

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001900-ME

K. M. D. R.¹

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 17-AD-00127

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND
R. R. R., JR., A CHILD

APPELLEES

AND

NO. 2017-CA-001901-ME

K. M. D. R.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 17-AD-00128

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND K. P. R.,
A CHILD

APPELLEES

AND

NO. 2017-CA-001902-ME

¹ Pursuant to the policy of this Court, to protect the privacy of minor children, we refer to the parties in termination of parental rights (TPR) cases only by their initials.

K. M. D. R.

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 17-AD-00129

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND K. L. R.,
A CHILD

APPELLEES

AND

NO. 2017-CA-001911-ME

R. R. R.

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 17-AD-00127

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND R. R. R.,
JR., A CHILD

APPELLEES

AND

NO. 2017-CA-001912-ME

R. R. R.

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 17-AD-00128

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND K. P. R.,
A CHILD

APPELLEES

AND

NO. 2017-CA-001913-ME

R. R. R.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 17-AD-00129

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND K. L. R.,
A CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, NICKELL, AND SMALLWOOD, JUDGES.

NICKELL, JUDGE: K. M. D. R. (“Mother”) and R. R. R. (“Father”) have appealed from judgments of the Kenton Circuit Court, Family Division, ordering involuntary TPR to their three minor children, R. R. R., Jr., K. P. R. and K. L. R. Custody of the children was awarded to the Cabinet for Health and Family Services (“CHFS”) with authority to place the children for adoption. Following a careful review, and finding no error, we affirm.

The minor children were removed from Mother and Father and placed in the care of CHFS on December 28, 2015, following reports of domestic abuse. Subsequent investigations revealed a pattern of substance abuse by the parents.

The children were adjudged as neglected on February 2, 2016. Case plans were subsequently developed for the parents in an effort to reunite the family.

Mother was asked to maintain stable housing and employment, take drug screens, complete mental health and substance abuse assessments, and maintain sobriety. Mother was able to maintain housing and employment but failed to complete the remaining portions of her plan. She did not take advantage of services to address her substance abuse issues, failed to consistently take drug screens, and had multiple positive drug screens when she did appear for testing.

Father's plan tasked him with maintaining stable housing, completing mental health and substance abuse assessments, drug screening, participating in batterer's intervention, and completion of an in-patient substance abuse program. Father was compliant with most portions of his plan, but he failed to complete counseling, get a substance abuse assessment or finish an in-patient program. Father frequently tested positive for illegal substances. Nevertheless, the children were returned to Father's care on March 10, 2017. Unfortunately, within two weeks of the children's return to the home, Father had two positive drug screens and was arrested for driving under the influence, resulting in the children's removal less than one month after the attempted reunification. Based on these events, CHFS filed neglect petitions and the children were adjudged as neglected on May 9, 2017.

On July 17, 2017, petitions for involuntary TPR were filed for all three children. On October 13, 2017, the trial court convened a final adjudication

hearing on the termination petitions. The court took testimony from Mother, Father, the children's paternal grandmother, and the family's social worker. Shortly before the scheduled termination hearing, Mother was incarcerated for a probation violation² due to a positive drug screen. She admitted using cocaine and heroin since 2013. Mother admitted her failure to pay court-ordered child support during the pendency of the proceedings. During the hearing, Father admitted using heroin as recently as four days prior. Both parties admitted their failure to complete substance abuse programs. Neither parent had attended physician visits or school meetings and had failed to inquire as to the basic needs of the minor children. All three children were thriving in foster care and all were in adoptive homes. Additional facts, as set forth above, were also elicited during the hearing.

Following the evidentiary hearing, the trial court concluded the children were neglected pursuant to KRS³ 600.020(1) and had previously been adjudicated as neglected. In addition, the trial court found the children had been in foster care for nineteen of the prior twenty-two months; Mother and Father had abandoned the children for more than ninety days; both had failed to provide essential parental care and protection to the children for a period of more than six months; for reasons other than poverty alone, Mother had failed to provide essential food, clothing, shelter, medical care and education for the children; no reasonable expectation of improvement in parental care was foreseeable; Mother

² Mother was on probation following a conviction for possession of heroin.

³ Kentucky Revised Statutes.

and Father have criminal, substance abuse and domestic violence histories which pose a risk to any child in their care; neither had paid a reasonable portion of substitute physical care and maintenance for the children; and CHFS had provided all reasonable efforts and services to reunify the family. Based on these findings, the trial court concluded TPR was in the children's best interests and transferred custody to CHFS with authority to place the children for adoption. Written orders comporting with these rulings were entered on October 20, 2017. The separate appeals were consolidated for treatment in a single Opinion of this Court.

