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Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-0030-ME

C.T.S. APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DOREEN S. GOODWIN, JUDGE
ACTION NO. 19-AD-00005

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
B.M.D., NATURAL MOTHER; AND
R.M.S., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, MAZE, AND MCNEILL, JUDGES.

MAZE, JUDGE: Appellant, C.T.S., appeals the Oldham Circuit Court's order terminating his parental rights to daughter, R.M.S. After careful consideration and review, we affirm for the following reasons.

BACKGROUND

Although the underlying case involved five children and three parents, this appeal only involves C.T.S.'s parental rights to his daughter, R.M.S. As explanation, B.M.D. is the mother of five children, including R.M.S. The father of the four eldest children is K.M.D., while the father of the youngest child is C.T.S.

In January 2019, the Cabinet for Health and Family Services ("Cabinet") petitioned to terminate B.M.D.'s parental rights to her five children, along with K.M.D.'s rights to his four children and C.T.S.'s rights to R.M.S. The termination cases were all heard together. After three days of trial, the family court terminated all parental rights to the children. Neither B.M.D. or K.M.D. appealed. As stated, only C.T.S. is appealing. We will hereinafter refer to C.T.S. as "Father."[1]

The relevant timeline began in 2014 when B.M.D. and her four children at the time moved into Father's three-bedroom residence. Father's twin teenage children from a different relationship also lived in the residence. That year, the Cabinet received a report that B.M.D.'s oldest child had gotten out of the residence without her knowledge, resulting in the police bringing the child home.

[1] C.T.S. requests the Court to clarify his name because the family court's order identified him by his nickname instead of his proper name. The Court takes judicial notice of this discrepancy. However, because C.T.S. is only identified by his initials, which are the same for both his nickname and proper name, and C.T.S.'s proper name was utilized in the termination petition, no further action is required by the Court.

No court action resulted, but the Cabinet began conducting home visits with the family. The Cabinet worker described Father's home as clean but crowded. The Cabinet eventually closed its case after providing services to B.M.D.

In June 2015, R.M.S. was born. Although B.M.D. and Father were not married, Father is the putative father of R.M.S. because he "caused his name to be affixed to the birth certificate" of R.M.S. *See* KRS[2] 625.065(1)(c).

In late 2016 or early 2017, B.M.D. and her five children moved out of Father's residence and eventually moved into a hotel room. The Cabinet became aware of the situation in the hotel room, investigated, and found clutter, chaos, and fighting. The Cabinet filed a dependency, neglect, and abuse ("DNA") petition against B.M.D. As a result, the four oldest children were placed in the Cabinet's custody, while R.M.S. was placed in Father's custody. Pursuant to this placement, Father had to supervise B.M.D.'s visits with R.M.S., and B.M.D. could not live in Father's residence.

In August 2017, the Cabinet received a report of bruising on R.M.S.'s back. The Cabinet placed R.M.S. with Father's neighbor/family friend while it investigated the bruising.

On September 1, 2017, before the investigation into the bruising was complete, Father got R.M.S. from the neighbor's residence and brought her back to

[2] Kentucky Revised Statutes.

his home where B.M.D. was also present. Father and R.M.S. laid down for a nap, but two-year-old R.M.S. got up and managed to get out of the residence. Neither parent realized R.M.S. was missing until the police returned her to Father's home.

Because of this incident, the Cabinet filed a DNA petition against Father and B.M.D., resulting in R.M.S. being placed in foster care. In November 2017, the family court found that Father and B.M.D. neglected R.M.S. Meanwhile, the Cabinet developed case plans for reunification. Father's reunification plan included protective parenting classes, visitation with R.M.S., stable housing and employment, and drug screens, which were later added to the case plan when Father admitted to using marijuana. Father mostly complied with his case plan. He completed his parenting classes, visited with R.M.S., maintained the same residence over the life of the case, and continued to receive his disability income and pay his child support. He also completed the drug screens, which were all negative. He did not complete a written budget or schedule, which were required by his case plan.

After about fifteen months had passed, on January 25, 2019, the Cabinet filed a petition for involuntary termination of parental rights to all five children, including R.M.S. The petition regarding R.M.S. alleged that Father failed to provide essential parental care and protection to R.M.S. In response,

Father denied the Cabinet's claim, noting he had worked diligently to be reunited with R.M.S. and had complied with his case plan.

