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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000604-ME

E.W., NATURAL FATHER — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
FAMILY BRANCH, FIRST DIVISION
v. HONORABLE TIM PHILPOT, JUDGE
ACTION NO. 16-AD-00060

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES AND
K.F. (A MINOR CHILD) — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JOHNSON AND JONES, JUDGES.

KRAMER, CHIEF JUDGE: E.W. (Father) appeals from the March 7, 2017 Fayette Family Court order terminating his parental rights.[1] After careful consideration, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Father and R.F. (Mother) are the biological parents of K.F. (Child). The Cabinet for Health and Family Services (Cabinet) became involved with Child, while in the care of Mother in 2011. At that time, an investigation was opened following an allegation that Mother had threatened to set fire to her home with one of her three children inside.[2] In 2012, in response to Mother's arrest stemming from a domestic violence dispute, an emergency custody order was issued for Child and her younger sister. The two children entered foster care because there were no appropriate relatives to place them with. The Cabinet attempted to contact Father, but he was incarcerated soon after the case was opened. Child, along with her sister, were adjudged to be neglected on March 14, 2012, and remained in foster care. In June 2013, temporary custody was granted to the maternal aunt for both children. By October 2013, Mother had moved in with her sister and children. Mother was case plan compliant, and the Cabinet's custody was rescinded on October 2, 2013.

[1] Mother did not appeal.

[2] The record does not indicate which child this was.

In April 2015, following an incident at Mother's home, emergency custody was granted to the Cabinet. The children were placed back into a foster home. Shortly thereafter a family team meeting was held, and a case plan was negotiated with Mother. Father did not attend the meeting. Mother was provided with case plans, free drug screens, and referrals to community partners. On May 8, 2015, the children were again adjudged to be neglected and committed to the Cabinet on June 11, 2015.

Mother was arrested twice while working on her case plan, once in May 2015 and once June 2015. Mother would visit the children, but made no other progress in her case plan. During this time, the Cabinet attempted to reunite Child with Father. Father attended the last five minutes of a visit in June 2015 after not seeing Child for a period of time. Following that visit, he was informed by the Cabinet of the date and time of the next visit; he agreed a case plan would be established at that time. Father did not show up to the next visit and did not make any contact again until September 2015. At that time he received his case plan which required him to: (1) maintain negative drug screens; (2) complete a substance abuse assessment and follow all recommendations; (3) complete a parenting assessment and follow all recommendations; (4) complete a psychosocial assessment and follow all recommendations; (5) complete a domestic violence assessment and follow all recommendations; and (6) participate in visitation. Father did not make any case plan progress other than submitting to one drug

screen, which came back positive for cocaine, opiates, oxycodone, and marijuana. In late 2015, Father reported that he had moved to Ashland, Kentucky. The Cabinet offered courtesy services from Boyd County. Before the services could commence, Father was incarcerated. Father gave the name of a possible relative for placement of Child, but the relative's home was denied after an evaluation. Father recommended another relative in Indiana, but that relative did not contact the Cabinet.

In September 2015, the maternal aunt began visits with the children. She had a couple of supervised visits and was later permitted to have unsupervised visits. Mother came back in contact with the Cabinet in the beginning of November 2015, while in jail. Mother communicated to the Cabinet that she wanted to participate in the upcoming Thanksgiving holiday with the aunt and children. The Cabinet informed both Mother and maternal aunt that this would not be permissible. Mother was told that she needed to come to the Cabinet for a case plan meeting. A time and date was set up for Mother; however, she did not show up. After Thanksgiving in November 2015, the children reported that they had visited Mother while with the maternal aunt. The maternal aunt confessed that she did in fact allow Mother to visit with the children. Therefore, the maternal aunt's visits with the children were stopped. For these reasons, the goal for the children was changed to adoption on December 23, 2015.

