

RENDERED: AUGUST 17, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000088-ME

K.S.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 17-AD-00116

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; AND A.W.S. (A CHILD)

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

CLAYTON, CHIEF JUDGE: K.S. (Mother) appeals the Kenton Circuit Court's order terminating parental rights to A.W.S. (Child). After careful consideration, we vacate and remand the decision because insufficient evidence was provided that Child was neglected.

BACKGROUND

Child was born on January 6, 2014. The Cabinet for Health and Family Services (“Cabinet”) became involved with Child shortly after his birth when the hospital expressed concern about Mother’s ability to care for him. He was taken into the Cabinet’s custody directly from the hospital on January 13, 2014, and has remained in its custody since then. Further, Child has also been with the same foster family. Child was adjudged to be dependent on February 20, 2014. During the Cabinet’s custody of Child, Mother has had continuous and ongoing visitation, but has never had unsupervised or overnight visitation.

More than three years later, on June 16, 2017, the Cabinet filed a petition for involuntary termination of parental rights of both the biological father and mother.¹ A trial was held on December 5, 2017. The Cabinet called Dr. James Rosenthal and Kevin Minch as witnesses. Mother and her autism advocate, Maureen Simpson-Henson, testified for her case.

Dr. Rosenthal, a licensed psychologist, evaluated Mother. She was 19 at the time of the evaluation and being treated for autism and depression. His review of her medical records from North Key, a previous treatment facility, indicated that she had been diagnosed with Pervasive Developmental Disorder.

¹ The father has not appealed the termination of his parental rights, and therefore, is not a part of this appeal.

During the evaluation, Mother denied substance abuse, and Dr. Rosenthal observed no signs of substance abuse.

Dr. Rosenthal administered the Wechsler Adult Intelligence test and stated that Mother's full-scale I.Q. score was 65, which is deemed borderline mental retardation. He testified that she had deficits in social judgment and interactions. Dr. Rosenthal stated that intellectual disabilities do not increase after the age of 14, and he did not expect any improvement for Mother. He acknowledged that some people with autism do experience difficulty with taking intelligence tests, but he did not believe that had occurred here. Dr. Rosenthal also opined that he was concerned with neglect if the Mother was placed in a care-giving role for Child. He did, however, think that the mother could live independently in an apartment by herself and work part-time.

Kevin Minch was the next witness, Minch testified that Mother had completed her case plan with the Cabinet and showed improvement in her parenting skills. Nonetheless, he had concerns about her ability to parent the child based on her cognitive limitations. He testified that Mother was currently employed and had obtained an apartment, although he thought occupancy was unstable because she had a month-to-month lease.

Minch explained the current visitation between Mother and Child was biweekly and supervised at the Cabinet's office. The visits are consistent, have

improved over time, and are appropriate. The visits were at Mother's prior residence, where she lived with her mother, but there were bedbugs. Hence, the visits were moved back to the Cabinet.

Minch further testified that Mother has no criminal history nor are there any concerns about substance abuse. Further, she does not owe any child support. Mother has brought food and clothing during her visits. In addition, she has attended some of Child's medical appointments.

Minch opined that there were individual services that could benefit Mother. However, he still thought the Cabinet had made reasonable efforts to reunify Mother with the child. She is receiving services for developmental delays including speech therapy and physical therapy. Minch admitted that there was a period that the Cabinet was inactive on the case – January 2016 through January 2017, which was the result of changes in Cabinet caseworkers. Minch also testified that Mother's autism advocate, Simpson-Henson, provided additional information about services for Mother's autism and developmental delays. These services began in January 2017. He believed there are other services that could improve Mother's parenting skills but not within a reasonable time.

Minch provided that the Mother is very likeable, has worked very well with the Cabinet, and loves and cares deeply about her child. Indeed, on cross-examination, Minch said Mother has completed every task the Cabinet has asked

her to do. He just has concerns about her ability to function at an appropriate level to care for the child. Furthermore, Minch testified that Child has a strong emotional attachment to his foster parents. Child calls them mom and dad. He had been in foster care for 46 months (at the time of the trial).

