

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001700-ME

C.C., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH BARTHOLOMEW, JUDGE
ACTION NO. 15-AD-500003

CABINET FOR HEALTH & FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND R.C.
(A MINOR CHILD)

APPELLEES

AND

NO. 2016-CA-001701-ME

C.C., FATHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH BARTHOLOMEW, JUDGE
ACTION NO. 15-AD-500004

CABINET FOR HEALTH & FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND A.C.
(A MINOR CHILD)

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON, AND J. LAMBERT, JUDGES.

JOHNSON, JUDGE: After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM the decision of the Jefferson Circuit Court, Family Court Division.

BACKGROUND

R.C. and A.C., the minor children (“children”) of C.C. (“Father”), were committed to the custody of the Cabinet for Health and Family Services (“Cabinet”) in 2013 in a prior dependency, neglect and abuse (“DNA”) proceeding. In July 2016, both children were placed with foster parents S.C. and R.C.

On January 8, 2015, the Cabinet filed a Petition for Involuntary Termination of Parental Rights (“TPR”) for R.C. and A.C. A trial was held on July 14, 2016, and August 4, 2016.

At trial, the court heard from several witnesses: Kim Sullivan (“Sullivan”), the clinical social worker for A.C.; Natascha Andrews (“Andrews”), the Cabinet’s social worker; S.C. and R.C., foster parents to both children; and D.M., mother to both children.

On September 1, 2016, the court entered Findings of Fact and Conclusions of Law and an Order Terminating Parental Rights and Order of Judgment for each child. Father filed motions asking the court to enter more

specific findings and to alter, amend, or vacate its Findings of Facts and Conclusions of Law. On October 11, 2016, the court entered an order denying those motions and Father filed notices of appeal.

On December 8, 2016, we entered an order designating the appeals to be expedited. On May 5, 2017, we consolidated appeals 2016-CA-001696-ME, 2016-CA-001697-ME, 2016-CA-001698-ME, 2016-CA-001699-ME, 2016-CA-001700-ME, 2016-CA-001701-ME, 2016-CA-001702-ME, and 2016-CA-001703-ME. In addition, we directed that D.M. no longer be designated as an appellee in 2016-CA-001700, 2016-CA-001701-ME, 2016-CA-001702, and 2016-CA-001703; and that C.C. no longer be designated as appellee in 2016-CA-001696-ME, 2016-CA-1697-ME, 2016-CA-001698, and 2016-CA-001699-ME.

Thus, our opinion will address both 2016-CA-001700-ME and 2016-CA-001701-ME.

STANDARD OF REVIEW

The standard of review in a termination of parental rights action is confined to the clearly erroneous standard in Rules of Civil Procedure (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. 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.

B.L. v. J.S., 434 S.W.3d 61, 65 (Ky. App. 2014) (citing *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998)).

ANALYSIS

On appeal Father raises six (6) issues. Four of them concern the September 1, 2016, Findings of Fact and Conclusions of Law, and we shall deal with those issues first. Father alleges that the trial court's order was not supported by sufficient evidence to support its findings. He further alleges that the order is devoid of specificity, thus deficient on its face. We disagree.

The trial court has broad discretion in determining whether the child's treatment fits within the abused or neglected category and whether the abuse or neglect warrants termination. *R.C.R. v. Cabinet for Human Resources*, 988 S.W.2d 36, 38 (Ky. App. 1998). Here the trial court heard testimony from Sullivan; R. C., the foster mother; Andrews; and D.M., mother of both children.

Before a trial court can terminate parental rights, it must satisfy the requirements of Kentucky Revised Statutes (KRS) 625.090. Kentucky's involuntary termination statute requires the court, pursuant to KRS 625.090(1)(a), first to find by clear and convincing evidence that the child has been abused or neglected as defined in KRS 600.020(1); secondly, KRS 625.090(1)(b) requires that the court determine that termination of parental rights would be in the best interest of the child; and third, that one or more of the factors set out in KRS 625.090(2)(a-j) are present.

