

RENDERED: OCTOBER 26, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001581-ME

R.D.

APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE ALLEN B. ROBERTS, JUDGE
ACTION NO. 15-AD-00028

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY; R.L.D., A CHILD; AND S.M.S.

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: JOHNSON, SMALLWOOD, THOMPSON, JUDGES.

SMALLWOOD, JUDGE: R.D. (hereinafter referred to as Appellant) appeals from the termination of parental rights order regarding his minor child, R.L.D.

(hereinafter referred to as Child), entered by the Clay Family Court.¹ Following a careful review, we affirm.

This case originated in February 2015, when the Cabinet received allegations that Child's mother, S.M.S. (hereinafter referred to as Mother), was homeless and Appellant was in jail. On February 15, 2015, Child entered the foster care system, where she has remained throughout the pendency of this action. The juvenile court adjudged both parents neglectful, and Child was committed to the Cabinet on October 15, 2015. The Cabinet filed a termination of parental rights petition on December 21, 2015.

The final hearing before the family court was held on June 16, 2017. Four witnesses testified: Breanne Cornett, the Cabinet caseworker assigned to Child's case; Kayla Holt, school-based therapist; Diana Holland, teacher; Appellant; and Mother. The court also took testimony from Child.

Cornett testified extensively about the Cabinet's efforts to reunite Child with her parents, which included four separate case plans. After making little progress on her initial case plan, Mother signed a voluntary termination of parental rights petition in May 2015 (though she later changed her mind and claimed she had been intoxicated when she signed the petition). Once located,

¹ S.M.S., the mother of Child, did not appeal the Clay Family Court's order.

Cornett met with Appellant at the Larue County Jail in June 2015.² At that time, Appellant stated that he did not wish to voluntarily terminate his parental rights to Child and wanted to work towards reunification. Upon Appellant's release from jail and return to Manchester, Kentucky, a case plan was created for him.³ The main requirements of Appellant's case plans were: (1) to establish a safe, stable home for six months; (2) to call the Cabinet office three days per week for potential random drug screens; (3) to successfully complete a substance abuse program; (4) to attend Alcoholics' Anonymous or Narcotics' Anonymous meetings; and (5) to attend visitation meetings with his child.

From August 2015 to June 2017, Appellant was faithful to his visitation schedule, except he did not visit when Child was admitted to the hospital for a minor medical procedure.

However, several other aspects of his case plan were never completed during that time period. Appellant failed to complete two different substance abuse programs before completing the substance abuse program at Hickory Hill Recovery Center in Knott County, Kentucky under the threat of parole revocation. During this period, Appellant's living arrangements changed several times: he

² Appellant was incarcerated due to a conviction for flagrant non-support of two other children.

³ Three other case plans were created for Appellant during the following 22 months.

lived at his aunt's house, where the Cabinet was not permitted to enter; Appellant and the mother were living "from place to place" for a period of time; they lived in a mobile home for a short period of time; and finally, they resided at Appellant's father's one-bedroom apartment for several months with three other individuals, one of which had his parental rights terminated due to neglect. Appellant did not attend the meetings as required, nor did he call the Cabinet for random drug screens as required. Only a few drug screens were completed, but they were clean. Additionally, Appellant struggled with employment throughout this time period. He was employed at Burger King for some time, but was fired due to his inability to arrive to work on time. He claimed to have a variety of technical skills, but said he only did "odd jobs" here and there. At the time of the hearing, he was not employed.

As to Child's progress, she had shown improvement at school and in extracurricular activities during her time with her foster parents with whom she had built a strong bond. However, her school therapist testified that Child had a general anxiety disorder likely due to her unknown future and her concerns about her parents and the court system. At the time of the termination hearing, Child had been in foster care for twenty-eight months. The therapist testified that a stable, permanent home would greatly help with Child's anxiety.

In the final judgment entered on July 14, 2017, the family court concluded that the parents' rights should be terminated. Specifically, the court found that the child had been adjudicated as a neglected child, pursuant to Kentucky Revised Statutes (KRS) 600.020(1), by the Clay Family Court on March 19, 2015, in juvenile case no. 15-J-00021-002. Under KRS 625.090(2), the family court found two grounds for involuntary termination of Appellant's parental rights: (1) Appellant failed, refused, or was incapable of providing essential care for Child; and (2) there was no reasonable prospect of improvement in the foreseeable future. Lastly, the court found that termination of parental rights was in Child's best interests, pursuant to KRS 625.090(1)(b).⁴ Both parents moved to alter, amend, or vacate the court's judgment; however, their motions were denied on August 18, 2017. This appeal followed.

We review an action to terminate parental rights under the clearly erroneous standard located in Kentucky Rules of Civil Procedure (CR) 52.01 based upon clear and convincing evidence. *Commonwealth, Cabinet for Health and Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). Clear and convincing evidence is "of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Id.* (quoting *M.P.S. v.*

⁴ KRS 625.090 was effectively amended on July 14, 2018. This subsection is now found at KRS 625.090(1)(c), but this trial occurred prior to the amendment taking effect.

