

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000107-ME

S.G.

APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 13-AD-00024

D.S. Sr. AND A.S.,
HUSBAND AND WIFE; AND
B.D.R.S., III (A MINOR CHILD)

APPELLEES

OPINION AND ORDER
AFFIRMING AND
DENYING MOTION TO STRIKE

** ** * * * **

BEFORE: JONES, MAZE, AND NICKELL, JUDGES.

JONES, JUDGE: This appeal arises out of an order by the Perry Circuit Court terminating S.G.'s rights to her minor son.¹ Also before this Court, is S.G.'s motion to strike the Appellees' brief from the record. For the reasons set forth

¹ The order also terminated Father's parental rights and awarded the maternal grandmother visitation with the child. The appeal before us concerns only the termination of Mother's parental rights, and therefore, our discussion of the facts centers primarily on Mother.

below, we affirm the trial court's order terminating S.G.'s parental rights and deny her motion to strike.

I. Background

S.G. ("Mother") is the natural mother of the minor child at issue in this appeal. The child was born in December of 2006. D.S. ("Father") is the child's biological father.

The Cabinet for Health and Human Services ("Cabinet") first became involved in this case in July of 2011 after Mother was incarcerated due to failing a Probation and Parole drug screen. The Cabinet filed an emergency motion on behalf of the child. Thereafter, an emergency custody order was entered placing the child in the joint care of Father and the paternal grandparents ("Grandparents").

On February 20, 2012, Father was arrested and incarcerated. As a result, on February 29, 2012, a permanent custody order was entered granting permanent custody of child to Grandparents. At the same time, the maternal grandmother was granted visitation with child. As part of the permanent custody order, Mother was ordered to complete the Commonwealth's Substance Abuse Program ("SAP"). Additionally, both Mother and Father were ordered to complete a case plan with the Cabinet. The Cabinet's case plan required Mother and Father to participate in drug screens, complete parenting classes, undergo Targeted

Assessment Project (“TAP”) evaluations, participate in alcohol assessments, and establish stable housing.

On September 18, 2013, Grandparents filed a petition for involuntary termination of the parental rights of Mother and Father and to adopt the child. After conducting a lengthy hearing, the trial court issued an order of termination and adoption accompanied by separate findings of fact and conclusions of law.

This appeal by Mother followed. On appeal, Mother asserts that the trial court abused its discretion in terminating her parental rights. Primarily, she asserts that termination was improper under KRS² 600.020(1) because she proved beyond dispute that the child would not be neglected if returned to her custody.

II. Standard of Review

“The trial court has wide discretion in terminating parental rights.”

Cabinet for Health & Family Servs. v. K.H., 423 S.W.3d 204, 211 (Ky. 2014).

“This Court's standard of review in a termination of parental rights action is confined to the clearly-erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings.” *M.L.C. v.*

Cabinet for Health & Family Servs., 411 S.W.3d 761, 765 (Ky. App. 2013).

“Substantial evidence has been conclusively defined by Kentucky courts as that

² Kentucky Revised Statutes.

which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.” *Bowling v. Nat. Res. & Envtl. Prot. Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994).

III. Analysis

The General Assembly provided the mechanism for the involuntary termination of parental rights in KRS 625.090. Termination of a party's parental rights is proper upon satisfaction, by clear and convincing evidence, of a three-part test. First, the child must have been found to be an “abused or neglected” child, as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination must be in the child's best interest. KRS 625.090(1)(b). Third, the trial court must find at least one ground of parental unfitness. KRS 625.090(2).

A. KRS 625.090(a)

The first requirement necessary to terminate a parent's rights is set forth in KRS 625.090(a). It provides that the trial court must find at least one of the following three requirements to be present by clear and convincing evidence:

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[.]

KRS 625.090(a)(1)–(3).

Mother stipulated to neglect as part of the district court proceedings awarding emergency custody to Father and Grandparents. Mother does not challenge the trial court’s reliance on her prior stipulation. Therefore, we agree with the trial court that the first requirement for termination has been satisfied beyond dispute.

