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Commonwealth of Kentucky

Court of Appeals

2016-CA-001451-ME

M.A.S., Mother — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON SHEA FLEMING, JUDGE
ACTION NO. 14-AD-00040

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES,
A.D.C. a child — APPELLEE

AND 2016-CA-001452-ME

M.A.S., Mother — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON SHEA FLEMING, JUDGE
ACTION NO. 14-AD-00041

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES,
A.M.C. a child — APPELLEE

AND 2016-CA-001453-ME

M.A.S., Mother APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON SHEA FLEMING, JUDGE
ACTION NO. 16-AD-00005

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES,
A.S.S. a child APPELLEE

AND NO. 2016-CA-001454-ME

C.D.H. APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON SHEA FLEMING, JUDGE
ACTION NO. 16-AD-00005

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES,
and A.S.S. a minor APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT AND NICKELL, JUDGES.

COMBS, JUDGE: This case involves four appeals concerning the termination of parental rights (TPR) of three children. Appellant M.A.S. (Mother) appeals from

judgments of the Christian Circuit Court, Family Court Division, terminating her parental rights to three of her minor children, A.D.C., A.M.C. and A.S.S. Appellant C.D.H. (Father) also appeals from the judgment terminating his parental rights to his minor child, A.S.S.,[1] the only child whom he and Mother have in common.

On August 27, 2014, Appellee, Commonwealth of Kentucky, Cabinet for Health and Family Services (the Cabinet), filed Petitions for Involuntary Termination of Parental Rights in the interest of A.D.C., a female born in 2009; and in the interest of A.M.C., a female born in 2012; M.B.C. is the biological father of those two children.[2] On February 9, 2016, the Cabinet filed a Petition for Involuntary Termination of Parental Rights in the interest of A.S.S., a male born in 2014, whose father is Appellant C.D.H. (Father). The cases were tried together on August 8, 2016. Sharon Washington, the case manager, testified on behalf of the Cabinet. Mother and Father, who were present and represented by respective counsel, also testified.

On August 29, 2016, the court entered detailed Findings of Fact, Conclusions of Law, and Judgments and Orders terminating Mother's parental

[1] By Order of this Court entered on December 8, 2016, Mother's three appeals, Nos. 2016-CA-001451-ME, 2016-CA-001452-ME, and 2016-CA-001453-ME, were consolidated for all purposes. Appellant C.D.H.'s appeal, No. 2016-CA-001454-ME, was consolidated to the extent that it shall be considered by the same three-Judge panel.

[2] M.B.C.'s parental rights were also terminated; however, he is not a party to these appeals.

rights to the three minor children and terminating Father's parental rights to A.S.S. pursuant to the pertinent Kentucky statutes: KRS[3] Chapter 625 and KRS 600.020.

As to each of the children, the court found that KRS 625.090 sets forth a three-pronged test as a prerequisite for termination of parental rights, one of the most serious and wrenching decisions ever to be made by a court. That statute is ably and succinctly summarized in *Cabinet for Health and Family Services v. K.H.*, 423 S.W. 3d 204, 209 (Ky. 2014), as follows:

> The Commonwealth's TPR [termination of parental rights] statute, found in KRS 625.090, attempts to ensure that parents receive the appropriate amount of due process protections. KRS 625.090 provides for a tripartite test which allows for parental rights to be involuntarily terminated only upon a finding, based on clear and convincing evidence, that the following three prongs are satisfied: (1) the child is found or has been adjudged to be an abused or neglected child as defined in KRS 600.020(1); (2) termination of the parent's rights is in the child's best interests; and (3) at least one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) exists.

Id. at 209.

In the case before us, the family court undertook a meticulous and detailed analysis of the condition of each of the three children. In its lengthy findings, the court weighed multiple statutory elements in determining: that each child was indeed "abused or neglected" pursuant to the statutory criteria of KRS 600.020(1); that termination was indeed in the best interest of each child; and that

[3] Kentucky Revised Statutes.

there existed **multiple** instances of the grounds for termination set forth at KRS 625.090(2)(a)- (j) – although the existence of only one of the factors would suffice. The family court found with respect to each child as follows:

