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Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-001206-ME

M.R.G. AND E.M.G. APPELLANTS

v.

APPEAL FROM ROCKCASTLE FAMILY COURT
HONORABLE ROBERT B. OVERSTREET, JUDGE
ACTION NO. 05-AD-00002

CABINET FOR HEALTH AND FAMILY SERVICES;
A.S.G., A CHILD; C.M.G., A CHILD;
D.C.G., A CHILD; AND E.K.G. A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

THOMPSON, JUDGE: M.R.G. (mother) and E.M.G. (father) appeal from orders of the Rockcastle Family Court terminating their parental rights to their four children, A.S.G., born on July 7, 1996, C.M.G., born on May 8, 1998, D.C.G., born on April 20, 1999, and E.K.G., born on June 21, 2002. On appeal the following issues are raised: (1) whether the judge's recusal following the termination hearing unduly prejudiced mother and father; (2) whether the family court made sufficient findings of

fact as required by CR 52.01; (3) whether the trial court erroneously excluded the testimony of John Larusch on the basis that he was not disclosed as a witness during the discovery process; and (4) whether the Cabinet for Health and Family Services (Cabinet) established by clear and convincing evidence the grounds for termination under KRS 625.090.

Mother and father were married on October 14, 1995. At the time, mother had a son, B.J.U., as result of a prior relationship. The family first came to the attention of the Cabinet in March 2002, when mother reported to school officials that father had struck B.J.U., then thirteen years old, and that B.J.U. had expressed suicidal thoughts.[1] The counselor reported the incident to the Cabinet who then contacted mother. This initial contact would eventually result in allegations of sexual abuse against father and the filing of a petition for involuntary termination of parental rights on February 8, 2005.

Mother met with a social worker, Terri Pushell, who opened a case file. Mother filed a domestic violence petition against father, and both parents and B.J.U. were referred to counseling. Additionally, father was ordered to complete domestic violence perpetrator counseling. At that time, father remained in the home.

After six months, father failed to complete the domestic violence perpetrator counseling. As a result, on September 17, 2002, he was ordered to complete the counseling

[1] B.J.U. was named in the termination petition but was subsequently dismissed after he turned eighteen while the petition remained pending.

and further to vacate the marital home. Mental health assessments and "family preservation" were also ordered.

Father moved to Lexington where he began domestic violence perpetrator counseling with Michael Finucane, a licensed clinical social worker. Mr. Finucane reported to the court that individual rather than group counseling was appropriate for father and recommended that he see father for twenty weeks. The court accepted the recommendation and permitted father to return to the marital home with the condition that he have no unsupervised time with B.J.U.

On October 28, 2002, mother filed a domestic violence petition against father alleging that he had sexually abused their sons, C.M.G. and D.C.G. She made the following written statement:

> Last week I walked in the living room and saw my son (C.M.G.) on top of my daughter trying to insert his penis in her mouth. I approached (C.M.G.) on 10/27/02 to ask him of inappropriate touching and he told me that he and his father have been touching each other since we lived in Lexington (two years ago) and the most recent time being the early morning of 10/27/02. (D.C.G.) also said "daddy plays with my bottom" and to that (C.M.G.) said "daddy does mine, too."

Mother requested that father be ordered to have no contact with the children. On October 29, 2002, an Emergency Order was entered and father was again ordered to vacate the marital residence.

The following Monday, mother witnessed B.J.U. forcing A.S.G. to masturbate him. Mother contacted the Cabinet and was told that the Kentucky State Police would contact her; however, no report was filed. Eventually, mother was able to arrange an assessment for B.J.U. and placed him in the "Turning Point" residential facility. After B.J.U. was determined to be a low to moderate risk to his siblings, mother and the counselor implemented a safety plan and B.J.U. returned home.

On November 4, 2002, father reported to his counseling session with Mr. Finucane. At that session he told the counselor that in June, 2002, he performed oral sex on C.M.G. and D.C.G.

A hearing on the Order of Protection was held on November 12, 2002, and father was again ordered to have no contact with any of the children.

In early January 2003, Pushell received a report that father was living in the home. She and another Cabinet employee made an unannounced visit to the home and found two cars in the driveway, two sets of keys in the kitchen, a dozen roses, and men's shoes. Both mother and father denied that father resided in the home or that he had contact with the children.

