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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001729-ME

E.D.B

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TRACI H. BRISLIN, JUDGE
ACTION NO. 18-AD-00040

COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH & FAMILY SERVICES; AND J.M.,
A MINOR CHILD

APPELLEES

NO. 2018-CA-001730-ME

E.D.B

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TRACI H. BRISLIN, JUDGE
ACTION NO. 18-AD-00041

COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH & FAMILY SERVICES; AND J.R.M.,
A MINOR CHILD

APPELLEES

AND
NO. 2018-CA-001731-ME

E.D.B

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TRACI H. BRISLIN, JUDGE
ACTION NO. 18-AD-00042

COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH & FAMILY SERVICES; AND S.J.M.,
A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: This is a case concerning the termination of parental rights to three minor children. Mother appeals from orders of the Fayette Circuit Court terminating her parental rights to her three children. After our review, we affirm.

Appellant, E.D.B. (Mother), and J.M. (Father)¹ are the biological parents of the three minor children: (1) J.R.M., a female born on July 30, 2011;

¹ Father is not a party to this appeal.

(2) J.M., a male born on February 7, 2015; and (3) S.J.M., a female born on February 21, 2017.

In May 2013, the Cabinet for Health and Family Services became involved after Mother filed a domestic violence petition against Father. Mother subsequently tested positive for marijuana, and she self-reported that she was enrolled in a suboxone clinic. In June 2013, the Cabinet filed a non-removal neglect petition against Father. Mother retained custody of J.R.M. (the only child as of that date). A no-contact domestic violence order (DVO) was entered against Father effective until July 2014. Mother was given a prevention plan regarding domestic and substance abuse, which she completed.

In July 2013, another incident of domestic violence occurred. J.R.M. was removed and placed with her maternal grandfather because of concerns that the child had been present during that incident. Mother successfully completed her case plan, and J.R.M. was returned to her custody on December 2, 2013.

On February 7, 2015, J.M. was born. The Cabinet received a referral because Mother was positive for suboxone. She had a prescription for it and was cooperative. Mother named Father as the father of J.M. -- notwithstanding the fact the no-contact DVO was still in place when the child was conceived. Another referral to the Cabinet was made in May 2015 because J.M. was diagnosed with

failure to thrive. Again, Mother was cooperative. The Cabinet intended to put in-home services in place, but then it received yet another referral.

In July 2015, police responded to Mother's home after she left J.R.M. and J.M. at home alone while she went to a nearby Speedway. Mother was charged with two counts of endangering the welfare of a minor. She subsequently pled guilty to an amended charge of first-degree disorderly conduct.

The Cabinet obtained emergency custody of the children. On July 27, 2015, Mother was given a case plan. On August 20, 2015, the children were adjudged to be neglected. On September 27, 2015, the children were committed to the Cabinet's custody.

Mother's initial progress with the case plan was slow. In January 2016, the Cabinet requested a Comprehensive Assessment and Training Services Program (CATS) assessment.² In March 2016, the CATS representative was unsure as to whether the assessment could work with the family because the parents were not making much progress on their case plans. However, Mother's progress improved, and CATS advised that they would see Mother and the children in August 2016. By the time of the Cabinet's July 6, 2016, review report, Mother had become compliant with each of the Cabinet's recommendations.

² University of Kentucky, Center on Trauma and Children.

The CATS assessment was completed in November 2016. The report stated:

Given the meaningful progress [Mother] has made on her case plan and the recent work she has completed with her therapist to improve her functioning, CATS recommends an extended case plan to mitigate the remaining caregiver risk to work toward safe reunification.

(Emphasis omitted.)

The CATS report set forth a case plan and cautioned Mother that she would need to show significant improvement within the next three months. It also advised that if Mother did not comply, if she began to show consistent problems with mental health and visitation attendance, or if she failed a drug test, efforts to return the children should be discontinued and permanent placement would become a priority.

The Cabinet's report for a November 30, 2016, review requested that Mother work through tasks recommended by the CATS assessment as follows:

1. [Mother] will need to be open and honest about her emotional well-being and acknowledge her ability to maintain a lifestyle of recovery and prevent relapse is closely related to her mental health. Engage in mental health services that can assist her addressing the underlying reasons related to her substance abuse issues.
2. Demonstrate her ability to make honest appraisals of the caregiving challenges she will likely encounter while being in a single parent caregiving role of two vulnerable children. She will need to communicate this with

providers and develop a viable plan to address and overcome these barriers.

