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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000871-ME

C.S. APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 14-AD-00016

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; S.W.; AND M.W.S. (A CHILD) APPELLEES

AND NO. 2015-CA-000872-ME

C.S. APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 14-AD-00017

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; R.W.; AND S.E.S. (A CHILD) APPELLEES

AND NO. 2015-CA-000957-ME

S.W. APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 14-AD-00016

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; AND M.W.S. (A CHILD) APPELLEES

OPINION AND ORDER
AFFIRMING ORDERS OF TERMINATION
AND GRANTING MOTION TO WITHDRAW

** ** ** ** **

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

MAZE, JUDGE: Appellants, C.S. and S.W.,[1] appeal from orders of the Greenup Circuit Court terminating their parental rights. S.W., who is before this Court *pro se*, argues that insufficient evidence existed to support termination of his rights to his child, M.S. Pursuant to our Supreme Court's adoption of the procedure outlined in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), counsel for C.S. has filed a brief on her client's behalf stating that she can identify no valid issues for appeal, and she has requested that this Court permit her

[1] Though R.W., father to S.S., was a party to the termination action, he did not participate in those proceedings, and he has not filed a brief or otherwise placed himself before this Court.

to withdraw as C.S.'s counsel. *See A.C. v. Cabinet for Health and Family Servs.*, 364 S.W.3d 361 (Ky. App. 2012).

Substantial evidence existed in the record which supported the trial court's decision to terminate C.S.'s and S.W.'s parental rights. Furthermore, we agree with counsel for C.S. that no meritorious grounds exist for an appeal of the orders terminating her client's parental rights. Therefore, we affirm; and we grant counsel's Motion to Withdraw.[2]

Background

C.S. is the mother of S.S. and M.S., the children who are the subject of the cases comprising this appeal. S.S. was born in December 2007 of a relationship between C.S. and R.W. She entered the custody of the Cabinet for Health and Family Services (hereinafter "the Cabinet") in July 2012 following entry of an Emergency Custody Order (ECO). The Commonwealth's subsequent petition of neglect stated that, in the process of investigating injuries another child sustained at C.S.'s home, social workers found the home in which S.S. lived to be in deplorable condition. Based on these allegations, the trial court entered a

[2] 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 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 sitting 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.

finding of neglect against C.S. following an August 2012 trial, and S.S. remained in a foster home.

Between August 27, 2012 and May 5, 2014, C.S. enjoyed supervised visitation with S.S. while the Cabinet provided services to C.S., with the ultimate goal of reunification. These services included a psychological evaluation performed by Dr. Gary Prater. This evaluation revealed C.S.'s limited intellectual capacity[3] and inability to perform basic parenting tasks,[4] despite her attendance at parenting classes as part of her case plan with the Cabinet. At an April 2013 annual review, the Cabinet reported this, and other, information to the trial court, including that C.S. was not fully compliant with her case plan and was residing with S.W., a registered sex offender.

From her relationship with S.W., M.S. was born in May 2013. Due to C.S.'s deficient parenting skills, which she exhibited at the hospital following M.S.'s birth, the Cabinet successfully sought an ECO placing M.S. in its custody. The Cabinet brought a petition alleging that M.S. was a dependent child. Prior to adjudication of this petition, C.S. enjoyed supervised vitiation with M.S., who resided in the same foster home as S.S. The Cabinet provided one-on-one

[3] Dr. Prater's report related that C.S. was unable to recite the alphabet, count money, or tell time. The report concluded that C.S. possessed a Full Scale Intellectual Quotient of 59 and qualified for a clinical diagnosis of Mild Mental Retardation.

[4] Dr. Prater's report stated that C.S. did not know what food or snacks were appropriate or "good" for children. She also stated, when asked, that a child begins to walk around the age of three to four months. C.S. did not know what a "feeding schedule" was. From this, Dr. Prater's report concluded that C.S. would find it difficult to feed and medicate a child regularly and as needed.

parenting supervision and counseling based upon the concerns voiced in Dr. Prater's report.

