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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000749-ME

S.A.-M.S. APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE CATHERINE RICE HOLDERFIELD, JUDGE
ACTION NO. 15-AD-00053

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; V.L.H., MOTHER; AND
H.F.'L.M.S., A MINOR CHILD APPELLEES

AND NO. 2016-CA-000750-ME

S.A.-M.S. APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE CATHERINE RICE HOLDERFIELD, JUDGE
ACTION NO 15-AD-00054

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF

KENTUCKY; V.L.H., MOTHER; AND
K.R.S., A MINOR CHILD APPELLEES

AND NO. 2016-CA-000751-ME

S.A.-M.S. APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE CATHERINE RICE HOLDERFIELD, JUDGE
ACTION NO. 15-AD-00055

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; V.L.H., MOTHER; AND
B.R.S., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Appellant, S.A.-M.S., brings these consolidated appeals from three separate findings of fact, conclusions of law and judgments entered April 22, 2016, in the Warren Circuit Court, Family Court Division, involuntarily terminating appellant's parental rights to three children, B.R.S., K.R.S. and H.F.'L.M.S.[1] We affirm.

[1] The three cases are related and were consolidated for all purposes on appeal by order of the Court entered July 11, 2016.

Appellant became acquainted with V.L.H. in 2008. Shortly thereafter, V.L.H., who was fourteen years old, learned she was pregnant by appellant, who was eighteen. After learning she was pregnant and due to circumstances in her own home, V.L.H. was placed in the custody of the Cabinet. While living in a foster home, V.L.H. gave birth to twins, B.R.S. and K.R.S., on August 16, 2009. V.L.H. and the twins remained together in a foster home until V.L.H. graduated high school and attained the age of majority. Then in June 2012, V.L.H. left the foster home and moved in with appellant at his mother's house; the twins remained in foster care.

On June 17, 2013, V.L.H. and appellant had a third child, H.F.'L.M.S. After the birth of the third child, V.L.H. and appellant cooperated with the Cabinet and regained custody of the twins. In October 2013, the Cabinet placed the twins with V.L.H. and appellant. Appellant, V.L.H., and all three children lived with appellant's mother.

In December of 2013, appellant, V.L.H. and all three children were still living with appellant's mother. On the evening of December 21, 2013, appellant was home alone with the children. V.L.H. was at work, and appellant's mother was away with friends. Late that evening, appellant called his mother and reported that B.R.S. had fallen out of bed and was nonresponsive. Appellant's mother headed home and called 911.

B.R.S. was taken by ambulance to a hospital in Bowling Green, Kentucky. The hospital subsequently transferred B.R.S. to Vanderbilt University

Medical Center for treatment of a severe head injury. At Vanderbilt, it was determined that B.R.S. had significant fractures to his skull due to multiple blows to different areas of his head.[2] In addition to the skull fractures, B.R.S. also suffered a bruise to his brain, bleeding around his brain, and multiple bruises to his face and shoulder. An emergency custody order was entered removing all three children from their parents' custody and placing them with the Cabinet. B.R.S. was removed for physical abuse; K.R.S. and H.F.'L.M.S. were removed for the risk of harm due to the severe injuries inflicted upon B.R.S. It was also subsequently determined that appellant had inflicted injuries upon K.R.S.

In January of 2014, the Cabinet completed a case plan with appellant and V.L.H. The goal of the initial case plan was to return the children to their parents. The case plan directed appellant to complete several tasks including anger management assessment, parenting classes, mental health assessment, substance abuse assessment, maintain employment, maintain stable housing, submit to random drug screens, and notify the Cabinet of any change in address or phone number. The family court subsequently conducted two adjudication hearings and rendered findings of abuse against appellant. The Cabinet ultimately changed the permanency plan goal from "return to parent" to "adoption."

