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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000933-ME

T.M. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TRACI H. BRISLIN, JUDGE
ACTION NO. 13-AD-00244

CABINET FOR HEALTH AND FAMILY SERVICES; B.A.H., MOTHER; AND O.B.H., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

ACREE, JUDGE: T.M. (Father) appeals from the Fayette Family Court's May 12, 2015 findings of fact, conclusions of law, and order involuntarily terminating his parental rights to his daughter, O.B.H. (Child). Father claims the family court's

termination decision must be reversed as it is not supported by clear and convincing evidence. We disagree. Accordingly, we affirm.[1]

DNA testing established Father's paternity of Child in October 2009, nine months after Child's birth. For the next two years, Father played an active, but limited role in Child's life. He visited with Child a few times a week; on occasion, Child stayed overnight with Father. In early 2012, Father and Child's mother, B.A.H. (Mother), had a falling out and Father ceased contact with Child. Except for an unauthorized contact in November 2012, Father has not since seen Child.

In April 2012, the Cabinet removed Child from Mother's care and filed a dependency, neglect, and abuse petition.[2] The Cabinet, having been awarded temporary custody, placed Child in foster care where she has remained throughout the case.

There was little contact between Father and the Cabinet after Child's removal. Father failed to establish or work a case plan, and his contact with the

[1] Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

[2] The action stemmed from allegations that Mother was medication seeking, was unable to provide food and clothing for Child and Mother's other children, and was unable to keep her children clean.

Cabinet ceased entirely after November 2012. On September 30, 2013, the family court held its annual permanency review, after which it changed Child's goal from reunification to adoption. The Cabinet filed a petition to terminate Mother's and Father's parental rights a few months later.

A two-day termination trial was held on October 13, 2014, and March 23, 2015. At the October hearing, before the taking of evidence, Mother consented to the voluntary termination of her parental rights. The termination hearing proceeded against Father in March 2015. Two Cabinet workers, Father, Father's parenting class instructor, Father's mother, and Father's brother all testified.

Sherry Postlewaite, a Cabinet employee, was the ongoing caseworker from April 2012 until May 2013, when she became a supervisor. Despite her new supervisory duties, she remained involved with this case until the fall of 2014.

Postlewaite testified that Father, after discovering Child had been removed from Mother's care, contacted the Cabinet in May 2012. He said to Postlewaite: "I heard [Child] was removed, what do I do?" Postlewaite advised him to come to the Cabinet and set up a case plan.

Shortly after his contact with the Cabinet, Father was incarcerated on misdemeanor domestic violence charges; his incarceration lasted from June 2012 until October 2012. Upon release, Father again contacted the Cabinet. Postlewaite advised Father that he needed to call back within a week to schedule a family team meeting, and develop a case plan. Father failed to do so. Instead, Father accompanied Mother to her scheduled visit with Child on November 13, 2012.

Father observed Child entering the Cabinet's office and attempted to talk to Child. Postlewaite testified Child saw father, hid behind Postlewaite, and held onto Postlewaite's hand and shirt. Child appeared afraid of Father.

Postlewaite informed Father that he could not visit with Child until he set up a case plan. Father called, as directed, and scheduled a family team meeting for November 19, 2012, but he failed to appear for that meeting. However, he claims he did eventually arrive, but not on time. In any event, after this incident, Father did not contact the Cabinet for two years. He has not seen Child since November 2012. Postlewaite confirmed Father made no effort to see Child or provide any care for her.

Father testified he did not pursue custody because he feared no one would take him seriously. He was homeless. He was unemployed. And he was incarcerated at times. Father testified he did not have anyone to depend on and could not even depend on himself. He did not think he could make a case as a stable parent during that time in his life. Father also believed Mother was working to regain custody of Child and he believed, therefore, he did not need to make the attempt. Father testified that, had he known Mother was not doing what she was supposed to do, he would have stepped up fully.

