

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001061-ME

J. R. B., II

APPELLANT

v. APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 09-AD-00014

J. C. J., A. J. J., AND
THE MINOR CHILD, K. N. B.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL AND VANMETER, JUDGES; SHAKE,¹ SENIOR JUDGE.

NICKELL, JUDGE: J.R.B., II appeals from three orders entered by the Todd

Circuit Court: Findings of Fact, Conclusions of Law and Order of Adoption

entered on April 2, 2010; Judgment of Adoption entered on April 8, 2010; and

¹ Senior Judge Ann O'Malley Shake 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.

Order Denying Motion to Alter, Amend or Vacate entered on April 29, 2010.

Upon review of the briefs, the record and the law, we affirm.

J.R.B. and A.J.J. married in 1997. A daughter, K.N.B., was born of their union on August 7, 1998. The couple separated in 2000 and divorced in 2001. The decree of dissolution awarded them joint custody of K.N.B. and ordered J.R.B. to pay \$200.00 in monthly child support.

Initially, J.R.B. exercised visitation with his daughter and called her through 2003. However, as time passed, his visits with the child became sporadic and then ceased completely for a period of years. He last corresponded with his daughter in 2005 or 2006; he sent her a Christmas card. His last visit with the child occurred in January of 2005. The last time he gave her a Christmas gift was 2005. When asked why he had no contact with K.N.B. for seven years, he testified it was mostly due to his own failure to take steps to see her.

Besides not communicating or visiting with his child for years, he also fell behind in his child support obligation, paying nothing in 2003, 2004 or 2007, and only \$200.00 a year in both 2005 and 2006. In 2008, he paid a total of \$5,411.00 by virtue of two tax intercepts and wage assignment. In 2009, he paid a total of \$3,250.00 by virtue of one \$250.00 payment and wage assignment. As of January 1, 2010, he was in arrears for a total of \$10,252.00 (\$7,639.00 in child support plus \$2,613.00 in interest).

J.R.B. acknowledged being healthy and strong enough to work and not under any disability. He testified he did not pay child support because he was

unemployed during a portion of the time following his honorable discharge from the military because jobs in the telecommunications field were scarce. He returned to his native Indiana to receive emotional support from his family and in the summer of 2007 found a job as a fiber optic technician. While unemployed he received assistance from his father, mother and sister. In 2005 he began receiving compensation of pension benefits from the Veteran's Administration which in March of 2010 amounted to \$580.00 each month. He continues receiving those benefits due to permanent hearing loss, knee trouble and lower back issues.

J.R.B. admitted he was wrong to cease contact with K.N.B. and stated he decided to rekindle their relationship after his aunt committed suicide and his mother developed health issues and suffered a mild heart attack. In 2008 and 2009, he placed several telephone calls to his former wife's home seeking to speak with K.N.B. However, the child had moved on with her life and did not wish to re-establish a relationship with her natural father. Twice, A.J.J. forced K.N.B. to speak with J.R.B. on the telephone and the child cried both times. J.R.B. testified he is a changed man and will now be there for his daughter.

A.J.J. has since remarried and has a son and daughter with her new husband, J.C.J. This case began when J.C.J. petitioned the court to allow him to adopt K.N.B. and to terminate J.R.B.'s parental rights.

The court held a daylong hearing at which both natural parents and K.N.B.'s stepfather testified. The court also spoke with K.N.B. in chambers in the company of the child's guardian *ad litem* (GAL) and a deputy circuit court clerk.

The child, a sixth grader at the time of the hearing who tests on the high school level and excels in dance and sports, told the court she did not want to see or talk to J.R.B. and had felt that way since the second or third grade. She stated J.R.B. had not been there for her when she needed him and now, as a stranger, he was trying to insert himself into her life when she already had a father. She asked, “Why now?” and expressed her concern that his reappearance would mess up her life.

At the conclusion of the hearing, the GAL stated there was a chance K.N.B. could benefit from a relationship with her natural father, but admitted he might feel differently if the child were older. He stated he was hesitant to cut off J.R.B.’s parental rights.

Describing the case as a “close” call and a “tough” case, the court acknowledged he had struggled with his decision and ultimately disagreed with the GAL and granted the petition to terminate J.R.B.’s parental rights and to allow J.C.J. to adopt K.N.B. The court made the following factual findings:

10. The Court finds that pursuant to K.R.S. § 199.500(4), there is clear and convincing evidence that [J.R.B.], (Birth Father) abandoned the child, or substantially or continuously or repeatedly neglected the child by his direct failure to communicate with or otherwise support the child.

11. The Court finds there is clear and convincing evidence that the Birth Father caused the child to be neglected; that the Birth Father abandoned this child for well more than 90 days; and, for more than 6 months the Birth Father continuously and 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.

