

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000657-ME

W.R.P.

APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 11-AD-00006

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; T.L.M., A CHILD

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, STUMBO, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: “W.R.P.”¹ appeals from findings of fact, conclusions of law and judgment of the Hart Circuit Court terminating her parental rights to a child,

¹ This appeal is from an action of the type normally directed by statute to be kept confidential in the circuit court. In accordance with Court of Appeals Administrative Order No.2006-01, the appellate record is designated as confidential and may be viewed only by the Court, the parties or their attorneys, an agency authorized by statute to review the records, or by Court Order. Accordingly, the parties’ names in this opinion shall remain confidential.

“T.L.M.” On appeal, W.R.P., who is both the biological grandmother and the adoptive mother, contends that the trial court erred because the Cabinet for Health and Family Services (hereinafter “Cabinet”) did not provide substantial evidence to support a finding of neglect or abuse or establish substantial evidence to support a finding that it was in T.L.M.’s best interest for W.R.P.’s parental rights to be terminated. For the reasons stated below, we vacate and remand the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

T.L.M. is a male child who was born on December 18, 1996, in Columbus, Ohio. At his birth, his mother was incarcerated and serving a seven-year prison sentence. In addition, his father is serving a ninety-three-year prison sentence. When he was born, his custody was given to T.W., his adult sister. Then, T.W. enlisted in the army, and T.L.M. went to live with W.R.P. For the most part, she has raised him since that time. W.R.P. formally adopted him in 2004.

T.L.M. began seeing a child therapist when he was approximately two (2) years old. As a young child, he has displayed destructive and disrespectful behavior toward W.R.P. In June 2006, he was charged with Terroristic Threatening, Disorderly Conduct, Criminal Mischief, and the status offense of Beyond Control. The charges were later dropped.

The dependency action began on August 16, 2006, in Hart District Court. The trial court entered an emergency custody order, which resulted in W.R.P. losing physical custody of T.L.M. The removal was based on the child’s

behavior, which was characterized as beyond control, plus his adoptive mother's fear of him. When T.L.M. was removed from W.R.P.'s home, a treatment plan was developed for her. Generally speaking, the treatment plan consisted of providing the child with appropriate supervision and consistent discipline, obtaining counseling for him, and for W.R.P. to attend parenting classes.

T.L.M. has had many placements since removal from his adoptive mother's home. Initially, T.L.M. lived with a foster family but his adult sister expressed interest in obtaining custody. Therefore, from September 25, 2006, until December 2006, he was again placed with his adult sister, T.W. She ultimately requested that T.L.M. be removed from her home because of her inability to control him. He returned to his previous foster family but problems developed. After threatening to harm himself, he was taken to Our Lady of Peace Hospital in Louisville, Kentucky, for psychiatric evaluation. For a short time, T.L.M. returned to the original foster family, but then was moved to another foster family.

Originally, a termination of parental rights hearing was held in Hart Circuit Court on May 20, 2008. The trial court denied the motion to terminate parental rights, determining that there was insufficient proof that either the adoptive mother or the Cabinet could control T.L.M. The Cabinet then changed its goal from termination to return to W.R.P. T.L.M. went to live with yet another foster family, but his behavior continued to be destructive. For instance, he was expelled from middle school for setting fire to trashcans in two separate restrooms.

In the case at bar, the petition for termination of parental rights was filed on March 8, 2011. The hearing concerning whether to terminate parental rights was held in Hart Circuit Court on June 14, 2011. Meanwhile, Hart District Court, which had jurisdiction over the dependency action, directed that T.L.M. be returned to W.R.P.'s custody. Then, on January 19, 2012, the Hart Circuit Court entered findings of fact, conclusions of law, and a separate order terminating W.R.P.'s parental rights. W.R.P.'s motion to alter, amend, or vacate was denied on March 6, 2012. W.R.P. now appeals from the judgment.

W.R.P. contends that the trial court erred in terminating her parental rights because the Cabinet did not provide substantial evidence to support a finding that T.L.M. was an abused or neglected child, that the termination was in his best interest, or that W.R.P. was unable to provide for or care for T.L.M. The Cabinet disagrees.

STANDARD OF REVIEW

We review a trial court's decision to terminate parental rights using a clearly erroneous standard. This standard requires that the court's decision be based upon clear and convincing evidence. Kentucky Rules of Civil Procedure (CR) 52.01; *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116–117 (Ky. App. 1998). Hence, a court's decision will not be disturbed unless the decision was not based upon substantial evidence. *M.E.C. v. Commonwealth, Cabinet for Health and Family Serv.*, 254 S.W.3d 846, 851 (Ky. App. 2008). In addition, as elucidated in *M.E.C.*, even though "termination of parental rights is not a criminal

matter, it encroaches on the parent's constitutional right to parent [a] child, and therefore, is a procedure that should only be employed when the statutory mandates are clearly met." *Id.* at 850. Keeping this standard in mind, we turn to the facts herein.

