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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002049-ME

D. S. F. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 12-AD-00083

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; T.S.B.F. (A CHILD); AND G.L.G. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE, CLAYTON AND MOORE, JUDGES.

CLAYTON, JUDGE: D.S.F. (the biological mother) appeals the Fayette Family Court's termination of her parental rights to T.S.B.F, her daughter. She claims that the family court abused its discretion when it failed to consider evidence that

T.S.B.F. would not be a neglected child if returned to her mother's custody. After careful consideration, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 11, 2012, the Cabinet for Health and Family Services, Commonwealth of Kentucky (hereinafter "the Cabinet"), filed a petition in Fayette Family Court seeking to terminate the parental rights of G.L.G. and D.S.F. to the child, T.S.B.F. The child was three years old and had been in the Cabinet's custody since July 15, 2009, approximately three weeks after her birth. During that time period, she had been in the same foster-to-adopt home and was developmentally on track.

The trial took place over the course of two hearing dates, August 30, 2012, and October 10, 2012. On the first day of the trial, neither parent appeared although their attorneys were present. Notwithstanding the parents' absence, the family court judge commenced the trial but noted that entry of the judgment might be delayed in order to allow the mother an opportunity to appear. The father, on the other hand, never appeared at the trial, but had contact with his counsel and was aware of the termination proceedings.

On August 30, 2012, the sole witness for the Cabinet was Charles Collins, the ongoing social worker for the child. He explained that the Cabinet initially became involved with T.S.B.F. after receiving a referral from the hospital where she was born. The hospital reported that the child had been born with narcotics in her system and, thus, the Cabinet filed an emergency custody order.

After initially exploring the possibility of a relative placement and placing the child with a maternal aunt, who ultimately was unable to care for the child, the Cabinet placed the child in a foster-adopt home.

Mr. Collins testified specifically with reference to the allegations in the Cabinet's petition. In essence, he pointed out both parents had abandoned the child; neither parent had adequately provided for the child for a period of not less than six months; both parents had extensive criminal histories; and, the child had been in the Cabinet's custody for over three years. Mr. Collins informed the family court that ninety days passed without either parent having contact with their daughter. Regarding the mother's visitation, her visits with the child had been sporadic. Further, she had not seen her daughter for the six months prior to the trial.

Other miscellaneous information provided was that D.S.F. had been ordered to pay child support and had an arrearage. He was unable to state the amount with specificity. Evidence was also given that no domestic violence occurred between the biological parents. And evidence was provided that D.S.F. had other children who had been removed from her custody and placed with a relative. She has a criminal history that consisted of multiple criminal charges and incarcerations. The criminal charges included possession of cocaine and heroin, possession of drug paraphernalia, and possession of a forged instrument.

Mr. Collins also gave information about the child's placement. She had been in the same foster home for over three years. In fact, it was her only

placement during the Cabinet's custody. The child identifies the foster parents as her parents, plus the foster parents are anxious to adopt her.

A key issue in the matter was the lack of progress by D.S.F. on meeting her case objectives. Collins stated that the Cabinet prepared a case plan with D.S.F., which had both individual and family goals. The goals consisted of the following: D.S.F. was to find stable housing and employment, participate in a parenting assessment, have a substance abuse assessment and receive treatment, and refrain from criminal activity. Mr. Collins conveyed that the resultant actions by D.S.F. were that in 2009, she began parenting classes but did not complete them, never participated in substance abuse treatment, and had been in and out of jail.

The Cabinet last had contact with D.S.F. in 2011, but she sent the Cabinet a letter in 2012 in which she stated that she wanted to work on her case plan. D.S.F., however, did not contact the Cabinet when she was released from custody in July 2012.

At the close of evidence on August 30, 2012, D.S.F.'s counsel made a motion for the trial court to dismiss the petition because the Cabinet had not established the statutory requirements for termination of parental rights by clear and convincing evidence. The trial judge denied the motion and granted the petition to terminate parental rights. But the next day, on August 31, 2012, her counsel made a motion for a new trial since D.S.F. had not been present at the trial. Thereafter, the family court judge agreed to allow D.S.F. to offer proof at a hearing

on October 10, 2012. She appeared in court on October 10, 2012, and testified on her behalf.

