

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000324-MR

CABINET FOR FAMILIES AND CHILDREN
and T.L.S., a minor, by and through
her Guardian ad Litem

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 98-AD-00003

S.B.S. and
R.T.

APPELLEES

OPINION
VACATING AND REMANDING
** **

BEFORE: BARBER, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order dismissing the Cabinet for Families and Children's petition for involuntary termination of parental rights based on a determination that the mother did not abandon the child because she initially consented to the child's commitment to the Cabinet. We adjudge that the trial court's determination that the mother did not abandon the child was in error and, thus, we vacate the order and remand for further proceedings.

The child, T.S., was born on May 15, 1991. The mother, S.B.S., was married to H.S., Jr. at the time of conception and birth. However, the biological father of the child is R.T.

On March 22, 1993, when T.S. was 22 months of age, the Cabinet for Families and Children (the "Cabinet") obtained emergency custody of T.S. because S.B.S. was incarcerated, had a serious substance abuse problem, and T.S.'s uncle could no longer care for her. Neither H.S. nor R.T. have had any contact with T.S. with the exception of some sporadic support provided by R.T. On April 21, 1993, T.S. was committed to the care of the Cabinet as a dependent child. At this time, S.B.S. consented to the commitment because she agreed that T.S. was better off in the custody of the Cabinet due to her substance abuse problem. T.S. was initially placed in foster care for a year until April 28, 1994 when she was placed in the home of T.S.'s maternal grandmother. Subsequently, on May 2, 1994, the Cabinet revoked its commitment. However, in February of 1995, T.S. was voluntarily committed by the grandmother because of the grandmother's illness. The child was returned to the care of the grandmother on July 10, 1995, but was thereafter again placed in the custody of the Cabinet on October 16, 1995 by emergency order because the grandmother had died. At the time of the grandmother's death, S.B.S.'s whereabouts were unknown to the Cabinet. On November 16, 1995, T.S. was again committed to the Cabinet and subsequently placed in foster care with relatives of S.B.S., where she remains to this date.

Subsequent to T.S.'s initial commitment to the Cabinet on April 21, 1993, a plan was established by the Cabinet for the return of T.S. to S.B.S. The goals of the plan were that S.B.S. was to complete an inpatient drug and alcohol treatment program, remain substance free, obtain safe and appropriate housing, and obtain a parenting assessment. S.B.S. made no effort to achieve any of these goals at this time.

S.B.S. saw T.S. at her mother's funeral and a few days later called the Cabinet to inquire about T.S.'s placement in foster care, but then had no further contact with the Cabinet for approximately six months. At this time, the Cabinet again established a treatment plan which had the same goals as the previous treatment plan. However, S.B.S. did not attend the treatment plan conference and admittedly made no serious effort to deal with her drug problem at that time. A visitation plan was also established by the Cabinet after T.S. was placed in foster care with the relatives of S.B.S. However, S.B.S. only visited T.S. once on May 13, 1996 during which T.S. was scared and crying, so S.B.S. left after 15 minutes. According to S.B.S., she made other attempts to visit T.S. during this time, but was discouraged by the foster parents who did not want S.B.S. to be around T.S.

On January 4, 1998, pursuant to a charge of third-offense possession and a guilty plea to second offense, S.B.S. was accepted into the Fayette Circuit Court Drug Court Program. It is undisputed that S.B.S. was an exceptional participant in

the program and did not have one absence or positive drug screen while in the program.

On January 21, 1998, the Cabinet filed a petition for involuntary termination of parental rights of S.B.S., H.S., and R.T. S.B.S. was served with process on January 30, 1998 by a warning order attorney. S.B.S. thereafter gave notice that she was contesting the termination and counsel was appointed on her behalf. In April of 1998, S.B.S. attended a conference with the Cabinet and indicated her desire to comply with the treatment plan in order to get T.S. back. She was advised by the Cabinet that its goal was now termination of parental rights and that there was nothing she could do to get T.S. back. She was further informed that visitation was not in the best interest of T.S.

At the termination hearing, S.B.S. testified that because of her drug addiction from 1991 to January, 1998, she was unable to care for T.S. She admitted that she had three convictions for drug-related offenses as well as a probation violation and theft convictions. She stated, however, that she now has her priorities straight and is able to care for her daughter. She testified that she has a steady job and stable housing.

