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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001128-ME

J.C. APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 10-AD-00007

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY and T.A.C., A CHILD APPELLEES

AND NO. 2011-CA-001138-ME

A.L.S. APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 10-AD-00007

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY and T.A.C., A CHILD APPELLEES

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

BEFORE: ACREE, CLAYTON AND DIXON, JUDGES.

CLAYTON, JUDGE: J.C. (the father) and A.L.S. (the mother) appeal, in separate cases, the Monroe Trial Court's orders involuntarily terminating their parental rights to the minor child, T.A.C. After careful review, we affirm.

On October 19, 2010, the Cabinet for Health and Family Services, Commonwealth of Kentucky (hereinafter "Cabinet") filed a petition for involuntary termination of parental rights in which the Cabinet sought to terminate the parental rights of J.C. and A.L.S. to T.A.C., who was born on October 24, 2008. On March 18, 2009, T.A.C. was removed from the custody of her parents as the result of an emergency custody order. The order was issued because A.L.S. was going to jail, and J.C. was already in jail. At that time, A.L.S. was arrested because she was in drug court and kept failing the drug tests.

There were other reasons to remove the child from A.L.S.'s custody including that T.A.C. was cared for by inappropriate babysitters and that A.L.S. was not compliant with her treatment plan. In fact, A.L.S. refused to tell the Cabinet T.A.C.'s location. When the Cabinet arrived at the home where T.A.C. was supposed to be, her babysitter had been arrested and the baby was at the home of that babysitter's neighbor.

On May 20, 2011, an evidentiary hearing was held on the Cabinet's petition for involuntary termination of parental rights. After the hearing, the trial court entered an order on May 25, 2011. With the order, the trial court also made findings of fact and conclusions of law wherein it determined that T.A.C., by clear

and convincing evidence was an abused or neglected child and that termination of the biological parents' parental rights was in the best interest of the child. Subsequently, pursuant to Kentucky Revised Statutes (KRS) 625.090, the trial court ordered the involuntary termination of J.C. and A.L.S.'s parental rights. These appeals follow.

J.C. contends that the trial court's order terminating his parental rights is not supported by substantial evidence of a probative value and that he was denied due process of law. Initially, J.C. observes that the trial court terminated his parental rights under KRS 625.090(2)(e) and KRS 625.030(2)(g), which state:

> 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[.]

KRS 625.090(2)(e). And

> 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)(g). J.C. argues that the trial court erred when it determined his parental actions met these criteria. Because J.C. was incarcerated before T.A.C. was born, is still incarcerated, and has a serve-out date in 2021, he believes that he

has not had any opportunity to care for this child, and therefore, he could not have abused or neglected the child. Moreover, J.C. claims that incarceration alone is not grounds to terminate parental rights. *J.H. v. Cabinet for Human Res.*, 704 S.W.2d 661, 663 (Ky. App. 1985). J.C., while acknowledging that adoption of a criminal lifestyle may be grounds for termination of parental rights, states that this reason is not relevant to him. Because he has been in jail the entire time, he has not adopted a criminal lifestyle in connection to T.A.C. Plus, he argues that he has not been convicted of any crime since the child's birth.

J.C. proffers another argument that the trial court erred by not finding less drastic measures than termination of his parental rights. J.C. complained that he did not receive a case permanency plan as required under KRS 620.230. But treatment plans were completed with J.C. when T.A.C. was removed from her mother's home. He was to contact the Cabinet upon release from prison, attend parenting classes, pass drug tests, remain drug free, attend counseling, follow the therapist's recommendations, visit with T.A.C., and pay child support.

A.L.S. also maintains that the trial court's order terminating her parental rights is not supported by substantial evidence of a probative value and that she was denied due process of law. She, too, has been incarcerated or in rehabilitative facilities for most of T.A.C.'s lifetime. A.L.S.'s sole argument is that in her situation, the trial court should have tried to find less drastic measures than termination of parental rights. She relies on *L.B.A. v. H.A.*, 731 S.W.2d 834, 836 (Ky. App. 1987). The facts in *L.B.A.*, however, vary remarkably from the case at

hand. The child in *L.B.A.* was taken from the mother after its birth without any opportunity for that mother to parent her child.

A 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). The standard of review that an appellate court uses in a termination of parental rights case is the clearly erroneous standard. Thus, a trial court's findings of fact will not be set aside unless unsupported by substantial evidence. *Id*.; *See also* Kentucky Rules of Civil Procedure (CR) 52.01.

