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Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-0508-ME

S.S. APPELLANT

v. APPEAL FROM OHIO FAMILY COURT
HONORABLE MICHAEL L. MCKOWN, JUDGE
ACTION NO. 19-AD-00012

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
G.B.W.; AND N.W. APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, MCNEILL, AND L. THOMPSON, JUDGES.

ACREE, JUDGE: S.S. (Mother) appeals the Ohio Family Court's order terminating her parental rights to raise one of her two children.[1] She argues there

[1] This appeal pertains only to Mother's and Father's younger child, a son, G.B.W. Throughout Mother's testimony at the termination hearing, she referenced their older child, and she was asked about her relationship with that older child, a daughter, M.W. (Video Record (V.R.) 1/31/2020 12:40:38-1:12:44). Mother alludes in her brief to the Cabinet's efforts to terminate her parental rights to that child as well. (Appellant's Brief, p. 2.) There is no mention of another child in the family court's ruling, nor is there another case file on appeal in this Court. However,

is a lack of substantial evidence sufficient to satisfy the applicable clear and convincing standard and, therefore, terminating her parental rights was clearly erroneous. After a careful review of the record, we agree, and reverse the family court's order.

Father has elected not to challenge the termination order. This Opinion has no effect on the order as it pertains to Father.

BACKGROUND

The years of government interaction with this family began when Mother's youngest child was two months old. After giving birth, Mother suffered from complications due to her Caesarean section surgery. (Video Record (V.R.) 1/31/2020; 1:01:44.) Her activities were restricted, and she required a pump and in-home health care. (V.R. 1/31/2020; 1:01:44.) She also suffered from postpartum depression and, at the time, was battling influenza. This prevented her from providing the level of maternal care she wanted to give her child, necessarily leaving care of the child mostly to Father. (*Id*.)

The child was already suffering diarrhea when he began vomiting. (V.R. 1/31/2020; 1:02:00 -1:03:16.) This prompted Mother to call the pediatrician; she was worried the child might have contracted the flu from her. (*Id*.) She asked

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the Cabinet for Health and Family Services (CHFS) did initiate an action regarding the daughter, as well as the son. *See In re: M.W.*, 16-J-00044-001 (Ohio Family Court).

Father to take the child to the doctor and he did, but the doctor sent Father and child back home with instructions to return only if symptoms worsened. (*Id*.)

Soon thereafter, Mother noticed the child was showing signs of seizures and asked Father to take the child to the hospital emergency room where a more comprehensive exam could be performed. (*Id*.) He did.

At the hospital, the doctors found the child had several physical and mental issues, including: spina bifida; a lump on his back; seizures; problems with his eyes and right leg; and strokes. The child had also sustained fractures to seven ribs, the left wrist, and the right tibia. (Record (R.) at 45.)

The medical professionals at the hospital notified the Cabinet for Health and Family Services, and the Cabinet opened a case. Taking the position that some or all these medical problems were caused intentionally,[2] the Cabinet immediately filed for emergency custody of the child while it pursued a dependency, neglect, or abuse action. According to the emergency custody order the Cabinet obtained, the child's fractures were at different stages of healing, suggesting several distinct incidents causing injuries. (R. at 45.) The family court granted emergency custody to the Cabinet on February 19, 2016. Since that time, the child has remained in foster care and separated from Mother.

[2] It should go without saying that the child's suffering with spina bifida could not have been caused by post-natal abuse.

Due to the seriousness of the injuries, coupled with the child's age, the Cabinet involved the police. Mother and Father were charged with first, second, and third-degree criminal abuse. Because of the bond restrictions of the pending criminal trial, Mother and Father had limited contact with the child.

Throughout the dependency, neglect, or abuse case, Mother successfully worked her case plan and was assured the goal was to reunify her with her child. According to the Cabinet worker, Mother was cooperative and consistent in following through with her case plan that included: lessons on coping with abuse; working on personal hurdles; working on her capacity for protecting her child; following court orders; cooperating with the Cabinet; participating in a targeted assessment program; participating in mental health services; and complying with Cabinet recommendations. (V.R. 1/31/2020; 11:12:04 and 11:15:20.) Mother also participated in weekly visitation sessions with her child for an hour a week. If she missed a session, she always made up the time with an extra hour the following week. Mother did all the Cabinet required of her.

