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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000745-ME

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

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 08-AD-00005

D.G.R.; T.B.H.; AND A.T.H., A CHILD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: The Cabinet for Health and Family Services appeals from an order of the Caldwell Circuit Court which denied the Cabinet's petition to

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

terminate the parental rights of D.G.R. and T.B.H. to their minor child, A.T.H. After careful review, we reverse.

A.T.H. was born on January 27, 1997. He was twelve years of age at the time of the termination hearing. He has been diagnosed with autistic disorder, attention deficit hyperactivity disorder (ADHD), and possible bipolar disorder. D.G.R. (the mother) and T.B.H. (the father) are his biological parents. They are not married to each other but have shared a household for over twelve years. The father is unemployed and receives disability benefits. His parental rights to a son from a previous marriage were involuntarily terminated by the court in 1996. The mother voluntarily gave up her parental rights to her child from another marriage. She is presently employed as a caretaker for an elderly person.

Three abuse petitions have been filed by the Cabinet on behalf of A.T.H. The first petition was filed on October 15, 2004, after the Cabinet received a report that an autistic child who could not communicate had numerous marks on his legs, back, chest and stomach. Cabinet Social Worker Brenda Bolton observed numerous marks on the child's upper body, face, neck and chest. There were also raised, red "angry" linear marks on his buttocks and upper thigh. Although A.T.H. was seven years of age at the time, he was wearing a urine-soaked pull-up type of diaper. His pajamas were also urine-soaked, and his bed had a strong odor of urine. He was taken to the Caldwell County Hospital where he was examined by a doctor who found soft tissue contusions consistent with physical abuse.

Due to his autistic condition, A.T.H. is developmentally delayed and unable to explain how he received the bruises and marks. He was removed from his parents' home and placed in foster care. A case plan was developed to keep him safe from future harm. The parents agreed not to use corporal punishment during visits.

While A.T.H. was in foster care, it was discovered that he had anal warts of a sexually transmitted type. His father was tested and it was found that he suffered from venereal warts. This incident led to the filing of the second juvenile petition, and the Cabinet also filed an addendum to the original abuse petition, indicating that A.T.H.'s initial injuries appeared to be due to neglect, as the pull-ups he had been wearing were too small and very urine-saturated. The addendum also stated that since A.T.H. had been in foster care, it was noticed that his developmental delays were due not solely to his autism but also to a lack of stimulation, social interaction, and teaching of basic soft skills at his home.

On March 15, 2005, the Caldwell District Court held an adjudication hearing on both juvenile petitions. With regard to the initial abuse petition, the court found that abuse had occurred. With regard to the sexual abuse petition, the court found that neglect had occurred.

Over the course of the spring and early summer of 2005, A.T.H. remained in foster care, and his parents cooperated with the Cabinet by working on their case plan and attending a support group for parents of autistic children. In August 2005, A.T.H. was returned to his parents' home.

The third petition was filed in June 2006, when the Cabinet received another abuse report that A.T.H. was screaming and yelling, and the sounds of "licks" could be heard as he was struck. A.T.H. suffered significant bruising on his buttocks but was unable to speak well enough to explain what had happened to him. A physician at the Caldwell County Hospital said that A.T.H.'s injuries were consistent with abuse and recommended that he be removed from the home and placed in foster care. Initially, D.G.R. and T.B.H. stated that A.T.H. received his injuries when he fell in the bathtub. Later, they claimed that he had fallen onto a plastic toy truck. Ultimately, T.B.H. admitted that he got angry and spanked the child for pulling his mother's hair. On July 17, 2006, a third adjudication hearing was held in Caldwell District Court. The court found A.T.H. was abused by his father when the father used excessive force in whipping the child.

From June 2006 until May 2008, A.T.H. resided in a state-approved foster home. For the next ten months, he resided at Our Lady of Peace psychiatric hospital in Louisville. During that ten-month period, A.T.H.'s mother visited him once. After a hearing, T.B.H.'s visitation rights were terminated by order entered on April 29, 2008, because the child's aggressive behavior escalated after visits with his father.