On January 9, 2003, Ms. Pushell filed a dependency, neglect and abuse petition alleging risk of harm to the children as a result of father's sexual abuse and the mother's failure to keep father away from the home. The family court declined to

remove the children but again ordered that the father have no contact with the children.

An adjudication hearing was held on April 15, 2003, and the father and mother appeared represented by private counsel. They both stipulated the neglect alleged in the petition.

Prior to the scheduled disposition hearing on May 27, 2003, mother, father, and the children moved to Texas. When the couple failed to appear in court on the stated date, a bench warrant was issued and the four youngest children were ordered to be placed in the custody of the Cabinet with the parents to have no contact with the children. B.J.U. was committed to the Cabinet and, subsequently, committed both to the Cabinet and Department for Juvenile Justice based upon the sex abuse charges regarding his sibling. Visitation was suspended and the family was ordered to complete an assessment by the Comprehensive Assessment and Training Services Project (CATS) at the University of Kentucky. Ms. Pushell then traveled to Texas and returned to Kentucky with the children. Mother returned to Kentucky. Father remained in Texas.

The Cabinet began reunification efforts. Social worker Amy Yates was assigned as the caseworker from June 9, 2003, until June 17, 2004. She addressed the safety risks to the children and, in addition to the CATS assessment, offered counseling and other services to the family. For two months in 2004, however, Ms. Yates had no contact with mother. Ms. Yates

testified that home visits indicated that mother was not residing at her address in Mt. Vernon, Kentucky. The reunification services offered to father were limited by his Texas location. He did, however, receive counseling from Marty Lerman, who sent reports to the Cabinet.

The CATS assessment was filed on December 28, 2003, which recommended that the children be placed for adoption. Adrienne Whitt, a licensed social worker, testified on behalf of the CATS assessment team. She explained that the CATS assessment uses a multi-disciplinary approach, involving medical, psychiatric and other mental health professionals and data to assess and evaluate the strengths and weaknesses of a family. The CATS team noted that several of the children demonstrated signs of probable sexual abuse by the father. The evidence indicated that mother's intelligence was offset by her tendency to minimize her children's problems and her own poor judgment. Although mother was aware of the children's abuse prior to their removal, she continued to expose them to their father. The assessment revealed that the mother blames the Cabinet for her situation and fails to understand the harm caused to the children while in her care.

Although the CATS project noted that mother possessed strengths, they were unwilling to recommend reunification citing the risk that she would again expose the children to father.

Social worker Joyce Cummins became the caseworker in the fall of 2004 and remained so at the time of the hearing. By

October 2004, she was unable to locate either parent. Reportedly, father was then residing in Atlanta, Georgia, and the mother in Texas. However, Ms. Cummins was unable to contact either parent at the addresses provided. When contact was reestablished in mid-2005, mother and father were in the process of reconciling.

In June 2005, criminal charges were brought against father for the sexual abuse of D.C.G. and C.M.G. On May 10, 2006, he entered an *Alford* plea to two counts of sexual abuse, second-degree, and was sentenced to twelve months' imprisonment for each count with the sentences to run concurrently, conditionally discharged for a period of twenty-four months.

Although mother was requested to provide updates on her progress in counseling, Ms. Cummins testified that she received only one letter in December 2005, two years after the children entered foster care. Mother refused to sign releases that would have enabled Ms. Cummins to obtain any counseling records. After the children had been in foster care for approximately nineteen months, Ms. Cummins changed the Cabinet's permanency goal for the children to adoption. The basis for her decision was the sexual abuse of the children, lack of parental cooperation or progress of the parents, and the parents' failure to maintain consistent contact with the Cabinet.

Cabinet supervisor, Cheryl Franklin, testified that reunification efforts were thwarted by mother's refusal to acknowledge the risk posed to the children by father and accept

responsibility for placing her children at risk. Although mother and father agreed in December 2005, to provide a plan to protect the children from further abuse, it had never been provided to the Cabinet.

While in foster care, the four younger children received therapy from Smitty Moore, a licensed social worker. He testified that A.S.G. and C.M.G. demonstrated sexually reactive behaviors. D.C.G. displayed aggressive behavior and touched other children inappropriately. E.K.G. showed fear of her brothers, A.S.G. and C.M.G. Mr. Moore did not recommend parental visits for the children based upon the court's no-contact order and the children's behavior.

