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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001743-ME

R.H. APPELLANT

v. APPEAL FROM LARUE CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 15-AD-00022

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND
X.S.H., A MINOR CHILD APPELLEES

AND

NO. 2016-CA-001744-ME

R.H. APPELLANT

v. APPEAL FROM LARUE CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 15-AD-00024

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND
R.D.H.H., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: R.H. (mother) appeals from separate findings of fact and conclusions of law, judgments and orders of the Larue Circuit Court terminating her parental rights to two of her children. She argues the circuit court erred when it adopted verbatim the Cabinet for Health and Family Services, Commonwealth of Kentucky's proposed findings of fact and conclusions of law and that the circuit court's decision to terminate her parental rights was not based on clear and convincing evidence. Mother also argues the circuit court erred when it denied her motion to hold its ruling in abeyance to permit her to present additional testimony. Finding no error, we affirm.

On September 25, 2015, pursuant to Kentucky Revised Statutes (KRS) 625.050 *et seq*., the Cabinet filed petitions seeking to terminate mother's rights to two of her children, born July 7, 2007 and September 20, 2011. The Cabinet also sought to terminate the rights of the children's biological father.

A trial was conducted on June 13, 2016. Father and mother were represented by separate counsel. Father appeared at trial and consented to a voluntary termination of his rights. Mother did not appear.

The Cabinet called Dr. Kelli Marvin, Ph.D., a psychologist, who testified by telephone without objection. On April 10, 2014, in the underlying juvenile action, Dr. Marvin conducted an evaluation of mother and, on July 22, 2014, she prepared an extensive thirty-five page report, which was entered into evidence. For purposes of this opinion, we provide a summary of the most pertinent parts of Dr. Marvin's testimony and report.

Dr. Marvin reviewed mother's history with the Cabinet dating back to 2007, mental health and substance abuse records, and extensive criminal history. During her evaluation, Dr. Martin conducted psychometric testing, including the Minnesota Multiphasic Personality Inventory (MMPI) and Child Abuse Potential Inventory (CAPI).

While mother's results on the CAPI were negative and she opined that mother does have parental strengths including loving and being bonded with the children, Dr. Marvin opined mother's history and mental health placed her at a considerable risk of engaging in future acts of neglect or abuse. Dr. Marvin noted mother's previous diagnosis of alcohol dependence, lengthy history of substance abuse, adjustment disorder, and her own diagnosis of borderline personality disorder with antisocial and narcissistic traits, unspecified depressive and anxiety disorders and alcohol use disorder. She detailed numerous risk factors associated

with future acts of abuse including maternal substance abuse; maternal psychopathology; attitudes supportive of child abuse/neglect; extreme minimization and denial of child abuse/neglect; negative attitudes toward intervention; parental conflict; poor martial/relationship quality; domestic violence; maternal history of child welfare involvement; and the special needs of the children. Dr. Marvin concluded as follows:

> As such this examiner concludes that while the respondent mother demonstrates some strengths that would ordinarily bode well in her and the subject children's favor, she is not poised to assume primary care and custody of the subject children at this time. Indeed, to a reasonable degree of clinical certainty, the respondent is currently unable to provide minimally safe and adequate care for the subject children, and if these children were returned to her care, these children would be at unacceptable risk of neglect and/or abuse[.]

Dr. Marvin opined mother's prognosis was poor and that her personal parental judgment was abysmal. Dr. Marvin made numerous recommendations including Dialectical Behavior Therapy (DBT), random drug screening and substance abuse treatment. Although she had not seen mother since her evaluation, Dr. Marvin testified that if mother did not complete these recommendations, she would not be capable of parenting in the foreseeable future.

The Cabinet next called Cabinet social worker Jamie Terrell. She testified that mother has four other children, three of whom are in the permanent custody of a paternal aunt and uncle. Mother's parental rights were voluntarily terminated to the fourth child. She testified as to mother's lengthy history with the Cabinet as

well as her criminal history of drug-related crimes, theft, and flagrant non-support of her children.

Terrell testified that the two children at issue were removed from the home after mother was intoxicated and involved in a domestic violence dispute while the children were in her care. The initial petition leading to the children's removal noted mother's history of substance abuse. That petition was later amended to describe violations of the case plan and the deplorable condition of the home. It further stated that it was unknown if one of the children had been receiving his ADHD medication. The children entered foster care on July 19, 2013, pursuant to an emergency custody order.

