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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001747-ME

N.S. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 12-AD-500096

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

LAMBERT, JUDGE: N.S. appeals from the Jefferson Family Court's order terminating her parental rights to K.R.S., her daughter. After careful review, we affirm.

This action commenced on March 19, 2012, when the Cabinet for Health and Family Services (Cabinet) filed its Petition for Involuntary Termination of Parental Rights against both parents of the child, K.R.S. The natural mother, N.S., is the appellant herein, and the natural father, R.H., has not appealed the order of termination and does not appear to have participated in the child's life in any way. After a trial conducted on August 13 and August 14, 2012, the family court entered findings of fact and a judgment terminating parental rights so that K.R.S. could be adopted by the foster mother. This appeal followed.

At trial, the Cabinet introduced evidence that on August 27, 2009, the Cabinet's representative filed a verified dependency action petition alleging that K.R.S. was an abused or neglected child within the meaning of Kentucky Revised Statutes (KRS) 600.020(1) because the mother abused alcohol regularly, drove with the child in the car while drinking, and had attempted suicide a month earlier by threatening to jump off a bridge. At the temporary removal hearing on September 9, 2009, the family court placed the child in the temporary custody of her maternal grandmother. At that time, the family court issued certain remedial orders to the mother in an effort to reunify the family, including, but not limited to, orders that the mother have an assessment by Jefferson Alcohol and Drug Abuse Center (JADAC) or Family Drug Court and random drug screens, have a psychological assessment, seek medical care for her MS through the University of Louisville, and cooperate with the Cabinet and with family treatment service providers and follow their recommendations.

On December 2, 2009, the mother entered a written stipulation that the child was an abused or neglected child within the meaning of KRS 600.020(1) in the dependency action because her substance dependency had interfered with her ability to parent the child and placed the child at risk.

On May 13, 2010, the Cabinet filed a motion through the County Attorney for the court to hold the mother in contempt for violating court orders that she remain clean and sober and submit to random drug screens. The mother stipulated to contempt on June 9, 2010. The following month, the family court issued an emergency protective order placing the child in the emergency custody of the Cabinet. On July 26, 2010, the Cabinet's representative filed a second verified dependency action petition. In the second petition, the Cabinet alleged that K.R.S. was an abused or neglected child within the meaning of KRS 600.020(1) because the child had run away from her maternal grandmother, who could no longer care for the child and who had been allowing the child unsupervised visits with the mother despite a supervised visitation order. The petition also alleged that the mother had upset the child and scolded her for "running her mouth" and encouraged the child to file a false report that she had been molested by her maternal grandmother.

At the temporary removal hearing on July 28, 2010, the court again placed the child in the temporary custody of the Cabinet. In subsequent proceedings, the family court again issued remedial orders to the mother in an effort to reunify the family, including orders that the mother remain clean and

sober, continue random drug screens, complete parenting classes, attend 4 to 5 AA/NA meetings per week and maintain proof thereof, and cooperate with the Cabinet and with family treatment service providers and follow their recommendations. Once again the child was determined to be an abused or neglected child within the parameters of KRS 600.020(1) in the dependency action following a stipulation by the mother entered on September 15, 2010.

Eventually, the family court returned the child to the mother's custody on February 23, 2011, with protective orders that the mother continue random drug screens, cooperate with the Cabinet, ensure the child's daily school attendance, and ensure that the child attend all medical appointments and take medication as prescribed. On or about April 6, 2011, the Cabinet's representative filed a third verified dependency action petition alleging that the child was abused or neglected because the mother had violated the Court's protective orders. In particular, the Cabinet alleged that the child had six unexcused absences from school and two unexcused tardies since returning to the mother's custody in February 2011. Following the temporary removal hearing on April 13, 2011, the family court ordered that the child be returned to the temporary custody of the Cabinet after the mother failed to attend a court-ordered drug screen the previous day. At that time and in subsequent proceedings, the family court continued all prior orders in an effort to reunify the family.

