

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001311-ME

J.S.D.

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 13-AD-00046

CABINET FOR HEALTH AND FAMILY SERVICES,
DEPARTMENT FOR COMMUNITY BASED SERVICES,
KIPDA RURAL/SALT RIVER BULLITT COUNTY
PROTECTION AND PERMANENCY,
D.M.C., and B.R.S.D.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KRAMER, and VANMETER, JUDGES.

KRAMER, JUDGE: J.S.D. (Father), appeals the Bullitt Circuit Court's July 8, 2014 order terminating his parental rights with respect to his son, B.R.S.D. On appeal, Father alleges the circuit court erred in concluding the Cabinet for Health and Family Services (Cabinet) made reasonable efforts at reunifying Father with

B.R.S.D., and that the circuit court's conclusion that Father neglected B.R.S.D. was not supported by clear and convincing evidence. After careful review of the record, we affirm the Bullitt Circuit Court's order terminating Father's parental rights with respect to B.R.S.D.

B.R.S.D. was born April 4, 2009, in Jefferson County, Kentucky to D.M.C., (Mother), and Father.¹ In March 2010, the Cabinet received information that Father and Mother engaged in domestic violence and abused alcohol around B.R.S.D. On March 23, 2010, the Cabinet filed its first Dependency, Neglect and Abuse petition on behalf of B.R.S.D., alleging that B.R.S.D. was neglected because Mother left him outside the home where Mother and Father were residing; Mother and Father regularly fought in front of B.R.S.D.; household members, including Mother and Father, as well as B.R.S.D.'s maternal grandmother, abused alcohol around B.R.S.D.; and B.R.S.D. was born with traces of marijuana in his meconium.² On April 1, 2010, the circuit court entered a temporary removal order and placed B.R.S.D. in the temporary custody of the Cabinet. On May 19, 2010, the circuit court entered an adjudication order wherein Mother stipulated to dependency and a judgment of neglect was entered against Father.³

¹ D.M.C. gave birth to a second child, L.R.T.D., on August 17, 2011, claiming that J.S.D. was the father. Although J.S.D. has continued to refer to both L.R.T.D. and B.R.S.D. as his sons, and acknowledges that it is in his sons' best interest to stay together, he has denied that he is the biological father of L.R.T.D and has declined to be tested to determine whether he is in fact L.R.T.D.'s biological father. On appeal, J.S.D. does not contest the Bullitt Circuit Court's concurrent termination of his parental rights with respect to L.R.T.D.

² Meconium is the first feces of a newborn infant.

³ Father failed to appear at the adjudication hearing, and a judgment of neglect was entered against him on the pleadings.

During the first proceeding, in April 2010, the Cabinet developed a case plan for Father. The case plan instructed him to have a mental health assessment and treatment, if necessary; complete parenting classes; complete anger management classes; maintain stable housing and employment; pay child support; maintain contact with the Cabinet; and be available for monthly home visits.

Similarly, a case plan was developed for Mother. Upon Mother's completion of her case plan, on October 13, 2010, the circuit court entered a disposition order and returned custody of B.R.S.D. to his Mother. However, Father failed to complete his case plan prior to his arrest and incarceration on April 15, 2011.⁴

On March 27, 2012, the Cabinet filed its second Dependency, Neglect and Abuse petition on behalf of B.R.S.D. in the Bullitt Circuit Court, alleging that B.R.S.D. was neglected because Mother left him with a neighbor on March 20, 2012, but was not available to care for him on March 22, 2012, when the neighbor left the child with his paternal aunt, S.D.; and again when Mother had left B.R.S.D. with a neighbor on March 23, 2012, and was not available to take B.R.S.D. back as of March 29, 2012. On March 30, 2012, the circuit court entered a temporary

⁴ The circuit court admitted Father's history of criminal convictions and incarceration into evidence at the termination hearing. The record reflects that Father was convicted in the Bullitt Circuit Court on June 23, 2006, of receiving stolen property over \$300; theft by unlawful taking/disposition over \$300; and complicity to theft by unlawful taking/disposition over \$300. He was convicted in the Bullitt District Court of alcohol intoxication in a public place on June 28, 2006, November 13, 2008, and December 21, 2009. He was also convicted in the Bullitt District Court of unlawful transaction with a minor on February 7, 2008; first degree disorderly conduct on December 21, 2009; and non-support on October 22, 2010. Although exact periods of Father's incarceration are unclear, Father testified that he was incarcerated for approximately seven months after the birth of B.R.S.D., and from April 15, 2011, until July 1, 2014, except for one month in late 2011.

removal order and adjudication order wherein Mother stipulated, and the circuit court found, that she had neglected B.R.S.D. On May 16, 2013, a disposition order was entered committing B.R.S.D. and his brother to the Cabinet and a permanency order was entered changing the goal to adoption. Because Father was incarcerated, he was not named as a party to the second petition.

