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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001331-ME

B.A.B. APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 08-AD-00003

C.K.N.; B.W.N.; AND T.P.B. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND VANMETER, JUDGES; GRAVES,[1] SPECIAL JUDGE.

VANMETER, JUDGE: B.A.B. appeals from an order and judgment entered by the McCreary Circuit Court in an adoption proceeding which terminated his parental rights. For the reasons stated hereafter, we affirm.

[1] Retired Judge John W. Graves concurred in this opinion prior to the completion of his senior judge service.

B.A.B. (the father) and S.A.B. (the mother) married in September 2004, one day before the father began serving a prison term relating to Tennessee felony convictions. Their child, the subject of this proceeding, was born in January 2005.

When the child was several months old, the mother and child began residing in McCreary County with the mother's sister and brother-in-law, who are the petitioners in the underlying proceeding and the appellees herein. After the mother was arrested on a bench warrant in August 2005, the McCreary District Court awarded temporary custody of the child to the petitioners. The child has remained in the petitioners' physical care and custody since that time.

In July 2006, after he was paroled from prison, the father filed a *pro se* motion seeking custody of the child. The district court denied the motion for custody but eventually ordered the father to pay child support in the amount of $60 per month.

Meanwhile, soon after he was paroled, the father met the child for the first time and visited with her at least twice at his mother's home in Pulaski County. He testified that he also traveled to the petitioners' home to visit the child at least eight times in 2006, and about thirteen to fifteen times in 2007. The petitioners, by contrast, testified that the father visited the child perhaps six or seven times in 2007. Nevertheless, the parties agreed that petitioners allowed the father to freely visit the child, and that each visit lasted about two or three hours. After the father moved to McCreary County in November 2007, he saw the child

on December 25, 2007, and on January 23, 2008. On February 7, 2008, the petitioners filed the underlying petition seeking to adopt the child. They requested the voluntary termination of the mother's parental rights, and the involuntary termination of the father's parental rights. Although the father testified the petitioners advised him he no longer could visit the child, the petitioners indicated they only told him that he could not visit without his parole officer's permission, and that they would not discuss the pending proceeding.

The father, who was represented by counsel, opposed the petitioners' proceeding. The Cabinet for Health and Family Services (Cabinet) evidently conducted an investigation and filed a report pursuant to KRS 199.510, although a copy of the report is not included in the record on appeal. *See* KRS 199.470(4)(a) (report may be ordered at the trial court's discretion). The record does contain the report of a guardian ad litem, who recommended approval of the adoption as being in the child's best interest. After a hearing, the circuit court entered a judgment of adoption in favor of the petitioners, and terminated the mother's and the father's parental rights. The father appealed.

Frequently, a petition for the involuntary termination of parental rights is filed by the Cabinet, and is preceded by the child's placement in foster care under the Cabinet's supervision. Such a termination proceeding falls within the scope of KRS Chapter 625, and a final order involuntarily terminating parental rights frees the child for adoption. *See* KRS 199.500(1)(b) and KRS 625.060. Less often, parental rights are involuntarily terminated as a result of an award of

adoption to a child's aunt, uncle, or other close relative who, as here, has had the child in his or her home for more than ninety continuous days immediately preceding the filing of the petition. KRS 199.470(4))(a). *See Moore v. Asente,* 110 S.W.3d 336 (Ky. 2003). As in a case seeking the termination of parental rights, a party seeking a nonconsensual adoption must plead and prove, by clear and convincing evidence "as a part of the adoption proceedings[,]"

> (1) that the child is abused or neglected as defined in KRS 600.020(1); (2) that termination is in the child's best interests; and (3) the existence of one or more of ten specific grounds set out in KRS 625.090(2).

M.B. v. D.W. 236 S.W.3d 31, 34 (Ky.App. 2007). *See Santosky v. Kramer*, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (1982) (proof in a parental rights termination case must satisfy at least the clear and convincing evidence standard). Appellate review of an involuntary termination or nonconsensual adoption proceeding

> is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources,* Ky.App., 706 S.W.2d 420, 424 (1986).
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> "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, 726, 70 S.W.2d 5, 9 (1934).