On May 11, 2011, the family court gave temporary custody of the child to Maria Plunkett, a maternal cousin. Thereafter, on May 18, 2011, the child

again was determined to be an abused or neglected child following a written stipulation entered by the mother indicating that her drug difficulties placed the child at continued risk.

In June 2011, the family court again issued an emergency protective custody order placing the child in the emergency custody of the Cabinet, in whose care and custody the child has remained to the present date. On the same date, the Cabinet's representative filed a fourth verified dependency action petition alleging that the child was abused or neglected because Ms. Plunkett could no longer care for the child, and the mother was noncompliant with her case plan and drug and alcohol treatment. She had again tested positive for drugs in May 2011. The petition also alleged that the father continued to be uninvolved in the child's life and was an inappropriate choice for custody.

At the temporary removal hearing, the court again ordered the mother to cooperate with the Cabinet and with family treatment service providers and follow their recommendations. Once again the child was determined to be abused or neglected following a written stipulation by the mother.

The Cabinet also introduced records that on September 7, 2011, the mother's motion for visitation and phone calls with the child was remanded from the docket when she failed to appear for court. In January 2012, another motion by the mother was remanded due to her failure to appear.

The Cabinet introduced a copy of the psychological assessment and report by David L. Winsch, Ph.D., which indicated that the mother "reported a

significant psychiatric history" and had been diagnosed with Major Depressive Disorder, which apparently had been treatable with medication per the mother's report. This report contained recommendations for treatment of the mother's problems, which was a subject of testimony by the Cabinet's currently assigned caseworker, Amanda Harris Alexander.

The Cabinet also called Kimberlie Scruggs, a mental health therapist for the child and a Kentucky Licensed Clinical Social Worker; Shannon Wilson, the child's foster mother; and the mother. The mother also testified on behalf of herself, but neither she nor the guardian ad litem called any other witnesses.

Ms. Scruggs testified that she provided counseling services for children as an independent contractor with the Transformations mental health program, that she had a Master of Science in Social Work, and that she was a licensed clinical social worker and a Marriage and Family Therapy Associate. Ms. Scruggs testified that, in May 2010, she began working with the child, who at that time had a diagnosis of Major Depressive Disorder, Disruptive Behaviors Disorder, and Attention Deficit Hyperactivity Disorder. The child's presenting problems included aggression, depression, impulsivity, and threats to harm herself and others. Ms. Scruggs's treatment for the child included individual counseling sessions once per week or twice weekly for two to three hours per session and collateral counseling sessions for the child's custodian for one to two hours per week.

Ms. Scruggs testified that she worked with the child on two separate occasions, the first being from May 2010 to January 2011, while the child was in the custody of her maternal grandfather, and the second being from July 2011 to January 2012, after the child had re-entered state care with the same issues as before. During these periods, the child required medications for emotional or behavioral problems and was seeing a psychiatrist who prescribed Zoloft for depression and who also prescribed Stratera and Respirdal.

Ms. Scruggs testified that the child made sporadic progress throughout treatment. She testified that therapy for the child ended the first time in January 2011 because custody had been returned to the mother, who did not want to continue with it. Ms. Scruggs said it ended the second time in January 2012 because the child had to be placed in-patient.

Ms. Scruggs testified that in her expert opinion, the child had suffered an emotional injury within the meaning of KRS 600.020(24) as a result of her feelings of abandonment due to the absence of the child's father, R.H., and as a result of the instability caused by the mother's drug and alcohol abuse and neglect by the mother. Ms. Scruggs testified that this injury manifested itself by "a substantial and observable impairment in the child's ability to function within a normal range of performance and behavior with due regard to [her] age, development, culture, and environment." *See* KRS 600.020(24). She explained that the child had spoken in therapy of harming herself and others and demonstrated behavioral issues following separation from the mother.

