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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000220-ME

J. M. APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 14-AD-00034

C.R.; J.R.; A.M.;
AND C.T.R., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT, AND TAYLOR, JUDGES.

J. LAMBERT, JUDGE: J.M. appeals from the Warren Circuit Court's findings of fact, conclusions of law, and judgment of adoption entered on January 7, 2015, involuntarily terminating his parental rights to his son, C.M. (the child). After careful review, we affirm the trial court's rulings.

This case arises out of an adoption petition filed in Warren County Family Court. A.M. (the mother) and J.M. (the father) are the biological parents of the child, who was born on July 5, 2009. C.R. and J.R. (the adoptive parents), husband and wife, sought to adopt the child, a relative who had been in their care since April 9, 2010. The mother consented to the adoption, but the father did not, and a hearing on the petition was held on November 25, 2014, with the father appearing by telephone by virtue of his ongoing incarceration in federal prison.

The child was initially placed with the adoptive parents when he was approximately nine months old, pursuant to a temporary custody order arising out of a neglect petition filed by the Cabinet for Health and Family Services (the Cabinet) against the mother. The child has resided continually with the adoptive parents since that time. The father was not named as a party responsible for neglect in that initial petition. The mother eventually stipulated to a finding of neglect in that proceeding.

In April of 2011, the adoptive parents sought permanent custody of the child. The father did not object, and on April 20, 2011, following an evidentiary hearing, it was ordered that the child be placed in the permanent sole custody of the adoptive parents. The father was present at the hearing by telephone and was represented by counsel. The Court made a finding that the father was supposed to establish a case plan with Cabinet Worker LaCassie Taylor but did not do so prior to incarceration, and he did not do so after becoming incarcerated in November 2010, where he remains as a federal prisoner for drug charges.

LaCassie Taylor, the social worker assigned to this case, testified at the hearing that J.M. did not contact her to establish a prevention or case plan regarding his son. Taylor admitted that she did not make any attempt to contact the father, testifying that she initially lacked contact information for him and that he then later entered federal custody. While the father testified that he was present at some of the court proceedings in the matter until permanent custody was granted, Taylor did not have any direct contact with the father. Ms. Taylor testified that had the father contacted her to develop a case plan, she would have included the following in the plan: obtain stable housing and employment, participate in a drug and alcohol use/abuse assessment, participate in a mental health assessment and attend parenting classes.

In November 2010, the father began an eighty-seven month prison sentence on federal drug charges related to trafficking in marijuana. Local state charges related to the same facts had been dismissed without prejudice. The father's projected release date as of the date of the adoption hearing was July 2017. He testified that he had completed a six-month drug program and vocational classes while incarcerated and was nearing completion of anger management classes. He further testified that his intention was to complete parenting classes as soon as he was eligible to do so, which was dependent upon his release date. The father further testified that as a minimum drug offender pursuant to federal guidelines, he was eligible for a sixteen-month reduction in his sentence, which

would advance his release date to November 2015, and he would be eligible for placement in a halfway house as early as May 2015.

The father testified that prior to the juvenile petition being filed, he had regular contact with the child and engaged in regular care-taking activities, including overnight stays, by agreement with the biological mother. This care-taking was somewhat interrupted when the adoptive parents were granted temporary custody. The adoptive mother admitted that the father continued to have weekly visits with the child with her knowledge up until his incarceration began in November 2010. The adoptive mother testified that the father was still seeing the child after his incarceration, when his mother would bring the child to the Warren County jail, but that this contact was without her knowledge or permission. She also testified that she terminated these visits when she became aware that they were occurring.

Proof was offered that the father ceased financial support of the child via child support payments in January or February of 2011, after becoming incarcerated. Prior to that time, he worked in masonry and paid child support to the state while the adoptive parents received kinship payments. The adoptive mother admitted that on at least one occasion, the paternal grandmother delivered a card to the child from the father, which included approximately $100.00 to $200.00. The adoptive mother further testified that since November 2010, the father did not send a card or letter or attempt to contact the child by telephone through her or attempt to arrange a visit through her.

On January 7, 2015, the trial court entered findings of fact, conclusions of law, and an order of adoption. The Court found that the biological mother had voluntarily terminated her parental rights to the child and had agreed to the adoption of the child by the adoptive parents. The Court further found that pursuant to Kentucky Revised Statutes (KRS) 199.502, it had found by clear and convincing evidence that the father had abandoned the child for a period of not less than ninety days (KRS 199.502(1)(a)); that the biological father for a period of not less than six months had continuously or repeatedly failed or refused to provide or had been substantially incapable of providing essential parental care and protection of the child and that there was no reasonable expectation of improvement in parental care and protection, considering the age of the child (KRS 199.502(1)(e)); that the biological father, for reasons other than poverty alone has continuously or repeatedly failed to provide or was incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there was no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child (KRS 199.502(1)(g)); and that the adoption herein terminated the parental rights of both the biological mother and biological father. This appeal now follows.

