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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000356-ME

R.P., Putative Father — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA MCDONALD, JUDGE
ACTION NO. 18-AD-500115T

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; C.M.D., Natural Mother; and X.L.D., a Child — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: R.P. appeals a February 7, 2019 order of the Jefferson Family Court terminating his parental rights with respect to his minor son, X.L.D.[1] Upon review, we affirm.

R.P. raises three arguments on appeal. As to the first, he urges this Court to hold that one of the statutes the family court was required to apply in determining whether to terminate his parental rights – Kentucky Revised Statute (KRS) 625.090(1)(a)1 – is "unconstitutional as a matter of law."[2] However, R.P. did not argue this before the family court nor did he notify the Attorney General of his challenge. Both are prerequisites to appellate review of this issue. *See Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 831 (Ky. App. 2014) (citing *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011)); KRS 418.075 (stating that no judgment shall be entered which decides the constitutionality of a statute until the Attorney General is given notice and an opportunity to be heard). Therefore, we decline to address this point.

[1] Because this matter involves a child, we refer to the parties by their initials.

[2] This statutory subsection allows for involuntary termination of parental rights if "[t]he child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction[.]" KRS 620.100(3) states that "a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence." Thus, R.P. argues the prior determination of abuse or neglect rested on a lower burden of proof by the Cabinet. In his view, its use here as a basis for termination would violate his right to hold the Cabinet to the higher burden of clear and convincing evidence.

R.P.'s second argument asks this Court to "revisit the holding of *A.C. v. Cabinet for Health and Family Servs.*, 362 S.W.3d 361 (Ky. App. 2012) with respect to the appointment of counsel without compensation during the appeal of a termination of parental rights." We are not at liberty to do so. *A.C.* is binding precedent on this Court, and a three-judge panel of this Court has no authority to overturn it. *See Armstrong v. Armstrong*, 34 S.W.3d 83, 86-87 (Ky. App. 2000); *see also* SCR[3] 1.030(7)(d).

R.P.'s third argument is, generally, that the family court's order terminating his rights was erroneous. Before discussing the finer points of this argument, however, it is necessary to discuss our standard of review. In this type of proceeding, we apply a clearly erroneous standard. *Commonwealth, Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010); CR[4] 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." *T.N.H.*, 302 S.W.3d at 663 (citation omitted).

Involuntary termination proceedings are governed by KRS 625.090, which provides that a family court may involuntarily terminate parental rights only

[3] Kentucky Supreme Court Rule.

[4] Kentucky Rule of Civil Procedure.

if the court finds by clear and convincing evidence that a three-pronged test has been met. First, the child may be deemed abused or neglected as defined by KRS 600.020(1). *See* KRS 625.090(1)(a). Second, termination must be in the child's best interest, and the court is provided with a series of factors it shall consider when making this determination. *See* KRS 625.090(1)(c); KRS 625.090(3). Third, the court must also find at least one ground of parental unfitness listed in the statute. KRS 625.090(2).

With that said, R.P. offers three reasons in support of why, in his view, the family court's order terminating his parental rights was erroneous. Regarding his first reason, he points to KRS 625.090(1)(a)1, which provides:

> The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> > (a) 1. The child has been *adjudged* to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction[.]

(Emphasis added).

Seizing upon the word "adjudged," he notes that prior to April 2018, when the Cabinet commenced this termination of parental rights action against him, no court of competent jurisdiction had ever made a finding that he abused or

neglected X.L.D.[5] From that, he reasons the first prong of the family court's KRS 625.090 inquiry could not have been satisfied.

However, R.P. ignores the remainder of KRS 625.090(1)(a), which provides that a family court may alternatively satisfy the first prong by making a finding of abuse or neglect in *this* proceeding. *See* KRS 625.090(1)(a)2. And, the family court did precisely that. On page 16 of its order, the family court held in relevant part:

> The petitioner child, [X.L.D.], has been adjudged to be abused or neglected as defined in KRS 600.020(1) by a court of competent jurisdiction. Moreover, the Petitioner child, [X.L.D.], is found in this proceeding to be abused or neglected, by each Respondent parent,[6] as defined in KRS 600.020(1)[.]