B.J.U. testified that father had shown him pornographic material and touched him sexually when B.J.U. was eleven or twelve years old. Likewise, C.M.G. testified that his father touched his "privates" and "private parts." D.C.G. was also able to recall his father touching him in a sexual manner.

Records from the Rockcastle County Attorney's Child Support Office demonstrated that father was in arrears on his court-ordered child support in the amount of $20,150.98. In October 2005, mother was ordered to pay child support but as of April 30, 2006, she was in arrears, $1,105.98.

Mother and father both testified. Father denied that he had sexually abused any of the children and explained that he admitted the sexual abuse of his children to Mr. Fucutane because mother threatened that she would not permit him to see

the children unless he told the counselor of the abuse. He further explained that he entered the *Alford* plea to the criminal charges because he was taking amphetamines and was upset. He and mother attributed their child support arreages to counseling charges which they had incurred.

Mother justified her continued interaction with father and her exposure of the children to him on the basis that the Cabinet failed to provide adequate services to the family and her belief that it was actually B.J.U. who perpetrated the abuse on her younger children. As for her fleeing to Texas, she explained that she had researched counseling services in that state and found them superior to those offered by Kentucky. Despite the fact that she permitted the children to be in father's presence in direct contradiction of the court's orders, she nevertheless believed that her actions were reasonable. When questioned in regard to the five-month lapse of time during which she had no contact with the children, she stated that she had done so on the advice of a federal clerk who told her and father not to have contact with the Cabinet during a federal lawsuit mother and father had filed against the Cabinet.[2] She was, however, unable to identify the clerk.

As revealed by our summation of the facts, this has been an unusually protracted and, understandably, a highly contested termination proceeding. Throughout the five years during which the court and the Cabinet were involved with the

[2] The complaint in the federal lawsuit that was ultimately dismissed is not a part of the record on appeal.

family, numerous hearings were held and eventually the court heard days of testimony regarding the question of the termination of parental rights. The testimony presented at the termination hearing was heard by Judge Lambert, the Rockcastle Family Court Judge. Following the hearing, however, Judge Lambert *sua sponte* recused from the case, thus, necessitating the appointment of a special judge. After Senior Judge Paisley was appointed and recused, Judge Overstreet was appointed. From the date of the conclusion of the proof until judgment, almost eleven months had passed.

Mother and father argue that because the decision terminating their rights was not entered within thirty days after the conclusion of proof, it must be reversed. KRS 625.090(6).

The purpose behind the thirty-day requirement provided in the termination statute is to expedite the resolution of termination cases so that the family, particularly the children, can be stabilized as quickly as possible. Under the circumstances, we can see no reasonable basis for reversing the decision of the court on the basis of its timeliness. To do so would only require further delay in resolution of this already prolonged proceeding and would not further the spirit of KRS 625.090(6). Moreover, mother and father made no objection to submitting the case on the record to a special judge nor at any time until appeal did they attempt to invoke the thirty-day requirement.

Mother and father contend that they were unduly prejudiced because Judge Overstreet did not view the testimony live. It is a premise of our appellate jurisprudence that the trial judge is in the best position to access the credibility of the witnesses and, therefore, the appellate court must defer to the fact-finder. *See R.C.R. v. Com. Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998). However, when as here, the proceedings are available on videotape, we can fathom no prejudice incurred by the presiding judge's replacement.

This Court has rejected the contention that the absence of hearing testimony live imputes to the trial court a failure to consider the evidence. As stated in *O.B.C. v. Cabinet for Human Resources*, 705 S.W.2d 954, 956 (Ky.App. 1986).

> Finally, appellants contend the lower court failed to observe the clear and convincing standard of proof required by *Santosky v. Kramer,* 455 U.S. at 747-748, 102 S.Ct. at 1391-1392, because the court tried this case by deposition rather than hearing the evidence personally. We disagree. *Santosky* does not require a trial judge to personally observe the witnesses; it simply mandates fundamental fairness in termination of parental rights proceedings. This case has a most comprehensive record. The evidence establishes shocking incidents of abuse and neglect, many of which the parents admitted. Under the circumstances, the trial court's deciding this case based on the record does not offend *Santosky.*

Having decided that the unusual procedural posture of this case did not result in any prejudice to mother and father, we address whether sufficient findings of fact were stated by the family court.

