

RENDERED: OCTOBER 9, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2019-CA-1191-ME

T.S.

APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT  
FAMILY COURT DIVISION  
HONORABLE S. MARIE HELLARD, JUDGE  
ACTION NO. 18-AD-00013

CABINET FOR HEALTH AND  
FAMILY SERVICES, COMMONWEALTH  
OF KENTUCKY; AND R.W.M.,  
A MINOR CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DIXON, GOODWINE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: T.S. brings this appeal from Findings of Fact and Conclusions of Law and from an Order Terminating Parental Rights and Order of Judgment

entered by the Spencer Circuit Court, Family Court Division (family court), on July 9, 2019, terminating his parental rights to R.W.M.<sup>1</sup> We affirm.

R.W.M. was born on December 4, 2017, and tested positive for oxycodone at birth. The Cabinet for Health and Family Services, Commonwealth of Kentucky (Cabinet), began an investigation which revealed R.W.M.'s mother also tested positive for oxycodone, benzodiazepines, and marijuana.<sup>2</sup> On December 8, 2017, the Cabinet filed a petition alleging R.W.M. was dependent, neglected, or abused. The family court entered an order placing R.W.M. in the emergency custody of the Cabinet. The Cabinet placed R.W.M. with a foster family.<sup>3</sup>

By an adjudication hearing order entered on February 27, 2018, R.W.M.'s mother stipulated to neglect. A disposition order was entered committing R.W.M. to the custody of the Cabinet on March 12, 2018. Also, on this date, the individual identified on R.W.M.'s birth certificate as his biological father was ordered to submit to a DNA test but the testing eliminated him as

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<sup>1</sup> The July 9, 2019, order also terminated the parental rights of R.W.M.'s biological mother. Apparently, R.W.M.'s mother did not pursue an appeal of the order terminating her parental rights.

<sup>2</sup> R.W.M.'s biological mother had an extensive history with the Cabinet for Health and Family Services, Commonwealth of Kentucky, including a near fatality investigation with a prior born child. In 2014, R.W.M.'s biological mother had a child born with neonatal abstinence syndrome as a result of drugs she ingested during pregnancy.

<sup>3</sup> R.W.M. has remained with the same foster family since the placement shortly after his birth in December 2017.

R.W.M.'s father. R.W.M.'s mother then identified three other individuals as putative fathers of R.W.M. DNA testing subsequently identified T.S. as being R.W.M.'s biological father on October 16, 2018.<sup>4</sup> On that same day, the Cabinet filed a petition for the involuntary termination of T.S.'s parental rights to R.W.M. in the Spencer Family Court. As T.S. was incarcerated at that time, a guardian *ad litem* was appointed for T.S. in accordance with Kentucky Rules of Civil Procedure (CR) 17.04 on November 27, 2018. Subsequently, attorney Paul Zimlich was appointed as T.S.'s attorney.

T.S. acknowledged having been convicted of various offenses since 2010. T.S. had been incarcerated since May 2017, currently serving an eleven-year sentence. T.S.'s release date is set for November 2027, but with good-time credit, his release date could be as early as July 2024. T.S.'s first eligibility for parole was the summer of 2020. T.S. was added to the Cabinet's case plan, and the plan was reviewed with him over the phone on January 15, 2019. On January 28, 2019, a Cabinet worker met with T.S. in person and again reviewed the case plan with him. She informed him that the Cabinet could offer him little assistance while he was incarcerated.

An evidentiary hearing was subsequently conducted on May 30, 2019. T.S. was present with counsel. By separate Findings of Fact and Conclusions of

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<sup>4</sup> A Judgment of Paternity was entered by the Spencer Family Court on November 1, 2018.

Law and by Order Terminating Parental Rights and Order of Judgment, all of which were entered on July 9, 2019, T.S.'s parental rights were terminated as to R.W.M. This appeal follows.

The statutory grounds for involuntary termination of parental rights are set forth in Kentucky Revised Statutes (KRS) 625.090. The statute provides that parental rights may be terminated only if the circuit court finds by clear and convincing evidence: (1) the child is abused or neglected under KRS 600.020, (2) termination of parental rights is in the child's best interest, and (3) one or more of the factors set forth in KRS 625.090(2) is present. *M.L.C. v. Cabinet for Health and Family Services*, 411 S.W.3d 761, 765 (Ky. App. 2013). Relevant to this appeal, KRS 600.020(1) defines an abused or neglected child as one whose health and welfare is harmed or threatened with harm when a parent engages in a pattern of conduct rendering the parent incapable of caring for the child's immediate and ongoing needs, continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, abandons the child, does not provide child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. *See* KRS 600.020(1).

