

RENDERED: OCTOBER 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000640-ME

AND

NO. 2010-CA-001688-ME

J.D.A.

APPELLANT

v. APPEALS FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 09-AD-00080

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES, AND G.S.R., A CHILD

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: J.D.A. (“the father”), an inmate who has been housed by the Kentucky Department of Corrections since 2008, appeals, *pro se*, from a Daviess Circuit Court termination of parental rights. The father raises five issues on appeal: (1) that the circuit court’s finding that G.S.R. (“the daughter”) was a

neglected child was unsupported by clear and convincing evidence; (2) that the circuit court's finding that termination of the father's parental rights was in the daughter's best interest was not supported by clear and convincing evidence; (3) that the circuit court abused its discretion by finding that the father failed to cooperate with the Cabinet for Health and Family Services ("the Cabinet") officials by failing to complete a substance abuse program; (4) that the father was not afforded his due process rights during the dependency proceedings; and (5) that the circuit court erred by considering irrelevant testimony from the daughter's foster father. Following a careful review of the facts of this case and applicable caselaw, we affirm the Daviess Circuit Court orders.

The father is currently housed at the Northpoint Training Center. He is serving a total sentence of fifteen years' imprisonment for the following convictions: two-counts of unlawful transaction with a minor under age sixteen and five-counts of second-degree unlawful transaction with a minor. He was eligible for parole in July, 2011.

In September of 2008, while the father was incarcerated, the daughter was born in Henderson County. Upon her birth, the daughter's biological mother ("the mother") agreed to terminate her parental rights. Although the father was not named on the daughter's birth certificate, the mother named the father as a potential biological parent. In July 2009, DNA analysis confirmed that the father was the daughter's biological father. Cabinet officials subsequently personally met with the father in prison and developed a case plan. Based upon his prior

involvement with the Cabinet and criminal convictions, the case plan required the father complete substance abuse treatment and sex offender treatment. The father did not complete these programs.

The daughter has been in the Cabinet's custody since birth. She was placed in a foster home. The daughter's foster parents previously adopted three of the daughter's half-siblings. She has assimilated well into the home without serious mental or emotional difficulties. The daughter's foster father testified that he and his wife would like to adopt the daughter should adoption become available.

While the daughter has been in the Cabinet's custody, the father has sent her letters, cards, and photographs. The foster parents testified they read these cards and letters to the daughter and showed her the pictures as well. He has sent only \$13.80 for her financial support and has refused to sell his property for further support.

Based upon the father's failure to comply with case plan, the Cabinet petitioned the court on December 14, 2009, to involuntarily terminate the father's parental rights to the daughter. Counsel was appointed for the father and a hearing was held on the Cabinet's petition. Having found that the daughter was neglected and that termination of the father's parental rights was in the daughter's best interest, the trial court entered its findings of fact, conclusions of law and order terminating the father's parental rights on March 12, 2010. This appeal followed (2010-CA-000640).

During the pendency of that appeal, the father moved the trial court to vacate the judgment and obtain a new trial pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. The trial court denied the father's CR 60.02 motion on August 17, 2010. The father subsequently filed an appeal of the August 17, 2010, order (2010-CA-001688), and this Court consolidated the appeals by order entered on October 18, 2010.

In his brief, the father did not address any issues concerning his appeal of the trial court's denial of his CR 60.02 motion (2010-CA-001688). The father's failure to argue these issues on appeal is considered a waiver, and we will not consider those issues. *Travelers Indem. Co. v. Patrick*, 386 S.W.2d 256, 257 (Ky. 1965). Rather, our review is limited to the trial court's ruling which terminated the father's parental rights (2010-CA-000640).

The standard of review for a trial court's decision to terminate parental rights is a clearly erroneous standard which requires the court's decision to be based upon clear and convincing evidence. CR 52.01; *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-117 (Ky. App. 1998). A court's decision regarding termination will not be disturbed unless the decision was not based upon substantial evidence. *M.E.C. v. Com., Cabinet for Health & Family Services.*, 254 S.W.3d 846, 850 (Ky. App. 2008).

