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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000373-ME

A.A.L.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY N. PHILPOT, JUDGE
ACTION NO. 16-AD-00127

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

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND D. LAMBERT,
JUDGES.

GOODWINE, JUDGE: A.A.L. (father) appeals from a judgment involuntarily terminating his parental right to appellee A.L.L. (child) arguing that the Fayette Family Court violated his constitutional rights; failed to correctly apply the criteria for involuntary termination set out in Kentucky Revised Statute (KRS) 625.090; and erred in refusing to place the child with a relative. Discerning no reversible

error in any of the arguments presented, we affirm the judgment of the Fayette Family Court.

FACTS

Father and S.F. (mother) are the parents of a minor child born on May 19, 2015. Because mother was incarcerated at the time, the child was released to her father's care. In June 2015, the Cabinet filed a juvenile court petition seeking temporary removal of the child from father's custody on the basis that the child was neglected under the criteria set out in KRS 600.020 and alleging that father was using and selling heroin. The Cabinet subsequently amended its petition to include mother after her release from incarceration. Although the family court's handwritten notes indicate that both parties stipulated to neglect at the temporary removal hearing, father argues that he did not stipulate to any finding of neglect. Because the Cabinet explored placement of the child with relatives of both father and mother and found none to be appropriate, the child was committed to the Cabinet on August 17, 2015.

The Cabinet originally initiated case reunification plans with both parents but due to father's failure to complete drug screens and to make progress on his case plan, his visits with the child were suspended. During this time, despite agreeing to cease contact, mother and father resumed a relationship which included father living with mother and engaging in drug sales out of their home. In January

2016, mother obtained an emergency protective order (EPO) against father on the basis of alleged domestic violence. Due to both parents' involvement with drugs and father's repeated incarceration, the Cabinet ultimately initiated a plan change and placed the child in an adoptive foster home. The Cabinet filed the underlying petition seeking the involuntary termination of both father's and mother's parental rights in May 2016.

After receiving testimony from multiple witnesses at a two-day bench trial, the family court entered thorough findings of fact and conclusions of law in support of its judgment terminating the parental rights of both father and mother. Only father has appealed from that judgment.

STANDARD OF REVIEW

In reviewing a decision involving a termination of parental rights, the appellate court is "confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence." *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014). This Court emphasized in *B.L.* that:

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.

Id.

ANALYSIS

In the first of three arguments he advances for reversal, father insists that he was deprived of procedural due process in the termination proceeding. Father maintains that the family court erred in finding that he had stipulated to neglect at the temporary removal hearing, claiming that he was neither present nor even knew of the prior family court proceeding; that his parental rights were terminated on the basis of incarceration alone; and that he suffered prejudice on the basis of his relationship with the child's mother who had stipulated to neglect and whose actions regarding the child's welfare cannot support the termination of his rights. We find absolutely no merit in any of these contentions.

Despite father's allegation that he neither knew of the proceeding at which the child was adjudicated neglected, nor ever stipulated to her neglect, the record is to the contrary. On August 17, 2015, the family court entered an order which specifically states that mother, father, and their counsel were present at the adjudication hearing. In finding that the child fell under definition of neglect set out in KRS 600.020(1), the family court specifically found that both mother and father had waived the conduct of the adjudication hearing and had stipulated to neglect. It is notable that father, although present, did not testify at the termination proceeding nor did he offer any evidence to counter the findings in the August 17, 2015 order. We have carefully searched the record and find absolutely no support

for father's current claim that he was unaware of 2015 adjudication proceeding and that he did not stipulate to neglect as the family judge specifically found. As the Supreme Court of Kentucky explained in *Conklin v. Commonwealth*, 799 S.W.2d 582 (Ky. 1990), a judgment is entitled to a presumption of regularity unless the party challenging its validity produces evidence to refute that presumption:

The presumption of regularity of judgment shall be sufficient to meet the Commonwealth's initial burden. After the judgment has been introduced, its validity may be attacked by the defendant by a showing that any of his constitutional rights were infringed in obtaining the judgment. **If the defendant produces evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity,** the burden then falls to the Commonwealth to prove that the underlying judgment was entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

Id. at 583 (emphasis added). Father had every opportunity to offer such evidence at the termination hearing and failed to do so.

However, most important for purposes of our review is the fact that the stipulation is only briefly mentioned in a finding which outlined the testimony of Sarah Bryant, the ongoing case worker for this family since June 2015. Quite simply, it is clear to us that the family court did not predicate its decision to terminate father's rights on the challenged stipulation. Rather, in concluding that father's parental rights should be terminated, the family court focused its attention on father's refusal or inability to cooperate with the Cabinet's exhaustive efforts to

provide a reunification plan; his refusal or inability to cease drug trafficking and abuse; and his refusal or inability to protect the child from dangerous people and situations. The record in this case is replete with evidence of father's neglect of the child's welfare. In its thorough and well-reasoned 24-page opinion, the family court determined that father had created or allowed a risk of physical or emotional injury to the child by engaging in the sale of drugs in her presence and that both parents had engaged in a pattern of conduct demonstrating their inability to care for the immediate needs of the child due to alcohol and drug abuse. In addition, the family court found that father failed to participate in a reunification plan proposed by the Cabinet and had engaged in violent behavior toward mother, all of which caused the child to remain in foster care for fifteen (15) of the most recent twenty-two (22) months. Thus, because the family court's decision to terminate father's rights is amply supported by evidence other than the 2015 stipulation to neglect, we find no basis for concluding that father was subjected to a deprivation of due process concerning the 2015 adjudication proceeding.