Ms. Scruggs testified that on the occasions when the child would discuss wishing to harm herself, some of that related to not being with the mother. She also stated that while the child wanted to be with the mother, the child was also afraid to be with her. During treatment, the child had discussed times when the mother was intoxicated and things had occurred which the child feared would happen again. Specifically, the child feared that if she were returned to her mother, the mother would again drink and drive while intoxicated while she was in the car or that she would become enraged and become out of control and leave her alone again.

The foster mother, Ms. Wilson, testified that she had been the child's foster mother from December 30, 2011, when the child was placed in her home after being released from Our Lady of Peace, a psychiatric hospital, to the present. Ms. Wilson testified that when the child came into her home she was very angry, her hair was matted, she cursed a lot, and was very combative. Now, the child is doing a lot better—she is learning how to write cursive and how to redirect her anger by writing about it or telling Ms. Wilson that she needs some time alone to compose herself.

Ms. Wilson testified that the last time the child had talked about suicide was July 4, 2012, after an outing with her and her daughter. The child had an altercation with Ms. Wilson's biological daughter, who is close to the child's age. Other than that, she testified, there had been no other talk of suicide from the child, who has grown close to Ms. Wilson's daughter. She testified that she had

discussed the possibility of adoption with the child and that there was a strong possibility that she would adopt the child if termination of parental rights occurred.

Ms. Alexander, the caseworker, testified on behalf of the Cabinet in support of terminating the mother's parental rights under KRS 625.090(2)(a), (e), and (g). She testified that the father had abandoned the child for a period of not less than ninety days. Since the child was first removed from parental custody, the father had not availed himself of the reunification services offered by the Cabinet and had instead remained uninvolved in the child's life.

Additionally, Ms. Alexander testified in support of the two grounds for termination, KRS 625.090(2)(e) and (g), which the Cabinet alleged in its petition. Regarding ground (e), the Cabinet alleged that the mother was incapable of providing essential parental care and protection for the child and that there was no reasonable expectation of improvement in this regard. Regarding ground (g), Ms. Alexander testified that the mother, for reasons other than poverty alone, had failed to provide essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there was no reasonable expectation of improvement.

Ms. Alexander testified that she referred the mother to JADAC and the mother began their Women's Intensive Out-Patient Program (WIOP) in September 2009; however, the mother was discharged due to a positive drug screen. She testified that the mother re-entered treatment in November 2009. She struggled with attendance issues through March of 2010 and was threatened with

discharge. Ms. Alexander testified that, although the mother continued to test positive on drug or alcohol screens, JADAC released her from aftercare as having successfully completed the program. Since the Cabinet did not have a contract with another treatment provider other than JADAC to make a referral, Ms. Alexander advised the mother that she could make a self-referral to various other treatment providers, which would require the mother to pay for treatment. However, to Ms. Alexander's knowledge, the mother never sought out such treatment.

The mother relapsed again, and in May 2011, Ms. Alexander again referred her to JADAC. She was referred to detox and the Intensive Out-Patient program, which she completed in September 2011. The mother again relapsed but JADAC would not accept her back into the program due to her history of noncompliance. Ms. Alexander testified that the mother most recently tested positive for cocaine on May 16, 2012, following a hair follicle test, and that the mother failed to show for a drug screen on June 25, 2012.

Regarding the mother's mental health, Ms. Alexander testified that she also made referrals for the mother in this regard, as recommended in a psychological assessment by Dr. Winsch. However, the mental health service provider, Seven Counties Services, Inc., would not see her because she did not have insurance. Ms. Alexander instructed the mother to schedule by self-pay for mental health services at the University of Louisville. However, the mother ran up a bill she did not pay and thus could not return.

Ms. Alexander testified that she referred the mother for mental health services at Family and Children's Place but the mother told her therapist that she was only there because her CPS worker sent her and that she did not have any problems to work on. The mother had poor attendance and did not take responsibility for her actions that had led to the removal of the child from her care.

