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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000553-MR

R.W. APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 98-AD-00092

CABINET FOR FAMILIES AND CHILDREN,
COMMONWEALTH OF KENTUCKY, AS PETITIONER
AND NEXT FRIEND OF THE MINOR CHILD, Z.W. APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment involuntarily terminating appellant's parental rights to his infant son. Appellant argues the court had insufficient grounds to terminate his parental rights. Upon review of all the evidence, we believe there was sufficient evidence to terminate appellant's parental rights pursuant to KRS 625.090.

Appellant, R.W., and J.S. met in November of 1997 at an AA meeting when R.W. was on parole from a thirty-year sentence for three robbery convictions and an assault conviction which

will be discussed further below. At that time, R.W. was residing at the Droege House, and completion of the program at the Droege House was a condition of his parole. R.W. and J.S. thereafter began an intimate relationship, and in December of 1997, J.S. became pregnant with Z.W., born September 11, 1998. R.W. testified that he learned J.S. was pregnant in December of 1997.

At the time R.W. and J.S. were seeing each other, J.S. was married to S.S., who was the father of two other of J.S.'s children, B.S. and S.S. In July of 1997, J.S. voluntarily committed B.S. and S.S. to the custody of the Cabinet for Families and Children ("the Cabinet") due to drug and alcohol addiction problems and her inability to provide food, clothing and shelter for the children. It is undisputed that R.W. knew that J.S.'s two other children had been committed to the custody of the Cabinet at the time she became pregnant with Z.W.

R.W. was terminated from the Droege House program one week before his completion thereof because of signing in late, his refusal to fully cooperate within the AA program, and his inability to maintain employment. On March 16, 1998, R.W.'s parole was revoked because of his failure to complete the Droege House program and he was sent back to prison. He was still incarcerated at the time of Z.W.'s birth and at the time of the termination hearing in June of 1999. At the termination hearing, R.W. testified that he would be eligible for parole in July of 1999, and the court stated in its order entered February 4, 2000 that R.W. was out on parole at that time.

Immediately upon giving birth to Z.W., Z.W. was committed to the custody of the Cabinet because of J.S.'s continued drug and alcohol abuse and her inability to provide for the basic needs of the child. Z.W. was placed in the same foster home with his two other siblings where he presently resides. Upon learning of the birth of Z.W., R.W. filed a pro se motion with the Kenton District Court seeking to be adjudged the father of Z.W. (S.S. was at that time the legal father of Z.W. due to the presumption of paternity because of his marriage to J.S. at the time of Z.W.'s conception.) and seeking sole custody of Z.W. Along with the motion, R.W. filed an affidavit stating that he was the natural father of Z.W. In the motion, R.W. also asked that his mother, G.W., be granted temporary custody of Z.W. for the time that he remained in prison. This motion was dated September 16, 1998. At the termination hearing, it was stipulated that, through clerical error, this motion was placed in the wrong juvenile file and no response was ever filed thereto. R.W. testified that he never received a response to his motion, although he also sent a copy of said motion to the case worker for Z.W. at the Cabinet.

Thereafter, R.W. began writing letters to Z.W.'s then case worker, Beverly Ruble-Ruparel, asking how he could go about getting visitation and custody of Z.W. Ruble-Ruparel responded by setting a treatment plan for R.W. which required that he: attend group and individual counseling in prison; pay $5 a week in child support; cooperate with Cabinet workers; write a letter to Z.W. explaining why he was absent from his life at this time;

follow prison rules; read a nurturing book sent by the Cabinet to R.W.; and provide a current psychological profile. Ruble-Ruparel testified that at that time, she checked into the possibility of G.W. being custodian of Z.W. However, she discovered that G.W. had a conviction for trafficking in marijuana and had suffered nervous breakdowns in the past and was thus precluded from being considered as a possible custodian.

It is undisputed that R.W. completed the requirements of the treatment plan except for providing the Cabinet with a current psychological profile and following prison rules which we shall discuss further below. As to the psychological profile, R.W. testified that when he asked the prison psychologist for a new psychological evaluation, he was told that his evaluation from 1996 was still considered current and that he could not obtain a new one at that time. Hence, at the termination hearing, R.W. provided the court with the 1996 evaluation.

R.W. was never allowed visitation with Z.W. In November of 1998, R.W. was informed that the treatment goal for Z.W. had been changed to termination of parental rights and adoption (the Cabinet had previously made the decision to seek termination of parental rights as to B.S. and S.S. in January of 1998). Ruble-Ruparel told R.W. he could nevertheless continue with his treatment plan in the event the court did not terminate R.W.'s parental rights.

