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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000156-ME

M.J. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 12-AD-500196

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY, AND T.S.S., A CHILD APPELLEES

AND NO. 2014-CA-000302-ME

L.S., THE NATURAL MOTHER APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 12-AD-500196

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY, AND T.S.S., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellants, M.J. and L.S., appeal the October 26, 2013, order of the Jefferson Circuit Court terminating their parental rights to their child, T.S. On appeal, the Appellants assert that the termination was not in the best interest of the child and that the Appellee, Cabinet for Health and Family Services (the Cabinet), failed to make reasonable efforts to reunite the child with her parents. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

T.S. was born on September 5, 2010, and has a half-sibling, D.W., who is not a party to this action.[1] On or about September 20, 2010, the Cabinet's representative filed a verified dependency action petition regarding T.S. alleging that she was an abused and neglected child within the meaning of KRS 600.020(1), and asserting that on September 14, 2010, L.S. had taken T.S. for a newborn checkup and that T.S. was then sent to Kosair Children's Hospital where it was discovered that T.S. had a fractured femur, multiple fractures on her legs, a subdural hemorrhage, and two other brain hemorrhages which L.S. was unable to explain.

[1] Although D.W. is not a party to this action, his court records were introduced pursuant to KRS 625.090(3)(b) as proof of "[a]cts or abuse or neglect … toward any child in the family [of the Appellant mother]."

As noted, on or about September 20, 2010, DNA petitions[2] were filed for both T.S. and D.W. setting forth the facts concerning T.S.'s condition and asserting that D.W., then four years of age, had been whipped with a belt by L.S. and a maternal aunt resulting in marks on his back. At the temporary removal hearing on September 21, 2010, the Jefferson Family Court placed T.S. in the temporary custody of her maternal great-grandmother, B.S., and issued certain remedial orders to the Appellant parents in an effort to reunify the family. These included orders that the Appellant parents cooperate with the Cabinet and with family treatment service providers and follow their recommendations, that any visitation by the parents be sight and sound supervised, that there be no corporal punishment of any of the children, and that the children's maternal aunts, N.S. and S.S., not be in a supervisory role with the children.

On December 15, 2010, an amended DNA petition regarding T.S. was entered into the record. It asserted that M.J. was also present in the home during the timeframe wherein the injuries occurred to T.S., that he drinks heavily, and that he has a criminal history relating to domestic violence and assault.

On January 26, 2011, the family court adopted recommendations that the deposition of Dr. Melissa Currie, Director of Forensic Medicine, Associate Professor of Pediatrics, and a Board-Certified Child Abuse Pediatrician at the University of Louisville School of Medicine, be made part of the record as well as medical records regarding T.S., which were under subpoena. Subsequently, on

[2] Dependency, Abuse or Neglect petitions filed pursuant to KRS Chapter 620.

February 23, 2011, the Appellant parents appeared with counsel and entered a written stipulation that T.S. and D.W. were abused or neglected children. That stipulation stated that:

> [T.S.] was severely injured by non-accidental means in the time [between] release from the NICU [Natal Intensive Care Unit][and] return for a well baby check up. The perpetrator is unknown but ultimately parents are responsible for the child [and] who they leave the baby with. [D.W.] also [is] at risk.

On that same date, the Family Court accepted and incorporated in the calendar order by reference the recommendations of the parties to the stipulation pending disposition. Those recommendations included that: (1) all prior consistent orders be continued; (2) the Appellant mother and father have separate protective parenting classes; and (3) the Appellant father have random drug and alcohol screens and a Jefferson Alcohol and Drug Abuse Center assessment if positive.

Subsequently, on April 15, 2011, the family court again placed T.S. in the emergency custody of the Cabinet after she was again hospitalized when it was discovered that she had a transverse break to the right femur and seven posterior rib fractures that were healed. The new DNA petition alleged that the rib fractures did not show up on x-rays dated October 4, 2010, and thus had occurred while T.S. was in the custody of the child's maternal great-grandmother. The great-grandmother, B.S., had allowed T.S. to be alone with L.S. At the temporary removal hearing on April 20, 2011, the family court placed T.S. in the temporary custody of the Cabinet and child support was ordered. On the same date, the

family court ordered that Appellant parents have only supervised sight and sound visitation at Family Place, and that Appellant parents have psychological evaluations to be paid for by the Cabinet.

