

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000315-ME

L.E.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER MEHLING, JUDGE
ACTION NO. 14-AD-00019

M.K.S.; M.S.; AND
L.D.S. (A MINOR CHILD)

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

MAZE, JUDGE: L.E. (“Mother”) brings this appeal from a Kenton Family Court judgment terminating her parental rights in her minor child, L.D.S., and granting a judgment of adoption to M.K.S. (“Stepmother”). Having reviewed the record, the applicable law, and the arguments of the parties, we affirm.¹

¹ Pursuant to CR 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an

The child who is the subject of this appeal was born in 2004. His biological mother is L.E. and his biological father is M.S. (“Father”). At the time the child was born, his parents were neither married nor in a stable relationship. When Father learned of the child’s birth, he obtained DNA testing which confirmed his paternity. He then sought joint custody. An agreed order was entered on February 28, 2005, pursuant to which Father paid child support to Mother and received visitation on alternating weekends and Wednesday evenings, with holiday and vacation time. Father was unaware that Mother is bi-polar and suffers from post-traumatic stress disorder and anxiety.

In 2007, Father married Stepmother. In September 2008, Mother suffered a severe manic episode and required hospitalization. In October 2008, Mother and Father entered into an agreed order granting Father temporary custody. Mother essentially assumed Father’s former schedule and had visitation with the child every other weekend and Wednesday evenings. Mother did not provide any child support, or participate in the child’s education or medical care. Stepmother provides health insurance for the child through her employment as a nurse. Father is employed full-time as a property manager. There are three other children in the household, one of whom is Father’s and the other two are Stepmother’s.

administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

In December 2012, Mother suffered a second psychiatric episode. She was admitted to Eastern State Hospital on January 21, 2013. Prior to her hospitalization, she contacted Father, claiming that she would be moving to Nicholasville with a former high school boyfriend. She told him that she did not want her mother to have contact with the child because she feared physical abuse. Mother's last contact with the child was a telephone call in January 2013. According to Mother, she required repeated hospitalizations for mental and physical reasons for the next nine months.

In July 2013, the child's maternal grandmother filed an action seeking grandparent visitation rights. On January 27, 2014, Stepmother filed an action to involuntarily terminate Mother's parental rights in the child and to adopt the child. On February 17, 2014, Mother filed a motion asking for some parenting time to be restored. On July 24, 2014, the trial court held a hearing on the grandparental visitation motion and dismissed the petition on August 13, 2014.

At the hearing on Stepmother's termination and adoption petition, which was held on November 21 and December 5, 2014, evidence was presented that the child, who was then in the fifth grade, displayed some disturbing behaviors when he began living full time with Father and Stepmother in 2008. Father testified that the child lied frequently, acted out and was disrespectful to authority figures. In December 2013, the child, Stepmother and the child's pediatrician completed a "Conner's Assessment" in order to analyze the child's behavior. Father and Stepmother enrolled him in a private school and obtained counseling and tutoring

for him. His therapist, Patricia Moore, testified that the child has no strong memory of his biological mother, although he did say that he missed her. He was initially diagnosed with an adjustment disorder with anxiety and ADHD combined. When they began treatment, he constantly thought he was in trouble with Father and Stepmother, exercised catastrophic thinking and acted impulsively. She testified that he has greatly improved in her care and rarely hits his siblings any more. The child indicated to Moore that he wants to be adopted by Stepmother and very badly wants to be part of Father and Stepmother's family. The therapist testified that he may regress if Mother's rights are not terminated. The therapist also testified that she met with Mother prior to the adoption hearing, but became concerned about her personal safety when Mother leaned over her and gritted her teeth. Moore testified that she decided not to facilitate contact between the child and Mother because, in her professional opinion, some of the things Mother had written in letters she wished to give to the child were inappropriate.

Although Mother was expected to present evidence and to testify at the termination and adoption hearing, which was continued in order for her to do so, she failed to appear.

