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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000170-ME

J.L.L. AND M.B.

APPELLANTS

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 14-AD-00007

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND
M.D.B., A CHILD

APPELLEES

AND

NO. 2015-CA-000171-ME

J.L.L. AND M.B.

APPELLANTS

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 14-AD-00008

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND
L.A.B., A CHILD

APPELLEES

AND

NO. 2015-CA-000172-ME

J.L.L. AND M.B.

APPELLANTS

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 14-AD-00009

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND
C.O.B, A CHILD

APPELLEES

AND

NO. 2015-CA-000173-ME

J.L.L. AND M.B.

APPELLANTS

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 14-AD-000010

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND
H.L.B, A CHILD

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND VACATING IN PART

BEFORE: CLAYTON, KRAMER AND STUMBO, JUDGES.

STUMBO, JUDGE: J.L.L. (hereinafter “Mother”) and M.B. (hereinafter “Father”)¹ appeal the involuntary termination of their parental rights to four children. We believe the evidence presented during the termination hearing was sufficient to terminate the parental rights to three of the four children; therefore, we affirm in part, reverse in part, and vacate in part.

Mother and Father have four children. Child 1 was born on July 8, 2010; Child 2 was born on June 21, 2011; Child 3 was born on August 4, 2012; and Child 4 was born on July 15, 2013. This family first came to the attention of the Cabinet for Health and Family Services on April 22, 2012. On that date, Father took Child 2 to the hospital due to illness. While at the hospital, the medical professionals were concerned about the child’s weight, which was around 12 pounds. This was later described as well below the 3rd percentile in weight for a child this age and size. A medical records check was also performed which showed that neither Child 1 nor Child 2 had seen a doctor in about 4 months. At this time, the Cabinet removed Child 1 and Child 2 from the parents’ custody due to Child 2’s “failure to thrive.”² While this case was ongoing, Child 3 and Child 4

¹ As this case involves minor children, we will not use the names of the parties involved.

² Only Child 1 and Child 2 had been born at this time. The other two children were born during the pendency of this action.

were born. These two children were also removed from the parents' custody within days of their birth.

The parents received a case plan from the Cabinet which, if followed, would allow them to regain custody of the children. Mother and Father were to complete parenting classes, a mental health assessment, and a substance abuse assessment. They were also to attend all visitations, submit to random drug testing, and maintain housing and employment. Mother and Father did not complete their case plan and on January 17, 2014, the Cabinet filed petitions to terminate their parental rights to all four children.

A trial was held on December 11, 2014. Testimony from Shannon Fenwick, the social services case worker, revealed that Mother and Father had completed the parenting classes, but not the mental health and drug assessments. The parents had also failed about half of their drug tests by testing positive for marijuana. Ms. Fenwick also testified that Mother and Father have maintained housing and that Father maintained employment. She also testified that visitation with the children was suspended by court order in October of 2013 because one parent failed a drug test and the other did not appear for the test. In addition, the parents ceased all contact with the Cabinet in August of 2014 and stated that any further contact would be through their attorney. Finally, Ms. Fenwick testified that Mother and Father have been paying child support.

All four children are in the same foster family. The foster father also testified during the hearing. He testified that the children are thriving in his family's care and that they intend to adopt all four children.

Mother and Father both testified at the hearing. They testified that they did not think the Cabinet did all they could do to reunify them with their children and that the Cabinet always intended to terminate their parental rights. They believed that the main reason the children were removed from their care is that they are poor and that they should be given a chance to parent the children.

The final witness called during the trial was a friend of the parents. He testified that Mother and Father were good parents and that he did not see any behavior which would warrant the removal of the children.

The trial court ultimately terminated Mother's and Father's parental rights to all four children. This appeal followed.

The standard for review in termination of parental rights cases is set forth in *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 - 17 (Ky. App. 1998). Therein, it is established that this Court's standard of review in a termination of parental rights case is the clearly erroneous standard found in Kentucky Rules of Civil Procedure (CR) 52.01, which is based upon clear and convincing evidence. Hence, this Court's review is to determine whether the trial court's order was supported by substantial evidence on the record. And the Court will not disturb the trial court's findings unless no substantial evidence exists on the record. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986).

Furthermore, although termination of parental rights is not a criminal matter, it encroaches on the parent's

constitutional right to parent his or her child, and therefore, is a procedure that should only be employed when the statutory mandates are clearly met. While the state has a compelling interest to protect its youngest citizens, state intervention into the family with the result of permanently severing the relationship between parent and child must be done with utmost caution. It is a very serious matter. *V.S. v. Commonwealth, Cabinet for Family Services*, 194 S.W.3d 331, 335 (Ky. App. 2006).

M.E.C. v. Com., Cabinet for Health and Family Services, 254 S.W.3d 846, 850 (Ky. App. 2008).

The statutes governing the termination of parental rights are as follows:

(1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence 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 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.

(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;
- (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
- (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
- (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
- (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;
- (f) That the parent has caused or allowed the child to be sexually abused or exploited;
- (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;
- (h) That:
 - 1. The parent's parental rights to another child have been involuntarily terminated;
 - 2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
 - 3. The conditions or factors which were the basis for the previous termination finding have not been corrected;
- (i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the

death of another child as a result of physical or sexual abuse or neglect; or

(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.