Proof on the second DNA petition was heard by the family court on September 21, 2011, and at disposition on November 2, 2011. At the close of proof on September 21, 2011, the family court found that it was more likely than not that T.S. was placed at risk of harm when B.S. allowed the Appellant parents, L.S. and M.J., to have unsupervised contact with T.S. in violation of court orders and when T.S. sustained injuries requiring a leg cast and hospitalization. At the close of proof on that date, the family court entered its handwritten findings as follows:

> [The Court] finds on [the] basis of Dr. Currie's analysis and testimony – subjected to substantial [cross-examination] – that there is overwhelming testimony that [T.S]'s injuries at 9 days old, and again her injuries at 7 months [old] (femur fractures and multiple healing broken ribs) could not have occurred accidentally and that [the] family's lack of knowledge or explanations are implausible. [The] Court finds that [the] child, who has been uninjured since 4/11 in foster care does not have brittle bone disease or other genetic disorder. The Court finds strongly that [the] child is unlikely to be safe and protected if returned to NM [natural mother]. MGGM [maternal great grandmother] or father, or any other family member.

Based upon these findings the court then committed T.S. to the Cabinet.

On the first day of the trial concerning the termination of the parental rights of Appellant parents with respect to T.S., Dr. Currie provided testimony

concerning the aforementioned injuries to the child and to her belief that these injuries were the result of child abuse. She testified that extensive testing was conducted to rule out bone disease or any other such malady, and that no such causes for T.S.'s injuries were found.

Dr. Currie did testify to one incident which occurred in the child's foster home shortly after the cast had been removed from her leg following the second incident. T.S. had been playing and bouncing in the lap of her foster brother when the bone broke again in the same place because it had not entirely healed and the cast had apparently been removed prematurely. Dr. Currie noted that other than this single explainable occurrence, there had been no further incidences of broken bones during all the time the child had been in foster care since April of 2011. This testimony was confirmed by the testimony of T.S.'s foster mother and by her physical therapist.

The Appellant parents disagreed with this testimony and testified that child abuse did not cause the injuries to T.S. M.J. testified that he would have done nothing differently than before to protect T.S. from injury because he did not believe that any child abuse occurred. Further, both parents testified that in the event that T.S. was returned to parental custody, they would still allow the same relatives and other people who had been around T.S. before or at the time of the previous first two instances in which T.S. was injured to be around her again. Further, L.S.'s therapist, Ms. Heidi Solarz-Kutz, testified that during the time she provided therapy to L.S., L.S. never saw herself as being able to do anything to

prevent the abuse. Solarz-Kutz also testified that there was no other protective parenting program of which she was aware that would allow a parent who did not admit to being a perpetrator of child abuse into the program. This testimony was confirmed by Ms. Krista Pippen, the Cabinet's caseworker for the family, and by Mr. James Burks, a therapist providing services to the abusive parenting and protective parenting groups at Seven Counties.

Additional testimony was provided below to establish that ongoing domestic violence issues were occurring between L.S. and M.J. as recently as 2013, some of which had occurred even after M.J. had completed a drug and alcohol abuse education program with the Jefferson Alcohol and Drug Abuse Center (JADAC).

T.S.'s foster mother testified that T.S. had done very well in her home and with her family, and that in the event of the termination of the rights of Appellant parents, she would like to adopt T.S. Pippen confirmed this to be the case, stating that the Cabinet had worked with the foster mother in facilitating numerous doctor's appointments, tests, and first steps services to care for T.S. and her injuries. Regarding the child's prospects for adoption, Pippen testified that T.S. had resided with the foster mother for over two years, and that she had observed T.S. and the foster mother to be very bonded and attached.

As noted, following the presentation of evidence below, the court entered an October 26, 2013, order terminating the parental rights of L.S. and M.J.

with respect to the minor child T.S. It is from that order that L.S. and M.J. now appeal to this Court.

On appeal, M.J. and L.S. argue that the trial court erred in finding that the termination of their parental rights was in the best interest of T.S., and urge that the order of termination be set aside as a matter of law. M.J. asserts that while the Cabinet did provide some services in an attempt to reunify the parents with T.S., it did not utilize all preventative and reunification services available. M.J. asserts that he was compliant with the court orders and case plan for reunification, aside from taking protective parenting and abusive parenting classes, which he asserts were not made available to him. L.S. echoes the arguments made by M.J., and also asserts that substantial evidence supports a finding that there was reasonable expectation of improvement on her part. L.S. asserts that throughout the dependency action, she was in substantial compliance with her case plan, that she had a full-time job, attended counseling, paid child support, and took parenting classes of her own volition to address safety issues. She thus argues that it is fundamentally unfair and not in the best interest of T.S. to terminate her parental rights.

In response, the Cabinet asserts that the court's finding that T.S. was an abused or neglected child was not clearly erroneous, nor was its determination of parental unfitness, and subsequent decision that termination of the parental rights of L.S. and M.J. was in the best interest of T.S.

