

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000422-ME

B.E.

APPELLANT

v.

APPEAL FROM LAWRENCE FAMILY COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 14-AD-00003

T.W.; CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY;
AND M.O.H.E., A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: B.E. (Appellant) appeals from a judgment of the Lawrence Family Court terminating her parental rights to her biological son, M.O.H.E. (Child), and granting the petition of Child's paternal grandmother, T.W. (Grandmother), to adopt Child without her consent. Appellant contends

Grandmother failed to prove grounds for termination of her parental rights by clear and convincing evidence. After careful review, we affirm.

In August 2009, Appellant telephoned Grandmother that the police and a social worker were at her home and requested Grandmother take possession of Child. He has resided with Grandmother ever since. The record contains little information concerning Appellant's history from 2009 to 2011. However, she was incarcerated sometime in 2011 and was not released until December 2013. In February 2014, Grandmother filed a petition for adoption and involuntary termination of parental rights. In response, Appellant filed a motion for visitation, stating she was currently employed, stable, and "loves her son very much and misses him dearly." Three months later, the Cabinet for Health and Family Services (Cabinet) filed a report recommending Appellant begin having visitation with Child. However, the family court never ruled on the motion for visitation, and Grandmother took no action on the petition for adoption and involuntary termination for over three years.

In January 2017, Appellant received an order for supervised visitation. The visitation was to occur at Grandmother's residence every other Saturday from 9:00 am to 5:00 p.m. In July 2017, Appellant moved to dismiss the petition for involuntary termination of parental rights, citing Grandmother's failure to prosecute the case. Grandmother filed a response stating she delayed adoption to give Appellant an opportunity to establish a relationship with Child, but Appellant's inconsistent exercise of her visitation rights had caused Child

psychological harm. Accordingly, she requested the family court schedule a final hearing for her petition for adoption and involuntary termination of parental rights. After granting Appellant multiple continuances, a final hearing was held on December 11, 2017. Child's biological father filed an entry of appearance but did not appear at the final hearing.

At the beginning, Appellant moved for another continuance so the family court could first rule on her pending motion for custody. The family court denied the motion, and the hearing continued. Grandmother testified that Child had resided with her since he was five weeks old. During this time, Grandmother provided for all of Child's needs. She also testified that she was employed, had no difficulty providing for Child financially, and that her home had been inspected and approved for placement by social services. Grandmother testified she never received child support directly from Appellant but did receive a monthly check from the state. However, this amount was not sufficient to meet all of Child's needs. She alleged Appellant never contributed to Child's care beyond occasionally purchasing toys and clothes. Grandmother also described a deep bond with Child and alleged she was the only one who assisted him with his school work and extracurricular activities. She described Child as her "whole life."

Grandmother testified that for a period of time she permitted Appellant to enjoy unsupervised visitation with Child on the weekends. Despite this permission, Grandmother alleged Appellant failed to exercise any visitation from December 2015 to January 2017 except for a single visit in June 2016.

Grandmother further testified that even after the family court entered an order permitting supervised visitation, Appellant frequently did not appear on the scheduled dates. When Appellant did attempt to exercise visitation, Grandmother alleged Appellant would arrive at her home without notice and outside the times provided in the family court's order. Grandmother denied ever preventing Appellant from visiting Child.

Grandmother was also cross-examined on her relationship with her son, B.G., who she conceded was a drug addict. Grandmother explained she allowed B.G. to visit Child and admitted B.G. lived in her home for a period of time. However, Grandmother testified B.G. did not live with her at the time of the hearing and that Child had never been exposed to drug use.

Appellant testified that she loved Child and wanted to keep her parental rights. She claimed she paid \$60 to \$75 a month in child support¹ and was employed part-time cleaning houses at the time of the hearing. However, Appellant admitted she was in arrears on her child support. When asked about her inconsistent exercise of her visitation rights, Appellant explained her unsupervised visits with Child ceased after Child made an "allegation" against her other son, C.E. It was never explained what C.E. allegedly did to Child.