In the meantime, the criminal trial proceeded. Nothing changed in Mother's case plan goals until after the criminal trial concluded – when the child was three years old.

At the criminal trial, the Commonwealth was unable to present sufficient proof to support a jury verdict that either Mother or Father intentionally

injured their child. Mother was acquitted of all charges. Father was found guilty only on the charge of criminal abuse in the second degree, a charge requiring proof only that Father's conduct was wanton.[3]

With the criminal matter resolved, the Cabinet encouraged Mother to pursue sole custody. However, the Cabinet's actions spoke louder, and quite differently. Without further explanation, the Cabinet filed a petition to terminate Mother's parental rights.

At the termination hearing, the family court heard testimony about Mother's efforts to reunite with her child. Proof showed she paid child support, provided diapers, bought presents, participated in visitation, was involved with doctor's visits, and went to therapy.[4] And it is important to note that Mother's case plan never required her to end her contact with Father.

Despite successfully working her case plan, the family court nevertheless terminated her parental rights for a reason never made a part of her case plan – because she failed to terminate her relationship with Father. The court found Mother failed to demonstrate an ability or desire to protect the child because

[3] In pertinent part, the statutory definition of "[w]antonly" is: "A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." Kentucky Revised Statutes (KRS) 501.020(3).

[4] She attended, as instructed, family therapy with the child but that counselor testified her individual therapy sufficed and ended Mother's participation in family therapy after two visits. (V.R. 1/31/2020; 9:09:40.)

she continued to believe that Father did not intentionally harm the child (notwithstanding that her belief was borne out by the jury's verdict in the criminal case), and because she failed to end her relationship with Father. (R. at 82.)

The family court determined that termination of the rights of both parents was in the child's best interest and ordered "that the full care, custody and control of the child . . . be vested in the Cabinet . . . with authority to place the child for adoption[.]" (R. at 87.) With respect to Mother, the court found the only ground for termination was that the child had been in foster care, under control of the Cabinet, for fifteen of the most recent forty-eight months preceding the filing of the petition for termination of parental rights. KRS 625.090(2)(j). Taking into account the factors listed in KRS 625.090(3), the court found it was in the child's best interest to terminate Mother's parental rights because her continued relationship with Father did not demonstrate she made reasonable efforts or adjustments in her circumstances, conduct, or conditions to justify returning the child to her. KRS 625.090(3)(d). Mother appeals the ruling.

STANDARD OF REVIEW

This Court's standard of review in parental termination cases is "the clearly erroneous standard in CR[5] 52.01 based upon clear and convincing evidence[.]" *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116 (Ky. App.

[5] Kentucky Rules of Civil Procedure.

1998). A reviewing court will not disturb the family court's findings unless no substantial evidence exists in the record to support those findings. *Id.*

Although our standard of review mandates that we not engage in *de novo* review of the family court's factual findings, we keep in mind that termination of parental rights "encroaches on the parent's constitutional right to parent his or her child[.]" *M.E.C. v. Commonwealth, Cabinet for Health and Family Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008). As noted in *M.E.C.*:

> [terminating parental rights] is a procedure that should only be employed when the statutory mandates are clearly met. While the state has a compelling interest to protect its youngest citizens, state intervention into the family with the result of permanently severing the relationship between parent and child must be done with utmost caution. It is a very serious matter.

Id. Our high court emphasized the fervor with which courts protect the parental right in *D.G.R. v. Commonwealth, Cabinet for Health and Family Services*, stating:

> Termination proceedings are—and should be—weighted against the State. Thus, the default position in such a proceeding is that the child is to be left with the parents or returned to them, with or without ongoing services as needed. The State cannot disturb this natural order lightly.