B. KRS 625.090(1)(b)

The second prong of KRS 625.090 requires a finding that the termination of parental rights would be in the best interest of the child. In determining the best interest of the child, and the existence of a ground for termination, the circuit court is required to consider the following factors set forth in KRS 625.090(2):

- (a) Emotional illness, mental illness, or mental deficiency 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 toward any child in the family;
- (c) If the child has been placed with the cabinet or a child-placing agency or child-caring facility, whether the cabinet has rendered or attempted to render all reasonable

services to the parent which reasonably might be expected to bring about a reunion of the family, including the parent's testimony concerning the services and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within a reasonable period of time, considering the age of the child;

(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.

We see no basis to conclude that the trial court erred in determining that it was in the best interest of the child that Mother's parental rights be terminated. The evidence showed that since being in Grandparents' care: (1) the child has received appropriate medical care and is in good health; and (2) the child has been enrolled in school and is enjoying both academic and social success at school. The evidence further revealed that Grandparents were able to continue meeting child's emotional, physical, and financial needs. The child was bonded with Grandparents. In contrast, Mother did not have stable employment. While Mother had housing at the time of the hearing, the trial court was concerned that based on her prior history, Mother would not be able to maintain stable, appropriate housing for the child. Further, considering the child's age and the

length of time he had been in Grandparents' care, the trial court appropriately considered that it would be better for child to be adopted by and remain with them. This conclusion was supported by the evidence.

C. KRS 625.090(2)

Next, we turn to the trial court's determination with respect to the factors set out in KRS 625.090(2). Of those ten factors, the trial court found three to be present in this case:

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

....

(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;

Having reviewed the record, we believe substantial evidence supported the trial court's findings. While there was some evidence to indicate that Mother occasionally attempted to give Grandparents money and items for child, even when viewed in Mother's favor, these efforts were sporadic at best. No evidence established that Mother consistently provided for child's needs. Additionally, even though not incarcerated at the time of the hearing, Mother did not have stable, regular employment that would allow her to meet child's needs.

D. KRS 625.090(5)

KRS 625.090(5) provides that “[i]f the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent, the court in its discretion may determine not to terminate parental rights.” Mother's appeal primarily centers on this section. She asserts that she presented evidence that she is no longer on drugs, has housing, and is babysitting a few times a week to earn money. She contends this evidence was not contradicted and establishes that child would not continue to be neglected if returned to her possession.

First, the trial court was certainly not convinced by the evidence that Mother had made sufficient changes in her life to say with certainty that the child would not be neglected if returned to her. Specifically, the trial court noted that Mother, despite being out of incarceration for several months, had not established

“stability” in employment or housing. We cannot say the evidence compelled a different conclusion.

Second, KRS 625.090(5) is plainly permissive. The trial court may opt not to terminate a parent's parental rights if the parent proves that the child will not continue to be an abused or neglected child. However, nothing compels the trial court to choose this option; it expressly vests the trial with the discretion to determine whether to do so. Therefore, as applied to this case, even if Mother proved it was more likely than not that the child would not continue to be neglected if returned to her care, the trial court still retained the discretion and authority to terminate her parental rights. The trial court proceeded in this manner, and we cannot say that in doing so the trial court abused its discretion.

E. Mother’s Motion to Strike

Mother has requested that we strike the Appellees’ brief in this case. As a basis for her motion, Mother points to the fact that the Appellees referenced factual matters that are not part of the record below. We do not condone inclusion of matters outside the record. However, in light of the nature of this proceeding, we have chosen to disregard Appellees’ citation to matters outside of the record instead of striking their entire brief.

IV. Conclusion

For the reasons set forth above, we AFFIRM the parental termination order of the Perry Circuit Court. Furthermore, we DENY Appellant's motion to strike.

ALL CONCUR.

ENTERED: August 12, 2016

/s/ Allison E. Jones
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Michael E. Roper
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and A.S.:

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BRIEF FOR GUARDIAN AD LITEM
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