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Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0598-ME

S.R.P. APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE WILLIAMS, III, JUDGE
ACTION NO. 21-AD-00060

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; AND X.K.T., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CETRULO, COMBS, AND GOODWINE, JUDGES.

GOODWINE, JUDGE: S.R.P. ("Father") appeals the May 2, 2022 judgment of the Franklin Circuit Court, Family Division, involuntarily terminating his parental rights to his minor child. After careful review, we affirm.

The child was born in August 2019 and was removed from the custody of N.B.T. ("Mother") because the child was exposed to illicit substances

during the pregnancy.[1] Thereafter, Mother identified multiple men as possible fathers. Father knew of Mother's pregnancy and that he was possibly the child's father. Multiple DNA tests were completed to determine paternity. On September 16, 2020, Father was identified as the child's father through genetic testing.

Thereafter, the Cabinet for Health and Family Services ("Cabinet") amended its petition and the family court adjudicated the child as neglected by Father in the underlying dependency, neglect, and abuse ("DNA") action. Father participated in case planning with the Cabinet. His case plan required that he: (1) complete mental health and substance abuse assessments; (2) complete parenting classes; and (3) participate in regular visitation with the child. Father completed a mental health and substance abuse assessment. Because he tested positive for an illicit substance on the day of the assessment, he was required to complete intensive outpatient treatment. Father did not initiate treatment, nor did he complete parenting classes.

Father has had minimal contact with the child. He attended only one in-person visit, where he did not provide any supplies or interact with the child in any way. When the Cabinet was required to make all visits virtual because of the COVID-19 pandemic, Father refused to participate.

[1] Mother passed away on August 30, 2021.

Father was incarcerated in January 2021 on charges of murder, conspiracy to commit first-degree burglary, and trafficking in controlled substances.[2] He remains incarcerated. His trial date is scheduled for December 5, 2022.[3] After he was incarcerated, Father did not contact the Cabinet to inquire about the child's well-being or to arrange virtual visitation with the child.[4] Father admitted that he maintained virtual communication with another child.

Father was employed delivering groceries prior to his incarceration. But he never provided any financial support for the child. After he was incarcerated, Father arranged for someone else to take over his deliveries, so he continued to receive compensation. Yet, he never provided support for the child.

The Cabinet petitioned to involuntarily terminate Father's parental rights on November 22, 2021. At trial, the family court heard testimony from the Cabinet caseworker and Father. Based on the evidence, the family court entered a judgment terminating Father's parental rights. This appeal followed.

The circuit court has "a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the

[2] *See Commonwealth v.* [*S.R.P.*], Franklin Circuit Court, Nos. 21-CR-00010 and 21-CR-00011-002.

[3] *Id.*

[4] Prior to her death, Mother occasionally included Father in her virtual visits with the child.

abuse or neglect warrants termination." *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998) (citation omitted). "This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR[5] 52.01 based upon clear and convincing evidence, and the findings of the [circuit] court will not be disturbed unless there exists no substantial evidence in the record to support its findings." *Id*. To be clear and convincing, evidence must not be uncontroverted, but only probative and substantial so as to "convince ordinarily prudent-minded people." *Id*. at 117 (citation omitted).

On appeal, Father argues: (1) the Cabinet did not present substantial evidence proving the child was abused or neglected under KRS[6] 600.020(1) because the child did not suffer direct emotional or physical injury from him; (2) under KRS 625.090(2)(e) or (g), the Cabinet failed to prove by clear and convincing evidence that Father is incapable of rendering care; (3) there was no substantial evidence in the record to support the family court's finding that there is no reasonable expectation of improvement in Father's situation; (4) the family court's finding of abandonment is based on his incarceration alone; and (5) the Cabinet's case focused solely on his past behavior.

[5] Kentucky Rules of Civil Procedure.

[6] Kentucky Revised Statutes.

Under KRS 625.090, involuntary termination of a parent's rights to a child requires the family court to find, by clear and convincing evidence, that (1) the child has been abused or neglected; (2) termination is in the child's best interest considering the factors enumerated in KRS 625.090(3); and (3) at least one of the termination grounds listed in KRS 625.090(2)(a)-(j) exists. *See Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014).

