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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000751-ME

R.T.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA SANDERSON, JUDGE
ACTION NO. 12-AD-00072

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; A.M.T., A CHILD; AND
K.C.

APPELLEES

OPINION AND ORDER
REVERSING AND REMANDING
AND GRANTING MOTION TO WITHDRAW

** ** * * * * *

BEFORE: MAZE, MOORE, AND VANMETER, JUDGES.

MAZE, JUDGE: This appeal arises from the McCracken Circuit Court's Order terminating the parental rights of Appellant, R.T. (hereinafter "Father"). As the

trial court's decision lacks substantial evidence in the record to support it, we reverse and remand for further proceedings.

Background

As a preliminary matter, we note that our record on appeal includes no video record; therefore, the record consists almost exclusively of the Petition, as well as the Findings of Facts and Conclusions of Law. Additionally, the Cabinet for Health and Family Services ("CHFS") did not file a brief. Therefore, we are reviewing a scant record and operating at a distinct and unnecessary disadvantage. Nevertheless, the following facts are developed from the minimal record available.

On June 24, 2011, Father's son, A.M.T., was born at twenty-eight weeks gestation, weighing less than two pounds, and testing positive for cocaine and opiates. A.M.T. spent more than four months in the neonatal intensive care unit at Kosair Children's Hospital in Louisville. During A.M.T.'s hospitalization, Father resided at the Ronald McDonald House with the mother. Father's whereabouts and the extent of his involvement with A.M.T. between July 2, 2011 and his arrest in August 2011 are unclear from the record.

CHFS filed a Petition alleging neglect against the mother. At the subsequent adjudicative hearing, a nurse employed by the Commission on Children with Special Health Care Needs testified that though A.M.T.'s condition was one of the most severe cases she had seen, A.M.T. had made substantial improvements due to the care he received at Kosair and from his living arrangement with his current foster parents. Following an adjudicative hearing, the mother was found to

have neglected A.M.T., as defined by Kentucky Revised Statutes (KRS) 600.020(1), based on A.M.T.'s testing positive for cocaine and opiates at birth. In the same December 2011 Order, the court found that though "mother stipulates to neglect . . . [t]he child's father did not cause child to be born premature or [with] drug addiction."

During the pendency of mother's neglect case, on November 5, 2012, CHFS filed a Petition for Involuntary Termination of Parental Rights. CHFS alleged that while Father had acknowledged paternity on A.M.T., he had an unstable housing and job history, that he had not taken steps to participate with the child's medical treatment, and he had not sought to build a relationship with the child. CHFS also alleged that it offered reunification services to both parents, including Father, few of which they utilized. In response to the Petition, Father wrote a letter which was filed with the trial court and which stated that he did not want to terminate his rights but instead wanted to file for custody.

On March 7, 2013, a termination hearing was held, following which the trial court involuntarily terminated Father's parental rights. Father is currently incarcerated with a scheduled release date of September 30, 2024. The circumstances of his re-incarceration are unclear from the record. He now appeals from the trial court's decision. Father's attorney has since filed a Motion to Withdraw which is pending before this Court and which we address *infra*. We will raise further facts as necessary to aid our analysis.

Standard of Review

Father does not contest the factual findings of the trial court. He contends only that his incarceration alone cannot satisfy the statutory prerequisites for termination of his parental rights. Therefore, the issue is largely one of law, and we review it *de novo*. *Ball v. Tatum*, 373 S.W.3d 458, 464 (Ky. App. 2012).

Analysis

On appeal, Father contends that CHFS did not meet its burden under KRS 625.090(2) and that the trial court's decision to terminate his parental rights was impermissibly based solely on the fact of his incarceration. Father therefore asserts that the trial court erred in terminating his parental rights.

To terminate a parent's parental rights, CHFS must satisfy three requirements: 1) That the child is abused or neglected as defined by KRS 600.020(1); 2) that termination is in the best interests of the child; and 3) that one of the factors listed in KRS 625.090(2) is present, including that the child has been abandoned for not less than ninety days or that the parent has "continuously or repeatedly failed or refused to provide" for the child. *See* KRS 625.090(2).

