

Case No. 09-102299-A

IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

IN THE INTEREST OF JLCC/JLND

BRIEF OF APPELLANT, NATURAL MOTHER

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Harold Flaigle
Judge of the District Court
District Court Case No. 06JC437 & 06JC474

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I.

ISSUES ON APPEAL

- A. The district court erred in its findings of fact and conclusions of law in its termination of Mother's parental rights.**

II.

FACTS OF THE CASE

In August, 2006, a Child in Need of Care Petition was filed by the State regarding JLCC and JLND. (R. I, 23). The petition alleged that the children's welfare had been endangered due to violence in the home and an incident related to the father of JLND, as well as the question of services that had been provided to the family but had not been beneficial and that there had been a prior termination of parental rights involving Mother. (R. I, 64-65). The petition also alleged that the natural mother, SM,

had previously received services, had been engaged in an abusive relationships and was not able to provide proper care for DMM. (R. I, 16-18).

In August, 2008, the State filed a Motion for Review and Termination. (R. I, 77).

The State alleged that mother was unable to properly care for the children because mother continued a pattern of instability despite the provision of extensive services and the prior termination case involving Mother's son. (R. III, 27). Further, the State averred that the reintegration had not been successful and could not parent her children appropriately and that she could not assure care of the children in the parental home. Id. at 29.

Testimony on the termination case was taken on January 12 and 13, 2009.

Angie Lynn, the counselor who treated JLCC, testified that she believed JLCC had developed through her counseling and was ready to proceed with family therapy with Mother. (R. IV, 24). Through family therapy, Ms. Lynn believed that Mother and daughter had progressed to the point of reintegration of the children and the mother. Id. at 26-27. Once reintegration occurred, the therapy was ended. Id. at 35. Even though Ms. Lynn had no contact with Mother or JLCC since October 2008, she still believed that the permanency of termination of parental rights was called for. Id. at 43.

Elizabeth Emmons testified. She was the current foster parent for JLCC and JLND. She spoke of the behavioral problems the girls had encountered since having been removed from their mother. Id. at 67-74.

Lee Herring, a therapist currently seeing JLCC and JLND, testified that there was a strong bond of love between the girls and Mother and that it would be very difficult for the girls to be removed permanently from Mother. Id. at 117-118. Ms. Herring stated that based on the prior failed reintegration, she felt it might be better for the children to have a final answer about whether they would go back to Mother or some other permanent placement and for the termination to be allowed to occur. Id. at 123-124.

Carolyn Wildman testified about Mother's interactions with DCCCA and the various services

that had been provided, areas that Mother had worked on and the difficulties mother had in contacting her family specialists. Id. at 135; 142 and 147. Ms. Wildman was an advocate for the reintegration of the family and advocated for increased visitation. It was Ms. Wildman's assessment that the reintegration might have been more successful if more time had been taken to stabilize the family unit and the reintegration had not been rushed. Id. at 145.

Carol Baker, also of DCCCA, regarding DCCCA's contacts with Mother and information gathered regarding the case. Id. at 164-169.

Kaylene Jones, JLCC's teacher, testified about the child's work in school and contact with Mother and that Mother was interested in her child's behavior and academics. (R. V, 9). Ms. Jones testified that JLCC's behavior in the classroom was typical but that, all in all, JLCC behaved very well and had close friends. Id. at 10.

Nancy Weigant testified as to how Mother interacted with her son, J., who was adopted by Ms. Weigant after Mother agreed to termination of rights in 2003. Id. at 15. Ms. Weigant had also observed Mother with her daughters and thought she was a capable, qualified mother. Ms. Weigant also corroborated Mother's testimony that she had difficulty contacting DCCCA workers. Id. at 16-17.

Jocelyn Goerzen testified as to her knowledge of Mother and her parenting skills. Ms. Goerzen was the foster parent to the two girls prior to the reintegration with Mother. Prior to the reintegration, there was significant contact because of the increased visits in anticipation of the reintegration. Id. at 48-49. Ms. Goerzen testified that she saw the children weekly or had contact during the reintegration period. From everything Ms. Goerzen saw, Mother was a great mother to her girls. She made sure her children were safe. Mother taught the children, used appropriate discipline, fed them well and played with the girls. Id. at 50. Ms. Goerzen testified that JLCC was much better behaved with Mother than she had been in foster care. Id. at 51. Ms. Goerzen felt that the longer the girls stayed with Mother, the better. She was noted that JLCC's guard came down and that she had lost a lot of her anxiety. "She just blossomed into a different child, and, you know, it was for the better." Id. at 55. Ms. Goerzen even

related a time that Mother called her to come and help with JLND because the girl was sick and that it was a great admission for Mother to ask for help and put her needs before those of her daughter. Id. at 58.