The matter proceeded to trial over three days in September and October 2019. During trial, the family court heard from various witnesses, including three Cabinet social workers, two CASA[3] volunteers, a therapist, a CATS[4] clinic worker, a child support caseworker, Father, and B.M.D. As trial concluded, the family court asked the parties to submit proposed findings of fact and conclusions of law. Ultimately, the family court adopted, almost verbatim, the Cabinet's seventy-plus-page proposed order terminating parental rights to all five children, including Father's rights to R.M.S.

This appeal by Father followed. Additional facts will be set forth below as necessary.

ANALYSIS

For his appeal, Father generally avers that the family court erred in terminating his parental rights. He claims that: (1) termination of his parental rights was not supported by clear and convincing evidence and the Cabinet failed to show "no reasonable expectation of improvement" in Father's parental skills,

[3] Court Appointed Special Advocates.

[4] The University of Kentucky Comprehensive Assessment and Training Services Program, which is abbreviated to "CATS."

pursuant to KRS 625.090(2); (2) the family court adopted the Cabinet's proposed order instead of making independent findings of fact and conclusions of law; and (3) the family court improperly considered unsubstantiated hearsay allegations in making its determination and included those in its order.

Standard of review

When we review a termination of parental rights ("TPR") decision, we are limited to the clearly erroneous standard, which focuses on whether the family court's order of termination was based on clear and convincing evidence. CR[5] 52.01; *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006). "Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). "Because termination decisions are so factually sensitive, appellate courts are generally loathe to reverse them, regardless of the outcome." *D.G.R. v. Com., Cabinet for Health and Family Services*, 364 S.W.3d 106, 113 (Ky. 2012). With these standards in mind, we turn to the TPR statutory requirements.

[5] Kentucky Rules of Civil Procedure.

Involuntary termination of parental rights

"The involuntary termination of parental rights is a scrupulous undertaking that is of the utmost constitutional concern." *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014) (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 119-20, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996)). "[P]arental rights are a 'fundamental liberty interest protected by the Fourteenth Amendment' of the United States Constitution." *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 426 (Ky. App. 2015) (quoting *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." *Id.* Thus, "termination of parental rights is a grave action which the courts must conduct with 'utmost caution.'" *Id.* at 427 (quoting *M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 850 (Ky. App. 2008)). Termination is analogized to capital punishment of the family unit because it is "so severe and irreversible." *Id.* (quoting *Santosky*, 455 U.S. at 759, 102 S. Ct. at 1398). So, "to pass constitutional muster, the evidence supporting termination must be clear and convincing." *Id.* "Clear and convincing proof is that 'of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people.'" *Id.* (quoting *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)).

This "fundamental interest 'does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State . . . .'" *K.H.*, 423 S.W.3d at 209 (citing *Santosky*, 455 U.S. at 754-55, 102 S. Ct. 1388). Therefore, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.*

Kentucky attempts to ensure that parents receive "fair procedures" and the appropriate amount of due process protections through its termination of parental rights statute, found in KRS 625.090. 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 interest; and (3) at least one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) exists.

Here, the family court held, by clear and convincing evidence, that the three-pronged test was satisfied because: (1) R.M.S. was a neglected child; (2) termination of parental rights was in her best interest; and (3) grounds (e), (g), and (j) of KRS 625.090(2) existed for termination of Father's rights. The family court addressed each prong in its order.

For the first prong, the family court previously adjudged that Father neglected R.M.S. after the September 2017 incident when R.M.S. was found outside Father's residence. *See* KRS 625.090(1)(a); *see also M.A.B. v. Commonwealth, Cabinet for Health and Family Services*, 456 S.W.3d 407, 412-13 (Ky. App. 2015) (finding prior adjudication of neglect establishes a basis for termination). Therefore, the first prong was met.

For the second prong, the family court found that termination would be in the best interest of R.M.S. because the Cabinet made reasonable efforts to reunite R.M.S. with Father and no additional services were likely to bring about parental adjustments enabling R.M.S.'s return to Father within a reasonable period of time given her age. *See* KRS 625.090(3). In addition, the family court considered R.M.S.'s physical, emotional, and mental health and found that R.M.S. was currently placed with three of her four half-brothers[6] in a safe and stable foster home where the foster parents were willing to adopt them, that R.M.S. was thriving, and that she had bonded to her foster family.