On appeal, the father argues that the uncontested proof at the hearing was that he acted as a caretaker to the child prior to the Cabinet's filing of the juvenile neglect petition in April 2010 and that he was never named as a party

responsible for the neglect of the child. The father argues that there was no proof offered to indicate that the child was at any particular risk of being neglected or abused by the father prior to or since the allegations. He further argues that he paid child support up until his incarceration began in late 2010, and he continued to have regular contact with the child into 2013, until such time as contact was unilaterally discontinued by the adoptive parents. The father argues that based on these facts, the trial court erred in its findings of fact and conclusions of law and in the judgment terminating his parental rights.

An adoption without the consent of a living biological parent is, in effect, a proceeding to terminate that parent's parental rights. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). The standard of review in a termination of parental rights action is confined to the clearly erroneous standard in Kentucky Rules of Civil Procedure (CR) 52.01 and a trial court's findings must be based upon clear and convincing evidence. The findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support the findings. Clear 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." *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998).

This action is an involuntary adoption proceeding in which the adoptive parents have been granted an adoption pursuant to KRS 199.502(1)(a), (e), and (g). That statute provides:

> (1) Notwithstanding the provisions of KRS 199.500(1), an adoption may be granted without consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding that any of the following conditions exist with respect to the child:
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> (a) That the parent has abandoned the child for a period of not less than ninety days;
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> . . . .
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> (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 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;
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> . . . .
>
> (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[.]

KRS 199.502.

As his first assignment of error, the father argues that abandonment has not been proven. The father argues that Kentucky law clearly indicates that incarceration alone is not a basis for concluding that a parent has abandoned a child, citing *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). *See also M.L.C. vs. Cabinet for Health and Family Services*, 411 S.W.3d

761, 766 (Ky. App. 2013). The father argues that the trial court completely ignored the testimony that he maintained regular contact with the child until and even after his incarceration began and that he paid child support until he became incarcerated.

In support of this argument, the father contends that the order granting permanent custody to the adoptive parents terminated his right to have contact with the child. The father argues that in order to prove abandonment, it must be "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) (internal citation omitted). Further, the father argues that when the parent's failure to make contact with the child results from a court order which denies that right, the courts have recognized that an abandonment finding puts the parent in a proverbial "catch-22." *Wright v. Howard*, 711 S.W.2d 492, 497 (Ky. App. 1986). The father argues that in his case, the testimony was precisely that his contact was unilaterally terminated by the adoptive mother under authority given to her by court order. Prior to that moment, there was no need for him to contact the adoptive mother regarding contact with the child since he was having visits with the child through his mother. The father argues that once the visits ceased, he was necessarily aware that the adoptive parents had legal authority to unilaterally terminate contact over his objection and contrary to his wishes.

In response, the adoptive parents argue that the testimony at the hearing proved by clear and convincing evidence pursuant to KRS 199.502(a) that the father had abandoned the child for a period of not less than ninety days. They argue that despite being represented by an attorney and involved in the court process, the father has made absolutely no effort to obtain or maintain contact with the minor child through the court system. They point out that the father has never filed a motion in either the juvenile action or the adoption action requesting any kind of contact with the child and that the father has instead tried to excuse his neglect by complaining that he has been a prisoner. They argue that the Commonwealth has provided the father with counsel that had a duty to advocate for contact with the child if requested. Finally, they argue that the father exaggerates the extent of his involvement with the child prior to his incarceration and exaggerates the contact he had with the child.

Regarding abandonment, the evidence supports the trial court's conclusion that the father abandoned the child for a period in excess of ninety days. The child was removed from his mother five years ago, and the father has never once requested visitation through the court or the adoptive parents, even though he complains that his visitation was unilaterally stopped over two years ago. The father's argument that the adoptive parents having sole custody of the child prevented him from contact is without merit, as there was no order prohibiting contact between the father and the child anywhere in the record. The father never asked the court for contact, nor did he seek contact from the case worker assigned

to the child's case. The father's failure to even ask for contact shows an abandonment of all parental duties, and it seems disingenuous to this Court that the father now complains about lack of contact with the child.

The father urges this Court to consider *M.L.C. v. Cabinet for Health and Family Services*, *supra*, and *M.E.C. v. Commonwealth*, 254 S.W.3d 846 (2008). These cases can be easily distinguished from the instant case. In those cases, both appellants consistently worked with the Cabinet to develop and work a case plan while they were not incarcerated and worked with their social workers when they were incarcerated. The father never contacted the Cabinet, nor did he attempt or complete a case plan. In fact, the father never had a case plan because, although he was present at many of the court hearings, he never case planned with his social worker. The father simply did not avail himself of the resources available to him, including the court, social workers, court-appointed counsel, the Appellees, or his mother (the paternal grandmother).

While we agree that incarceration alone is not sufficient for a finding of abandonment, it is a factor to be considered. "Although incarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights, incarceration is a factor to be considered…." *Cabinet for Human Resources v. Rogeski et al*, 909 S.W.2d 660, 661 (Ky. 1995). While the father argues that the trial court relied solely on his incarceration in determining that he had abandoned the child, the evidence shows that from April 9, 2010, through November 2010, the father provided nothing for the child, never requested

visitation through the court or the temporary custodian, never participated in any of the responsibilities of a parent for a child and never case planned with the Cabinet. We agree with the trial court's findings and conclusions of law in this regard.

