RENDERED: OCTOBER 21, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

MODIFIED: OCTOBER 28, 2016; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001639-ME

T.H. APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 14-AD-00017

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; B.[J.]B.; AND C.M.B., A CHILD APPELLEES

OPINION
VACATING
AND REMANDING

** ** ** ** **

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

MAZE, JUDGE:[1] T.H. appeals from an order of the Bath Circuit Court terminating his parental rights to C.M.B. He argues that the trial court impermissibly based the termination on his incarceration, and that the trial court failed to make sufficient factual findings. We agree with T.H. that the factual findings were insufficient, as they do not adequately identify facts other than T.H.'s incarceration to support the decision to terminate his parental rights. However, we conclude that T.H. has not shown that he was prejudiced by the trial court's denial of his request to be transported to the termination hearing, because T.H. had a full opportunity to participate in the hearing by telephone. Hence, we vacate the order terminating T.H.'s parental rights, and remand for entry of additional findings of fact and conclusions of law.

The child, C.M.B., was born in March 2009. The Cabinet first became involved with C.M.B.'s family in 2010. In September 2011, the child's mother, B.J.B., informed the Cabinet that she was having substance abuse issues and was no longer capable of caring for C.M.B. and another child. At that time, C.M.B. was placed in foster care, where he has remained since. The Cabinet set

[1] Pursuant to 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.

out a reunification plan for B.J.B., which included substance abuse screening and treatment, parenting classes, and random drug screenings. Although B.J.B. initially complied with the case plan, her efforts later faltered. In February 2014, the Cabinet changed the goal from reunification to adoption.

T.H. has admitted paternity of C.M.B. At the time of the child's conception, he was on parole from a twenty-year sentence for first-degree robbery and other offenses. His parole was revoked in February 2009, approximately one month before the C.M.B.'s birth. Other than sending five or six letters, he has had no contact with the child. The Cabinet contacted him in 2010 and offered him a case plan, but the record does not set out the terms of that plan or whether he made any efforts to comply at that time. In January 2015, the Cabinet negotiated a detailed case plan with T.H. However, he has been unable to make progress on his plan due to his incarceration and his extended periods of solitary confinement. At the hearing, T.H. testified that he would be eligible for parole in May or June of 2016.[2]

On November 24, 2014, the Cabinet filed a petition to involuntarily terminate the parental rights of B.J.B. and T.H. The trial court appointed a *guardian ad litem* for the child and counsel for both parents. The matter proceeded to an evidentiary hearing in September 2015. T.H. was not present at the hearing,

[2] Our review of the public records of the Department of Corrections indicates that T.H. was not released at that time, but was ordered to serve out his sentence. He will be eligible for release no earlier than March 2018.

but participated by telephone. B.J.B. did not appear at the hearing, but was represented by counsel. On October 15, 2015, the trial court entered findings of fact, conclusions of law, and a separate order terminating the rights of both parents to C.M.B. T.H. now appeals from this order.

To terminate parental rights, KRS[3] 625.090 requires the Cabinet to prove, by clear and convincing evidence: 1) that the child is abused or neglected as defined by KRS 600.020(1); 2) that termination is in the best interests of the child; and 3) that one of the factors listed in KRS 625.090(2) is present, including that the child has been abandoned for not less than ninety days or that a parent has "continuously or repeatedly failed or refused to provide" for the child. *See* KRS 625.090(2). We review the trial court's factual findings under a clearly erroneous standard, giving due regard to the ability of the trial court to evaluate the credibility of witnesses and to judge the weight of the evidence. CR[4] 52.01. However, the sufficiency of the trial court's findings, as well as the trial court's application of the law to those findings, are issues of law which we review *de novo*. *D.G.R. v. Commonwealth, Cabinet for Health & Family Servs.*, 364 S.W.3d 106, 113 (Ky. 2012).

With regard to the first prong of the test for termination of parental rights, the Cabinet notes that C.M.B. was adjudicated as neglected when he was

[3] Kentucky Revised Statutes.