Appellant was also cross-examined on her failure to visit Child following the family court's January 2017 order granting her supervised visitation. Appellant admitted to missing scheduled visits but alleged Grandmother took steps

¹ It is unclear to whom Appellant made these payments.

to frustrate her attempts to see Child, such as refusing to answer her phone calls. Appellant conceded she could not provide evidence to support this allegation. However, she alleged she notified her attorney Grandmother was obstructing her visitation efforts, which she believed was the only action she could take to enforce the family court's January 2017 order. The family court also interviewed child in chambers with counsel present. Child stated he wanted to stay with Grandmother but enjoyed visiting Appellant, who he claimed he had not seen in months.

In a written order, the family court incorporated reports from the Cabinet and Child's guardian *ad litem* recommending the family court grant Grandmother's petition for adoption. The family found Child had been abused and neglected, as defined in KRS 600.020(1), and that three of the statutory grounds for termination enumerated under KRS 625.090(2) existed. The family court also concluded termination of Appellant's parental rights would be in Child's best interest given Grandmother had acted as his mother for nearly his whole life, especially in contrast with Appellant's sporadic visitation. It therefore granted Grandmother's petition for adoption and involuntary termination of parental rights. This appeal follows.

“An adoption without the consent of a living biological parent is a proceeding to involuntarily terminate that parent's parental rights.” *S.S. v. Commonwealth, Cabinet for Health and Family Services*, 537 S.W.3d 834, 836 (Ky. App. 2017). KRS² 625.090 provides that parental rights may be involuntarily

² Kentucky Revised Statutes.

terminated only if the court finds by clear and convincing evidence that (1) the child is abused or neglected, as defined under KRS 600.020(1); (2) termination is in the child's best interest, and (3) the existence of one or more of the ten statutory grounds for termination exist. In this case, the following statutory grounds for termination were cited by the family court:

(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[.]

KRS 625.090(2). On appeal, Appellant argues the family court committed reversible error by finding clear and convincing evidence warranted termination because she testified to doing everything possible to see Child despite Grandmother's efforts to frustrate visitation. We disagree.

“Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people.” *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934). Thus, we review a termination of parental rights action under the clearly erroneous standard in CR³ 52.01, and the trial court’s findings will not be disturbed unless no substantial evidence exist in the record to support its findings. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). Accordingly, the trial court has a great deal of discretion in determining whether termination is warranted. *Id.*

Grandmother testified that Appellant’s contribution to Child’s care was limited to occasionally purchasing him toys and clothes. Appellant did not dispute this testimony, but contended she paid nominal amounts of child support. Grandmother also testified that she was the only person who assisted Child at school and in his educational activities. Conversely, Appellant did not produce evidence she provided anything that could be considered “essential parental care and protection” after Child was placed in Grandmother’s care. Nor did she controvert the evidence that her visitation with Child was, at best, sporadic, often with several months passing between visits. Although Appellant blamed her lack of visitation on Grandmother’s chicanery, “judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court.”

³ Kentucky Rules of Civil Procedure.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003). Thus, sufficient proof was presented for the family court to find by clear and convincing evidence that grounds for termination existed under KRS 625.090(2)(a), (e), and (g).

Appellant does not contest the family court's finding Child was abused and neglected, as defined by KRS 600.020(1), and that termination of her parental rights was in his best interest. Even if she did, we would be compelled to hold there was sufficient evidence to support these findings. Grounds for finding a child abused or neglected exist when a parent "[a]bandons or exploits the child" or "[c]ontinuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child." KRS 600.020(1)(a)(4), (7). Appellant's sporadic visitation and Grandmother's testimony that she provided for all of Child's needs since Appellant placed him in her care provided sufficient evidence for the family court to find Child abused or neglected. The family court's finding that termination of Appellant's parental rights was in Child's best interests was supported by the undisputed testimony that Grandmother acted as Child's parent while Appellant remained only a sporadic presence in his life.

Appellant also alleges she suffered substantial prejudice when the family court denied her requested continuance. However, she does not explain how the result of the termination hearing would have been different had the family court granted a continuance. An appellant arguing a trial court should be reversed for denying a requested continuance must make a showing of identifiable

prejudice. *Guffey v. Guffey*, 323 S.W.3d 369, 372 (Ky. App. 2010). Having failed to make one, Appellant has not provided grounds to reverse the order of the family court.

Based on the foregoing, the order of the Lawrence Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Howe E. Baker
Hager Hill, Kentucky

BRIEF FOR APPELLEE:

Adam S. O'Bryan
Paintsville, Kentucky