The father next argues that the proof at the hearing did not support a finding that he had neglected the child or that there was no reasonable expectation of improvement in his ability to provide essential parental care and protection, food, clothing, shelter, medical care, or education for the minor child. The father concedes that the trial court cited evidence supporting a conclusion that he had failed to provide both parental care and protection or to provide food, clothing, shelter, medical care, or education to the child for a period in excess of six months; however he argues that the trial court failed to connect the dots in terms of explaining why the facts, as stated, support a conclusion that there is no reasonable expectation of improvement in the future. The father concedes that he cannot currently provide parental care and protection or food, shelter, etc. while incarcerated; however he argues that the child never suffered neglect or abuse at his hands prior to the child being placed into the care of the custodians. While we agree that no abuse to the child occurred at the hands of the father prior to his incarceration, we note that he was absent from the child's life prior to the neglect petition filed against the child's mother. All of that was prior to his incarceration, and not because of it.

Furthermore, the record supports the trial court's findings that since April 9, 2010, the father has not provided any food or clothing for the child, has not

provided any shelter for the child, has never been to a doctor's appointment, and has not participated in any medical care or any educational activities of any kind. The father has never asked to be involved with the child, has not prepared a meal for the child, and has never provided any parental care and protection for the child. While this list is certainly not an exhaustive list as to how a parent provides parental care and protection, the father did not offer any evidence that he ever provided any parental care and protection for the child. In fact, although the father claims to have had contact with the child before his incarceration, he did not provide any evidence or testimony of examples of him providing care and protection for the child.

We agree that there is no reasonable expectation of improvement because the father's history shows that he has never made any effort to provide parental care and protection for the child. The father's past behavior indicates that when released from prison, he could possibly continue his life as a career criminal, continue to fail to take advantage of the resources provided to him by the Commonwealth, and continue to provide nothing for the child. Furthermore, once released from federal prison, there is a possibility that state proceedings for drug charges will be commenced against the father, as those charges were dismissed without prejudice and could be brought again.

Next, the father argues that termination of his parental rights was improper because the trial court failed to consider any less drastic measures to accomplish the child's best interests. We disagree. This Court has previously held that there is

no requirement under our current statute that the court must consider less drastic means than adoption prior to granting an adoption pursuant to KRS 199.500. *B.L. v. J.S. et al.*, 434 S.W.3d 61, 68 (Ky. App. 2014). There, a panel of this Court stated:

> Biological Father argues that the trial court erred by not following the standard set forth in *D.S. v. F.A.H.*, 684 S.W.2d 320, 323 (Ky. App. 1985), which stated that it is "incumbent upon the court when considering a petition to adopt pursuant to K.R.S. 199.500(4) to not only require clear and convincing evidence of abandonment or neglect, but to also consider any less drastic measures to accomplish the child's best interest."
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> In relevant part, KRS 199.500(4) provides that "an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as a part of the adoption proceedings that any of the provisions of KRS 625.090 exist with respect to the child." KRS 625.090 is the current statute listing the factors that a court must consider when determining if a termination of parental rights is appropriate. However, *D.S.* was decided pursuant to the old statute for termination of parental rights, KRS 199.603, which was repealed in 1987. The current statute and its corresponding case law contain no requirement that a court consider means less drastic than adoption prior to a judgment of adoption. This court previously declined to carry over the requirements of the repealed KRS 199.603 into the current adoption-law requirements. *See R.L.F., Jr. v. Cabinet for Health and Family Services*, No. 2011–CA–001640–ME, 2012 WL 1886956 at *5 (Ky. App. May 25, 2012) ("That case was decided under prior law (KRS 199.603 and KRS 199.500), and has no bearing on the instant case."). There is simply no requirement under our current statute that the court must consider less drastic means than adoption prior to granting an adoption pursuant to the current KRS 199.500.

In fact, KRS 199.502 requires the court only to find that one of the subsections (a)—(i) is applicable.

(1) Notwithstanding the provisions of KRS 199.500(1), an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding that any of the following conditions exist with respect to the child:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
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> (b) That the parent had inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
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> (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;
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> (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to a child named in the present adoption proceeding;
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> (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;
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> (f) That the parent has caused or allowed the child to be sexually abused or exploited;
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> (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;
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> (h) That: 1. The parent's parental rights to another child have been involuntarily terminated; 2. The child named in the present adoption proceeding was born subsequent to or during the pendency of the previous termination; and 3. The condition or factor which was the basis for the previous termination finding has not been corrected; or
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> (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.

Id. at 67-68. We agree with the adoptive parents that the father's argument that the trial court failed to consider any less drastic measures is without merit.

The record in this case supports the trial court's findings of fact that the father had abandoned the child, had failed to provide paternal care and protection, and had failed to provide food, clothing, shelter, etc., and the court's conclusion that adoption was in the child's best interest was without error. Accordingly, we affirm the trial court's January 7, 2015, findings of fact, conclusions of law, and judgment of adoption.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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