

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000969-ME

J.A.T.

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 13-AD-0004

CABINET FOR HEALTH
AND FAMILY SERVICES,
COMMONWEALTH OF
KENTUCKY, K.M.W.,
AND M.R.W.

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; KRAMER¹ AND THOMPSON, JUDGES.

KRAMER, JUDGE: J.A.T., Father, appeals the Woodford Circuit Court's findings of facts, conclusions of law, and judgment terminating his parental rights to

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

M.R.W., Child. After careful review of the record, we reverse the trial court's judgment as it relates to Father's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

The child at the center of this action was born on January 24, 2012. The identity of Child's biological father was unknown. Approximately one week after Child's birth, Child was placed in the temporary custody of the Cabinet for Health and Family Services (the Cabinet), and a neglect action was instituted against Mother. Child remained in foster care² while Mother attempted to work a case plan with the Cabinet and overcome substance abuse issues and criminal conduct. Ultimately, in May 2013, the Cabinet filed a petition to terminate Mother's parental rights to Child. At this time, Mother listed two possible putative fathers of Child, however, one failed to submit to paternity testing and the other could not be located. Mother then named J.A.T. (Father) as a putative father. He was tested, and the Woodford County Attorney's Office notified Father in a letter dated August 7, 2013, he was Child's biological father. Father was added to the termination action on September 4, 2013.

Father filed a motion for temporary and permanent custody on September 12, 2013, in Fayette Circuit Court. Father's action was transferred to Woodford Circuit Court, and he was initially granted limited, supervised visitation with Child. However, on November 26, 2013, the visitation was suspended upon a motion filed by Child's guardian ad litem.

² Child has resided with the same foster parents since she was removed from Mother's custody on February 1, 2012. The foster parents wish to adopt Child if parental rights are terminated.

Hearings were held on the termination petition on December 13, 2013, January 21, 2014, and January 27, 2014. Mother and Father both testified that they had never been in a relationship. They had only engaged in sexual relations twice over the course of one week in May 2011. Father testified that he did not see Mother while she was pregnant. Father testified he did not know that he was Child's biological father until he received the August 7, 2013 letter. Father also testified that in early January 2013, a mutual friend of his and Mother told him that Mother had given birth to Child and that Child resembled him. This information prompted Father to go to the Fayette County Attorney's Office to get information on paternity testing on January 15, 2013. Father testified that he was turned away because another man was listed on Child's birth certificate. Father was then contacted by the Woodford County Child Support Office in June 2013 after Mother had named him as a putative father in the termination action. Father testified that as soon as his paternity was established he began working a case plan with the Cabinet. He completed a Fatherhood Initiative program, drug screens, and several assessments. Father began supervised visitation with Child for one hour every other week. He testified that at first Child was hesitant but that she had warmed up to him, and the visitation was going well up until it was discontinued. He stated that he would bring her snacks and toys to play with at each visit. Father also prepared a room for Child at his home.

Tonya Leathers, the social worker assigned to the case by the Cabinet, testified to Father's cooperation with the Cabinet and his case plan. Ms. Leathers

observed some of the visits between Father and Child and stated they were going well. She testified that she was satisfied with Father's ability to parent Child, his residence, and stated that termination of Father's parental rights was not in Child's best interest.

The court allowed the preadoptive foster parents to submit to the court screen shots of Facebook posts by Father indicating that he had knowledge in January 2013 that he might have possibly fathered a child with Mother and that Child was in the State's custody.³

A letter to the Cabinet from Christy Leaver, a child therapist at Slater & Associates, LLC, was also considered by the court. Ms. Leaver completed an assessment of Child and the foster parents. Ms. Leaver stated in her letter that Child has a secure attachment with the foster parents as her primary caregivers, and that the bond is vital to Child's continued development. She also stated that loss of this attachment could present a significant traumatic experience for Child.

The Woodford Circuit Court entered its findings of facts, conclusions of law, and judgment on June 9, 2014, terminating both Mother⁴ and Father's parental rights to Child. The court found that Child was an abused and neglected child, as defined in KRS 600.020(1), in this proceeding and in case 12-J-00020-

³ The court allowed this evidence pursuant Kentucky Revised Statutes (KRS) 620.100(5), which provides: "Foster parents, preadoptive parents, or relatives providing care for the child shall receive notice of, and shall have a right to be heard in, any proceeding held with respect to the child. This subsection shall not be construed to require that a foster parent, preadoptive parent, or relative caring for the child be made a party to a proceeding solely on the basis of the notice and right to be heard."

⁴ Mother has not appealed the court's judgment terminating her parental rights.

001⁵ because Mother and Father had abandoned Child for not less than ninety (90) days, continuously and repeatedly failed to provide essential parental care and protection for Child, and did not provide adequate care, supervision, food, clothing, shelter and education or medical care necessary for Child's well-being. Additionally, the court considered the factors set forth in KRS 625.090(3) and found that termination of parental rights was in Child's best interest. And finally, the court found by clear and convincing evidence grounds (a), (e), (g), and (j) of KRS 625.090(2). Father now appeals.

