

RENDERED: October 9, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-001698-MR
NO. 1997-CA-001827-MR
NO. 1997-CA-001828-MR

W.D.J.

APPELLANT

v.

APPEALS FROM UNION CIRCUIT COURT
HONORABLE TOMMY CHANDLER, JUDGE
ACTIONS NO. 94-AD-0009 AND 95-AD-0008

J.S., D.S., L.J., L.H.J.,
G.J. and J.J.

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GARDNER, HUDDLESTON and KNOX, Judges.

HUDDLESTON, JUDGE. Before the Court are three appeals by W.D.J. from judgments of the Union Circuit Court (1) terminating his parental rights to his twin sons G.J. and J.J.; (2) terminating his parental rights to his daughter L.H.J.; and (3) approving the adoption of the three children by the appellees J.S. and D.S., the maternal great-uncle and great-aunt of the children. We affirm.

Twins G.J. and J.J. were born June 22, 1993. In September 1993, the twins were placed in the home of the J.S. and

D.S. with the consent of L.J., the children's mother. Shortly thereafter, pursuant to a Marshall District Court order, J.S. and D.S. were appointed custodians of the twins, and the two boys have resided with the appellees continually since that time. L.H.J. was born October 17, 1994. L.H.J. was born in the back seat of a car suffering from the side effects of L.J.'s use of crack cocaine during her pregnancy. Shortly after her birth, L.H.J. was placed in the home of J.S. and D.S. by the Cabinet for Human Resources (now Cabinet for Families and Children). L.H.J. has lived with J.S. and D.S. continually since October 25, 1994.

On August 11, 1994, in case No. 94-AD-0009, J.S. and D.S. filed a petition seeking the adoption of the twins. On June 23, 1995, in case No. 95-AD-00008, J.S. and D.S. filed a petition seeking adoption of L.H.J. On November 11, 1996, in case No. 96-CI-00185, J.S. and D.S. filed a petition for temporary and permanent custody of the children. The latter action was a precautionary filing in the event the adoption proceedings were unsuccessful. Following a hearing on the matter, on June 10, 1997, the trial court entered an order terminating the parental rights of W.D.J. to his three children¹ and granting adoption of the children

¹ The order also terminated the parental rights of the children's mother, L.S. L.S. did not appeal the June 10, 1997, orders terminating her parental rights or the July 9, 1997, orders granting the petitions of J.S. and D.S. for adoption. On April 29, 1997, the trial court ruled in case No. 96-CI-00185 and granted the motion of J.S. and D.S. to be awarded permanent custody of the children. L.S. timely filed an appeal of this order in action No. 97-CA-1303. W.D.J. did not appeal the April 29, 1997, judgment granting J.S. and D.S. permanent custody of the children.

to J.S. and D.S. W.D.J. timely filed an appeal of the June 10 order in action No. 97-CA-001698. On July 9, 1997, an order and judgment of adoption approving the adoption of the three children by J.S. and D.S. was entered. W.D.J. filed timely appeals of the July 9, 1997, judgment. The action concerning the twins is case No. 97-CA-001827 and the action concerning L.H.J. is case No. 97-CA-001828. The three appeals were subsequently consolidated.

W.D.J. argues that the trial court placed too much reliance on his incarceration and gave no weight to the fact that he may have been rehabilitated as a result of his incarceration; that the best interests of the children have and can continue to be protected without terminating his parental rights; and that he should be given an opportunity to obtain his release on parole and a period of time thereafter before a final determination regarding his parental rights should be made.

The parental rights termination statute, Ky. Rev. Stat. (KRS) 625.090, provides, in pertinent part, that:

The circuit court may involuntarily terminate all parental rights of a parent of a named child, if the circuit court finds from the pleadings and by clear and convincing evidence 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 circuit court in this proceeding and that

termination would be in the best interest of the child. No termination of parental rights shall be ordered unless the circuit court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

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(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

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(d) 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;

.; or

(f) 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.

In summary, the statute requires a finding, supported by clear and

convincing evidence, (1) that the child is an abused or neglected child;² (2) that the termination would be in the best interest of the child; and (3) that one or more of the factors set out in subsection (1) (a)-(f) are present.

