

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002791-MR

D.R., BY AND THROUGH V.L.C.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 99-FC-000441

J.W.R.

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: DYCHE, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: V.L.C., mother of D.R., filed, on behalf of D.R., a complaint, in the Jefferson Family Court, for the involuntary termination of J.W.R.'s parental rights. J.W.R. is the biological father of D.R. V.L.C. appeals from an October 25, 2000 final judgment of the Jefferson Family Court that dismissed her petition for termination of J.W.R.'s parental rights. The Jefferson Family Court held that, while J.W.R. had neglected and abandoned D.R., it was not in the best interest of D.R. to terminate the father's parental rights. We affirm.

J.W.R. and V.L.C. are the parents of D.R., who was born on June 11, 1996. J.W.R. and V.L.C. were not married, and before D.R. was born, they had ended their relationship with one

another. V.L.C. claimed that she ended the relationship due to domestic violence. On March 13, 1996, V.L.C. filed a domestic violence petition that resulted in an emergency protective order (EPO) being issued against J.W.R. V.L.C. never substantiated her claims of domestic violence since she failed to appear at a hearing scheduled for March 25, 1996. As a result, the petition and EPO against J.W.R. were dismissed. J.W.R. claimed the relationship ended because he started dating another woman.

On July 26, 1996, V.L.C. filed a paternity suit naming J.W.R. as D.R.'s father. J.W.R. requested a DNA test to establish his paternity. The test proved that J.W.R. was in fact D.R.'s father and the Jefferson Family Court entered a summary judgment to that effect. On August 14, 2000, the family court ordered J.W.R., who was not present, to pay \$51.16 per week in current child support and to pay \$13.84 per week towards child support past due.

On January 21, 1999, V.L.C. filed, on behalf of D.R., the petition to terminate, involuntarily, J.W.R.'s parental rights. V.L.C. alleged that J.W.R. had failed to pay child support; had denied paternity; had abandoned their daughter for more than six months; had attempted to physically harm V.L.C.; had failed to provide parental care and protection to D.R.; and had repeatedly and continuously failed to provide food, clothes, shelter, medical care, and educational opportunities for D.R. with no reasonable expectation that he would improve his parental skills. On October 20, 2000, the parties tried the case before the bench. On October 25, 2000, the Jefferson Family Court handed down its final judgment, findings of fact and conclusions

of law. Pursuant to Ky. Rev. Stat. (KRS) 625.090(1), the Jefferson Family Court found by clear and convincing evidence that J.W.R. had neglected and abandoned D.R., as defined by KRS 600.020(1). However, the family court found by clear and convincing evidence that it was not in D.R.'s best interest that J.W.R.'s parental rights be terminated; thus, it dismissed V.L.C.'s petition. V.L.C. appeals.

On appeal, V.L.C. raises only one assignment of error, that the Jefferson Family Court abused its discretion when it found by clear and convincing evidence that J.W.R.'s parental rights should not be terminated.

V.L.C. argues that the family court's finding that it was in D.R.'s best interest not to terminate J.W.R.'s parental rights was not supported by clear and convincing evidence as required by M.P.S. v. Cabinet for Human Resources, Ky. App., 979 S.W.2d 114 (1998) and Rowan v. Holt, 253 Ky. 718, 70 S.W.2d 5 (1934). V.L.C. argues that KRS 625.090(3)(d), which states the court shall consider, "the efforts and adjustments the parent has made in his circumstances, conduct or condition, to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child," does not apply because D.R. never lived with J.W.R. and would not be returning to his home even if the family court did not terminate his parental rights; therefore, the family court should not have considered KRS 625.090(3)(d) in determining whether or not to terminate. V.L.C. argues that, because J.W.R. had not by then made the effort to have a relationship with D.R., the family court's conclusion that he should have a further opportunity to

develop one was not based on clear and convincing evidence. V.L.C. argues that, since J.W.R. did not have an existing relationship with D.R., D.R. would suffer no harm by continuing not to have a relationship with him. V.L.C. argues that the family court's conclusion that D.R. would benefit from a loving relationship with J.W.R. and his family was not supported by clear and convincing evidence. V.L.C. argues that all the evidence points, by clear and convincing evidence, to the conclusion that J.W.R. will not improve his parental skills and that D.R. will be harmed by having a relationship with J.W.R. because D.R. now refers to V.L.C.'s current husband as father. With all of these arguments we disagree.