ANALYSIS

Kentucky Revised Statutes (KRS) 625.090 governs involuntary termination of parental rights proceedings. This statute permits a trial court to terminate parental rights only under limited circumstances. First, the trial court must find by clear and convincing evidence that a child is, or has been previously adjudged, abused or neglected. KRS 625.090(1)(a). Then, the trial court must find by clear and convincing evidence that termination would be in the child's best interest. KRS 625.090(1)(b). Finally, the trial court must find by clear and convincing evidence the existence of one or more of the grounds for termination that are enumerated in KRS 625.090(2)(a)-(j). Furthermore, these three (3) steps are both separate and also necessary. KRS 625.090.

Since the statutory strictures initially mandate that the trial court must find that T.L.M. was an abused or neglected child, we begin our analysis by reviewing the trial court's findings. Additionally, to make such a finding the trial court must have "clear and convincing evidence." KRS 625.090(1). In the order regarding W.R.P.'s termination of parental rights, the trial court stated as follows:

T.L.M. is an abused and neglected child as defined in KRS 600.020(1) and termination of parental rights would be in the best interest of the child, T.L.M.

In its “Findings of Fact and Conclusion of Law,” the trial court observed that “T.L.M. is an abused and neglected child as defined in KRS 600.020(1) and termination of parental rights would be in the best interest of the child.” Both statements are virtually identical, conclusory and, significantly, without any findings. Nine (9) separate statutory definitions are provided in KRS 600.020(1) to delineate an abused or neglected child. None were specifically mentioned by the trial court. Thus, it is not possible from the order or the findings to ascertain whether T.L.M. is an abused or neglected child. Without any findings, abuse or neglect has not been established. Therefore, the trial court failed to meet the first prong necessary to permit an involuntary termination of parental rights.

The next prong involves the trial court finding by clear and convincing evidence that termination would be in the child’s best interest. KRS 625.090(1)(b). Here, the trial court only mentions that termination would be in T.L.M.’s best interest in the statement cited above. In its “Findings,” the trial court again only refers to the T.L.M.’s best interest in the aforementioned statement in the “Findings.” Again, the statements are conclusory and without evidentiary basis.

Additional statutory guidance is provided for a trial court to decide whether the child’s best interests would be served by termination. These factors are listed in KRS 625.090(3). In summary, the factors are a parent’s mental illness as certified by a mental health professional, which makes the parent unable to care

for the child; acts of abuse or neglect toward any child in the family; reasonable efforts by the Cabinet to reunite the child with the parent; the efforts of the parent under the circumstances to allow the child to return home given the age of the child; the physical, emotional, and mental health of the child and prospects for the child's improvement if termination is ordered; and finally, the financial support of the child by a parent that is able to do so.

In the findings, the trial court did remark that the child's stability would be improved by termination, which reasonable efforts have been provided by the Cabinet that his mother cannot handle him and his behavior is worse after visits with her, that the child does not want to return home, and that he has made substantial improvements in foster care. In contrast, W.R.P. provided evidence that she is compliant with her medical treatment for a mental illness, that she could not complete parenting classes because of knee surgery, that T.L.M. wanted to return home, that his behavior has not improved appreciably during foster care, that he would always have behavioral issues, that no adoptive family was currently available, that she wanted him back and had a bedroom in her home for him, and that she provided him an allowance during his foster care without any apparent court order for child support. Further, one witness suggested that regardless of his living arrangements, the most essential assistance for T.L.M. was the involvement of the Department of Juvenile Justice, which apparently has occurred. Lastly, the district court during the pendency of the action did return T.L.M. to W.R.P.'s custody.

This young man, who is now sixteen (16) years old, has had a difficult, trying childhood and has acted out many times towards his mother, foster families and school. There is nothing easy about any decision regarding his future. And it is not our desire to usurp the trial court's decision-making authority. Still, since this case is returning for the trial court's consideration, we highlight the contradictory and troubling information to inform the trial court's decision regarding the best interest of T.L.M.

The third requirement for an involuntary termination of parental rights is that the trial court must find by clear and convincing evidence the existence of one or more of the grounds for termination that are enumerated in KRS 625.090(2)(a)-(j). The only grounds referred to in the record were (e), (g), and (j), which are below.

(e) 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;

.....

(g) 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;

.....

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

KRS 625.090(2)(e), (g), and (j). Clearly, T.L.M. has been in the custody of the Cabinet for the requisite amount of time. The other two (2) factors, however, are merely recited in the trial court's findings and order. A trial court must establish in its findings that these grounds exist and cannot perfunctorily state them.

CONCLUSION

For the above reasons, the order of the Hart Circuit Court terminating W.R.P.'s parental rights to T.L.M. is vacated and remanded to the Hart Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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