On appeal, the only issue raised is whether the court properly terminated Father's parental rights when the sole basis for doing so was the fact that he has been incarcerated for the majority of A.M.T.'s life. After reviewing the limited record and relevant precedent, we answer that question in the negative.

The Kentucky Supreme Court has explained that, "incarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights" *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660,

661 (Ky. 1995). Instead, incarceration is merely a factor to consider when applying a parent’s conduct to the KRS 625.090(2) standard. *Id.* If this were not the case, detention so lacking in intent “would make servicemen, prisoners of war, ship captains, or person requiring prolonged hospitalization . . . likely candidates to have their parental rights terminated.” *Id.* (quoting *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985)).

This Court has also applied this rule, stating that “[i]ncarceration alone can never be construed as abandonment as a matter of law.” *M.L.C. v. Cabinet for Health and Family Services*, 411 S.W.3d 761, 766 (Ky. App. 2013) (quoting *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1986)). In *M.L.C.*, this Court vacated and remanded the trial court’s order to terminate parental rights because the “trial court did not provide ample support for its findings of fact and conclusions of law and appear[ed] to have relied primarily on M.L.C.’s incarceration alone” 411 S.W.3d at 766. We explained that based on the record the “trial court . . . did not explain or cite to any specific evidence which supported its decision . . . [f]or instance, the trial court did not detail any reunification efforts made by CHFS” *Id.*

The current case is comparable to *M.L.C.* in that the sole basis for CHFS’s effort, and the trial court’s decision, to terminate Father’s parental rights was his incarceration. In the Petition giving rise to the case, CHFS claimed that KRS 625.090(2)(a) was met because Father had abandoned the child for a period of not less than ninety days. The only support given in the Petition for this claim

was that “the father is incarcerated in West Liberty KY and has been since the child has been in custody so he doesn’t visit.” In asserting that KRS 625.090(2)(g) was met, the only “reason[] other than poverty alone” CHFS proffered for Father’s failure to provide for A.M.T. was that “[Father] is in jail and will be for a while” and “[Father] continues to be incarcerated.”

In addition, in its order terminating Father’s parental rights, the trial court reached several conclusions concerning this and other facts. In its Findings of Fact, the trial court noted that Father was “currently in a halfway house . . . [in] Louisville, Kentucky . . . awaiting release into the community. He is approved for parole with the Kentucky Department of Corrections.” The trial court went on to find that the child was neglected “as defined in KRS 600.020(1) in that a court of competent jurisdiction found him neglected based upon being born positive for cocaine and opiates.” The trial court then made a finding of fact concerning an incident at the Ronald McDonald House, where the family was staying while the infant received treatment at Kosair:

[Father] was incarcerated for a period of time during [A.M.T’s] stay in foster care. Prior to the most recent incarceration, which occurred in August 2011, [Father] had been in Louisville, staying at the Ronald McDonald House with [the mother]. However, an employee of the Ronald McDonald House testified by telephone that [the mother] requested that he leave, and the staff enforced her request. When she changed her mind, the Ronald McDonald House refused to allow [Father] to return.

An incident report from this event was an exhibit at the March 7 hearing.

In addition to these findings, the trial court made several findings seemingly based upon the above facts and clearly aimed at satisfying the statutory prerequisites of KRS 625.090(2)(a), (e), and (f). The court first found that Father

[h]as abandoned [A.M.T.] for periods of not less than ninety days in that he has not visited the child for a substantial period of time and has expressed no actions or words that demonstrate intent to parent the child, even after his incarceration. [Father] acknowledged early in the case that he is [the child's] father; however, he has not made steps to participate with [the child's] treatment. There is no evidence that he has sought to build a relationship with the child.

The trial court then, parroting KRS 625.090(2)(e), found that,

[t]he Respondent mother and father of said child, for a period of not less than six (6) months, have continuously or repeatedly 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 . . . During the time from June 24, 2011 to the present, CHFS has offered reunification services to [the parents], few of which they have utilized . . . The reasons for the mother's failure and refusal is a continued dependence on substances . . . [Father] has been incarcerated for a period of time, because of failure to obey rules while on parole from a conviction for possession of cocaine. His arrest in August 2011 was for parole violation . . . The Court finds that there is no reasonable expectation that [the parents] can safely resume parenting . . .

