

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000246-ME

B.W.P.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 10-AD-500123

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; AND D.M.A.
(AN INFANT)

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: B.W.P. (“Father”) appeals *pro se* from the Jefferson Circuit Court, Family Division order terminating his parental rights to his minor child. The order is supported by clear and convincing evidence, and therefore, we affirm.

Father has been incarcerated since the birth of his minor child in 2005. On July 14, 2009, the family court placed Father's minor child in the temporary custody and care of the Cabinet for Health and Family Services ("Cabinet") following an incident with the minor child's mother ("Mother"). On April 19, 2010, the Cabinet filed the underlying petition pursuant to KRS¹ 625.050, seeking the involuntary termination of the parental rights of Father and Mother to their minor child. The child has remained in the temporary custody and care of the Cabinet throughout the course of the proceedings below. Following a hearing on the Cabinet's motion, the family court terminated the parental rights of Father and Mother.

Father's sole argument on appeal is that the family court erred by determining he abandoned his child based solely on his incarceration. Following a review of the record, we disagree.

A family court has broad discretion to determine whether a child has been either abused or neglected and whether the best interests of the child warrant a termination of parental rights. *R.C.R. v. Commonwealth Cabinet for Human Res.*, 988 S.W.2d 36, 38 (Ky. 1998) (citation omitted). An appellate court reviews the termination of parental rights under the clearly erroneous standard, *i.e.*, a trial court's findings of fact will not be set aside unless unsupported by substantial evidence. *Id.* (citation omitted); *see also* CR² 52.01.

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

KRS 625.090 provides that a family court may involuntarily terminate parental rights if it finds, by clear and convincing evidence, that the child is an abused or neglected child as defined in KRS 600.020(1) and that termination serves the best interest of the child. KRS 625.090(1)(a)-(b). Further, KRS 625.090(2) provides, in pertinent part:

No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

...

(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;

...

(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;

KRS 625.090(2)(a), (e), (g).

The record reveals that Father has been incarcerated since the child's birth in 2005. Father correctly argues that incarceration alone can never be construed as abandonment; however, incarceration is a factor to be considered. *Cabinet for Human Res. v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). The court noted that Father failed to: provide any necessities for the child during his time in prison, maintain any contact with his child while in prison, and suggest any appropriate relative placements for his child. The evidence supports the trial court's conclusion that subsections (a), (e), and (g) of KRS 625.090(2) were met. Additional evidence was provided that while in the care of the Cabinet, the child's educational and social development progressed. Thus, substantial evidence supports the family court's findings that termination of Father's parental rights is in the best interests of the child. Accordingly, the trial court's decision to involuntarily terminate Father's parental rights was not clearly erroneous.

The order of the Jefferson Circuit Court, Family Division is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

B.W.P., *Pro se*
Lexington, Kentucky

BRIEF FOR APPELLEES:

No Appellee Briefs filed.