RENDERED: DECEMBER 14, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001919-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES
AND J.R.L.,[1] A CHILD — APPELLANTS

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 11-AD-00004

R. R. L. AND R. W. L. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: The Commonwealth of Kentucky, Cabinet for Health and Family Services (CHFS) appeals from an order entered by the Hart Circuit Court denying its petition to involuntarily terminate the parental rights (TPR) of R.R.L.

[1] Pursuant to Court policy, children and parents in a termination case are identified by initials only to protect the child's identity.

(birthmother) and R.W.L. (legal father) to J.R.L., a daughter born on February 6, 1998. Based on the same proof, the court terminated R.R.L.'s parental rights to H.R.A.L., a female born on October 31, 2002, and subsequently adopted by R.R.L.[2] CHFS argues that if there was sufficient evidence to order TPR for H.R.A.L., there must have been sufficient evidence to order TPR for J.R.L. since the only difference regarding the two girls was R.R.L.'s testimony that she wanted to return to her mother and H.R.A.L.'s testimony that she did not want to go home because her mother routinely pushed her into the wall. Having reviewed the CHFS brief, the record and the law, we affirm.

On February 7, 2011, CHFS petitioned the court to involuntarily terminate the parental rights of R.R.L. and R.W.L. to J.R.L., alleging she was an abused and neglected child under KRS[3] 600.020. The petition also sought appointment of a guardian *ad litem* (GAL)[4] for the child. Specifically, CHFS alleged the parents (1) had failed, or been unable, to provide for and protect J.R.L. for at least six months and a change in their behavior could not be reasonably expected; and, (2) for reasons other than poverty, they had failed to, or could not, provide to the child "essential food, clothing, shelter, medical care or education"

[2] No adopted father is listed for this child; she was adopted during a period in which R.R.L. and R.W.L. were separated. This child is R.R.L.'s biological granddaughter and is not a named party in this matter.

[3] Kentucky Revised Statutes.

[4] A GAL was appointed the day the petition was filed.

and there was no reason to expect a change in their "conduct in the immediately foreseeable future[.]" *See* KRS 625.090. The petition further stated:

> J.R.L. was most recently removed in June 2009 when mother and father were arrested for methamphetamine charges. She was then placed with relatives in June 2009 and moved to other relatives in October 2009. Those relatives could not continue to care for the child due to threats made by the parents. The child returned to foster care in March 2010. The child had previously been removed in October 2004 for the parents' drug use. She returned home in December 2005. She was removed again in March 2006 for the parents' drug use and returned in June 2006. Parents are somewhat compliant with their treatment plans, but refuse to take any responsibility. Father is an alcoholic. The child's therapist feels that it would present a significant risk to the child if she were ever returned to the parents.

R.R.L. and R.W.L. filed verified answers urging dismissal of the petition. A few days later, pursuant to their request, the court directed CHFS to consider placing J.R.L. with her maternal grandmother—a woman with both a criminal record and significant health issues.

A lengthy hearing was held on April 28, 2011, at which the court heard testimony from a licensed marriage and family therapist who was working with the family; two social workers; the girl's current foster mother; R.W.L.'s mother and sister; both parents; and both girls, eight-year-old H.R.A.L. and thirteen-year-old J.R.L. On August 5, 2011, the trial court entered orders finding CHFS had proven TPR to be appropriate for H.R.A.L., but not J.R.L. The court found instead that the parents "should be allowed to continue working on their case

plan" as to J.R.L. with a goal of reuniting the family. The court specifically found[5] J.R.L. was "not an abused and neglected child as defined in KRS 600.020(1) and termination of parental rights would not be in the best interest of the child."

On August 15, 2011, CHFS moved the court to alter, amend or vacate its order based on the belief "that the facts and testimony given do support a finding of termination of parental rights." That motion was denied on September 20, 2011, following a brief court appearance by counsel for CHFS and the parents. In response to a request for clarification of its reasoning for treating the girls differently, the court stated it chose to divide the girls because J.R.L. had testified she wanted to return to her mother and H.R.A.L., not being a natural child of R.R.L. and not having as strong a tie to her adoptive mother, testified that she did not. Thereafter, a timely notice of appeal was filed by CHFS.

LEGAL ANALYSIS

Regardless of conflicting evidence, the weight of the evidence, or the fact that we, as a reviewing court, might have reached a contrary finding, we must give "due regard . . . to the opportunity of the trial court to judge the credibility of

[5] We note that the trial court stated CHFS had not met its burden for involuntary TPR under KRS 625.050. We question the correctness of this citation. KRS 625.050 lists the requirements for an involuntary TPR petition. From our review of the record, the petition filed by CHFS satisfies the statutory requirements for a complete petition. Perhaps the trial court intended to cite KRS 625.090 which lists the requirements for termination.

the witnesses." CR[6] 52.01. Judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. "Mere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts will not disturb trial court findings that are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted); *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). While there was certainly evidence from which the trial court could have concluded J.R.L. was abused and neglected, as it did for H.R.A.L., the trial court chose instead to give dispositive weight to J.R.L.'s testimony[7] that she wanted to return to her mother. The fact that we might have given more weight to the testimony of the therapist and the social worker is not sufficient reason for us to reverse the trial court's decision. *Moore.*

WHEREFORE, the order of the Hart Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, DISSENTING: Respectfully, I dissent. I will not discuss why I believe this case should be reversed on the merits presented in the appellants' brief. Rather, I will note only that the appellees, two parents whose right to a relationship with their minor child is at stake, failed to file a brief in protest of the Cabinet's appeal. Pursuant to CR 76.12(8)(c), we are permitted to

[6] Kentucky Rules of Civil Procedure.

[7] Under the "best interest" definition found in KRS 403.270(2), the child's wishes are one of several factors to be considered. We realize this statute pertains to custody determinations, but it is a useful guide.

"regard the appellee[s'] failure as a confession of error and reverse the judgment without considering the merits of the case." I would do just that. J.R.L. was removed from the appellees' home three times between October 2004 and October 2010. Each removal was due to her parents' use or manufacture of methamphetamine; TPR proceedings were initiated once it became apparent they were chronically unable to set aside the drugs and become adequate parents to J.R.L. and her sister. Their failure to participate in this appeal is further evidence that they remain unable to properly prioritize their responsibilities as parents. Because I consider this failure a confession of error, I would reverse.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
Mary Gaines Locke Munfordville, Kentucky	No brief filed.