Finally, the trial court found that

[t]he respondent mother and father, for reasons other than poverty alone, have continuously and repeatedly failed to provide the necessities of life for [the child] and there is no reasonable expectation of significant improvement . . . in the immediately foreseeable future in that [the parents]

have both unstable housing and job histories. There is no expectation of improvement in this condition, given that . . . [Father] is currently in a halfway house in Louisville and does not appear able to provide income and support . . .

These various findings have insufficient factual support. Concerning the trial court's reference to mother's adjudication of neglect, it bears repeating that the only mention of Father in the court calendar from the adjudication hearing, which is included in the record on appeal, was that the father "did not cause child to be born premature or [with] drug addiction." Hence, the trial court's reliance upon mother's dependency issues and the resulting adjudication of neglect was misplaced. Similarly, the Ronald McDonald House incident is of questionable import, and the trial court's order makes no attempt to clarify that incident's relevancy to the statutory requirements for termination.

The trial court's finding that Father had not "visited the child for a substantial period of time and has expressed no actions or words that demonstrate intent to parent the child, even after his incarceration" is unsupported in the record. First, it is unclear if Father's lack of visitation, participation in treatment, and relationship building with the child is due to any reason other than his incarceration. Secondly, the finding is shown to be false in light of at least one document in the record, a handwritten letter written by Father in response to the Petition and filed on November 14, stating that he did not want his parental rights terminated, that he intended to file for custody of the child, and that "hopefully we can get this matter resolved and said child with biological father."

Finally, just as in *M.L.C.*, the trial court's order stated that the parents have been offered reunification services and have only taken advantage of a few of them. However, the court does not detail the extent of those efforts, nor does it state whether Father's incarceration was the sole reason for their failure. Similarly, the trial court pointed to the parents' unstable employment and housing histories, but cited to nothing in the record supporting the implied assertion that these facts made termination of Father's parental rights necessary.

As we stated prior, there is no video record of the termination hearing. It is well-established that “[i]t is the duty of the appellant to see that the record is complete on appeal” and that “[t]o the extent that the record is incomplete, the reviewing court must presume that the omitted portions support[ed] . . .” the trial court's decision. *Roberts v. Fayette County Bd. of Educ.*, 173 S.W.3d 918, 923 (Ky. App. 2005). However, given the above facts, even presuming that the evidence at the hearing supports the trial court's conclusion, the trial court's decision to terminate Father's parental rights lacked a sufficient basis. When the unsupported findings listed above are removed from the trial court's analysis, only the fact of Father's incarceration is offered as support for terminating his parental rights. According to our Supreme Court, as well as this Court's holding in *M.L.C.*, Father's incarceration is insufficient to support termination of his parental rights; and the trial court's repeated reliance upon that fact requires reversal.

Conclusion

This is a challenging and emotional case because it involves a child whose best interests are of utmost concern. Based upon the fact that the child is flourishing with its foster family while Father is incarcerated for the foreseeable future, there is an understandable temptation to summarily terminate Father's parental rights and permit A.M.T. to begin anew. However, we must follow the law, and the law mandates that we cannot affirm the trial court's termination in the absence of substantial evidence. The law is also clear that incarceration alone does not constitute substantial evidence supporting termination.

We again state our disappointment that CHFS did not file a brief. Had it done so, it likely would have been a great help in clarifying an unclear and incomplete record. Likewise, a more evidence-oriented and less parroted Findings of Fact and Conclusions of Law would have answered many of the questions we are left asking. Nevertheless, "[because] the trial court did not provide ample support for its findings of fact and conclusions of law and appears to have relied primarily on . . . incarceration alone," we reverse the trial court's order and remand so that the trial court may, if the evidence permits, enter further findings of fact which rely on more than Father's incarceration and which truly comply with the requirements of KRS 625.090. *M.L.C.*, 411 S.W.3d at 766.

IT IS FURTHER ORDERED that the Father's counsel's Motion to Withdraw, due to the circumstances described in that motion, is GRANTED. On remand, the trial court shall appoint Father new counsel if he so qualifies.

ALL CONCUR.

ENTERED: AUGUST 29, 2014

/s/ Irv Maze
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Heather L. Jones
Paducah, Kentucky