RENDERED: JULY 27, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002600-MR

D.R. APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 94-AD-00006

S.J.; H.A.J., a minor by and through his mother, S.J.; and EDWIN EVANS TAYLOR, Guardian Ad Litem APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

McANULTY, JUDGE: This is an appeal from a judgment of the Daviess County Circuit Court involuntarily terminating Appellant's parental rights to his child, H.A.J. We affirm.

Appellant and Appellee (S.J.) were married in 1988, and their only child, H.A.J., was born in 1991. In November of that year, Appellant reportedly left the marital home, and subsequently, he was hospitalized twice for depression and alcohol and drug addiction. In 1992, the couple divorced. At the time of the divorce, Appellant was not ordered to pay child support.

After the divorce, Appellant moved to Florida, living and working there for about a year. Then, in 1993, Appellant returned to Kentucky and entered the hospital for a third time, again for treatment of his depression and substance abuse. After his release, Appellant took a job at the Oneida Baptist Institute in Oneida, Kentucky. Appellee claims that Appellant made no effort to see, contact or support his child during this entire period.

In January of 1994, Appellee filed a motion to involuntarily terminate Appellant's parental rights to H.A.J., claiming Appellant had neglected and abandoned his child. Several months later, she filed a second motion seeking child support. According to the trial court, it was during a June 1994 support hearing that Appellant evidenced a desire to visit his child for the first time since he had left the marital household in 1991.

This is the third time this case has come before the Court of Appeals. In 1996, we reversed and remanded the decision of the trial court terminating Appellant's rights because the child had not been joined as a necessary party to the litigation. D.R. v. S.R., No. 1995-CA-1643-MR. On remand, the trial court decided not to terminate Appellant's parental rights, based on comments made in the previous Court of Appeals opinion, believing them to be the law of the case. However, on appeal, this court declared those comments to be dicta, sending the case back to the trial court again. H.R. v. Revlett, Ky. App., 998 S.W.2d 778

(1999). On remand, the trial court decided once again to terminate Appellant's parental rights. This appeal followed.

The trial court has broad discretion in determining whether a child is abused or neglected and whether that abuse of neglect warrants termination of parental rights. Our review of such an action must be confined to a clearly erroneous standard based on clear and convincing evidence. Such clear and convincing evidence is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people. The findings of the trial court will not be disturbed unless no substantial evidence exists in the record to support such findings. R.C.R. v. Commonwealth, Ky. App., 988 S.W.2d 36, 38 (1998).

KRS 625.090 sets out the requirements for involuntarily terminating a parent's rights. According to the statute, rights may be terminated only if a court finds by clear and convincing evidence that a child has been abused or neglected and that termination would be in the child's best interest. KRS 625.090 (1). A court must also consider, however, a group of secondary factors listed in KRS 625.090(2). Without the occurrence of one of these factors, such as abandonment of the child by the parent or repeated and continuing inability to provide the child with necessities like food and clothing, termination will not be granted. To determine that Appellant has abandoned his child, the court must find by clear and convincing proof that he "evidenced a settled purpose to forego all his parental duties

and all parental claims" to the child. Wright v. Howard, Ky. App., 711 S.W.2d 492, 497 (1986).

In the case at bar, two different judges on the trial court level found on two separate occasions that the rights of Appellant with regard to his child should be terminated. Most recently, in 1999, the trial court wrote in its opinion that Appellant's child was harmed or threatened by Appellant's abandonment and that Appellant had made no effort to provide or help provide his child with care, food, clothing, shelter, education or medical care. The court also wrote that the evidence was clear and convincing that Appellant had repeatedly and continually failed to provide essential care and protection for his child and saw no expectation of improvement in the future. Opinion of Daviess Circuit Court, No. 94-AD-00006, September 28, 1999. In addition, the child's current Guardian Ad Litem has recommended termination of Appellant's rights. Upon review of the facts in this case, we agree.

The trial court did not err when it found that H.A.J. was an abused or neglected child as is required for termination under KRS 625.090. As defined in KRS 600.020(1), a child may be abused or neglected if his/her welfare is harmed or threatened with harm by a parent who engages in a pattern of conduct (such as alcohol or drug abuse) that renders that parent incapable of meeting the child's immediate and ongoing needs. KRS 600.020(1)(c). Also, a child may be neglected if the child is abandoned. KRS 600.020(1)(g).

Both parties have stipulated that Appellant voluntarily left the marital home in 1991 and made no effort to have sustained contact with his child from that point in time until the commencement of this action. Appellant has also shown a pattern of substance abuse, and even now that he has completed several rehabilitation programs, according to the record he is not and has not been enrolled in any recognized support groups like Alcoholics Anonymous. He has also resumed social drinking. Based on these facts, we feel the court did not err when it found this behavior fit the definition of neglect set out in KRS 600.020(1)(c) and (g).

Likewise, we agree the court did not err in deciding that termination would be in the child's best interests. In assessing whether termination is in a child's best interest, the court must consider a number of factors spelled out in KRS 625.090(3)(a)-(f). These factors include acts of abuse or neglect by the parent, the physical, emotional and mental health of the child, and the parent's failure to pay a reasonable amount for care and maintenance of the child if financially able to do so. KRS 625.090(b), (e) and (f).

The trial court decided based on Appellant's behavior during and after the marriage that H.A.J. was a neglected child as defined in KRS 600.020(1). As well, the record shows the court, with the help of the Guardian Ad Litem, had consistently considered the child's emotional and mental well-being during the proceedings. Finally, Appellant testified in court that he would have been financially able to provide support to Appellees, but

did not do so, another factor for consideration under KRS 625.090. In fact, Appellee testified that Appellant's only efforts to support H.A.J. came in the form of a single birthday gift and a valentine card containing $20 sent after this action commenced. And while Appellant has seemingly made improvements in his living situation according to the record, another factor for consideration under KRS 625.090(3), we find those improvements do not compel us to disregard the trial court's well-reasoned findings and conclusions.

Finally, KRS 625.090(2) requires the occurrence of at least one of several additional factors before a termination may be ordered, such as abandonment of the child for a statutory period (at the time of this case the period was six months; currently it is 90 days) or inability to provide for the child for a period of more than six months. In this case, we find the court did not clearly err under this provision by finding Appellant had abandoned the child for the statutory period as enumerated in KRS 625.090(2)(a) or that Appellant had failed to provide care and protection for the child for the statutory period with no reasonable expectation of improvement under KRS 625.090(2)(e).

The decision of the trial court terminating Appellant's parental rights was not clearly erroneous under KRS 625.090. We affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE S.J.:

William G. Craig, Jr.
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BRIEF FOR APPELLEE H.R.:

Evan Taylor
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