> [B]y clear and convincing evidence under KRS Chapter 625, and more specifically KRS 625.090, that (1) [the child] is a neglected child as defined in KRS 600.020(1) due to the complete abandonment of the biological parents in that the biological parents have not provided adequate food, clothing or shelter for [the child], (2) the biological parents have abandoned [the child] for a period of not less than 90 days in that the Petitioner [Cabinet] has solely cared for the child without any aid or significant contact by the putative parents under KRS 625.090(2)(a); (3) that for a period of not less than six (6) months the biological parents have continuously or repeatedly failed or refused to provide or have been substantially incapable of providing essential parental care and protection for [the child], and there is no reasonable expectation of improvement in parental care and protection considering the child's age; (4) that for reasons other than poverty alone, the biological parents have continuously or repeatedly failed to provide and are incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for [the child's] well being, and there is no reasonable expectation of significant improvement in such [*sic*] the biological parent's conduct in the immediately foreseeable future, considering [the child's] current age under KRS 625.090(2)(g); and (5) that the child . . . has been in foster care under the responsibility of the Cabinet for fifteen of the most recent twenty-two months prior to the filing of the petition to terminate parental rights ….
>
> [The Cabinet] has proven the above by clear and convincing evidence, the Court also finds by clear and convincing evidence, that it is in the child's best interests that the parental rights of the mother and father be

> terminated and the child be permanently committed to the Cabinet with the goal of adoption being pursued. The Court has considered the factors contained in KRS 625.090(3) and finds by clear and convincing evidence that these factors support the finding that the termination is in the child's best interest.

The family court discussed in detail the history of each child leading to its ultimate commitment to the Cabinet: lengthy periods of abandonment, incarceration of both parents, failure to provide support for reasons other than poverty alone, repeated drug use and failure of Mother to complete her drug court program, and her mental health issues (bipolar disorder). The examples of abuse proliferate throughout the opinion. The court even noted that one child was born with a sexually transmitted disease and that at the time of its birth, Mother had already had two other children removed from her care.

In noting the efforts made by the Cabinet toward reunification, the family court made the following sad observations:

> While the mother visited the child some and occasionally brought close [*sic*] and toys, this is not enough to be considered support of the child. Overall she has abandoned the child for a period of at least 90 days. She has been arrested multiple times for failure to pay her child support. She would go for months and then come back and expect pick up [*sic*] right where she left off. The Cabinet has modified her case plan five times trying to work with her which is more chances the [*sic*] most cases. The Cabinet has recommended that she go to the Oasis Treatment Program and [she] went for 10 days and was kicked out for having a physical altercation with another resident.

> The reason that she was in jail in the first place was for possession and wanton endangerment of the child. She never did a complete parenting class. She has had multiple jobs. She has been evicted previously. While she has made some effort to stay employed, the only time that she has been compliant with her mental health and drug issues was she was in the Drug Court program.
>
> She would not keep in contact with her worker. The worker has tried but just cannot get her [to] turn the corner and that is the crux of this case. She testified that she would miss visits with her worker because she "forgot." To paraphrase her, [Mother] stated that "someday I can be successful; do not know how long; but someday". While the Court hopes this is true, the Court does not believe that the child should linger in foster care while [Mother] tries further to get her life in order.
>
> The mother may have bipolar disorder and definitely has depression and is not being treated for it. The mother testified that she used drugs for the first time at seven years old [*and*] she has continued to use drugs often on [*sic*] since that time. She testified that for her mental health "I do not want to take the pills". She testified that she used spice right before her youngest child [A.S.S.] … was born. She admits that she has a long criminal history. While her attorney has argued that she could have gotten more services, the Court is not sure what else the Cabinet could have tried that the mother would have completed.

Citing clear and convincing evidence, the family court concluded that it should terminate the parental rights of Mother to each of the three children and that "further reasonable efforts are waived under KRS 625.127, and that up to this

point, the Cabinet has provided reasonable efforts to reunify the family at all relevant points in the proceeding[.]"

On appeal, Mother contends that the court's decision involuntarily terminating her parental rights was in error because it was not supported by clear and convincing evidence. In essence, Mother re-argues her case. She contends that with adequate time, she would have a chance to succeed. But, as Sharon Washington testified, they could not get Mother to "turn the corner". Indeed, that was the crux of this case.

> [T]he trial court has wide discretion in terminating parental rights. Thus, our review is limited to a clearly erroneous standard which focuses on whether the family court's order of termination was based on clear and convincing evidence. Kentucky Rules of Civil Procedure … 52.01. Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them. Due to the fact that termination decisions are so factually sensitive, appellate courts are generally loathe to reverse them, regardless of the outcome.

K. H., 423 S.W.3d at 211.

In summary, the court found that each child was a neglected child as defined in KRS 600.020(1), thus satisfying the first prong of the test set forth at KRS 625.090. The court found that termination of parental rights is in the child's best interest as directed by the second prong of the statute. And finally, the court satisfied the third prong in considering all of the factors set forth at KRS

625.090(2). To reiterate, at least one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) must exist. In the cases before us, the court concluded that the Cabinet met the criteria of KRS 625.090(2)(a), (2)(e), 2(g), 2(h), and 2(j) in its detailed findings with respect to each element of the statute.