On May 5, 2014, the Cabinet filed petitions to terminate C.S.'s parental rights concerning S.S. and M.S. In addition, these petitions sought to terminate the parental rights of each child's father. At an April 9, 2015 hearing on these petitions, the Cabinet social worker testified that none of the parents had contributed financially to the children during the time they were in the Cabinet's custody. She stated her belief that all three parents were capable of contributing to some degree. The Cabinet social worker also testified that the children were doing "excellent" and meeting their developmental and educational milestones since entering adoptive foster homes. Dr. Prater also testified to the results of his psychological evaluation of C.S. and reiterated his conclusion that C.S. could not effectively parent either child due to her limited mental function.

Finally, S.W. testified. He confirmed that he is a registered sex offender due to a conviction for Rape in the third degree. He stated that he was married to C.S. and wanted to live with his children,[5] including M.S. S.W. stated that he had not contributed financially to the Cabinet for M.S.'s care because he had not been asked to. He also acknowledged that he had not signed or complied with case plans the Cabinet proposed.

Following the hearing, the trial court entered Findings of Fact, Conclusions of Law, and Orders terminating C.S.'s, S.W.'s, and R.W.'s parental

[5] S.W. and C.S. have a subsequently born child together. That child is not the subject of the cases comprising this appeal.

rights to their respective children. Specifically, the trial court found that S.W. "has abandoned [M.S.] for a period of not less than ninety (90 days)[,]" and that C.S. "is incapable of providing proper care for the minor child[ren] with no reasonable expectation of improvement." The court also found that R.W. had abandoned S.S. for the requisite period of time for termination to be appropriate. C.S. and S.W. now appeal from these orders.

Standard of Review

Trial courts enjoy "a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination." *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998) (citing *Department for Human Resources v. Moore*, 552 S.W.2d 672 (Ky. App. 1977)). However, an appellate court's review "is confined to the clearly erroneous standard in CR[6] 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings." *M.P.S.* at 116 (quoting *V.S. v. Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986)). Substantial evidence is that which is sufficient to induce conviction in the mind of a reasonable person. *See Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002).

Analysis

[6] Kentucky Rules of Civil Procedure.

Termination of parental rights is permitted only after a trial court enters specific statutory findings supported by clear and convincing evidence. *See Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006) (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). Accordingly, KRS[7] 625.090 requires three findings: that the child is, or has been adjudged to be, neglected or abused; that termination is in the best interest of the child; and that one or more of the factors of KRS 625.090(2) is satisfied. Included among the factors listed in KRS 625.090(2) are a parent's abandonment of the child for more than ninety days, KRS 625.090(2)(a); a parent's past conviction for a felony involving serious injury to any child, KRS 625.090(2)(d); that a parent has failed to provide, or was incapable of providing, care, protection, shelter, food, or education for the child, KRS 625.090(2)(e) and (g); and that the child has been in the Cabinet's custody for fifteen of the twenty-two months preceding filing of the petition. KRS 625.090(2)(j).

I. Termination of S.W.'s and R.W.'s Parental Rights

The record is replete with documentary and testimonial evidence supporting the trial court's finding that S.S. and M.S. were neglected and that termination of R.W.'s and S.W.'s parental rights was appropriate. Concerning R.W., the Cabinet social worker's testimony and documentation included in the record established that R.W. is a convicted sex offender in the State of Ohio and apparently resides there, having had little or no contact with C.S. or S.S. since her

[7] Kentucky Revised Statutes.

birth. This supports a finding of neglect under KRS 625.090(1) and abandonment under KRS 625.090(2)(a). Additionally, the social worker testified that, despite entering the Cabinet's care with delayed educational and socialization skills, S.S. is now on-target and thriving in both respects. Therefore, termination of R.W.'s parental rights to S.S. was appropriate.