This standard of review reflects the law's protection of the parent-child relationship. While termination proceedings are not criminal matters, they "encroach[] on the parent's constitutional right to parent his or her child, and

therefore, is a procedure that should only be employed when the statutory mandates are clearly met.” *Id.* These proceedings must be regarded with the utmost caution.

Kentucky Revised Statutes (KRS) 625.090 provides for the involuntary termination of parental rights upon the court’s finding that clear and convincing evidence establishes that “a child is or has previously been adjudged, abused or neglected, and that termination is in the child’s best interest. Then, the circuit court must find the existence of one or more of ten specific grounds set forth in KRS 625.090(2).” *Id.* at 851.

First, the father claims that the court’s finding of neglect was based only upon his incarceration and was, therefore, based upon insufficient evidence. We agree with the father’s assertion that incarceration alone is insufficient to show abandonment. However, a parent’s incarceration and underlying convictions may be factors in the court’s analysis. *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995).

At the time of termination, the father was serving a fifteen-year prison sentence. The trial court noted the father’s imprisonment but also based its decision upon the father’s failure to complete a sexual offender treatment program, failure to complete a substance abuse treatment program, and failure to dispose of property in order to provide support for the daughter. Evidence of the father’s failure to complete the programs and failure to financially support the daughter

within his ability provides sufficient evidence to support the circuit court's finding of neglect.

Second, the father claims that the circuit court's conclusion that termination of the father's parental rights was in the best interest of the daughter was not supported by clear and convincing evidence. KRS 625.090(3) requires courts to consider the following factors when determining the best interest of the child with regard to termination of parental rights:

(a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions 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;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

In addition to the evidence that supported the trial court's finding of neglect, the Cabinet presented evidence that the daughter was thriving in her foster parents' home. She has formed an attachment to her foster parents and to her three siblings who had previously been adopted by her foster parents. KRS 625.090(3)(b). The court found that removal of the daughter from her foster home would likely create emotional damage. In contrast, no evidence indicated that the father could provide permanency in a reasonable amount of time. Thus, the court's determination to terminate the father's parental rights was based upon substantial evidence.

Third, the father claims that the trial court's finding that his inappropriate behavior prevented him from completing a substance abuse program was unsupported by substantial evidence. Lee Maglinger, a caseworker from the Cabinet, testified that the father had been dismissed from the Substance Abuse Program ("SAP") due to "conduct unbecoming of a client" in January 2009. Since this dismissal was prior to the father's adjudication of paternity, the father claims it should not have been considered. Although the father's dismissal occurred prior to his involvement with the Cabinet, the father's failure to re-apply to the program or to seek help to address his substance abuse problem demonstrates an uncooperative nature and disregard for the Cabinet's plan for permanency. The court's finding was relevant and supported by evidence.

Fourth, the father claims that his due process rights were violated when he was not named as a party and provided an opportunity to be participate in the underlying dependency proceeding. KRS 620.100 and 625.080 provide custodial parents the right to counsel during dependency proceedings. *R.V. v. Com., Dept. for Health and Family Services*, 242 S.W.3d 669, 672 (Ky. App. 2007). In *R.V.*, this Court held:

[T]he parental rights of a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings. This includes all critical stages of an underlying dependency proceeding in district court, unless it can be shown that such proceeding had no effect on the subsequent circuit court termination case.

Id. at 673.

Although he had been named as a potential parent, the father did not have standing in the dependency proceeding because paternity had not been established. The dependency proceedings only addressed the biological mother and did not affect the father's position in the termination proceeding. Therefore, the father's due process rights were not violated.

Finally, the father argues that the circuit court erroneously considered the irrelevant testimony of the daughter's foster father. The foster father's testimony regarded the daughter's emotional health, mental health, and adjustment to her foster family. He also testified about his desire to adopt the daughter if termination was ordered. As previously noted, KRS 625.090(3)(e) specifically requires courts to consider "[t]he physical, emotional, and mental health of the

child and the prospects for the improvement of the child's welfare if termination is ordered[.]” The circuit court's consideration of the foster father's testimony was proper.

Accordingly, the Daviess Circuit Court orders are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J.D.A., *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Kristy Abel Fulkerson
Cabinet for Health and Family
Services
Owensboro, Kentucky