

RENDERED: JANUARY 31, 2020; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000555-ME

S.J.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 18-AD-00043

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
and J.T.L.D.J, a minor child

APPELLEES

NO. 2019-CA-000581-ME

S.J.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 18-AD-00044

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
and T.D.M.S.J., a minor child

APPELLEES

AND

NO. 2019-CA-000582-ME

S.J.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE DEANNA WISE HENSCHER, JUDGE
ACTION NO. 18-AD-00045

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
and T.J.L.D.J., a minor child

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: S.J. (Mother) appeals orders from the McCracken Circuit Court terminating her parental rights to her three children. After carefully reviewing the record, we conclude the trial court committed clear error when it found the Commonwealth of Kentucky, Cabinet for Health and Family Services (the

Cabinet) had proven statutory grounds for termination by clear and convincing evidence. Hence, we reverse.

Mother's children, J.T.L.D.J., T.D.M.S.J., and T.J.L.D.J., were born in March 2013, December 2014, and December 2015 respectively. On May 5, 2017, the Department of Community Based Services was notified by the Paducah Police Department that Mother's children, along with two other children, were discovered unattended in a hotel room in Paducah, Kentucky. It was soon learned that Mother had entrusted her children with a friend of hers, Nichole Wright, who had left all five children unattended since 10 p.m. the night before. The responding social worker, Katie Hargrove, then contacted Mother and learned Mother was in Missouri. Mother informed Hargrove that she did not have available transportation and could not immediately travel to Kentucky to take custody of her children. Hargrove then filed petitions for removal and notified Mother that a temporary removal hearing was scheduled for May 9, 2017. Mother did not appear at the temporary removal hearing, and the children were placed in the custody of the Cabinet. On May 31, 2017, Mother was arrested in Missouri for driving with a suspended license, property damage, and leaving the scene of an accident and subsequently incarcerated for violating her parole.

On July 30, 2018, the Cabinet petitioned to involuntarily terminate Mother's parental rights to her three children. A termination hearing was held on

February 15, 2019. Mother was represented by counsel but appeared telephonically while incarcerated in Missouri. The children were represented by a guardian *ad litem*. The children's father is not a party to this case and it is unclear if either the Cabinet or Mother is aware of his identity.

Allison Rogers, the social worker the Cabinet assigned to Mother's case, testified that the children were behind on their immunizations when received by the Cabinet and T.J.L.D.J. needed dental work. Rogers also explained that the children were behind developmentally when the Cabinet received custody and exhibited aggressive behaviors and suffered nightmares following removal. Rogers alleged that it took her some time to discover Mother's whereabouts after the temporary removal hearing, but she was eventually able to determine that Mother was incarcerated in a facility in Missouri. Once she discovered Mother's location, Rogers developed a case plan for Mother that required her to take parenting classes, undergo a substance abuse/mental health assessment, and abide by the terms of her probation upon release. Rogers testified she spoke to Mother every one to two months and was aware Mother had taken some classes while incarcerated. However, Rogers was unaware which specific classes Mother had taken and was not aware if Mother had access to parenting classes or a substance abuse/mental health assessment while incarcerated. Rogers admitted that Mother wrote letters to her children while in prison, which she explained were given to the

children's foster parents. Rogers did not know whether the foster parents shared these letters with the children. Rogers also admitted that the Cabinet did not facilitate communication between Mother and her children based on advice from the children's counselor.

It is unclear if the Cabinet investigated the children's living conditions before they were discovered unattended in Paducah, Kentucky. However, Rogers was aware that Mother had previously been incarcerated from May 2016 to November 2016. Rogers also spoke to the children's maternal grandmother, E.J. (Grandmother), to investigate whether Grandmother's home was suitable for placement. However, E.J. did not complete the forms necessary to be considered for placement. Rogers explained she was unable to get a clear explanation from Mother why she left her children with Wright. Similarly, Rogers testified she asked Mother on multiple occasions when she would be released from prison, but Mother's answer would change. The record is completely absent of any evidence the Cabinet attempted to obtain certified records from Missouri stating when Mother would complete her sentence and when, if ever, Mother would be eligible for any type of conditional release.