Ms. Alexander testified that due to the mother's failure or inability to fully engage in treatment and reform the behaviors which led to the removal of the child from parental custody, the child could not be safely returned to parental custody. During the time the child was in state care, "for a period of not less than six months," the parents were continuously or repeatedly incapable of providing essential parental care and protection for the child.

The mother also testified at the hearing. Her testimony indicated that she had struggled with addiction, but had remained clean and sober since at least August of 2012. She testified that at the time she was attending treatment and therapy at JADAC for her addiction, she did not want to stop using drugs. She indicated that she only admitted to drug use and attended treatment so she could get her daughter back, but that she now has a strong desire to stop using drugs for herself, and not to just get her daughter back. The mother testified that she lived in government housing and worked for a temporary agency, taking part-time jobs as they would come available and making approximately ten to twelve dollars an hour. She testified that she had sought out full-time jobs but had been unable to obtain one to date. The mother testified that the daughter never had any learning

problems when she was in her care and that the school never told her that the child needed extra attention. Further, she testified that the child had been diagnosed with ADHD and medicated for that since she was four years old. She testified that she very much loves her daughter and wants her back now that she is clean and sober.

On appeal, the mother's arguments are not completely clear in her *pro se* brief. She appears to be arguing that there was insufficient evidence presented at trial to support the court's judgment terminating her parental rights. The Cabinet counters that there was substantial evidence as to each of the three elements of a termination action and urges this Court to conclude that each finding was supported by the evidence of record.

Our standard of review in termination of parental rights cases is set forth in *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998):

> The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, Ky. App., 552 S.W.2d 672, 675 (1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in 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. *V.S. v. Commonwealth, Cabinet for Human Resources,* Ky. App., 706 S.W.2d 420, 424 (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).

The General Assembly provided the mechanism for the involuntary termination of parental rights in KRS 625.090. Pursuant to this statute, the Cabinet must meet a three-prong test and establish that 1) the child is abused or neglected; 2) termination would be in the child's best interest; and 3) one of several listed grounds exists. In deciding the second and third prongs, the circuit court is required to consider several enumerated factors, including "[i]f 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[.]" KRS 625.090(3)(c).

The mother appears to argue on appeal that there was insufficient proof at the hearing to support the court's finding that the child was an abused or neglected child within the meaning of KRS 600.020(1). She states in her brief that "I have drove before with my daughter in the car while drinking and that is nothing I am proud of[,] I realize I could have killed my child[,] myself or someone else[.] She also states, "[t]here has never been any type of report saying that she was hurt[.]" Thus, the mother appears to argue that because the child was not actually harmed by her behavior, she is not an abused or neglected child.

Clearly, the proof presented at the trial satisfied this element by establishing that a court of competent jurisdiction had adjudged the child to be abused or neglected in the dependency, neglect or abuse (DNA) action. This was proven at the hearing by introduction of evidence of clerk-certified copies of the DNA court records for the child indicating that, following the filing of four separate DNA petitions, the mother entered written stipulations that the child was an abused or neglected child within the meaning of the statute based on her behavior. Each of these stipulations was accepted by the court in lieu of an adjudicative hearing.

Not only did the Cabinet prove that the child was an abused or neglected child pursuant to the first option allowed by KRS 625.090(1)(a)1, it also proved that element by clear and convincing evidence presented at the termination trial pursuant to the second option, KRS 625.090(1)(a)2. While being cross-examined during the termination hearing regarding each of her four prior stipulations, the mother reaffirmed that the stipulations were true and, thus, the trial court found that the child was abused or neglected within *this* proceeding.

The child abuse or neglect statute does not require proof that a child's caretaker actually has hurt or harmed the child. Instead, it begins by saying that "[a]bused or neglected child" means a child whose health or welfare is harmed or threatened with harm by a caretaker in any of nine enumerated ways. KRS 600.020(1)(a). In the instant case, the mother's drug habit and alcohol abuse continuously put the child at risk for harm and hurt her health and welfare, as demonstrated by her own admissions to her mental health providers that she was

scared her mother would drink, rage out of control, drive drunk with her in the car, or abandon her again. We agree with the Cabinet that the trial court had ample evidence to conclude that the child was an abused or neglected child, and its finding in this regard was not clearly erroneous.