The next witness was Maureen Simpson-Henson, Mother's autism advocate. Simpson-Henson is a speech pathologist who worked with Mother when she was a young child in the school system by providing speech and language therapy. She testified that Mother has speech delays and autism. In fact, Simpson-Henson stated that she was on the original team of professionals who diagnosed Mother during her childhood. In January 2017, Simpson-Henson became involved with Mother as her advocate.

Simpson-Henson advised the Cabinet of additional services available to assist Mother. She observed that the Mother has improved her parenting skills and could continue to improve them. Also, Mother has become much more independent since Child's birth.

On December 14, 2017, the trial court entered findings of fact and conclusions of law as well as a judgment terminating Mother's parental rights. Mother now appeals the judgment.

On appeal, Mother argues that the judgment was clearly erroneous because insufficient evidence supported that the child was neglected; insufficient

evidence was provided as to the best interests of the child; and insufficient evidence was provided, pursuant to the statutory grounds for termination. Namely, Mother maintains that the Cabinet had not established by clear and convincing evidence the following statutory grounds for termination: that Mother was incapable of caring for the child with no expectation of improvement; and that Mother, for reasons other than poverty alone, had failed or was incapable of providing the essential needs of a child with no reasonable expectation of improvement; the Mother conceded that the child had been in foster care for fifteen of the last twenty-two months preceding the filing of the petition.

The Cabinet counters that it was established by clear and convincing evidence that the elements of Kentucky Revised Statutes (KRS) 625.090 were met, and that termination of parental rights was proper.

ANALYSIS

To protect the rights of natural parents, Kentucky courts require strict compliance with statutory provisions governing the involuntary termination of parental rights. *P.C.C. v. C.M.C., Jr.*, 297 S.W.3d 590, 592 (Ky. App. 2009). Under KRS 625.090, to involuntarily terminate a parent's right to a child, a trial court must find, by clear and convincing evidence that the child (1) is an "abused or neglected child" as defined by KRS 600.020(1) and (2) that termination is in the child's best interest. After that threshold is met, the trial court must find the

existence of one of the grounds cited by KRS 625.090(2). It must first be determined that the child is abused or neglected before the other requirements of the statute come into play. KRS 625.090(1)(a)1-3; *H.M.R. v. Cabinet for Health and Family Services*, 521 S.W.3d 221, 225 (Ky. App. 2017).

Trial courts are given broad discretion in ascertaining whether a child is abused or neglected when determining whether the termination of parental rights is necessary. Accordingly, an appellate court's review of such decisions is limited to the clearly erroneous standard. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). A trial court's order is clearly erroneous if it is unsupported by substantial evidence on the record. *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986).

As noted, the first hurdle to meet in the involuntary termination of parental rights is to prove, by clear and convincing evidence, that a child was abused or neglected. In the matter at hand, the judgment held that A.W.S. was a neglected child. The trial court noted in its findings that Dr. Rosenthal testified the **risk of neglect** remains high based on Mother's reasoning skills. Further, the trial court noted that while testimony revealed that the Mother could live independently, no testimony was given that she could care for the child. Because of Mother's mental deficiency as defined by KRS 202A.011(9) or KRS 202B.010(9), the trial

court concluded that she was incapable of caring for a child. Mother responds that insufficient evidence supported the finding of neglect.

Therefore, it is our task to ascertain whether sufficient evidence supported the trial court's finding that Child was a neglected child under KRS 600.020. This statute defines an abused or neglected child. Here, the child has not been adjudicated as "abused" but rather "neglected." A review of KRS 600.020 shows the pertinent provisions in this matter are as follows:

3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005; [or]

4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child; [or]

8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or

9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) cumulative

months out of forty-eight (48) months[.]