On July 16, 2008, the Cabinet filed a petition to terminate the parents' rights. The termination hearing was held on March 5, 2009. The trial court issued an order denying the Cabinet's petition, and this appeal followed.

Involuntary termination proceedings are governed by KRS 625.090, which provides:

> [A] court may involuntarily terminate all parental rights of a parent to the named child if it finds by clear and convincing evidence that: (1) the child has been abused or neglected; (2) termination would be in the child's best interest; and (3) one or more of several listed grounds for termination are present.

J.M.R. v. Commonwealth, Cabinet for Health and Family Services, 239 S.W.3d 116, 121 (Ky. App. 2007).

When reviewing a family court's decision to terminate parental rights, we review the decision to determine if it was based upon clear and convincing evidence under the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure (CR) 52.01. *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006). "With this in mind, we are required to give considerable deference to the trial court's findings, and we will not disturb those findings unless no substantial evidence exists in the record to support them." *Id*. "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." *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citing *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934)).

In this case, the trial court found by clear and convincing evidence that the child had been abused and neglected, thereby fulfilling the first prong of

the statute. KRS 600.020(1). Under KRS 625.090(2)(j), the trial court also found by clear and convincing evidence that the child had been in foster care under the responsibility of the Cabinet for fifteen of the most recent twenty-two months preceding the filing of the petition to terminate parental rights, noting that the child had in fact been in foster care for a total of forty-three months since October 2004. Two prongs of the statute, KRS 625.090(1) and (2), were therefore met.

The central issue on appeal, then, is whether the trial court properly determined that termination was not in A.T.H.'s best interest. KRS 625.090(3) details the factors to be considered when determining whether termination is in the child's best interest. Those factors are as follows:

> (a) Mental illness as defined by KRS 202A.011(9), or mental retardation 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;
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> (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
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> (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;
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> (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).

The Cabinet argues that the trial court's determination that termination was not in A.T.H.'s best interest is not supported by clear and convincing evidence and that the evidence instead overwhelmingly favors termination. For example, Brenda Bolton, a social worker who has been involved with A.T.H. and his parents since 1995, testified at the termination hearing that there were concerns for the child's welfare because of the parents' history of neglecting him, the father's history of abusing him, the father's history of mental health issues, and the parents' inability to understand the needs of an autistic child. She testified that there was a lack of stimulation in the parents' home whereas, by contrast, when he was in foster care, A.T.H. made significant progress in the area of toilet skills and use of eating utensils. She explained that due to the child's special needs, caring for him is a "24/7 job" and that his parents have never been able to consistently demonstrate the ability to give A.T.H. the attention and special care he requires.

Similarly, Mary "Beth" Beshear, a social worker who became involved with the family in January 2005, testified that A.T.H. "bloomed" while he was in foster care and regressed when he was returned to his parents. She also testified that the parents' home was dirty and roach-infested, and she observed that the sheets on the child's bed did not appear to have been washed since his removal over two years earlier. She stated that the condition of the parents' home had deteriorated since the mother began working full-time and that the father was unwilling to assist with the housekeeping.

The Cabinet also stresses the significance of an evaluation report performed by the University of Kentucky Child and Adolescent Trauma Treatment Center (CATS Evaluation). The CATS team could conceive of no scenario under which it would be in A.T.H.'s best interest to return to the home, and the evaluation did not recommend reunification or a case plan for the parents because it found that the child had regressed after returning to his parents after the first removal from their home. The CATS team had "validity issues" regarding the statements of the parents in their interviews. Dr. Heather Risk, a licensed psychiatrist and the leader of the CATS Evaluation team, testified by telephone that the parents could not maintain stability or demonstrate positive changes in their home. The CATS team found that the parents had a history of not following through and maintaining services. They found that both parents minimized their problems, lacked empathy for A.T.H., and had unrealistic expectations for him. T.B.H. refused to take responsibility, to accept blame, and denied abusing the

child. The team observed that the child was very distressed after interaction with T.B.H. The CATS Evaluation concluded that A.T.H's parents were unable to demonstrate an ability to meet the child's basic needs, much less his intense needs.

