RENDERED: DECEMBER 14, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000867-ME

M.W.L. APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 11-AD-00012

T.B.S. III and T.S. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND NICKELL, JUDGES.

COMBS, JUDGE: This is a case involving an adoption. M.L. (Father) appeals the order of the Oldham Family Court which granted the petition for adoption filed by T.B.S. (Stepfather). After our review, we affirm.

Father and T.L.S. (Mother) were married in 2005. In 2006, a daughter, J.F.L. (Child), was born. When Child was three months of age, Father was

arrested for sexually abusing Child's older sister, who was not his biological child. Father has not seen Child since then. Father was convicted of sexual abuse in the first degree and was incarcerated until the summer of 2009. During his incarceration, Mother filed a petition for divorce. In August 2009, the court entered a final order of dissolution in which it granted Mother sole custody of Child, denied Father ***any*** visitation,[1] and ordered Father to pay child support.

Mother married Stepfather in October 2009. They had been living together for approximately two years. Their household now consists of Mother, Stepfather, Stepfather's son from a previous relationship, Mother's two daughters from previous relationships (one of whom is Child in the case before us), and a son who is the child of the present union of Mother and Stepfather.

Stepfather filed a petition for adoption of Child on April 1, 2011. A hearing was held on February 28, 2012. The court found that it was in the best interest of Child to terminate Father's parental rights and to grant Stepfather's petition for adoption. This appeal follows.

We recognize that the termination of parental rights is a grave matter that requires and deserves considerable entitlement to the guarantees of due process. Therefore, parental rights "can be involuntarily terminated only if there is clear and convincing evidence that the child has been abandoned, neglected, or abused by the parent whose rights are to be terminated, and that it would be in the best interest of the child to do so." *Cabinet for Health and Family Services v. A.G.G.*,

[1] As a condition of Father's parole, he was not permitted to have contact with minors; *ergo,* the prohibition as to visitation.

190 S.W.3d 338, 324 (Ky. 2006). An appellate court defers to the broad discretion of the trial court and applies the "clearly erroneous" standard of review under Kentucky Rule[s] of Civil Procedure (CR) 52.01. As long as the record contains substantial evidence to support the trial court's findings, they must stand. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

Father's main contention is that the trial court utilized the wrong statute in reaching its findings. The court relied on Kentucky Revised Statute[s] (KRS) 199.050. Father argued to the trial court -- and again argues on appeal -- that the proper statute is KRS 625.090. Father contends that the standards under KRS 625.090 are more stringent and would not have permitted the trial court to terminate his parental rights. We disagree.

Our court has recently had the opportunity to determine which statute is appropriate in this very situation. *R.M. v. R.B.*, 281 S.W.3d 293 (Ky. App. 2009). That case clarified the issue of standing under Kentucky Revised Statute[s] (KRS) Chapter 625. It determined that the only entities having standing to proceed under KRS Chapter 625 are: the Cabinet, a child-placing agency licensed by the Cabinet, any County or Commonwealth's attorney, or a parent. *Id*. at 296 (citing KRS 625.050(3)).

In the case before us, the action was commenced by Stepfather. Therefore, he had no standing to invoke Chapter 625. In *R.M., supra*, this Court noted that an action initiated as an adoption must be filed pursuant to Chapter 199. KRS 199.502 is the statute that governs adoption proceedings ***without the consent*** of a

living biological parent. Although KRS 199.502 adjudicates and often terminates parental rights, proceedings conducted pursuant to that statute share the context and the nature of an adoption action. *Id*. at 295. Therefore, the trial court properly applied KRS 199.502.

KRS 199.502 provides that "an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding that ***any*** of [nine] following conditions exist with respect to the child[.]" (Emphasis added.) The trial court in this case relied on the provisions in subsections (a) and (e):

> (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.

Father argues that there was no substantial evidence before the court to support a finding of abandonment.

For the purposes of Chapter 199, "abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983). Non-support is a factor to be considered – although it does not constitute abandonment *per se*. *Id*. However, sporadic payment of child support is not necessarily indicative of lack of abandonment. *S.B.B. v. J.W.B.*, 304 S.W.3d

712 (Ky. App. 2010). Additionally, incarceration "can never be construed as abandonment as a matter of law." *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985). A parent who is denied access to a child by order of the court has not necessarily abandoned the child. *Wright v. Howard*, 711 S.W.2d 492, 497 (Ky. App. 1986).

In this case, the court did not find that Father had abandoned Child merely because he had been incarcerated or because he was denied access to Child by order of the court. Rather, the court found that Father had made no attempts to be part of Child's life. In its 2009 order determining custody and child support, the court denied Father visitation because one of the conditions of his parole was that he was not allowed to have contact with minors. However, the court unequivocally stated that Father "may petition this court for visitation when he becomes eligible to do so." Father was cleared to have contact with minors in January 2010 – more than one year prior to the filing of the adoption petition. It is undisputed that after becoming eligible to have contact with minors, Father made ***no effort*** to contact Mother or Child. The court also found it significant that during his incarceration, Father demanded a paternity test of Child – despite the fact that she was born during his marriage to Mother.

In light of the circumstances of this case, we conclude that the court's finding of abandonment was supported by substantial evidence. Father has provided no evidence to refute the evidence upon which the court relied. He argues that Mother denied him access to Child; however, Father has never

attempted to assert his parental rights. It is true that he has paid some child support. However, it is the function of the trial court -- not this Court -- to determine whether the payments outweigh the other factors to be considered. *S.B.B. v. J.W.B.*, 304 S.W.3d at 717.

Because the order of the Oldham Family Court is supported by substantial evidence, we affirm its decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert A. Riley
LaGrange, Kentucky

BRIEF FOR APPELLEE:

T. Andrew Howell
Stephen C. Emery
LaGrange, Kentucky