

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000036-ME

C.B.

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 18-AD-500207T

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; AND C.A.B. (A MINOR CHILD)¹

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, MAZE, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: C.B. (Mother) appeals from the Jefferson Family Court's findings of fact, conclusions of law, and judgment terminating parental rights in

¹ It is undisputed that the natural father of C.A.B. is unknown and that there is no known person meeting the requirements of Kentucky Revised Statute (KRS) 625.065 to be named as the putative father of C.A.B.

this case involving her minor child C.A.B. (Child). After careful review, we affirm.

Factual and Procedural Background

Mother gave birth to Child on March 15, 2017. At the time of Child's birth, Mother was in inpatient treatment at the psychiatric unit of the University of Louisville Hospital, where she had been since January 13, 2017. Mother experienced both suicidal and homicidal ideations during her pregnancy. Mother gave birth via cesarean section because she could not be instructed to push during delivery due to her mental health status. The Cabinet for Health and Family Services (CHFS) was contacted due to Mother's mental health and the behaviors she exhibited after the birth of Child. Child was placed in custody of CHFS by emergency custody order. On March 22, 2017, CHFS filed a dependency, neglect, and abuse (DNA) petition in Jefferson Family Court alleging that Mother "accused the nurses of trying to kill her baby, threatened to kill her mother, threw ice on a nurse, and threatened to kill herself." The petition also stated that Mother had diagnoses of bipolar disorder, borderline personality disorder, a history of paranoia, and a history of noncompliance with medication. The petition listed Mother's criminal history dating back to 2012. The family court placed Child in the temporary custody of CHFS on March 28, 2017.

Shortly after giving birth to Child, Mother was transferred to Central State Hospital for further psychiatric treatment. Mother testified she received paperwork while still in treatment and that it contained a telephone number so that she could reach CHFS. Mother was released from Central State in July 2017. Due to her hospitalization, Mother was not present for any court proceedings prior to her appearance on July 11, 2017. At that time, Mother had contact with CHFS and the family court ordered her “to continue psychological and/or psychiatric treatment by an approved CHFS psychologist/psychiatrist and follow all recommendations until released; CHFS to pay costs.” Mother was permitted to have therapeutic visitation only as determined by her doctor and in consultation with CHFS. Mother was ordered to take all medications as prescribed and to undergo a competency evaluation, the cost of which was to be covered by CHFS.

But, Mother did not contact CHFS after July 11, 2017. From July 2017 through February 2018, Mother had no contact with CHFS or Child. She stopped taking her mental health medication and became transient and homeless. Mother was briefly incarcerated in September 2017. She was admitted to Wellstone Hospital in Indiana for two weeks of psychiatric treatment in October 2017. In November 2017, Mother was admitted to Our Lady of Peace Hospital (OLOP) in Louisville for additional psychiatric treatment. She did not attempt to contact CHFS during either period of inpatient treatment. In December 2017,

Mother was arrested and charged with criminal trespass. She became incarcerated on or about December 5, 2017. In February 2018, CHFS learned of Mother's incarceration in the Louisville Metro Department of Corrections (LMDC) and made contact.

In April 2018, while still incarcerated, Mother was sent to the Kentucky Correctional Psychiatric Center (KCPC) for a competency evaluation. The competency evaluation pertained to Mother's criminal charges, but CHFS also accepted the results for the DNA action in family court. Mother was found incompetent to stand trial, but with the ability to become competent. CHFS filed the petition to terminate Mother's parental rights to Child on or about May 15, 2018. Mother remained at KCPC for further treatment and was transferred back to LMDC in July 2018, after being found competent. Mother was released from LMDC on or about August 1, 2018. She immediately contacted CHFS and scheduled an appointment for an in-home meeting on August 14, 2018. Mother was readmitted to OLOP for psychiatric treatment prior her meeting with CHFS; however, she did not tell her social worker of her most recent admission.

