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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001781-MR

N.P., THE MOTHER OF
J.L.F., A CHILD,
AND J.D.P., A CHILD[1] APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 01-AD-00034

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: N.P. has appealed from an order of the Warren Circuit Court entered on July 23, 2002, which, following a bench trial, terminated N.P.'s parental rights to her son J.D.P., and her daughter, J.L.F. Having concluded that the trial court

[1] In order to protect the privacy of the children, we will use initials to identify the parents and children.

erred by relying upon impermissible hearsay evidence at trial, we reverse and remand for further proceedings.

On July 24, 2001, the Commonwealth of Kentucky, Cabinet for Families and Children filed a petition in Warren Circuit Court, seeking the termination of N.P.'s and C.F.'s parental rights to their two children, J.D.P. and J.L.F. A bench trial was held in this matter on July 10, 2002. C.F. appeared at trial and agreed to the termination of his parental rights to both children.[2] In the Cabinet's case-in-chief against N.P., Susan Rigsby, a compiler of records for the Cabinet, and Judy Parsons, an investigator and treatment worker for the Cabinet, both testified on behalf of the Cabinet and provided the bulk of the evidence against N.P. Their testimony, as well as the other evidence presented, reveals the following.

N.P. and C.F. are the biological parents of both J.D.P. and J.L.F.[3] J.D.P. was born on March 5, 1993, and J.L.F. was born on October 3, 1994. In April 1995 the couple ceased living together and N.P. retained custody of the two children. Shortly after the couple's separation, N.P. first became aware of the possibility that C.F. had sexually abused J.D.P. The Cabinet took emergency custody of the children after this

[2] Prior to trial, C.F. pled guilty to sexual abuse charges involving his children and was sentenced to 20 years' imprisonment. C.F.'s parental rights are not at issue in this appeal.

[3] N.P. and C.F. were never married.

initial allegation of sexual abuse arose. Rigsby testified that on April 18, 1995, the Cabinet substantiated one incident of sexual abuse by C.F. on J.D.P. The children were returned to N.P.'s custody following the Cabinet's internal investigation and the court granted C.F. supervised visits at the Cabinet's offices.

Rigsby further testified that despite the district court's order that C.F. be allowed supervised visits only, N.P. permitted the children to have unsupervised, weekend visits with C.F. while she was working. Approximately one year later, on April 24, 1996, the district court granted C.F. unsupervised visits with the children.[4] N.P. retained custody of the children until approximately September 11, 1997, when she sought psychiatric treatment. N.P. was eventually hospitalized at Western State Hospital, where she was diagnosed with a psychotic disorder and cannabis abuse.

While N.P. was hospitalized, she left her two children with C.S., her fiancé, whom she and the children had been living with at that time. By the time N.P. was released from the hospital on November 5, 1997, C.F. had sought and had been granted emergency custody of his children. Over the next year, C.F. and N.P. continued to have disagreements concerning their

[4] Rigsby testified that the Cabinet substantiated another incident of sexual abuse by C.F. on J.D.P. in October 1996.

respective custodial and visitation rights to their children. In October 1998 the children were placed in foster care after the Cabinet substantiated an allegation of neglect on the part of C.F.[5] The children remained in foster care until approximately March 1999.

On June 1, 1999, the children were once again returned to C.F.'s custody and N.P. was awarded unsupervised visitation rights. The children's cases were closed on January 6, 2000, but later reopened in April 2000, after the Cabinet substantiated an incident of physical abuse committed by C.S. on J.D.P.[6] At this same time, an incident of sexual abuse on J.L.F. was substantiated.[7] In addition, the Cabinet substantiated an incident of neglect against N.P. for failing to prevent these abuses from occurring in her presence.

In January 2001 another incident of neglect was substantiated against N.P. and C.S. According to testimony from both Parsons and Rigsby, the children reported that they were allowed to view pornographic videos while N.P. and C.S. smoked marijuana in their bedroom. Three months later, on March 29,

[5] According to Rigsby's testimony, the children reported to a Cabinet investigator that on this occasion, C.F. became extremely intoxicated, left the children alone in the home, and forced them to clean up his vomit.

[6] Parsons testified that C.S. hit J.D.P. with a "cane pole." Her finding was based on interviews she conducted with J.D.P. and C.S., as well as her observations of a bruise on J.D.P.'s backside.