The mother also apparently argues that the trial court was clearly erroneous in finding that the Cabinet had proven at least one of the enumerated statutory grounds of parental unfitness under KRS 625.090(2). In fact, the trial court found that two of the enumerated statutory grounds of parental unfitness applied to the mother, KRS 625.090(2)(e) and (g), and that either of them, considered independently, was sufficient to justify termination of the mother's parental rights.

The ground of parental unfitness set forth in KRS 625.090(2)(e) states as follows:

> That the parent, for a period of not less than six 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 there is no reasonable expectation of improvement in parental care and protection, considering the age of the child.

The grounds for parental unfitness set forth in KRS 625.090(2)(g) states:

> 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 there is no reasonable expectation of significant improvement in

parental conduct in the immediately foreseeable future, considering the age of the child.

In this regard, the trial court considered the psychological assessment and report by Dr. Winsch, which indicated that the mother had a significant psychiatric history and had been diagnosed with Major Depressive Disorder. The trial court also considered the testimony by the mother at trial that she had attempted suicide in July 2009, but that the police had talked her down from jumping off a bridge. Further, the trial court considered the chaotic lifestyle that the child had been required to endure as a result of the mother's recurrent bouts with addiction when she was unable to care for the needs of her daughter, who was shuffled from place to place and from one custodian to another. Further, the trial court considered the fact that the child had only been in the mother's custody for two months in the last three years preceding the termination proceeding. The trial court also considered the evidence that the child's placement with the foster mother was the longest consistent placement the child had while in state care. The trial court also properly considered the services offered by the Cabinet to reunify the mother with the child and the fact that the mother had not even seen the child since June 2011.

We agree with the Cabinet that, based on all the evidence presented and the factors to be considered, the trial court was not clearly erroneous in finding that the grounds for parental unfitness set forth in KRS 625.090(2)(e) and (g) apply to the mother in this case. The mother's on-going pattern of addiction, relapse, and noncompliance with treatment has resulted in her being "for a period of not less

than six (6) months…substantially incapable of providing essential parental care and protection for the child." KRS 625.090(2)(e). Moreover, the same evidence and factors considered support the trial court's finding that there is no reasonable expectation of significant improvement in parental conduct in the immediately foreseeable future, considering the age of the child.

By the same token, the trial court was not clearly erroneous in finding that the mother, "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." Although the mother testified that she was seeking permanent work but could only find temporary employment, it was not clearly erroneous for the court to find that her on-going pattern of addiction, relapse, and noncompliance with treatment constituted "reasons other than poverty alone" for her material nonsupport of the child.

With regard to the mother's argument that termination of parental rights is not in the child's best interest, we again agree with the Cabinet. Ample evidence supports the trial court's finding that termination is in the best interest of the child. While the mother has expressed some willingness to stay sober and reunify with the child, her extensive history with substance abuse and her mental health issues simply prevent her from doing so. At this point, the child has bonded with her foster mother, has an educational plan at school, is working toward becoming on grade level, and has bonded with her foster sister. She is attending counseling for

her behavioral issues and her depression and, most importantly, she has consistently been in a safe and nurturing home for an extended period of time. While we believe that the mother does love her child, in a termination proceeding the trial court is forced to make a judgment call based on the prior history and treatment of the child and balance that with the efforts made by the parents to rectify the issues and problems and reunify with the child. In the instant case, the trial court made that judgment call based upon an extensive history of abuse and neglect that was not remedied in a timely manner by the mother. The trial court's determination that termination was in the child's best interest is supported by the evidence and was not clearly erroneous.

Based on the foregoing, we affirm the findings of fact and the order terminating the parental rights of N.S. to K.R.S.

ALL CONCUR.

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BRIEF FOR APPELLEE
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