

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001758-ME

R.B., MOTHER; AND R.B., FATHER

APPELLANTS

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE A. BAILEY TAYLOR, SPECIAL JUDGE
ACTION NO. 11-AD-00002

S.J.B.; AND S.D.B., A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER,¹ TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: R.B., mother, and R.B., father, (collectively referred to as appellants) bring this appeal from a September 11, 2013, judgment of the Owen Circuit Court terminating their parental rights as to S.D.B. and granting the adoption by S.J.B. We affirm.

¹ Judge Joy A. Kramer, formerly Judge Joy A. Moore.

S.D.B. was born to appellants on January 27, 2006. By order entered in the Grant District Court on May 19, 2007, S.D.B. was placed in the temporary custody of her parental grandmother, S.J.B. (appellee). The placement occurred following a physical altercation between appellants that resulted in injury to S.D.B. Over the next several years, S.D.B. remained in appellee's custody with virtually no contact from appellants.

Some five years after S.D.B. was placed in appellee's custody, a petition for adoption and for involuntary termination of parental rights was filed in the Owen Circuit Court on April 29, 2011.² Counsel was appointed to represent appellants. Appellants filed a verified answer. After multiple delays, a hearing on the petition for adoption and termination of parental rights was scheduled for June 27, 2013. Notice of the hearing was served by the court on June 13, 2013. On June 27, 2013, appellants failed to appear at the hearing but were represented by counsel. Counsel for appellants moved to continue the hearing due to appellants' absence. Counsel argued appellants could not be present at the hearing as mother had recently taken a new job. The circuit court denied the motion to continue. By Findings of Fact, Conclusions of Law and Judgment entered September 11, 2013, the circuit court terminated appellants' parental rights and granted the petition for adoption. This appeal follows.

When reviewing a family court's termination of parental rights, this Court employs the clearly erroneous standard of Kentucky Rules of Civil

² This action was initiated in accordance with Kentucky Revised Statutes (KRS) 199.500(4), which triggers the application of KRS 625.090 to these proceedings.

Procedure 52.01 and we will not disturb the family court's findings if supported by substantial evidence. *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114 (Ky. App. 1998)(citing *V.S. v. Com., Cabinet for Human Res.*, 706 S.W.2d 420, 424 (Ky. App. 1986)).

Appellants contend that the circuit court erroneously terminated their parental rights and granted S.J.B.'s petition for adoption. Specifically, appellants raise two issues on appeal: (1) that the circuit court violated appellants' due process rights by denying their motion to continue the evidentiary hearing and then conducting the hearing in their absence, and (2) that S.J.B. failed to establish by clear and convincing evidence sufficient grounds to terminate appellants' parental rights. Each issue will be addressed separately.

As concerns appellants' motion to continue the evidentiary hearing, a circuit court may consider numerous factors in determining whether to grant a continuance. *M.S.M. v. Dept. for Human Res.*, 663 S.W.2d 752 (Ky. App. 1983). And, the court's ruling upon a motion to continue is generally reviewed for abuse of discretion.

The record reflects that the June 27, 2013, hearing was noticed to the parties on June 13, 2013. On the morning of the hearing, counsel for appellants moved to continue the hearing. Counsel argued that the mother had obtained a new job and could not be absent from work to attend the hearing. However, no explanation was offered for father's absence from the hearing. Appellee responded that appellants were responsible for multiple delays in the adoption/termination

proceedings that began some two years earlier.³ Appellee also pointed out that appellants' counsel was present at the hearing and represented appellants' interests.

This case is clearly distinguishable from *A.P. v. Commonwealth*, 270 S.W.3d 418 (Ky. App. 2008), where a termination of parental rights was vacated when the parent involved was not represented by counsel at the termination hearing. This Court enforced a fundamental rule that parental rights may not be terminated where the parent is not represented by counsel at the termination hearing. *Id.*

In this case, counsel was present and ably represented appellants throughout the proceeding. Accordingly, we cannot conclude that the circuit court abused its discretion by denying the motion to continue. The hearing date was initially scheduled on June 13, 2013, but the motion to continue was not made until the day of the hearing. Neither appellant submitted an affidavit stating reasons for their absence. Additionally, no excuse of any kind was offered as to why the father could not attend the hearing. Given the circumstances, including previous delays in the case, we believe the circuit court properly denied appellants' motion to continue the hearing. Likewise, appellants' due process rights were not violated as they were represented by counsel throughout the proceeding.

As concerns the evidence supporting the termination of appellants' parental rights, appellants argue that the circuit court erred by determining there was clear and convincing evidence to support the finding that appellants failed to

³ The initial proceeding that resulted in S.D.B.'s removal from appellants' custody actually began in the Grant Circuit Court some seven years earlier.

provide essential food, clothing, shelter, medical care or education for the child pursuant to KRS 625.090(2)(g), to justify the termination.

The involuntary termination of parental rights is governed by KRS 625.090(1), which permits termination where:

- (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 in 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.

And, KRS 625.090(2) requires the circuit court to find by clear and convincing evidence the existence of one or more of ten criteria. Relevant to this appeal, KRS 625.090(2) provides:

- (2) 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;
 -
 - (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[.]

Under Kentucky law, it is well-established that “[c]lear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

In the case *sub judice*, the circuit court satisfied KRS 625.090(1) by finding that the child was abused and that termination of the parental rights was in S.D.B.’s best interest. The court also satisfied KRS 625.090(2)(a) by finding that appellants had abandoned the child for a period of more than ninety days. The circuit court specifically found that appellants “failed to make contact with child during the [2 year] pendency” of the action and that appellants “failed to exercise any form of visitation with the child”. Upon the whole, we believe that the circuit court’s findings were supported by clear and convincing evidence and that the circuit court properly ordered termination of parental rights. Thus, appellants’ argument is without merit.

In sum, we conclude that the parental rights of appellants were properly terminated. The circuit court made sufficient findings of fact that appellants intentionally abused S.D.B. per KRS 625.090(1) and that appellants had

abandoned the child per KRS 625.090(2)(a), and thus there existed clear and convincing evidence to support said findings.

For the foregoing reasons, the judgment of the Owen Circuit Court terminating appellants' parental rights and granting the adoption by S.J.B. is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Alecia Gamm Norman
Lexington, Kentucky

BRIEF FOR APPELLEE:

John Brent Threlkeld
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