The court considered Mother's mental health as well as her substance abuse issues. It determined that the children were neglected. The court considered the Cabinet's reunification efforts and found that under KRS 610.127(1), aggravated circumstances existed to such an extent that reasonable reunification efforts could have been waived. The court also considered Mother's efforts and adjustments, but, as noted above, it did not believe the children should "linger in foster care while she tries to get her life in order." It considered that each child was more stable and seemed to be thriving in foster care and specifically articulated that the children's "best opportunity" is to remain away from the parents and in a structured environment. Finally, the court considered the fact that Mother occasionally brought clothes and toys; but it concluded that her sporadic efforts were not enough to be considered support. It observed that she had been arrested multiple times for failure to pay child support.

Again, only one criterion must exist in order to support termination. The trial court found five. Clearly, the court established a substantial evidentiary foundation to satisfy the third prong of the test. We find no error.

We now turn to Father's appeal. He argues that his parental rights were improperly terminated due to his incarceration alone. We disagree. Father cites *J. H. v. Cabinet for Human Res.,* 704 S.W.2d 661, 663 (Ky. App. 1985), which held that:

> Abandonment is a matter of intent which may be proved by external facts and circumstances; otherwise, servicemen, prisoners of war, ship captains or persons requiring prolonged hospitalization would be likely candidates to have their parental rights terminated.
>
> Wherefore, whether abandonment occurs through incarceration sufficiently to support terminating parental rights must be strictly scrutinized. Incarceration alone can never be construed as abandonment as a matter of law.

In *J. H.,* the father's incarceration *itself* did not warrant termination; nonetheless, the evidence was sufficient to support termination of father's parental rights where he had continually neglected the children and "pursued a lifestyle incompatible with parenting." *Id.* at 664. In *Cabinet for Human Resources v. Rogeski,* 909 S.W.2d 660, 661 (Ky. 1995), our Supreme Court explained that "[a]lthough incarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights, incarceration is a factor to be considered …."

In the case before us, the court properly applied the tripartite test under KRS 625.090, which was fully discussed above. The court found that A.S.S.

was a neglected child. It found that termination was in the child's best interest. And it considered the relevant KRS 625.090(2) factors in its analysis. The court considered Father's history of flagrant nonsupport of his other children to be a strong indicator that he likely would not support this child. The court also considered Father's efforts -- or lack thereof. As he admitted on cross-examination, Father could have telephoned Ms. Washington during the time that he was out on pre-trial release on a trafficking charge. But he did not. The court considered that fact to be significant:

> When [Father] was released from the jail for two months, he never once called his caseworkers to set up a treatment plan or to visit the child. . . . Even when he has had the opportunity to be a father he is [sic] failed to take advantage of said opportunities. It was more important to him to save his own self than it was to be active in his child's life.

Again, as to Father, the court determined that the Cabinet met several of the criteria of the KRS 625.090(2) grounds for termination, including (2)(e):

> [t]hat 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[.]

The court found that Father's inability to care for the child had been going on since the birth of the child and that it was continuing. We find no error.

Father next argues that the Cabinet violated the civil rules and his due process rights by failing to serve his counsel with five items which were filed in the underlying dependency, neglect, and abuse (DNA) action -- specifically three Case Plans, the Findings and Recommendations of an Interested Party Review Board, and Mother's Medical and Psychiatric Evaluation. Father asserts that "[t]his fundamental error was not readily discoverable until the record on appeal was reviewed by the undersigned . . . ." However, these documents were filed in the underlying DNA action, No. 14-J-00196-001, not in the termination of parental rights action, No. 16-AD-0005, from which Father now appeals.

We have considered Father's arguments, but we agree with the Cabinet that Father was afforded due process. We are not persuaded that any error or deficiency in the underlying DNA action warrants reversal. *See In re O.C.,* 171 N.C. App. 457, 615 S.E.2d 391, 395 (2005) (Even if mother entitled to appointment of GAL in dependency proceeding, any error in failing to do so did not require reversal of subsequent order terminating mother's parental rights. "[C]onsequences of reversing termination orders for deficiencies during some prior adjudication would yield nonsensical results. While the order on termination would be set aside, the order on adjudication would not . . . . This would generate a legal quagmire . . . .").

We affirm the Findings of Fact, Conclusions of Law, and Judgments and Orders of the Christian Circuit Court, Family Court Division, terminating the parental rights of Mother and Father.

ALL CONCUR.

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