

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000323-ME

B. N. W.¹

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 12-AD-500238

STATE OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: B.N.W. (“Mother”) has appealed from the decision of the Jefferson Circuit Court, Family Division, involuntarily terminating her parental rights to one of her children, E.E.W.² For the following reasons, we affirm.

¹ Pursuant to the policy of this Court, in termination of parental rights cases, to protect the privacy of minors and their parents, we refer to them only by their initials.

² Although the parental rights of Mother and the child’s biological father were terminated, only Mother has appealed from the family court’s decision. Therefore, D.W.C. (“Father”) will be referenced only when necessary for a complete understanding of the facts and issues presented.

A petition seeking termination of parental rights was filed by the Cabinet for Health and Family Services (“Cabinet”) on July 27, 2012, and a hearing on the petition was conducted on December 5, 2012. Erin Kelly, the Cabinet’s assigned caseworker for the family, testified regarding the family’s history, her involvement with the family and the services rendered. The Cabinet first became involved with Mother in 2008 in relation to one of Mother’s older children. It was alleged the child had access to illicit drugs and drug paraphernalia. Mother was arrested and the child was placed with the paternal grandmother. A second child born in June of 2008 was removed from Mother based on allegations of medical neglect and was placed with the same paternal grandmother.

E.E.W. was born on August 2, 2010, and was placed in the emergency custody of the Cabinet on April 6, 2011, following the discovery that Mother and child resided with Mother’s father, J.W., who had pending charges of sexual abuse of a minor and an extensive criminal history; child had been left alone with J.W.; J.W. had been arrested for smoking marijuana in the presence of the child; and J.W. was under court order to have no contact with persons under 18 years of age due to his pending charges and prior substantiated abuse and neglect petitions. Further, the Cabinet was aware Mother had an outstanding arrest warrant and an active bench warrant related to her nonsupport of her other children,³ illegal

³ At the time of trial, Mother was in arrears approximately \$8,000.00 in child support for her two older children and faced criminal charges related to her non-payment of support.

substance possession and abuse, traffic violations, and her failure to appear at court proceedings.

A subsequent dependency action resulted in entry of a stipulation by Mother that E.E.W. was an abused or neglected child because of the inappropriate living arrangements. The child was committed to the Cabinet on September 8, 2011, and has resided in the same foster home since her initial placement in April of 2011. Throughout the pendency of the dependency action, the Cabinet offered services focused on reunification of the family pursuant to orders of the family court. Mother complied with some, but not all, of the requirements of the reunification plan.

Kelly testified Mother had changed residences eleven times since the child's removal, averaging three months at each location. Kelly believed the frequency of the residence changes was due primarily to Mother's inability to support herself financially, coupled with multiple incarcerations. Mother was unemployed from May of 2011 until August of 2012. She was incarcerated for ten days in April 2011 and again from May 21, 2012, to August 10, 2012, related to her nonsupport of her older children. She was also on a diversion program related to a charge of possession of methamphetamine. Mother failed to complete protective parenting classes and individual therapy sessions as required by her reunification plan. She offered no adequate explanation for her failure to comply with the Cabinet's recommendations. Mother gave no financial assistance in support of the child during the twenty months she was in the Cabinet's care.

The Cabinet was unable to recommend E.E.W. be returned to Mother's care due to her failure to make sufficient progress in the court-approved reunification and treatment plan. Thus, the permanency plan for the child was changed to termination of parental rights and adoption, resulting in the filing of the instant petition.

Mother testified she never left her child alone with the maternal grandfather and she was staying in his home for financial reasons. She admitted she was aware of his propensities and the nature of his pending criminal charges. She noted all of her drug screens had been negative and she had recently moved into her own trailer. She discussed her financial situation and stated her belief she could adequately provide for the child. She admitted her failure to complete the required protective parenting classes and that the failure was partly due to bad choices on her part. She discussed her pending criminal charges and delinquent child support. Although she could give no reasonable explanation for her failure to regain custody of her two older children, or her failure to comply with all of the requirements to get E.E.W. back, she indicated her current desire to regain custody of E.E.W. now that she had "gotten it together" and believed she would be a good mother.