In the meantime, Child was struggling in foster care. Postlewaite testified that when Child entered foster care in 2012 she was the angriest, most out-of-control child she had ever seen. Child would hit, punch, kick, and spit, all without warning. She struggled to follow rules and would lash out with intense

tantrums and physical aggression. Postlewaite explained that, before foster care, Child's life was chaotic; therefore, "her response was chaos." Postlewaite also testified Child weighed sixty-five pounds at the age of 3.

Traci Coleman, a social service clinician with the Cabinet, echoed Postlewaite's testimony. Coleman became Child's case worker in January 2015. Coleman testified Child had been in three different foster homes since April 2012. Child entered her most recent foster home around January 2014. In that placement, Child's behaviors significantly improved and stabilized, and she lost the excess weight. She is well-adjusted and thriving. She refers to her foster parents as "mom and dad," and frequently asks when it will be her turn to be adopted. Coleman also testified, and Postlewaite confirmed, that Child is in a concurrent foster home, meaning the foster parents are considering adopting Child upon termination.

In August 2014, Father moved in with his mother, and his life stabilized. He contacted the Cabinet on September 11, 2014 – his first contact in almost two years – and was informed of a court hearing on September 16, 2014. He tried to attend that hearing but, unknown to Father, the hearing was held in chambers. Father came to court again on October 13, 2014, at which time the family court appointed counsel to represent him.

Father, with his counsel, contacted the Cabinet. A family team meeting was scheduled for February 2, 2015. Father attended the meeting, and a case plan was developed. The case plan required Father to: cooperate with the

Cabinet and all service providers; establish and maintain stable housing and employment; undergo parenting classes; complete a domestic violence assessment and follow recommendations; and engage in individual therapy. Coleman confirmed Father had made progress on his case plan.

Father had stable housing. Father's mother testified that Father lived with her in her home, and that he had lived there approximately nine months.

Father testified he was employed. He also testified he had completed a domestic violence program in May 2014, and he had a mental health assessment scheduled for April 1, 2015.

Father testified he began parenting classes, on his own initiative, in January 2015. Father was scheduled to complete the parenting course in April 2015. The course instructor testified Father was engaged and participated in every meeting, that Father was taking the course seriously, and that he was pleased with Father's progress.

Notwithstanding this progress, Postlewaite testified the Cabinet still had serious reservations about Father's ability to parent Child. She identified several barriers to reunification, including: (1) Child's lack of a relationship with Father; (2) Child's recent emotional stabilization in foster care; (3) Father's history of domestic violence; and (4) the fact that Father only recently established and began working his case plan.

Postlewaite confirmed Father has not had meaningful contact with Child since early 2012. Child does not know Father. Father testified he knew he

could not visit with Child until he established a case plan. Yet, he failed to do so until February 2015. Postlewaite concluded from Father's sparse contact with Child and the Cabinet, his failure to attend the family team meeting that he requested in 2012, and his lack of follow-through, that he did not want to be involved in Child's life.

Postlewaite also questioned Father's commitment to Child and to working his case plan. She testified that she had informed Father on three occasions – 5/12/2012, 10/18/2012, and 11/12/2012 – that he needed to establish a case plan, but he waited to do so until January 2015. She testified Father has had more than sufficient opportunity to work a case plan and demonstrate his desire to care for Child, yet he did nothing for almost three years. She was not hopeful Father would actually follow through with his case plan. When asked if she thought there was a reasonable expectation that Father could change, Postlewaite said, "I do not think it is possible. The history tells me this is the third time we've had contact and we're now at the 11th hour."

Concerns were also raised about Father's living situation. Although Father had stable housing, Postlewaite testified Child could not live with Father at his mother's house. Father, as a child, had been removed from his mother's care due to her substance abuse issues and placed in foster care for five years. He returned to his mother's care when he was seventeen years old. Because of this history, the Cabinet was unable to place Child with Father in his mother's home.