3. Continue to be compliant with drug screening and suboxone, and work close with her providers to address weaning off and maintaining sobriety.
4. Show considerable insight in the area of caregiving risks and demonstrate her ability to provide safe, supportive, and developmentally appropriate care for her children as well as demonstrate her ability to engage in interpersonal relationships with paramours who are non-abusive, non-aggressive and who do not have a CPS history, do not use drugs, or engage in criminal activity.
5. Make meaningful progress towards completing the previously mentioned tasks so she can participate in the mental health treatment of her children as well, as long as this is recommended by the child's providers.
Reparations with [J.R.M.'s] relationship needs [*sic*] to be made before she is returned to [Mother's] care, to ensure she feels safe and protected in her mother's care.
6. [J.R.M.] and [Mother] will need to participate in conjoint therapy sessions with a trauma informed provider who can facilitate discussions about ways to maintain physical and psychological safety.
7. Continue engagement with mental health provider who is experienced at using insight raising interventions to help acknowledge the role she played in her children's maltreatment (neglect, failure to thrive, substance abuse, and domestic violence). She will need to demonstrate the ability to acknowledge how such experiences have affected her children's physical and psychological safety. She will need to demonstrate her ability to tolerate hearing seemingly distressing information while maintaining emotional stability.

8. Once meaningful progress has been made on these tasks it is recommended the frequency of visitations be increased with unsupervised visitation to occur. If she does not comply with these tasks or begins to show constant problems with mental health or visitation attendance or fails drug screens then efforts [sic] return the children to her custody will be discontinued.

The recommendations were reviewed and made an order of the court.

In January 2017, Father informed the Cabinet that Mother was pregnant. Mother confirmed that she was pregnant and told the Cabinet she thought the father was a boyfriend who was deceased. On February 21, 2017, Mother gave birth to S.J.M. On March 1, 2017, the Cabinet took custody of S.J.M.

The Cabinet's report for an April 26, 2017, review reflected that Mother was doing very well. Her therapist recommended family therapy with the children. Mother was gaining stability and working hard on addressing all her mental health goals. The report further noted that the children were currently residing together in a foster home in Frankfort. S.J.M., the baby, had been placed with her siblings and was doing well.

A June 9, 2017, progress report utilized in the juvenile action reflected that Mother was working with her therapist to gain stability and to address mental health concerns and that she continued to work with her therapist for family counseling. Mother was seeing the children every Friday. The visits appeared to

be going well, and the children appeared to have formed a bond with Mother. The Cabinet recommended that the permanency goal remain “return to parent,” noting “the diligent work [Mother] is doing at this time.”

At that time, Mother was living with her own mother (Grandmother) and was working at Toyota through a staffing agency. In August 2017, the Cabinet undertook a new investigation after Mother and Grandmother got into an argument in front of the children during a supervised visit at Grandmother’s home. The foster father had to be called to pick up the children. After that incident, Mother began staying with one of her sisters. Visits were changed back to supervision by the Cabinet, but they had to be conducted in a therapeutic setting. Mother needed to find a family therapist. In October 2017, Mother and the children began seeing therapist Anna Bunch for family counseling.

The Cabinet’s report for a November 15, 2017, review reflected that the case worker, Rhonda Armijo, discussed several times with Mother that it was very important for her to gain stability and to move into her own place. She also discussed the length of time that the children had been in care. Mother was actively looking for apartments. However, she had a low credit score and did not want anyone to co-sign for her because she wanted to do it alone. The children were residing together in a concurrent home in Frankfort. Concerns had arisen about the behavior of the two older children during visitations. The Cabinet was

also concerned about the protracted length of the case and continued instability. The Cabinet recommended that the goal be changed to adoption.

On February 1, 2018, Mother moved into her own apartment after having saved sufficient money to do so on her own. She was working at the Red Mile as a beverage server.³

On February 8, 2018, the Cabinet filed petitions for termination of parental rights (TPR) and for appointment of a guardian *ad litem* (GAL) in the interest of each of the children. In March 2018, the court suspended Mother's visitation rights due to allegations that the children became upset before and after the visits occurred. Mother continued to see Anna Bunch for therapy after the visits were suspended.

In March 2018, Mother tested positive for gabapentin. She denied having a prescription for it -- although she continued to test positive for it. She later provided a prescription for gabapentin before the trial.⁴

The case was tried on September 17 and 24, 2018. Mother was present and was represented by counsel. Father was also represented by counsel,

³ Mother was still living in the same apartment and was still working at Red Mile at the time of trial.