Mother signed a case plan with CHFS on August 18, 2018. Several days later, she attended an individual therapy session at Centerstone. On September 6, 2018, she attended a group therapy session at the same facility. On September 11, 2018, Mother stipulated to dependency in the DNA action. The

following day, Mother attended a parenting assessment at Transitions in Louisville, Kentucky. She had visitation with Child (supervised by CHFS) on September 20, 2018 (for one hour); October 4, 2018 (for one hour); and on October 12, 2018 (for two hours). These visits were the only contact Mother had with Child since his birth. The family court held the termination hearing on October 19, 2018, and issued findings of fact, conclusions of law, and an order terminating Mother's parental rights on December 11, 2018. This appeal followed. Further facts will be developed as necessary.

Analysis

In Kentucky, termination of parental rights is proper upon satisfaction, by clear and convincing evidence, of a tripartite test. *Cabinet for Health & Family Servs. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). First, KRS 625.090(1) requires that a child be adjudged neglected or abused. Second, KRS 625.090(1)(c) requires that termination must be in the child's best interest. Third, at least one of the conditions set out in KRS 625.090(2) must be established. The family court's termination decision will be reversed only if it is clearly erroneous. *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). Such a decision is clearly erroneous if there is no substantial, clear, and convincing evidence to support the decision. *Id.* Where the record contains substantial

evidence to support the trial court's findings, we will not disturb them on appeal. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

Mother makes three arguments on appeal. She asserts that the family court erred because (1) it failed to make findings of fact that Mother abused or neglected Child by clear and convincing evidence; (2) there was no clear and convincing evidence to support the family court's finding that Mother abandoned Child for a period of not less than ninety days; and (3) there was no clear and convincing evidence in the record to support the family court's finding that termination was in Child's best interest. We disagree.

As to Mother's first argument, KRS 625.090(1)(a)(1)-(2) states, in relevant part,

(1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:

(a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction; [or]

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding[.]

The record contains substantial clear and convincing evidence to support the family court's finding that Child is an abused or neglected child.

Moreover, despite Mother's assertions to the contrary, the family court's findings of fact are extensive and well reasoned. For example, the court found that

[Mother] was released from the hospital in July 2017, at which time she lost contact with [CHFS]. [Mother] testified that she stopped taking her medication after being released and was homeless for several months until she was arrested in December 2017. [Mother] did not attempt to contact [CHFS] even after her arrest. The assigned social worker for [CHFS] could not locate [Mother] until February 2018. So, from July 2017 until February 2018, [Mother] did not contact [CHFS] or her son. During that period she did not work her case plan. Moreover, during this period she failed to provide care for the child.

These findings by the family court address KRS 600.020(1)(a)(7)-(9)

which defines an abused or neglected child as a child whose health or welfare is harmed or threatened with harm when "[h]is or her parent, guardian, person in a position of authority or special trust . . . or other person exercising custodial control or supervision of the child:"

7. Abandons or exploits the child;
8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or

9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) cumulative months out of forty-eight (48) months[.]

The family court also found that, per her own testimony, Mother's current home is not safe for Child.² Mother lives with her mother (*i.e.*, Child's maternal grandmother) and stepfather. The maternal grandmother's parental rights to Mother were previously terminated.³ Mother testified that maternal grandmother has a "drinking problem," and the home is not safe. While Mother also testified that she planned to move out of the home, the family court found that she had no independent housing and no means of support. Mother receives food stamps in an unknown amount and Social Security Disability payments (SSDI) in the amount of \$325.00 per month.

Based on the foregoing, we cannot say that the findings of family court with respect to abuse or neglect of Child are clearly erroneous. The record contains substantial clear and convincing evidence that Child is abused or neglected.

² See KRS 600.020(1)(a)(4). A child is abused or neglected when a "parent, guardian, person in a position of authority or special trust . . . or other person exercising custodial control or supervision of the child . . . continuously or repeatedly fails or refuses to provide essential parental care *and protection* for the child, considering the age of the child." (Emphasis added.)

³ According to the family court's findings of fact, maternal grandmother's parental rights were terminated due to substance abuse and domestic violence.