On November 15, 2013, the Cabinet filed a petition for involuntary termination of Father and Mother's parental rights with respect to B.R.S.D. Shortly thereafter the circuit court appointed counsel for Mother, a Guardian *Ad Litem* for B.R.S.D., and due to his incarceration, a Guardian *Ad Litem* for Father. A hearing on the petition was held on May 22, 2014, and completed on May 30, 2014. Father remained incarcerated until July 1, 2014. On July 11, 2014, the circuit court entered findings of fact and conclusions of law, and ordered Father and Mother's parental rights terminated with respect to B.R.S.D. Father now appeals from the July 11, 2014 termination order.

When a brief does not comport with the requirements of the rule we are authorized to strike that brief entirely, refuse to consider those claims that do not comply with the rule, or review the non-compliant allegations of error for manifest injustice rather than considering them on the merits. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. 1990); *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky.App. 2006); Kentucky Rules of Civil Procedure ("CR") 61.02. The Cabinet points out that in contravention of CR 76(4)(c)(v), Father does not cite us to the record indicating the factual basis supporting his legal arguments. His brief contains only bare

allegations that the evidence presented was insufficient to support the trial court's findings of fact and conclusions of law. He provides no citations to the record indicating how, if at all, his legal arguments were preserved for our review.

Further, he attempts to introduce new evidence from outside the record and from events occurring subsequent to the termination of the proceedings below.

However, in spite of these failings, because of the importance of the matter at bar, we review his claims on the merits, but shall not consider any facts presented by him that are outside of the trial court record.

It is well settled that a parent has a "fundamental liberty interest" in raising his child. *See Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S.Ct. 1388, 1394–95, 71 L.Ed.2d 599 (1982). However, a parent's fundamental interest must be balanced against the Commonwealth's compelling interest in protecting its youngest citizens. *M.E.C. v. Commonwealth, Cabinet for Health & Family Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008). Accordingly, our legislature has enacted a statutory scheme that provides parents with a fundamentally fair procedure when the Commonwealth seeks to involuntarily terminate a parent's rights. The statutes provide for a tripartite test to be applied by the court. The court must find by clear and convincing evidence, first, that a child is abused or neglected under Kentucky Revised Statute (KRS) 600.020(1);⁵ second, that termination would be in the

⁵ KRS 600.020(1)(a) defines an "Abused or neglected child" as a child whose health or welfare is harmed or threatened with harm when his or her parent:

....
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;

child's best interest pursuant to KRS 625.090(3);⁶ and third, the existence of one or more of the grounds set forth in KRS 625.090(2).⁷ *Cabinet for Health & Family Servs. v K.H. Sr.*, 423 S.W.3d 204, 209 (Ky. 2014).

We give the trial court's findings in involuntary termination proceedings great deference. *M.P.S. v Cabinet for Human Res.*, 979 S.W.2d 114,

4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of 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. . . .
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;. . . .

⁶ KRS 625.090(3) states:

In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

- (a) Mental illness as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;
- (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
- (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;
- (d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;
- (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
- (f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

⁷ KRS 625.090(2) states:

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;
- ...

116 (Ky. App. 1998). Where the record contains substantial evidence to support the trial court’s findings, we will not disturb them on appeal. *Id.* Our review is limited to ensuring the trial court’s findings are not clearly erroneous. CR 52.01; *Cabinet for Families & Children v G.C.W.*, 139 S.W.3d 172 (Ky. App. 2004).

There is no requirement that the evidence supporting termination be uncontradicted, only that it be of a probative and substantial nature sufficient to convince ordinarily prudent minded people. *V.S. v. Commonwealth, Cabinet for Human Res.*, 706 S.W.2d 420, 424 (Ky. App. 1986) (citation omitted).

Reasonable Efforts to Reunify Family

First, we turn to Father’s claim that the circuit court erred by concluding the Cabinet made reasonable efforts⁸ to reunify Father and B.R.S.D. prior to petitioning the circuit court to involuntarily terminate Father’s parental

(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;

....

(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;

....

(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.

