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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000646-ME

M.J.R. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 12-AD-00105

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; AND S.J.R., A CHILD APPELLEES

AND NO. 2013-CA-000647-ME

M.J.R. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 12-AD-00106

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; AND L.J.R., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, M.J.R. (hereinafter "Father"), appeals the termination of his parental rights by the Fayette Circuit Court. Specifically, he contends that he was denied procedural due process and the assistance of counsel during critical stages of the termination proceedings, as well as during the district court neglect and abuse proceedings which led to termination. He also challenges the sufficiency of the evidence supporting the trial court's decision. Finding no deprivation of due process in the Father's notice of, or representation during, these proceedings, and finding no clear error in the trial court's order of termination, we affirm.

Background

This appeal represents the latest chapter in a lengthy legal history dating to 2001, when the Cabinet for Health and Family Services (CHFS) removed Father and C.R.'s (Mother's) children, S.R. and L.R, based on allegations of neglect against both parents. After completing a case plan recommended by CHFS and ordered by the district court, Father and Mother were reunited with their children less than two years after removal.

Father and Mother separated in 2005 and Father relocated to Pennsylvania, leaving his children in the custody of their mother. In June of 2006,

CHFS once again removed S.R. and L.R. from their home following allegations of Mother's drug use and placed them in the care of a person believed to be a maternal cousin. This cousin was later granted permanent custody in 2008 and the children remained in her care until 2010, when CHFS sought removal of the children from her home due to allegations of neglect against her. Following this removal, CHFS renewed its efforts to reunite the children with Mother, which included the institution of a case plan for Mother to follow.

It remained the goal of CHFS to return the children to Mother until 2012 when, following Mother's relapse, the district court changed the permanency goal of the case to termination of parental rights (TPR). CHFS subsequently filed petitions for involuntary termination of Mother's and Father's parental rights on May 4, 2012. On November 28, 2012, the Fayette Circuit Court held an evidentiary hearing on the TPR petitions. Mother was in attendance, but refused the appointment of counsel, stating that she did not wish to contest termination. Father, having been timely served with notice of the TPR petition and hearing, was present and represented by counsel.[1]

At the hearing, the investigative worker for CHFS testified that, while she maintained case responsibility from August 2006 until December 2006, there was direct contact by telephone between Father and CHFS regarding the case. She testified that Father declined to take custody of the children when informed of the 2006 removal and otherwise refused to intervene in the case or in Mother's affairs.

[1] The guardian *ad litem* (GAL) was also present at this hearing on behalf of the children and filed a brief in this appeal seeking affirmation of the trial court's decision to terminate parental rights.

The "on-going" worker on Mother and Father's case also testified. She stated that she maintained case responsibility from February of 2007 until 2012 and that during this time, Father had very sporadic physical contact with his children. She stated that, before July 2012, Father last saw the children during the spring of 2007. In the interim, Father contacted the children regularly, but by phone and mail only. During the time the children lived with the putative maternal cousin, Father regularly sent money and clothes to his children.

The on-going worker further testified that when the children were removed from the permanent custodian in 2010, she approached Father about taking custody. Father refused on the basis that if he took the children, Mother would not have the necessary incentive to "do what she needed to do." When the caseworker contacted Father via phone about CHFS's decision to seek TPR, she stated that he consented to TPR and expressed his wish only that he be able to maintain contact with his children. The on-going worker testified that Father was directly involved in the development of three case plans prior to his separation from Mother but none after he left the household. She also stated that, throughout her time on the case, she knew Father's address in Pennsylvania and kept him apprised of the case via phone only, including verbal notice of upcoming hearing dates. She never sent Father written notice and his address, when it was listed on court documents during cases, was listed simply as "Pennsylvania." The on-going worker also reported that both children had stated their desire to be adopted.