364 S.W.3d 106, 116 (Ky. 2012).

ANALYSIS

Our laws place in the hands of our family court judges the considerable power of the state to extinguish a parent's relationship with her child,

notwithstanding her constitutionally recognized fundamental right to raise that child. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000). In Kentucky, that power is restrained by requiring the court to expressly follow the procedure set out in KRS 625.090.

"[T]he 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." *D.G.R.*, 364 S.W.3d at 112. Even then, "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'[.]" *Id.* (citing KRS 625.090(1)).

The statute requires a judge to base the decision to terminate upon clear and convincing evidence that supports each of three prongs: (1) that the child has been abused or neglected; (2) that termination would be in the child's best interest; and (3) that one or more of several listed grounds for termination are present. KRS 625.090. This is not the easiest standard to satisfy. As our Supreme Court said:

> where the "burden of persuasion" requires proof by clear and convincing evidence, the concept relates more than anything else to an attitude or approach to weighing the evidence, rather than to a legal formula that can be precisely defined in words. Like "proof beyond a reasonable doubt," "proof by clear and convincing

> evidence" is incapable of a definition any more detailed or precise than the words involved. It suffices to say that this approach requires the party with the burden of proof to produce evidence substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt.

Fitch v. Burns, 782 S.W.2d 618, 622 (Ky. 1989). It was the Cabinet's burden to prove Mother's unfitness as a parent by presenting clear and convincing evidence to satisfy each legal requirement in KRS 625.090. It not the parent's burden to bear.

Still, the parent may present evidence to prove by a mere "preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent . . . ." KRS 625.090(5). If the parent carries that burden, "the court in its discretion may determine not to terminate parental rights." *Id.* The parent's lower burden-of-persuasion requirement respects the parent's fundamental constitutional right, just as the court's exercise of discretion should respect the statute's overall default preference against termination.

We now address each of the three prongs of KRS 625.090, out of sequence, saving consideration of the child's best interest for last.

The one ground for termination under KRS 625.090(2)

The family court correctly acknowledged there was only one statutory ground for termination, and it is stated in KRS 625.090(2)(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 . . . ." However, "the existence of only one of the grounds in that section" is all it takes. *Commonwealth, Cabinet for Health and Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). The statute does not ask the family court to consider in retrospect why that circumstance exists or whether it should have occurred in the first place.

It was easy for the family court to find the Cabinet satisfied KRS 625.090(2)(j) because the Cabinet's custody lasted all the years it took for the Commonwealth to bring the criminal cases against Mother and Father to trial. Until her acquittal, Mother could do nothing but work her case plan, and she did just that. Nevertheless, for purposes of this review, we must conclude this prong was established by clear and convincing evidence.

The finding of abuse or neglect

The family court also had to find, by clear and convincing evidence, that Mother had abused or neglected her child. Citing KRS 625.090(1)(a)1, the family court found that the child "was adjudicated as a neglected or abused child by separate Order as to each parent, of the Ohio Family Court, a court of competent jurisdiction, Juvenile Action No. 16-J-00043-001." (R. at 81.) But this case illustrates a conundrum.

Although clear and convincing evidence does support the family court's finding that there was a prior adjudication of neglect or abuse, neglect or abuse was only proven under the lower preponderance of the evidence standard. The instant case presented the first opportunity to apply, as constitutionally required, the more stringent clear and convincing evidence standard for terminating parental rights.

When we more closely examine the specific finding in the prior juvenile adjudication, we see that "the allegations contained in the Petition [alleging neglect or abuse] have been proven by a *preponderance of the evidence*" (emphasis added) based on "the following specific findings of fact[:] . . . Mother squeezed the child which created a risk of physical injury *by other than accidental means*. *The Court does not believe the Mother intended to injure the child*." (R. 62 (emphasis added).)

To be as clear as this confusing finding allows, the court concluded that Mother hugged her child so vigorously that it risked a kind of harm that was neither intended nor accidental. That was the factual basis for the legal finding of neglect or abuse in the juvenile proceeding, and it was adopted by the family court in the termination proceeding to satisfy KRS 625.090(1)(a). But that confusing finding is not the greater problem.