Ms. Jaclyn Goerzen testified that she had seen Mother interact with her children both before and after the reintegration. She stated that Mother was appropriate with her children and played with them, loved them and helped with their homework. Id. at 83-85; 87.

Mother testified as to her home life with the children and her problems and frustrations in dealing with the differing messages she received from DCCCA and here inability to have contact with her DCCCA contacts. (R. VI, 29-36; 90-91). The additional specific portions of Mother's testimony will be incorporated with the arguments in the brief.

The district court found by clear and convincing evidence that the termination of parental rights of Mother was in the best interest of the children and that it was justified in that pursuant to K.S.A. 38-2269(b)(7) and (c)(3) that there had been a failure of reasonable efforts made by an appropriate public or private agencies to rehabilitate the family and that there was a failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home. (R. III, 98). The district court found there was a lack of effort on the part of the parent to change her circumstances, conduct or conditions to meet the needs of the children pursuant to K.S.A. 38-2269(b)(8). Id. The district court found that it was presumed that Mother was unfit by reason that the parent had previously been found to be an unfit parent pursuant to K.S.A. 38-2271(a)(1). Id.

A timely notice of appeal was filed and this brief follows.

III.

ARGUMENTS AND AUTHORITIES

A. The district court erred in its findings of fact and conclusions of law in its termination of Mother's parental rights.

1. Standard of review.

When an appellate court reviews a trial court's determination to terminate a parent's rights under the clear and convincing evidence standard, “it should consider whether, after review of all the evidence, viewed in the light most favorable to the State, it is convinced that a rational factfinder could have found it highly probable, *i.e.*, by clear and convincing evidence,” that the parent's rights should be terminated. In re B.D.-Y., 286 Kan. 686, 705, 187 P.3d 594 (2008).

2. The findings of the district court must be made based upon clear and convincing evidence.

In Kansas, a parent's right to custody and control of their children is a fundamental right and liberty interest protected by the Fourteenth Amendment to the U.S. Constitution. In re M.M.L., 258 Kan. 254, 264, 900 P.2d 813 (1995).

Proof of unfitness must be by clear and convincing evidence. In re M.M., 19 Kan. App. 2d 600, 873 P.2d 1371 (1994). Kansas law makes clear that the term “unfitness” relates to “conduct or condition which renders the parent unable to care properly for a child.” In re Bachelor, 211 Kan. 879, 508 P.2d 862 (1973). The substantial evidence must be more than some quantity of negative evidence about a parent but of a quality of evidence that shows clearly and convincingly not merely the existence of negative parental qualities, nor parental eccentricities, but current unfitness and an unlikelihood of sufficient change in the conduct or condition of the parent in the foreseeable future. In re Reed, 8 Kan. App. 2d 602, 635 P.2d 675 (1983).

In In re B.D.-Y., 286 Kan. 686, Syl. ¶ 2, 187 P.3d 594 (2008), the Supreme Court held that the “clear and convincing evidence” standard is an intermediate standard of proof between preponderance of the evidence and proof beyond a reasonable doubt.

Thus, the findings of the district court had to be based upon a higher evidentiary standard than that relied upon in normal, civil proceedings.

3. The district court’s finding that there had been a failure of reasonable efforts made by appropriate private or public agencies to rehabilitate the family and that

there had been a failure to carry out a reasonable plan was not supported by clear and convincing evidence.

The district court found that pursuant to K.S.A. 38-2269(b)(7) and (c)(3) that there had been a failure of reasonable efforts made by an appropriate public or private agencies to rehabilitate the family and that there was a failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home. (R. III, 18).

The district court found in its memorandum opinion that Mother had repeatedly violated the Family Based Safety Plan, which was part of the reintegration plan, by allowing her father to supervise the children and for allowing her mother to have contact with the children. The court also opined that the children were to have SRS approved daycare and that the maternal grandfather was not to provide such care. (R. III, 103-104).

However, Mother testified that she had contacted Mr. Bias and Ms. Solis, her DCCCA family service providers, regarding her father watching the kids and had been told that it was okay if there were no other options. (R. VI, 18-19; 20). Ms. Arnold testified that Ms. Solis had told her that there were issues in the reintegration plan that were discretionary to DCCA and that an exception was being made. (R. VI, 20).