Mother's next argument is that the family court erred by finding that she abandoned Child for a period of not less than ninety days pursuant to KRS 625.090(2)(a). At the outset, we note that Mother asserts "[the family court] did not make a finding that KRS 625.090(2)(e) and (g) were grounds for termination of [Mother's] parental rights. Thus, the entire Termination of Parental Rights case is based solely on the theory of abandonment." Mother's assertion is incorrect.

Although the family court must find the existence of *one* of the factors enumerated in KRS 625.090(2)(a)-(j), the family court, in addition to abandonment, also found that Mother, 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 Child and there is no reasonable expectation of improvement in parental care and protection considering the age of the child. KRS 625.090(2)(e). The family court further found that Mother, 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 Child's well-being and there is no reasonable expectation of significant improvement in Mother's conduct in the immediately foreseeable future, considering the age of the child. KRS 625.090(2)(g). Nevertheless, Mother appeals only the finding of

Mother's abandonment of Child for a period of not less than ninety days pursuant to KRS 625.090(2)(a).

Mother argues that a finding of abandonment is not warranted when she has not been able to *ever* have custody of Child because he was removed from her at birth due to a mental illness which is not intentional on her part. *L.B.A. v. H.A.*, 731 S.W.2d 834 (Ky. App. 1987). We disagree. *L.B.A.* is distinguishable. Mother gave birth to Child under unusual circumstances. She was a patient in a psychiatric facility, where she had been for two months preceding Child's birth. She exhibited erratic and concerning behavior following Child's birth, including making threats to herself and others. Mother continued inpatient psychiatric treatment for approximately four months after Child's birth. Like the parent in *L.B.A.*, Mother was not permitted to have custody of the minor child at birth. The difference is Mother was afforded the opportunity to begin working towards reunification with Child when she attended family court proceedings on July 11, 2017. However, she failed to contact CHFS after that date. She failed to inquire about or provide for Child in any way. While the parent in *L.B.A.* received no services from CHFS and "no effort whatsoever [was] expended in preventing the separation of mother and child[,]"⁴ the family court in the instant action found, and the record supports, that CHFS provided Mother referrals to parenting classes,

⁴ *L.B.A.*, 731 S.W.2d at 836.

individual counseling, group counseling, and supervised visitation as part of its reasonable efforts to reunite Mother with Child. While Mother began to work her case plan approximately one month prior to the termination hearing, she made no contact with CHFS, provided no support for Child, and showed no interest in Child from July 2017 through February 2018.

The family court took into account Mother's struggles with her mental health and her frequent hospitalizations and incarcerations. The family court found that

[t]here are thousands if not millions of people who suffer from mental illness yet manage to parent their children. The issue here is [Mother's] failure to make any effort to provide for her child in anyway [sic]. She has failed to manage her mental health issues, which further exacerbated her failure to care for her child. [Mother] is well aware of her issues, and what she must do to address them.

There is substantial clear and convincing evidence in the record that Mother abandoned child for a period of not less than ninety days. Therefore, we find no error.

With respect to Mother's third and final argument, the family court's written findings of fact and conclusions of law considered each factor enumerated in KRS 625.090(3)(a)-(f) in its determination of Child's best interest. On appeal, Mother challenges the family court's findings related to each factor.

The first factor addressed by the family court in consideration of Child's best interest is KRS 625.090(3)(a), which relates to Mother's mental health and states

Mental illness as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time[.]

Mother argues that the family court erred because it made no finding that Mother suffered a mental illness. Mother's assertion is refuted by the record.

The family court found that

[Mother] suffers from severe bipolar disorder with paranoia and psychosis and borderline personality disorder. She will need indefinite medication management and counselling and she will regularly experience suicidal and homicidal ideations.

Additionally, the family court found that

[Mother] has a lengthy history of intermittent treatment at Centerstone dating back to age seven (7) and had a total of 44 different treatment episodes at Centerstone. Her bipolar disorder has been noted as severe, with psychosis and paranoia, and the records reflect many instances of treatment, non-compliance, and self-medicating with illicit drugs.