First, citing *M.E.C. v. Cabinet for Health and Family Services*, 254 S.W.3d 846 (Ky. App. 2008), Father argues the family court was required to find the child suffered direct emotional or physical injury from Father for his parental rights to be terminated. However, this is not the standard set forth in KRS 625.090(1)(a) or KRS 600.020(1). Instead, whether a parent "[i]nflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means[,]" or "[c]reates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means" are just two of a number of possible findings a family court may make as to the child's status as "abused or neglected." KRS 600.020(1)(a)1. and 2.

Furthermore, to satisfy the requirements for involuntary termination of parental rights, the family court may find "[t]he child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction[.]" KRS 625.090(1)(a)1. In the underlying DNA action,

the Cabinet amended its petition to allege Father neglected the child on March 31, 2021.[7] At adjudication, the family court found the child was neglected by Father. After entry of the dispositional order, Father did not appeal. The family court is a court of competent jurisdiction and its finding of neglect in the DNA action satisfies the requirements of KRS 625.090(1)(a).

Next, the family court made sufficient findings under KRS 625.090(2). Father contests the sufficiency of the evidence supporting the court's findings under KRS 625.090(2)(e) and (g). However, the court is only required to find the existence of one of the grounds enumerated in KRS 625.090(2). In addition to its findings under subsections (e) and (g), the court also found the child had been in the Cabinet's care for fifteen cumulative months out of forty-eight months preceding the filing of the petition to terminate Father's parental rights. KRS 625.090(2)(j). Father does not contest this finding and it is supported by the record. Therefore, we need not consider the sufficiency of evidence supporting the court's findings under any other subsection.

Relatedly, we will not disturb the family court's finding that there was no reasonable expectation of improvement in Father's situation. Consideration of a "reasonable expectation of improvement" is required under KRS 625.090(2)(e)

[7] The Cabinet entered the DNA record for No. 19-J-00179-002 as Petitioner's Exhibit 4 in this action.

and (g). As explained above, because the family court found the child had been in Cabinet care for fifteen of the previous forty-eight months, we need not consider the sufficiency of evidence supporting its finding under any other subsection of KRS 625.090.

We will not disturb the family court's finding of abandonment. Like the family court's findings under KRS 625.090(2)(e) and (g), its finding of abandonment under subsection (a) need not be reviewed by this Court because of the court's finding under subsection (j). However, we will review Father's argument so far as he alleges the court's decision to terminate his rights was based on his incarceration alone.

"[I]ncarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights[.]" *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). However, "absence, voluntary or court-imposed, may be a factor to consider in determining whether the child[] ha[s] been neglected." *A.R.D. v. Cabinet for Health and Family Services*, 606 S.W.3d 105, 111 (Ky. App. 2020) (citation omitted).

Here, Father's incarceration was only one of several factors the family court considered when it terminated his parental rights. Prior to his incarceration, Father visited with the child only once and chose not to interact with the child during the visit. When offered virtual visitation during the COVID-19 pandemic,

Father refused. Father has never provided material or financial support for the child. Once incarcerated, Father did not initiate virtual visitation with the child or inquire about the child's well-being. Father did not begin substance abuse treatment or parenting classes prior to his incarceration and has no plan to do so in the future. The family court's decision was not based on Father's incarceration alone, but also on his minimal efforts to care for, support, or reunite with the child.

Finally, the family court's decision is based on Father's prior and current behavior, as well as the prospect for improvement in the future. Neither Father's past behavior nor his actions at the time of trial indicated he was making meaningful efforts to care for or reunite with the child. Based on Father's failure to make progress on his case plan or provide any support prior to or during incarceration, despite doing so for another child, even if his release was imminent, the child could not be returned to his care.

Based on the foregoing, we affirm the judgment of the Franklin Circuit Court, Family Division.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
James Dean Liebman Frankfort, Kentucky	Dilissa G. Milburn Mayfield, Kentucky