Deborah Brandon, the children's "court appointed special advocate," testified that she saw the children on a monthly basis and was privy to the Cabinet's reports on Mother's case. Brandon testified that the children had

elevated lead levels when they entered the Cabinet's custody and opined that the children's behavior had improved while in foster care. Grandmother testified that she had custody of Mother's children while Mother was incarcerated in 2016. Grandmother also alleged Mother was employed when she was not incarcerated. Grandmother explained that Mother and the children resided with her for a time, but Mother eventually moved out and rented her own place. Grandmother testified that social services in Missouri had approved of her home and that she already had custody of one grandchild. Grandmother insisted she wanted to be considered for placement of Mother's children and denied having received any paperwork from the Cabinet. When cross-examined on why she would not travel to Kentucky to obtain custody of the children, Grandmother testified that anxiety prevented her from making the drive from her home in Columbia, Missouri to Paducah, Kentucky.

Mother testified telephonically and was questioned about the circumstances in which her children were left unattended in Kentucky. Mother testified she let Wright babysit her children and spoke with Wright the day before her children were discovered unattended. Mother alleged she was not aware Wright had traveled with her children out of state and left them alone. When asked why she did not immediately return to Kentucky so her children could be returned to her, Mother explained she was on parole at the time and did not have a valid

driver's license. Mother claimed she attempted to get a travel pass from her parole officer but did not receive a timely response. She also alleged she was unable to find a family member or friend willing to drive her to Kentucky. According to Mother, she then attempted to travel to Kentucky on May 31, 2017, without permission from her parole officer or a valid driver's license but was in a car accident in Jefferson City, Missouri. Mother claimed another driver slid on ice and struck her car. When asked why there was ice in May, mother alleged that it must have been rain or sleet that caused the other driver to slide.

Mother was also questioned about her history before her children were placed in the Cabinet's custody. Mother testified she was employed before her most recent incarceration and believed she could get her old job back after being released from prison. Mother denied that her children were ever without food, clothing, or shelter while in her care. Mother admitted to being convicted of eight crimes from 2009 to 2012: three for criminal trespass; one for property damage; one conviction for disturbing the peace; and three theft convictions. The revocation of Mother's parole on her third theft conviction is what led to her 2016 incarceration. Mother also had criminal convictions following the birth of her children. In April 2017, she was convicted of possession of marijuana and driving on a suspended license. After her May 2017 car accident, Mother was convicted of driving on a suspended license, property damage, and leaving the scene of an

accident. Mother admitted she had never had a valid license but drove with her children in the car anyway before the Cabinet received custody.

Regarding her efforts at reunification, Mother testified that she was taking parenting classes in prison and was three or four classes away from receiving a certificate of reunification. Mother also testified that she was taking classes to receive her GED, which she was scheduled to complete in March 2019, and planned to enroll in victim management/impact class as soon as one became available. Mother testified she was scheduled to be released in March 2019 but would remain on parole upon release. Mother stated she could complete her case plan after being released from prison. Mother also testified that March 25, 2020 was her “max out date.” It was never clarified if “max out date” was the date Mother would complete her sentence.

In its written findings of fact and conclusions of law, the trial court found that Mother’s testimony regarding her May 31, 2017, car accident was not credible and concluded Mother never intended to travel to Kentucky to obtain custody of her children. The trial court also found Mother abused and neglected her children by leaving them with an inappropriate caregiver and that termination of Mother’s parental rights would be in the children’s best interest. Finally, the trial court found three statutory grounds for termination. Specifically, the court found that Mother abandoned her children for a period of not less than ninety (90)

days through her “voluntary participation in a criminal lifestyle” that separated her from her children; repeatedly failed or refused to provide essential parental care and protection for her children for a period exceeding six months; and for reasons other than poverty alone failed to provide essential food, clothing, shelter, medical care, or education for her children. Accordingly, the trial court entered orders terminating Mother’s parental rights to all three children. These appeals follow.

KRS¹ 625.090 provides that parental rights may be involuntarily terminated only if the court finds by clear and convincing evidence: (1) the child is abused or neglected, as defined under KRS 600.020; (2) termination is in the child’s best interest; and (3) the existence of one or more of the eleven statutory grounds for termination.

“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). Thus, the trial court has a great deal of discretion in determining whether termination is warranted. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). We review a termination of parental rights action under the clearly

¹ Kentucky Revised Statutes.

erroneous standard in CR² 52.01, and the trial court's findings will not be disturbed unless no substantial evidence exists in the record to support its findings. *Id.*

The trial court cited the following statutory grounds in terminating Mother's parental rights:

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

...

(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[.]

KRS 625.090(2).