Following the hearing, on January 22, 2013, the trial court entered a twenty-five page findings of fact and conclusions of law along with an accompanying order which ultimately terminated parental rights of both Mother and Father to the minor child. The court specifically found the Cabinet had carried

its burden of proving by clear and convincing evidence that termination was in the best interests of E.E.W. because she was an abused or neglected child pursuant to KRS⁴ 600.020(1); the Cabinet had made all reasonable efforts to reunite the family; the parents had abandoned the child for a period of not less than ninety days; the parents had continuously or repeatedly failed or refused to provide essential care for the child, and there was no reasonable expectation of improvement in parental care; for reasons other than poverty alone, the parents had continuously or repeatedly failed to provide essential food, clothing, shelter, medical care and education reasonably necessary, with no reasonable expectation of improvement in the foreseeable future; the child had been in the care of the Cabinet for fifteen of the most recent twenty-two months preceding the filing of the instant action; the Cabinet had provided for the child's physical, mental and emotional needs since removal; and all the grounds for termination set forth in KRS 625.090 had been proven. This appeal followed.

Our review of actions involving termination of parental rights is confined to the clearly erroneous standard set forth in CR⁵ 52.01, which is based on clear and convincing evidence. *W.A. v. Cabinet for Health and Family Services*, 275 S.W.3d 214, 220 (Ky. App. 2008). As this Court has previously stated, clear and convincing proof does not mean uncontradicted proof. *Id.* Rather, it is sufficient if there is proof of a “probative and substantial nature carrying the weight of

⁴ Kentucky Revised Statutes.

⁵ Kentucky Rules of Civil Procedure.

evidence sufficient to convince ordinarily prudent-minded people.” *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986) (quoting *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)). “In a trial without a jury, the findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be ‘clearly erroneous.’ [CR] 52.01; *Stafford v. Stafford*, 618 S.W.2d 578 (Ky. App. 1981). This principle recognizes that the trial court had the opportunity to judge the witnesses’ credibility.” *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998).

A trial court has broad discretion in determining whether a child satisfies the definition of an abused or neglected child and whether such abuse or neglect is sufficient to warrant termination of parental rights. *See id.*, 988 S.W.2d at 38 (citing *Department of Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977)). We will not substitute our judgment for that of the family court unless there is no substantial evidence in the record to support such a finding. *V.S.*, 706 S.W.2d at 424. We review the application of the law to the facts *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Mother contends the trial court erred in determining the Cabinet had met its burden of proving the existence of the grounds for termination of her parental rights. She alleges the evidence clearly indicated her parenting skills had improved during the Cabinet’s involvement and the trial court impermissibly discounted those advances. Relying primarily on policy arguments and cases from foreign

jurisdictions in support of her position, Mother seeks reversal. We have reviewed the record, the briefs, and the law, and are compelled to affirm the trial court's determination.

KRS 625.090(1) provides, in pertinent part, that a circuit court may involuntarily terminate all parental rights of a parent to a child if it finds by clear and convincing evidence the child is now an abused or neglected child as those terms are defined by statute, or has previously been adjudicated as such by a court of competent jurisdiction, and that termination is in the child's best interests. The court must also find by clear and convincing evidence the existence of at least one of ten listed grounds for termination set forth in KRS 625.090(2)(a)-(j).

In the case *sub judice*, E.E.W. was adjudicated a neglected child based on Mother's stipulation, as the trial court noted in its decision. The court went on to find, based on the testimony and evidence presented, that E.E.W. currently satisfied the definition of a neglected child⁶ and adjudicated her as such. After making additional findings, the court went on to determine termination of parental rights was in the child's best interests.

The testimony before the family court revealed Mother had: abused or neglected her two other children resulting in their removal from her care; not made significant advances toward regaining custody of those children during the nearly four years they had been out of her care; made some—but insignificant—progress toward completion of the reunification plan for E.E.W.; continuously failed to fully

⁶ The trial court specifically found four of the ten factors listed in KRS 625.090(2) existed.

comply with requests made by the Cabinet; multiple pending criminal actions; a history of substance abuse; a history of housing and employment instability; and poor decision-making skills in the parenting realm. These facts were coupled with the general neglectful behavior evidenced by Mother, all of which were appropriate for the trial court to rely upon in making its determination. As a result, this testimony convinces us the trial court was not clearly erroneous in concluding the child was neglected. After reviewing the statutory factors which must be considered prior to terminating parental rights, we are unable to hold the trial court committed clear error in determining termination was in E.E.W's best interests.

Although Mother disagrees with the trial court's decision, there was sufficient testimony adduced at trial to support the finding that four or more of the grounds for termination listed in KRS 625.090(2) existed. A finding of one ground is all that is required. Even in light of the conflicting testimony and the differences of opinion of the parties, we will not substitute our decision for that of a trial court. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Therefore, as the evidence adduced at the termination hearing was sufficient to support the trial court's findings of neglect and to terminate Mother's parental rights, there was no clear error and we will not disturb the judgment on appeal. CR 52.01.

Therefore, for the foregoing reasons, the judgment of the Jefferson Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Louisville, Kentucky

BRIEF FOR APPELLEE:

Sarah M. Steele
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