The trial court determined that the children were abused or neglected children with its finding that their parents had failed to provide them with essential food, clothing, shelter, medical care and education.³ Both parents admit to a long history of drug and alcohol abuse, violence, and criminal behavior. While L.J. was pregnant with the twins, she and W.D.J. experienced episodes of domestic violence, including an occasion when W.D.J. attacked L.J. by driving his car into her and breaking her leg. Four months after the twins were born W.D.J. left the family and moved in with another woman. L.J., with W.D.J.'s knowledge, used crack cocaine during her pregnancy with L.H.J., and L.H.J. was born addicted to crack cocaine. L.J. testified that only days before

² Ky. Rev. Stat. (KRS) 600.020(1) defines "abused or neglected child" as: "a child whose health or welfare is harmed or threatened with harm when his parent, guardian or other person exercising custodial control or supervision of the child: inflicts or allows to be inflicted upon the child physical or emotional injury by other than accidental means; creates or allows to be created a risk of physical or emotional injury to the child by other than accidental means;...does not provide the child with adequate care, supervision, food, clothing, shelter and education or medical care necessary for the child's well-being."

³ The trial court did not specifically find that the children were abused and neglected children; however, the foregoing finding meets the definitional standard for abused or neglected child pursuant to KRS 600.020(1).

L.H.J. was delivered, she and W.D.J. used crack cocaine.

The trial court has considerable discretion in determining whether a child fits within the abused or neglected category and whether the abuse or neglect warrants termination. Department for Human Resources v. Moore, Ky. App., 552 S.W.2d 672, 675 (1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in Ky. R. Civ. Proc. (CR) 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there is no substantial evidence in the record to support them. V.S. v. Commonwealth, Cabinet for Human Resources, Ky. App., 706 S.W.2d 420, 424 (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, Ky., 70 S.W.2d 5, 9 (1934). The record contains substantial evidence to support the findings of the trial court that the three children are abused or neglected children. The specific instances of deficient parental care identified by the trial court, and otherwise revealed in the record, convince us that the trial court did not clearly err in its determination that the children are abused and neglected within the meaning of KRS 600.020(1).

The second prong of KRS 625.090 requires a finding that the termination of parental rights would be in the best interest of the child. In determining the best interest of the child and the

existence of a ground for termination, the circuit court is required to consider the factors set forth in KRS 625.090(2):

(a) Emotional illness, mental illness or mental deficiency of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect toward any child in the family;

(c) If the child has been placed with the cabinet or a child-placing agency or child-caring facility, whether the cabinet has rendered or attempted to render all reasonable services to the parent which reasonably might be expected to bring about a reunion of the family, including the parent's testimony concerning such services and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within a reasonable period of time, considering the age of the child;

(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.

Among the factors identified by the trial court relating to the children's best interest were: (1) both parents are now in prison for felony convictions and have had previous incarcerations for various crimes and misdemeanors; (2) neither expects to be released from prison in the near future; (3) both parents admit to a long history of drug and alcohol abuse, violence and criminal behavior; (4) rehabilitation of the parents is unconvincing in light of their past records and conduct; and (5) there is no reasonable expectation of significant improvement in their conduct in the immediate foreseeable future.

The findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be "clearly erroneous." CR 52.01; Stafford v. Stafford, Ky. App., 618 S.W.2d 578 (1981). This principle recognizes that the trial court alone had the opportunity to judge the witnesses' credibility. Without the rule, actions would be tried anew upon appeal. Id. at 579. While W.D.J. may disagree with the trial court's findings, when the evidence is conflicting, we cannot and will not substitute our judgment for that of the trial court. Wells v. Wells, Ky., 412 S.W.2d 568, 571 (1967). The record

clearly and convincingly reveals that the trial court did not err in its determination that it was in the children's best interest that W.D.J.'s parental rights be terminated.

The final prong of KRS 625.090 requires a finding by clear and convincing evidence of one of the factors set forth in KRS 625.090(1)(a)-(f). In this case, the trial court specifically found that the grounds set forth in (a), (d) and (f) were present. As clearly and convincingly demonstrated by the factors identified in previous sections of this opinion, there is substantial evidence to support the trial court's determination. The Cabinet has met its burden to establish grounds for termination by clear and convincing evidence as required by KRS 625.090. Santosky v. Kramer, 455 U.S. 745 (1982); O. B. C. and F. D. C. v. Cabinet for Human Resources, Ky. App., 705 S.W.2d 954 (1986); and V. S. and H. S. v. Commonwealth Cabinet for Human Resources, Ky. App., 706 S.W.2d 420 (1986).

For the foregoing reasons, the orders and judgments of the trial court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, W.D.J.:

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BRIEF FOR APPELLEES, J.S.
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