

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-001672-ME

B.J.K.

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 06-AD-00032

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY,
As Petitioner and Next Friend
of M.R.B., a Child

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

STUMBO, JUDGE: "B.J.K."² appeals from findings of fact,

conclusions of law and order of the Boyd Circuit Court

terminating her parental rights as to her biological child

"M.R.B." The court determined that B.J.K. continuously or

¹ Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² To protect the identity of B.J.K.'s minor child, we will use the initials of the parties' names.

repeatedly failed or refused to provide essential parental care and protection to M.R.B., and that M.R.B. is an abused and neglected child as defined by KRS Chapter 600. B.J.K. argues that the circuit court improperly adopted the findings and order tendered by opposing counsel, and that the court relied upon insufficient grounds in support of its conclusions. For the reasons stated below, we affirm the order on appeal.

M.R.B., a male child, was born out of wedlock on August 3, 2005.³ His biological mother is Appellant B.J.K., and his father is S.M.B. Two days after M.R.B.'s birth, the Boyd Circuit Court apparently entered an Emergency Custody Order based on the allegation that B.J.K. had multiple positive drug tests during her pregnancy and that M.R.B. tested positive at birth for opiates. The Cabinet's brief indicates that over the months that followed, B.J.K. was directed to cooperate with the Cabinet, the Court Appointed Special Advocate (CASA), and to actively participate in drug treatment and/or social service programs. The Cabinet's brief also alleged that B.J.K. failed random drug tests, and was arrested after attempting to bring illicit substances into the Boyd County Courthouse. The Cabinet further contends in its brief that B.J.K. pled guilty to other offenses including shoplifting and receiving stolen property.

³ The appellate record does not contain any circuit court video record or trial transcript of the proceedings below, nor does it contain any pleadings or orders other than the June 6, 2007, Order Terminating Parental Rights from which B.J.K. now appeals. Our recitation of the facts is based solely upon 1) the findings set forth in the June 6, 2007, Order, and 2) the appellate briefs. The appellate record does contain a file of miscellaneous exhibits such as arrest records and drug tests, but these are of limited value in reconstructing the action's factual and procedural history.

B.J.K., through counsel, states in her brief that the child was placed in foster care shortly after its birth, and that, subsequent to the child's birth, B.J.K. continued to use illegal drugs and commit other criminal offenses.

At some point not revealed by the incomplete record, the Cabinet sought to permanently terminate the parental rights of B.J.K. and S.M.B. as to M.R.B. On June 6, 2007, the Boyd Circuit Court rendered the order which forms the basis of the instant appeal. The court found by clear and convincing evidence that M.R.B. is an abused and neglected child as defined by KRS 600.020. It further found that the child's parents had, for a period of not less than six months, continuously or repeatedly failed or refused to provide or have been substantially incapable of providing essential parental care and protection for the child, and that there was no reasonable expectation of improvement in that parental care and protection. It noted that the child had been in foster care since August 5, 2005, and concluded that termination of parental rights was in the child's best interest and that the Cabinet is best qualified to receive custody of the child.

Thereafter, B.J.K. apparently tendered motions to Alter, Amend or Vacate the termination order, and requesting Additional Findings of Fact and Conclusions of Law. These motions were overruled and this appeal followed.

B.J.K., through counsel, now argues that the circuit court erred in adopting the findings of fact tendered by the

Cabinet. She claims that she was not apprised that the Cabinet tendered proposed findings to the court, and in any event that it constitutes reversible error for the court to adopt the tendered findings rather than draft those of its own. She also maintains that the circuit court had insufficient grounds to terminate B.J.K.'s parental rights. She seeks an order reversing the termination, or in the alternative, reversing and remanding for further proceedings.

We find no error. As noted above, the appellate record does not contain any circuit court video record or trial transcript of the proceedings below, nor does it contain any pleadings or orders other than the June 6, 2007, Order Terminating Parental Rights from which B.J.K. now appeals. Where the record before the Court of Appeals does not contain a transcript of evidence or a narrative statement, upon review, we are confined to a determination of whether the pleadings supported the judgment. *Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972). The burden to produce the lower court record rests with the appellant. CR 75.01; *Richman v. First Security National Bank and Trust Company*, 652 S.W.2d 671 (Ky. App. 1983). Where the appellate record is incomplete, we are required to assume that the evidence below supported the findings of the lower court. *Porter, supra*.

In the matter at bar, it is uncontroverted that the Cabinet sought - through its pleadings - an order terminating B.J.K.'s parental rights as to M.R.B. It is further without

question that the appellate record does not contain a transcript of evidence or narrative statement. As such, we must assume that any evidence tendered below supported the trial court's findings. *Id.*

KRS 625.090 provides that the circuit court may involuntarily terminate all parental rights of a parent of a named child, if it finds from the pleadings and by clear and convincing evidence that the child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), and that termination would be in the best interest of the child. The statute goes on to state that no termination may occur unless the court finds by clear and convincing evidence that at least one of the enumerated factors was proven, said factors including 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.

The circuit court's findings and conclusions comport with the requirements of KRS Chapter 625. The court used the statutorily required "clear and convincing" standard to first determine that M.R.B. was abused and neglected as defined by KRS 600.020. It went on to determine that B.J.K. continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and

protection for the child, with no reasonable prospect of improving that care, and that termination was in the child's best interest. Since the order on appeal comports with KRS Chapter 625, and because we must assume that any evidence tendered below supported the trial court's findings, we find no error on this issue.

B.J.K. also complains that the circuit court improperly adopted the Cabinet's findings rather than drafting its own. Unfortunately without a record to examine, we have no way of determining whether the findings are in any way lacking. While it is preferable for a court to prepare its own orders, particularly in sensitive cases of this type, we cannot set aside a judgment without evidence upon which to base such an action. As such, we find no error.

For the foregoing reasons, we affirm the order of the Boyd Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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