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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000435-ME

S.H. APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE SHEILA N. FARRIS, JUDGE
ACTION NO. 10-AD-00029

G.W.P.; C.D.P.; AND
T.D.M., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND KELLER, JUDGES.

KELLER, JUDGE: S.L.H. (Father) appeals from an order of the Henderson Family Court terminating his parental rights with respect to T.D.M., his daughter. For the following reasons, we affirm.

FACTS

Father and C.D.P. (Mother) are the natural parents of T.D.M. who was born in 1999. At the time of T.D.M.'s birth, both Father and Mother were married to other people from whom they are now divorced. Father was present at the hospital when T.D.M. was born; however, he has had no contact with T.D.M. since shortly after her birth. Although paternity of Father to T.D.M. was established by an order of the Union Family Court entered on April 21, 2004, Mother never requested child support.

In July 2006, Mother married G.W.P. (Stepfather), and in early November 2010, Father received two letters advising him that Stepfather wanted to adopt T.D.M. Thereafter, Father filed a motion for visitation with T.D.M. in the Union Family Court. On November 16, 2011, Stepfather filed a petition for the termination of parental rights of Father to T.D.M. and for the adoption of T.D.M. in the Henderson Family Court. On that same day, Mother filed a consent to adoption. The Union Family Court entered an order holding Father's motion for visitation in abeyance pending the outcome of the termination proceedings in the Henderson Family Court.

A hearing was subsequently held in the Henderson Family Court. At that hearing, Father testified that his relationship with Mother began as a result of their working together. Father testified that he had not seen T.D.M. since shortly after her birth, and Mother told him that he was the father of the child at the time of T.D.M.'s birth. Father testified that the reason he stopped having contact with

T.D.M. was because he and Mother went their separate ways after he was laid off from his job and no longer worked with Mother.

Father further testified that, at the urging of his ex-wife, he took a paternity test in 2004. According to Father, after his paternity of T.D.M. was established, he and Mother discussed whether to tell T.D.M. that he was her biological father. Mother told him she thought T.D.M. was too young to understand and wanted to wait until T.D.M. was more mature. Mother never requested child support and Father acknowledged that he never provided any financial support or gifts for T.D.M. Father testified that he was financially able to provide for T.D.M. and that he earned a salary of approximately $36,000 for the past two years. Father also testified that in 2006, he and his ex-wife made an unannounced visit to Mother and Stepfather's house in an effort to see T.D.M. and discuss visitation. Mother would not let Father see T.D.M. at that time, but agreed to meet him at a nearby park the next day. According to Father, the meeting at the park never took place because Mother decided she did not think it would be a good idea.

At the hearing, Mother testified that she never requested child support and that Father has never given T.D.M. a gift of any kind, paid child support, or provided medical insurance. Mother further testified that she never told Father that she wanted to wait until T.D.M. got older to introduce her to Father. Additionally, Mother testified that Father and his ex-wife did show up unannounced at her house

in 2006 in an attempt to visit T.D.M. According to Mother, she agreed to meet Father at a park the next day, but Father cancelled the meeting.

After the hearing, the family court entered findings of fact and an order terminating Father's parental rights to T.D.M. It is from this order that Father appeals. Additional facts are set forth below.

STANDARD OF REVIEW

Parental rights "can be involuntarily terminated only if there is clear and convincing evidence that the child has been abandoned, neglected, or abused by the parent whose rights are to be terminated, and that it would be in the best interest of the child to do so." *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006). An appellate court accords the trial court much discretion and applies the clearly erroneous standard of review under Kentucky Rule(s) of Civil Procedure (CR) 52.01. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). If the record contains substantial evidence to support the trial court's findings, we may not set them aside. *Id*.

ANALYSIS

On appeal, Father first contends that the family court misapplied Kentucky Revised Statute(s) (KRS) 600.020 and KRS 625.090. We disagree.

KRS 625.090(1) provides that a family court may involuntarily terminate parental rights only if it finds by clear and convincing evidence that the child is

abused and neglected as defined in KRS 600.020(1), and that termination would be in the child's best interest. Additionally, parental rights may not be involuntarily terminated unless the court finds by clear and convincing evidence the existence of one or more of the grounds for termination that are enumerated in KRS 625.090(2), including:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> . . . .
>
> (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;
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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 600.020(1) defines an "[a]bused or neglected child" as one "whose health or welfare is harmed or threatened with harm when his parent . . . :"

> . . . .
>
> (d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

. . . .

(g) Abandons or exploits 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 . . . .