[2] The preliminary radiology report revealed:

> There is a small amount of subarachnoid hemorrhage in the left cerebellopontine angle and anterior to thepons. . . . Large subcutaneous hematoma over the left posterior head. A vertically oriented fracture line involving the right side of occipital bone. Another vertically oriented fracture involving the left parietal bone and left occipital bone. There is partial opacification on the left mastoid air cells and left middle impression.

In February 2014, appellant was indicted in the Logan Circuit Court (Action No. 14-CR-00054) upon assault in the second degree (KRS 508.100(1)(c)), assault in the fourth degree (KRS 508.030), and two counts of criminal abuse in the first degree to a victim under twelve years of age (KRS 508.110(1)). On February 6, 2015, pursuant to a plea agreement with the Commonwealth, appellant pleaded guilty to the amended charge of criminal abuse in the second degree (KRS 508.110). The remaining charges were diverted or dismissed. Appellant was sentenced to a total of five-years' imprisonment in May 2015.

On August 21, 2015, the Cabinet filed petitions for involuntary termination of appellant's parental rights as to all three children.[3] The family court subsequently conducted an evidentiary hearing in March 2016 upon the petitions to terminate parental rights. After the evidentiary hearings, the family court found that all three children were abused and neglected and that termination would be in their best interest. By orders entered on April 22, 2016, appellant's parental rights were involuntarily terminated as to B.R.S., K.R.S. and H.F.'L.M.S. This consolidated appeal follows.

The involuntary termination of parental rights in Kentucky is governed by Kentucky Revised Statutes (KRS) 625.090. At the outset, we note that our review of an action to terminate parental rights is confined to the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01 and the

[3] The children's biological mother, V.L.H., ultimately agreed to voluntarily terminate her parental rights but appellant, S.A.-M.S., did not agree.

family court's findings must be based upon clear and convincing evidence. *Com. v. Cabinet for Health and Family Servs. v. T.N.H.*, 302 S.W.3d 658 (Ky. 2010).

Appellant asserts that the family court failed to comply with the mandates of KRS 625.090(3) when it involuntarily terminated his parental rights as to B.R.S., K.R.S. and H.F.'L.M.S.[4] Appellant specifically contends that the family court's error "resulted from its failure to utilize ALL Factors set out in KRS 625.090(3)(a–f) when determining the best interest of the child and the existence of a ground for termination which it was mandated to do…." Appellant's Brief at page 6-7.

Prior to an involuntary termination of parental rights, the family court must find by clear and convincing evidence that the three-prong analysis under KRS 625.090 has been satisfied. First, there must be a finding that the child is or has been adjudicated abused or neglected. Second, there must be a finding that termination of parental rights is in the child's best interest. This best interest determination requires the family court to consider the factors set forth in KRS 625.090(3)(a) – (f). And, third, there must be a finding that at least one of the grounds enumerated in KRS 625.090(2)(a) – (j) is present.[5]

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[4]Appellant filed one brief and combined his arguments as to Appeal Nos. 2016-CA-000749-ME, 2016-CA-000750-ME and 2016-CA-000751-ME.

[5] KRS 625.090(3) provides, in relevant part:

> 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. . . or an intellectual disability . . . of the parent . . . 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;

We emphasize that the language of KRS 625.090(3) provides that a best interest determination merely requires the family court to "consider" the factors set forth in subsections (a)-(f); it does not require the court make findings of fact as to each of the factors. As articulated by our Supreme Court, "the statute itself notes, the factors in [KRS 625.090(3)(a)-(f)] are to be 'considered' in deciding whether termination is in the child's best interest. They do not necessarily dictate a result and are always subordinate to the best-interest finding that the court is tasked with making." *D.G.R. v. Com., Cabinet for Health and Family Servs.*, 364 S.W.3d 106, 115 (Ky. 2012).

In the case *sub judice*, the family court was merely required to "consider" the factors set forth in KRS 625.090(3)(a)-(f) in making its best interest determination. From a review of the family court's judgments terminating appellant's parental rights in Appeal Nos. 2016-CA-000749-ME, 2016-CA-000750-ME and 2016-CA-000751-ME, we believe the factors enumerated in KRS

> (b) Acts of abuse or neglect . . . 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 . . .
>
> (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.