The court noted in its memorandum opinion that there were definitely issues with DCCA. (R. III, 105).

The problem was that AC's testimony about her contacts with DCCA and the information that was given to her was undisputed. There was no testimony from Mr. Bias and no testimony from Ms. Solis that contradicted any of the information testified to by AC.

That testimony stands uncontroverted. "Uncontradicted evidence which is not improbable or unreasonable is ordinarily regarded as conclusive and cannot be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976). See also Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978)

(workers compensation); Berry v. Wondra, 173 Kan. 273, Syl. ¶ 3, 246 P.2d 282 (1952) (oil and gas lease).” Matter of Adoption of W.J., 262 Kan. 788, 795, 942 P.2d 37, 41 (1997).

The district court found that Mother had failed to keep in contact with DCCCA. However, there was conflicting evidence regarding Mother’s obligations and the actual contact made between DCCA and Mother. According to the court’s order, on March 20, 2008, the court modified the reintegration plan to read: “DCCCA contact with Mother will be 2 times per week for a minimum of 2 months after the date of this order, followed by weekly, bi-weekly and monthly as set forth in the proposed plan.” (R. II, 88). There was evidence provided at the court proceedings that Mother had been in contact with DCCCA consistently throughout the time period complained of.

At the trial, Mother was asked if she thought it was appropriate for DCCCA personnel to overrule a court order. Mother stated that she didn’t know and that she thought that DCCCA had discretion to adapt the plan or make those decisions. (R. VI, 21).

The evidence in the case-file shows that DCCCA had previously altered the court orders and had acted on their own and had advised Mother of changes and worked to implement those changes. “Subsequent to the docket call of 3/13/08 the Court learned that the children had been placed already with Mother for some two weeks. Under the particular circumstances of this case the Court does not feel it would be in the best interest of these children to remove them from thier mother’s custody and again place them in a resource home. The children were placed full time with mother without Court permission; the remedy will be taken up with DCCCA Supervisors.” (R. II, 88). It is significant to recognize that Ms. Wildman, the DCCCA supervisor for Mother’s case, testified the reintegration might have been more successful if more time had been taken to stablize the family unit and if the reintegration had not been rushed. Id. at 145. A tacit admission that her, and DCCCA’s actions in the instant case, without informing the court and without the court’s permission, assisted in the failure of the reintigration.

Thus, the precedent had been set by DCCCA with Mother that they could act independently and

adapt programs to fit the needs of the mother and the child. Thus, the evidence of the case and the record shows that Mother had received wrongful information, in violation of court orders, from DCCCA.

The evidence also showed that Mother had four different family support workers over the four months she had her children.

Records admitted for the trial showed that Ms. Dillard attempted contact with Mother on 5/21/08; 5/27/08; 6/2/08; 6/3/08; 6/10/08; 6/30/08; 7/14/08; and 7/19/08. However, during this same time period, James Bias of DCCCA, had contact with Mother on 5/21/08, 5/27/08; 6/2/08; 6/10/09; 6/30/08; and 7/19/08. (R. III, 21-22). It seems pretty amazing that one family service worker is unable to contact Mother, but, on the exact same dates that contact was attempted, another DCCCA worker had contact with Mother. Who was working the case and how did one worker not know that the other had contact with Mother?

Mother testified that DCCCA had never come to her home, except to investigate the lack of feeding her child and that no visits or investigations had ever been requested. At least not by Mr. Bias who had no trouble contacting the Mother at anytime.

It is important to note that JLCC had made an allegation that her mother had not been feeding her. On April 1, 2008, DCCCA receive a report that JLCC stated she was not being fed. Three DCCCA workers showed up at the house and walked through the house and found that there was food in the house, chicken was thawing for dinner and the DCCCA workers had no concerns. (R. III, 21).

Mother testified that Ms. Solis had told her that the first thirty days of the reintegration were what mattered and Mother did took that information to mean that her children would then, no longer be in State custody. (R. VI, 30).

Mother testified that she had called Mr. Bias numerous times and that he finally contacted her in May and that she told him at that time that she was moving because her apartment was flooding. Id. at 31. She testified that once she got moved to the S. Pattie address, she had called and left Mr. Bias a

message as to her new address. Id. at 33.

It is also significant to note that Mr. Bias was removed as the family support worker at some point because it was believed by Ms. Wildman that Mr. Bias was failing to set boundaries during visits and that he would allow people to be at the visits who were not approved to attend visits. (R. IV, 136). This would further support Mother's testimony that Mr. Bias had been giving her information and stretching rules based on his own interpretation of DCCCA's status as the supervisor and enforcer of her reintegration plan.