Following the hearing, the trial court entered findings of fact and conclusions of law and a judgment on December 17, 2014, terminating Mother's parental rights in the child and awarding the full care, custody and control of the child to Stepmother. This appeal by Mother followed.

“[T]o pass constitutional muster, the evidence supporting termination must be clear and convincing. Clear and convincing proof is that of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people.” *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 427 (Ky. App. 2015) (internal citations and quotation marks omitted).

Our standard when reviewing a question of admissibility of evidence is whether the trial court abused its discretion. *Johnson v. Commonwealth*, 105 S.W.3d 430, 438 (Ky.2003). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

We are also mindful that

A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

Bailey v. Bailey, 231 S.W.3d 793, 796 (Ky. App. 2007).

Kentucky Revised Statutes (KRS) 199.502(1) provides that “an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding that any of the following conditions exist with respect to the child:[.]” In this case, the trial court found that

the evidence supported a finding under the conditions set forth in the following three subsections:

(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; [and] . . .

(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.

Mother disputes the trial court's findings under each of these three sections.

First, under KRS 199.502(1)(a), she argues that her separation from her child did not constitute abandonment because it was not willful, harsh, or done with indifference. "Abandonment is not actually defined in our jurisprudence in the context of termination proceedings. Rather, 'abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child.'" *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 716 (Ky. App. 2010) (citing *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App.1983)).

The last time Mother saw the child was December 2012, when she suffered her second psychiatric episode. She did not ask Father to resume visitation until

one year later, in December 2013. Mother argues that she acted protectively in placing the child with his father so that she could obtain needed mental health treatment. She contends that she required repeated hospitalization for the next nine months for physical and mental health reasons. Mother has provided very little specific evidence regarding these hospitalizations, and the extent to which she was disabled by them. Our review of Mother's trial exhibits indicates that Mother was admitted to Eastern State Hospital on January 21, 2013 and discharged on January 25, 2013. The remainder of the medical records in her trial exhibits appear to be for routine outpatient consultations for a urinary tract infection, a Pap smear, water retention and lethargy.

Mother relies on *Kantorowicz v. Reams*, 332 S.W.2d 269 (Ky. 1959), a case in which the appellate court reversed the termination of parental rights of a mother who left her child with his grandparents and resided in another state with her husband and two other children. The mother did make efforts to stay in touch with the child, however, writing monthly and sending him gifts and money. The Court found that “[w]hatever neglect may be attributed to the mother, it appears not to have been of her own volition. She seems to have done the best she could.”

Kantorowicz, S.W.2d at 273. The *Kantorowicz* opinion dates from over fifty years ago, when long-distance communication presented a greater challenge than it does today. More recently, a panel of this Court observed that “abandonment must be based on more than mere failure to exercise visitation. Distance and inconvenience are no longer barriers to keeping in touch with others as modern technology has

made communication ubiquitous and instantaneous, a blessing for absent parents. However, a vast distinction exists between absence and indifference.” *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 717 (Ky. App. 2010). As the trial court found, after a January 17, 2013 telephone call, the child in this case (who was nine years old at the time) had absolutely no contact with his mother, in any form, for almost one year. According to Mother’s appellate brief, her mental and physical condition stabilized in September 2013, and she asked Father to resume visitation in December 2013.

Although it is understandable that Mother’s mental or physical condition may have made actual physical visitation with the child impossible, she never provided adequate evidence to explain why she was unable to telephone, e-mail, write or otherwise communicate with the child for such a long period. The evidence supports the trial court’s finding that she had abandoned the child for more than ninety days, because “[t]he facts of this case clearly evidence more than a simple failure to exercise visitation rights[.]” *Id.*