D.S.F. testified that she was twenty-eight years old and the mother of T.S.B.F. Over the last few years, she had worked as a waitress or server at various restaurants. D.S.F. discussed the case plan developed by the Cabinet after the birth of her daughter. Currently, she could not meet the Cabinet's requirements regarding her residence because her handicapped roommate was unable to participate in drug testing.

Additionally, D.S.F. said that she was unable to make progress on her case plan because of the many court dates associated with her criminal charges. She recounted that on September 17, 2009, she was incarcerated and released with an ankle bracelet on February 2, 2010. Then, following a criminal trial, D.S.F. was convicted and sent back to jail in July 2011. Next, she was released on July 2, 2012, but returned to custody on September 11, 2012, after failing a drug test. At the time she testified, a trial date had not been set for the last incident.

According to D.S.F., she visited with T.S.B.F. twenty to thirty times since the child's placement with the Cabinet. After D.S.F. was released from prison between February and July 2011, she described her visitation with T.S.B.F. as on and off. For instance, two months prior to a trial related to criminal charges, D.S.F. began using drugs again and slacked off on visitation. Once, she skipped visitation because she did not want to be arrested in front of her daughter. The last

time D.S.F. saw her daughter was in April 2011. Moreover, she acknowledged that she had a $2,296 child support arrearage.

After D.S.F.'s release in July 2012, she explained that she did not visit T.S.B.F. because she was trying to get her life together. She had no place to live, no job, and began using drugs again. Her failure, however, to attend the August 30, 2012 trial was an honest mistake. She had recorded the date for the trial incorrectly on her calendar.

At the time of the October 10, 2012 hearing, D.S.F. had additional criminal issues and was waiting to learn of a date for a criminal trial on a trafficking charge. Nonetheless, D.S.F. said that the trial judge in her criminal case was going to release her from custody to a drug treatment program. She planned to work on the Cabinet's goals upon release from this program. In this last case prior to failing the drug test, she received a ten-year sentence. At this time, no plea offer had been made. Notwithstanding her problems and issues, D.S.F. said that she loved her daughter and was willing to do anything to have a second chance.

On cross-examination, D.S.F. admitted that she had smoked marijuana while pregnant with T.S.B.F., was currently in custody because of a positive drug test, that her daughter had been in custody over 40 months, that she owed $2,296 in child support, and that she could not say with certainty the number of times she visited her daughter when she was out of custody in 2011. D.S.F. acknowledged that sometimes she did not see her daughter for three months.

After D.S.F.'s cross-examination and the close of the case, her counsel moved the court to dismiss the petition for insufficiency of the evidence. The family court judge then engaged D.S.F. in a colloquy. She informed the family court judge, among other things, that since her release in July 2012, drugs had been discovered in her apartment, and she has been charged with trafficking. She denied the trafficking but admitted the drugs were there. She had also tested dirty for cocaine in September 2012. No criminal trial was scheduled at this time, but the trial judge in the criminal case had signed an order to send her to the Schwartz Center where she would be able to work on a case plan.

D.S.F. also shared that she had two other children that the Cabinet had removed from her. These children live with their maternal grandmother. Although D.S.F. is not allowed around the children, it was her testimony that she loves them very much and wants them with her. D.S.F. also described a troubled childhood.

After the colloquy, D.S.F.'s counsel renewed the motion for dismissal. Following a brief recess, the family court judge ruled and granted the petition for termination of parental rights. Thereafter, on October 29, 2012, the family court judge provided written findings of fact and conclusions of law regarding termination of parental rights. It was determined that termination was in the best interests of the child.

On October 29, 2012, the family court entered written findings of fact and conclusions of law. On that same date, an order and judgment was also entered that terminated the parental rights of both parents, vested custody of the

child with the Cabinet, and changed the Cabinet's goal to adoption. It is from this order that D.S.F. now appeals.

D.S.F. maintains, based on Kentucky Revised Statures (KRS) 625.090(5), that she has established by a preponderance of evidence that her daughter would not be a neglected child if returned to her and, thus, the family court erred in terminating her parental rights. She cites the following language:

> If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights.