Further, absolutely nothing in this record suggests that father's incarceration was the sole basis for termination or that his relationship with the child's mother resulted in the family court improperly imputing her conduct and stipulation of neglect against him. As required by the holding in *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 210-11 (Ky. 2014), the

family court made specific findings concerning the conduct of each parent in concluding that termination was warranted. Thus, our review of the record discloses no deprivation of due process.

Father next argues that the family court erred in finding that the requirements of KRS 625.090 had been satisfied prior to involuntarily terminating his parental rights. Before a court may involuntarily terminate a parent's rights, it must find by clear and convincing evidence that the child has been adjudged to be an abused or neglected child as defined in KRS 600.020(1); that one or more of the requirements in KRS 625.090(2) have been met; and that termination is in the best interest of the child, KRS 625.090(3). *Id.* at 209.

After hearing two days of testimony, the family court found that father has continued to be involved with drug use and criminal activity even to the point of exposing the child to a drug sale; that both father and mother were in a relationship in which heroin and other evidence of criminal activity were present in their home; that mother was forced to obtain an EPO against father due to domestic violence in the home where she resided with the child; that neither parent exercised good judgment or seemed capable of providing the essential care for the child; and that neither parent appeared able to protect the child from high-risk people and situations. The family court also found that the neglect lasted for more than six months and that, based upon the current behavior of both parents, there appeared

no reasonable expectation that they would be able to provide essential care and protection for the child in the near future. Considering the clear and convincing evidence adduced at the bench trial, the family court determined that father's actions fell under the following sections of KRS 625.090:

(2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

...

(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[.]

KRS 625.090(2)(e) and (g). After considering both the statutory requirements and the facts presented at the two-day trial, the family court concluded that it would be in the child's best interest to terminate her father's parental rights. Our review of

the family court's findings and conclusions, in light of the record, convinces us that there is absolutely no basis for setting aside the well-supported decision to terminate father's parental rights.

Finally, father insists that the family court erred in failing to place the child with a relative or fictive kin, arguing that the child should not have been placed in foster care in 2015, but rather should have been placed with a relative at that time. Father supports his contention by citing 922 KAR 1:140 section (3)(6) and KRS 620.090(1), which require the Cabinet to consider relatives before assigning a child to foster care. The essence of father's argument concerns the temporary placement of the child, not error in the termination of his parental rights.

The fallacy in father's argument, however, is the fact that the family court specifically addressed the issue of the child's placement with family members, finding that the Cabinet determined none would be a suitable custodian. The Cabinet offered specific reasons for its decision to not place the child with relatives and in fact stated that it had considered father's step-mother as well as the child's paternal grandmother but found neither to be a placement in the child's best interest.

In rejecting a similar contention concerning the trial court's failure to place children with relatives, this Court in *R.C.R. v. Com. Cabinet for Human Res.*,

988 S.W.2d 36 (Ky.App. 1998), held that the Cabinet did not have to prove it considered relative placement in a termination action:

R.C.R.'s argument that the Cabinet failed to follow its own program manual is not a basis for reversal. She alleges that the Cabinet did not present proof that it had considered alternatives to the termination of parental rights, such as relative placement. Under KRS Chapter 625, proof that this alternative has been considered is not required to terminate parental rights. **Once the conditions of terminating parental rights are met, it is the duty of the Cabinet to then act in the best interests of the children. Placement with relatives may be an option for consideration, but nothing more.**

Id. at 40 (emphasis added.)

Thus, upon the termination of father's parental rights, he no longer has standing to object to the child's placement. It is the responsibility of the Cabinet to decide what is in the child's best interest. Here, the child's foster mother testified that the child has been in her care for almost three years. The family court heard proof that the child is very bonded to her foster family including members of the extended family, has many friends at preschool, participates in dance lessons, and is active in the family's church. The family court found that it is in the child's best interests that she be placed for adoption. Again, the record in this case is replete with substantial evidence supporting the family court's decision to terminate father's parental rights and to allow her to be placed for adoption.

The family court has broad discretion in determining whether a child is neglected and in concluding whether that neglect warrants termination. *Id.* at 38. As previously stated, an appellate court's review of a judgment terminating parental rights action is confined to the clearly erroneous standard in CR 52.01, based upon clear and convincing evidence. *B.L.*, 434 S.W.3d at 65. Because substantial evidence supports the family court's findings in this case, there is no basis to set aside its conclusion that it is in the child's best interest to terminate father's parental rights.

CONCLUSION

Accordingly, we affirm the judgment of the Fayette Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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