

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001442-ME

A. C.

APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE HEATHER FRYMAN, JUDGE
ACTION NO. 16-AD-00011

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

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, JOHNSON, AND MAZE, JUDGES.

MAZE, JUDGE: This appeal arises from the Harrison Family Court's order terminating the parental rights of Appellant, A.C. (hereinafter "Father"). Father appeals the trial court's order involuntarily terminating his parental rights to his son, W.C. (hereinafter, "Child"). As the record shows substantial evidence to support the trial court's order, we affirm.

Background

Child, born in 2006, has twice been removed from the custody of his mother on grounds of neglect. Child was removed from August 2012 to August 2014, and Child was again removed from December 2014 until the present day. In October 2015, the Cabinet revised Child's permanency goal to adoption.

Child has been diagnosed with ADHD (attention deficit hyperactivity disorder), ODD (oppositional defiance disorder), PTSD (post-traumatic stress disorder), and mood disorder. Included in the Cabinet's years-long record are several instances of Child's deplorable hygiene, periods where Child and his siblings were left alone and unsupervised, instances of inappropriate sexual contact among Child's siblings, and one substantiated instance of sexual abuse of Child by a man with whom the mother left Child alone. At the present time, Child is making considerable progress towards controlling his behavioral conditions in a rehabilitative facility.

In the meantime, and by his own admission at the termination hearing, Father has not seen Child for at least six years even though he has been out of prison for part of that time. He has a lengthy criminal history of burglary, robbery, and manufacturing methamphetamine dating back to 2000. Father made one attempt to initiate contact with Child through the Cabinet in May 2014, but did not further cooperate with the Cabinet or make additional attempts to initiate contact. Father is a habitual offender and has not been out of prison for a period longer than

one year during the life of Child and remains incarcerated to the present day.

Accordingly, the Cabinet has determined that he is not a part of Child's life.

On March 31, 2016, the Cabinet filed a petition to involuntarily terminate the parental rights of the mother and Father so that Child could be placed for adoption. Both the mother and Father were declared indigent by the court and were appointed counsel in compliance with KRS 625.080(3). The mother agreed to voluntary termination of her parental rights on August 2, 2016. Father did not agree to voluntary termination.

Father stated at the termination hearing that he has completed a substance abuse program while incarcerated and has stayed on as a teacher's aide to help others battle addiction. While this is commendable, Father has previously completed such a program, been released from prison, reoffended, and been re-incarcerated. The trial court stated at the termination hearing that it had no reason to believe that the same result would not occur again. The Cabinet testified that Father would need to be out of prison for at least a year and supply six months of clean drug screens to begin receiving day visits with Child. The trial court was not convinced that Child should continue to remain in foster care in hopes that Father successfully rehabilitates following completion of his fifteen-year sentence.

Following the hearing, the trial court granted the Cabinet's petition to terminate Father's parental rights, and Father now appeals from that order.

On appeal, Father's appointed counsel has filed an *Anders* brief and a motion to withdraw from the case, stating that counsel had determined the appeal

has no merit. *See Anders v. California*, 386 U.S. 738, 744-45 (1967); *Also see A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361, 370-71 (Ky. App. 2012). In accordance with *Anders*, counsel suggested two issues which Father may raise on appeal. The motion to withdraw will be disposed of in a separate order.

Standard of Review

The trial court's findings of fact will only be disturbed if clearly erroneous. CR 52.01; *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Hunter*, 127 S.W.3d at 659. Any decisions based upon those findings will be reviewed for abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Abuse of discretion exists when a trial court's ruling is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.*

Analysis

Father's rights have been involuntarily terminated through KRS¹ 625.090. KRS 625.090 requires three elements be satisfied by clear and convincing evidence to involuntarily terminate parental rights. First, KRS 625.090(1)(a) requires that a court of competent jurisdiction adjudge Child to be abused or neglected. KRS 625.090(1)(a)(1). The trial court is a court of competent jurisdiction because of the ongoing proceedings in that court regarding Child. KRS 625.050(2)(b). The trial court has adjudged Child to be abused or

¹ Kentucky Revised Statutes.

neglected as defined in KRS 600.020(1). Father's failure to make reasonable efforts to initiate contact with Child during the periods that he was not incarcerated and Father's chronic incarceration and drug abuse demonstrate that the weight of the evidence clearly and convincingly supports the trial court's finding that Father abused or neglected Child.

Second, KRS 625.090(1)(b) requires that the termination be in the best interests of Child. KRS 625.090(3) lists the six factors that the trial court should look to when making a best interests determination. Among those six factors, the trial court found four to be satisfied: (1) that Child was abused or neglected, KRS 625.090(3)(b); (2) that the Cabinet has provided all reasonable services to the family, KRS 625.090(3)(c); (3) that Father had not made sufficient efforts and adjustments to his circumstances to justify return of Child to Father, KRS 625.090(3)(d); and (4) that Child's mental and emotional health has progressed and will continue to progress upon adoption, KRS 625.090(3)(e).

Father's chronic incarceration and drug abuse, the Cabinet's work resulting in the past reunification of Child with the mother, and the reports made by Child's behavioral therapists that Child is improving with therapy demonstrate that the weight of the evidence clearly and convincingly supports the trial court's finding that involuntary termination of Father's parental rights is in Child's best interests.

Third, KRS 625.090(2) requires that at least one of ten criteria be satisfied to terminate parental rights. Of the ten listed criteria, the trial court found four to be satisfied: (1) that Father has abandoned Child, KRS 625.090(2)(a); (2)

that for at least six months, Father has been substantially incapable of providing essential parental care and protection for Child with no reasonable expectation of improvement, KRS 625.090(2)(e); (3) that Father, for reasons other than poverty alone, has proven incapable of providing essential needs for Child's well-being with no reasonable expectation of improvement, KRS 625.090(2)(g); and (4) that Child has continuously resided in foster care for fifteen of the most recent twenty-two months, KRS 625.090(2)(j). Father's failure to make reasonable efforts to initiate contact with Child during the periods that he was not incarcerated, Father's chronic incarceration and drug abuse, and the Cabinet documentation showing that Child has been placed in foster care for seventeen of the most recent twenty-two months demonstrates that the weight of the evidence clearly and convincingly supports the trial court's finding that each of the four alternative criteria has been satisfied.

While incarceration alone can never be grounds for terminating parental rights, incarceration may be a factor to consider in determining whether Child has been neglected. *J. H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663-64 (Ky. App. 1985). In *Rogeski*, a parent's parental rights were terminated while incarcerated because he did not provide for his child in any way when he was not imprisoned, even though the parent did not have intervening periods of freedom where his parental rights could be asserted. *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 660-61 (Ky. 1995). Here, Father has had multiple opportunities during periods when he was not incarcerated to assert his

parental rights to Child. His single, very limited effort to do so does not sufficiently demonstrate an intent to begin providing proper support for Child.

Conclusion

Because this Court can find no clear error or abuse of discretion in the Harrison Family Court's termination of Father's parental rights, the order of the Family Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey A. Herrington
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jerry M. Lovitt
Lexington, Kentucky