625.090(3)(a)-(f) were properly considered and will address each seriatim. *See Cabinet v. for Health and Family Services v. K.H.,* 423 S.W.3d 204 (Ky. 2014).

We begin with KRS 625.090(3)(a) which provides the family court shall consider any mental illness or intellectual disability of appellant. In this case, neither appellant nor the Cabinet raised any issue related to mental illness or intellectual disability. As part of appellant's case plan, he was to obtain a mental health assessment, but appellant failed to do so until more than a year after these young children had been removed from the home. And, when appellant finally obtained the assessment, he failed to notify the Cabinet of same. Therefore, neither mental illness nor intellectual disability appear to be relevant in this case.

Next, Subsection (b) of KRS 625.090(3) requires the family court to consider whether appellant committed acts of abuse or neglect toward any child in the family. As evidenced in the family court's findings of fact and conclusions of law, the court considered the acts of severe abuse appellant inflicted upon B.R.S. These acts of abuse resulted in serious physical injury to B.R.S., including multiple fractures to his skill. The family court made several findings of fact relevant to the abuse and clearly considered same as required by KRS 625.090(3)(b).

KRS 625.090(3)(c) mandates the family court to consider whether the Cabinet made reasonable efforts to reunite appellant with the children. There was extensive testimony describing the Cabinet's attempts to provide appellant with the services necessary to complete his case plan. Appellant initially refused to utilize any of the services the Cabinet made available despite being released on bond for

several months. The record discloses that appellant did not attempt to complete the tasks on his case plan until after he was criminally charged, pleaded guilty, and was awaiting sentencing. Therefore, the family court properly considered the Cabinet's reasonable efforts to provide appellant the services needed to allow reunification.

KRS 625.090(3)(d) instructs the family court to consider the efforts and adjustment appellant made in his circumstances, conduct, or conditions to enable the return of the children to be in their best interest. As previously pointed out, appellant initially refused to participate in his case plan and waited over a year to begin working on the plan. Thus, it was apparent to the family court that appellant was not attempting to change his circumstances, conduct, or conditions in a way that would enable returning the children to be in their best interest.

Subsection (e) of KRS 625.090(3) directs that the family court consider the physical, emotional, and mental health of the children and their prospects for improvement if termination is ordered. The family court was clearly concerned about the physical and emotional health of these children due to the severe physical abuse appellant inflicted upon B.R.S. The family court specifically made a finding of fact that appellant had been convicted of criminal abuse of B.R.S. There was also testimony presented by the Cabinet that all three children had been placed together and were thriving in their foster home. The family court heard testimony about the twins being in the top of their classes academically, and that all three children were involved in various extra-circular activities. Therefore,

the family court plainly considered the physical, emotional, and mental health of the children.

Finally, subsection (f) of KRS 625.090(3) provides that the family court must consider the payments, or lack of payments, for the substitute care of the children. There was little or no evidence presented regarding appellant's payment of child support; therefore, we do not believe this subsection is dispositive given the severity of the physical abuse appellant inflicted upon B.R.S.

In this case, the family court's findings of fact clearly indicate it considered the factors relevant to a best interest determination as set forth in KRS 625.090(3)(a)-(f) in its judgments terminating appellant's parental rights as to B.R.S., K.R.S., and H.F.'L.M.S. And, there exists clear and convincing evidence to support the family court's decision that termination of appellant's parental rights was in the best interest of the children. Upon the whole, we are of the opinion that the family court did not err by terminating appellant's parental rights to B.R.S., K.R.S., and H.F.'L.M.S.

For the foregoing reasons, the findings of fact, conclusions of law, and judgments of the Warren Circuit Court, Family Court Division, are affirmed in all three cases as consolidated in this appeal.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Thomas J. Blaha
Bowling Green, Kentucky

BRIEF FOR APPELLEES:

Mary Gaines Locke
Munfordville, Kentucky