Mother testified that she would make numerous calls to DCCCA and get no return calls. This was corroborated by Ms. Goerzen. Mother on several occasions would call and leave messages in front of Ms. Goerzen on the speakerphone so Mother would have a witness to her attempting to contact DCCCA. (R. V, 72). Ms. Goerzen testified that she, herself, as a foster parent had a very, very negative experience with DCCCA and that she had numerous problems with the contacting the workers and the workers failing to check on the kids. Id. at 74.

Ms. Wildman testified that even when she was no longer working on the case, Mother would call her for help "because she was not getting her calls returned. She didn't know when visits were. She didn't - - at one point she had contacted me because she wasn't sure who her specialist was. (R. IV, 146). Ms. Wildman testified that after the reintegration occurred, Mother had contacted her in person and told Ms. Wildman that she had documentation of the completion of court orders to turn in but couldn't get in touch with her Specialist. Id. at 147.

All of the work and concern of DCCCA was encapsulated by Ms. Baker, who took over the case in July, 2008. In reviewing her files, she testified that she had only written one letter, in six months, to Mother. Id. at 168. This was the same, involved supervisor who, in her report to the court, stated that Mother had never completed a urinalysis or a follicle test. When she was confronted with the fact that Mother had complied with such requests in November 2008 and January 2009, Ms. Baker stated she only supervised Ms. Dillard and not Ms. Bates and so she couldn't have reported that in her report. Id.

at 176. Ms. Baker also confirmed that the records showed that Mother had provided DCCCA with a copy of the lease at the S. Pattie apartment in August, 2008. Id. at 190.

In short, the “reasonable” plan was modified and mutilated by DCCCA which, at best, was unavailable and inconsistent in their contact and monitoring of Mother and her children following the reintegration. It is, at best, suspicious, and, at worst, fraudulent that Mr. Bias and Ms. Dillard’s notes about contact with Mother are totally opposite on exactly the same dates. The record was replete with testimony and evidence that Mother made multiple attempts to contact DCCCA and had multiple difficulties in getting her calls returned. The evidence presented by Mother as to the modifications made to her action plan with the authority of Ms. Solis and Mr. Bias was uncontradicted. Thus, one of the strongest basis for the termination of Mother’s parental rights, her allowing contact with her parents, as held by the court, was authorized by the family support staff of DCCCA with no evidence to the contrary.

Therefore, the plan, as implemented by DCCCA, was not reasonable, at least in the eyes of the court, because DCCCA sanctioned many of the main contentions raised by the court in its findings. Further, Mother, by her uncontradicted testimony, followed the direction and instructions of her DCCCA contacts and was in regular contact with at least one representative of DCCCA consistently throughout the time of the reintegration and was in compliance with the direction of her supervising agency.

Further, as noted in the next section, all evidence related to Mother’s interaction with and parenting of her daughters was exemplary and the children prospered.

This matter should be remanded to the district court and the order of termination rescinded because there was not clear and convincing evidence to support the findings of the district court.

4. The district court’s finding that there was a lack of effort on the part of the parents to adjust the parent’s circumstances, conduct or conditions to meet the needs of the children was not supported by clear and convincing evidence.

The district court found there was a lack of effort on the part of the parent to change her circumstances, conduct or conditions to meet the needs of the children pursuant to K.S.A. 38-2269(b) (8).

Despite Mother's requests for DCCCA to come to her house and see the children, no such visit occurred. From May 21, 2008 to July 19, 2008, Mother had six contacts with Mr. Bias. There were no home visit requests made. There were no home visits made. Only twice in the entire reintegration period were unannounced visits attempted and no one was home, perhaps because there were no scheduled visits.

The number of contacts with Mr. Bias, it should be noted, exceeded the number necessary for that time period as Mother was up to only monthly contact required based on the court's order.

So, what evidence was presented about how the children were doing while living with Mother? All the uncontested evidence presented was that the girls were doing great and Mother was an attentive parent who cared for her kids both physically and emotionally.

Kaylene Jones, JLCC's teacher, testified about the child's work in school and contact with Mother and that Mother was interested in her child's behavior and academics. (R. V, 9). Ms. Jones testified that JLCC's behavior in the classroom was typical but that, all in all, JLCC behaved very well and had close friends. Id. at 10.