The greater concern is that if we limit consideration of the evidence of neglect or abuse to the adoption of a finding based only on the preponderance standard, it will fail to satisfy the constitutionally mandated clear and convincing evidence standard for terminating parental rights. As our own Supreme Court said:

> The Constitution itself requires the state to meet this burden of proof [clear and convincing evidence] 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).

D.G.R., 364 S.W.3d at 112-13.

In our effort to find any basis for affirming the family court, *see Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co.*, 434 S.W.3d 489, 495 (Ky. 2014), we consider the other evidence of neglect or abuse in the termination proceeding itself, whether addressed by the parties or mentioned by the court. We start with Father's criminal conviction for abuse.

The family court focused on Father's conviction for wanton behavior. KRS 508.110. But the court ignored Father's acquittal on a charge that he harmed his child intentionally. KRS 508.100. More importantly, the family court ignored its own agreement with the jury's acquittal of Mother in the criminal case that "[Mother] has nothing to do directly with the child's injuries . . . ." (R. at 82.)

Furthermore, there is the unrefuted proof that Mother's medical condition hindered, if not prevented, her ability to oversee Father's care of the child. The family court appears to have given no weight to that proof. No weight appears to have been given to the unrefuted proof that, despite her impairment, she instructed Father to take the child to the doctor; that the doctor did not report any suspicion of abuse; or that Mother was not satisfied with the doctor's diagnosis and instructed Father to take the child to the emergency room. These are not the actions of a parent who has herself neglected or abused the child.

There is no substantial evidence that clearly and convincingly supports the factual finding that Mother neglected or abused the child. The finding to the contrary is clearly erroneous.

"In the case at bar, the best interest of the child test appears to have been the decisional basis rather than the clear and convincing evidence standard . . . ." *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky. 2004). Therefore, we consider the final prong – the best interest of the child.

Best interest of the child

Mother contends the evidence does not support the legal conclusion that termination of her parental rights is in the best interest of her child. We agree.

A non-exclusive list of factors guides a court when determining whether termination of parental rights is in the child's best interest, as follows:

> (a) 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;
>
> (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
>
> (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 circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;
>
> (d) 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;
>
> (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
>
> (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). Our Supreme Court has emphasized that these factors are not to be applied as a checklist but "are to be 'considered' in deciding whether termination is in the child's best interest. They do not necessarily dictate a result and are always subordinate to the best-interest finding that the court is tasked with

making." *D.G.R.*, 364 S.W.3d at 115. But we shall begin with the list and consider them in sequence.

There is no evidence that Mother is suffering from any mental condition impacting her ability to parent. KRS 625.090(3)(a). And we have just addressed the absence of proof that she abused or neglected her child. KRS 625.090(3)(b).

When it comes to the efforts of the Cabinet, and Mother's cooperation and effort in working her case plan, KRS 625.090(3)(c)-(d), the family court had this to say:

> The Court does commend [Mother] for doing an excellent job on her case plan other than missing therapy appointments. Mother has kept in consistent contact with the child when not prevented by the bond from the criminal case, although there is not a strong bond between mother and child at this time and the child considers mother more of a playmate than a parental figure. [Mother] has done a pretty good job supplying material items for the child including child support, diapers and clothing and has maintained consistent contact with the child's foster parent.

(R. at 82.) We agree with the family court. However, as we read and re-read this quote, we must pause to consider the irony of the family court's use of the word "bond" in two places – "the *bond* from the criminal case" and the lack of "a strong *bond* between mother and child at this time . . . ." The jury verdict is quite an indicator that the prosecutor overcharged Mother and Father with crimes they did

not commit. Are we to pretend the Commonwealth played no role in breaking that strong bond between Mother and her child?

The Commonwealth's agencies separated Mother and child two months after his birth and kept them apart for the first five formative years of the boy's life. The longer the separation, the less negative the impact of termination on the child's physical, mental, and emotional health under KRS 625.090(3)(e). The record shows Mother did all she could to maintain as much of that bond as possible. The Cabinet's record for helping maintain that bond is not as obvious.