Postlewaite testified that the Cabinet also had concerns about Father's repeated episodes of domestic violence. Postlewaite explained, and Father did not dispute, that he had had two assault 4th degree domestic violence convictions, the first in 2010 and the second in 2012, both misdemeanors, and two domestic violence orders (DVO) taken out against him. Neither DVO involved Child or Mother. As part of the first DVO, Father underwent a domestic violence assessment and completed domestic violence classes. Postlewaite testified that Father reported that he got little benefit from the classes. She was concerned that Father still did not understand his triggers and alternative courses of action. Coleman testified that the Cabinet had received no evidence or proof that Father actually completed domestic violence classes. And, even more concerning, Coleman explained, was that Father was charged in November 2014 – several months *after* he completed the domestic violence program – with violating an active DVO.

In response, Father explained that the violation occurred when he went to his child's daycare to speak to his daughter, thus violating the restriction that he remain five hundred feet away from his children's daycare.[3] He emphasized that the violation was not for the commission of other acts of domestic violence. Father also testified he had learned to control himself and his anger, to think and use his head, and to walk away from upsetting situations. He testified he is willing to retake domestic violence classes.

[3] Father has other children not subject of this termination action.

Postlewaite testified to her belief that termination of Father's parental rights would be in Child's best interest. She again testified as to the substantial and significant progress Child had made in her foster home. She testified to her concern about placing Child, who has come so far, in a home with a person who does not know Child and does not know her needs. In Postlewaite's opinion, Child is better off in a home with people who have made a commitment to her, fully aware of her special needs.

Father testified he is willing and able to parent Child. Father's brother testified Father has a very good relationship with his nephew and nieces, that he trusts Father to babysit for him, and that Father plays with his nephew and nieces and tries to teach them things. Father's brother further testified that Father has a good relationship with his other children and is very passionate about his children.

On May 12, 2015, the family court entered findings of fact, conclusions of law, and orders terminating Father's parental rights to Child. The family court found Child abused and neglected. KRS[4] 625.090(1)(a). It also found that termination was in Child's best interest, KRS 625.090(1)(b), and found Father was unfit to parent Child because: (a) he had abandoned Child for a period of not less than ninety days; (b) he failed to offer essential parental care and protection for Child; and (c) he failed to provide basic necessities for Child for reasons other than poverty alone. KRS 625.090(2)(a), (e), (g). Father appealed.

[4] Kentucky Revised Statutes

This Court will only disturb a family court's decision to terminate a person's parental rights if clear error occurred. If there is substantial, clear, and convincing evidence to support it, the decision must stand. KRS 625.090(1); *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). The clear and convincing standard does not demand uncontradicted proof. All that is needed "is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citation omitted).

Termination of a party's parental rights is proper upon satisfaction, by clear and convincing evidence, of a "tripartite test." *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). First, the child must have been found to be an "abused or neglected" child, as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination must be in the child's best interest. KRS 625.090(1)(b). Third, the family court must find at least one ground of parental unfitness. KRS 625.090(2).

Father does not challenge the family court's neglect or best-interest findings. Instead, he only attacks the family court's findings of parental unfitness. KRS 625.090(2). He argues there is not substantial evidence to support the family court's findings: (1) that he abandoned Child; (2) that there was no reasonable expectation of improvement in his parental care and protection; and (3) that he failed to provide for Child for reasons other than poverty alone. We are not persuaded.

Father contends there is no evidence in the record, much less clear and convincing evidence, demonstrating he ever intended to abandon Child and, therefore, his parental rights were wrongly terminated. While admitting he was absent from Child's life for a significant period of time, Father asserts that he never stopped thinking or caring about Child, that during every point of stability in his life he tried to make contact with the Cabinet to regain custody of Child, and that upon learning of the termination action in 2014 he took steps, on his own initiative, to attend court hearings and undergo parenting classes. Father argues that this is not the picture of a parent who has given up on or abandoned his Child with the intent to forego all parental rights.