² Kentucky Rules of Civil Procedure.

In this case, there was sufficient evidence to support the trial court’s finding that Mother abandoned her children, for a time, by leaving them with an inappropriate caregiver. However, the uncontroverted evidence was that Mother left the children with Wright sometime in April 2017 and they were discovered unattended on May 5, 2017. While grounds for temporary removal, this act could not, on its own, provide sufficient evidence that Mother abandoned her children “for a period of not less than ninety (90) days[.]” KRS 625.090(2)(a). There was also evidence Mother did not contact the Cabinet from prison until Rogers discovered where she was incarcerated. “Generally, abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child.” *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985) (quoting *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983)). There was no evidence that Mother knew how, and had the ability, to communicate with the Cabinet before Rogers initiated contact. Once the Cabinet initiated contact, the uncontroverted evidence was that Mother wrote letters to the children, and the Cabinet decided not to facilitate contact with the children on the advice of a counselor. These facts do not establish clear and convincing evidence that Mother’s actions while incarcerated amounted to abandonment.

The trial court also cited Mother's "criminal lifestyle" when finding she abandoned her children. However, Mother's previous convictions were almost all for relatively minor property crimes, and her only other period of incarceration was for less than a year. The trial court also cited the fact that Mother drove with a suspended license with full knowledge that doing so could lead to revocation of her parole and incarceration. However, such a minor criminal offense with only the potential to lead to parole revocation has never been found to constitute a criminal lifestyle sufficient to terminate parental rights. *See, e.g., Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 660-61 (Ky. 1995) (father was serving twenty-five-year sentence for raping half-sister of child involved in termination proceedings and never contributed to family's economic well-being before or after his incarceration); *J.H.*, 704 S.W.2d at 663-64 (father was serving twenty-eight-year sentence for armed robbery and committed several acts of violence on his wife in front of the children at issue in termination proceedings).

While Mother was incarcerated during the termination hearing, "whether abandonment occurs through incarceration sufficiently to support terminating parental rights must be strictly scrutinized. Incarceration alone can never be construed as abandonment as a matter of law." *J.H.*, 704 S.W.2d at 663. In this case, Mother attempted to maintain contact with her children by writing letters, and it was *the Cabinet* that made the decision not to permit the children to

communicate directly with Mother. Mother also was taking parenting classes and working towards her GED from prison. There is no evidence Mother was refusing to complete any aspect of her case plan that she actually had the ability to complete while incarcerated. Mother's testimony, which was uncontroverted, was that she was scheduled to be released a month after the termination hearing. After reviewing the entire record and giving the required deference to the trial court's factual findings, we simply cannot find sufficient evidence of "facts or circumstances" that Mother had "a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Id.* (citation omitted). Accordingly, we cannot affirm a finding that Mother abandoned her children for a period of not less than ninety days.

The trial court also cited KRS 625.090(2)(e) and KRS 625.090(2)(g) as grounds for termination. We do not find grounds for termination under either statutory provision. Mother testified that the children were in her care when she was not incarcerated and that they never lacked food, shelter, or clothing during this time. While there was evidence the children had elevated lead levels and some dental problems, the Cabinet never linked these issues to Mother's care. Mother also testified that she was employed before her incarceration and that she believed she could get her old job back after being released from prison. Because the Cabinet did not investigate the children's living condition before the temporary

removal proceedings, Mother's testimony was uncontroverted. Mother unequivocally stated that she could "absolutely" complete her case plan if given the opportunity.

Thus, the case for termination depends on Mother's lack of veracity regarding the events leading to and immediately preceding the discovery of her children unattended in Paducah, Kentucky. While extremely concerning, this act provided grounds only for temporary removal, not termination of parental rights. The Cabinet failed to produce any evidence rebutting Mother's testimony that the children were never without food, clothing, shelter, and parental care at all other times she had custody. The Cabinet was also unaware of the progress Mother was making on her case plan while incarcerated. Moreover, it elected not to give Mother an opportunity to prove she would continue working towards reunification after being released from prison. Quite simply, the Cabinet failed to develop evidence that grounds for termination existed. The result of the Cabinet's decision to petition to terminate Mother's parental rights prematurely is that the trial court's order cannot stand.

Accordingly, the orders of the McCracken Circuit Court terminating Mother's parental rights to J.T.L.D.J., T.D.M.S.J., and T.J.L.D.J. are reversed.

ALL CONCUR.

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