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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000151-ME

D.M.C.[1] APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY N. PHILPOT, JUDGE
ACTION NO. 16-AD-00029

CABINET FOR HEALTH
AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND D.L.C. III., A MINOR CHILD APPELLEES

AND NO. 2017-CA-000152-ME

D.M.C. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY N. PHILPOT, JUDGE
ACTION NO. 16-AD-00030

[1] Pursuant to the policy of this Court, in termination of parental rights ("TPR") cases, to protect the privacy of minors and their parents, we refer to them only by their initials.

CABINET FOR HEALTH
AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND H.A.C., A MINOR CHILD APPELLEES

AND NO. 2017-CA-000153-ME

D.M.C. APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE TIMOTHY N. PHILPOT, JUDGE
ACTION NO. 16-AD-00031

CABINET FOR HEALTH
AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND S.M.C., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

NICKELL, JUDGE: D.M.C. ("Mother") appeals from TPR orders regarding her three minor children, D.L.C. III, S.M.C. and H.A.C., entered by the Fayette Circuit Court. Custody of the three children was granted to the Cabinet for Health and

Family Services ("CHFS"), which was also given authority to place the children for adoption.[2] Following a careful review, and finding no error, we affirm.

Mother has a history with CHFS dating to 2004 regarding one or more of her children. In 2010, CHFS substantiated neglect allegations against Mother and Father for failing to consistently send the children to school. Removal petitions were filed in late 2010 related to unsafe living arrangements and the children were removed on November 15, 2010. The children were returned to the parents' care in February 2011 after Mother and Father cooperated with plans established by CHFS. In 2012, a prevention plan was completed, again related to school issues following reports the oldest child had changed schools thirteen times and the middle child had been in ten different schools.

In November 2013 CHFS received reports of illegal drug activity by Mother and Father. Father admitted using illicit substances while Mother denied all use and provided a clean drug screen as proof. Father was asked to leave the home. CHFS filed non-removal petitions regarding the children in December 2013. An extensive case plan was put in place to provide necessary services to Mother and the children. In January 2014 the children were adjudicated as neglected children.

[2] The parental rights of D.L.C., Jr. ("Father") were also terminated in the proceedings below. Father has not filed an appeal and any reference to him in this appeal is intended solely for purposes of clarity and completeness.

By February 2014, additional petitions were filed based on CHFS learning of additional unexcused school absences and Father living in the home in violation of Mother's case plan and specific court orders to the contrary. Because of the filing of new petitions, Mother's case plan was amended to address the more recent issues which had been brought to light. The children were again adjudicated as neglected and in April of 2014 were committed to the custody of CHFS. The children were placed with different families due to behavioral issues among the trio. Mother's case plan was amended again in April of 2015 to include additional resources and tasks related to specific recommendations garnered from a reassessment of her needs. Mother failed to complete substantial portions of her case plan.

Because of Mother's lack of progress on her case plan, on February 16, 2016, CHFS filed TPR petitions related to all three children. The trial court convened an evidentiary hearing on June 30, 2016, and concluded the hearing on July 26, 2016. During the two-day hearing the trial court heard testimony from social workers, service providers, foster parents, Mother and one of Mother's cousins. Father did not appear.

The testimony elicited from CHFS focused on the family's history of referrals due to drug use, inappropriate living arrangements, excessive school absences, lack of supervision, and substantiations of neglect; prior court

adjudications of the children being neglected and removed from the parents' custody; issues experienced by the children including emotional, behavioral, developmental and educational deficiencies; reunification efforts including case planning and multiple services offered to Mother and her failure to complete those plans; past and current placements for the children; services and therapy provided to the children; noticeable improvements in the children since their removal and placement in separate foster homes; and the substantial challenges and risks associated with returning the children to Mother. CHFS also introduced a substantial amount of written material including mental health assessments for the children, complete court records from previous juvenile dependency, neglect and abuse actions, and criminal records for Mother and Father.

Mother testified on her own behalf. She stated she completed most of her case plans but admitted she had failed to fully comply with all of the recommendations and requirements. She indicated she had or was going to file for divorce from Father and had no intention of allowing Father back in her life. Mother believed she could adequately provide care for the children despite their substantial special needs and her own shortcomings. She further indicated her belief it would be better for all three children to remain together, notwithstanding their significant improvements since being placed in separate foster homes. Mother also presented testimony from a cousin who stated Mother had severed

contact with Father and believed she sincerely wanted her children returned to her care and custody.

On December 14, 2016, the trial court entered detailed and lengthy findings of fact and conclusions of law related to each of the three children. The trial court specifically concluded the children had previously been adjudicated as neglected, they currently met the statutory requirements for again being so adjudicated, and TPR would serve the best interests of the children. Specific citations to applicable statutory authority and references to evidence adduced at the hearing supported each of the court's findings and conclusions. In addition, the court found CHFS had rendered all reasonable services and further attempts to reunify the family or provision of additional services were unlikely to bring about changes necessary to enable the children to be returned to Mother and Father. TPR orders for both Mother and Father, placing the children in the custody of CHFS, and authorizing CHFS to place the children for adoption were entered contemporaneously. This appeal followed.

Mother presents three allegations of error in seeking reversal. First, she contends termination was not in the best interests of the children. Next, she asserts CHFS failed to make reasonable efforts to reunite the family. Finally, Mother argues she proved the children would not be abused or neglected if returned to her care. Following a careful review, we affirm.

As an initial matter, we note Mother's failure to comply with CR[3] 76.12(4)(c)(v) which requires "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the brief or dismiss the appeal for Mother's failure to comply. *Id*. While we have chosen not to impose such a harsh sanction due to the important nature of the instant proceedings, we caution counsel such latitude may not be extended in the future.