Prior to addressing the arguments of the parties, we note that 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, this Court held that the 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 is based upon clear and convincing evidence. Therefore, it is the function of this Court to determine whether the trial court's order was supported by substantial evidence on the record, and we will not disturb the findings of the trial court unless there is an absence of substantial evidence. *V.S. v. Commonwealth, Cabinet for Human Resources,* 706 S.W.2d 420, 424 (Ky. App. 1986).

Kentucky Revised Statutes (KRS) 625.090 sets forth the grounds for involuntary termination of parental rights. A circuit court may involuntarily terminate parental rights if it finds by clear and convincing evidence that a child is or has previously been adjudged, abused or neglected, and that termination is in the child's best interest. Then, the circuit court must find the existence of one or more of ten specific grounds set forth in KRS 625.090(2). KRS 625.090(2) provides that:

> (2) No 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:
>
> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;

(b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
(d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
(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;
(f) That the parent has caused or allowed the child to be sexually abused or exploited;
(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;
(h) That:
1. The parent's parental rights to another child have been involuntarily terminated;
2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
3. The conditions or factors which were the basis for the previous termination finding have not been corrected;
(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or
(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.

In making such findings, the trial court has a great deal of discretion. *M.P.S.*, 979 S.W.2d at 116.

Upon review of the record, the arguments of the parties, and the applicable law, we are in agreement with the Cabinet that the court's finding that T.S. was an abused or neglected child was not clearly erroneous, nor was its determination of parental unfitness, and subsequent decision that termination of the parental rights of L.S. and M.J. was in the best interest of T.S.

The record clearly indicates that T.S. was proven to be an "abused or neglected child" both in light of her parent's own stipulation that such was the case in the DNA action, and in light of the court's determination that such was the case in accordance with KRS 600.020(1) during the course of the termination of parental rights action. We find no reason to disturb the finding of the court below on this issue, and indeed, note our prior determination that:

> In order for the court to conclude that a child has been abused or neglected, the statute requires a finding that the parent or guardian has created or allowed to be created a risk that the child will be the victim of sexual abuse or exploitation. The identity of the perpetrator of the abuse is not material to that finding.

CHFS v. R.H., 199 S.W.3d 201, 204 (Ky. App. 2006).

Sub judice, though L.S. and M.J. both claimed to be unaware of how T.S. sustained her injuries, by their own stipulation they allowed this risk to be created. We are thus in agreement with the court below that the pattern of conduct

exhibited by both L.S. and M.J. clearly rendered them unable of caring for the immediate and ongoing needs of T.S. in accordance with KRS 600.020, and that they continuously or repeatedly failed or refused to provide the essential parental care and protection that T.S. needed. KRS 600.020(1)(a)(4).

Further, we believe the record is clear that for a period of not less than thirty months, both L.S. and M.J. continued either to express ignorance as to how T.S. sustained her injuries or to assert an argument, not borne out by the medical evidence of record, that T.S. had a bone disease. Accordingly, we are in agreement with the Cabinet that based upon the substantial evidence before the court regarding the state of mind of each Appellant parent and their lack of perception concerning the risk to T.S. if she was returned to their care, the court's determination that L.S. and M.J. were parentally unfit in accordance with KRS 625.090(2)(e).

Having found that T.S. was an abused and neglected child in accordance with the statute, and having found that both M.J. and L.S. met at least one of the grounds of parental unfitness set forth in KRS 625.090, the court determined that termination of the Appellants' parental rights was in the best interest of T.S.

While the parents argue that it was the fault of the Cabinet that they were unable to attend the abusive and protective parenting programs which were recommended, testimony provided below clearly indicated that these programs were only for persons who had admitted to abusing a child, or who had admitted to

failing to protect a child from abuse. However, the position of the Appellant parents at trial was that no abuse had occurred. Accordingly, we decline to reverse on the basis of their arguments that the Cabinet failed to make reasonable efforts at reunification. Indeed, as set forth by statute, "reasonable efforts" require only "the exercise of ordinary diligence and care by the department to utilize all preventative and reunification services available in the community … which are necessary to enable the child to safely live at home." KRS 620.020(11). As the Seven Counties program at issue was the only one of its kind in the community, and as Appellant parents did not qualify due to their failure to make necessary admissions, we do not find that the Cabinet's efforts in this instance were unreasonable.

Ultimately, upon review of the record, the arguments of the parties, and the applicable law, we are in agreement with the court below that termination of the parental rights of L.S. and M.J. was in the best interest of T.S. For the foregoing reasons, we find that the decision in this regard was supported by substantial evidence, was not clearly erroneous, and we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the October 26, 2013, order and judgment of the Jefferson Circuit Court, terminating the parental rights of M.J. and L.S. with respect to the minor child T.S.

ALL CONCUR.

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