M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116-17 (Ky.App. 1998). *See also M.B. v. D.W.,* 236 S.W.3d at 34-35.

An involuntary termination or nonconsensual adoption proceeding often involves a claim that a child has been abused or neglected. *See* KRS 199.500(4) and KRS 625.090(1). KRS 600.020(1) defines an abused or neglected child as including a child "whose health or welfare is harmed or threatened with harm" when a parent or other person entrusted with the child's custody or supervision engages in any one of a number of specified conducts, including:

> (c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
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> (d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child; [or]
>
> . . . .
>
> (h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being.

However, even if the evidence shows that a child is abused or neglected, a court may order a nonconsensual adoption only "if it is pleaded and proved as a part of the adoption proceedings that any of the provisions of KRS 625.090 exist with respect to the child." KRS 199.500(4). KRS 625.090(2) in turn sets out ten conditions as alternative grounds to support the termination of parental rights. The

first nine of those conditions[2] are identical to the nine conditions listed in KRS 199.502 as alternative grounds for a nonconsensual adoption. Thus, parental rights may be terminated or a nonconsensual adoption may be awarded upon clear and convincing evidence of the existence of one or more of the nine conditions, as described in either statute. Those conditions include:

> (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; [or]
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> . . . .
>
> (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[.]

KRS 199.502(1) and KRS 625.090(2).

Here, the father first contends on appeal that the trial court erred by failing to find the petitioners lacked standing to file their claim. We disagree.

The child continuously resided in the petitioners' home for some two and one-half years immediately preceding the filing of the petition, thereby satisfying the ninety-day filing requirement of KRS 199.470(3). Certainly,

[2] The tenth condition, as set out in KRS 625.090(2)(j), is irrelevant to KRS Chapter 199 nonconsensual adoptions since it pertains to a situation in which a child has spent at least fifteen of the preceding twenty-two months in foster care under the Cabinet's responsibility.

petitioners lacked standing to seek the termination of the father's parental rights pursuant to KRS Chapter 625. However, because they are the child's aunt and uncle, petitioners were authorized by KRS 199.470(4)(a) to plead and prove the existence of conditions in support of their claim for adoption, the award of which would necessarily result in the termination of the father's parental rights. *See Smith v. Wilson*, 269 S.W.2d 255 (Ky. 1954). The father's argument that petitioners lacked standing to proceed below is without merit.[3]

Next, the father alleges that his due process rights were violated when the district court entered the August 2005 emergency order placing the child in the petitioners' custody after the mother was arrested on a bench warrant. The district court's order was not timely appealed, and the matter is not properly before this court for review.

Next, the father contends that the trial court's findings and conclusions do not conform to the allegations raised in the pleadings. More specifically, he notes that although petitioners' pleadings raised only the grounds set out in KRS 199.502(1)(e) and (g), the court's order cited KRS 625.090(2)(a), (c), (e) and (g), thereby indicating a reliance on a different statute and two additional grounds.

[3] The father relies on an unpublished opinion of this court, *K.N. v. R.P.*, WL 275106 (No. 2007-CA-000181, Feb. 1, 2008), when arguing that petitioners lacked standing to initiate termination proceedings. However, *K.N.* is distinguishable on its face, as in pertinent part it turned on the fact that parental rights were terminated through a separate termination proceeding prior to the adoption hearing, despite the fact that KRS 625.050 authorizes the initiation of such termination proceedings only by "the cabinet, any county or Commonwealth's attorney or parent." Here, by contrast, the termination of the father's parental rights was an authorized result of a judgment of adoption pursuant to KRS 199.500(4).

As noted above, KRS 199.500(4) specifically directs that when considering a request for a nonconsensual judgment of adoption, a trial court should rely on the termination of parental rights provisions set out in KRS 625.090. However, the grounds set out in KRS 625.090(2)(a)-(i) are identical to those listed in KRS 199.502(1)(a)-(i) and the petitioners' pleadings. Thus, any error in the citation of the relevant statute had no effect on the provision of adequate notice to the parties, or on the court's determination of whether clear and convincing evidence supported the judgment of nonconsensual adoption. Moreover, since the court's award required the court to find the existence of only one of the statutory conditions, its finding that four grounds supported the adoption judgment, rather than only the two grounds alleged by the petitioners, was cumulative and any error was harmless. CR[4] 61.01.

