RENDERED: NOVEMBER 2, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000165-ME

M.H., THE NATURAL MOTHER OF
J.O.W., JR., A MINOR CHILD — APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE HEATHER FRYMAN, JUDGE
ACTION NO. 13-AD-00022

A.T AND C.J.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, M.H., appeals from an order of the Pendleton Circuit Court terminating her parental rights to J.O.W., Jr., and granting the adoption of said minor child to C.J.C. and A.T. Finding no error, we affirm.

M.H. is the biological mother of J.O.W., Jr., born August 15, 2010. In February 2012, a dependency, neglect and abuse action was filed in the Pendleton

Family Court against M.H. and the biological father of J.O.W., Jr. The petition alleged that J.O.W., Jr. was at risk of neglect because of both parents' drug use. In August 2012, the Cabinet recommended that J.O.W., Jr., be placed in the temporary custody of his paternal aunt, C.J.C., and her husband, A.T. In April 2013, the family court granted C.J.C. and A.T. permanent custody of J.O.W., Jr., citing that neither parent had made progress toward completing his or her plans with the Cabinet.

Thereafter, in October 2013, C.J.C. and A.T. filed a petition for adoption. On August 27, 2015, the family court held a termination of parental rights and adoption hearing. Thereafter, on October 7, 2015, the family court entered findings of fact and conclusions of law terminating both parents' parental rights, as well as a judgment of adoption. With respect to M.H.,[1] the family court concluded,

> The [biological mother, M.H.] failed to present any testimony contradicting the juvenile record wherein she failed to attend drug screens or receive an assessment or treatment for her drug dependency issues. [M.H.] has abandoned the minor child for a period of not less than 90 days prior to her incarceration, allowed emotional harm to the minor child and has exhibited conduct proving her incapable of caring for the minor child with

[1] We only address the family court's rulings concerning M.H. Although the biological father was a party to the adoption petition, he did not participate in the termination of parental rights/adoption hearing because he was apparently trying to avoid being apprehended on an arrest warrant. The biological father did not appeal the family court's 2015 ruling and, as such, the family court on remand determined that the matter was resolved against him.

> no expectation of significant improvement. The legal grounds to terminate [her parental rights] under KRS 625.090 have be[en] proven.

M.H. then appealed the family court's decision to this Court. On April 28, 2017, a panel of this Court reversed the family court's decision and remanded the matter for further proceedings. *M.H., the Natural Mother of J.O.W., Jr., a minor child v. A.T. and C.J.C.*, 2015-CA-001685-ME, 2017 WL 1533810 (April 28, 2017). In so doing, we concluded that "M.H. was not given due process because the family court's findings of fact and conclusions of law, upon which its judgment of adoption was based, were woefully inadequate." (Slip op. pg. 5). Citing to KRS 199.502(1) and (2), we determined that the family court failed to set forth sufficient factual findings to demonstrate that there was clear and convincing evidence to support its decision to terminate M.H.'s parental rights. "Consequently, the family court erred in granting the adoption petition . . . ." (Slip op. pg. 9).

Subsequently, on September 27, 2017, the family court held a supplemental hearing during which the parties were permitted to introduce additional evidence. Thereafter, on December 15, 2017, the family court entered its amended findings of fact and conclusions of law again terminating M.H.'s parental rights and granting the adoption. With respect to M.H., the family court made the following findings:

8. That the Respondent/Mother, [M.H.], is the mother of the minor child. During the DNA case, Respondent/Mother failed to screen regularly with the Cabinet, and did not screen at all, even though requested between November 2012 and April 2013, when temporary custody was granted. When she was screening, Respondent produced only a few clean screens and frequently did not appear when requested. Respondent failed to keep in contact with the Cabinet during the DNA case, making it difficult for the Cabinet to contact [her]. Respondent was not able to obtain a permanent residence prior to April 2013, and reported to the Cabinet that she was homeless. During the DNA case, Respondent reported to the Cabinet that she was employed and received disability for a seizure disorder but did not provide financial assistance to the Petitioners on behalf of the child. Respondent visited with the child infrequently, despite being granted weekly visits with the child. Respondent appeared for at least one visit while seeming to be under the influence, according to the DNA record. After the Petitioners were given permanent custody in April 2013, the Order in the DNA case permitted the Respondent to have visits at the Petitioners' discretion. Respondent asked Petitioners for visits, and Petitioners informed Respondent she could begin to have visits if she would take two consecutive drug screens for them which were clean. Respondent never submitted evidence of any drug screens to Petitioners after April 2013.