12. The Court finds that for reasons other than poverty alone, the Birth Father continuously and repeatedly failed or refused to provide or has been substantially 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 improvement in parental care and protection, considering the age of the child.

13. The Court finds that pursuant to K.R.S. 625.080 the best interest of the child dictates that the parental rights of the Birth Father should be terminated.

14. The Court finds that in this case the grounds for termination have been established and the biggest and most important question is what would be in the best interest of the child. It is very important for this child to have permanency in her relationship with her mother and father. Although there may be a chance that the Birth Father could reinstate himself as the primary father in the child's life, it is not a likelihood. It is better to terminate now than to give chance to allow any more damage to be done in this child's life. Furthermore, the Court finds that the mother was justified in her actions by protecting the child and preventing visitation with the Birth Father after he had no contact (sic) with the child for at least five years.

J.R.B. timely moved the court to reconsider the order of termination which it denied. It is from these two orders, as well as the Judgment of Adoption, that J.R.B. appeals and we affirm.

LEGAL ANALYSIS

J.R.B. first alleges the trial court erred in terminating his parental rights because there was no evidence he abandoned his daughter for more than ninety days.

This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR² 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).

M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116 (Ky. App. 1998).

The testimony in this case, corroborated by J.R.B., was that he had no contact with his daughter for about five years. Thus, the trial court's findings are supported by clear, convincing and substantial evidence and we will not disturb them.

Citing *O.S., Jr. v. C.F.*, 655 S.W.2d 32 (Ky. App. 1983), for the proposition that "abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child[,]" J.R.B. argues his attempted phone calls to K.N.B. in 2008 and 2009 show his desire to rekindle his relationship with his daughter. However, the trial court was not so convinced and neither are we. This is an example of too little, too late. As noted by the trial court in its opinion, J.R.B. abandoned his daughter for well in excess of the ninety days and the six months mentioned in KRS 199.502(1)(a), (e) and (g). Furthermore, as expressed by the trial court at the conclusion of the hearing on March 19, 2010, summer vacation (which lasts about three months) is a lifetime to a child, and here, J.R.B. voluntarily missed more than five years of his daughter's life. We will not fault the trial court for concluding it

² Kentucky Rules of Civil Procedure (footnote added).

was in the child's best interests to terminate her natural father's parental rights and to approve the adoption she so strongly desired.

J.R.B.'s second allegation is that the evidence did not support a finding that there was no reasonable expectation of improvement in parental care and protection. First, when termination is granted due to abandonment for a period of not less than ninety days, KRS 199.502(1)(a), as it was in this case, no finding of reasonable expectation of parental improvement is required. However, the trial court went further and made the challenged finding.

Citing *M.E.C. v. Commonwealth, Cabinet for Health & Family Servs.*, 254 S.W.3d 846 (Ky. App. 2008), J.R.B. argues the trial court was wrong to base its prediction of his future conduct on his past behavior. However, in this case, unlike *M.E.C.*, there was little else for the court to consider. In *M.E.C.*, a mother with drug and legal issues took the initiative to begin parenting classes which she paid for herself. She arranged her own transportation for visitation with her children. She also enrolled in substance abuse counseling. In contrast to *M.E.C.*, J.R.B. attempted to make a series of phone calls to a child who wanted nothing to do with him. He also told the court that everyone involved would benefit from family counseling yet he did nothing to develop his own parenting skills. Furthermore, consistently attending family counseling sessions would be difficult since he was living in Indiana and traveling weekly for work, even though he was off from work every Friday. We are simply unconvinced the trial court erred in concluding J.R.B.'s likelihood of parental improvement was bleak.

J.R.B.'s third allegation is that the evidence did not support a finding of neglect. This is the same as the first argument and will not be repeated here.

J.R.B.'s fourth and final argument is that the court wrongly concluded termination of J.R.B.'s parental rights was in K.N.B.'s best interests. He bases his argument on the fact that the GAL was hesitant to recommend termination. J.R.B. cites no authority for his suggestion that a trial court must adopt a GAL's recommendation and we are aware of none.

A trial court has wide discretion in determining whether a child fits within the abused or neglected category and whether such abuse or neglect justifies termination. *Dept. for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977). Here, the GAL viewed the testimony differently, but even the GAL admitted he might recommend termination if K.N.B. were older.

K.N.B. is a bright girl. At the age of twelve she has determined she does not want a relationship with the father who was not there for her when she needed him. We simply cannot say, under the circumstances of this case, that the trial court erred in finding it to be in K.N.B.'s best interests not to force a father/daughter relationship.

For the foregoing reasons, the termination of J.R.B.'s parental rights and the Judgment of Adoption are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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