The order of the Fayette Circuit Court terminated the parental rights of H.S. and found that grounds existed to terminate the parental rights of R.T. However, the court dismissed the petition as to S.B.S., adjudging that S.B.S. never abandoned T.S. because she consented to the child's initial commitment to the Cabinet. At the request of the Cabinet, since

the court was not ordering the termination of S.B.S.'s parental rights, the parental rights of R.T. were not terminated so that he could still be ordered to provide support for T.S. The court, however, did allow T.S. to remain in the custody of the Cabinet until a determination could be made as to "the future propriety of returning the child to her maternal parent." From this order of the circuit court, the Cabinet now appeals.

The Cabinet does not deny that its desire is for the parental rights of S.B.S. to be terminated so that T.S.'s current foster parents can adopt T.S. T.S. is presently still in foster care with the relatives of S.B.S. and has been there since November of 1995. The evidence at the hearing established that T.S. is a happy, healthy seven-year-old who is doing very well in her Fayette County Magnet School.

The Cabinet argues that the trial court's conclusion of law that S.B.S. could not have abandoned T.S. since she consented to her commitment to the Cabinet was in error, while S.B.S. argues that such determination was a finding of fact which could not be overturned unless there was no substantial evidence to support the finding. It is noted that a trial court's findings of fact with regard to a termination of parental rights petition are governed by the clearly erroneous standard set forth in CR 52.01. R.C.R. v. Commonwealth Cabinet for Human Resources, Ky. App., 988 S.W.2d 36 (1999). It has been held the state must present its proof in a termination of parental rights case by clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). In our view, the

determination of whether a parent has abandoned a child is a mixed question of fact and law. In the present case, the significant facts relative to S.B.S.'s actions are essentially undisputed. It is not disputed that because of S.B.S.'s drug problem, she could not care for T.S. and, thus, consented to T.S.'s commitment to the Cabinet in 1993. It is further undisputed that S.B.S. thereafter failed to make any effort to comply with the Cabinet's treatment plan and continued to abuse drugs until 1998. The sole basis of the trial court's ruling that there was no abandonment in this case was that S.B.S. consented to T.S.'s initial commitment to the Cabinet. We believe this was a conclusion of law, an erroneous conclusion of law.

KRS 625.090(2) (a) provides:

(2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

(a) That the parent has abandoned the child for a period of not less than ninety days;

There is no statutory definition of "abandon" relative to KRS 625.090(2) (a). In O.S. v. C.F., Ky. App., 655 S.W.2d 32, 34 (1983), our Court stated, "Generally, 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." In our view, simply because a parent voluntarily gives her child over to the Cabinet for commitment because she is addicted to drugs does not preclude a finding of abandonment. When S.B.S. allowed T.S. to be committed to the Cabinet because

she was addicted to drugs and thereafter made no good faith attempt to stop abusing drugs and meet the Cabinet's treatment plan for almost five years, she clearly demonstrated her intent to forego and relinquish all parental duties and claims. Under the trial court's logic, a parent who wishes to continue abusing drugs need only consent to the child's commitment to the Cabinet in order to reclaim the child years later when she has finally gotten clean. By this time, the child has either languished in the foster care system or, as in the present case, has bonded with a foster care family and must suffer the emotional consequences of being torn therefrom.

Even if we assume, for the sake of S.B.S.'s argument, that S.B.S. did take care of T.S. for some of the time that T.S. was placed with S.B.S.'s mother, S.B.S.'s mother was still the one legally responsible for T.S. and S.B.S. was admittedly still using drugs during this period. Thus, S.B.S. should not have been caring for T.S. Further, the state need only prove that the abandonment was for at least 90 days. Prior to T.S.'s placement with her grandmother, T.S. had been in foster care for over a year. Likewise, after the grandmother's death when T.S. was placed with the current foster parents in 1995, she saw T.S. only once and made no serious attempt to meet the Cabinet's treatment plan until 1998.

Accordingly, we reverse the trial court's finding that S.B.S. did not abandon T.S., vacate the judgment, and remand to the trial court for further proceedings on the petition for

involuntary termination of both S.B.S.'s rights and R.T.'s rights.

ALL CONCUR.

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