

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000131-ME

M.S.G.W. AND
R.E.W.

APPELLANTS

v. APPEAL FROM BOONE FAMILY COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 04-AD-00025

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY, AS PETITIONER
AND NEXT FRIEND OF T.L.W., AN INFANT

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: M.S.G.W. and R.E.W. ("appellants") appeal from a final order and judgment of the Boone Family Court terminating their parental rights in their child, T.L.W. We affirm.

The appellants are the natural mother and father of T.L.W. The appellants were married at the time of the conception and birth of the child. The appellants have another

child, and appellant father has four other children by a previous marriage.

T.L.W. was born on July 1, 2001. The appellants moved from Oklahoma to Kentucky in 2002. They had not been in Kentucky long before they were arrested, leaving T.L.W. without a caregiver while they were incarcerated.¹ The Cabinet for Health and Family Services then filed a petition in the Boone Family Court to place the child in foster care. She was placed in foster care on July 9, 2002.

After the appellants were released from jail, the Cabinet began to work with them in an effort to reunify them with their child. Treatment plans that dealt with domestic violence, substance abuse, and anger management were developed. In October 2002, the appellants chose to move back to Oklahoma while the child remained in foster care in Kentucky.

After the appellants returned to Oklahoma, the appellants' home continued to have domestic violence, substance abuse, and neglect issues. The Oklahoma Department of Human Services refused to approve the home for the placement of the child. This led the Cabinet to eventually file a petition to terminate the appellants' parental rights. That petition was

¹ The father's four children by a previous marriage were not in their custody during this period of time. Also, the appellants' other child had not yet been born.

filed in the Boone Family Court on July 7, 2004. The child continued to remain in foster care.

A trial was held on November 16, 2004. The court heard testimony from Lisa Davis, a social worker for the Cabinet; Danielle Balluto, a qualified mental health professional in Oklahoma; Charles Porter, chief of the Jennings Oklahoma Police Department; and Heidi Alley, a social worker for the Oklahoma Department of Human Services. Appellant husband also testified, but appellant wife did not. Following the conclusion of the trial, the court determined that the Cabinet had proved by clear and convincing evidence sufficient grounds under KRS² 625.090 for the termination of the parental rights of the appellants. This appeal followed.

The appellants' first argument is that the trial court abused its discretion when it denied the appellant wife's motion for a continuance. On the morning of the trial, appellant wife's attorney moved the court for a continuance because she and appellant wife had not met to prepare for the case. Counsel related to the court that she had sent two letters to appellant wife in Oklahoma requesting that an appointment be scheduled to discuss the case but that appellant wife failed to schedule any such appointments. Further, counsel related to the court that appellant wife had twice telephoned counsel requesting an

² Kentucky Revised Statutes.

immediate appointment but that counsel had other appointments scheduled and could not meet with her on such short notice. The court then denied the motion for a continuance.

"The trial court has broad discretion in granting or denying a continuance." Grant v. Dortch, 993 S.W.2d 506, 508 (Ky.App. 1999), citing Pelfrey v. Commonwealth, 842 S.W.2d 524, 525 (Ky. 1993). This court will not reverse the trial court's failure to grant a motion for a continuance unless it is shown that the trial court abused its discretion. Id., citing Abbott v. Commonwealth, 822 S.W.2d 417, 418 (Ky. 1992). Based on the reasons that appellant wife's counsel moved for a continuance, we conclude that the court did not abuse its discretion in denying the motion.

Second, the appellants argue that the trial court erred in relying on impermissible hearsay evidence in reaching its decision to terminate their parental rights. This argument is based on the court allowing the Cabinet to introduce the case worker's file into evidence in this action. The appellants contend that the case worker's file contained numerous pages of written hearsay upon which the court relied in making its decision. In support of this argument, the appellants rely on the cases of G.E.Y. v. Cabinet for Human Resources, 701 S.W.2d 713 (Ky. 1985), and Prater v. Cabinet for Human Resources, 954 S.W.2d 954 (Ky. 1997).

In this case, the judge who heard this termination action also presided over the proceedings in the juvenile case. In cases where the judge acts as a fact finder, "it is presumed that he will be able to disregard hearsay statements." See G.E.Y., 701 S.W.2d at 715. However, where it is apparent that the court relied on hearsay in making its decision, "the error in the admission of the unreliable evidence cannot be deemed harmless or nonprejudicial." Id.

In reviewing the trial court's order and judgment, there is no indication that it relied on inadmissible hearsay evidence in reaching its decision. In addition, we note that much of the evidence about which the appellants complain was not hearsay evidence but was evidence properly admitted for a nonhearsay purpose. In short, we conclude that the presumption the court disregarded any inadmissible hearsay statements in the juvenile court record was not overcome by the appellants.

Finally, the appellants argue that the Cabinet failed to prove grounds for termination of their parental rights. The grounds for involuntarily terminating the parental rights of a parent are set forth in KRS 625.090. Those grounds must be proved by clear and convincing evidence. Id. See also M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116 (Ky.App. 1998). In determining whether a child fits within the abused or neglected category and whether the abuse or neglect warrants

termination, the trial court has "a great deal of discretion." Department for Human Resources v. Moore, 552 S.W.2d 672, 675 (Ky.App. 1977); R.C.R. v. Cabinet for Human Resources, 988 S.W.2d 36, 38 (Ky.App. 1998). Our review is confined to the clearly erroneous standard, and we will not disturb the findings of the trial court "unless there exists no substantial evidence in the record to support its findings. R.C.R., 988 S.W.2d at 38.

Acknowledging that they have not been model parents and citing Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the appellants argue that proof of their deficiencies as parents was insufficient to prove by clear and convincing evidence that T.L.W. was an abused or neglected child. We conclude otherwise.³

T.L.W. is a special needs child who was found to be a disabled child by Social Security. Before terminating the appellants' parental rights to T.L.W., the court had to find by clear and convincing evidence the existence of one or more of the grounds listed in KRS 625.090(2). In its Findings of Fact

³ The appellants state that it is "incongruous that the Cabinet would seek to terminate the parental rights to one child but leave the care, custody, and control of the other five children with their parents." The answer to this is that the appellants and the other children no longer reside in Kentucky and are not under the jurisdiction of the Boone Family Court. Furthermore, when T.L.W. was placed in foster care in Kentucky in 2002, the other four children from appellant husband's previous marriage were not residing with the appellants and the fifth child had not yet been born.

and Conclusions of Law, the court found the existence of four grounds listed under the statute.

The evidence to support the findings included evidence that the appellants failed to make sufficient progress toward the reunification goals set by the Cabinet, the appellants' home remained unstable throughout the time the child remained in foster care, domestic violence continued to be a problem in the home, the appellants abandoned the child by moving to Oklahoma while the child remained in Kentucky in foster care and thereafter failed to visit on numerous occasions, and the appellants generally, for reasons other than poverty alone, continuously or repeatedly failed or refused or were incapable of providing adequately for the child, with no reasonable expectation of significant improvement in the immediate foreseeable future, considering the age of the child. Further, the court found that the Cabinet had rendered or attempted to render all reasonable services in an attempt to bring about reunification of the appellants and T.L.W. We conclude the evidence was sufficient to support the findings and conclusions of the trial court and that such findings and conclusions were not clearly erroneous. See R.C.R., 998 S.W.2d at 38.

The order and judgment of the Boone Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Cynthia Kloeker
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