KRS 625.090(1) provides, in pertinent part, a circuit court may involuntarily terminate all parental rights to a child if it finds by clear and convincing evidence the child is now an abused or neglected child as those terms are defined by statute or has previously been adjudicated as such by a court of competent jurisdiction, and TPR is in the child's best interests. The court must also find by clear and convincing evidence the existence of at least one of ten grounds listed for termination set forth in KRS 625.090(2)(a)-(j).

Our review of actions involving TPR is confined to the clearly erroneous standard set forth in CR⁴ 52.01, which is based on clear and convincing evidence. *W.A. v. Cabinet for Health and Family Services*, 275 S.W.3d 214, 220 (Ky. App. 2008). As this Court has previously stated, clear and convincing proof does not mean uncontradicted proof. *Id.* Rather, it is sufficient if there is proof of a “probative and substantial nature carrying the weight of evidence sufficient to

⁴ Kentucky Rules of Civil Procedure.

convince ordinarily prudent-minded people.” *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d 420, 423-24 (Ky. App. 1986) (quoting *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)). “In a trial without a jury, the findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be ‘clearly erroneous.’ [CR] 52.01; *Stafford v. Stafford*, [618 S.W.2d 578 (Ky. App. 1981)]. This principle recognizes that the trial court had the opportunity to judge the witnesses’ credibility.” *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998).

A trial court has broad discretion in determining whether a child’s circumstances satisfy the definition of an abused or neglected child and whether such abuse or neglect is sufficient to warrant TPR. *See id.*, at 38 (citing *Department of Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977)). We will not substitute our judgment for that of the trial court unless there is no substantial evidence in the record to support such a finding. *V.S.*, 706 S.W.2d at 424. We review the application of the law to the facts *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Mother and Father do not contest the trial court’s findings the children had previously been adjudicated as neglected, were currently at risk of again being so adjudicated if returned to their care, or that multiple grounds for termination under KRS 625.090(2) were proven. Rather, both challenge the trial court’s finding TPR would be in the children’s best interests. They further contend clear and convincing evidence did not support the trial court’s ruling; essentially Mother

and Father disagree with the trial court's assessment of the evidence adduced at the hearing.

The facts appearing on the face of the record contradict the parents' position. Substantial evidence supporting the trial court's decision is patent. Considerable testimony was presented regarding the reasoning for removing the children and the significant familial shortcomings at that time; the history of CHFS intervention with the family including prior neglect allegations, petitions and adjudications; and the failure of the parents to avail themselves of the many resources offered in the nearly two years the children were out of their care. Nothing in the record suggests anything other than the children are thriving in their current placements, having advanced significantly since being separated.

Although Mother and Father disagree with the trial court's decision, there was sufficient testimony adduced at trial to support a finding TPR was in the children's best interests. Even in light of conflicting testimony and differences of opinion of the parties, we will not substitute our decision for that of a trial court. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Therefore, as the evidence adduced at the termination hearing was sufficient to support the trial court's findings of neglect and to terminate both parties' parental rights, there was no clear error and we will not disturb the judgment on appeal. CR 52.01. Accordingly, we do not believe the trial court's decision to grant TPR and place the children in the permanent custody of CHFS was in error as a matter of law.

Finally, we comment briefly on Mother's suggestion the trial court improperly relied on her incarceration in reaching its decision. As correctly noted by Mother, Kentucky law is clear that incarceration alone cannot support a finding of abandonment justifying TPR. *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). Incarceration is, however, a factor to be considered by the trial court when undertaking an analysis of the parent's conduct under KRS 625.090(2). *Id.* In the instant case, the trial court's stated reasons for granting TPR as to Mother were her refusal to complete the tasks on her case plan, her significant substance abuse issues, her failure to seek treatment or otherwise adequately address her drug problem, and the continued risk of domestic abuse. Although the trial court mentioned Mother's incarceration,⁵ it was not, as Mother suggests, the primary basis on which the court relied. The record contains an abundance of other evidence supporting the trial court's decision and the plain language of the judgments does not indicate an inappropriate or sole reliance on Mother's incarceration as a basis for granting TPR. There was no error.

Therefore, for the foregoing reasons, the judgments of the Kenton Circuit Court, Family Division, are AFFIRMED.

ALL CONCUR.

⁵ Interestingly, Mother was not incarcerated until September 2017, some two months after the TPR petitions were filed.

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