On December 4, 1998, the Cabinet filed a petition for the involuntary termination of the parental rights of J.S. and S.S. as to B.S., S.S., and Z.W., and of R.W. as to Z.W. An

affidavit by J.S. was filed in the record stating that R.W. was the natural father of Z.W. At the termination hearing held on June 2, 1999 and June 9, 1999, J.S. did not contest the termination of her parental rights as to all three children. S.S. did not respond to the petition, nor did he attend the hearing. R.W. attended the hearing and contested the termination of his rights as to Z.W.

The criminal record of R.W. was entered in the record which established that R.W. had been convicted on February 18, 1986 of first-degree robbery and first-degree assault for shooting a priest in the course of a robbery on November 14, 1984. He received two 15-year sentences, to be served consecutively. Also on February 18, 1986, R.W. was convicted of first-degree robbery for the hold-up of a grocery store on September 26, 1985. For this conviction, he was sentenced to ten years' imprisonment to be served concurrently with the previously mentioned sentences. R.W. was also convicted of second-degree robbery for an offense committed on September 26, 1985 for which he was sentenced to five years' imprisonment, also to run concurrently with the other sentences.

J.S. testified at the hearing that when she was seeing R.W., he had been physically abusive toward her. She stated that he had slapped her, choked her, and hit her about the head and face a couple of times. During one incident in which they were attending an AA dance, she alleged that he choked her until she finally broke free and ran outside. She went on to state that even after finding out she was pregnant, he had hit her in the

head and face. Ruble-Ruparel testified that when she confronted R.W. about these accusations, he stated to her that he wouldn't admit that he hit her, but wouldn't deny that he laid his hands on her. At the termination hearing, R.W. denied ever hitting or being in any way physically abusive toward J.S.

Also admitted at the hearing was R.W.'s prison record which included numerous disciplinary violations, several of which involved fighting and other forms of physical violence. Even after returning to prison due to his parole revocation, R.W. was cited for tampering with a prison locking device and for becoming belligerent with guards after being caught.

R.W.'s 1996 psychological evaluation revealed he was:

> an individual who is under stress, who has problems in control and in coping with the problems of everyday living. . . . There is projective evidence that he over-values his personal worth which may dominate his perception of the world and contribute to a lack of concern for the integrity of others. . . .
> He is egocentric and off balance about himself. He tends to be dissatisfied, anxious, erratic in the way he approaches his world for inner satisfaction. He is insecure, sometimes passive-dependent, with low self-esteem, and poor social skills. He is suspicious and untrusting and tends toward poor judgments and bad choices. He is unaware of the consequences of his choices as they relate to others. He lacks insight into his motivations. . . .

The foster mother of all three children testified that Z.W. was thriving in her care and was a well-adjusted, happy baby. She further stated that he has bonded with her and her husband, as well as with his two siblings.

On February 4, 2000, the court entered its findings of fact, conclusions of law and order terminating the parental rights of J.S. and S.S. as to B.S., S.S., and Z.W., and of R.W. as to Z.W. From that order, R.W. now appeals.

R.W. maintains that there was insufficient grounds to warrant termination of his parental rights since he never had the opportunity to visit with the child or otherwise prove that he was capable of caring for the child. KRS 625.090 sets forth the grounds for involuntary termination of parental rights. The statute requires a finding 1) that the child, by clear and convincing evidence, is an abused or neglected child pursuant to KRS 600.020(1), 2) that termination would be in the best interest of the child, and 3) that, by clear and convincing evidence, at least one of the factors in KRS 625.090(2) exists. The trial court has broad discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. Department for Human Resources v. Moore, Ky. App., 552 S.W.2d 672 (1977). As to the standard of review in a termination action, this Court has stated:

> This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings will not be disturbed unless there exists no substantial evidence in the record to support its findings.

M.P.S. v. Cabinet for Human Resources ex rel. S.A.S., Ky. App., 979 S.W.2d 114, 116 (1998), (citing V.S. v. Commonwealth, Cabinet for Human Resources, Ky. App., 706 S.W.2d 420, 424 (1986)).

It should first be noted that the Cabinet did not seek termination of R.W.'s parental rights on grounds of abandonment. KRS 600.020(1)(g); KRS 625.090(2)(a). Rather, the Cabinet alleged and the court found that R.W.:

> 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.

KRS 625.090(2)(e). Further, the court found that termination of R.W.'s parental rights was justified under KRS 625.090(2)(g) which provides as follows:

> 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.

As it happens, the factors alleged in KRS 625.090(2)(e) and (g) are also essentially two of the same factors in KRS 600.020(d) and (h) which constitute an abused or neglected child.