[7] Parsons testified that J.D.P. told her he observed one of C.S.'s relatives sexually abusing J.L.F.

2001, after the Cabinet substantiated an allegation of sexual abuse by C.F. on J.L.F., the children were once again returned to foster care. On July 24, 2001, the Cabinet filed its petition seeking the involuntary termination of N.P.'s and C.F.'s parental rights to J.D.P. and J.L.F. On July 23, 2002, the trial court granted the Cabinet's petition and terminated N.P.'s parental rights to both J.D.P. and J.L.F. This appeal followed.

N.P. claims that the trial court erred (1) by admitting impermissible hearsay evidence at trial; (2) by determining that N.P. neglected and/or abused her children; (3) by determining that the termination of N.P.'s parental rights was in the best interest of the children; (4) by determining that N.P. inflicted or allowed to be inflicted upon the children physical injury; (5) by determining that N.P. caused or allowed the children to be sexually abused or exploited; (6) by determining that N.P. continuously and repeatedly failed to provide essential food, clothing, medical care, shelter, or education and that there was no reasonable expectation of improvement; (7) by determining that the Cabinet rendered all reasonable services to N.P.; (8) by taking judicial notice of various juvenile, criminal, and circuit court files; and (9) by

failing to expedite the proceedings as required by KRS[8] 625.080(5).

We first turn to N.P.'s argument that the trial court erred by admitting impermissible hearsay testimony into evidence. Specifically, N.P. claims that Rigsby was allowed to testify as to "conclusions and/or opinions of other [Cabinet] workers," and that this testimony constituted inadmissible hearsay evidence.[9] We agree.

In Prater, supra, our Supreme Court explained that not all portions of a social worker's report fall within the business records exception[10] to the hearsay rule:

> Thus, we have held that the factual observations of social workers recorded in CHR case records are admissible under the business records exception, because such observations would be admissible if the social worker testified in person; but the

[8] Kentucky Revised Statutes.

[9] The Cabinet's entire response to this claim of error by N.P. is as follows:

> Susan Rigsby is a social worker with the Permanency Unit in Warren County. She has never been the case worker for [N.P.]. She has had contact with the children. Ms. Rigsby testified from the Cabinet's record as to factual information contained therein. She did not testify as to other worker's [sic] opinions or conclusions. Rigsby did testify regarding her own opinions after reviewing the record which she is entitled to do.

As Prater v. Cabinet for Human Resources, Commonwealth of Kentucky, Ky., 954 S.W.2d 954, 958 (1997), and Jordan v. Commonwealth, Ky., 74 S.W.3d 263, 269 (2002) make clear, the Cabinet's characterization of Rigsby's testimony is simply incorrect. It is also noted that this portion of the Cabinet's brief contains no citations to the record as required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). This rule requires, inter alia, that a party's argument contain "ample supportive references to the record."

[10] See Kentucky Rules of Evidence (KRE) 803(6).

> recorded opinions and conclusions of social workers are not admissible, because the persons offering those opinions are insufficiently qualified to render expert opinions.

Further, in Jordan, supra, the Supreme Court stated:

> In Prater, we specifically held that "[t]he recorded opinions and conclusions of social workers are not admissible," and a social worker's "professional determination" that an allegation of abuse is "substantiated" is nothing more than improper opinion testimony [footnote omitted].

In the case sub judice, the record is replete with instances in which the trial court, over N.P.'s objection, permitted Rigsby to testify regarding "substantiated" instances of neglect and/or abuse that had been reported in the Cabinet's records. Rigsby's testimony was not limited to simply reiterating the factual observations of the various social workers; rather, she was permitted to testify as to the impermissible opinions and/or conclusions of those investigating workers.