In termination of parental rights cases, the court is required to specifically state the facts that justify its decision. *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky.App. 1977). Because termination of parental rights is a drastic action which permanently severs the parent-child relationship, the court's findings of fact should be more than a parroting of the involuntary termination statute. *See Cabinet for Human Resources v. E.S.*, 730 S.W.2d 929, 933 (Ky. 1987) (Lambert, J., concurring). The court must state with specificity the facts supporting its decision so that meaningful review can be afforded by the appellate court. *Id*.

In this case, in addition to citing the relevant portions of the statute, the family court made the required findings. The court found that the parents failed to protect and preserve their children's fundamental rights to a safe and nurturing home and that the children were abused or neglected as defined in KRS 600.020. It further found that father had sexually abused or exploited the children and that mother permitted the abuse. Additionally, the court found that the children had been in foster care for fifteen of the most recent twenty-two months preceding the filing of the termination proceeding and that both parents owed substantial child support arrearages. Having found facts to establish the parents' abuse and neglect of the children, it found that termination was in the children's best interests.

The court made sufficient findings of fact. Had the parents desired more detailed facts in the court's judgment, it was incumbent upon them to make such a request. CR 52.04; *Vinson v. Sorrell*, 136 S.W.3d 465, 471 (Ky. 2004).

As a final objection to the form of the court's judgments terminating their parental rights, the parents complain that the court simply adopted the findings of fact as tendered by the Cabinet. Unless there is evidence that findings of fact and conclusions of law are not the product of the court's independent deliberation, it is not error for the family court to adopt those drafted by a party. *Prater v. Cabinet for Human Resources, Com. of Ky.*, 954 S.W.2d 954, (Ky. 1997). There is no evidence to suggest that the family court failed to make an independent review of the record. We find no error.

Before discussing what we perceive to be the paramount issue, whether the termination of the parents' rights was supported by the evidence, we address the parents' challenges to the family court's evidentiary rulings concerning expert testimony.

We are perplexed by the parents' argument that the family court erred when it granted the Cabinet's motion *in limine* regarding the purported testimony of Marty Lerman, who counseled father while in Texas. The only mention of Marty Lerman as an expert was in response to interrogatories certified to the Cabinet on April 5, 2006, fifteen days prior to the first hearing, in which father stated that "perhaps Marty Lerman"

would be called as an expert witness. Mr. Lerman was not proffered as an expert witness at the hearing and, in fact, was not the subject of the motion *in limine*, nor did he appear at the hearings. We conclude there was no error.

The court did exclude the testimony of John LaRusch based on the failure to comply with CR 33.01. In father's response to interrogatories submitted by the Cabinet, no mention was made that Mr. LaRusch would be called as an expert witness. Although Mr. LaRusch was deposed during the dependency neglect and abuse proceeding, until his appearance on the date of the first termination hearing conducted on April 20, 2006, there was no mention of him as a witness. The purported reason for his testimony in the termination proceeding was to challenge the CATS assessment.

The trial court is granted wide discretion in applying the penalties provided for the failure to comply with our rules of discovery. An appellate court will not disturb the exercise of that discretion absent its clear abuse. *Benjamin v. Near East Rug, Inc.*, 535 S.W.2d 848 (Ky. 1976). Relying on *M.P.S. v. Cabinet*, 979 S.W.2d 114 (Ky.App. 1998), mother and father urge that we not comply with this well-embedded rule.

We do not read *M.P.S.* broadly so as to permit this court to ignore the law applicable to our rules of discovery and the orderly progression of our judicial system. In *M.P.S.*, the Court found that it was not an abuse of discretion to permit testimony from an expert identified five days prior to the

commencement of the termination hearing; however, the premise of the Court's holding was that the imposition of sanctions in termination of parental rights cases remains within the discretion of the trial court. *Id.* at 118. In this case, we find no abuse of discretion.

For the first time on appeal, mother and father challenge the qualifications of Mr. Moore, a licensed social worker, to testify as to whether or not the children suffered sexual abuse. *See R.C. v. Commonwealth*, 101 S.W.3d 897 (Ky.App. 2002). Mr. Moore testified as to the children's progress in therapy and as to their behavior. He did not render a psychological diagnosis. Moreover, the parents failed to object to any of Mr. Moore's testimony and, therefore, any error in its admission is not reviewable. *Com., Dept. of Highways v. Spillman*, 489 S.W.2d 814 (Ky. 1973).