Father argues that the trial court failed to articulate sufficient reasons for its finding of abuse and neglect as required under KRS 625.090(1)(a)(1). At the DNA hearing, based upon a preponderance of the evidence, the court determined the children had been subjected to scenes of domestic violence in the home and had been abandoned for a period of not less than ninety (90) days by Father. While we note the requirements of KRS 600.020(1) were satisfied at the DNA hearing, we are aware that a TPR hearing requires a higher standard of proof, one which is based on clear and convincing evidence.

At the hearing, the court found, as noted in its September 1, 2016 Order, that the children had been abused or neglected by their Father's failure or inability to comply with the court's remedial orders and the Cabinet's court-approved case treatment plan as previously required. The court found that although Father was capable of working, he had not done so, or when periodically working, offered no financial assistance to meet the material needs of children. The court found that Father had at various times been incarcerated, resulting in his failure or inability to provide the material necessities of life for reasons other than poverty alone. Thus, the court in the TPR hearing satisfied the requirements of KRS 625.090(1)(a)(1) by clear and convincing evidence.

The court further determined it was in the best interests of the children to terminate the parental rights of C.C. and allow them to remain in the custody of the Cabinet. This conclusion was based upon the court's finding that Father was not currently capable of providing his children with a safe and nurturing

environment. The court also found that Father was incapable of providing a safe and nurturing environment in the immediately foreseeable future. Having satisfied the first two requirements of KRS 625.090, the court then turned to the requirements of KRS 625.090(2).

At the hearing, the court heard testimony from numerous parties concerning the welfare of the children. Sullivan, the clinical social worker for A.C., testified that A.C. has extreme anxiety and hypervigilance affecting his ability to progress. She stated that he needs stability and consistency in his life.

R.C., the foster mother, testified that there were school issues for A.C., specifically noting that he needed help in working through self-harm tendencies of cutting.

D.M., mother to both children, testified that she has substance abuse issues. She acknowledged that the family moved for various reasons, including non-payment of rent and eviction, noting that often the electricity or water was shut off for non-payment of the bill. D.M. also acknowledged that between the summer of 2009 and spring of 2013 the family had moved eight times, changing schools and disrupting their home life.

C.C., Father to R.C. and A.C., was incarcerated during the pendency of the underlying action, and was present for the first day of trial only. He did not testify, but acknowledged that he had neither seen his two children nor paid child support in at least three (3) years.

Andrews testified that based upon Father's response to the offer of services, that it was not safe to reunify the Father with the children within a reasonable period of time. Andrews also testified that as of the date of the filing of the petition, the Father has not been compliant with the court's remedial orders from the DNA hearing due to continued drug use, criminal activity, and his resultant incarceration.

Based upon the foregoing evidence, the court determined:

- (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;
- (j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

KRS 625.090(2)

Having considered the requirements of KRS 625.090, and based upon clear and convincing evidence in the record and taken at the hearing, the court terminated the Father's parental rights for each child. While the Father

might want more specificity, given the record and the applicable law, we find no error in the ruling of the court. The court's ruling was based upon proof of a probative and substantial nature, and was of sufficient weight to convince ordinarily prudent-minded people it was the correct result.

The last two issues raised on appeal by Father relate to the constitutionality of KRS 625.090 and his request for this Court to overturn its ruling in *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361(Ky. App. 2012). CR 24.03 requires the party challenging the constitutionality of an act of the General Assembly to serve notice of the challenge on the Attorney General. We find no such notice in the record. In addition, the trial court while adopting the DNA findings, made an independent finding of neglect or abuse based upon evidence at the TPR hearing which satisfied the statutory requirements of KRS 625.090(2). Therefore, we find that *Cabinet for Health and Family Services v. T.G.*, 2008 WL 3890033, 2007-SC-000436-DGE, 2007-SC-000821-DGE (Ky. 2008), is dispositive of the issue.

As to the issue raised by Father requiring counsel to continue to represent him through the appellate process for the same initial fee, we decline to overturn or distinguish the holding of *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361(Ky. App. 2012).

CONCLUSION

For the foregoing reasons, we AFFIRM the opinions of the Jefferson Circuit Court, Family Division, in relation to Action Nos. 15-AD-500003; and 15-AD-500004.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Karen Faulkner
Louisville, Kentucky

Elizabeth Bricking
Louisville, Kentucky

John H. Helmers, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEES:

Sarah Steele
Louisville, Kentucky