Mother also relies on *D.S. v. F.A.H.*, 684 S.W.2d 320, 323 (Ky.App. 1985), an opinion in which the termination of a mother’s parental rights was reversed because her separation from her child was due to her mental illness and emotional problems and thus deemed by the Court to be beyond her control. As a preliminary matter, we note that the case “was decided pursuant to the old statute for termination of parental rights, KRS 199.603, which was repealed in 1987. The current statute and its corresponding case law contain no requirement that a court

consider means less drastic than adoption prior to a judgment of adoption. . . . In fact, KRS 199.502 requires the court only to find that one of the subsections (a)—(i) is applicable.” *B.L. v. J.S.*, 434 S.W.3d 61, 67 (Ky. App. 2014). Insofar as the reasoning of *D.S.* is applicable, the facts are significantly distinguishable because, unlike the case before us, the record in *D.S.* showed and the appellees conceded that the mother had by telephone communication and periodic visitation maintained contact with the child. *D.S.*, 684 S.W.2d at 322-23.

The trial court’s determination that Mother had abandoned the child for a period of more than ninety days was supported by clear and convincing evidence, and consequently will not be reversed on appeal.

Next, Mother argues that the trial court erred in finding, under KRS 199.502(1)(e), that she was incapable of providing essential parental care due to her mental and physical health. Mother agrees that she was previously incapable of providing such parental care, but argues that her health has improved because she now has access to medical care, and consequently has not required inpatient psychiatric treatment for over a year. She contends that Stepmother presented no evidence as to Mother’s current or potential ability to provide care, pointing to testimony by Stepmother that she had “no idea” whether there was a reasonable expectation of improvement in Mother’s ability to provide for the child.

Although the burden of proof is on the petitioner, surely Mother was in the best position to provide evidence of the improvement in her living situation and ability to care for the child. Although Mother did seek to establish Social Security

disability support for the child in April 2014, she does not explain why she did so months after receiving her own Social Security disability award in September 2013, and only after Stepmother had filed the termination and adoption petition in January 2014. Father testified that Mother had never made any effort to pay child support until Stepmother filed the adoption action. He was then contacted by Social Security and informed that the child was eligible for payments in connection with Mother's disability. The trial court's finding that the Mother had for a period of not less than six months continuously failed to provide essential parental care and protection for the child, and that there was no reasonable expectation of improvement in this regard, was fully supported by the evidence provided at trial.

Mother further argues that there was no evidence to support the trial court's finding under KRS 199.502(g) that she, for reasons other than poverty alone, did not provide basic living essentials for the child. She concedes that she did not provide any essentials for the child during the nine months during which she contends she was repeatedly hospitalized and therefore in poverty, but contends that she now has Social Security disability income, a medical card, and stable housing. As the trial court noted, however, in the years leading up to her breakdown in December 2012, she provided very little for the child, yet she does not allege that she was living in poverty at that time. Moreover, there is no evidence in the record regarding her alleged poverty beyond her own assertions in a verified response. Mother was provided with an opportunity to testify at trial and to introduce evidence regarding her financial situation, but chose not to do so.

Based on the evidence available to the trial court, its determination that she has continuously failed, for reasons other than poverty alone, to provide essential food, clothing, shelter, medical care and education for the child is supported by substantial evidence and will not be reversed on appeal.

Next, Mother argues that the trial court abused its discretion when it sustained an objection to Mother's attempt to elicit testimony from Father regarding his personal history, his relationship with the child and his alleged parental deficits. The questions related to Father's status as a recovered alcoholic, his psychiatric treatment as a juvenile, his placement in foster care as a juvenile, and whether Stepmother has gone to Al/Anon. The trial court ruled that the questions were irrelevant because Father was not the petitioner, his parental rights were not being terminated, and the issue of whether he is a good father was not being tried. The trial court permitted Mother's counsel to proffer the testimony for purposes of appeal.