STANDARD OF REVIEW

In termination of parental rights actions, “[t]he trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination.”

M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116–17 (Ky. App. 1998) (citing *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977)). This Court's standard of review in termination of parental rights actions is the clearly erroneous standard provided in Kentucky Rules of Civil Procedure (CR) 52.01, based upon clear and convincing evidence. “Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR 52.01. Thus, we will not disturb a trial court's findings if they are supported by

⁵ This is the neglect action against Mother initiated on February 1, 2012.

substantial evidence on the record. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986).

ANALYSIS

Pursuant to KRS 625.090, a court may involuntarily terminate parental rights if it finds by clear and convincing evidence that (1) the child is an abused or neglected child, as defined in KRS 600.020(1); (2) termination is in the child's best interest; and (3) the existence of at least one of the grounds listed in KRS 625.090(2). "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantive nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *M.P.S.*, 979 S.W.2d at 117.

The court must first find by clear and convincing evidence that Child is an "abused or neglected child." KRS 625.090(1). Father is entitled to an individualized finding of whether he abused or neglected Child specific to his conduct according to KRS 625.090(6):

Upon conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision *as to each parent-respondent* within thirty (30) days either: (a) Terminating the right of the parent; or (b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

Cabinet for Health and Family Services v. K.H., 423 S.W.3d 204, 210 (Ky. 2014).

The Woodford Circuit Court found that Child was abused and neglected by Father, as defined in KRS 600.020(1), including that Father had abandoned Child for a

period of not less than ninety (90) days, continuously failed to provide essential parental care and protection, and did not provide Child with adequate care, supervision, food, clothing, shelter, medical care or education necessary for Child's well-being. The court's judgment stated:

[Father] had knowledge of paternity as far back as "early January" but definitely by January 21, 2013, yet he waited until September 4, 2013, to make his entry of appearance in this action. This eight month gap between knowledge of possible paternity and action is critical. This time period represents perhaps the greatest dereliction of parental duty present in this case. [Father] had knowledge of possible paternity and this, coupled with no response or attempt to intervene in the termination proceeding show a clear disregard for the physical and emotional needs of the child. This near eight month window satisfies legal requirements of KRS 625.090(2)(a) that a child be abandoned for at least 90 days. However, it represents much more than mere abandonment. During this time, [Father] showed no interest in the health and welfare of the child in question. During this period, he denied the child affection, financial support and failed to meet the physical needs of the child.

Father's main contention on appeal is that he did not abandon Child, and therefore, his parental rights were wrongfully terminated because the statutory requirements of KRS 625.090 were not satisfied.

In the context of termination proceedings, "abandonment" has been explained as "a matter of intent which may be proved by external facts and circumstances." *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985). Also, "abandonment is demonstrated by facts and 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).

Father claims that he did not abandon Child because he immediately went to the Fayette County Attorney’s Office twice in January 2013 to attempt to take a paternity test as soon as he learned he could possibly be Child’s father. He testified that he was told there was another person named on the birth certificate, and there was nothing he could do. Mother did not name Father as a putative father until May 2013. Father was then contacted by the Woodford County Attorney’s Office and ordered to complete a paternity test. As soon as Father’s paternity was confirmed, he began working with the Cabinet and taking the necessary steps to assert his parental rights to Child.

The court’s finding that Father abandoned Child is clearly erroneous as it is not supported by substantial evidence in the record. The court charges Father with knowledge of paternity starting in January 2013 and considers the subsequent eight month period, for which approximately six months paternity to Child was not established, to constitute abandonment and failure to provide for Child. When Father became aware that he could have possibly fathered Child, he attempted to have his paternity established. However, due to the circumstances created by Mother in not initially naming him as a putative father and affixing another man’s name on Child’s birth certificate, Father was unable to confirm his paternity to Child until August 2013. As soon as Father’s paternity was determined, he demonstrated clear intent to assert his parental rights to Child

through his motion for custody, efforts at visitation, and by diligently working with the Cabinet. Under these circumstances, Father could not be considered to have abandoned Child until he knew he was Child's father.

The court's judgment also includes a finding that Father "has never paid child support nor provided financially for the child." However, it is the obligation of the biological father to provide the child support. *J.A.S. v. Bushelman*, 342 S.W.3d 850, 857 (Ky. 2011); KRS 406.011. Until Father's paternity was established, he was under no obligation, and under these facts could not be ordered, to pay support for Child. Therefore, the court's finding that Father did not financially provide for Child in support of its determination of abandonment constituting abuse or neglect is clearly erroneous.

Without findings sufficient to support its conclusion that Child is abused or neglected by Father, the required statutory grounds of KRS 625.090(1) for termination have not been met. Therefore, Father's parental rights were wrongfully terminated. Accordingly, we reverse the Woodford Circuit Court's judgment as it relates to Father's parental rights to Child.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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