⁴ At trial, Mother testified that she had a prescription for gabapentin from Kentucky Orthopedics. She explained that she was in a car accident in December. From December to February, her fingers and hands were swelling. She thought it could be from working hard. She testified that she had a nerve test performed and that she has nerve damage in her wrist and elbow.

but he was not present. The GAL appeared on behalf of the children. Among the Cabinet's many witnesses were Rhonda Armijo, the ongoing case worker from November 2016-June 2018, and Dr. Adrienne Whitt-Woosley, associate director of the Center on Trauma and Children, which conducted the CATS assessment. Mother's current therapist, Anna Bunch, testified on Mother's behalf -- as did her sister. Mother also testified. We have carefully reviewed the video recording of the hearing.

At the close of the hearing, Mother's counsel made an impassioned argument on her behalf, contending that the Cabinet had failed in its burden of proof. The court acknowledged that this was a hard case and that it differed from most TPRs that it had seen. Nonetheless, the court concluded that the Cabinet met its burden of proof and that termination of parental rights was indeed in the children's best interests.

The court explained that it weighed Mother's ongoing relationship with Father very heavily -- the fact that she continued to have a relationship with him and continued to lie about it. The court observed that people have to pick their children over the person who committed acts of domestic violence. When Mother struggled to explain that they just had a sexual relationship, the court did not believe that Mother "just had sex with this man three times and had three children."

The court was concerned about Mother's history of substance abuse. The court believed that Mother had a prescription for gabapentin back in March 2018. But what really concerned the court was that Mother was not truthful about it initially and that she had a history of either lying overtly or withholding information. The court was also concerned that Mother was still on suboxone after so much time and that she had used heroin while she had children in her care.⁵

The court recognized that everyone involved in the case had seen good things in Mother and that she was working her case plan. But the court recognized that she kept backsliding. The court did not question that Mother loves her children, but it was very concerned about the length of time that they had been in foster care and their need for permanency.

On October 10, 2018, the trial court entered its findings of fact and conclusions of law, an order terminating parental rights, and an order of judgment in each of the three cases.⁶ Mother has appealed.

This Court explained in *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 426-27 (Ky. App. 2015), as follows:

[P]arental rights are a “fundamental liberty interest protected by the Fourteenth Amendment” of the United

⁵ At trial, Mother admitted having used heroin a week or two before the children were removed (in 2015), which was after J.R.M. had already been removed and returned to her.

⁶ The trial court's findings of facts and conclusions of law are substantially the same in the three cases.

States Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982).

When the government acts to terminate a parent's rights, it is not merely infringing on those rights; it is ending them. *Lassiter v. Dept. of Social Svcs. of Durham Co., N.C.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 2160, 68 L.Ed.2d 640 (1981).

Accordingly, termination of parental rights is a grave action which the courts must conduct with "utmost caution." *M.E.C. v. Commonwealth, Cab. for Health and Family Svcs.*, 254 S.W.3d 846, 850 (Ky. App. 2008). Termination can be analogized as capital punishment of the family unit because it is "so severe and irreversible." *Santosky v. Kramer*, 455 U.S. at 759, 102 S.Ct. at 1398. Therefore, to pass constitutional muster, the evidence supporting termination must be clear and convincing. 455 U.S. at 769-70, 102 S.Ct. at 1403. Clear and convincing proof is that "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 (Ky. 1934).

In *Cabinet for Health & Family Svcs. v. K.H.*, 423 S.W.3d 204, 209

(Ky. 2014), our Supreme Court held that:

The Commonwealth's TPR statute, found in KRS^[7] 625.090, attempts to ensure that parents receive the appropriate amount of due process protections. KRS 625.090 provides for a tripartite test which allows for parental rights to be involuntarily terminated only upon a finding, based on clear and convincing evidence, that the following three prongs are satisfied: (1) the child is found or has been adjudged to be an abused or neglected child as defined in KRS 600.020(1); (2) termination of the parent's rights is in the child's best interests; and (3) at least one of the termination grounds enumerated in

⁷ Kentucky Revised Statutes.

KRS 625.090(2)(a)-(j) exists.

We conduct our review pursuant to the “clearly erroneous” standard.