Mother and father admitted to neglect and the case was set for disposition on October 13, 2013. Orders were entered requiring mother to cooperate with the Cabinet and complete a substance alcohol abuse assessment; attend parenting classes and substance abuse treatment; complete a psychological examination; complete parenting classes; demonstrate a means to support the children and follow all court orders. Mother was also required to complete a forensic mental health evaluation with Dr. Marvin.

The Cabinet conducted case planning in an effort to reunify the family. Although mother attended initial case planning conferences, after March 2015, she failed to appear for the conferences. A copy of current case plans incorporating Dr. Marvin's recommendations were mailed to her last known address.

Terrell testified that mother had not submitted any proof that she has enrolled in or completed any of Dr. Marvin's recommendations including DBT, substance abuse treatment and a psychiatric assessment with ongoing case management. Although Terrell made mother an appointment with a DBT provider, mother failed to appear. Mother initiated mental services at Communicare but missed three appointments and was discharged from the program. She also missed drug screenings. During the years the children have been in foster care, the only requirement in mother's case plan she met was completion of a parenting class. Terrell testified that because mother had not followed any recommendations of Dr. Marvin, a more recent psychiatric evaluation would not produce different results.

Terrell was unaware of any other services that the Cabinet could offer mother that would result in reunification of the family within the foreseeable future. Terrell identified several barriers to reunification of the family including mother's lengthy substance abuse history, transient lifestyle, lack of stability, numerous paramours, and her unwillingness to acknowledge her fault in the children's abuse and/or neglect.

Terrell testified that mother's visitation with the children had been sporadic. The last time she visited with the children was January 2015 and, despite that Terrell requested mother's cell phone number, she was unable to reach mother and had no contact with mother since February 2015. Aside from providing food at visits and Christmas presents in 2014, mother has not provided any food, clothing, shelter, medical care or education for the children and failed to pay child

support. Terrell testified that the children are doing well in foster care, which is an adoptive placement.

After the close of the Cabinet's case and with no testimony from mother who failed to appear, the matter stood submitted. The Cabinet stated it would tender proposed findings of fact, conclusions of law judgment and orders. Mother's counsel requested and was granted time to decide if he would tender the same documents. Counsel elected to do so.

The parties agree that on June 22, 2016, mother's counsel sent findings of fact, conclusions of law, orders and judgments to the presiding judge by e-mail and mail but not to the clerk and, consequently, the record does not contain those documents. However, mother's proposed findings and conclusions were discussed at a hearing held on September 19, 2016, regarding mother's motion to hold the matter in abeyance and present additional testimony.

Mother appeared at the September 19, 2016 hearing and explained her absence from the termination hearing. She testified that she was aware of the June 13, 2016 trial but that it had "slipped her mind." Finding her reason was not sufficient to warrant further delay in the case that had already been tried, the circuit court denied the motion. The court then allowed all parties until October 3, 2016, to submit any other proposed finding of fact and conclusions of law. On October 3, 2016, the Cabinet submitted its proposed findings of fact and conclusions of law, which the circuit court adopted on the same date. On October 30, 2016, orders were entered terminating mother's parental rights. This appeal followed.

The standard for review in termination of parental rights cases is the clearly erroneous standard found in Kentucky Rules of Civil Procedure (CR) 52.01. *M.P.S. v. Cabinet for Human Resources,* 979 S.W.2d 114, 117 (Ky.App. 1998). If the trial court's decision is supported by substantial evidence on the record it must be affirmed. *Id*. However, because of the parent's constitutional right to parent his or her child, termination is appropriate only when the statutory mandates are met by clear and convincing evidence. *See N.S. v. C. and M.S.,* 642 S.W.2d 589 (Ky. 1982). These statutory mandates are required even when the parent fails to appear for the termination hearing.

KRS 625.090 sets forth the grounds for involuntary termination of parental rights. A trial 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. The trial court must also find the existence of one or more of ten specific grounds set forth in KRS 625.090(2). As pertinent to this appeal, those grounds are as follows:

> (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;
>
> (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; [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.

Mother argues that the trial court failed to make independent findings of fact as required by Kentucky Rules of Civil Procedure (CR) 52.01 regarding the requirements of KRS 625.090 by adopting the Cabinet's proposed findings of fact, and conclusions of law verbatim. CR 52.01 provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" In *Callahan v. Callahan*, 579 S.W.2d 385, 387 (Ky.App. 1979) (citations omitted), the Court expressed disfavor with practice of adopting findings of fact prepared by counsel stating as follows:

> Although we are totally sympathetic to trial judges and fully appreciate the difficulty of trial courts in handling the volume of cases that they must consider, ... we cannot condone the delegation by the trial court of its responsibility to make findings of fact, because based on such findings subsequent conclusions of law and the ultimate judgment results. It is critically important to the litigants to be assured that the decision making process is totally under the control of the trial judge. It is equally important for the appellate courts to be similarly confident if and when they become involved in the judicial process. Although under certain conditions, for purely clerical reasons, the preparation of some

> documents may be delegated to counsel, such a situation should be limited to routine matters and should be conducted under the close scrutiny of the trial court.

