as part of her case plan; that she failed to attend court-ordered drug rehabilitation, and that she disappeared for a period of five to eight months. In this case, it appears as though the trial court found the Appellant's three-year history of parental care to be more telling than her three-month history of recovery, and such is its discretion. "[T]he trial court, as the finder of fact, has the responsibility to judge the credibility of all testimony, and may choose to believe or disbelieve any part of the evidence presented to it." *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky.App. 2006). Indeed, as Appellant points out, the record contains substantial proof that she was attempting to improve her life. And, it is possible that the trial court could have placed greater credence in the Appellant's testimony and her claim of reform. However, as we have already pointed out, "[c]lear and convincing proof does not necessarily mean uncontradicted proof." *Rowland*, 70 S.W.2d 5 at 9. The record contains substantial evidence to support the findings of the trial court, and for that reason we are compelled to affirm.

For the foregoing reasons, the Bell Circuit Court's March 4, 2010, orders terminating Appellant's parental rights are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Otis Doan, Jr.
Harlan, Kentucky

BRIEF FOR APPELLEE:

Stephen D. Spurlock
London, Kentucky