Briefly, to terminate an individual's parental rights regarding a named child, the circuit court must make a two pronged determination. First, it must find that, "[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"; or, "[t]he child is found to be abused or neglected, as defined in KRS 600.020(1), by the Circuit Court," in a parental termination action; or, "[t]he parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child." KRS 625.090(1)(a)(1-3). Second, the circuit court must also find that termination is in the best interest of the child. KRS 625.090(1)(b). The circuit court must make these two findings by clear and convincing evidence. KRS 625.090(1).

A circuit court has great discretion in making each of these determinations. R.C.R. v. Commonwealth, Cabinet for Human Resources, Ky. App., 988 S.W.2d 36, 38 (1998), quoting Department

for Human Resources v. Moore, Ky. App., 552 S.W.2d 672, 675 (1977). "This Court's 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 of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings." R.C.R. v. Commonwealth, Cabinet for Human Resources, supra, quoting V.S. v. Commonwealth, Cabinet for Human Resources, Ky. App., 706 S.W.2d 420, 424 (1986). See also M.P.S. v. Cabinet For Human Resources, Ky. App., 979 S.W.2d 114 (1998).

After reviewing the record, we find that the family court's conclusion that termination of J.W.R.'s parental rights would not be in the best interest of D.R. was supported by substantial evidence. While D.R. never lived with J.W.R. and would not be residing with him, we find that it was appropriate for the family court to consider, "the efforts and adjustments" J.W.R. had made, "in his circumstances, conduct, or conditions." J.W.R. testified that he desired to be a father to D.R. and to develop a close and loving relationship with her. Although the family court also found that J.W.R. had been absent from D.R.'s life and had made little effort to establish a relationship with her, the family court also found J.W.R. both sincere and credible in his desire. At trial, J.W.R. and his mother both testified that J.W.R. had sole custody of one of his older children, and J.W.R.'s mother testified that her son was a loving and caring parent to the child in his custody as well as to his other children. She testified, further, that J.W.R., upon finding out he was D.R.'s father, sincerely wished to establish a paternal

relationship with D.R. J.W.R.'s mother also testified that she and J.W.R.'s father were willing to help J.W.R. to establish and maintain a relationship with D.R. At trial, V.L.C. did not dispute J.W.R.'s parenting skills regarding his other children, and the family court noted that V.L.C. had moved residences without telling J.W.R.; had placed a block on her telephone so she could not receive J.W.R.'s telephone calls and allegedly had told J.W.R. that he was not D.R.'s father.

Usually, of course, a child benefits from a close and loving relationship with a parent. V.L.C. offered no evidence at trial that D.R. would be emotionally, mentally, or physically harmed by having a relationship with her biological father. As for her 1996 allegations of domestic violence, V.L.C. never substantiated those allegations, and the family court, as fact-finder, had sole discretion to weigh the credibility of V.L.C.'s allegations. The court did not find those allegations to be persuasive.

"In a trial without a jury, the findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be 'clearly erroneous.' This principle recognizes that the trial court had the opportunity to judge the witnesses' credibility. Without the rule, actions would be tried anew upon appeal." R.C.R. v. Commonwealth, Cabinet for Human Resources, supra at 39, quoting Ky. R. Civ. Proc. (CR) 52.01 and Stafford v. Stafford, Ky. App., 618 S.W.2d 578 (1981). We will not deviate from this well-founded rule nor will we retry this action anew upon appeal. We defer to the family court, which had the best opportunity to hear and weigh the evidence presented.

Therefore, the judgment of the Jefferson Family Court
is affirmed.

GUIDUGLI, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Teddy B. Gordon
Louisville, Kentucky

BRIEF FOR APPELLEE:

Oliver K. Metzertott
Louisville, Kentucky