Subsequently, our Supreme Court retreated somewhat from the view expressed in *Callahan*.

In *Bingham v. Bingham,* 628 S.W.2d 628 (Ky. 1982), the Court rejected the notion that a trial court is prohibited from adopting proposed findings tendered by a party. *Bingham* teaches absent a demonstration that "the decision-making process was not under the control of the [family court] judge" or "that these findings and conclusions were not the product of the deliberations of the [family court] judge's mind[,]" an order supported by substantial evidence will be affirmed on appeal. *Id*. at 629-30.

Bingham was a marital dissolution action. However, the same rule was applied by our Supreme Court in the context of the termination of parental rights. In *Prater v. Cabinet for Human Resources, Commonwealth*, 954 S.W.2d. 954, 956 (Ky. 1997), the Court clarified that a trial court may adopt a party's proposed findings regardless of whether any substantive corrections or changes are made by the court. The Court held:

> Appellant claims the trial court failed to make independent findings of fact as required by CR 52.01. He bases this allegation on the fact that the trial court adopted the Cabinet's proposed findings of fact without correction or change. The trial court requested both parties to submit proposed findings of fact, which both did. It is not error for the trial court to adopt findings of fact which were merely drafted by someone else.

This Court followed the reasoning of *Bingham* and *Prater* in *M.E.C. v. Commonwealth, Cabinet for Health & Family Servs*., 254 S.W.3d 846, 851 (Ky.App. 2008).

The Supreme Court has not overruled *Bingham* or *Prater*. However, in *Retherford v. Monday*, 500 S.W.3d 229, 232 (Ky.App. 2016), this Court held that while *Bingham* remains the law, our Supreme Court has since returned "to the more rigorous and scrupulous compliance with CR 52.01 as discussed in *Callahan*" in cases involving families and children. The reasoning was based on the Court's decision in *Keifer v. Keifer,* 354 S.W.3d 123 (Ky. 2011), where it held that the statutory requirements for child custody cases found in KRS Chapter 403 and CR 52.01 require that trial courts "include in all orders affecting child custody the requisite findings of fact and conclusions of law supporting its decisions." *Id* at 125. In *Retherford*, the verbatim adoption of a party's findings of fact and conclusions of law was held reversible error. *Retherford*, 500 S.W.3d at 233.

While in *Retherford*, this Court expressed its continued disfavor with the practice of a trial court's adoption a party's proposed findings of fact and conclusions of law in matters involving children, it is not a complete disavow of the holding in *Bingham*. Nor can it be so interpreted. In all cases, "[a]s an intermediate appellate court, this Court is bound by published decisions of the Kentucky Supreme Court." *Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 829 (Ky.App. 2014); Kentucky Supreme Court Rule 1.030(8)(a).

In *Retherford*, the act of adopting the prevailing party's proposed findings of fact and conclusions of law was not itself error. Reversible error was found because the content of those findings of fact and conclusions of law did not accurately reflect the evidence in the custody action as relevant to the statutory requirements. The Court emphasized this point when it expressed specific deficiencies in the findings of fact and conclusions of law:

> Having reviewed the record, we agree with appellant that many concerns indeed exist: the stability of Kyle's living arrangements; his sporadic income; where Daughter would actually be living and attending school if Kyle were the primary residential parent; whether Kyle would, in fact, insure that Daughter receives appropriate medical and dental care and treatment; and the fact that Kyle has no family in Kentucky while April has family and an established support system in Indiana (where both of Kyle's parents also live). These are, however, factors to be addressed independently and conscientiously by the trial court when it reassesses all of the trial testimony and makes its own impartial findings and conclusions on the ultimate substantive issue before it.

Retherford, 500 S.W.3d at 233. The circumstances are not the same in this case.

There was simply no other evidence upon which the trial court could find facts different than those proposed by the Cabinet. Mother did not present any evidence, has not stated how her proposed findings would have differed from the trial court and has not provided a copy of those proposed findings to this Court. Mother only states that in her proposed findings and conclusions of law she requested that her rights not be terminated and the children be returned to her over a six month period. In other words, she does not dispute the facts found but argues

that a different conclusion should be reached from those facts. We will not remand this case to the trial court for the sole purpose of authoring the same findings of fact and conclusions of law. The question is whether there was clear and convincing evidence to support the termination of parental rights.