In this case, Father contends that the family court misapplied KRS 600.020 because there was no evidence presented at the hearing to support its conclusion that T.D.M. was neglected by Father. Specifically, Father argues that there was no evidence presented that T.D.M.'s "health or welfare [was] harmed or threatened with harm." Father also argues that the family court erred in concluding that one or more of the grounds set forth in KRS 625.090(2) exist. We disagree.

In this case, Father testified that, despite being financially able to provide for T.D.M., he never provided child support, food, clothing, shelter, or medical care for T.D.M. Additionally, Father testified that he had not seen T.D.M. since shortly after her birth and only attempted to visit her one time in 2006. We believe that this evidence constitutes clear and convincing evidence of abuse or neglect by Father as set forth in KRS 600.020(1)(d),(g), and (h). Additionally, we believe the same facts constitute clear and convincing evidence to support the trial court's findings that Father continuously and repeatedly refused to provide essential care for her as set forth in KRS 625.090(2)(e) and (g).

Furthermore, despite Father's assertion to the contrary, we believe that there was clear and convincing evidence to support the family court's finding that,

pursuant to KRS 625.090(a), Father abandoned T.D.M. for at least ninety days. As set forth in *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 716 (Ky. App. 2010):

> Although payment of support is a significant factor in determining whether a parent has abandoned a child, *Hafley v. McCubbins,* 590 S.W.2d 892 (Ky. App. 1979), it is but one factor to be considered. Abandonment is not actually defined in our jurisprudence in the context of termination proceedings. Rather, "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." *O.S. v. C.F.,* 655 S.W.2d 32, 34 (Ky. App. 1983).

Father contends that there was not sufficient evidence to support a finding of abandonment because he was simply following the wishes of Mother by waiting until T.D.M. was older to begin visiting her. In support of this argument, Father cites to *Wright v. Howard*, 711 S.W.2d 492 (Ky. App. 1986), wherein this Court held that there could be no abandonment of a child where the parent was under a court order not to exercise visitation. Because there was not a court order in the instant case preventing Father from exercising visitation, the *Wright* case is distinguishable.

Additionally, we note that Mother testified that she never told Father that he had to wait until T.D.M. was older to begin visiting T.D.M. Because the family court, "as the finder of fact, has the responsibility to judge the credibility of all testimony, and may choose to believe or disbelieve any part of the evidence presented to it[,]" we cannot say the court erred in relying on Mother's testimony. *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006). We conclude that, based

on Father's testimony that he has not seen T.D.M. since shortly after her birth; that he only made one attempt in 2006 to visit T.D.M.; and that he has never provided any child support for T.D.M., the family court did not err in concluding that Father abandoned T.D.M.

Next, Father argues that the family court erred in not allowing him to present evidence as to the kind of father he has been to his other three minor children and the support he has provided to them. We agree with the family court that this evidence was not relevant to a determination of whether Father's parental rights of T.D.M. should be terminated. While Father may provide adequate care and support for his three other children, such evidence is not relevant to show whether Father provided essential care and support for T.D.M. Because evidence must be relevant to be admitted, we conclude that the family court did not err in excluding this evidence. Kentucky Rule(s) of Evidence (KRE) 402.

The final argument that Father makes on appeal is that the family court judge erred by not recusing herself from the case due to her hostility toward Father's counsel. Having reviewed the record, we note that, at the end of the hearing, the judge made a ruling granting Stepfather's motion for involuntary termination of Father's parental rights. Because Father was not allowed to introduce evidence as to the kind of father he has been to his other three children, the parties and the judge discussed whether such testimony could be entered into the record by avowal. After a short recess, the judge informed Father's counsel that he could enter the testimony into the record by avowal.

Thereafter, Father's counsel noted that, during the recess, the judge made a comment to him that he found to be "troublesome." The judge then explained that her comment was in reference to counsel's representation of her stepson's wife in a dissolution action against her stepson. The judge further explained that she had recused from that case, but noted a hearing scheduled for December 29, 2010, had been cancelled because the parties agreed to enter into a settlement agreement. However, because her stepson's attorney was waiting for the settlement agreement from Father's counsel, the dissolution was not final and her stepson and his black Labrador had been living at her house up until the previous week. Father's counsel then stated that he took this comment to mean that the judge thought the dog was living at her house because of him.

As stated in *Bussell v. Commonwealth*, 882 S.W.2d 111,113 (Ky. 1994), "A motion for recusal should be made immediately upon discovery of the facts upon which the disqualification rests. Otherwise it will be waived." (Internal citations omitted). Having carefully reviewed the record, we note that a motion for recusal was never made. Thus, this argument is waived, and we do not address it.

CONCLUSION

For the foregoing reasons, we affirm the order of the Henderson Family Court terminating Father's parental rights with respect to T.D.M.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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