We acknowledge, as did the trial court, that while incarceration alone may not constitute abandonment justifying termination of parental rights, it is a factor to be considered. Cabinet for Human Resources v. Rogeski, Ky., 909 S.W.2d 660 (1995); J.H. v. Cabinet for Human Resources, Ky. App., 704 S.W.2d 661 (1985). In the present case, R.W. was incarcerated from the time of Z.W.'s birth through the termination hearing and was,

thus, unable to provide for the child's needs during that time. Moreover, R.W. was aware of Z.W.'s impending birth at the time he violated his parole. R.W. knew that J.S.'s two other children had been committed to the Cabinet because of her drug and alcohol addiction and yet allowed himself to be sent back to prison prior to Z.W.'s birth. If he had really been concerned with Z.W.'s welfare, as he claims, he would have fulfilled the terms of the Droege House program to maintain his parole and be available to the child at birth.

The trial court also properly looked to R.W.'s tendency toward violence in assessing whether he was capable of providing essential parental care and protection to Z.W. R.W. has been convicted of four crimes involving physical violence or threatened physical violence. The prison disciplinary violations demonstrate that this pattern of behavior is continuing. The physical violence directed at J.S. before and during her pregnancy we see as the most disturbing evidence of his violent propensity. We agree with the trial court that R.W.'s propensity towards violence would put Z.W. at risk if R.W. were to have custody of the child.

R.W.'s 1996 psychological profile indicates that he would have problems responding to the needs of a child and putting the needs of a child before his own. While R.W. did demonstrate the desire to provide for Z.W. by voluntarily paying $5 a week in child support pursuant to the treatment plan, we believe a much more persuasive indication of this commitment

would have been if R.W. had maintained employment while at the Droege House and avoided parole revocation.

As to R.W.'s contention that he demonstrated his commitment to being a father to Z.W. by filing the petition to establish paternity and for custody, we note that, although the petition was misfiled through no fault of R.W.'s, the petition did not notice the matter for a hearing, which would have brought the matter before the court regardless of where it was filed. Moreover, it was R.W.'s responsibility to follow up with the court to determine where the matter stood on the court's docket.

R.W. also claims that because he successfully completed his treatment plan, he should be given the opportunity to demonstrate his ability to be a father to Z.W. The Cabinet conceded that R.W. cooperated in completing most of the terms of the treatment plan, with the exception of the requirement that he follow prison rules while incarcerated. However, Ruble-Ruparel testified that during the course of his treatment plan, the Cabinet did not feel that R.W. demonstrated sufficient changes in his thinking patterns that would indicate he could be a fit parent. For instance, in one of R.W.'s letters, he stated that he would not stop Z.W. from having contact with J.S., who R.W. knew to be a drug and alcohol abuser.

Finally, R.W. argues that sufficient services were not provided to him pursuant to KRS 620.130. KRS 620.130(2) provides in pertinent part:

> If the court orders the removal or continues the removal of the child, services provided to the parent and the child shall be designed to promote the protection of the child and

> the return of the child safely to the child's home as soon as possible. The cabinet shall develop a treatment plan for each child designed to meet the needs of the child. The cabinet may change the child's placement or treatment plan as the cabinet may require.

Under the circumstances of R.W.'s incarceration, we do not see what other services could have been provided to R.W. The Cabinet did formulate a treatment plan which took R.W.'s incarceration into account and continued to communicate with R.W. regarding Z.W.'s placement during his incarceration.

In light of the evidence regarding Z.W.'s progress in foster care, R.W.'s history of violence, including domestic violence, R.W.'s psychological impairments, and R.W.'s failure to stay out of prison despite the knowledge that he was going to have a child, we believe there was substantial clear and convincing evidence that: Z.W. was an abused or neglected child within the meaning of KRS 600.020(1); it was in the best interest of Z.W. that R.W.'s parental rights be terminated; that R.W. is incapable of providing Z.W. with essential parental care, protection, food, clothing, shelter, medical care and education; and there is no reasonable expectation of significant improvement in R.W.'s conduct in the immediately foreseeable future, given the age of Z.W. As the trial court aptly stated:

> The Respondent, [R.W.], chose a violent and criminal lifestyle in the past. He also chose not to change his lifestyle after his first parole in 1997. As a result, he left his child, [Z.W.], to be born without capable parental care and to be placed in foster care for the first year of his life. The child deserved better, and still deserves to have parents who will provide for his physical and emotional needs. He deserves a safe and loving home.

Accordingly, we affirm the judgment involuntarily terminating R.W.'s parental rights.

For the reasons stated above, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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