Considering KRS 625.090(3)(e) in the greater context, we ask what are "the prospects for the improvement of the child's welfare if termination is ordered"? The child currently has two caring maternal figures in his life. Mother urged the family court to consider her acknowledgement and respect for the ties now existing between her child and the foster mother. Mother testified to her willingness to return gradually to the natural *status quo* with her in her proper and primary role of the child's mother. If termination is ordered, will the child's welfare be improved? He would lose one of those maternal figures in his life – the only one whose maternal status is protected by the Constitution. Giving KRS 625.090(3)(e) its intended consideration, it seems the evidence suggests the child's welfare will be harmed if termination is ordered.

As for KRS 625.090(3)(f), the record shows, and the family court found, that Mother did "pay a reasonable portion of substitute physical care and maintenance" while her child was in foster care.

So, why does the Cabinet continue to insist Mother is unfit to parent her child? Despite Mother's active and successful working of her case plan, the Cabinet determined she had a low protective capacity because she was unwilling to acknowledge Father intentionally harmed their child and she failed to sever all ties with him. (V.R. 1/31/2020; 11:18:45.) In fact, when the jury acquitted Father on the charge of intentional abuse of the child, it proved Mother was right and the Cabinet was wrong about Father. *See* KRS 508.110; 501.020(3). As for her relationship with Father, Mother said she would do anything necessary to get her child back. Eliminating Father entirely from her life would be difficult because she and Father have not one, but two, children together. Mother testified that she and Father no longer live together and their relationship is limited to communicating about their child. The Cabinet's insistence that Mother extinguish the relationship entirely with her daughter's father, at this point, borders on persecution.

Finally, Mother presented substantial evidence under KRS 625.090(5) "that the child will not continue to be an abused or neglected child as defined in

KRS 600.020(1) if returned" to her. The family court is required to consider that evidence as part of the best-interest consideration. As our Supreme Court stated:

> although [KRS 625.090(5)] comes sequentially after the factors to be considered in making the best interest determination in the statute, it must be considered in making the best interest determination if the parents present such proof. Otherwise, this section of the statute would have no meaning. That the parents can persuade the court that the child will not be abused in the future obviously goes to what is in the child's best interest going forward[.]

D.G.R., 364 S.W.3d at 115.

Mother testified that she lives with her mother and step-father now, limiting her contact with Father as described above. She completed her case plan and continues therapy. The Cabinet's vapid response was the new, no-contact-with-Father contingency it added after Mother had done everything asked of her.

If this Court is errant in its belief that the proof is insufficient to find Mother neglected or abused her child, reversal is still appropriate based on the family court's abuse of discretion under KRS 625.090(5) in terminating parental rights anyway. The family court based its conclusion on little or no proof that terminating Mother's parental rights is in the child's best interest.

Do we doubt our conclusion that clear and convincing evidence does not support the termination? We do not. Our best assurance is demonstrated by

the family court's expression of its own uncertainty when it asked the parties to attempt an amicable settlement about the child. The court said:

> I want to start my recitation of the judgment by saying until I sign this order the parties could agree to something different. It seems to me there's a middle ground here that would be acceptable to the court, and that's up to you all. But if the Commonwealth is going to proceed forward with the termination, then I am going to rule on it, but, uh, I think that everybody ought to step back and think about this and think about [Foster Mother] and think about [Mother] and see if there is some middle ground that could be reached.

(V.R. 1/31/2020 at 1:25:31-1:26:10.)

This approach may seem inspired by Solomon, but it is not. Solomon did not want the two mothers before him to split the child. 1 *Kings* 3:16-28. The family court here did.

The inspiration for this approach was the family court's uncertainty that terminating Mother's parental rights was the right thing to do. If it were otherwise, if the family court here had been certain the statutory requirements were met by clear and convincing evidence that Mother was unfit to parent the child, why give her the opportunity to make a deal with the foster mother to stay in the child's life? Like the real mother in the story of Solomon's judgment, Mother refused to split the baby; unlike that biblical mother, the real Mother here refused to relinquish her parental rights.