During his testimony, Father agreed that CHFS had maintained at least phone contact with him since the removal of his children in 2006; however he stated that he heard about his children's removals from Mother's relatives. His testimony also corroborated that he had not received written notice of hearings or other court proceedings from 2006 until May 2012 when TPR proceedings began. Father acknowledged he had declined custody in the past because of his belief that his children needed their mother. However, he denied ever agreeing to TPR, stating that once he became aware of the full consequences of TPR, he did not wish to voluntarily terminate his rights. Father further testified that he never stopped sending money and clothing to his children and that he was willing and able to take custody of his children immediately.

Following this and other testimony at the 2012 hearing, the trial court entered Findings of Fact, Conclusions of Law and its judgment terminating both parents' parental rights on March 19, 2013. Specifically, the trial court found that both parents had previously been found to have neglected their children and had refused to care for their children for "periods of not less than six months[,]" that CHFS made reasonable efforts to reunite the children with both parents, and that it was in the best interest of both children that they be committed to the permanent custody of CHFS for purposes of adoption. The trial court also found that Father "continually and repeatedly declined to become involved in the neglect case" despite being kept verbally apprised throughout.

Father now appeals from this order. Further facts will be utilized as they become relevant.

Analysis

"Parental rights are so fundamentally esteemed under our system that they are accorded Due Process protection under the Fourteenth Amendment of the United States Constitution." *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006) (citing to *O.S. v. C.F.*, 655 S.W.2d 32, 33 (Ky. App. 1983)). "They can be involuntarily terminated only if there is clear and convincing evidence that . . . it would be in the best interest of the child to do so." *Id*. (citing to KRS 625.090; *Santosky v. Kramer*, 455 U.S. 745, 769-770, 102 S. Ct. 1388, 1403, 71 L. Ed. 2d 599 (1982); *N.S. v. C & M.S.*, 642 S.W.2d 589, 591 (Ky. 1982)).

Consistent with this well-established legal principle, Father's argument on appeal is two-fold. He first argues that he was denied due process when CHFS and the district court failed to notice him of the prior district court proceedings against Mother, cases which had custody implications for his children. He further argues that the trial court's findings and the evidence of record both were insufficient to support termination of his parental rights. We address both of Father's arguments in turn.

I. Father's Notice of Underlying District Court Proceedings

Kentucky law pertaining to dependency, neglect and abuse cases requires that:

> [a]fter a petition has been filed, the clerk of the court shall issue, and the sheriff or other authorized agent shall serve, a copy of the petition and a summons to the parent or other person exercising custodial control or supervision, unless their identity or location is unknown, in which case the petition and summons shall be served on the nearest known adult relative.

KRS 620.070(2). However, when addressing a "child custody determination" involving a parent who resides outside of Kentucky, a court must consider the notice requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), adopted in Kentucky law under KRS 403.800, *et seq*. The relevant portions of that statute require that notice and an opportunity to be heard must be provided "in accordance with the standards of KRS 403.812 . . . to . . . any parent whose parental rights have not been previously terminated…." KRS 403.830(1). The statute to which this provision alludes further requires that notice "…shall be given in a manner prescribed by the law of this state for service of process or by the law of the state in which service is made. Notice shall be given in a manner reasonably calculated to give actual notice…." KRS 403.812(1).

The rules governing service of process in Kentucky require that a court wishing to exercise jurisdiction over a resident of another state notice that person either by personal service, certified mail or by warning order attorney. *See* CR 4.04(8); CR 4.05. The rules providing for adequate "constructive notice" do not include verbal or telephonic communication. Furthermore, Pennsylvania law also does not seem to permit such means of service.

It is an uncontroverted fact that, after Father left Kentucky in 2005, and after removal of the children from Mother in 2006, the district court did not serve Father with notice of the district court proceedings using the methods prescribed in Kentucky or Pennsylvania law. Hence, Father is correct that there was a defect in his legal notice of those proceedings. While it is also uncontroverted that Father was in constant telephonic contact with CHFS throughout the pendency of the neglect and abuse cases, such contact does not constitute notice and is legally insufficient under the UCCJEA. Furthermore, it was the district court's responsibility, and not CHFS's, to notice Father of the underlying neglect and abuse proceedings.