For the third prong, the family court found that, pursuant to KRS 625.090(2), grounds (e), (g), and (j) existed for termination of Father's parental rights. Again, only one of these grounds needs to be met for the third prong of the

[6] The oldest half-brother was placed in a residential treatment program due to his aggression and inability to regulate his emotions.

tripartite test to be satisfied, but the family court found three grounds, as detailed below, had been met. First, pursuant to ground (e), the family court found that Father had not made any meaningful changes to demonstrate how he is now capable of providing R.M.S. essential parental care and protection that is any different from that offered in 2017 when R.M.S. was removed from Father's care. Second, pursuant to ground (g), the family found that Father, for reasons other than poverty alone, had continuously or repeatedly failed to provide essential food, clothing, shelter, medical care, or education reasonably necessary and available for R.M.S.'s well-being and there was no reasonable expectation of significant improvement in Father's conduct in the immediately foreseeable future, considering R.M.S.'s age. Third, pursuant to ground (j), the family court found that R.M.S. had been in foster care for fifteen months before the Cabinet filed the petition to terminate Father's rights. We now address Father's arguments on appeal.

Father argues termination not proven by clear and convincing evidence and "no reasonable expectation of improvement" was proven

Father's main claim of error appears to focus on the third prong of the tripartite test.[7] Relying on *F.V. v. Commonwealth, Cabinet for Health and Family*

[7] In his brief, Father does not specifically state that he is challenging the third prong of the tripartite test. Indeed, Father does not cite any statute, much less any subsection of the termination statute. However, his argument focuses on the "no reasonable expectation of improvement" language, which is found in KRS 625.090(2).

Services, 567 S.W.3d 597 (Ky. App. 2018), he alleges that the Cabinet failed to prove "no reasonable expectation of improvement" in his parental skills of R.M.S. As stated, the Cabinet is only required to establish one ground under KRS 625.090(2) for the third prong to be met. Here, Father does not challenge that ground (j), which requires the child to be in foster care for fifteen months, has not been met. So, Father's appeal could fail based on ground (j) alone. Yet, Father's appeal also makes a general argument that the Cabinet failed to prove its case by clear and convincing evidence and raises several factual issues to support his argument. Therefore, we briefly summarize those issues below.

First, although he is sixty-four years old and disabled, Father claims he is physically able to care for a young child and cites a certified letter from his physician to this effect. He also notes he has raised twin children, so he is experienced as a father.

Second, Father argues he has dutifully paid his child support. While he had an arrearage that occurred from September to November 2017 when the Cabinet initially removed R.M.S. from his custody, he continues to pay off that arrearage while also making his child support payments.

Third, Father argues he attended all allowed visitations with R.M.S. Because Father visited with R.M.S. along with her four siblings, he claims he is being punished for not requesting individual visitation with R.M.S. However,

Father notes he was the only father the four siblings knew, so he wanted to visit with the children together. He further notes that the therapist, Laurie Qualah, even testified that it was not appropriate to separate R.M.S. from her siblings during parental visits because she needed her brothers to feel safe. Yet, Father believes he is now being unfairly penalized for not requesting individual visitation with R.M.S.

Fourth, Father disputes the Cabinet's claim that he did not improve his parenting skills. He notes that the Cabinet only observed him during one-hour, bi-monthly visits with R.M.S., which were also with R.M.S.'s siblings and R.M.S.'s mother. He claims he should not be judged in a vacuum by these limited visitations. Instead, Father claims the Cabinet should have observed him during a sit-down dinner at his home with R.M.S., which would closer mirror real life.

Fifth, Father was criticized at trial for not attending his CATS appointment, which may have helped determine if additional services would help Father achieve reunification. Father claims his car's motor burned out at an inopportune time and he had no other transportation to Lexington for the appointment. Father does not state whether any efforts were made by him or the Cabinet to reschedule this appointment.

Sixth, the Cabinet cited Father's noncompliance with the budget and scheduling requirements of his case plan, but Father argues he did not know how to complete the budget or schedule. Father claims he testified at trial regarding his

budget and how, after paying his bills, he had $250-300 per month left over. Regarding the schedule, Father argues that, due to his disability, he does not work and has a flexible schedule to accommodate R.M.S.'s needs.