Judicial intervention into the parental relationship is done with reluctance that is reflected in the standard applied to the Cabinet when it pursues the goal of the termination of parental rights. The Cabinet is required to prove by clear and convincing evidence the statutory factors delineated in KRS 625.090. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Our scope of review in such cases is limited to the clearly erroneous standard and the findings of the trial court will not be disturbed unless there is no substantial evidence in the record to support its findings. *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d

420, 424 (Ky.App. 1986). "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 (Ky.App. 1934). Applying this standard as our guide, we turn to the facts presented.

Involuntary termination of parental rights requires a three-prong analysis. *R.C.R.*, 988 S.W.2d 36 (Ky.App. 1998). The trial court must find that the child has been adjudged to be an abused or neglected child by a court of competent jurisdiction or is found to be an abused or neglected child by the family court in the termination proceeding. *Id.* at 38.

The family court is then required to find by clear and convincing evidence one of the factors set forth in KRS 625.090(2)(a)-(j). In relevant part it provides:

> b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
>
> (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
>
> . . . .
>
> (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;
>
> (f) That the parent has caused or allowed the child to be sexually abused or exploited;
>
> (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;
>
> . . . .
>
> (j) That the child has been in foster care under the responsibility of the Cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

Id.

Finally, the family court must apply the final prong of KRS 625.090 and find that the termination of parental rights would be in the best interest of the child considering the relevant factors set forth in the statute which includes:

> (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
>
> (c) If the child has been placed with the Cabinet, whether the Cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

Mother and father claim that the first prong of the termination statute was met only by the family court's reliance on the prior adjudication of neglect in the dependency, neglect and abuse proceeding. In doing so, they cite the unpublished and not yet final Opinion, *T.G. v. Kentucky, Cabinet for Health and Family Services*, 2007 WL 1452572, which has been accepted by the Kentucky Supreme Court for discretionary review. In that case, it was held that KRS 625.090 requires that the family court make an independent review of the evidence and render its own determination as to abuse or neglect under the clearly erroneous standard. Even should the Supreme Court affirm our decision in *T.G.*, in this case there was clear and convincing evidence sufficient to support the family court's independent finding of abuse and neglect pursuant to KRS 600.020(1).

The family court's finding that these children were sexually abused by father is supported by the testimony of the children, father's admission to his counselor, and father's

entry of an *Alford* plea to sexual abuse, second degree. Additionally, the mother reported suspected abuse to the Cabinet after witnessing her toddler making sexual gestures to his infant sister. She later discovered her oldest son forcing his sibling to masturbate him. There was testimony that such dysfunction in one family by such young children is undeniably indicative of exposure to sexual contact.

We find no merit to the contention that father's *Alford* plea was not admissible in the termination proceeding. It is a plea of guilty regardless of the denial of the underlying facts and constitutes a criminal conviction. *Pettiway v. Commonwealth*, 860 S.W.2d 766, 767 (Ky. 1993). Moreover, no objection was made to its admission; any alleged error, therefore, was waived.

Mother appears to be highly intelligent and has demonstrated love for her children and, as evidenced by her initial contact with the Cabinet, at times she has evidenced a desire to protect her children from abuse. However, for four years she has consistently permitted the father to have contact with the children, she fled with the father and the children to Texas, and at the time of hearing expressed the belief that the father was innocent of sexual abuse. She continues to justify her behavior while blaming the Cabinet for her family's dysfunction. Sadly, we conclude that the family court did not abuse its discretion in finding that mother's continued

attachment to father will dominate her reasoning and she will again expose her children to his abuse.

The ultimate question this court must resolve is whether the family court erred when it decided to terminate the parents' rights to rear and provide for their four children. Without question, the severance of parental rights is the most difficult for a court to decide. It is not a decision rendered without contemplation, nor without concern for the sanctity of the family and the consequences of the permanent severance of that relationship. Our obligation to accomplish justice is most tested in such situations and is accomplished only after a thorough review of the facts. In this case, we have done so and can only conclude that the family court did not abuse its discretion in its decision.

We find no error in the termination of the parents' rights to the children. The decision of the Rockcastle Family Court is affirmed.

ALL CONCUR.

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