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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-1896-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 17-AD-500449T

J.M.A. AND M.M.H. — APPELLEES

AND

NO. 2019-CA-1899-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 17-AD-500450T

J.M.A. AND S.G.M.H. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

CLAYTON, CHIEF JUDGE: The Cabinet for Health and Family Services (the "Cabinet") appeals from the Jefferson Circuit Court's orders denying the Cabinet's petitions to involuntarily terminate the parental rights of J.M.A. ("Mother") to two of her children - M.M.H., born on July 6, 2010 ("Older Daughter"), and S.G.M.H., born on August 23, 2016 ("Younger Daughter"). Upon review of the applicable facts and law, we affirm.

BACKGROUND

The Cabinet became involved with the family due to allegations of domestic violence between Mother and R.H. ("Father"), the natural father of Older Daughter and Younger Daughter. The Cabinet ultimately filed petitions with the court in May of 2014 alleging that both Mother and Father had abused or neglected Older Daughter and her two older brothers, who have a different father than Older Daughter and are not involved in this case. The court placed Older Daughter in her maternal grandmother's temporary custody on June 3, 2014, and ordered Mother to complete substance abuse treatment, mental health counseling, and U.K. Targeted Assessment services; to maintain sobriety; and to refrain from domestic violence. Mother was permitted to have supervised visits with the children.

The court held an adjudication hearing on October 14, 2014, with Mother being present and stipulating to having abused or neglected Older Daughter and her brothers and admitting that "due to her substance abuse and failure to abide by the terms of [the Cabinet's] safety plan the children were placed at risk of neglect." The court granted Older Daughter's maternal grandmother permanent custody of Older Daughter at the dispositional hearing, and the Cabinet closed its case after this award of custody.

Throughout 2015, Mother was incarcerated for various drug convictions, including trafficking cocaine and possession of heroin. In November of 2015, Older Daughter's permanent custodian, her maternal grandmother, passed away. Despite a court order that Mother only have supervised visits with Older Daughter, Mother took Older Daughter and cared for her during the approximately eight-month period following the maternal grandmother's death. Further, despite a court order that Father have no contact with Older Daughter, Mother permitted Older Daughter to visit with Father. During one such visit in July of 2016, Father was arrested during a traffic stop in Indiana for possession of methamphetamine with Older Daughter in the vehicle.

Thereafter, the Cabinet filed second petitions against Mother and Father in August of 2016 alleging that Older Daughter was abused or neglected and additionally alleging that Mother continued to abuse opiates. Older Daughter

was placed in the Cabinet's temporary custody on August 2, 2016, and has remained continuously in the Cabinet's custody since that date.

Younger Daughter was subsequently born to Mother and Father on August 23, 2016, while Mother was in jail. Younger Daughter was positive for heroin at birth and was placed in the Cabinet's emergency custody on August 25, 2016. The Cabinet filed a petition on August 26, 2016, alleging Younger Daughter to be abused or neglected, and the court placed Younger Daughter in the Cabinet's temporary custody on August 30, 2016, where she has remained continuously thereafter.

Mother was released from incarceration in September of 2016 and her whereabouts remained unknown for approximately a year thereafter, with her failing to attend any court dates related to the Cabinet's second petitions or to have any communication with the Cabinet. The court adjudicated the Cabinet's second petitions in Mother's absence on January 10, 2017, found both children to be neglected, and subsequently committed both children to the Cabinet's custody at a dispositional hearing in March of 2017.

Mother thereafter communicated with the Cabinet in the summer of 2017 to report that she had begun receiving methadone treatment and that she was ready to engage in reunification services. In August of 2017, the Cabinet allowed Mother to have supervised visitations with Older Daughter and Younger Daughter

after she had several clean drug screens and had signed another prevention plan with the Cabinet. Simultaneously with these events, the Cabinet filed termination of parental rights petitions against Mother and Father as to Older Daughter and Younger Daughter in August of 2017.

Beginning in July of 2018, however, Mother was allowed to have unsupervised visits with Older Daughter and Younger Daughter after she continued to show progress with her prevention plan goals, although her visits were ultimately switched back to supervised due to a positive drug screen in August of 2018.

The initial trial of this matter began on November 16, 2018, with the Cabinet concluding its proof that same day. The second portion of the trial was conducted on March 28, 2019, but was concluded after approximately three hours due to time constraints. Thereafter, the court issued orders on May 9, 2019, granting the Cabinet's petitions and terminating both Mother's and Father's parental rights to Older Daughter and Younger Daughter.

Mother subsequently filed a timely motion to alter, amend, or vacate the court's order pursuant to Kentucky Rule of Civil Procedure ("CR") 59.05 alleging that she was not afforded adequate time to present her testimony and proof due to the time constraints imposed by the court at the March 28, 2019, hearing. The court entered an order on July 9, 2019, vacating its May 9, 2019, orders as to

Mother only and setting another trial date for October 24, 2019, in order to allow Mother to complete her introduction of evidence.

After the final hearing on October 24, 2019, the court entered revised orders on December 9, 2019, denying the Cabinet's petitions to terminate Mother's rights as to Older Daughter and Younger Daughter. The Cabinet filed timely appeals of such orders. We note that Mother's parental rights are the only ones at issue in this appeal, as Father never appealed from the court's orders.