In the context of termination proceedings, "abandonment rests mainly upon intent." *V.S. v. Com., Cabinet for Human Res.,* 706 S.W.2d 420, 424 (Ky. App. 1986). "[A]bandonment is demonstrated by facts and 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). Intent to abandon one's child "may be proved by external facts and circumstances." *J.H. v. Cabinet for Human Res.,* 704 S.W.2d 661, 663 (Ky. App. 1985).

It is clear to us that Father abandoned Child for a substantial part of her life. KRS 625.090(2)(a). Father, by his own admission, has not had meaningful contact with Child since early 2012, well past the ninety days required for abandonment. Father was well aware that he needed only to establish a case plan to visit Child, yet he did nothing for years. He was not prevented from

visiting Child. It was his choice not to visit Child. From November 2012 to September 2014 Father made no effort to contact the Cabinet, to work a case plan, or to take any steps to gain custody of Child. We acknowledge Father's testimony that he was not capable during this period of caring for Child. But Father was certainly capable of contacting the Cabinet to ascertain Child's well-being. Or of taking meaningful, albeit small, steps to work a case plan. But he did not. Father's conduct was not consistent with an intent to nurture, parent, and provide for Child. It was reasonable for the family court to infer from this evidence that, for a period of greater than ninety days, Father intended to abandon Child and relinquish all parental rights. Accordingly, we cannot say the family court's abandonment finding lacks clearing and convincing supportive evidence.

Father next contends that the family court's findings that there was no reasonable expectation of improvement in Father's parental care and protection of Child and that he failed to provide for Child for reasons other than poverty were not supported by substantial evidence. It is not strictly necessary for us to address the arguments. Only one ground is needed to satisfy this prong of the tripartite termination test. *See* KRS 625.090(2) (termination shall only be ordered if the family court finds the existence of at least one of the statutory grounds enumerated in KRS 625.090(2)); *K.H.*, 423 S.W.3d at 209 (the family court need only find "one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) exists"). The family court found, and we agree, that Father abandoned Child for a period of

not less than ninety days. The parental-fitness prong has been satisfied. However, out of an abundance of caution, we will briefly address his remaining arguments.

KRS 625.090(2)(e) requires that the family court consider a parent's prognosis for improvement within a reasonable time. In this case, Father did establish a case plan and began earnestly working that plan. But, as noted by one witness, he did so at the eleventh hour. He obtained housing, but that housing was not appropriate for Child. He obtained employment, but it is unclear to this Court how long he had been employed. Father, at the very least, had yet to demonstrate he could successfully maintain steady employment. Father had taken domestic violence classes, but readily admitted he received little value from those classes and obtained subsequent domestic-violence related charges. Clearly, domestic violence was still an issue for Father and this family. Father had three years to make some type of progress on his case and improve his ability to parent, but he waited even to start doing so until sixty days before the termination hearing. In considering Father's reasonable expectation of improvement, the family court was essentially weighing Father's efforts toward a case plan with a duration of less than sixty days, against three years of no contact with Child or the Cabinet, joblessness, homelessness, criminal issues, and domestic violence. Family courts have wide discretion in termination cases. Given that discretion, we cannot say the family court's finding of no reasonable expectation of improvement was unsupported by substantial evidence given the record, history, and current circumstances.

Finally, KRS 625.090(2)(g) requires the family court to find that, for reasons other than poverty alone, a parent has continuously or repeatedly failed to provide or was incapable of providing essential food, clothing, shelter, medical care, or education necessary for the child's wellbeing. Father testified that for two years he was homeless, jobless, and unable to care for himself, much less Child. But Father also testified that he moved in with his mother in August 2014 and at some point obtained employment. Despite this stability, Father *still* failed to provide essential items for Child. Accordingly, we agree with the family court that Father repeatedly failed to provide basic necessities for Child for reasons other than poverty alone.

We affirm the Fayette Family Court's May 12, 2015 Findings of Fact, Conclusions of Law, and Order terminating Father's parental rights to Child.

ALL CONCUR.

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