On March 21, 2016, the Cabinet filed a petition for involuntary termination of parental rights, alleging that: (1) Father failed to protect and preserve Child's fundamental right to a safe and nurturing home; (2) Child is a neglected child as defined in KRS[3] 600.020; (3) for periods of not less than six months, Father has continuously failed or refused to provide or has been substantially incapable of providing essential parental care and protection for Child, and there is no reasonable expectation of improvement, considering the age of Child; (3) for reasons other than poverty alone, Father has continuously failed to provide or is incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for Child's well being, and there is no reasonable expectation of significant improvement in the Father's conduct in the immediately foreseeable future, considering the age of Child; (4) Father has abandoned Child for a period of not less than ninety days; and (5) that the Cabinet has offered or provided all reasonable services, but Father has failed or refused or has been unable to make any lasting changes in his circumstances, conduct or conditions, which would allow Child to be safely returned to Father's care.

Due to being incarcerated, Father testified by phone at the termination hearing at the end of the Cabinet's case. Father testified that he was the parent of Child; was incarcerated at the Boyd County Detention Center; and believed that he would be released in the next sixty days. Father testified that Child lived with him

[3] Kentucky Revised Statute.

for approximately eight to nine months in 2011. Eventually, Child returned to her Mother, and Father would visit Child on the weekends. Father and Mother had an argument, which led Father to stop all visits with Child. Father admitted that he did not pursue any court action to aid in getting visitation with Child and could not even remember the last time he saw Child. Father also admitted to receiving the February 2015 petition in the mail and the case plan in September 2015. Father did not dispute any factual testimony given by the Cabinet, but he did not consent to the termination of his parental rights.

At the termination hearing, evidence was introduced of Father's extensive criminal history and periods of incarceration. Father has been convicted of: (1) complicity to first-degree burglary; (2) wanton endangerment first-degree; (3) facilitation of first-degree burglary; (4) tampering with physical evidence; (5) criminal mischief, first-degree; (6) trafficking cocaine; (7) possession of a controlled substance; (8) felon in possession of a firearm; (9) assault fourth-degree domestic violence with minor injury; (9) shoplifting; (10) shoplifting $500 or more; (11) probation violation for misdemeanor offense; and (12) probation violation for felony offense. Father was ordered to pay $207.00 per month in child support. Father's payments were suspended at some point, but as of December 2016 he was in arrears of $1,863.00.

By an order entered March 7, 2017, the family court terminated Father's parental rights to Child and determined that the Cabinet is best qualified to

receive custody of Child. The family court found that Child had been previously adjudged neglected and was neglected consistent with KRS 600.020(1)(a); that termination was in Child's best interest; and that Father and Mother were unfit to parent Child.

Father timely filed this appeal.

STANDARD OF REVIEW

This Court will set aside a family court's decision to terminate a person's parental rights, only if a clear error is found to have occurred.

> The standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR[4] 52.01 based upon clear and convincing evidence. 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

To terminate a party's parental rights, the three-part test of KRS 625.090 must be satisfied by clear and convincing evidence. First, the child must have been "abused or neglected" within the meaning of KRS 600.020. KRS

[4] Kentucky Rule of Civil Procedure.

625.090(1)(a). Second, termination must be in the child's best interest. KRS 625.090(1)(b). Third, the family court must find at least one ground of parental unfitness. KRS 625.090(2).

On appeal, Father primarily makes three arguments. First, Father argues that the Cabinet failed to prove that the best interest of Child supports termination. Second, Father argues that the family court erred in determining that the Cabinet made reasonable efforts for reunification. Third, Father argues that the Cabinet failed to prove by a preponderance of the evidence that the Child will continue to be abused or neglected by him as defined in KRS 600.020(1)(a).

We begin our analysis with determining whether there was clear and convincing evidence to terminate Father's parental rights in accordance with KRS 625.090 and its three-prong test. We then will address Father's remaining arguments.

i. Neglect

As a basis for ordering an involuntary termination of parental rights, a family court must find by clear and convincing evidence the child was previously adjudicated an abused or neglected child or make such a finding in the current proceeding. KRS 625.090(1)(a)(1) and (1)(a)(2). Here, Child has been adjudged to be abused or neglect on two previous occasions by a court of competent jurisdiction and Father does not dispute it.

ii. Best Interest

Next, we must consider if the family court's determination that termination was in the best interest of the child was supported by clear and convincing evidence. Termination must be in the best interest of the child. KRS 625.090(1)(b). When considering termination of parental rights in the best interest of the child, the family court must consider several factors, which can be found in KRS 625.090(3), which provides:

> (3) 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 as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) 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 as defined in KRS 600.020(1) 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 unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(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.