KRS 625.090(5). The Cabinet responds that based on the standard of review for such cases, that is, the trial court's decision will not be disturbed on appeal unless clearly erroneous, the family court's decision was strongly supported by substantial evidence and, therefore, not clearly erroneous.

STANDARD OF REVIEW

The standard for 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). Therein, it is established that this Court's standard of review in a termination of parental rights case is the clearly erroneous standard found in Kentucky Rules of Civil Procedure (CR) 52.01, which states "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

In sum, if the sufficiency of the evidence is challenged on appeal, we are permitted to reverse only where the trial court's findings of facts were clearly erroneous. *Cabinet for Health & Family Services v. I.W., Jr.*, 338 S.W.3d 295, 299 (Ky. App. 2010). Further, a finding supported by substantial evidence is not clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Lastly, we note that

> Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men.

Id. (citations and footnotes omitted). With this standard in mind, we turn to the matter before us.

ANALYSIS

The statutory direction found in KRS 625.090 provides that a family court may involuntarily terminate parental rights if it finds, by clear and convincing evidence, that the child is an abused or neglected child as defined in KRS 600.020(1) and that termination serves the best interest of the child. KRS 625.090(1)(a)-(b). In doing so, the trial court must also follow the mandate of KRS 625.090(2) that "[n]o termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds[.]" KRS 625.090(2). The statute then lists ten factors, including the following factors, which the family court found in this case concerning T.S.B.F.:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> (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;
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> (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)(a), (e),(g), and (j).

In addition, the family court's judgment observed that the Cabinet has offered all reasonable services that would likely have permitted reunification of the family pursuant to KRS 625.090(3)(c). The family court also held that termination of parental rights is in the best interest of the child. Here, the family court precisely followed the statutory protocol for termination of parental rights.

We next appraise whether substantial evidence existed to support the decision. In making this determination, we note that due regard must be given to the family court's opportunity to assess the credibility of the witnesses. In the

instant case, the family court was presented with a mother, who stated that she loved her daughter, but was without employment or appropriate housing, had not obtained or completed substance abuse treatment, never met any requirements of her case plan, was facing criminal charges and future incarceration, plus had spent little time with her three-year-old daughter. Meanwhile, T.S.B.F. had spent the last three years with a foster family that wanted to adopt her and was thriving.

We are cognizant that the termination statute, KRS 625.090, establishes different standards of proof for the Cabinet and the parents whose rights are to be terminated when the court considers the best interest of a child. The Cabinet must prove the necessary statutory allegations by clear and convincing evidence in order for the trial court to terminate parental rights, KRS 625.090(1) and (2), but the parents must only present proof by a preponderance of the evidence that a child will not be abused or neglected in the future. KRS 625.090(5).

D.S.F. asserts that she provided evidence that met the preponderance of the evidence standard to show that T.S.B.F. would not be a neglected child if returned to her. In addressing this contention, first, it is important to recognize that the language of KRS 625.090(5) is permissive:

> If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights.

KRS 625.090(5). Hence, the statute says that trial court "may" determine not to terminate the parental rights rather than it shall not terminate. Hence, even if D.S.F. proved, by a preponderance of the evidence, that T.S.B.F. would not be neglected if returned to her, the family court still retained the discretion to terminate her parental rights. Therefore, we cannot say that, based on the preceding, the family court abused its discretion.

Second, the evidence provided by D.S.F. to demonstrate that her child would not be neglected may be based on good intentions but has no solid support. While D.S.F. loves her daughter, she has not been treated for substance abuse, attended parenting classes, found employment and housing, or even dealt with the penalties resulting from her criminal activities. Furthermore, T.S.B.F. has never lived with her mother, is only three years old, has been with the same foster family since she was a tiny infant, and is flourishing.

Under these facts, D.S.F. did not prove by a preponderance of the evidence that T.S.B.F would not be neglected if returned to her mother's custody. Moreover, the family court's decision was soundly supported by substantial evidence, which was clear and convincing. Consequently, the family court's decision to terminate parental rights was not clearly erroneous.

CONCLUSION

We are convinced by our review of the entire record that the family court's decision terminating the parental rights of D.S.F. was not clearly erroneous and, thus, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas L. Conn
Lexington, Kentucky

BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

Jerry M. Lovitt
Lexington, Kentucky