C.J.M. v. Cabinet for Health & Family Servs., 389 S.W.3d 155, 160 (Ky. App. 2012):

A court has broad discretion to determine whether a child has been either abused or neglected and whether the best interests of the child warrant a termination of parental rights. *R.C.R. v. Commonwealth Cabinet for Human Res.*, 988 S.W.2d 36, 38 (Ky. App. 1998). The standard of review that an appellate court uses in a termination of parental rights case is the clearly erroneous standard. Thus, a trial court’s findings of fact will not be set aside unless unsupported by substantial evidence. *Id.*; *see also* Kentucky Rules of Civil Procedure (CR) 52.01.

On appeal, Mother argues that terminating her parental rights was clearly erroneous because: (1) it was not (and is not) in the best interests of the children; (2) clear and convincing evidence did not exist for the court to find any of the grounds in KRS 625.090(2) applicable to Mother; and (3) the application of KRS 625.090(2)(j) to her was unfair and unreasonable. Mother also argues that the court erred when it allowed the Cabinet worker to express non-expert opinion regarding the effects of drugs.

Mother argues that termination of parental rights was not -- and is not -- in the children’s best interest. Mother submits that there is substantial evidence of her bond with the children. She notes the testimony of her therapist, Anna

Bunch, that there was a reasonable expectation Mother would continue to thrive and be a good mother. Mother also notes that she completed her case plans, proving again and again that her sole focus was to get her children back and to improve herself in the process.

“In conducting a best interest analysis, a trial court must consider the six factors enumerated in KRS 625.090(3)(a)-(f).” *K.H.*, 423 S.W.3d at 212. Accordingly, we must review the court’s findings⁸ concerning those statutory factors.

It does not appear that the first factor, KRS 625.090(3)(a), which deals with mental illness or intellectual disability of the parent, is applicable.

The second factor is “(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family[.]” KRS 625.090(3)(b). The trial court found that each child had previously been adjudged to be a neglected child, and it also adjudged each child to be an abused or neglected child as defined in KRS 600.020.

The third factor that the court must consider is:

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the

⁸ The court’s findings with respect to the best interest of each child appear at pages 21-22 of its findings of fact and conclusions of law, which are attached to Appellant’s Brief as Appendices 2, 5 and 8.

circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court[.]

KRS 625.090(3)(c). As to each child, the trial court found that reasonable efforts had been made by the Cabinet to reunite the child with the parents prior to the filing of the petition -- but without success. It also found that:

The Cabinet for Health and Family Services has offered or provided all reasonable services to the family, including case planning, referrals to community partners, no-cost drug screening, home visits, and supervised visitation services. The Cabinet has worked with the family and has offered almost every service available in the community to facilitate reunification with the family.

The fourth statutory factor is KRS 625.090(3)(d), which requires the trial court to consider “efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child’s best interest to return him to his home within a reasonable period of time, considering the age of the child[.]” As to each child, the court found that:

Despite the availability of these services, [Mother] and [Father] have failed or refused or have been unable to make sufficient effort and adjustments in their circumstances, conduct or conditions to make it in the best interest to return [the child] to their home within a reasonable period of time, considering the child’s age.

Mother contends that the court barely discussed the specific facts that it considered. We cannot agree. At pages 23-24 of its findings of fact and

conclusions of law, in discussing grounds for termination, the court found in detail as follows:

[J.M.] was conceived while a no-contact DVO was in place between [Mother] and [Father]. While the older children were still in foster care, [Mother] became pregnant and gave birth to her third child with [Father], S.J. in February 2017. [Mother] did not tell CATS or the Cabinet about the pregnancy until the baby was born. She is then deceptive about who the father of the new child was until paternity is established. . . . [Mother] lacks protective capacity in that she has continued to maintain some relationship with [Father] despite his complete non-compliance with his case plan and his continued drug use. While [Mother] has continued suboxane [*sic*] treatment over the course of several years, she obtained a prescription of Gabapentin sometime in March 2018 after a car accident. She did not inform the Cabinet about the accident and was intentionally deceptive when asked if she had a prescription. These actions directly contradict [Mother's] in-court assertions that she has learned from her mistakes, has learned new coping skills, and has learned to ask for support. While the court declines to speculate as to the effect of taking Gabapentin and suboxane [*sic*] at the same time as sufficient expert testimony was not provided, it is still a concern that [Mother] has continuously been involved in a suboxane [*sic*] clinic since 2013 Overall [Mother] has had significant periods of improvement but has been unable to maintain her progress sufficiently. . . . [Mother] is able to articulate and explain the problems in her life that have resulted in the maltreatment of the children and is even able to identify what changes she needs to make to alleviate those issues. However, she has been unable, over the course of the more than three years the case has been open, to apply these skills to her life and maintain stability long term leaving the Court to believe that the pattern of instability is likely to repeat.