Father claims that termination of his parental rights would not be in the best interest of Child because he has shown that he was previously capable of taking care of Child. Father argues that he has shown that he could work through a case plan successfully and should be given the opportunity to do so again. Although Father previously cared for Child in 2011, he admitted that he willingly ceased doing so over an argument with Mother. Father has no discernable relationship with Child. Testimony was offered at the termination hearing that Child is doing well in the current foster home, has bonded with the family, and is in a potentially adoptive foster home. It was also shown that Father has failed to pay a reasonable portion of substitute physical care and maintenance, which has resulted in child support arrears. There is enough evidence to support the family court's finding that termination of parental rights is in the best interest of Child.

iii. **Parental Unfitness in KRS 625.090(2)**

The family court must base its decision upon at least one of the grounds specified in KRS 625.090(2). Relevant to this case, KRS 625.090(2)(a), (e), and (g) apply. First, the family court found that Father had abandoned Child for a period of not less than ninety days. KRS 625.090(2)(a). It is clear that "[i]ncarceration alone can never be construed as abandonment as a matter of law." *J.H. v. Cabinet for Human Res.,* 704 S.W.2d 661, 663 (Ky. App. 1985). "However, absence, voluntary or court-imposed, may be a factor to consider in determining whether the children have been neglected[.]" *Id.* at 664. Father admitted that he had willingly stopped visits with Child prior to his current incarceration and that he could not remember the last time that he has seen Child.

Second, evidence was also offered that Father, for a period of not less than six months and for reasons other than poverty alone, has continuously or repeatedly failed or refused to provide essential food, clothing, shelter, medical care, or necessary education for Child and that there is no reasonable expectation of improvement in the parents conduct, considering the child's age. KRS 625.090(2)(e), (g). Father has an admitted history of drug abuse and periods of incarceration, which has led him to being out of Child's life for periods longer than six months at a time. Father has refused to work with Cabinet when given the opportunity to do so. No evidence was offered that Father was unable to take care of Child due to financial difficulty. Father had ample opportunity before and after Child was placed in foster care to show he could be a successful parent. Also,

Father offered no evidence to show the family court that there is a reasonable expectation of significant improvement in his parental care and protection of the Child, considering Child's age. The family court only needs to find one ground under the statute to base its termination decision upon, and there are three relevant grounds that apply to this case.

iv. Reunification

Father argues that the Cabinet did not make reasonable reunification efforts. According to KRS 625.090(4), "[i]f the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent." Child was committed to the Cabinet on June 11, 2015. Testimony was offered that the Cabinet tried to offer Father reunification services, but he did not use them. Testimony by the Cabinet further established that the Cabinet attempted to contact Father about Child and that Father knew there was an open case concerning Child. Father was provided with a case plan, free drug screens, courtesy services through Boyd County when he moved, supervised visitation services, and referrals to community partners. Even though Father was offered these services, he did not cooperate with the Cabinet, leaving the Cabinet no other choice than to terminate his rights. Father testified at the hearing that he wants reunification with his Child. However, when given the opportunity to reunify before his current incarceration,

he declined to act and admitted that he had a drug problem. Father has offered no evidence that with additional services to help in reunification, there will be a lasting parental adjustment that will enable the return of Child to him. Therefore, Father's argument that reunification services were not offered fails.

v. Continued Neglect

Father makes his last argument pursuant to KRS 625.090(5). Father argues that the Cabinet did not prove by the preponderance of the evidence that Child will continue to be neglected if placed with Father. KRS 625.090(5) states, "[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."

The statute clearly states that the parent is responsible for proving by a preponderance of the evidence that the child would not continue to be neglected. Father has offered no evidence to show that Child would not continue to be neglected in the future. Therefore, he did not overcome his burden of proof that abuse or neglect will not continue if Child is returned to him.

CONCLUSION

In light of the foregoing, the family court did not err in terminating Father's parental rights.

Accordingly, we AFFIRM the Fayette Family Court's March 7, 2017 termination order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, CABINET FOR HEALTH AND FAMILY SERVICES:

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