Respondent has not seen and/or visited with the child since April, 2013. Respondent was incarcerated in October 2013 for what she thinks was approximately 2 ½ months. She was then incarcerated in August 2014 and released in September 2016. Respondent has completed IOP and the PORTAL program, however this occurred following the hearing in October, 2015. Respondent admitted that between April 2013 and August 2014 she made little or no effort to try and see the child or obtain custody of the child because she was still actively

> engaged in drug use. Respondent has never paid any financial support, whether court ordered or otherwise, to the Petitioners since they obtained custody of him in August 2012.
>
> The Court finds that Respondent has thus continuously or repeatedly failed or refused to provide, or been substantially incapable of providing parental care and protection for the child, and that there is no reasonable expectation of improvement in parental care and protection 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 immediate foreseeable future considering the age of the child. Further, the Court finds that her failure to exercise visitations and her pattern of criminal behavior, evidence by her multiple incarcerations, are evidence that the child was willfully abandoned by the Respondent for a period in excess of ninety (90) days.

M.H. has again appealed to this Court as a matter of right.

"An adoption without the consent of a living biological parent is, in effect, a proceeding to terminate that parent's parental rights." *M.B. v. D.W.,* 236 S.W.3d 31, 34 (Ky. App. 2007) (citation omitted); *see also Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Thus, by entering the judgment of adoption in this case, M.H.'s parental rights were involuntarily terminated. Our standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01, based upon clear and convincing evidence. The findings of the family

court will not be set aside unless there exists no substantial evidence in the record to support the findings. Clear and convincing evidence does not necessarily mean uncontradicted evidence. *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014). Instead, "[i]t is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Id.* (citing *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998)).

M.H. argues that the family court erred in finding that termination of her parental rights was warranted. M.H. contends that the family court essentially ignored all of the supplemental evidence pertaining to her circumstances since being released from incarceration. While we agree that the family court did not consider the evidence of M.H.'s rehabilitative efforts, we are compelled to conclude that it properly determined that M.H. had abandoned J.O.W., Jr., for a period in excess of ninety days.

Our court system holds parental relationships in the highest esteem and has found them deserving of the utmost protection. The United States Supreme Court has held that "[t]he rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.'" *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (internal citations omitted). Accordingly, "[t]he

integrity of the family unit has found protection in the Due Process Clause . . ., the Equal Protection Clause . . ., and the Ninth Amendment." *Id.* In Kentucky, our appellate courts have reiterated the special protections afforded to parental rights under the law. *See Cabinet for Health and Family Service. v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006) ("Parental rights are so fundamentally esteemed under our system that they are accorded Due Process protection under the Fourteenth Amendment of the United States Constitution."). Specifically referring to the involuntary termination of parental rights, a panel of this court has stated that "[t]ermination can be analogized as capital punishment of the family unit because it is so 'severe and irreversible.'" *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 427 (Ky. App. 2015) (citing *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

KRS 199.502(1) provides, in relevant part:

> (1) Notwithstanding the provisions of KRS 199.500(1), 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:
>
> (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;
> …
>
> (2) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision either:
>
> (a) Granting the adoption without the biological parent's consent; or
>
> (b) Dismissing the adoption petition, and stating whether the child shall be returned to the biological parent or the child's custody granted to the state, another agency, or the petitioner.

Although not explicitly citing to the statute, the family court herein concluded that substantial evidence existed under subsections (1)(a), (e), and (g) to support termination of M.H.'s parental rights.

We agree with M.H. that the family court apparently did not believe that it could consider any proof that pertained to the time period after the initial 2015 hearing. Such is evidenced by the fact that although a brief reference is made

to the programs M.H. had completed during and since her incarceration, that family court noted that such "had occurred following the hearing in October 2015." As a result, the family court completely ignored M.H.'s extensive testimony as to the programs she had completed and the progress she had made since the first hearing. It was uncontradicted that at the time of the supplemental hearing, M.H. had been drug free for several years, had not had any parole or probation violations, had appropriate housing, and was receiving disability income. Notwithstanding, the family court concluded that M.H. had

> continuously or repeatedly failed or refused to provide, or been substantially incapable of providing parental care and protection for the child, and that there is no reasonable expectation of improvement in parental care and protection 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 immediate foreseeable future considering the age of the child.