Mother argues that despite Dr. Marvin's detailed findings, Dr. Marvin did not make the required findings under KRS 625.090. The defect in her argument is that those findings were required by *the trial court* based on the evidence and not by Dr. Marvin, who was a witness. She also attacks the reliability of Dr. Marvin's testimony and report because her evaluation was conducted in April 2014. Again, we find no merit in her contention. Dr. Marvin testified that unless mother completed the recommendations outlined in her report, the children would remain at unacceptable risk for future acts of abuse and/or neglect and reunification or visitation would not be recommended. The undisputed evidence was that mother did not complete those recommendations and, therefore, there is no reason to believe the diagnosis, prognosis and opinions given by Dr. Marvin in 2014 would be different if a more recent evaluation was performed.

Mother also attempts to discredit Terrell's testimony arguing that the Cabinet was "prejudiced" against her and that the termination proceeding was motivated by that prejudice. While Terrell agreed that mother felt the Cabinet was being unfair, the evidence was overwhelming that mother's long history of substance abuse, criminal acts, poor judgment, inability to parent her children and

failure to take the reasonable actions required by the Cabinet to be reunited with her children, prompted the Cabinet to seek termination.

The trial court found that the children had been adjudged abused or neglected as defined by KRS 600.020(1) by the Larue District Court and there was clear and convicting evidence that termination was in the children's best interests. It further found that grounds existed under KRS 625.090(2)(a),(e), (g) and (j). "Under the language of KRS 625.090(2), the existence of only one of the grounds in that section needs to be proven by clear and convincing evidence." *Commonwealth, Cabinet for Health & Family Servs. v. T.N.H.,* 302 S.W.3d 658, 663 (Ky. 2010).

Regarding the specific statutory factors under KRS 625.090(2), there was clear and convincing evidence to support the trial court's findings. Although abandonment is not defined, it has been defined by case law. "[A]bandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." *O.S. v. C.F.,* 655 S.W.2d 32, 34 (Ky.App. 1983). The evidence clearly supports the family court's finding that mother abandoned child, including her lack of contact with the children since January 2015, failure to provide financial support since the children entered foster care, and failure to complete steps toward reunification. KRS 625.090(2)(a).

The trial court made additional findings regarding the grounds set forth in KRS 625.090. The requirements of KRS 625.090(2)(e) were clearly met based on

Dr. Marvin and Terrell's testimony that mother had not or was not substantially capable of providing continuous essential parental care and protection for more than six months and there was no reasonable expectation of improvement. Again, mother's failure to seek and complete treatment for her mental health and substance abuse weighed heavily in reaching this conclusion. Moreover, there was clear and convincing evidence that for reasons other than poverty alone, for a period of not less than six months, mother has not provided adequate care, supervision, food clothing, shelter, education and medical care for the children. KRS 625.090(2)(g). She had not done so since July 2013, when the children were placed in foster care. Finally, the children had been in foster care for well over fifteen of the most recent twenty-two months preceding the filing of the Cabinet's petition. KRS 625.090(2)(j).

Mother has a lengthy history with the Cabinet and mother has not complied with the case plans developed, including receiving treatment for her mental health and substance abuse. KRS 625.090(3). Termination was in the children's best interests.

Mother's final argument is that the trial court abused its discretion when it denied her request to hold its ruling in abeyance and allow her to present testimony. Our standard of review is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky.App. 2001). Mother contends that any further delay caused by allowing her to testify would be inconsequential.

Although mother's constitutional right to parent her children is fundamental, the legislature has recognized the need for children to have stability and make a child's stay in foster care as brief as possible. *Cabinet for Families & Children v. G.C.W.*, 139 S.W.3d 172, 177 (Ky.App. 2004); KRS 625.090(2)(j). By the time of the hearing, the children had been in foster care for almost three years, yet mother failed to make those necessary changes or, most telling of her failure to take steps toward reunification, to attend the termination hearing. We cannot say the trial court's denial of mother's motion to hold its ruling in abeyance and permit time to present additional evidence was an abuse of discretion when her only reason for not attending was that she forgot.

Based on the foregoing, the judgments and orders of the Larue Circuit Court are affirmed.

ALL CONCUR

BRIEFS FOR APPELLANT:

Ronald D. Mather
Hodgenville, Kentucky

BRIEFS FOR APPELLEE, COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES:

Jennifer R. Hall
Leitchfield, Kentucky