RENDERED: DECEMBER 20, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002769-MR

W. S. APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
ACTION NO. 00-AD-00036

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES
AND CHILDREN APPELLEE

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

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: W.S. appeals from an order of the Henderson Circuit Court, entered November 26, 2001, terminating his and his wife's parental rights with respect to D.S and authorizing the Cabinet for Families and Children to place D.S. for adoption.[1] W.S. contends that the trial court's decision was premature, curtailing his efforts to provide a home for his son, and unjustified, based unduly on the fact that W.S. had recently been incarcerated. We disagree with both contentions and affirm.

[1]The wife, C.S., has not appealed.

W.S. and his wife, C.S., had experience with the Cabinet even before D.S. was born. In 1991 the couple's older child, W.S. Jr., and C.S.'s two children from prior relationships were removed from the couple's home after a neighbor rescued them from a fire apparently set by the children while left unattended. W.S. Jr. was placed in the family of W.S.'s brother where he has remained ever since. The other two children were eventually returned to C.S. In February 1993, however, the Cabinet again removed those children from the couple's home and conditioned their return on the couple's overcoming alcohol-abuse and domestic-violence problems. The couple had access to various social services, but their problems continued. They drank and fought, amassing numerous misdemeanor convictions, and went through periods of living apart. The Cabinet deemed C.S.'s living conditions too unstable for custody of the children, although its goal for her remained family reunification.

D.S. was born into this turmoil in March 1994. In March 1996, just prior to his second birthday, he too was discovered unattended by a neighbor. The Cabinet removed him from the home, and his return, like that of the other two children, was conditioned upon C.S's. and W.S.'s undergoing treatment for substance abuse and achieving a measure of stability. From the removal in 1996 until June 1998, W.S. claims to have visited D.S. regularly, but during those two years he provided only minimally for the support of his son and made no progress toward the modest goals the Cabinet had established for him.

In about June 1998, W.S. was imprisoned for drug trafficking, and even his visitation with D.S. ceased. Although he claims to have written about his incarceration promptly and repeatedly to his social worker, the Cabinet had no record of the correspondence and no knowledge of W.S.'s whereabouts. It regarded him simply as missing until about December 2000. At that time it initiated termination proceedings for all three children, and tracked W.S. down in order to serve him with process.

The trial court conducted an evidentiary hearing on July 31, 2001. Both W.S. and C.S. testified. C.S. conceded that she had had almost no contact with any of the children since their removal from her care; that her income was limited to about $500.00 per month in disability benefits; and that alcohol, anger, and jail continued to be problems for her. W.S. conceded that he had been in prison and had done nothing for two years to contact either the Cabinet or his child beyond sending the plainly ineffective letters to his social worker. He had completed substance abuse and anger management programs in prison, however, and he had recently been granted parole. He claimed that upon his release he was to work at a farm where he would live in a house big enough for his family. He asked the court to postpone terminating his parental rights until he had had a chance to demonstrate to the Cabinet that he was capable of providing for D.S.

The trial court denied W.S.'s request. It acknowledged W.S's good intentions, but ruled that after more than five years

with the family that wanted to adopt him and little contact during that time with his parents, D.S would best be served by being allowed to remain where he was. It is from that ruling that W.S. has appealed. He contends that the Cabinet should have discovered his whereabouts much sooner than it did and helped him to maintain contact with D.S. Because the Cabinet did not do this, he further contends, the trial court should not have given much significance to his recent three-year absence from D.S.'s life. Neither contention is persuasive.

A petitioner seeking the termination of parental rights must demonstrate by clear and convincing evidence all of the following: that the child is abused or neglected, that there exists at least one of the factors listed in KRS 625.090(2), and that termination would be in the best interest of the child.[2] There is no dispute in this case about the first two requirements. The Cabinet introduced the 1996 district-court judgment duly adjudging D.S. a neglected child, and D.S. had clearly "been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights," which is factor (j) of KRS 625.090(2).[3] W.S. contends, however, that the trial court abused its discretion by ruling that termination is in D.S.'s best interest. A trial court abuses its broad discretion in making a best-interest

[2]KRS 625.090.

[3]In fact, D.S. had been with his foster family for more than forty-eight months when the Cabinet filed the termination petition.

determination if its findings of fact clearly lack the requisite evidentiary support or if it fails to apply or misapplies the factors listed in KRS 625.090(3).[4]

Among the factors the trial court is obliged to consider are the Cabinet's efforts to bring about family reunification and the parents' efforts to provide a stable and nurturing home.[5] W.S. insists, rightly, that the Cabinet has a duty to facilitate family reunification.[6] We agree with W.S., furthermore, that the Cabinet's handling of his case was not perfect. Ideally, the Cabinet would have searched for him as diligently when he was first missed as when it decided to seek termination of his rights. We do not agree, however, that the Cabinet failed to make reasonable efforts on this family's behalf, and reasonable efforts are all that is required.[7]

The Cabinet began working with this couple in 1991, so that in 1996, when D.S. was removed to the Cabinet's custody, W.S. had long known that certain of his habits were not compatible with parenthood, and he had known as well of various community services where he could seek help to change those habits. Despite this history, the Cabinet was patient. For two more years W.S. continued as before. He visited his son, but he was content to have him loved and raised by someone else. Not

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[4]R. C. R. v. Commonwealth, Ky. App., 988 S.W.2d 36 (1998).

[5]KRS 625.090(3)(c) and (d).

[6]L. B. A. v. H. A., Ky. App., 731 S.W.2d 834 (1987); L. S. J. v. E. B., Ky. App., 672 S.W.2d 937 (1984).

[7]KRS 625.090(3)(c) and KRS 620.020(9).

only did his ability as a caretaker and provider not improve during those years, but W.S. did not even try to improve by enlisting in the programs the Cabinet recommended. On the contrary, he made matters worse by resorting to serious crime. When W.S. disappeared in 1998, the Cabinet had every reason to give up on him, and had the Cabinet known why he had disappeared, very likely it would have.

W.S. points out that a parent's incarceration does not, by itself, establish that the parent has abandoned his child.[8] In conjunction with other facts tending to show that the prisoner is unsuited for parenthood, however, incarceration is a serious factor that the trial must take into consideration.[9] A parent's responsibility to his child is not tolled during imprisonment, after all, and a court may rightly take into consideration the extent to which a prisoner understands and accepts that fact.

Here, the trial court did not base its decision on W.S.'s incarceration alone. It noted D.S.'s long period of foster care even before the incarceration, and it noted W.S.'s lack of effort during his incarceration to reestablish contact. At the time of the hearing, as a result, D.S.'s foster mother had had him for more than five years, and for more than three years the seven-year-old D.S. had known no other parent. Although W.S. is to be congratulated for using his time in prison to confront his problems and although we do not doubt W.S.'s sincere

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[8]J. H. v. Cabinet, Ky. App., 704 S.W.2d 661 (1985); L. S. J. v. E. B., *supra.*

[9]M. P. S. v. Cabinet for Human Resources, Ky., 979 S.W.2d 114 (1998); Cabinet v. Rogeski, Ky., 909 S.W.2d 660 (1995).

affection for D.S., the trial court did not abuse its discretion by ruling that D.S. has waited long enough. It is now in the child's best interest to be firmly established in the stable family he knows and not subjected to the substantial risk that W.S. will again prove incapable of providing for him. Accordingly, we affirm the November 26, 2001, order of the Henderson Circuit Court.

ALL CONCUR.

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