The fifth factor, KRS 625.090(3)(e), requires the court to consider “[t]he physical, emotional, and mental health of the child and the prospects for the improvement of the child’s welfare if termination is ordered[.]” The trial court found that:

[The child] is currently in an adoptive home. [The child] is thriving in care and has the support [the child] needs including therapeutic services. [The child] is placed with [her/his] siblings and is meeting all developmental milestones. [The child] has improved greatly while in care and it is expected that [the child] will continue to improve with a permanent adoptive home.

The sixth factor that the court must consider is “(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.” KRS 625.090(3)(f). The court did not make a specific finding as to this factor under its best interest analysis *per se*; however, the court did consider the issue. In finding that each child was an abused or neglected child as defined in KRS 600.020, the court noted at page 21 of its findings of fact and conclusions of law that Mother had a significant child support arrearage, “which is concerning especially as [she] reports working full time.”

We conclude that the trial court properly considered all of the applicable KRS 625.090(3) factors in determining the best interest of each child and that its findings have a substantial evidentiary foundation.

Mother argues that termination should not have occurred because clear and convincing evidence did not exist for the court to find that any one of the grounds listed under KRS 625.090(2) applies to her. However, the court found the existence of the following grounds for termination of parental rights under the statute:⁹

(2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

...

(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;

...

⁹ Appellant's Brief, Appendices 2, 5 and 8 at pp. 22-27.

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights[.]¹⁰

With respect to KRS 625.090(2)(e), we have discussed the court's findings above and need not repeat them again in detail here. To summarize, the court found that Mother *demonstrated a lack of protective capacity* in that she continued to have some relationship with Father -- despite the fact she knew that he was using drugs and was non-compliant with his case plan. The court weighed Mother's relationship with Father very heavily -- again, both the fact of the relationship itself and the fact that she continued to lie about it.

Mother contends that the court's findings of fact and conclusions of law failed to mention any of the reported progress Mother made. We cannot agree. Nor can we agree that the court erred in using Mother's suboxone clinic, one instance of heroin usage in 2015, her gabapentin prescription, and unqualified opinions to paint a picture throughout her case that she was abusing substances. The court was reasonably and understandably concerned about the length of time that Mother had been in a suboxone clinic. Mother admitted to using heroin once in 2015 shortly before the children were removed. What concerned the court was that this usage occurred *after* J.R.M. had already been removed and returned to her

¹⁰ As to J.R.M. and J.M.

care. The court did believe that Mother had a prescription for gabapentin in March -- although she did not provide it. What concerned the court was that Mother was not truthful about it initially. The court specifically stated that it had not considered any non-expert opinion regarding the effect of gabapentin.

The court recognized that Mother had significant periods of improvement, but it noted that “she has been unable, over the course of the more than three years the case has been open, to apply these skills to her life and maintain stability long term leaving the Court to believe that the pattern of instability is likely to repeat.” Mother contends that the Cabinet failed to meet its burden for grounds of termination because it focused on her past behavior rather than on her future parenting capacity, citing *M.E.C. v Commonwealth, Cabinet for Health and Family Servs.*, 254 S.W.3d 846 (Ky. App. 2008). However, *M.E.C.* is distinguishable on its facts.

We are compelled to conclude that substantial evidence supports the trial court’s finding that for a period of not less than six months, Mother has continuously or repeatedly failed or refused to provide -- or has been substantially incapable of providing -- essential parental care and protection for each child and that there is no reasonable expectation of improvement in parental care and protection considering the age of the child. KRS 625.090(2) only requires the court to find the existence of one ground by clear and convincing evidence.

Accordingly, we do not reach Mother's argument with respect to subsections (g) and (j).

Mother's final argument is that the court erred in allowing the Cabinet worker to express non-expert opinion regarding the effects of drugs. The trial court **specifically declined** to speculate as to the effect of taking gabapentin and suboxone because sufficient expert testimony was not provided. Thus, the court clearly did not rely on non-expert opinion. Therefore, the alleged error -- if any -- was harmless. *See Prater v. Cabinet for Human Res., Commonwealth of Ky.*, 954 S.W.2d 954, 959 (Ky. 1997) (admission of incompetent evidence in bench trial harmless error where the trial judge did not base decision on that evidence).

We AFFIRM.

ALL CONCUR.

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BRIEF FOR APPELLEE CABINET
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