

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0856-ME

L.R.

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE SHELLEY M. SANTRY, JUDGE
ACTION NO. 22-AD-500193

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; AND E.R., A
CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CETRULO, LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: L.R. (the father) has appealed from the judgment of the Jefferson Family Court involuntarily terminating his parental rights to his daughter, E.R. (the child). We affirm.

The father and M.B. (the mother) are the natural parents of the child, who was born in 2016 in Jefferson County, Kentucky. The child was removed

from the mother's care when she was 11 months old and placed with the father and his wife, K.R. (the stepmother). The father and the stepmother have two children in common, who are younger than the child, and the stepmother has an older child from a previous relationship.

On September 18, 2020, Barbara Scheer, a Child Protective Services investigator for the Cabinet for Health and Family Services (the Cabinet), filed a juvenile dependency/neglect or abuse (DNA) petition, detailing suspected nutritional abuse of the child at the home of the father and stepmother. Ms. Scheer expressed significant concerns if the child were to be left in the care of the father and the stepmother because she was not getting enough to eat and was being locked in her room for 12 hours per day. The court granted the motion for emergency custody and placed the child with the Cabinet, relying upon the affidavit. The Cabinet placed the child with foster parents.

Following a temporary removal hearing, the court entered an order on September 28, 2020, finding "reasonable grounds to believe that child has been nutritionally neglected by [the father and stepmother]. Child has been reported to have exhibited conduct and behaviors consistent with a starving child." The court ordered that the child be placed in the Cabinet's temporary custody. The court permitted visitation and ordered the father to complete several evaluations and parenting classes.

The court held a trial on the DNA petition on October 20 and December 8, 2021, which this Court has reviewed. The court entered its findings of fact and conclusions of law on February 2, 2022, finding, in relevant part, as follows:

The Court heard testimony from a variety of witnesses and takes particular interests in the exhibit and testimony of Dr. Jennie Green on behalf of Pediatric Protection Specialists (PPS) in which they were consulted on 9/8/2020 for concerns of possible neglect of a 4.3 year old girl [the child. The child] was significantly underweight and appeared malnourished during admission to an inpatient medical facility, Our Lady of Peace hospital (OLOP).

[The child] was taken to OLOP by [the stepmother] on 8-26-20 for behavioral issues. At admission, [the child], age 4.3, weighed 23 pounds (the weight of an 18-month old). [The stepmother] reported [the child] suffered from Bulimia/eating disorder though throughout [the child's] extensive medical treatment (propelled by [the stepmother]) no such diagnosis nor any medical diagnosis was rendered explaining (medically) why [the child] had such a hard time gaining weight. In addition, [the stepmother] placed blame on [the child's] mother . . . alleging that [the child] was removed from [the mother] because [the mother] "starved" [the child]. [The stepmother] offered this as an explanation as to why [the child] was stealing food; though records indicate [the child] was a normal weight (17 pounds) at 11 months old, her age at the time of removal. Given this information, [the child] gained 6 pounds since first removal and placed with [the stepmother], until her second removal 3.4 years later! This little weight gain is baffling especially when [stepmother] testified that [the child] would eat "5 man size plates when they went to a buffet" and has eaten up

to 5000 calories per day. This was proved by [the stepmother's] food journal and pictures (exhibit 1 – 5a-j) and further explained why [the stepmother] had to lock [the child] in her bedroom at night for 10-12 hours to prevent her from eating food. OLOP reported that despite [the stepmother's] report of massive food intake and behavioral problem, OLOP found that [the child] ate appropriate amounts of food and posed no behavioral problems at all. [The child] gained 3 pounds during her 11 day stay at OLOP, some weight gain being the result of a 'cast' but certainly not the entire 3 pounds. Additionally, after 4/5 months in foster care, [the child] has gained an additional 7 pounds, which is more than the weight gained in [the stepmother's] care for over 3 years.

The court went on to conclude:

The proof is clear that at the hands of [the stepmother and father, the child] suffered from severe nutritional neglect and abuse. There is no other medical explanation as to [the child's] failure to thrive though [the stepmother] went to every [doctor] and had almost every test known administered.

In addition, locking a child in her room through the night, ignoring her bangs and screams and pleas is not only abuse and neglect but any child living in the house hearing the screams of a starving child is abuse and neglect, certainly a risk of abuse and neglect and thus, the finding of the Court is that ALL the children must be protected.

[The father] had little to say if anything throughout the entire 2-day trial and likely had little to say if anything about how [the stepmother] was treating [the child]. His absence of protection makes him as responsible as the offender, [the stepmother].