We acknowledge that a lot of the evidence presented at trial involved B.M.D., K.M.D., and their four children, while evidence regarding Father and R.M.S. played a smaller role. And, we acknowledge that parents have individual rights to their child and "they are not a package deal[.]" *D.G.R.*, 364 S.W.3d at 115. Therefore, we mindfully reviewed the termination of Father's rights separately from B.M.D.'s actions or inactions. Ultimately, however, we conclude the family court's decision to terminate Father's rights was based on substantial evidence. Simply because Father can explain some of the evidence presented against him does not negate the fact that the Cabinet proved its case at trial and the court's findings were supported by substantial evidence. Indeed, Father provided the same explanations set forth in his brief as he did at trial through his own testimony and the cross-examination of other witnesses.

As set forth in CR 52.01, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" and its findings of fact shall not be set aside unless clearly erroneous. As the court sitting in the presence of the witnesses, a family court is in the best position to evaluate the testimony and other evidence. "Indeed, 'judging the credibility of witnesses and weighing

evidence are tasks within the exclusive province of the trial court.'" *D.G.R.*, 364 S.W.3d at 114 (quoting *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)). "[M]ere doubt as to the correctness of a finding will not justify its reversal, and appellate courts should not disturb trial court findings that are supported by substantial evidence." *Id.*

After the 2017 incident in which R.M.S. was found outside alone, Father was provided services. Under KRS Chapter 620, the primary goal is to enable a child to be with her family with the assistance of the Cabinet. *See* KRS 600.010(2)(a). The Cabinet provided assistance to Father and this family. However, at some point, as happened here, the Cabinet may change its goal to a permanent rather than temporary solution for the child. Despite hearing favorable evidence regarding Father's partial compliance with his case plan, the family court determined that a permanent rather than a temporary solution was in R.M.S.'s best interest:

> While [Father] completed parenting classes, the Court heard nothing to suggest he learned anything from those classes such that he can now safely parent [R.M.S.] [R.M.S.] was in and out of [Father's] physical care in 2016 and the early part of 2017. [R.M.S.] was in [Father's] physical and legal custody from March 2017 until she was removed on September 1, 2017. [R.M.S.] came into care with PTSD, early childhood neglect, dissociative episodes, sleep disturbances, and sexualized behaviors. It has taken [R.M.S.] two (2) years of therapy, including family therapy with Ms. Qualah and parent-child interactive therapy with Donna Richardson, another

> therapist, and her foster parents to make significant progress. The Court heard nothing at trial that convinces it that [Father's] parenting skills have improved such that [R.M.S.] will not only maintain the progress she has made but will not suffer additional abuse or neglect such as what she underwent prior to coming into Cabinet care. While [Father] has not regressed in his circumstances, he has also not improved or changed his circumstances such that it would be in [R.M.S.'s] best interest to return to his care. Maintaining the status quo is not enough.

Order at 56-57. We defer to these findings, which were based on substantial evidence and are not clearly erroneous. *See T.N.H.*, 302 S.W.3d at 663.

Because Father relies on *F.V. v. Commonwealth, Cabinet for Health and Family Services*, *supra*, for his sole legal authority on appeal, we will discuss why that case is distinguishable from his situation. In *F.V.*, the family court terminated father's rights to his two children. On appeal, a panel of this Court vacated and remanded that decision because the Cabinet failed to prove that there was no reasonable expectation of improvement in father's care given the lack of reunification efforts made by the Cabinet.

Essentially, F.V.'s children were removed from their mother's care for her drug use. F.V. did not work his case plan initially, but after he was arrested for a DUI[8] warrant and detained by immigration for being a non-citizen, he attended his needed classes and attempted to contact the Cabinet to request assistance.

[8] Driving Under the Influence.

When he learned of the termination petition, he immediately responded in opposition. After prevailing in his immigration case and being released from detention, he made repeated requests for visitation with his children, passed weekly drug screens, obtained housing and full-time employment, and could afford to hire someone to watch the children while he was at work.