Nevertheless, this Court has stated previously that a parent's absence from, and lack of representation during, underlying district court proceedings is not automatically fatal to termination proceedings. *See R.V. v. Commonwealth Dept. for Health and Family Services*, 242 S.W.3d 669, 673 (Ky. App. 2007). We have held that:

> pursuant to both the due process clause of the Fourteenth Amendment . . . and KRS 625.080(3) . . . the 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 (emphasis added). Citing *R.V.* as authority for his more general claims regarding due process, Father argues that the underlying district court cases

"constituted a major factor" in termination because the trial court included in its order Father's decision not to become involved in those cases. Indeed, given our finding of inadequate notice, if the sole basis for the trial court's election to terminate was Father's "decision," we might be compelled to reverse. However, the trial court importantly found independent and adequate grounds upon which to base its findings.

In addition to the above finding to which Father objects as the basis of termination, the trial court also made the following findings:[2]

> 7. Respondent parents, for periods of not less than six months, have 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.
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> 8. Respondent parents, for reasons other than poverty alone, have failed to provide or have been incapable of providing essential food, clothing, shelter, medical care, or education necessary and available for the child's well-being, and there is no reasonable expectation of significant improvement in the immediately foreseeable future, considering the age of the child.
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> . . .
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> 12. The child has resided in foster care under the responsibility of the Cabinet for more than fifteen of the most recent twenty-two months prior to the filing of the petition to terminate parental rights.

These facts, as they pertain to Father, exist independently of the district court proceedings filed against Mother since 2006. Regardless of his notice of the

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[2] The trial court entered these, and other, Findings of Fact for each child. The trial court entered *verbatim* orders regarding S.R.

neglect and abuse petitions against Mother, it remains the case that Father left his children with their Mother in 2005 and has had very sporadic physical contact with them since, otherwise communicating only by phone and mail for the seven years preceding termination. Hence, we find that the proceedings of which Father had insufficient legal notice had no effect on the trial court's subsequent decision to terminate his parental rights because the trial court's ultimate findings of fact and conclusions of law were based on facts other than those arising from the prior proceedings.

Though we ultimately affirm the trial court's decision, we must also state that, when a parent lives outside of our Commonwealth, the district court must follow, and CHFS would be well-served to seek compliance with, the notice requirements found in the UCCJEA.[3] Unlike the present case, it will seldom be true that the underlying neglect or abuse proceedings have no effect on subsequent termination proceedings. Therefore, our lower courts must ensure parties are properly noticed of *all* such proceedings pursuant to statute, lest this Court be compelled to vacate future orders of termination on otherwise avoidable grounds.

Nevertheless, we are satisfied that the trial court in the present case did not violate Father's due process rights.

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[3] In arguing that Father had sufficient notice, CHFS and the guardian *ad litem* cite to *Lowery v. Fayette County Children's Bureau*, 209 S.W.2d 487, 490 (Ky. 1948), in which this state's highest Court held that where a father has not been served with a summons but has "actual knowledge of the proceedings and proposal to rest [his children's] custody in the Home," due process is not violated. However, we find the facts of *Lowery* easily distinguishable to those of the present case given Father's status as a resident of another state and the resulting application of the UCCJEA's express provisions requiring more formal notice. Both are issues *Lowery* did not address.

II. Sufficiency of Circuit Court Findings

Father's second argument on appeal questions the sufficiency of the trial court's Findings of Fact. Specifically, he alleges that the trial court failed to make findings required for termination and that the record lacked evidence of Father's abandonment, abuse or neglect of his children. On appeal, we review the trial court's findings for clear error. *See M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 851 (Ky. App. 2008); Kentucky Rules of Civil Procedure (CR) 52.01. "Hence, this Court's review is to determine whether the trial court's order was supported by substantial evidence on the record." *Id.* (citing *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986)). "Substantial evidence" is that which is sufficient to induce conviction in the mind of a reasonable person. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002).

In order to terminate a parent's parental rights, a trial court must first find 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 on 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.

