RENDERED: July 28, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002162-ME

D.W.B., JR. APPELLANT

v.

APPEAL FROM WARREN FAMILY COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 05-AD-00050

COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH AND FAMILY SERVICES,
AS NEXT FRIEND OF K.J.R.,
A CHILD APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

BUCKINGHAM, SENIOR JUDGE: D.W.B., Jr., appeals from an order of the Warren Family Court terminating his parental rights to his child, K.J.R. We affirm.

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[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

On May 10, 2004, E.A.R. gave birth to a male child, K.J.R. The birth certificate makes no reference to the child's father. Due to continuing drug problems, E.A.R. entered a drug rehabilitation program in early October 2004. E.A.R. left K.J.R. in the care of a friend.

While in the care of E.A.R.'s friend, K.J.R. was taken to the hospital on October 16, 2004. It was determined that the child had ingested cocaine. As a result, the Cabinet for Health and Family Services was contacted. Two days later, K.J.R. was placed in the Cabinet's custody.

After the Cabinet learned that D.W.B. was alleged to be the child's father, a Cabinet social worker assigned to the case set up a case plan involving D.W.B. While the plan set out goals and objectives for D.W.B., the Cabinet was unable to locate him to inform him of the plan. Meanwhile, another branch of the Cabinet had been able to locate D.W.B., who was in prison, and it had initiated a paternity action against him on October 13, 2004. The court appointed a guardian ad litem for D.W.B. in that case, and the guardian ad litem was able to maintain contact with D.W.B. throughout D.W.B.'s various transfers in the prison system.

Based on E.A.R. admitting that she had left the child in the care of an inappropriate provider, on November 30, 2004, the court entered a finding of neglect. Because E.A.R. was in

jail at the time, the court found that K.J.R. should remain in the Cabinet's custody.

As the dependency, neglect, and abuse case was proceeding, D.W.B. continued to deal with the paternity action. A paternity test was ordered by the court on January 12, 2005. The court did not receive results of the paternity test until June 6, 2005. During the period from October 2004 when the action was filed until June 2005 when the paternity test results were received, D.W.B. remained in prison and made no attempt to become involved in the child's life.

During the period E.A.R. continued to struggle with her addictions, the Cabinet social worker assigned to K.J.R.'s case managed to discover more specific identifying information on D.W.B. Because E.A.R. continued to have substance abuse problems, the Cabinet elected to change its permanency plan for K.J.R. from reunification to involuntary termination of parental rights and adoption. This decision was made on April 4, 2005, more than two months before the paternity test results would be available. The petition for termination of the parental rights of E.A.R. and D.W.B. was filed by the Cabinet on May 13, 2005.

On June 19, 2005, the family court entered a summary judgment in the paternity case, determining that D.W.B. was the father of K.J.R. The judgment specifically stated that

visitation was "reserved until such time as the respondent is released from custody."

A hearing was held in the termination of rights case on August 31, 2005. D.W.B. participated in the hearing and presented evidence through his own testimony, as well as testimony from his sister. E.A.R. elected to proceed without presenting any additional evidence on her behalf. Further, witnesses testified on behalf of the Cabinet.

The court found that D.W.B. had failed to provide K.J.R. with essential parental care and protection for more than six months. The court also found that D.W.B., for reasons other than poverty alone, had failed to provide or was incapable of providing essential food, clothing, shelter, medical care, or education. Following the entry of findings of fact and conclusions of law and the entry of an order terminating his parental rights on September 9, 2005, D.W.B. filed this appeal.

As noted by this court in O.S. v. C.F., 655 S.W.2d 32 (Ky.App. 1983), the parent's interest in a termination of rights proceeding has a constitutional dimension to it. Citing to Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the court stated:

> Parental rights are so fundamentally esteemed under our system that they are accorded due process protection under the 14th Amendment to the United States

> Constitution, when sought to be severed at the instance of the state.

O.S. v. C.F. at 32. In a subsequent case, L.B.A. v. H.A., 731 S.W.2d 834 (Ky.App. 1987), this court again emphasized the constitutional dimension to parental rights when, quoting Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), it stated:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," ... "basic civil rights of man," ... and "[r]ights far more precious ... than property rights." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, ... and the Ninth Amendment. (Citations omitted.)

Id. at 835. Given this constitutional dimension, the burden of proof placed on the Cabinet is one of clear and convincing evidence. See O.S. v. C.F., 655 S.W.2d at 32; KRS[3] 625.090(1).

This case was tried before the court without a jury. As such, the trial court heard the evidence and entered its findings of fact and conclusions of law. On appellate review, such "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR[4] 52.01. In addition, in reviewing findings of fact by the trial

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[3] Kentucky Revised Statutes.

[4] Kentucky Rules of Civil Procedure.

court, "the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that [s]he abused [her] discretion." Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

The grounds for the involuntary termination of parental rights are set out in KRS 625.090. As noted by this court in Cabinet for Families and Children v. G.C.W., 139 S.W.3d 172 (Ky.App. 2004),

> Before a circuit court may terminate such rights, it must find--by clear and convincing evidence--(1) that the child is an "abused or neglected child, as defined by KRS 600.020(1)" and (2) that termination would be in the child's best interest. KRS 625.090(1). After that threshold is met, the court must find the existence of one of the numerous grounds recited in KRS 625.090(1) (including abandonment, infliction of serious physical injury or emotional harm, sexual abuse, or neglect in providing access to basic survival needs) in order to terminate parental rights.

