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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001765-ME

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

APPEAL FROM KENTON FAMILY COURT
v. HONORABLE BARBARA L. PAUL, SPECIAL JUDGE
ACTION NO. 14-AD-00043

T.N.S, MOTHER; D.K., FATHER; AND
D.L.S., A MINOR CHILD — APPELLEES

AND

NO. 2016-CA-001766-ME

CABINET FOR HEALTH AND FAMILY SERVICES,
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APPEAL FROM KENTON FAMILY COURT
v. HONORABLE BARBARA L. PAUL, SPECIAL JUDGE
ACTION NO. 14-AD-00044

T.N.S, MOTHER; W.H., SR., FATHER; AND
D.G.S., A MINOR CHILD APPELLEES

AND

NO. 2016-CA-001767-ME

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY APPELLANT

APPEAL FROM KENTON FAMILY COURT
v. HONORABLE BARBARA L. PAUL, SPECIAL JUDGE
ACTION NO. 14-AD-00045

T.N.S, MOTHER; W.H., SR., FATHER; AND
W.H., JR., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: In this consolidated appeal, the Cabinet for Health and Family Services, Commonwealth of Kentucky (hereinafter referred to as "the Cabinet"), appeals from three Findings of Fact, Conclusions of Law and Judgments of the Kenton Family Court resulting from its Petitions to terminate the parental rights of T.N.S. (hereinafter referred to as "Mother").[1] The Cabinet argues that the family court committed reversible error in failing to terminate the parental rights of

[1] This case involves a minor child; therefore, we will not identify the parties by their names.

Mother as to her three minor children. For the reasons stated below, we find no error and AFFIRM the Judgments on appeal.

Background

The facts are not in controversy. Mother is the biological mother of the three minor children at issue, namely D.L.S. (hereinafter referred to as "Child 1"), D.G.S. (hereinafter referred to as "Child 2") and W.H., Jr. (hereinafter referred to as "Child 3"). D.K. (hereinafter referred to as "Father 1") is the father of Child 1 and W.H., Sr. (hereinafter referred to as "Father 2") is the father of Child 2 and Child 3. The children were born between 2006 and 2012.

The record reveals a long and complicated procedural history involving the abuse and neglect of the three children. The Cabinet initially became involved with the children after reported medical and dental neglect in 2011. The family court adjudicated the children as neglected on January 26, 2012, and they were placed in the Temporary Custody of the maternal grandmother. Sometime thereafter, Mother notified the maternal grandmother that the children were present at the home of a maternal aunt, who was an approved supervisor. The maternal grandmother went to the aunt's house and learned that the police had raided the aunt's home and found drugs, drug paraphernalia, and cash. The children were present during the raid, resulting in an adjudication of neglect on July 12, 2012. While still in the custody of the maternal grandmother, the Cabinet substantiated physical abuse of the children by the grandmother.

On August 18, 2012, the children were present when Mother and Father 2 were arrested during another drug raid at the grandmother's home. The police found heroine, oxycodone, marijuana, syringes, a stolen handgun and other evidence. Mother and Father 2 were charged with trafficking. The maternal grandmother/temporary custodian and aunt were also arrested. As a result, the children were adjudicated as neglected and placed in foster care.

The children remained in foster care for 3.5 years, with the foster parents intending to adopt the children. The foster parents then divorced and, according to the record, the children were abandoned by the foster parents.

On January 29, 2013, Mother was placed on diversion. The Kenton Family Court would later find that she maintained housing, substantial employment, paid child support, maintained contact with the Cabinet, completed UK TAP, CATS and mental health assessments, and participated in drug testing and parenting classes. Mother's behavior was not consistently positive, however, and on February 21, 2014, the Cabinet filed petitions seeking to terminate Mother's parental rights as to the three children. Trial on the petitions was conducted on August 19, 2016. The family court rendered Orders on November 1, 2016, terminating the parental rights of Father 1 and Father 2 and dismissing the action as to Mother. The basis for the dismissal was the court's conclusion that the Cabinet failed to prove by clear and convincing evidence under KRS[2] 625.090 that 1) there was no reasonable improvement in Mother's ability to provide the

[2] Kentucky Revised Statute.

children's essential needs, 2) that Mother had abandoned the children for at least 90 days, and 3) that Mother has a criminal past which posed a significant risk to the children. This consolidated appeal followed.

The Cabinet now argues that it provided clear and convincing evidence supporting the termination of Mother's parental rights as to the three children and that there was no substantial evidence to support the family court's contrary finding. It contends that in reaching its conclusion dismissing the Petitions as to Mother, the family court improperly considered the adoptability of the children, failed to properly admit medical records, and excluded CATS evaluations as to Mother and the children. The Cabinet also maintains that the family court improperly limited the admission of Northkey medical records and incorrectly held that the children's guardian ad litem opposed termination of parental rights. In sum, the Cabinet argues that it provided clear and convincing evidence supporting the termination of parental rights and that there was no substantial evidence supporting the family court's ruling. It seeks an Order reversing the Judgments on appeal and granting the termination of Mother's parental rights so that the children might be made available for adoption.