According to Mother, she filed a motion for custody in Boone Family Court which was subsequently transferred to Kenton Family Court, where it was set to be heard with the pending adoption action brought by Stepmother. She argues that the questions she wished to ask about Father were pertinent to the custodial motion. There are no references to the record to support her assertion that her motion for custody was at issue at the hearing. "[W]e have consistently and repeatedly held that it is an appellant's responsibility to ensure that the record contains all of the materials necessary for an appellate court to rule upon all the

issues raised.” *Clark v. Commonwealth*, 223 S.W.3d 90, 102 (Ky. 2007). In any event, since the trial court terminated Mother’s parental rights, the issue of custody is moot. Moreover, our review of the record indicates that Mother’s counsel was able to cross-examine Stepmother at some length regarding Father’s behavior. The trial court did not abuse its discretion in sustaining the objection to this line of questioning of Father.

Next, Mother argues that the trial court erred when it held that she “continues to exhibit mental health problems that ultimately left the child’s therapist concerned for her safety during her meeting with the mother,” and that she “has demonstrated that she is not in a position to act as a parent at this time or for any time in the foreseeable future.” Mother reiterates that she is receiving disability income, and has obtained medications and treatments that have enabled her to stabilize her condition. As to her behavior at the meeting with the child’s therapist, she explains that she was under the false impression that it was for a custody evaluation. She attributes her agitation at the meeting to her concern over reading the Conner’s Assessment, the frustration of being denied the opportunity to see her child, and to the fact that she was not represented by counsel. But Mother did not testify to any of this in court, and does not provide any references to the record to show that these explanations were entered into evidence. This evidence may not therefore be considered on appeal. “It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.” *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011)

(internal citation omitted). The therapist's testimony regarding her meeting with Mother provided substantial evidence for the trial court's conclusions regarding Mother's lack of stability.

Mother's next arguments concern the admissibility of the Conner's Assessment. When Stepmother was cross-examined on the content of the assessment, her counsel objected on the grounds that the examination was based on an unverified exhibit that was hearsay, pointing out that counsel did not have a certified copy of the assessment. The trial court stated, presumably in reference to an earlier ruling, that "she going to get it verified in her case in chief" and repeated that the admissibility of the testimony regarding the report was subject to Mother getting the report admitted in her case in chief. Apparently, Mother never sought to admit the report, nor does she explain why she failed to do so. Mother provides no reference in the record to the trial court's ruling in this regard, nor to her contemporaneous arguments regarding its admissibility as non-hearsay or alternatively, as a statement made for medical diagnosis, treatment or state of mind. "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). Under Kentucky Rules of Civil Procedure (CR) 76.12(4)(c), a party is required to make "ample" citations to the record in her Statement of the Facts and Argument. "It is not the job of the appellate courts to scour the record in support of an appellant[']s argument." *Dennis v. Fulkerson*, 343 S.W.3d 633, 637 (Ky. App. 2011). In any event, despite the trial court's ruling, Mother's counsel was

permitted to cross-examine both Father and Stepmother at some length about the content of the report. The trial court did not abuse its discretion in ruling that Mother was required to verify the Conner's Assessment before it could be introduced into evidence.

Finally, Mother argues that the trial court abused its discretion in basing its findings on evidence presented in the previous grandparental visitation case. The trial court alluded briefly to Mother's description of Father as a "good father" in the prior action, and implied that she was now taking a different position that destroyed her credibility. The trial court stated that it was not trying the issue of whether he was a good father. Thus, the trial court's comment was made in the context of assessing the relevance of Mother's counsel's questions to Father. Even if the trial court erred in making its remark, there is no indication that the trial court's observation informed its findings of fact or final judgment. Circuit courts speak "only through written orders entered upon the official record." *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky. 2010). Substantial evidence supported the trial court's written findings, and there was no improper reliance on evidence outside the record.

For the foregoing reasons, the Kenton Family Court's findings of fact and conclusion of law, and the judgment terminating parental rights and adopting child are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kelly S. Wiley
Covington, Kentucky

BRIEF FOR APPELLEES:

Stephanie A. Dietz
Edgewood, Kentucky