Id. at 175-76.

KRS 625.090(1) sets forth two parts that must be satisfied before termination can be considered:

> The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> **(a) 1.** The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

> **2.** The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; **or**
>
> **3.** The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; **and**
>
> **(b)** Termination would be in the best interest of the child. (Emphasis added.)

See KRS 625.090 (1). If the threshold requirements are met, the court must then find by clear and convincing evidence that one or more of the grounds listed in KRS 625.090(2) are present before termination can be ordered. The grounds found by the court to be applicable to D.W.B. include:

> (e) That the parent, 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;
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> (g) 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;

See KRS 625.090 (2).

In regard to the first part of the necessary requirements, the court concluded the threshold requirements had been established. First, the court found K.J.R. had been adjudged by a court of competent jurisdiction in a prior dependency, neglect, and abuse action to be neglected. In particular, the court recognized its own finding of neglect entered November 30, 2004. Second, the court found termination would be in K.J.R.'s best interests. Neither of these findings has been challenged by D.W.B.

As to the second part of the requirements under KRS 625.090, the court concluded:

> E.A.R. and D.W.B. Jr., for a period of not less than six (6) months, have continuously or repeatedly failed or refused to provide or have been substantially incapable of providing essential parental care and protection for the child and there is no reasonable expectation of improvement in parental care and protection, considering the age of the child.
>
> E.A.R. and D.W.B. Jr., for reasons other than poverty alone, have continuously or repeatedly failed to provide or are incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the child's well-being and there is no reasonable expectation of significant improvement in the parents' conduct in the

> immediately foreseeable future, considering
> the age of the child.

As it relates to D.W.B., the court took particular notice of the fact that he did not come forward and seek involvement with K.J.R. after the paternity action was filed in October 2004. Nor did he come forward to actively seek involvement in May 2005 when the termination action was filed. Rather, he waited until he received the results of the paternity test in June 2005. As to alternative placement with D.W.B.'s sister or mother, the court noted that neither of the women came forward to actively seek a role with the Cabinet. Finally, the court noted that while D.W.B. was eligible for parole in January 2006, there was no guarantee parole would be granted.

D.W.B. argues the court terminated his rights based on the actions of E.A.R. Alternatively, he claims it was based solely on the fact that he was incarcerated. D.W.B. argues that neither ground supports the findings under KRS 625.090(2). D.W.B. insists that the court, in effect, "treated both of the parents in this case as a package deal[.]"

D.W.B.'s argument ignores the actual findings of the court in this case. While it is true that this court in J.H. v. Cabinet for Human Resources, 704 S.W.2d 661, 663 (Ky.App. 1986), concluded that "incarceration alone can never be construed as a abandonment as a matter of law[,]" the trial court here did not

find D.W.B. should be terminated for abandonment. Rather, the court considered D.W.B.'s continuing absence as a factor when making its actual findings. The court in J.H. further stated that "absence, voluntary or court-imposed, may be a factor to consider in determining whether the [child has] been neglected[.]" Id.

This position was reiterated by the Kentucky Supreme Court in Cabinet for Human Resources v. Rogeski, 909 S.W.2d 660 (Ky. 1995). In that case the court stated that incarceration for an isolated criminal offense may not alone justify the termination of parental rights, but it is a factor to be considered. Id. at 661. See also M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114 (Ky.App. 1998). Under these circumstances, we cannot say the court erred in considering D.W.B.'s continuing incarceration as a factor in making its decision.

Further, D.W.B.'s argument makes little effort to address the other facts the court considered. D.W.B. does point out that the Cabinet filed the termination action prior to the establishment of paternity. D.W.B.'s sole explanation for taking no action until he received the results of the paternity test rests on his assertion that, given E.A.R.'s lifestyle and substance abuse, he could not be sure he was, in fact, K.J.R.'s father. While these assertions have merit from D.W.B.'s point

of view, they ignore the fact that K.J.R. remained fatherless and left in the Cabinet's care while D.W.B. waited on the results of the paternity test.

A review of the record demonstrates that the Cabinet moved for termination before D.W.B.'s parental rights had even been established. In addition, the Cabinet presented evidence that it refused to allow E.A.R., K.J.R.'s mother, visitation while she was in the Warren County Jail. Given that it was the Cabinet's policy to deny visitation to parents who are incarcerated when the child is of this age, there is no reason to believe D.W.B., who had yet to establish paternal rights, would have been allowed visitation while he remained in prison.

Further, we note that the Cabinet made no effort to contact D.W.B. after it obtained his address in May 2005. Nor did it bother to respond to his attempt to contact them by letter in June 2005. These facts all weigh against termination. However, the standard is not whether we would decide the case differently, but whether the court's findings were clearly erroneous. See Cherry, supra; C.R. 52.01. In this case, the court's findings are supported by evidence of record. Thus, those findings are not clearly erroneous, and we find no abuse of discretion in this regard.

The judgment of the Warren Family Court is affirmed.

ALL CONCUR.

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