Standard of Review

Trial courts are afforded a great deal of discretion in determining whether termination of parental rights is warranted. *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116 (Ky. App. 1998). Accordingly, appellate courts will

not set aside the trial court's findings of fact unless they are clearly erroneous. CR[3] 52.01. Findings of fact are clearly erroneous only if there exists no substantial evidence in the record to support them. *Yates v. Wilson*, 339 S.W.2d 458, 464 (Ky. 1960). "The standard of proof before the trial court necessary for the termination of parental rights is clear and convincing evidence." *V.S. v. Commonwealth of Kentucky, Cabinet for Human Res.*, 706 S.W.2d 420, 423 (Ky. App. 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, 70 S.W.2d 5, 9 (1934). We give due regard "to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of the 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)(internal quotation marks and footnotes omitted).

Law and Analysis

KRS 625.090 provides that,

> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

[3] Kentucky Rule of Civil Procedure.

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or

3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and

(b) Termination would be in the best interest of the child.

(2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;
(b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
(d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
(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;
(f) That the parent has caused or allowed the child to be sexually abused or exploited;
(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;
(h) That:
1. The parent's parental rights to another child have been involuntarily terminated;
2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
3. The conditions or factors which were the basis for the previous termination finding have not been corrected;
(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or
(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:
(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.

(4) If the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.

(5) If the parent proves by a 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 the court in its discretion may determine not to terminate parental rights.

(6) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:
(a) Terminating the right of the parent; or
(b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.[4]

[4] The Courts of the Commonwealth and of the United States have consistently held parental relationships in great regard and found them deserving of the highest protection. The United States Supreme Court held that "[t]he rights to conceive and to raise one's children [are] 'essential,' 'basic civil rights of man,' and '[r]ights far more precious ... than property rights.'" *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)(citations omitted). As such, "[t]he integrity of the family unit has found protection in the Due Process Clause ... the Equal Protection Clause ... and the Ninth Amendment." *Id.* (citations omitted). Kentucky's appellate courts have reiterated the high regard afforded parental rights under the law. *See Cabinet for Health and Family Servs. v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006) ("Parental rights are so fundamentally esteemed under our system that they are accorded Due Process protection under the Fourteenth Amendment of the United States Constitution."). This Court has further held that "[t]ermination can be analogized as capital punishment of the family unit because it is so 'severe and irreversible.'" *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 427 (Ky. App. 2015) (citing *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

The Cabinet asserted several reasons why the termination of Mother's parental rights in this matter would be justified under KRS 625.090, and its arguments are well taken. On four occasions, two of the children have been adjudicated abused or neglected, with Child 3 having been so adjudicated three times. Most of the adjudications involved drug abuse or trafficking, and/or exposure to inappropriate caregivers by Mother. One child has been in the Cabinet's custody since 2012 and the others were removed and placed in the custody of relatives. Two of the children reported exposure to chaotic environments including seeing relatives arrested, as well as exposure to domestic violence and drug abuse. Two of the children have resultant mental health issues, including anxiety, ADHD, intermittent explosive disorder and oppositional defiant disorder. The record contains ample evidence upon which the family court might have reasonably justified the termination of Mother's parental rights under KRS 625.090.

The question for our consideration, however, is not whether the family court might have reached a different conclusion. That is to say, the proof in support of the ruling on appeal need not be uncontradicted. *Rowland*, *supra.* Rather, we must determine if any substantial evidence supports the court's factual findings, *Yates*, *supra*, and whether these findings were properly applied to KRS 625.090. In so doing, we must recognize the principle that the family 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." *M.P.S.*, 979 S.W.2d at 116.

Having closely considered the record and the law, we cannot conclude that the Kenton Family Court's findings were clearly erroneous, nor that those findings were improperly applied to KRS 625.090. The court expressly found that Mother was placed on diversion in January 29, 2013, and since that time has maintained housing, substantial employment, paid child support and worked with the Cabinet. Further, the court determined that Mother completed a UK TAP assessment, a mental health assessment at Northkey, and CATS assessment, drug testing and parenting classes while raising another infant. These findings are supported by the record. The court noted that had trial occurred one year earlier, it "likely would have granted the petition." But the court went on to note that in the intervening year prior to trial, Mother "made necessary improvements and gained some maturity that she did not previously display." The court also recognized that there was no current foster home that had a significant relationship with the children, and that termination would not provide permanency and would not be in the best interest of the children. Ultimately, the family court placed significant weight on Mother's testimony, her tangible improvements in the year leading up to trial, and her apparent desire to continue to improve her care of the children.

The Cabinet goes on to argue that the circuit court abused its discretion by 1) considering the adoptability of the children as a basis for its denial of a termination of parental rights; 2) failing to admit or otherwise properly

consider "CATS" assessments and Northkey treatment records; 3) holding that the guardian ad litem opposed the Cabinet; and 4) failing to find that the evidence supported a termination of parental rights. We have closely examined each of these arguments and find no error. They are largely subsumed in the Cabinet's overarching argument that the evidence compelled a termination of parental rights, and we cannot conclude that these arguments – taken individually or collectively – compel a result other than that reached by the circuit court. We find no error.

Conclusion

Given the totality of the record and the law, in conjunction with our recognition that "judging the credibility of the witnesses and weighing evidence are tasks within the exclusive province of the trial court", *Moore*, *supra*, we cannot conclude that the Kenton Family Court committed reversible error in determining that the Cabinet failed to prove by clear and convincing evidence that the termination of Mother's parental rights was warranted under KRS 625.090. We find no error.

For the foregoing reason, we AFFIRM the Findings of Fact, Conclusions of Law and Judgments dismissing the Cabinet's Petitions to terminate Mother's parental rights.

ALL CONCUR.

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