Our jurisprudence is designed to prohibit the state's interference with a parent's constitutional right until a judge concludes with the certainty of clear and convincing evidence that it is the right thing to do. "Notwithstanding the state's civil labels and good intentions, the [Supreme] Court [of the United States] has deemed this level of certainty necessary to preserve fundamental fairness in . . . proceedings that threaten the individual involved with a significant deprivation of liberty or stigma." *Santosky*, 455 U.S. at 756, 102 S. Ct. at 1396 (internal quotation marks and citation omitted). This sounds much like the criminal law's beyond-a-reasonable-doubt standard, applied in the civil context. And perhaps our courts could do a better job of defining the clear and convincing evidence standard than saying only that it "is incapable of a definition any more detailed or precise than the words involved." *Fitch*, 782 S.W.2d at 622.

Historically, when a standard higher than a preponderance is called for in Kentucky, our courts often equate the standard with the dispelling of reasonable doubt. The closest example measures the proof necessary to overcome the presumption of a child's father being the mother's husband; such proof must be "so clear, distinct and convincing as to remove the question from the realm of reasonable doubt." *J.A.S. v. Bushelman*, 342 S.W.3d 850, 860 (Ky. 2011) (citation

omitted).[6] On the other hand, when the issue was child custody as between a parent (with a constitutional parental right) and grandparents (without such right), our Supreme Court said clear and convincing evidence was "substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt." *Fitch*, 782 S.W.2d at 622. A comparison of the language suggests the clear and convincing standard is higher in cases like *J.A.S.* than in cases like *Fitch* and the instant case.

However, if there is a distinction, or if the Supreme Court believes clarification is needed, there will be many opportunities to do so. Under any notion of what it means to be clear and convincing, the evidence here fails to provide the family court's decisions with that degree of certainty.

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[6] The equating of "clear and convincing" with the absence of "reasonable doubt" can be found in many other kinds of cases not even involving the constitutional protection afforded parents. To prove a lost will, we require "'clear and convincing' proof, which is [shown when] . . . 'the entire proof, together with surrounding circumstances shall be such as to convince a reasonable mind of the truth of the grounds alleged, and to dispel any well-founded doubt upon the subject.'" *Mimms v. Hunt*, 458 S.W.2d 759, 760 (Ky. 1970) (quoting *Glass v. Bryant*, 302 Ky. 236, 194 S.W.2d 390, 393 (1946)). "[E]vidence of a gift inter vivos must be clear, convincing and free from reasonable doubt . . . ." *Knox v. Trimble*, 324 S.W.2d 130, 132 (Ky. 1959). "The proof necessary to establish [a parol trust] must be clear and convincing, and such as to leave in the mind of the chancellor no reasonable doubt as to the fact of the trust." *Panke v. Panke*, 252 S.W.2d 909, 911 (Ky. 1952). "Before a reformation of a deed may be had the proof must be clear and convincing and established beyond a reasonable doubt." *Hale v. Hale*, 297 Ky. 631, 180 S.W.2d 857, 858 (1944). When we determine whether a statute is penal in nature, the language must be "clear and convincing [and] . . . if the statute was so ambiguous as to leave reasonable minds in doubt, the penalty would not be exacted . . . ." *Commonwealth ex rel. Martin v. Tom Moore Distillery Co.*, 287 Ky. 125, 152 S.W.2d 962, 964-65 (1939). To reform a contract for mutual mistake, it must be "established by such clear and convincing proof as to preclude all doubt that a mistake was made . . . ." *Flimin's Adm'x v. Metropolitan Life Ins. Co.*, 255 Ky. 621, 75 S.W.2d 207, 209 (1934).

CONCLUSION

Father has not appealed the Ohio Family Court's order and his parental rights relative to G.B.W. remain terminated. However, for the foregoing reasons, we reverse the Ohio Family Court's order terminating Mother's parental rights.

ALL CONCUR.

BRIEF FOR APPELLANT:

Preston J. Wade
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BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY:

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