(3) 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.

Kentucky Revised Statutes (KRS) 625.090(1)-(3).

As used in KRS Chapters 600 to 645, unless the context otherwise requires:

(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[.]

KRS 600.020(1).

To summarize the above statutes, in order for a court to involuntarily terminate a parent's parental rights, the court must find that the child has been abused or neglected as defined in KRS 600.020, the court must find the existence of at least one of the factors listed in KRS 625.090(2), and the court must find that it would be in the best interest of the child for termination to take place. In the case at hand, the trial court found that all four children had been abused or neglected. As to Child 1, Child 2, and Child 3, the court found that KRS 625.090(2)(a), (e), (g), and (j) applied. As to Child 4, the court found that KRS 625.090(2)(a), (e), and (g) applied. Finally, the court found that it would be in the best interests of the children for Mother's and Father's parental rights to be terminated.

We believe that the evidence presented at trial was sufficient to satisfy the termination statute as it pertains to Child 1, Child 2, and Child 3. The trial court

found that these children had been abused or neglected. The evidence supporting this finding was not clearly erroneous. These children can be deemed neglected pursuant to KRS 600.020(1)(a)(9). There was clear and convincing evidence that Mother and Father did not complete the goals set forth in their case plan. Some goals were met, but not all. Because the parents did not complete the case plan, these three children remained in the care of the Cabinet and the foster family for 15 of the most recent 22 months. Child 1 and Child 2 were put in the care of the Cabinet on April 22, 2012, and the petition to terminate parental rights was filed on January 17, 2014. Child 3 was put in the care of the Cabinet on August 7, 2012, and the petition to terminate parental rights to this child was also filed on January 17, 2014. All three children exceed the fifteen-month threshold.

As for the factors listed in 625.090(2), only one is required. Although the court listed multiple factors, KRS 625.090(2)(j) clearly applies. This statute too concerns the children being in the care of the Cabinet for 15 of the most recent 22 months. As shown above, these three children were in the care of the Cabinet for more than 15 months preceding the filing of the petition to terminate parental rights.

As for the factors listed in KRS 625.090(3) which the court should consider when determining the best interests of the children, evidence submitted showed that efforts were made to reunite the children with the parents, the parents had not completed the goals set forth in the Cabinet's case plan, the children were thriving with their foster family and were bonded to the foster parents, and that Mother and

Father had paid child support. While Mother and Father paid child support, the remainder of the KRS 625.090(3) factors weigh in favor of terminating their parental rights.

Child 4, on the other hand, is a different matter. When the trial court entered its order terminating Mother's and Father's parental rights and its findings of fact and conclusions of law, it recounted the facts testified to during the trial, but did not specify which facts it considered when determining neglect or abuse or the KRS 625.090(2) and (3) factors. The facts supporting the termination of parental rights to Child 1, Child 2, and Child 3 are easily discernable because the 15 of 22 months factors are date specific and are uncontradicted.

When looking at whether Child 4 was abused or neglected, presumably the trial court relied on KRS 600.020(1)(a)(4),³ (7),⁴ and (8).⁵ What we must remember is that Child 4 was removed from the care of the parents immediately after birth. We cannot discern how these parents can have failed to provide care and protection for a child they were never allowed to parent. As to abandonment, "abandonment is demonstrated by facts or 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). "[A]bandonment rests mainly upon intent." *V.S. v. Com., Cabinet for Human Res.*, 706 S.W.2d 420, 424 (Ky.

³ The parents failed to provide parental care and protection for the child.

⁴ The parents abandoned the child.

⁵ The parents did not provide adequate care, supervision, food, clothing, shelter, education, or medical care.

App. 1986). Here, although the parents lost visitation privileges in October of 2013, they completed the parenting classes, remained in contact with the Cabinet until August of 2014, paid child support, and fought the termination of their parental rights. Finally, even though this child was removed from their care immediately after birth, the parents maintained housing that was never deemed inadequate by the Cabinet and paid child support. For these reasons, we believe there was insufficient evidence presented at trial to find that Child 4 was abused or neglected. The finding of such was clearly erroneous.

These reasons would also negate the required finding that one of the factors listed in KRS 625.090(2) applied. The trial court found KRS 625.090(2)(a), (e), and (g) applied. These factors are similar to those discussed in the preceding paragraph. The evidence shows that the parents did not intend to abandon Child 4, did not have the opportunity to provide parental care or protection, had stable housing, and were paying child support. Furthermore, KRS 625.090(2)(g) specifically requires the court to determine if poverty is a factor. Here, the only evidence regarding Mother's and Father's finances was that Father was intermittently employed as a laborer and Mother was unable to work due to medical reasons. This suggests the parents were impoverished. We believe that the evidence presented at trial was insufficient to show one of the KRS 625.090(2) factors applied. The trial court's finding to the contrary was clearly erroneous.

Based on the foregoing, we affirm the termination of parental rights as to Child 1, Child 2, and Child 3; however, we reverse and vacate the termination of parental rights as to Child 4.

CLAYTON, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN PART, DISSENTS IN PART,
AND FILES SEPARATE OPINION.

KRAMER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority opinion wherein it affirms in part the circuit court; however, I dissent as to the majority opinion's reversal in part. I would affirm the circuit court's decision regarding the termination of parental rights as to all four children.

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