The court held that the Cabinet had proven by a preponderance of the evidence that the allegations in the petition were true and that the child had been abused and neglected by the father and the stepmother. The court signed an order entered the same day ordering that the child was to remain in the temporary custody of the Cabinet. Following the disposition hearing, the child was committed to the Cabinet on February 9, 2022.

In 2022, the family court entered a permanency order listing the goal as adoption. The court noted that it had previously made a finding of neglect or abuse, that returning the child to the home would be contrary to her welfare, and that reasonable efforts had been made to prevent the child's removal from the home.

On July 21, 2022, the Cabinet filed a petition to involuntarily terminate parental rights of both natural parents. The Cabinet alleged that the parents had failed to protect and preserve the child's fundamental right to a safe and nurturing home, that she was an abused and neglected child as defined by Kentucky Revised Statutes (KRS) 600.020, and that it was in the child's best interest that parental rights be terminated. The mother had abandoned the child for at least 90 days, and both parents failed to provide the essentials to the child without any reasonable expectation of improvement in their ability to do so. And the child had been in foster care under the Cabinet's care for 15 of the most recent

48 months. Trial was scheduled for 2023, and the court appointed a guardian *ad litem* for the child and separate attorneys to represent the father and the mother.

The court held a termination hearing on April 14, 2023. The court heard testimony from current Cabinet caseworker Devin Reul (who took over the case in April 2022), the child welfare specialist/visitation supervisor at Family and Children's Place, a treatment service provider from Seven Counties Services, the child's foster father, the father (using an interpreter), the stepmother, and a former therapist for the child. Over the father's hearsay objection, the family court permitted the filing of the record in the DNA case and took judicial notice of the orders entered in the child's case.

On June 16, 2023, the court entered its findings of fact and conclusions of law and, separately, an order terminating the parental rights to the child. The court noted that at the beginning of the hearing, the mother had waived her right to a trial and consented to a voluntary termination of her rights, leaving the father's parental rights as the sole issue to be decided. The court first found that the child had been determined to be an abused or neglected child within the meaning of KRS 600.020(1). The court then made extensive findings related to the grounds the Cabinet alleged under KRS 625.090(2)(e) and (g) regarding the father's failure to meet the child's needs. It also found, under subsection (2)(j), that the child had been in foster care for the requisite length of time, as she had

been placed in the temporary custody of the Cabinet on September 21, 2020, and the petition was filed close to two years later, in July 2022. The court went on to consider the relevant factors under KRS 625.090(3) to determine whether termination was in the child’s best interest, as well as reasonable inferences about future parental conduct. All but the first factor (mental illness or an intellectual disability of a parent) resulted in findings supporting termination. Based upon its extensive findings and analysis, the court terminated the father’s parental rights to the child and placed the child’s full care, custody, and control with the Cabinet along with the authority to place the child for adoption. This appeal now follows.

In *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014), the Supreme Court of Kentucky discussed the fundamental interest a parent has to raise his child and how the required statutory elements protect that right:

The involuntary termination of parental rights is a scrupulous undertaking that is of the utmost constitutional concern. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 119-20, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996). The U.S. Supreme Court has unequivocally held that a parent has a “fundamental liberty interest” in the care and custody of his or her child. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). 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” *Id.* 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.*

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

We are mindful of the father’s liberty interest as we consider his appeal.

In *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998), this Court set forth the applicable standard of review in termination proceedings:

The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, Ky. App., 552 S.W.2d 672, 675 (1977). This Court’s standard of review in a termination of parental rights action is confined to the clearly erroneous standard in [Kentucky Rules of Civil Procedure (CR)] 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources*, Ky. App., 706 S.W.2d 420, 424 (1986).

“Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is

proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

More recently, the Supreme Court of Kentucky stated:

“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).] Due to the fact that “termination decisions are so factually sensitive, appellate courts are generally loathe 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)].

K.H., 423 S.W.3d at 211.

Turning to the statutory requirements, the first prong of the three-part test requires that the child is or has been adjudged to be an abused or neglected child pursuant to KRS 625.090(1)(a), as defined in KRS 600.020(1). The father has not disputed that the child had been adjudged to be abused or neglected by a court of competent jurisdiction, *see* KRS 625.090(1)(a)1., and the court made independent findings to this effect.

Next, the court must find the existence of one or more grounds listed in KRS 625.090(2) related to parental unfitness. In this case, the family court found the existence of the following three grounds:

(e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

...

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

...

(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[.]

There is no dispute that the Cabinet met the ground under subsection (j) as the child had been in foster care for more than 15 months during the 48 months prior to the filing of the petition. And the record contains clear and convincing evidence, as set forth in the judgment, that overwhelmingly supports the court's findings under subsections (e) and (g).