[4] Kentucky Rules of Civil Procedure.

removed from his mother's custody in 2011. We note that KRS 625.090(6) requires the trial court to find that each parent satisfies the three prongs found in the termination statute, including whether the child qualifies as an abused or neglected child. *Cabinet for Health & Family Servs. v. K.H.*, 423 S.W.3d 204, 210 (Ky. 2014). While there may be situations where the court can infer joint responsibility of parents for the neglect or abuse of a child based on a previous stipulation, such a presumption is not appropriate where the parents do not live together or have joint responsibilities for the care of the child. *Id.*

In this case, the 2012 adjudication of neglect only related to B.J.B., and did not list T.H. as father. Consequently, we conclude that the prior adjudication of neglect was not sufficient, by itself, to establish that T.H. neglected C.M.B. Rather, the trial court was obligated to make separate findings of neglect as to T.H. Furthermore, the trial court's factual findings under KRS 625.090(2) merely repeated the language of the statutory factors and did not explain or cite to any specific evidence which supported its decision regarding any of the factors. *M.L.C. v. Cabinet for Health & Family Servs.*, 411 S.W.3d 761, 765 (Ky. App. 2013). Consequently, this matter must be remanded for additional and particularized findings required by statute.

T.H. primarily contends that the trial court's findings under KRS 625.090(2) were impermissibly based only on his incarceration. In *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995), the Kentucky

Supreme Court held that "incarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights...." Instead, incarceration is merely a factor to consider when applying a parent's conduct to the KRS 625.090(2) standard. *Id. See also M.L.C. v. Cabinet*, 411 S.W.3d at 766; and *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1986).

T.H. argues that the Cabinet failed to address whether his abandonment or failure to support C.M.B. was based on circumstances other than his incarceration. He also points out that the Cabinet never offered him a detailed case plan until after it changed the permanency goal from reunification to adoption. The 2015 case plan included a number of steps which could only be met after T.H. was released from prison. Consequently, T.H. argues that there was no evidence that the Cabinet had made reasonable efforts to reunite him with the child, or that there was no reasonable expectation for improvement in his ability to care for the child.

The Cabinet responds that the trial court based its decision to terminate T.H.'s parental rights on facts and findings additional to its finding of abandonment. In addition to abandonment, the trial court found that (1) B.J.B. and T.H. continuously or repeatedly failed or refused to provide essential parental care or support for the child and that there was no reasonable expectation of improvement, KRS 625.090(2)(e); (2) that the parents, for reasons other than poverty alone, continuously or repeatedly failed to provide or were incapable of

providing, essential food, clothing, shelter, medical care or education for the child and there was no reasonable expectation of significant improvement, KRS 625.090(2)(g); and (3) that C.M.B. had been in foster care and under the responsibility of the Cabinet for fifteen out of the twenty-two months prior to the filing of the petition. KRS 625.090(2)(j). The Cabinet argues that there was substantial evidence to support these findings.

The Cabinet further maintains that the trial court did not rely primarily on T.H.'s incarceration to support these findings, but upon his conduct while incarcerated. T.H. has been incarcerated for all of C.M.B.'s life, and he only made sporadic attempts to contact the child. T.H. has clearly made no efforts to support the child, nor has he ever requested any visitation.

In addition, the Cabinet points out that T.H. failed to make progress on his case plan because he was repeatedly sent to disciplinary segregation due to misconduct while in prison. In fact, T.H. admitted that his parole eligibility was extended because of his behavior. Based on this evidence, the Cabinet argues that there was additional evidence beyond T.H.'s incarceration to support the trial court's decision to terminate his parental rights.

We agree with the Cabinet that this evidence could have supported the trial court's findings under KRS 625.090(2) on more than T.H.'s incarceration alone. But as we noted above, the trial court's findings on these factors merely repeat the language of the statute and do not identify any particular evidence

supporting these conclusions with respect to T.H. Because the trial court did not provide ample support for its findings of fact and conclusions of law and appears to have relied primarily on T.H.'s incarceration alone, we must vacate the order terminating his parental rights and remand for additional factual findings.

Finally, T.H. complains that the trial court improperly refused to transport him to the termination hearing. T.H. contends that his participation by telephone hampered his ability to communicate with his appointed counsel during the hearing. However, in *M.L.C. v. Cabinet*, this Court held that "in certain circumstances such as the case at bar, it is appropriate for a parent to testify by telephone in a termination proceeding, as long as there is adequate notice of the proceedings and adequate time for the parent to testify, be cross-examined, and to fully participate in the hearing process." 411 S.W.3d at 764. T.H.'s *guardian ad litem* advised T.H. and the court that he could pick up the receiver and speak to T.H. privately at any point in the proceeding. T.H. does not explain how he was prejudiced by participating in the hearing telephonically rather than in person. In the absence of any showing of prejudice, we decline to address the issue further.

Accordingly, the order of the Bath Circuit Court terminating T.H.'s parental rights to C.M.B. is vacated, and this matter is remanded for entry of additional findings of fact and conclusions of law as set forth in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

N. Blaze Tomlin
Mount Sterling, Kentucky

BRIEF FOR APPELLEE:

Natasha Kinnan
Office of Legal Services
Ashland, Kentucky