The Cabinet also points to the fact that T.B.H. used excessive force in spanking his son in 2006. Even a year later, after his son had been removed from the home for a second time, and T.B.H. had been instructed not to use corporal punishment on an autistic child, T.B.H. spanked the child again, at the mother's instigation.

The Cabinet also argues that the trial court failed to give adequate weight to the fact that T.B.H.'s parental rights to an earlier-born child were terminated in 1996. *See* KRS 625.090(2)(h). As grounds for that termination, the trial court relied primarily on KRS 625.090(2)(e) and (g):[2]

> (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;
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> (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;

[2] Under the version of the statute then in effect, these were numbered KRS 625.090(1)(d) and (f).

The Cabinet contends that the conditions or findings of neglect that were the basis for the previous termination have not been corrected. *See* KRS 625.090(2)(h)(3.).

The only testimony in the parents' favor was that of Jackie Murray and A.T.H.'s bus driver. Murray, who was employed as the child's occupational therapist from December 2002 through the 2005-2006 school years, testified that the child never displayed fear or apprehension around his parents and appeared to be happy in their presence. She testified that the parents were exceptional in staying together despite the stress of having a severely autistic, "very unpredictable" child. She testified that they "definitely" had the potential to learn to parent him effectively. She testified that the parents had respect for what she told them, that the mother took notes, asked questions and later reported what she had observed of the child's behavior. Murray also testified that she had been to the family home, often without a prior telephone call, and found that it was always clean and decorated for the appropriate season. She testified that the parents were never negative, critical or resentful towards her, unlike many other parents she encountered.

Upon careful review of this record, we are bound to consider the fact that virtually every single factor listed in KRS 625.090(3) for evaluating the child's best interest was triggered in this case. There is a history of mental illness in T.B.H. Acts of abuse or neglect also occurred to another child in the family; in particular, T.B.H. had his parental rights to another child terminated due to neglect.

Thus, not only was T.B.H. found to have abused and neglected A.T.H., but he also had a history of neglecting other children.

Further, when A.T.H. was placed with the Cabinet, the Cabinet made several efforts to reunite A.T.H. with his parents; however, his parents continued to abuse and neglect A.T.H., and he was again removed from the home. Clearly, the physical, emotional, and mental health of A.T.H. are of utmost importance in this case, and the evidence overwhelmingly demonstrated that A.T.H. improved while in foster care and away from his abusive parents. Thus, despite the existence of favorable testimony on the parents' behalf, the conclusion that A.T.H.'s welfare will likely improve if termination is ordered is inescapable, given his past improvements while away from the home.

Because all but one of the factors in KRS 625.090(3) weighs in favor of termination being in A.T.H.'s best interest, we agree with the Cabinet that the trial court erred in failing to find by clear and convincing evidence that termination was in the best interest of A.T.H. While there was some evidence presented in favor of D.G.R. and T.B.H. and their minimal efforts to improve the care of their child, such evidence did not constitute substantial evidence that termination was not in A.T.H.'s best interests, much less clear and convincing evidence.

We are cognizant of our obligation to give deference to the trial court's findings. However, we simply cannot say that the minimal evidence in favor of D.G.R. and T.B.H. constitutes substantial evidence to support the trial court's determination not to terminate parental rights. Instead, we find by clear

and convincing evidence that termination of D.G.R. and T.B.H.'s parental rights was in A.T.H.'s best interest. The overwhelming evidence suggests that on more than one occasion, D.G.R. and T.B.H. either abused or allowed a severely developmentally delayed child suffering from autism to be abused. Furthermore, the evidence indicated that at the very least, the parents were guilty of neglect regarding a sexual disease contracted by A.T.H. from his father, T.B.H. This, coupled with the continual use of corporal punishment, the lack of stimulation, the unsanitary conditions of the home, and the lack of empathy toward their child demonstrate by clear and convincing evidence that D.G.R. and T.B.H. are not only unable but are unwilling to give A.T.H. the love and attention he needs, particularly as he is afflicted by severe physical, mental, and emotional problems associated with autism, ADHD, and bipolar disorder.

Accordingly, we reverse the trial court's March 27, 2009, order denying the Cabinet's petition for involuntary termination of parental rights and remand with instructions that the trial court enter an order granting the Cabinet's petition and terminating the parental rights of D.G.R. and T.B.H. to their child, A.T.H.