In addition, Parsons's testimony was also improperly admitted into evidence.[11] She testified regarding an incident of

[11] N.P. made no contemporaneous objection to Parsons's testimony. However, for preservation purposes, it was not necessary to repeat the objection N.P. had made earlier to Rigsby's testimony, when the basis for the objection would have been the same and the trial court had overruled the prior objection. See Burnett v. Commonwealth, 252 Ky. 521, 67 S.W.2d 683, 684 (1934)(holding that "'[h]aving properly objected to similar evidence from Wilson when that objection was overruled, it was not necessary to repeat the objection every time a question along that same line was asked the same or any other witness'")(quoting Brown's Adm'r v. Wilson, 222 Ky. 454, 1 S.W.2d 767, 768 (1927)).

abuse involving a cane pole that she had "substantiated" after conducting an investigation. This opinion/conclusion testimony was not admissible evidence. Further, Parsons was allowed to testify as to out-of-court statements that J.D.P. had made to her during her investigation. Hearsay statements made by children to social workers during the course of their investigation do not become admissible merely because they may be later memorialized in the agency's records.[12]

In support of its determination that J.D.P. and J.L.F. were "abused and neglected children as defined in KRS 600.020(1)," the trial court found that "N.P. inflicted or allowed to be inflicted upon the children" physical injury or emotional harm[13] and that N.P. "allowed the children to be sexually abused or exploited."[14] As the basis for these statutory findings, the trial court relied primarily upon its underlying factual findings that N.P. had allowed C.F. to have unsupervised visits with the children after she knew of C.F.'s alleged sexual abuse,[15] and that N.P. had failed to prevent J.D.P.'s physical abuse in her presence when C.S. allegedly

[12] Prater, 954 S.W.2d at 959.

[13] KRS 625.090(2)(c).

[14] KRS 625.090(2)(f).

[15] It is noteworthy that subsequent to the allegations of sexual abuse by C.F. and N.P. allowing C.F. to have unsupervised visits with the children, the district court also allowed unsupervised visitation by C.F. and the court eventually awarded custody to C.F..

struck J.D.P. with a cane pole. At trial, Rigsby and Parsons provided most, if not all, of the evidence pertaining to these incidents in the form of the aforementioned testimony related to the "substantiated" nature of these alleged abuses. As we stated above, this testimony was not admissible evidence. Hence, absent this inadmissible evidence, there was not "clear and convincing evidence" before the trial court which justified its ultimate findings that J.D.P. and J.L.F. were abused and neglected children as defined under KRS 600.020(1).[16] Accordingly, we hold that this evidentiary error was so substantial that it affected the quantum of proof required to meet the statutory standard of clear and convincing evidence. The trial court's order must be reversed and this matter must be remanded for further proceedings.

N.P.'s next six claims of error are all based on her assertion that there was insufficient evidence in the record to justify the trial court's factual determinations and/or that the evidence justified a contrary conclusion. There is no need for this Court to address these six alleged errors other than to state that before a trial court can terminate parental rights, it must "state specifically the facts which justify its

[16] See KRS 625.090(2)(stating that a "clear and convincing evidence" standard governs a circuit court's determination of whether to terminate parental rights).

decision."[17] Thus, on remand, it is crucial that specific factual findings be made by the trial court in order to facilitate meaningful review on appeal.[18]

We next turn to N.P.'s argument that the trial court erred by taking judicial notice of certain juvenile, criminal, and circuit court files. We first note that N.P. failed to make a timely objection to the trial court's action as required by KRE 103(a)(1).[19] Ordinarily, this alleged error would be deemed unpreserved and it would not be considered for review on appeal. However, since this issue is likely to arise again on remand, we will examine the merits of N.P.'s argument.

The concept of judicial notice has been codified in Kentucky under KRE 201. In relevant part, this rule states:

> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
>
> (1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or

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[17] Department for Human Resources v. Moore, Ky.App., 552 S.W.2d 672, 675 (1977).

[18] Reichle v. Reichle, Ky., 719 S.W.2d 442, 443 (1986)(holding that one of the principal reasons for requiring specific factual findings "is to have the record show the basis of the trial judge's decision so that a reviewing court may readily understand the trial court's view of the controversy").

[19] KRE 103(a)(1) states that an alleged error will not be preserved for review on appeal unless a substantial right of the party is affected and "[i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, and upon request of the court stating the specific ground of objection, if the specific ground was not apparent from the context[.]"

> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

In his highly respected treatise on Kentucky evidence law, Professor Lawson provides some helpful insight regarding how KRE 201 should be interpreted with respect to the noticeability of court records:

> [KRE 201] requires that the critical inquiry be focused [ ] not on the noticeability of court records as such but rather on the noticeability of indisputable facts which just happen to be evidenced by court records. The propriety of taking notice would depend first and foremost upon whether the fact in question is indisputable and secondly upon whether it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." It is not critical that the fact in question is contained in a court record but rather that it is capable of verification by resort to a readily available and accurate source of information.[20]

In the case at bar, the trial court took judicial notice of, inter alia, district court case files containing the birth certificates of J.D.P. and J.L.F., and a psychological evaluation of N.P. While the birth certificates certainly fall within the definition of a fact that is "indisputable" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," N.P.'s

[20] Robert G. Lawson, The Kentucky Evidence Law Handbook, § 1.00 p.10, (3d ed. 1993).

psychological evaluation and the hearsay statements and opinions contained therein clearly do not.

In General Electric Capital Corp. v. Lease Resolution Corp.,[21] the United States Court of Appeals for the Seventh Circuit, in discussing the federal counterpart to KRE 201, further explained the requirement that a fact in a court record be sufficiently "indisputable" before judicial notice may be taken:

> We agree [with the Second and Eleventh Circuits] that courts generally cannot take notice of findings of fact from other proceedings for the truth asserted therein because these findings are disputable and usually are disputed. However, it is conceivable that a finding of fact may satisfy the indisputability requirement of [Federal Rule of Evidence] 201(b).

Accordingly, on remand, the trial court must limit the facts to which it takes judicial notice to only those facts falling within the standard mandated by KRE 201 and the aforementioned principles.

Finally, we turn to N.P.'s claim that the trial court erred by failing to expedite the proceedings as required by KRS 625.080(5).[22] N.P. contends that since the bench trial was not held within the 60-day period after the Cabinet filed its motion

[21] 128 F.3d 1074, 1082 n.6 (7th Cir. 1997).

[22] KRS 625.080(5) provides that a hearing to determine the possible involuntary termination of parental rights "shall be held within sixty (60) days of the motion by a party or the guardian ad litem for a trial date."

for a trial date, the trial court committed "reversible error." However, it is well-settled that "[t]he decision whether to grant or to deny a motion for continuance lies within the sound discretion of the trial court."[23] In the case sub judice, the trial court granted C.F.'s motion for a continuance on two occasions and continued the case sua sponte on one other occasion, due to the fact that C.F. was facing criminal sexual abuse charges in Warren Circuit Court. In light of the fact that these charges were germane to the issues in the pending termination proceeding, we cannot conclude that the trial court abused its discretion by granting the continuances. Accordingly, we reject N.P.'s claim that this action on the part of the trial court constituted "reversible error."

Based on the foregoing, the order of the Warren Circuit Court is reversed and this matter is remanded for further proceedings consistent with this Opinion.

MINTON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: It is important to note that this case involved a bench trial, thus precluding a jury from sifting through and perhaps being misled by inadmissible hearsay. The trial judge, wholly aware of the Prater and Jordan precedents, also heard compelling testimony based on the

[23] Kentucky Farm Bureau Mutual Insurance Co. v. Burton, Ky.App., 922 S.W.2d 385, 388 (1996).

admissible portions of the social workers' reports rendered admissible under the business records exceptions. Those recorded incidents of repeated abuse speak for themselves – separate and apart from any taint of possible hearsay offered by opinion testimony of either Susan Rigsby or Judy Parsons. I am convinced that there is a quantum of admissible evidence that suffices to satisfy the "clear and convincing" standard of KRS 625.090(2) governing termination of parental rights.

Additionally, the findings of the trial court amply recited other grounds compelling termination, noting that these children had needed the Cabinet's protective services "almost continuously since 1995" – from the tender ages of two years and one year. (Opinion of trial court of July 22, 2002, finding #12.) The court dutifully noted the failure of the mother to provide the essential needs of food, clothing, shelter, medical care, or education, citing to the serious likelihood that these needs would not be met in the foreseeable future.

After meticulous findings of fact based on non-hearsay evidence, the court concluded that termination of parental rights was warranted in the best interests of these children. The erroneously admitted hearsay evidence constituted harmless error in light of the weight of non-hearsay evidence reviewed and recited by the trial court in its Findings of Fact and

Conclusions of Law. Therefore, I would affirm the Order of termination of the Warren Circuit Court.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
B. Alan Simpson Bowling Green, Kentucky	Mary Gaines Locke Munfordville, Kentucky