KRS 600.020(1)(a)3-4, 8-9.

Perusal of the statute shows that for a parent to neglect a child, he or she must intend to do so. We do not believe it has been established that Mother intended to neglect the child. Instead, the facts of this matter implicate dependency, which is different than neglect. While dependency may occur in circumstances similar to neglect, it lacks the requisite intent on the part of the parent. “A child who suffers harm as a result of a parent’s intentional acts is neglected or abused. In contrast, a child is dependent if the harm results from a parent’s unintentional acts, or from a cause unrelated to parental culpability.” L. GRAHAM & J. KELLER 15 KY. PRACTICE SERIES, DOMESTIC RELATIONS LAW § 6:9 (2017).

Further examination of KRS 600.020(20) provides the definition of “dependent” child:

“Dependent child” means any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child[.]

Our courts have long held that a child cannot be both neglected and dependent.

J.H. v. Commonwealth, Cabinet for Human Resources, 767 S.W.2d 330, 332 (Ky. App. 1988).

After review of the record, we are confounded by the Cabinet's assertion that A.W.S. was neglected by Mother. Clearly, the Mother never had the opportunity to parent the child independently because Child has always been committed to the Cabinet's custody. The reason for the commitment was because the Mother did not seem to be able to parent him. This reason comports much more with dependency rather than neglect.

Moreover, Cabinet's rationale to support the Mother's ostensible neglect is somewhat disingenuous. The reason Child has been in foster care for the last four years is because the Cabinet removed Child from Mother's custody based on its perception that Mother was unable to care for him. There is no culpability on the Mother's part.

The case law provided by the Cabinet to support the termination was unpublished case law. According to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c), unpublished opinions shall not be cited or used as binding precedent. Nonetheless, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration if no published opinion would adequately address the issue. *Id.* Still, to cite such an opinion for the Court's consideration, the unpublished decision must be so designated, and a copy of the entire decision shall be provided to the Court and all parties to the action. *Id.* In the case at bar, the cases were not properly cited nor provided to the Court.

The first case provided by the Cabinet was *R.L.R. v. Commonwealth, Cabinet for Health and Family Services*, 2010-CA-001829-ME, 2011 WL 2436810 (Ky. App. June 17, 2011). The Cabinet maintains that this case is analogous to the one herein. That is, the mother was unable to care for the child because of a low IQ score, and the psychologist opined that it was highly unlikely she would ever be able to parent the child. *Id.* at *2. Therein, the Cabinet suggests that the trial court found that the children were abused and neglected because the mother did not make sufficient progress in the case plan and the children had been in the Cabinet's custody for 15 of the most recent 22 months. *Id.* at *5-6.

Termination of parental rights matters are fact-specific and to analogize facts from one situation to another is often problematic. The *R.L.R.* case is factually quite different than our matter. For one thing, although at one time during the *R.L.R.* dependency action, the children were adjudicated dependent, the mother stipulated that her oldest child was an abused or neglected child in another proceeding, and during the termination procedure, she did not contest that the two children were neglected or abused. In fact, the parents' sole argument on appeal was that the trial court erred in finding that the Cabinet met its burden of proving, by clear and convincing evidence, the grounds for termination – progress in meeting their reunification goals.

Therefore, *R.L.R.* is distinguishable from our facts since the parents stipulated that the children were neglected. In our case, the Mother denied neglect, and the only neglect indicated by the trial court was “risk of neglect.” Further, the Mother here did make progress toward her goals.

The next case proffered by the Cabinet to sustain the validity of the finding of neglect against the Mother is *R.N. v. Commonwealth, Cabinet for Health and Family Services*, 2012-CA-001600-ME, 2013 WL 6158043 (Ky. App. Nov. 22, 2013). R.N. was the mother of three children. The mother and children had extensive dealings with the Cabinet. *Id.* at *1. The mother, prior to the Cabinet’s involvement, had custody of the children, and initially, continued to have them in the home even after the Cabinet became involved. *Id.* In that case, the Cabinet had concerns about educational neglect, medical neglect, unsanitary living conditions, and drug use in the home. *Id.* The relationship between the Cabinet and the family lasted nine years. Ultimately, the mother was unable to meet her children’s basic needs and her parental rights were terminated. *Id.* at *3.