The statutory direction found in 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). Next, the trial court must also establish under KRS 625.090(2) that "[n]o termination of parental rights shall be ordered unless the [Trial] Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds[.]" The statute then goes on to list ten factors including the two factors cited above.

First, we will address the situation as it relates to J.C. Here, the record reveals that J.C. has been incarcerated since before the child's birth in 2008. And although he correctly argues that incarceration alone can never be construed to

establish abandonment, incarceration is, nevertheless, a factor to be considered. *Cabinet for Human Res. v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995).

As relates to his treatment plan, J.C. has completed programs while incarcerated. He completed a substance abuse program, parenting classes, anger management classes, and drug classes. J.C., however, has had no contact with T.A.C. He has not written or called her. He has paid no child support even though he works at the Kentucky Horse Park. And J.C. has another child, who is nine (9) years old. J.C. had no contact with this child until very recently.

Nonetheless, J.C. has a criminal history with significant charges. Since 2000, he has regularly been charged with criminal activity. Notably, in November 2008, J.C. was sentenced to ten (10) years on charges of criminal conspiracy to manufacture methamphetamines, four (4) counts of child endangerment, two (2) counts of possession of a controlled substance, burglary, and persisted felony offender 2nd degree. Most recently, he was denied parole in December 2010. As previously noted, his serve-out date is December 2021.

Besides his criminal history and current incarceration, the trial court observed that J.C. did not provide any necessities for the child while in prison nor maintained contact with T.A.C. This issue is significant because while incarceration alone is not grounds for termination, incarceration may be considered in terms of abandonment of a child. *See Rogeski*, 909 S.W.2d 660. In light of J.C.'s failure to connect with his child at any time including since the Cabinet took custody, we believe that J.C. has abandoned his child. Moreover, given that his

serve-out date is 2021, we believe strongly that the best interests of T.A.C., another consideration under KRS 625.090(1), are best served by terminating J.C.'s parental rights to a child that he has never met or attempted to meet.

Therefore, the evidence supports the trial court's conclusion that subsections (e) and (g) of KRS 625.090(2) were implicated as well as (j), that is, T.A.C. had 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." J.C. has failed to show that the trial court's ruling was clearly erroneous. And substantial evidence supports the family court's findings that termination of J.C.'s parental rights is in the best interests of the child. Accordingly, the trial court's decision to involuntarily terminate the father's parental rights was not clearly erroneous.

Next, regarding A.L.S., the trial court ascertained, pursuant to KRS 625.090(1) that T.A.C. was an abused and neglected child and termination of parental rights would be in her best interests. Following that the trial court found, as it had with J.C., that under KRS 625.090(2) factors (e), (g), and (j) were present.

When T.A.C. was placed in the custody of the Cabinet, a treatment plan was formulated for A.L.S. She was to contact the Cabinet upon release from prison, provide a safe home for the child, attend parenting classes, pass drug tests, remain drug free, attending counseling and follow the therapist's recommendations. A.L.S. has done nothing in her treatment plan. She did not attend parenting classes or counseling while in prison nor did she write to or send

gifts to T.A.C. Furthermore, A.L.S. only asked two (2) times to see T.A.C. Some confusion surrounds the last time she saw her daughter but it was either in March 2009 or September 2009. In addition, A.L.S. had another child's rights terminated, which is another listed factor. KRS 625.090(2)(h). Her rights to this child were terminated on October 22, 2009, and the conditions and factors were the same as in this case.

Thus, A.L.S. has not proven that the trial court's findings were clearly erroneous. Furthermore, substantial evidence is in the record to support the trial court's findings. T.A.C. was removed from A.L.S. because of A.L.S. being arrested, leaving the child with inappropriate babysitters, and not complying with treatment plans. Moreover, A.L.S. has not reached out to her child with calls or gifts or provided any support. Hence, the trial court did not err in its decision to terminate A.L.S.'s parental rights.

Upon review of the entire record and considering the specific evidence outlined by the trial court, we believe substantial evidence of a probative value that was both clear and convincing supported the trial court's findings that T.A.C. was abused and neglected under KRS 625.090. Additionally, the evidence as a whole supports the conclusion that it was in the child's best interest to terminate appellants' parental rights. Accordingly, we hold that substantial evidence of a probative value supports the trial court's findings of fact and, thus, the trial court's order terminating appellant's parental rights is affirmed.

The order of the Monroe Circuit Court is affirmed.

ALL CONCUR.

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