Nancy Weigant testified as to how Mother interacted with her son, J., who was adopted by Ms. Weigant after Mother agreed to termination of rights in 2003. Id. at 15. Ms. Weigant had also observed Mother with her daughters and thought she was a capable, qualified mother. Ms. Weigant also corroborated Mother's testimony that she had difficulty contacting DCCCA workers. Id. at 16-17.

Jocelyn Goerzen testified as to her knowledge of Mother and her parenting skills. Ms. Goerzen was the foster parent to the two girls prior to the reintegration with Mother. Prior to the reintegration, there was significant contact because of the increased visits in anticipation of the reintegration. Id. at 48-49. Ms. Goerzen testified that she saw the children weekly or had contact during the reintegration

period. From everything Ms. Goerzen saw, Mother was a great mother to her girls. She made sure her children were safe. Mother taught the children, used appropriate discipline, fed them well and played with the girls. Id. at 50. Ms. Goerzen testified that JLCC was much better behaved with Mother than she had been in foster care. Id. at 51. Ms. Goerzen felt that the longer the girls stayed with Mother, the better. She was noted that JLCC's guard came down and that she had lost a lot of her anxiety. "She just blossomed into a different child, and, you know, it was for the better." Id. at 55. Ms. Goerzen even related a time that Mother called her to come and help with JLND because the girl was sick and that it was a great admission for Mother to ask for help and put her needs before those of her daughter. Id. at 58.

Ms. Jaclyn Goerzen testified that she had seen Mother interact with her children both before and after the reintegration. She stated that Mother was appropriate with her children and played with them, loved them and helped with their homework. Id. at 83-85; 87.

There was no testimony from any other person who observed Mother and her interaction with her children. None. There was no other evidence that the children were doing poorly in the reintegration. There was no evidence to support the "emergency" situation that there was any danger to the children when they were taken from the mother following the reintegration.

The basis for the taking of the children and the filing of the motion to terminate parental rights was based on fallacy and fantasy.

On July 24, 2008, the State filed an Application and Affidavit in Support of Emergency Removal from the Parental Home for out of the Home Placement. (R. II, 97).

The "emergency" situation complained of was that Mother's probation on two traffic cases had been extended and that eviction proceedings had been filed regarding Mother's last residence and that Mother's driver's licence may have been suspended again. Id. at 98. It was not shown in any way how a single one of these things endangered the children's safety or welfare. The State further averred that Ms. Dillard had tried to meet with Mother on every day that Mother had contact with Mr. Bias of

DCCCA. Mr. Bias in all of his conversations with Mother apparently never communicated to her that a home visit was being sought by DCCCA. *Id.* at 99. The problems and threats to the well-being of the children are still unclear.

The reintegration was not failed. The reintegration was terminated without any consideration of the well being of the children nor the actions of the Mother in the care of her children.

Thus, the reintegration failed because of the State's zealous advance of a need to disrupt the home and base an "emergency" situation on issues that presented absolutely no threat to the welfare of the children. The children were safe, the children were happy, the children were cared for and the children were loved. And that situation was destroyed for the children because the State was concerned that Mother had not paid her fines or might have her probation for a traffic crime extended.

The evidence that the children were harmed by the disruption was made clear by the testimony of the latest foster parent and the girls present counselors. None of these persons knew the reasons for the termination of the reintegration, only that harm had occurred to the children because of it. The State failed in its burden to show that the children were being neglected or harmed in anyway, neither at the time the children were taken back into custody, nor through the evidence presented at trial.

This matter should be remanded to the district court and the order of termination rescinded because there was not clear and convincing evidence to support the findings of the district court.

5. The presumption of unfitness was mitigated by the evidence presented and the age and complications of the prior termination.

The district court found that it was presumed that Mother was unfit by reason that the parent had previously been found to be an unfit parent pursuant to K.S.A. 38-2271(a)(1). (R. III, 98).

Mother gave birth to a child with severe medical needs at the age of 16. (R. III, 35-36).
Mother's parental rights were terminated with relation to this child. (R. III, 47).

Mother was immature and overwhelmed at that time. Since then she has received a high school diploma, maintained stable housing, completed individual therapy and parenting classes. Mother is still

engaged with the child that was adopted and still maintains visitation with him and has a close relationship with the child and the adoptive mother. (R. V, 17-18).

In short, the prior termination is a world away from where Mother presently resides in her knowledge, skills and life as a parent. While it is correct that the presumption is imposed by statute, the reality is that Mother overcame the presumption by her actions and care for her children. Thus, there was clear and convincing evidence for the court not to include this as one of the basis for the finding of unfitness.

Respectfully submitted,

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Sup. Ct. No. 16611

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