We find *F.V.* distinguishable for several reasons. For instance, in *F.V.*, the termination petitions were filed only eight months after the children were placed in foster care and, at that time, father was in detention. Here, the Cabinet filed the petition more than fifteen months after R.M.S. was placed in foster care. Father had no barrier, like a detention facility, to prevent him from working his case plan. Granted, Father testified that he did not know how to complete the budget and schedule for his case plan, and his car troubles prevented him from attending his CATS appointment. However, Father admitted he did not ask for the Cabinet's help to complete the budget and schedule, and he points to no evidence that he tried to reschedule the CATS appointment after obtaining a car. Also, in *F.V.*, the Court concluded that father demonstrated significant improvement, whereas one of the Cabinet's main arguments for termination against Father in this case was his lack of improvement. As mentioned, Father failed to attend his CATS assessment, which may have identified other services the Cabinet could have offered Father to help reunite him with R.M.S. Finally, in *F.V.*, the Court held that

the Cabinet failed to meet its burden at trial to establish grounds for termination. In comparison, the Cabinet here met its burden at trial and established three grounds for termination of Father's parental rights when only one was required.

In sum, unlike *F.V.*, Father had the time and opportunity to work his case plan and improve his parenting skills to achieve reunification with R.M.S. Even if we concluded that "no reasonable expectation of improvement" had been proven under grounds (e) or (g), the Cabinet proved ground (j) for termination and proof of one ground can satisfy the third prong of the tripartite test in KRS 625.090.

Adoption of Cabinet's proposed findings of fact and conclusions of law

Father next complains that the family court adopted the Cabinet's proposed order. In response, the Cabinet claims the family court carefully reviewed the evidence and, although the findings are lengthy and detailed, they are based directly and extensively on the testimony and documents admitted at trial.

While we agree that the family court adopted, almost verbatim, the Cabinet's seventy-plus-page proposed order, we find no error. The family court requested all parties to submit proposed findings of fact and conclusions of law after trial concluded. Both Father and the Cabinet complied with this request. The family court did not err by adopting the findings of fact and conclusions of law mainly drafted by the Cabinet. *Prater v. Cabinet for Human Resources*,

Commonwealth of Ky., 954 S.W.2d 954, 956 (Ky. 1997) ("It is not error for the trial court to adopt findings of fact which were merely drafted by someone else."). Review of the record reveals that the family court was familiar with the facts of this case. Also, a comparison of the Cabinet's proposed order and the family court's order indicates that the court examined the proposed findings and conclusions and made several additions to reflect its decision in the case. Father fails to show that the decision-making process was not under the control of the family court or that the findings and conclusions were not the product of the deliberations of the judge's mind. *Bingham v. Bingham*, 628 S.W.2d 628, 629-30 (Ky. 1982).

Consideration of unsubstantiated hearsay allegations

This brings us to Father's last claim of error. He alleges that, despite his objections, the family court considered unsubstantiated hearsay allegations in deciding to terminate his parental rights and included those in its order. Father claims that the family court heard testimony that R.M.S.'s back was bruised, which resulted in R.M.S. being removed from Father's custody and placed with a neighbor, but the Cabinet never proved how or by whom R.M.S. received this bruising. Also, Father complains that the family court heard testimony regarding allegations of sexual misconduct between Father's teenage son and one of R.M.S.'s brothers, but this allegation was not substantiated. Finally, Father claims

the family court heard hearsay testimony from Cabinet worker Katrina Holcombe regarding the children's statements that sexual abuse occurred between Father's son and one of the brothers, even though none of the children testified.

In TPR trials, the family court hears evidence outside the presence of a jury. KRS 625.080(1); *May v. Department for Human Resources*, 656 S.W.2d 252, 253 (Ky. App. 1983). "Admission of incompetent evidence in a bench trial can be viewed as harmless error, but only *if the trial judge did not base his decision on that evidence* . . . or *if there was other competent evidence to prove the matter in issue.*" *Prater*, 954 S.W.2d at 959 (citations omitted) (emphasis in original).

Here, Father admits in his brief that Cabinet workers Andreana Bridges and Ms. Holcombe conceded that the allegations of physical abuse by Father (bruising on R.M.S.'s back) and sexual abuse by Father's son were unsubstantiated. While the family court heard about the allegations, the court also understood these allegations had not been proven. While the family court's order mentions these allegations and does not always clarify that the allegations were unsubstantiated, we find no error. If the family court erroneously admitted hearsay allegations of physical and sexual abuse, we find it irrelevant because there was other evidence sufficient to support the family court's decision to terminate Father's parental rights.

CONCLUSION

For the foregoing reasons, we affirm the family court's order terminating Father's parental rights. R.M.S. was found to be a neglected child, substantial evidence supported the family court's conclusion that termination was in her best interest, and at least one ground of termination, pursuant to KRS 625.090(2), had been found.

ALL CONCUR.

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