⁸ KRS 620.020(11) defines “reasonable efforts” as “the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community . . . which are necessary to enable the child to safely live at home.”

rights. *See* KRS 625.090(3)(c) (in determining the best interest of the child, the court must consider whether the Cabinet utilized reasonable efforts to reunite the family before the petition to terminate was filed). Here, the record contains substantial evidence supporting the circuit court's conclusion that the Cabinet exerted reasonable efforts to reunite Father and B.R.S.D.

After the Cabinet filed its first petition in 2010, it developed a case plan for Father, instructing him to have a mental health assessment and treatment, if necessary; complete parenting classes; complete anger management classes; maintain stable housing and employment; pay child support;⁹ maintain contact with the Cabinet; and be available for monthly home visits. However, the record reflects that Father failed to complete any of the case plan objectives in the years following the Cabinet's first petition. Tellingly, Father failed to avail himself of *any* services prior to initiation of the involuntary termination proceedings, testifying at the termination hearing that his only progress had been signing up for parenting classes while incarcerated, although due to a long waiting list, he had not started the classes. Father failed to complete a mental health assessment or take part in any treatment; failed to complete anger management classes; failed to maintain stable housing and employment; or provide support for B.R.S.D. Father testified that he relied on B.R.S.D.'s maternal grandmother to provide housing for B.R.S.D. prior to his incarceration; relied on public assistance programs to provide for B.R.S.D.'s support; had struggled with drug and alcohol use his entire life; had

⁹ Father was never ordered to pay child support for B.R.S.D. because he was incarcerated.

failed to obtain his G.E.D. while incarcerated; and had been diagnosed with Tourette Syndrome, Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, and Bi-Polar Disorder.

Further, Father testified that he has had no contact with B.R.S.D. since being arrested and incarcerated on April 15, 2011, with the exception of a one-month period where he was released near the end of 2011. Father did write to the Cabinet to object to termination of his parental rights and to suggest placement with family, but due to Father's relatives' criminal history and Father's claim that B.R.S.D.'s brother was not his biological child, placement of B.R.S.D. with Father's relatives was declined by the Cabinet. Each time the Cabinet responded to Father's letters by providing him with a copy of his case plan and encouraging him to take part in any available services while incarcerated.

Father's adoption of a criminal lifestyle and lack of progress towards completing any of the case plan objectives over a four-year period supports the circuit court's finding that the Cabinet rendered or attempted to render all reasonable services to Father that might have been expected to bring about reunion of Father and B.R.S.D., and that no additional services were likely to bring about adjustments enabling B.R.S.D. to return to Father's home within a reasonable time. *See Cabinet for Human Res. v. Rogeski*, 909 S.W.2d 660 (Ky. 1995) (while incarceration alone cannot be considered grounds for termination of parental rights, adoption of a criminal lifestyle can be considered as a factor in the determination). Because substantial evidence of record supports the circuit court's finding that the

Cabinet exerted reasonable efforts to reunite the Father and B.R.S.D. prior to seeking termination of his parental rights, we affirm the Bullitt Circuit Court with respect to Father's first claim of error.

Clear and Convincing Evidence of Neglect

Similarly, we disagree with Father's second claim. Father argues the circuit court's conclusion that Father neglected B.R.S.D. was based solely on the allegations contained in the Cabinet's first petition and was not supported by clear and convincing evidence. Father is mistaken. The circuit court's findings of fact and conclusions of law supporting its order terminating his parental rights indicate B.R.S.D. was also found to be a neglected child in the termination proceedings and the record of the termination proceeding contains clear and convincing evidence that Father neglected B.R.S.D.

Here, the record shows that Father struggled with drug and alcohol use; had myriad mental health issues; adopted a criminal lifestyle that resulted in several periods of incarceration; and failed to act on the case plan recommendations developed by the Cabinet. As a result of his actions and inaction, Father was incapable of caring for the immediate and ongoing needs of the child; repeatedly failed to provide essential parental care and protection for B.R.S.D.; failed to provide B.R.S.D. with adequate care, supervision, food, clothing, shelter, education, and medical care necessary for the child's well-being; and failed to make any progress toward goals identified in the Cabinet resulting in

B.R.S.D.'s commitment to the Cabinet for fifteen of the twenty-two months prior to termination. *See* KRS 600.020(1)(a).

In summation, the circuit court's findings were supported by substantial evidence sufficient to conclude that the Cabinet exerted reasonable efforts to reunite Father and B.R.S.D. and that Father neglected B.R.S.D. For these reasons we affirm the order of the Bullitt Circuit Court terminating Father's parental rights with respect to B.R.S.D.

ALL CONCUR.

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