Moreover, the family court cited two statutory bases in its February 7, 2019 order for determining R.P. had abused or neglected X.L.D.; namely, "abandonment" and R.P.'s failure to provide X.L.D. with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for X.L.D.'s well-being. *See* KRS 600.020(1)(a)7, 8.

[5] As discussed more fully below, two DNA proceedings regarding X.L.D. were initiated against R.P. prior to April 2018, but both were dismissed without prejudice.

[6] As indicated, the family court terminated the parental rights of R.P. and the mother of X.L.D. in this proceeding. X.L.D.'s mother did not appeal.

Regarding his second reason, R.P. argues the family court could not have properly determined that he abandoned X.L.D. if its determination was based upon the fact that he was "intermittently incarcerated."

It is true that incarceration alone cannot be considered abandonment in this context. *See J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985). But, there is no indication that the family court took R.P.'s incarceration *alone* into account, if at all, in determining whether he abandoned X.L.D. for a period of not less than ninety (90) days. *See* KRS 625.090(2)(a). Moreover, the family court's determination in this respect was supported by substantial evidence. To begin, R.P. does not explain *when* he was incarcerated at any time following X.L.D.'s birth. This was, however, a subject of discussion at the January 4, 2019 termination hearing. To summarize, he was incarcerated for thirteen days in November 2014 for pleading guilty to driving under the influence and one count of wanton endangerment, second degree; he was incarcerated for twenty-four days in March 2017 for pleading guilty to various drug offenses; he was sentenced to three years' imprisonment when his probation (for a 2013 felony handgun offense) was revoked on April 18, 2017; and, despite that latest three-year term of imprisonment, R.P. was again released on probation at least as early as January 2018 – the month that the Cabinet was eventually able to make contact with him.

With that in mind, the family court explained there was little evidence demonstrating R.P. had been involved in X.L.D.'s life since X.L.D. was born in 2007. The family court noted that nothing of record indicated R.P. had had any contact with X.L.D. since X.L.D. had first become "court active" in November 2016, when dependency, neglect, and abuse (DNA) proceedings relating to X.L.D. were initiated against both X.L.D.'s mother and R.P. And, while R.P. emphasizes that the DNA proceedings that were initiated against him at that time were dismissed without prejudice, he omits *why* they were dismissed: From all indications, no one could find him, and he did not want to be found.

Specifically, R.P. never appeared in court during those proceedings; the November 17, 2016 order dismissing the DNA proceedings against R.P. noted that R.P. had "outstanding bench warrants" at the time and dismissed because R.P. never had custody of X.L.M.; and, the November 15, 2016 DNA petition filed against R.P. – which R.P. has included as a supporting exhibit in his appellate brief – notes that R.P. was "a persistent offender and currently reported a fugitive."

The family court also relied upon Amanda Gadsden, the Cabinet's caseworker assigned to this matter and the sole witness who provided evidence during the January 4, 2019 termination hearing.[7] In sum, Gadsden detailed her

[7] R.P. attended the January 4, 2019 hearing, but declined to testify.

attempts to contact R.P. since September 2017.[8] She testified that the first occasion she and the Cabinet were able to establish contact with R.P. was in January 2018, after conducting a successful "absent parent search" for him. She reached him by telephone and confirmed he was then residing in a substance abuse rehabilitation facility in Owensboro, Kentucky (*i.e.*, Boulware Mission), as a condition of probation. She testified that during their conversation, R.P. acknowledged that he had previously been incarcerated; had not been in contact with X.L.D. during his incarceration; and had not had contact with X.L.D. for "a couple of years" prior to the child's removal from his mother's custody in November 2016 as he was "on the run." Gadsden further testified that R.P. did not specify how long he had been "on the run," and that he had also refused to disclose the nature of his criminal issues.

The family court also noted that Gadsden thereafter had face-to-face contact with R.P. on July 19, 2018, during a case-planning conference, and had requested documentation relating to his substance abuse treatment, including information about the program, proof of attendance, and copies of any random drug screens. Gadsden and R.P. also scheduled a visitation with X.L.D. for

[8] In his brief, R.P. faults the Cabinet for failing to properly "seek to discover which institution he was being held at" during his incarceration (*i.e.*, between April 2017 and January 2018). That aside, he provides nothing to rebut the Cabinet's evidence regarding his conduct before and after it discovered him.