KRS 625.090(1). Further, the trial court must also find by clear and convincing evidence the existence of one or more of the following:

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

KRS 625.090(2).

Father seeks reversal of the trial court's order terminating his rights on the basis that the trial court failed to find "that . . . [Father] had been found . . . to

have abused or neglected his sons[]" or "that either child was abused or neglected by [Father] in the current proceeding." Father also alleges that the trial court failed to make the finding that he committed any of the neglectful or abusive acts listed in KRS 600.020[4], or that he abandoned his children. He argues that such findings were required prior to termination and that there was insufficient evidence on the record to support any such findings.

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[4] (1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:
(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:
1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
7. Abandons or exploits the child;
8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;
9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months; or
(b) A person twenty-one (21) years of age or older commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon a child less than sixteen (16) years of age….

However, Father did not bring the issue of the trial court's alleged lack of findings on essential issues to the attention of the trial court.[5] Therefore, our review of these alleged omissions is bound by the requirement that:

> [a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

CR 52.04. Pursuant to this rule, to the extent that Father contends failure by the trial court to make specific findings regarding certain issues, we will not reverse the trial court's order solely on the basis of such alleged failures.[6] To the extent Father attacks the sufficiency of the evidence in support of the trial court's findings, we are nonetheless satisfied that the trial court made the required findings and that there was substantial evidence to support the trial court's decision to terminate his parental rights.

Despite Father's claim to the contrary, the trial court did find that Father had been found to have neglected both children; and despite his claim to the contrary, such a finding was supported by the January 10, 2002 order of the district

[5] Counsel for Father made a verbal motion to dismiss at the termination hearing and argued in support of that motion. Counsel also filed a written motion to this effect on December 17, 2012. However, this motion merely attacked the sufficiency of the evidence presented at the hearing; they did not, and could not possibly, bring to the trial court's attention the insufficiency of its subsequent findings. Furthermore, the record shows that no "written request for a finding" on the matters now raised "or . . . motion pursuant to [CR] 52.02" was filed by counsel after entry of the trial court's order of termination.

[6] CR 52.03 states, in pertinent part, that "the question of the sufficiency of the evidence to support the findings may thereafter be raised *whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them….*" (emphasis added). Hence, CR 52.04 applies only to Father's claim that the trial court failed to make certain findings, not to his arguments concerning sufficiency of the evidence.

court finding that both parents neglected S.R. and L.R. as alleged in the 2001 petition.[7] Also contrary to Father's claim, the trial court did find that he had committed at least two of the acts listed as neglect or abuse under KRS 600.020 and required for TPR pursuant to KRS 625.090.[8] Finally, the trial court concluded that it was in the children's best interest that Father's parental rights be terminated. Therefore, in direct opposition to Father's allegations on appeal, the trial court made the required statutory findings for termination.

In response to Father's argument that insufficient evidence existed on the record to support an order of termination, we point out that the record included the following facts: that Father relocated to Pennsylvania in 2005 without his children following his separation from Mother; that, from 2006 to July 2012, Father saw his children twice; that Father stated his unwillingness or inability to take custody of his children; and that the children are thriving in their current placement and, on at least one occasion, expressed to the on-going worker their wish to be adopted by their current foster parents. Put simply, these facts were reasonably relied upon, and thus constituted substantial evidence, for purposes of terminating parental rights. We are satisfied that the trial court in this case committed no clear error in applying the above facts to the statutory requirements for termination.

[7] The January 2002 order of the Fayette District Court made a finding of neglect in adjudicating the facts of the November 2001 petition, which alleged neglect against Mother and Father. Hence, "a court of competent jurisdiction" has found Father to have neglected the children.

[8] See the trial court's Findings of Fact, Nos. 7, 8, and 12, quoted *supra* and entered pursuant to KRS 625.090(2)(e), (g) and (j), respectively.

Conclusion

For the aforementioned reasons, we find that Father was not deprived of his due process rights, and that there existed in the record substantial evidence to support the trial court's termination of Father's parental rights. Therefore, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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