VANMETER, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, DISSENTING: I respectfully dissent. The reason I feel compelled to do so is cited in the majority opinion, and it bears

repeating here: "[W]e are required to give considerable deference to the trial court's findings, *and we will not disturb those findings unless no substantial evidence exists in the record to support them.*" *K.R.L. v. P.A.C.,* 210 S.W.3d 183, 187 (Ky. App. 2006) (emphasis added).

It is not difficult to see why the majority decided as it did. From my review of the factual record, in the family court's place I might well have reached a different result. This is an emotionally wrenching case based upon a set of facts which, difficult and disturbing as they may be, are the daily grist of family court. Beyond question, there is evidence in the record to support our decision. But the majority's conclusion that the factual findings of the trial court were not based upon substantial evidence is simply not supported by the record of this case, and I cannot join the majority in blatantly substituting its factual findings for those of the trial court. "As an appellate court, this Court is not authorized to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court's decision is supported by substantial evidence." *Castle v. Castle,* 266 S.W.3d 245, 247 (Ky. App. 2008), citing *Reichle v. Reichle,* 719 S.W.2d 442 (Ky. 1986). This Court and the Kentucky Supreme Court have repeatedly held that "[w]hen an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous or that he abused his discretion." *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008).

In reaching its decision the trial court relied heavily on the testimony of occupational therapist Jackie Murray, whom the court described as the witness

with the most experience within the parents' home. Murray's testimony about her four-year-long involvement with the child and his family is briefly summarized in the majority opinion. Her testimony, especially when considered together with that of the child's teacher and bus driver that there had been no "regression" in the child's behavior when he returned from foster care, surely cannot fairly be said not to be "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men[,]" the generally accepted definition of "substantial evidence" in this jurisdiction. *See Owens-Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 414 (Ky. 1998). Yet rather than pointing out how the trial court abused its discretion or was clearly erroneous in deciding based upon Murray's testimony, the majority dismisses it as "minimal" and "[i]nstead . . . find[s] by clear and convincing evidence that termination of D.G.R. and T.B.H.'s parental rights was in A.T.H.'s best interest."

Admittedly the Caldwell District Court's discovery that the child suffers from venereal warts and that his father also has the disease was disturbing and prejudicial. It is difficult to resist jumping to the conclusion that the father sexually abused the child. But the law requires that we take the record as we find it. The Caldwell District Court held an adjudication hearing on the sexual abuse petition and found not sexual abuse, but neglect. For purposes of our review, that means that the court tasked with making factual findings was unable to find by clear and convincing evidence that sexual abuse had occurred. That finding, made by the district court before the case ever came to family court, was supported by

evidence in the record that the child may have contracted the disease in some way other than by genital-anal contact with the father. Like us, the family court must take the record as it finds it. While from our vantage point it may be tempting to assume that the family court was naïve, that court may no more substitute its findings for those of the district court than we may substitute our findings for those of the family court.

Barring the (unlikely) event that the Cabinet successfully places him for adoption this child now faces a life in foster care and possibly institutions, permanently separated from his family. Whether to place a child with foster families or leave him with his own family is a deceptively complex decision. The family court did not face a choice between a good option and a bad one for this child. It was instead the typical family court scenario, in which the judge must weigh all the distressing evidence and try to choose the best from a range of poor choices. The majority has concluded from reading a sterile record that it knows better than the trial court, which held hearings, met all the participants and listened face-to-face to the testimony of all the witnesses, what is in the best interest of this autistic, bipolar, ADHD child. While I do not doubt the purity of the majority's motives, I am unable to concur in its method.

We can never know for certain whether the result the majority has chosen is more nearly "right" than that arrived at by the trial court. But because what is right is often a matter of subjective opinion, that is not the standard the legislature, the Kentucky Supreme Court and our own cases have set to guide us in

making our decisions. As an appellate court our job is simply to review the case and determine whether or not the decision of the trial court is both legally correct and supported by substantial evidence in the record. In other words we are merely supposed to play the game according to the rules. We failed to do so in this case, and for that reason I dissent.

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