Further facts will be discussed as they become relevant.

ANALYSIS

a. Standard of Review

As stated by the Kentucky Supreme Court, "[b]ecause termination decisions are so factually sensitive, appellate courts are generally loathe [sic] to reverse them, regardless of the outcome." *D.G.R. v. Commonwealth, Cabinet for Health and Family Services*, 364 S.W.3d 106, 113 (Ky. 2012). Appellate review of a court's termination of parental rights decision is limited to the clearly erroneous standard. CR 52.01; *D.G.R.*, 364 S.W.3d at 113 (citations omitted). Under such standard, "an appellate court is obligated to give a great deal of deference to the trial court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *D.G.R.*, 364 S.W.3d at 113 (citing *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006)).

The trial court's application of the law to the facts is reviewed *de novo*. *Id.* (citation omitted).

b. Analysis

While "it is an unusual situation to be reviewing [a] trial court's *denial* of a petition to terminate parental rights, an unsuccessful party has the constitutional right to appeal said denial." *Id.* (citing KY. CONST. § 115 and *K.R.L.*, 210 S.W.3d at 186-87). The grounds to involuntarily terminate parental rights are set forth in Kentucky Revised Statute ("KRS") 625.090, which provides that a court may do so only if it finds, in pertinent part (1) that a child has been adjudged abused or neglected as defined in KRS 600.020(1), (2) that termination is in the child's best interests, and (3) the existence of one or more of eleven specific grounds set out in KRS 625.090(2). KRS 625.090(1)(a)-(c), (2); *M.B. v. D.W.*, 236 S.W.3d 31, 34 (Ky. App. 2007). Further, KRS 625.090(3) lays out factors for the trial court to consider in determining the best interests of the child and the existence of grounds for termination.

Moreover, under the specific language of the statute, even if the above factors have been met, "the trial court is never *required* to terminate under the statute as its authority to terminate is couched in the permissive 'may' rather than the mandatory 'shall,' . . . and the trial court has substantial discretion in

determining the best interests of the child under KRS 625.090(1)(b) and (3)."

D.G.R., 364 S.W.3d at 112. As further explained by the *D.G.R.* Court:

> Indeed, the bulk of the statute, reflects a default preference against termination, which is why it states that no termination of parental rights shall be ordered *unless* the court makes the statutory findings based on the higher standard of proof of clear and convincing evidence. The Constitution itself requires the state to meet this burden of proof before a parent's rights may be terminated because of the 'fundamental liberty interest' a parent has in the relationship with a child. *See Santosky v. Kramer*, 455 U.S. 745, 768, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (holding that a preponderance of the evidence standard to allow termination 'violates the Due Process Clause of the Fourteenth Amendment' and that termination must be justified by at least clear and convincing evidence).

Id. at 112-13. As a result, "it is only when a court does decide to terminate that clear and convincing evidence is required. Otherwise, there need be only substantial evidence to support a trial court's finding in order to avoid reversal." *Id.* at 114.

In this case, we believe that substantial evidence supported the court's findings that Older Daughter and Younger Daughter had a relationship with Mother, that Mother had demonstrated a creditable effort in her work towards sobriety, and that Mother would continue in her attempts to reunify with her children. Such evidence included specific testimony from various counselors who had treated both Mother and the children, as well as Mother's own testimony.

For example, Cindy Kamer of Centerstone testified and confirmed Mother's ongoing participation in services despite her other obligations related to gainful employment and maintaining stable housing. Older Daughter's therapist, Sara Allen, testified that Older Daughter missed Mother and wanted to be with her. Further, Ms. Allen observed progress in Older Daughter's demeanor and behaviors and a general decrease in anxiety following Older Daughter's increased contact with Mother. Ms. Allen further testified that Older Daughter talked positively about her visits with Mother. Regarding a potential return to Mother's home, Ms. Allen stated that, although Older Daughter was comfortable with the foster parents, she wanted to be with Mother.

Additionally, Mother testified to her progress in her treatment plan since the beginning of the case, her commitment to her children, and her desire to have her children returned to her custody. Mother had submitted to over one hundred random drug screens, found and continued full-time employment, established independent housing, was actively participating in methadone treatment, and had engaged in supervised and unsupervised visitation with both Older Daughter and Younger Daughter. Through her testimony, Mother showed an understanding of her mistakes and acknowledged the damage that she had caused to her children by her actions. This Court cannot say that the trial court was

clearly erroneous in choosing to believe the evidence offered by Mother, nor that the testimony was insufficient to support the trial court's determination.

The trial court was entitled to rely on the witnesses it found most convincing. As stated in *D.G.R.*, "[t]hat one side presents more testimony than the other, or that one side's evidence seems superior to the other's, at least from the appellate perspective, has no bearing." *D.G.R.*, 364 S.W.3d at 114. In reviewing a trial court's findings, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. Indeed, "judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citation omitted). Therefore, "mere 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*. (citations, quotation marks, and brackets omitted).

CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE J.M.A.:

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