Finally, the father contends that the trial court's judgment of adoption was not supported by the evidence. We disagree.

As noted above, petitioners were required to plead and prove by clear and convincing evidence that the child was neglected, that at least one of the grounds set out in KRS 625.090(2) existed, and that the termination of parental rights would be in the child's best interest. *M.B. v. D.W.* 236 S.W.3d at 34. On review, this court must determine whether the trial court's findings were clearly erroneous as being unsupported by substantial evidence. *Id.* at 34-35.

[4] Kentucky Rules of Civil Procedure.

Here, clear and convincing evidence was produced to show that the father was incarcerated and did not meet the child until she was eighteen months old, that the father subsequently saw the child for no more than an average of two or three hours per month through January 2008, and that he did not visit the child after January 2008. Further, the father admitted during the hearing that in 2007, he traveled to McCreary County with the intention of killing his wife and brother. He changed his mind but nevertheless fired a gun toward their residence. The father testified that he has a seventh grade education, that he has been convicted of perhaps eight felonies, that he used and sold drugs in the past, and that he and his wife used cocaine while she was pregnant with the child. His income consists of disability payments, which evidently were awarded as a result of physical injuries.

This situation is distinguishable from that described in *D.S. v. F.A.H.,* 684 S.W.2d 320 (Ky.App. 1985), which involved a mother who voluntarily placed her child with the paternal grandparents while seeking psychiatric treatment for mental health issues. The mother admitted she currently was unable to care for her child, but she remained in contact and hoped someday to be reunited with the child. Thus, she opposed the grandparents' nonconsensual adoption proceeding. This court vacated the trial court's judgment of adoption, noting that the mother had remained in touch with the child while seeking medical treatment, and that her inability to work or to care for the child was not self-imposed or deliberate. The court concluded the evidence was insufficient to support the trial court's conclusion that the mother had abandoned or neglected the child.

Here, by contrast, although the father attested to his ability and willingness to care for the child, he produced no evidence that he ever had provided essential care and treatment for the child. Clear and convincing evidence showed that, although the petitioners did not limit the frequency of visitation, and the father may have misunderstood whether he could continue to visit the child after January 2008, he has had only minimal contact with the child since her birth. Moreover, he has failed to fulfill his court-ordered child support obligation, and he has accumulated a substantial record of drug-related criminal conduct which, by its very nature, calls into question his ability to provide essential care and protection for the child. Further, the father produced no probative evidence to show the existence of any "reasonable expectation" of an improved ability or willingness to provide suitable care for the child, other than his claims that adequate financial support would be provided through his fiancé's employment income, and that governmental assistance would be available to the child if she was in his custody.

Under these circumstances, the trial court did not err by finding that clear and convincing evidence proved that the child was neglected as defined in KRS 600.020(1), and proved that one or more of the conditions described in KRS 625.090(2)(e) and (g), and KRS 199.502(1)(e) and (g), existed.

Hence, as the third part of its analysis, the trial court was required to determine whether a nonconsensual adoption, resulting in the termination of the father's parental rights, would be in the child's best interest. The evidence is undisputed that the child has been in the petitioners' exclusive custody since she

was a few months old, and that she is thriving in their care. From all indications, the petitioners are healthy, they are financially and personally stable, and they have a mutually affectionate and supportive relationship with the child.

The father, by contrast, spent no time with the child before she was eighteen months old, and he subsequently has spent no more than an average of a few hours each month with her. His income is limited to disability benefits supplemented by financial support from his fiancé, and he admitted that he has accumulated a substantial child support arrearage. The father testified that he has a seventh grade education, that he has perhaps eight felony convictions, that he and the child's mother used cocaine once while she was pregnant with the child, and that he demonstrated or threatened several acts of violence toward the mother and other family members. The father provided no evidence to support a "reasonable expectation" that his level of care, protection or conduct will show a marked level of improvement in the future.

Having carefully reviewed the substantial evidence adduced below, we conclude that the trial court did not err by finding that the adoption and the termination of her father's parental rights is in the child's best interest, and by entering a judgment to that effect.

The order and judgment entered by the McCreary Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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