

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000618-ME

M.C.H.

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 11-AD-00149

CABINET FOR HEALTH & FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY, and
K.A.H., an infant

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, LAMBERT, AND THOMPSON, JUDGES.

COMBS, JUDGE: M.C.H. (Mother) appeals the order of the Kenton Circuit Court terminating her parental rights to her child, K.A.H. (Daughter). Following careful review, we affirm.

The facts of the case are difficult and sad. Mother was involved in a relationship for ten years with J.T. In 2003, a child was born, and J.T. was

believed to be her father.¹ Mother, J.T., and Daughter resided together. In June 2010, the police were summoned to their home because J.T. had shot a window; he then pointed the gun at Mother's head. Daughter was a witness to the violence. Mother later recanted her story and failed to obtain an Emergency Protective Order (EPO) against J.T. Thus, the Cabinet for Health and Family Services removed Daughter from the home.

Daughter remained in foster care until December 2010 when she returned to Mother's home. However, after the Cabinet learned that Mother had been permitting J.T. to be in the home, Daughter was removed a second time in April 2011. Again, she was placed in foster care. In October 2011, Daughter was admitted to a children's psychiatric hospital due to behaviors that were harmful to herself and to others. Following her discharge from the hospital, she was placed in a residential treatment facility. Treatment included regular visitation with Mother. Visitation was unsupervised until the Cabinet learned that Daughter had once again been in the presence of J.T. during one of the visits.

On November 10, 2011, the Cabinet filed a petition for the involuntary termination of Mother's parental rights. A hearing was held over the course of three days – September 28, 2012; December 4, 2012; and January 25, 2013. There was extensive testimony by Daughter's care providers and by Mother. On March

¹ However, during the proceedings of this case, a DNA test established that J.T. is not the biological father of Daughter. The actual identity of her father is unknown; therefore, Mother is the only appellant.

8, 2013, the court entered its order granting the petition for termination of parental rights. This appeal follows.

Termination of parental rights is a grave matter and should only be upheld in the face of clear and convincing evidence. *Waters v. Cabinet for Human Resources*, 736 S.W.2d 365, 366 (Ky. App. 1987); Kentucky Revised Statute[s] (KRS) 625.090(1). “Parental rights are so fundamentally esteemed under our system that they are accorded due process protection under the 14th Amendment to the United States Constitution when sought to be severed at the instance of the state.” *O.S. v. C.F.*, 655 S.W.2d 32, 33 (Ky. App. 1983). Courts must cautiously insure that statutory mandates are upheld in the termination process. *M.E.C. v. Commonwealth of Kentucky, Cabinet for Health and Family Services*, 254 S.W.3d 846, 850 (Ky. App. 2008). An appellate court allows a trial court much discretion and applies the clearly erroneous standard of review under Kentucky Rule[s] of Civil Procedure (CR) 52.01. As long as the record contains substantial evidence to support the findings of the trial court, those findings must stand. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

The General Assembly has set forth the requirements that must be met in order for termination to be granted:

- (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
 - (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
 3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and
- (b) Termination would be in the best interest of the child.

KRS 625.090(1). In this case, it is undisputed that Daughter was adjudged to be neglected on two previous occasions – both of which resulted in removal from Mother’s home. However, Mother’s first argument is that termination was not in Daughter’s best interest. We disagree.

The record and the evidence presented at the hearing revealed that Daughter has suffered greatly from the noxious effects of living in an abusive home. Daughter revealed to her care-givers that she had witnessed J.T. shoot a man, drag Mother by the hair, and hold a knife to Mother’s neck. J.T. had thrown a table at Daughter and had thrown Daughter on the ground. He forced Daughter to repeat sexually derogatory remarks to Mother. Daughter often slept in the same bed as Mother and J.T. Frequently, J.T. would make Mother leave the bed while Daughter slept alone with him. The record indicates that J.T. was physically violent on a frequent basis. At the hearing, Mother was unable to state whether his violent episodes occurred every week or every day.

Daughter was admitted to a residential facility because she had begun acting out sexually and aggressively. Her play with dolls was sexually violent and

sometimes incestuous. She also verbally bullied other children. She was diagnosed with post-traumatic stress disorder (PTSD), over-anxious disorder, and disruptive behavior disorder. The record shows that throughout her treatment, her care providers all believed that Daughter has been a victim of sexual abuse – although she would not reveal the identity of the perpetrator. Daughter’s therapists testified that upon release from the residential facility, she would need a specially trained, therapeutic foster home. She would also need around-the-clock supervision because of the risks that her behaviors posed to herself and to others.

At the time of the hearing, Daughter was eight years of age, but her cognitive skills were at the level of a child of five years. However, she had made extensive improvement while in therapy. By the time of the last hearing date, Daughter was in a therapeutic foster home, and one social worker testified that it was likely that Daughter would find an adoptive home.

None of the professionals who testified at the hearing recommended that Daughter be returned to Mother. They all agreed that Mother had not acquired sufficient skills through her therapy to provide the level of care that Daughter needs due to the severe effects of trauma with which she struggles. In preparation for the hearing, Daughter underwent a pre-treatment evaluation report by the University of Kentucky Comprehensive Assessment and Training Services (CATS). It advised that “[M]other is not able to be a participant in [Daughter’s] treatment and has interfered with [Daughter’s] therapeutic recovery.” It also

recommended that prospectively, Daughter's therapy should focus on closure of her relationship with Mother.