The applicable standard of appellate review in a termination of parental rights case is the clearly erroneous standard; thus, the findings of fact will not be set aside unless unsupported by substantial evidence. *M.L.C.*, 411 S.W.3d

at 765; *see also* CR 52.01. A family court has broad discretion in determining whether a child has been abused or neglected and whether the best interests of the child warrant termination of parental rights. *C.J.M. v. Cabinet for Health and Family Servs.*, 389 S.W.3d 155, 160 (Ky. App. 2012) (citation omitted).

T.S. argues the family court erred by terminating his parental rights to R.W.M. More specifically, T.S. contends the family court erred by determining that R.W.M. was abused or neglected based solely upon T.S.'s incarceration. In so doing, T.S. asserts the family court committed an error of law as incarceration alone is never sufficient to support a termination of parental rights.

In Kentucky, it is well-established that incarceration cannot serve as the sole basis for a termination of parental rights. *J.H. v. Cabinet for Human Res.*, 704 S.W.2d 661, 663 (Ky. App. 1985). However, any absence as a parent, whether voluntary or court-imposed, may be considered in determining whether a child has been neglected. *Id.* at 664. And, while a brief period of incarceration for an isolated offense may not justify termination of parental rights, repeatedly engaging in criminal behavior that leads to repeated convictions and incarcerations is certainly a factor to consider in determining whether a child has been neglected. *See Cabinet for Human Res. v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). In particular, a pattern of criminal behavior including repeated convictions and

incarcerations could clearly create or contribute to many of the neglect factors identified in KRS 600.020(1).

In the case *sub judice*, the family court found that T.S.'s history of criminal behavior, his repeated criminal convictions, and his numerous incarcerations revealed a pattern of criminal conduct. In 2010, T.S. was convicted of fourth-degree assault/domestic violence and over the next seven years was convicted of crimes on eight occasions, including his current conviction in 2017 for possession of a handgun by a convicted felon and terroristic threatening, for which he received an eleven-year sentence. T.S.'s pattern of violent criminal behavior certainly rendered him incapable of caring for R.W.M.'s immediate and ongoing needs. T.S.'s convictions also included drug use, possession, and trafficking. T.S.'s criminal conduct and the resulting incarcerations also prevented T.S. from providing essential parental care and protection for the child, including food, clothing, education needs, and medical needs and, likewise, constituted an abandonment of the child.<sup>5</sup>

The family court noted that T.S., after learning he was R.W.M.'s father in October 2018, made little to no effort to be part of the child's life. The family court also found T.S.'s testimony at the hearing to be suspect and lacking in credibility. T.S. testified he had housing and employment lined up upon his

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<sup>5</sup> As noted, T.S. was incarcerated in 2017 at the time of R.W.M.'s birth.

release from prison, which the family court found to be vague and uncertain, given he had no actual predetermined release date. T.S. also declined to use income from his prison job to support the child. Thus, the family court found that T.S.'s overall behavior rendered him incapable of providing for R.W.M.'s immediate and ongoing needs. Upon the whole, we are of the opinion that the family court's finding that R.W.M. was neglected by T.S. was supported by substantial evidence. And, it is readily apparent that the family court did not rely solely on T.S.'s current incarceration in reaching this conclusion.

T.S. next contends that the family court erred by finding that the Cabinet made "reasonable efforts" pursuant to KRS 625.090(3)(c) to reunite the family before seeking termination of his parental rights.

KRS 625.090(3)(c) provides that the Cabinet must make "reasonable efforts" to reunite the child with the parents prior to seeking termination of parental rights. "Reasonable efforts" is defined in KRS 620.020(13) as "the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available . . . which are necessary to enable the child to safely live at home[.]"

In the case *sub judice*, the family court believed that due to T.S.'s repeated incarcerations, the length of his sentence of imprisonment, and his pattern of criminal behavior, T.S. was unlikely to improve his circumstances nor would he

be able to complete a case plan within a reasonable amount of time. As noted, the Cabinet's services were limited because of T.S.'s lengthy incarceration. However, the Cabinet notified T.S. of the judgment of paternity, established a case plan, and reviewed the case plan with T.S. telephonically and in person. Notwithstanding, T.S. made no effort to communicate with or support the child. The family court also considered T.S.'s history with three other children he had fathered, being adjudged to have neglected those children by the family court in 2015. And in those cases, T.S. never completed a case plan for any of his children. *See* KRS 620.023. Finally, the family court noted that R.W.M. continued to thrive with his foster parents in his permanency placement. Therefore, the family court's findings of fact as to the reasonable efforts by the Cabinet to reunify the family are supported by substantial evidence and are not clearly erroneous.

In sum, we hold that the family court did not commit error by involuntarily terminating T.S.'s parental rights to R.W.M.

For the foregoing reasons, the Findings of Fact and Conclusions of Law and the Order Terminating Parental Rights and Order of Judgment entered by the Spencer Circuit Court, Family Court Division, are affirmed.

ALL CONCUR.



BRIEF FOR APPELLANT:

Paul A. Zimlich  
Taylorsville, Kentucky

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

Leslie M. Laupp  
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