Testimony also established that S.W. previously pled guilty to felony rape and is a registered sex offender. This is more than enough to satisfy KRS 625.090(2). However, the record – including S.W.'s own testimony – also establishes that S.W. has provided no support, financial or otherwise, for M.S. since his birth and that M.S. is thriving in his adoptive foster placement. Therefore, the record supported the trial court's conclusion that termination was appropriate and in the best interest of M.S.

II. Termination of C.S.'s Parental Rights

KRS 600.020(1) defines a "neglected or abused child" to include: a parent's continued or repeated failure to "provide essential care and protection, considering the age of the child[,]" KRS 600.020(1)4 and a parent's failure to make sufficient progress toward identified goals which would permit safe reunification with the child, KRS 600.020(1)9. Under this statutory definition, both of C.S.'s children were "neglected."

It is undisputed that S.S. is a neglected child, as a court entered this finding in her underlying juvenile case. Though the underlying juvenile case concerning M.S. resulted only in a disposition of dependency, there was sufficient

evidence in the record at termination to justify the trial court's finding that M.S. was a neglected child. The basis for M.S.'s removal from C.S.'s care was concern expressed at the child's birth that C.S. did not respond to his crying, got frustrated when M.S. would not eat, and had to be prompted to change him and feed him regularly. As the case progressed and as the Cabinet provided services and supervision, C.S.'s actions failed to allay observer's concerns. Dr. Prater testified that, due to C.S.'s inability to tell time, she would likely never be able to establish a feeding schedule for M.S. He also testified that C.S. did not know what food was appropriate for children or when they should reach key milestones. Though C.S. depended heavily on others to care for M.S. during the time she was in the hospital following his birth, testimony and documentary evidence demonstrated that the assistance she received from family diminished when family moved away and that C.S.'s ability to parent without assistance was concerning and unlikely to improve. This evidence supported a finding that M.S. was a neglected child.

Evidence of record also established that one or more factors of KRS 625.090(2) were present and that termination was in the best interest of the children. Due to C.S.'s failure to learn and retain even basic parenting and life skills such as telling time, establishing a feeding schedule, and providing age-appropriate and nutritious foods, she was, and had been, "substantially incapable of providing essential parenting care" to a child of such tender age. KRS 625.090(2)(e). Dr. Prater's and the Cabinet social worker's respective testimonies

established that C.S.'s parenting ability was unlikely to improve, that S.S. and M.S. were thriving in foster care, and therefore, that termination of both children was in the best interest of the children. Specifically, the Cabinet social worker testified that, whereas S.S. had entered foster care educationally delayed, she was on-target at the time of the termination hearing. She also testified that M.S. was meeting all of his developmental milestones in his adoptive foster home. Hence, the trial court's findings as to termination did not constitute clear error.

Finally, we would be remiss if we did not acknowledge the prevalent and unfortunate toll C.S.'s intellectual disability and poverty have taken on her ability to parent her children. We also point out that Kentucky law expressly forbids termination of an individual's parental rights based solely on her poverty. *See V.S. v. Cabinet for Human Resources*, 706 S.W.2d 420 (Ky. App. 1986); *Dept. for Human Resources v. Moore*, 552 S.W.2d 672 (Ky. App. 1977); KRS 625.090(2)(g). Accordingly, we emphasize that clear and convincing evidence which the Commonwealth presented establishing that factors other than poverty favored termination of C.S.'s parental rights. Though we are sensitive to C.S.'s immutable challenges, the requisite statutory factors indicate, and the best interest of her children dictate, that termination was appropriate.

Conclusion

For the reasons above, the contemporaneous orders of the Greenup Circuit Court terminating the parental rights of C.S., R.W., and S.W. are affirmed. Furthermore, the Motion to Withdraw of C.S.'s counsel is hereby GRANTED.

ALL CONCUR.

ENTERED: JULY 29, 2016

/s/ IRV MAZE
JUDGE, COURT OF APPEALS

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