We further agree with the family court's finding that Mother's mental illness was "uncontroverted." In her own testimony, Mother admitted that she

suffers from bipolar disorder and borderline personality disorder. She testified as to the various psychotropic medication she has been prescribed and numerous admissions to various inpatient psychiatric facilities. The family court had Mother's mental health treatment records before it.⁵ The family court determined that, due to her mental health issues, "the very best [Mother] can offer [Child] is visits, and only if she is properly addressing her mental health issues." We discern no error in the family court's conclusion that Mother's mental illness "renders her consistently unable to care for the immediate and ongoing physical or psychological needs of [Child] for extended periods of time" pursuant to KRS 625.090(3)(a).

Next, the family court looked to KRS 625.090(3)(b), which examines any "acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family[.]" As already addressed in this opinion, the family court found that Child is abused or neglected. There is substantial evidence in the record to support the family court's findings. Therefore, we discern no error.

⁵ Mother's treatment records from Centerstone were entered into the record as CHFS's Exhibit 3 at the termination hearing. However, that exhibit is not before us. Mother did not file a designation of record pursuant to Kentucky Rule of Civil Procedure (CR) 75.01. "When the evidence is not presented for review, this court is confined to a determination as to whether the pleadings support the judgment and on all issues of fact in dispute we are required to assume that the evidence supports the findings of the lower court." *McDaniel v. Garrett*, 661 S.W.2d 789, 791 (Ky. App. 1983) (citation omitted).

The next factor pertains to reasonable efforts to unite Mother and Child. KRS 625.090(3)(c). The family court found that CHFS offered appropriate services to Mother and that “there are no other services which [CHFS] could provide or refer [Mother] to that would allow for the safe reunification[.]” As previously stated, the family court found that CHFS provided Mother referrals to parenting classes, individual counseling, group counseling, and supervised visitation as part of its reasonable efforts to reunite Mother with Child. However, Mother did not begin to utilize those services until approximately one month prior to the termination hearing. There was no error by the family court.

The next factor pertains to the “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[.]” KRS 625.090(3)(d). Mother points to her compliance with her case plan in the month or so preceding the termination hearing. However, there is substantial evidence in the record to support the family court’s finding that Mother had not “successfully completed all of her necessary treatment and training,^[6] lacks appropriate housing, and that even with psychiatric care remains

⁶ Mother was ordered to complete a protective parenting course and had not enrolled in the course at the time of the termination hearing.

without ability to fully meet her own needs much less those of her son.” We agree and find no error.

Regarding KRS 625.090(3)(e), the family court found that Child’s physical, mental, and emotional needs have been met while in the custody of CHFS and that he is expected to continue to make improvements. He is in an adoptive home and is bonded to his foster parents and foster sibling. While in the custody of CHFS, Child was able to undergo a medical procedure to have “tubes” inserted into his ears due to numerous infections. Child also suffers from allergies, for which he has been able to receive appropriate treatment. Mother was unable to consent to any medical treatment due her lack of contact with CHFS.⁷ We discern no error.

Finally, KRS 625.090(3)(f) concerns Mother’s “payment or . . . failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.” Although Jasmine Salm-Newman, the ongoing social worker, testified that she was unsure whether Mother could work due to the fact that she receives SSDI, Mother testified that she is able to work limited hours and continue to receive SSDI. There was no evidence submitted regarding Mother’s work history or potential employment. Regardless, as noted previously in this

⁷ It is unknown if Mother would have been able to give consent at the time of any procedures due to her mental health status, even if she had been in contact with CHFS.

opinion, Mother made no effort whatsoever to provide for Child. We discern no error.

We do not mean to diminish Mother's efforts to take control of her mental illness in the one to two months prior to the termination hearing. But the record shows that Mother continues to suffer from severe mental illness and has had a pattern of frequent hospitalizations and noncompliance with medication throughout her life. She does not have an adequate support system to avert potential mental health crises, and she failed to take advantage of services CHFS offered until the eleventh hour. Therefore, there is substantial evidence in the record to support the family court's findings of fact, conclusions of law, and judgment of termination of Mother's parental rights. Accordingly, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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