Here, again, we note that the children were neglected. The mother had drug problems, she failed to care for them, and she was unable to comply with the Cabinet’s case plan. In contrast, Mother in this matter never had custody of the child, never neglected the child, and complied with her case plan.

The evidence on the record is primarily from Dr. Rosenthal stating that Mother's limited intellect and adaptive behavior skills give rise to a **risk of neglect**. We believe that "risk of neglect" is not the same as neglect but rather indicates a child is dependent. Hence, we do not believe sufficient evidence was provided to show Child was a neglected child.

We are cognizant that KRS 600.020(1) provides that an "[a]bused or neglected child" means a child whose health or welfare is harmed or threatened with harm" and that some would interpret "threatened with harm" as implicating a risk of neglect. Although this interpretation may be sound in some cases, it does not obviate the necessity of intent for neglect or abuse. Mother, here, has developmental disabilities. But that alone is insufficient to render her behavior as neglectful. There are no incidents of neglect, and she has completed her case plan.

We hold that the termination of parental rights was improper because insufficient evidence supported the determination that the child was "neglected" by Mother. Thus, the trial court did not meet the first requirement for a termination of parental rights – establishment of neglect. Having so determined, we need not address the other two prongs required to terminate parental rights. However, we do note that for almost one year, Mother was not provided with services, that her advocate provided new resources to help Mother, and that the Cabinet's Family

Supervisor testified that there were likely additional services the Cabinet could provide to help Mother.

Child has been in foster care for over four years, and Mother has done everything the Cabinet has asked her to do. She has a job, and an apartment. Mother procured the apartment when the Cabinet noted that her other residence had bedbugs. Bedbugs are a problem, but whether that requires termination of parental rights is questionable. Mother's interaction with the child improved with time. The Family Services Supervisor testified that the Mother's behavior with the child was appropriate.

Mother does have cognitive limitations, but the severity of these problems in terms of parenting the child has not been established since she has had no opportunity to parent her child. The length of time in this case – 4 years – seems to relate in part to the Cabinet's failure to provide appropriate services for Mother more than any recalcitrance or failure to follow the directives of the case on her part.

Under our system of jurisprudence, parental relationships are held in the highest esteem and found deserving of the highest protection. Our nation's highest court has so held. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). In Kentucky, our appellate courts have reiterated the special protections afforded to parental rights under the law. *See Cabinet for Health and*

Family Servs. v. A.G.G., 190 S.W.3d 338, 342 (Ky. 2006). Because of the sanctity of parental rights, we must strictly conform to the requirements for termination of parental rights. In the case at bar, insufficient evidence of neglect was provided.

CONCLUSION

Therefore, we conclude that the Cabinet failed to provide substantial evidence that Child was neglected as required under KRS 600.020(1). Indeed, the basis of the child's removal from Mother was dependency. Moreover, since the removal of Child, Mother has done everything required by the Cabinet and shown steady improvement. The Cabinet admitted, after the intervention of the Mother's advocate, that additional services could have been provided to the Mother to address her specific disability. Hence, the Cabinet did not provide sufficient evidence that the child was neglected, and consequently, the trial court's judgment was clearly erroneous.

Accordingly, we vacate the judgment of involuntary termination of parental rights and remand the matter for additional services to the Mother to ascertain whether the Mother is capable of parenting this child while keeping in mind the child's best interest.

ALL CONCUR.

BRIEF FOR APPELLANT:

George A. Thompson
Covington, Kentucky

BRIEF FOR APPELLEE:

Abigail E. Voelker
Cabinet for Health and Family
Services
Covington, Kentucky