Cabinet for Human Res., 979 S.W.2d 114, 117 (Ky. App. 1998)). But, “termination of parental rights . . . encroaches on the parent’s constitutional right to parent his or her child, and therefore, is a procedure that should only be employed when the statutory mandates are clearly met.” *M.E.C. v. Commonwealth, Cabinet for Health and Family Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008).

Appellant asserts the following arguments to support his request to vacate and remand the trial court’s decision to terminate: (1) the petition to terminate parental rights was filed prematurely; (2) Appellant should have been appointed a guardian *ad litem* (GAL) in the juvenile case; (3) the Cabinet failed to comply with Kentucky Family Court Rules of Practice and Procedure (FCRPP) 29; and, (4) the evidence presented at trial was insufficient. These arguments were properly preserved for review.

Appellant argues that the ten months that passed between Child’s removal and the filing of the termination petition was an insufficient amount of time to allow the parents to complete their case plans. After the enactment of the Adoption and Safe Families Act of 1997 (ASFA), 42 U.S.C. § 620 et seq., which was intended to expedite the adoption of children in foster care, the Kentucky General Assembly made changes to the process for the termination of parental rights: “(1) the definition of an ‘abused and neglected’ child was amended to include a child left to linger in foster care for 15 of the last 22 months (KRS

600.020(1)[(a)(9)]; and (2) the grounds for termination enumerated in KRS 625.090(2) were enhanced to include a ‘15/22 month’ provision (KRS 625.090(2)(j)).”⁵ *Commonwealth, Cabinet for Families and Children v. G.C.W.*, 139 S.W.3d 172, 177 (Ky. App. 2004). The intention of this provision is to create a deadline for the Cabinet to file a termination petition. However, there is no specified amount of time that the Cabinet is required to wait once the conditions for terminating parental rights are met. *See R.C.R. v. Cabinet for Human Res.*, 988 S.W.2d 36, 40 (Ky. App. 1998).

The caseworker also testified at the hearing that the filing of a petition does not guarantee that parental rights will be terminated. In this case Child’s parents had adequate time to make adjustments and improvements that could have stopped the Cabinet’s movement towards termination. Instead, it appeared from the caseworker’s testimony that Appellant’s progress was stagnant. This cannot be characterized as a “fast-tracked” termination case. From the time of Child’s removal to the date of the final hearing, Appellant (after being released from jail) had twenty-two months to make appropriate and necessary changes for reunification with Child. We find that to be a sufficient amount of time.

⁵ Pursuant to the 2018 amendment, KRS 625.090(2)(j) now states that the child has been in foster care for “fifteen (15) cumulative months out of forty-eight (48) months.” This trial took place prior to the amendment taking effect, but it would not have affected the outcome here.

We do not find Appellant's second argument persuasive. He claims that the juvenile case cannot be used during this termination case because his rights were violated in the juvenile case. As the trial court noted during the hearing and in its order, Appellant, who was incarcerated at the time, was appointed counsel in the juvenile case to represent him at the temporary removal hearing since he was incarcerated at the time. Though appointed counsel may not be the same in form as a GAL, it is sufficiently similar in substance. Appellant was represented by counsel in that case. Additionally, in the twenty-eight months that elapsed since the temporary removal hearing, Appellant did not attempt to challenge or appeal that decision.

For his third argument, Appellant claims that the Cabinet's failure to file its multiple case plans in the record was a violation of FCRPP 29 and violates his rights. There is no mandated consequence for noncompliance with this rule. Further, there was undisputed evidence at the hearing that reunification services were offered to Appellant and that Appellant attended conferences to address his case plans.

Lastly, Appellant argues that there was insufficient evidence to support the family court's decision in favor of termination of Appellant's parental rights. Involuntary termination of parental rights is governed by KRS 625.090. Under that statute, the court must find by clear and convincing evidence that the

following three-prong analysis is satisfied: (1) the child was adjudged to be abused or neglected as defined in KRS 600.020(1); (2) termination of parental rights is in the child's best interests; and, (3) the existence of at least one of the grounds enumerated in KRS 625.090(2). *Commonwealth, Cabinet for Health and Family Servs., v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014).

Appellant specifically claims that there was insufficient evidence to find that there was no reasonable expectation of improvement in his ability to provide essential care, pursuant to KRS 625.090(2)(e) and (g). He places great weight on the statement by a Cabinet supervisor that he had completed 90% of his case plan.

However, the case plan required the Appellant to establish safe and stable housing before reunification with his daughter. This had not been accomplished in twenty-two months. Additionally, the court found there was a lack of effort or motivation on Appellant's behalf because he failed to utilize the resources offered by the Cabinet and he did not have steady employment. Therefore, it was not clearly erroneous for the court to find there was not a reasonable expectation of improvement.

For the foregoing reasons, we affirm the order of the Clay Circuit Court terminating the parental rights of Appellant.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph C. White
Manchester, Kentucky

**BRIEF FOR APPELLEE CABINET
FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY:**

Stephen D. Spurlock
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