In reversing the family court in 2017, this Court did not remand the matter for further findings related solely to the time period before the family court's first hearing. Rather, we concluded that the family court's findings of fact did not support termination of M.H.'s parental rights. After reviewing the evidence offered at the supplemental hearing, we believe that the family court erred in finding that "there [was] no reasonable expectation of significant

improvement in [M.H.'s] conduct in the immediate foreseeable future considering the age of the child." It is obvious that the family court erroneously based that conclusion solely upon evidence presented at the 2015 hearing, without consideration of any evidence presented during the 2017 hearing.

Notwithstanding our opinion that the evidence presented at the supplemental hearing did not support a finding under KRS 199.502(1)(e) or (g), we are nonetheless compelled to conclude that the evidence as a whole supported a finding that M.H. abandoned J.O.W., Jr., for "a period of not less than ninety (90) days." KRS 199.502(1)(a). There is no dispute that M.H. has not seen J.O.W., Jr., since permanent custody was granted in April 2013. At that time, J.O.W., Jr., was only two and one-half years' old. M.H. testified that she was incarcerated in October 2013 until sometime in March 2014. She was again reincarcerated in August 2014 for a little over two years. Unquestionably, "incarceration is just one factor to be considered when determining whether to terminate parental rights." *M.L.C. v. Cabinet for Health and Family Services*, 411 S.W.3d 761, 766 (Ky. App. 2013). However, as the family court noted, M.H. conceded that between April 2013 and August 2014, even when she was not incarcerated, she made little to no effort to see J.O.W., Jr., because she was still actively engaged in drug use. Thus, even without consideration of the periods of M.H.'s incarceration, the record

clearly supported a finding that she had abandoned J.O.W., Jr., for a period not less than ninety days.

Generally, "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." *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983); *see also R.P., Jr.*, 469 S.W.3d at 427. Citing to *H.M.R. v. Cabinet for Health and Family Services*, 521 S.W.3d 221 (Ky. App. 2017), M.H. argues that although she could have done more and been more proactive, the family court erred in finding that her actions rose to the level of willful abandonment. M.H. claims that she attempted to visit and call J.O.W., Jr., but that C.J.C. would not allow her to have any contact. Indeed, C.J.C. admitted that M.H. had shown up at her office wanting to schedule a visit but that she would not agree to such. C.J.C. further acknowledged that she hung up on M.H. if she called to speak with J.O.W., Jr., and that she returned M.H.'s letters with a note telling her not to contact the family again. However, the record reveals that M.H.'s efforts all occurred shortly before and shortly after the first termination hearing and judgment of adoption. By that point in time, M.H. had already abandoned J.O.W. Jr., for a period in excess of ninety days. Quite simply, M.H.'s efforts were too little too late.

As previously noted, the standard of clear and convincing evidence does not mean uncontradicted evidence. *W.A. v. Cabinet for Health and Family*

Services, 275 S.W.3d 214, 220 (Ky. App. 2008). It was the prerogative of the family court to determine the credibility of the witnesses and the weight of the evidence. *R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998). This Court sympathizes with M.H. and certainly commends her for the positive changes she has made in the last several years to turn her life around. However, the fact remains that M.H. has had no part in J.O.W., Jr.'s, life for over five years. C.J.C. testified that J.O.W., Jr., essentially does not know who M.H. is and that he calls C.J.C. and A.T. "mommy" and "daddy." While we may have decided the matter differently, we believe that the family court's judgment is amply supported by substantial evidence in the record. Accordingly, we may not disturb it.

For the reasons set forth herein, the judgment of the Pendleton Family Court is affirmed.

COMBS, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND WILL NOT FILE A SEPARATE OPINION.

BRIEF FOR APPELLANT:

J.D. Fleming
Lexington, Kentucky

BRIEF FOR APPELLEE:

Mark W. Wegford
Stacey Sanning
Alexandria, Kentucky

Sue M. Lake
Cynthiana, Kentucky