[3] Kentucky Rules of Civil Procedure.

Our review of actions involving termination of parental rights is confined to the clearly erroneous standard set forth in CR 52.01, which is based on clear and convincing evidence. *W.A. v. Cabinet for Health and Family Services,* 275 S.W.3d 214, 220 (Ky. App. 2008). As this Court has previously stated, clear and convincing proof does not mean uncontradicted proof. *Id.* Rather, 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." *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986) (quoting *Rowland v. Holt,* 253 Ky. 718, 70 S.W.2d 5, 9 (1934)). "In a trial without a jury, the findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be 'clearly erroneous.' [CR] 52.01; *Stafford v. Stafford,* 618 S.W.2d 578 (Ky. App. 1981). This principle recognizes that the trial court had the opportunity to judge the witnesses' credibility." *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998).

A trial court has broad discretion in determining whether a child satisfies the definition of an abused or neglected child and whether such abuse or neglect is sufficient to warrant termination of parental rights. *See id.*, at 38 (citing *Department of Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977)). We will not substitute our judgment for that of the trial court unless there

is no substantial evidence in the record to support such a finding. *V.S.*, 706 S.W.2d at 424. We review the application of the law to the facts *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Mother first argues the trial court erroneously ordered TPR. In support, without citation to any statute or precedent and only a sole reference to an obliquely related statement from the testimony of a social worker regarding placement of the children, she states only that severing the relationships between parent and child and also between siblings "can never be in the children's best interests." As a general rule we will not consider bare allegations of error which are unsupported by evidence or argument on appeal. *Stewart v. Jackson*, 351 S.W.2d 53, 54 (Ky. 1961) (citations omitted). Further, to the extent Mother now presents an allegation of error for the first time, it is improper and will be disregarded. *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011); *see also Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Nevertheless, in spite of these failings we have considered Mother's argument and perceive no error in the trial court's ruling.

KRS 625.090(1) provides, in pertinent part, a circuit court may involuntarily terminate all parental rights to a child if it finds by clear and convincing evidence the child is now an abused or neglected child as those terms are defined by statute, or has previously been adjudicated as such by a court of

competent jurisdiction, and TPR is in the child's best interests. The court must also find by clear and convincing evidence the existence of at least one of ten grounds listed for termination set forth in KRS 625.090(2)(a)-(j).

In the case *sub judice*, the children were adjudicated as neglected on two prior occasions, as the trial court noted in its decision. The court went on to find, based on the testimony and evidence presented, the children currently satisfied the definition of a neglected child[4] and adjudicated them as such. After making additional findings, the court went on to determine TPR was in the children's best interests.

The facts appearing on the face of the record contradict Mother's position. Substantial evidence supporting the trial court's decision is patent. Considerable testimony was presented regarding the reasoning for removing the children and the significant familial shortcomings at that time; the history of CHFS intervention with the family including prior neglect allegations, petitions and adjudications; and Mother's failure to avail herself of the many resources offered in the nearly two years the children were out of her care. Nothing in the record suggests anything other than the children are thriving in their current placements,

[4] The trial court specifically found existence of four of the ten factors listed in KRS 625.090(2) existed.

having advanced significantly since being separated. Mother's assertions to the contrary are simply unsupported and incorrect.

Although Mother disagrees with the trial court's decision, there was sufficient testimony adduced at trial to support the finding that four or more of the grounds for termination listed in KRS 625.090(2) existed. A finding of one ground is all that is required. Even in light of conflicting testimony and differences of opinion of the parties, we will not substitute our decision for that of a trial court. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Therefore, as the evidence adduced at the termination hearing was sufficient to support the trial court's findings of neglect and to terminate Mother's parental rights, there was no clear error and we will not disturb the judgment on appeal. CR 52.01.

Mother next alleges CHFS failed to make reasonable efforts to reunite the family. Once again, Mother supports her position with nothing more than bare allegations and conclusory statements. Mother does not state what further services CHFS should have provided. Nor does she adequately or satisfactorily explain her own failure to complete her case plan. "It is not the job of the appellate courts to scour the record in support of an appellant['s] argument." *Dennis v. Fulkerson*, 343 S.W.3d 633, 637 (Ky. App. 2011) (citation omitted). Allegations of error which are unsupported by evidence or argument will not be considered on appeal. *Stewart*, 351 S.W.2d at 54. We are unable to discern any viable challenge

to the provision of services by CHFS or to the trial court's conclusion reasonable efforts had been provided and we refuse to create an argument for a litigant. No further discussion of this assertion is warranted.

Finally, in an attempt to invoke the savings provision of KRS 625.090(5), Mother argues she proved the children would not be abused or neglected if returned to her care. KRS 625.090(5) states "[i]f 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." While conceding the express terms of that statute are permissive and discretionary, Mother asserts the evidence "mandated that the Trial Court allow [her] an opportunity to reunite with her children." Mother primarily refers to her own self-serving testimony in support of her position.

KRS 625.090(5) is plainly permissive. The trial court may opt not to grant TPR if the parent proves the child will not continue to be an abused or neglected child. However, nothing compels a trial court to choose this option; it ultimately leaves the decision to the trial court's discretion. As applied to this case, even if Mother proved it was more likely than not the children would not continue to be neglected if returned to her care, the trial court still retained the

discretion and authority to order TPR. The trial court proceeded in this manner, and we cannot say the trial court abused its discretion.

For the foregoing reasons, the judgments of the Fayette Circuit Court are AFFIRMED.

ALL CONCUR.

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