As the Cabinet points out, the father's brief focuses on the third prong of the test; namely, whether the termination of his parental rights was in the child's

best interest. In considering the best interest of the child (as well as the existence of a ground for termination), the family court must consider the factors set forth in KRS 625.090(3), which include:

- (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.

We review a best interest determination for abuse of discretion:

When reviewing a family court's determination of the best interests of a child, we must apply the abuse of discretion standard. *Young v. Holmes*, 295 S.W.3d 144, 146 (Ky. App. 2009). Absent a showing that a decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles, a family court's determination on the issue will not be an abuse of discretion and will be

sustained. *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010).

D.J.D. v. Cabinet for Health and Family Servs., 350 S.W.3d 833, 837 (Ky. App. 2011).

Here, the family court painstakingly examined all of the factors, other than subsection (a) dealing with whether the parent has a mental illness or intellectual disability as that is not applicable here, and it detailed the extensive evidence introduced in the case before concluding that termination of parental rights was in the child's best interest.

In support of his argument that it was not in the child's best interest for his parental rights to be terminated, the father argued that he and the stepmother had denied withholding food from the child and had tirelessly sought to find the source of the child's behavioral and nutritional issues; he blamed the child's issues on the lack of care she received while in the mother's custody several years before. The father also pointed to his lack of English language comprehension for his failure to adequately comply with the court's orders, the Cabinet's failure to provide expanded visitation or family therapy, and a lack of awareness that he could or should provide financial assistance for the child while she was in the Cabinet's care to combat the family court's conclusion related to the best interest factors. The father stated that he loved his daughter and would protect her from harm.

The Cabinet countered each of the father's arguments, and we agree that the clear and convincing evidence introduced into the record supports the family court's conclusion that termination was in the child's best interest. The child had been abused or neglected as found in the underlying DNA action and in the termination proceeding, the Cabinet made appropriate referrals and reasonable efforts to reunite the family, the child's needs had been met by her foster family, and the father had not paid any support for the child while the child was out of his care despite being employed and the breadwinner of his family.

Regarding the factor in subsection (d) ("[t]he 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"), the family court found the father's testimony that he would be able to meet the child's future needs if she were returned to his care to be "totally lacking in credibility." We agree.

At the termination hearing, Cabinet caseworker Mr. Reul discussed the traditional family dynamic in the father's home, meaning that the stepmother would be the child's primary caretaker, and that neither the father nor the stepmother would take responsibility for the child's weight and hunger issues, which affected the father's ability to be accepted into a program to address his parenting skills. Mr. Reul believed it would be "absolutely detrimental" to return

the child to the father's home due to the father's failure to acknowledge the serious abuse that had gone on in his home. In its order, the court stated:

[The father] agreed that [the child] was being locked in her room, stated that his wife was not doing anything to harm [the child] and that [the child] was not malnourished while in his custody. He testified that there was nothing going on in his home, that [the child] was not suffering and she had everything she wanted. Despite his belief that [the child] was not being harmed, he agreed that medical evidence showed [the child] was in the twentieth (20) percentile for weight and height at the time [the child] was placed into his home as a baby, upon removal from the mother's custody. Respondent father agreed that medical evidence showed [the child] dropped to the zero point zero (0.0) percentile for height and weight while in his home. The Respondent father could not explain [the child's] failure to gain weight in the absence of any medical conditions causing her to be underweight and agreed that there were no medical diagnoses preventing her from gaining weight while in his custody. The Court also heard from [the stepmother. The stepmother] stated her belief that [the child] suffers from Reactive Attachment Syndrome or RAD because [the child] did not attach to her, although [the stepmother] did state [the child] is attached to her father. Like the Respondent father, [the stepmother] blames [the child's] malnourished body and the lack of attachment to her on [the child's] mother.

We likewise find no support in the father's attempt to blame the mother's care as the cause of the child's issues in light of her weight gain immediately following her removal from his care, as the records established and the foster father testified.

While this Court does not doubt that the father loves the child, that is not enough to provide adequate protection for her, considering the neglect and

abuse the child experienced while in his and the stepmother's care. The father certainly failed to meet her hunger needs and inappropriately disciplined her by locking her in her room overnight when she lived in his home, yet he denied that he had done anything wrong. Therefore, we find no abuse of discretion in the family court's conclusion that termination of the father's parental rights was in the child's best interest.

For the foregoing reasons, the judgment of the Jefferson Family Court terminating the father's parental rights is affirmed.

ALL CONCUR.

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