The recommendation for termination was otherwise supported by the record. Mother admitted that she had requested a good-bye visit between Daughter and J.T. if the termination occurred – even though therapists had **repeatedly** told her that Daughter should not be in the presence of J.T., who was the source of Daughter's trauma. Mother was unable to describe what she had learned about domestic violence in the course of her own therapy. Daughter's therapists described several incidents in which Mother's behavior had impeded Daughter's progress. For instance, she had refused to inform Daughter of her paternity until after the first day of the hearing; Daughter's counselors had been asking Mother to tell Daughter the truth for months because it was important for Daughter's therapy.

In addition, the record consistently reiterates that in spite of Daughter's healthy eating plan, Mother usually came to visitation with unhealthy food for Daughter. The record also shows that Mother berated Daughter for telling her therapists the truth. There was repeated testimony that Mother and Daughter have a peer-like relationship – with Daughter often assuming the parental role. The resulting worry and feelings of obligation to comfort her mother that Daughter experiences have exacerbated her problems – especially her anxiety disorder.

Most significantly, Mother has demonstrated that she does not comprehend the extent of Daughter's needs – or that perhaps she is in denial as to their existence. At the hearing, she disagreed that Daughter functions at a cognitive

level below that of her actual age. She does not admit that it was possible that Daughter was sexually abused while in her care. She consistently contends that Daughter's extreme sexual "acting out" is the result of some incident of play with another child in a foster home. She was reluctant to inform the court of her relationship with another man; she has not obtained a background check about him in order to confirm that it is safe for him to be around Daughter. Mother also told the court that earlier in this case, she had concocted a story in order to protect J.T. However, Mother did not comprehend that "making up a story" was the same as telling a lie.

The record shows that even though Mother's father had abused her during her childhood, she asked the family court to grant him temporary custody of Daughter. While Mother stated that her home was safe, she was unable to explain what safety meant. Her willingness to allow her daughter to live with someone whom she has identified as her own abuser demonstrates an inherent inability to protect her child. In view of the extent of Daughter's needs and the indisputable amount of evidence of Mother's inability to meet her needs, the family court correctly concluded that termination was in Daughter's best interest.

Furthermore, KRS 625.090(2) sets forth that a list of factors that must be considered in order for termination to be proper. The family court relied on two of them:

- (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.

The same factual evidence already discussed supports the court's findings. At the time of the hearing, Daughter had been in residential care for more than a year; yet Mother failed to demonstrate that she would be able to meet Daughter's needs. At the time of this appeal, Daughter is nearly ten years of age. The longer that Daughter continues living in limbo, the more detrimental her situation becomes. At this point, she needs resolution, adequate care, stability, and permanency.

Mother also argues that the family court erred in determining that Daughter had been in care of the Cabinet for fifteen of the twenty-two months preceding the filing of the petition for termination. KRS 625.090(2)(j) provides that the child must have been in foster care for this precise period of time as a condition precedent to termination. The Cabinet filed its petition in November 2011. Twenty-two months prior to that date would have been January 2010, and Daughter was not removed from the home until June 2010. Additionally, Daughter was returned to Mother for several months in the meantime. Thus, Mother is correct in contending that KRS 625.090(2)(j) was not met. However, the court was

only required to find that one of the statutory factors existed, and as previously discussed, it properly found that KRS 625.090(2)(e) and (g) were met.

Furthermore, Mother received treatment and had ample opportunity to work on her case plan for more than one year before the termination proceedings were completed. Therefore, this error was harmless.

Finally, Mother cites KRS 625.090(5) as a basis for asserting error on the part of the court. That statutory section provides that the court has the discretion to refuse to terminate “[i]f the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child . . . if returned to the parent.” We cannot agree that Mother has provided such evidence.

First, Mother claims that she was compliant with treatment. She has completed classes and has shown up for counseling sessions consistently. However, she has admitted that she merely pretended to understand what she learned at the hearing, and she also failed to demonstrate what she learned. She points out that she revealed Daughter’s paternity to her, but she fails to acknowledge that the revelation came nearly one year after Daughter’s therapists began asking Mother to do so. Mother also cites her participation in group therapy with Daughter. However, the record shows that Mother often undermined therapy with her Daughter. As noted earlier, at least one professional has recommended that Daughter’s therapy shift to closure of the relationship. Therefore, this argument is unpersuasive.

Mother continues to express the extent of her love and affection for Daughter. This is a undoubtedly tragic situation for this family, and we note the extraordinary care and compassion of the family court in this case. The family court did not make its decision easily, and this Court does not affirm it lightly. We have examined the record carefully, including an intent observation of the hearing. Daughter is an extraordinarily damaged child. Unfortunately, her mother has not demonstrated any ability to care for her needs. We agree that it is in the best interest for Daughter to be in the care of adults who have the capability to acknowledge her problems and to work to mitigate their effects.

We are aware that Daughter is of an age at which termination will be an additional trauma for her to process. Nonetheless, with the overwhelming clear and convincing evidence that comports with the statutory scheme, we cannot conclude that the family court abused its discretion when it granted the petition to terminate Mother's rights.

Therefore, we affirm the Kenton Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET
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