December 4, 2018, one month in advance. Despite that, Gadsden testified R.P. continued to maintain inconsistent contact with the Cabinet; R.P. ultimately called her on the day of the scheduled visitation to cancel it; and, she had not received any information detailing R.P.'s progress in drug treatment beyond July 2018.[9] As a result, the family court noted, X.L.D. "has been unable to return safely to parental custody and care and instead has remained in the Cabinet's care and custody for not less than nineteen (19) months." In short, the family court did not clearly err in determining R.P. abandoned X.L.D. for a period of not less than ninety (90) days. *See* KRS 625.090(2)(a).

Regarding the third reason why R.P. believes the family court entered its order in error, it concerns the factors enumerated under KRS 625.090(2)(e) and (g). In the relevant part of his brief, he argues:

> Appellant currently resides in Evansville, Indiana. Appellant has completed the terms of his incarceration and has obtained employment and is desirous of a relationship with [X.L.D.] While Appellant may at one time been [sic] unable to substantially provide care for

[9] Gadsden testified that as of the January 4, 2019 termination hearing it was unknown whether R.P. remained in or completed substance abuse treatment and that the information she had been able to obtain about R.P.'s substance abuse treatment was limited to a July 2018 conversation with a man who identified himself as the director of Boulware Mission, Harold Richardson, and a letter ostensibly from Richardson, dated May 23, 2018. According to Gadsden, Richardson informed her during their conversation that R.P. "had been complying with all drug screens," but despite Gadsden's repeated requests, he never provided the Cabinet any documentation to that effect. As to the May 23, 2018 letter, it stated that R.P. had been admitted to substance abuse treatment, was in good standing, and that R.P. was "complying with all court orders." Notably, Gadsden received that May 23, 2018 letter in November 2018, and received it directly from R.P. – *not* Richardson.

> [X.L.D.], his current circumstances bring with them hope of improvement.
>
> KRS 625.090(2)(g) requires that the Cabinet prove that for reasons other than poverty alone, a parent failed to provide for what can succinctly be described as the economic needs of child and there is no reasonable expectation of improvement. The Appellee never sought to have a child support order entered against Appellant, by the testimony of Ms. Gadsden at the termination of parental rights trial, either during or after his incarceration. The Appellee never facilitated the giving of any gifts or other financial support directly from Appellant, nor were any requested. Appellant is now employed and capable of helping to support [X.L.D.] There is a reasonable expectation of improvement under this portion of the statute.

There are several problems with R.P.'s argument. First, he insinuates that he can support X.L.D. because he has "obtained employment" and because he "has completed the terms of his incarceration." Yet, nothing of record supports either of those statements. He does not cite any evidence of record supporting that he is employed. He provided no evidence that he successfully completed substance abuse treatment. Indeed, he declined to testify and offered no evidence at all at the January 4, 2019 termination hearing.

Second, the fact that the Cabinet or family court never required him to pay child support or "requested" or "facilitated the giving of any gifts or other financial support" does not work in R.P.'s favor, nor provide him an excuse in this context. As the family court noted in its order, R.P. has never provided X.L.D.

with any financial support or material necessities of life; he has never provided a reasonable portion of X.L.D.'s substitute physical care and maintenance as envisioned by KRS 625.090(3)(f); and, in the words of the family court:

> The Kentucky Public Assistance statutes, KRS Chapter 205 et seq., contemplate that a parent must assume the burden of supporting his child if physically capable of so doing through any kind of legitimate endeavor, and that the parent may not pass the burden to the state merely because there are some limitations upon his ability to compete freely in the labor market. *Barnes v. Turner*, 280 S.W.2d 185 (Ky. 1955). Thus, Kentucky law imposes a duty upon a parent—and not the state—to support his child regardless of whether or not a child support order has been entered against the parent. Id.; also see, e.g., KRS 205.710(5) and KRS 205.715.

We have addressed the breadth of R.P.'s arguments and determined that he has not presented any basis of reversible error. R.P. does not take issue with any other aspect of the family court's order, nor do we find it otherwise inconsistent with the law and evidence presented in the matter. We therefore AFFIRM.

ALL CONCUR.

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