

Commonwealth of Kentucky
Court of Appeals

NO. 2020-CA-0384-ME

O.S.¹

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 19-AD-00059

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

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, DIXON, AND MAZE, JUDGES.

¹ Pursuant to Court policy, to protect the privacy of minors, we refer to parties in termination of parental rights cases by initials only.

DIXON, JUDGE: O.S. (Father) appeals from the Graves Circuit Court order terminating his parental rights to J.R.-M.W. (Child),² entered on February 12, 2020. After careful review of the record, briefs, and law, we affirm.

BACKGROUND

Father and Mother had a casual relationship, and in 2014 Mother informed Father she was pregnant with their child. In August 2014, Father was incarcerated for criminal conduct and remained so during the entirety of the underlying case. Child was born February 10, 2015. Prior to 2016, when Father was relocated to a prison, he saw Child multiple times when Mother and paternal relatives brought her to the jail.

In March 2018, the Cabinet for Health and Family Services (CHFS) filed a dependency, neglect, and abuse (DNA) petition alleging that Mother had tested positive for illegal substances and that the home was in deplorable condition. Child was removed from Mother's home and placed in the custody of CHFS. As Child's paternity had not been established, Father was not a party to the DNA proceedings.

In December 2018, with the assistance of her social worker, Mother completed a paternity affidavit identifying Father. Thereafter, the social worker

² The parental rights of T.W. (Mother) were also terminated in the proceedings below; however, Mother has not filed an appeal. Accordingly, any reference to her in this appeal is intended solely for purposes of clarity and completeness.

sent Father a standardized letter informing him. In January 2019, Father and the social worker telephonically discussed the paternity testing process, Child's removal from Mother's home, and how to request supervised visitation once Father was released. Father requested his sister be considered for placement, which was not approved. Father sent the social worker a birthday card and a letter for Child in February as well as a follow-up letter in March 2019 claiming paternity and seeking to forgo the paternity test. Other than a few calls from the prison chaplain requesting status updates on Father's behalf, there was no further communication between Father and CHFS. Ultimately, paternity testing was conducted, and in July 2019 Father's paternity was established.

On September 27, 2019, CHFS petitioned the court to terminate the parents' rights to Child. After a hearing, the court granted the petition. This appeal followed. Additional facts will be introduced as they become relevant.

STANDARD OF REVIEW

The trial court's findings of fact are subject to the clearly erroneous standard of review. CR³ 52.01. Accordingly, we give great deference to the trial court's findings of fact and will only set them aside if the record is devoid of substantial evidence to support them. *D.G.R. v. Commonwealth, Cabinet for*

³ Kentucky Rules of Civil Procedure.

Health and Family Servs., 364 S.W.3d 106, 113 (Ky. 2012). Application of the law to the facts, we review *de novo*. *Id.*

ANALYSIS

Involuntary termination of parental rights (TPR) actions are governed by KRS⁴ 625.090. TPR may be granted only if the trial court finds a three-pronged test has been met by clear and convincing evidence. *Id.* First, the child must be deemed abused or neglected as defined by KRS 600.020(1). KRS 625.090(1)(a). Second, the trial court must find the existence of at least one statutory ground for termination listed in KRS 625.090(2). Third, termination must be found to be in the best interest of the child after consideration of the factors listed in KRS 625.090(3).

Father's first argument is the trial court erred in granting TPR where his incarceration served as the sole basis for the decision, in violation of long-held precedent, and his criminal conduct predated Child's birth. While Father's argument addresses the trial court's conclusions under the first and second prong of the test, we need only consider the former, whether Child is abused or neglected.⁵

⁴ Kentucky Revised Statutes.

⁵ The trial court's finding that Child has been in CHFS custody for fifteen cumulative months out of the forty-eight months preceding the filing of the petition is uncontroverted by Father and satisfies the second prong. KRS 625.090(2)(j).

Under the relevant statutory provisions, an abused or neglected child is one whose health or welfare is harmed or threatened when a parent: engages in a pattern of conduct rendering them incapable of caring for the child's ongoing needs; continuously or repeatedly fails or refuses to provide essential parental care and protection for the child; abandons the child; or does not provide the child with adequate care, supervision, food, clothing, shelter, and education, or medical care necessary for the child's wellbeing. KRS 600.020(1)(a)(3), (4), (7), and (8).

It is true that Kentucky courts have long held that incarceration alone can never be construed as abandonment. *J.H. v. Cabinet for Human Res.*, 704 S.W.2d 661, 663 (Ky. App. 1985); *see also Cabinet for Human Res. v. Rogeski*, 909 S.W.2d 660 (Ky. 1995). However, a parent's absence, voluntary or not, is a relevant factor in determining neglect. *J.H.*, 704 S.W.2d at 664. Further, a court is permitted to consider whether the parent has manifested a criminal lifestyle, characterized by multiple convictions and lengthy sentences, which is incompatible with parenting. *Id.*; *A.R.D. v. Cabinet for Health and Family Servs.*, 606 S.W.3d 105, 112 (Ky. App. 2020).

The trial court adjudged Child abused or neglected through Father's continued engagement in a criminal lifestyle which constituted a complete abandonment of Child.⁶ Additionally, the court determined Father had failed to

⁶ KRS 600.020(1)(a)(2) and (7).

provide Child with the essentials of life; *i.e.*, food, clothing, and shelter, as well as parental care and protection.⁷

In support, the trial court found that Father: (1) had a lengthy and significant criminal history with felony charges beginning in 2006, at age 19, and reoccurring in 2009, 2014, and 2015, with several misdemeanor charges as well; (2) had been incarcerated 12 of the 14 years of his adult life – with seven months as his longest period of freedom; (3) was apprised of Child’s impending birth when he committed the criminal acts leading to his current incarceration; and (4) will potentially remain incarcerated until 2023 or longer, as Father had a pending felony indictment.

Contrary to Father’s contention, the trial court’s findings evidenced that it complied with the dictates of *J.H.* and *Rogeski* as the focus was on Father’s actions, not merely his incarceration. As to the timing of his criminal conduct, in *A.R.D.*, this Court rejected a father’s argument that it was error for the trial court to consider his criminal history where all his offenses predated the child’s birth. 606 S.W.3d at 112. We find *A.R.D.* instructive, given the similarly lengthy and serious criminal history, and note that herein, unlike in *A.R.D.*, Father had knowledge of Child’s impending birth when he engaged in his most recent criminal conduct.

⁷ The court discussed these conclusions in the context of the statutory factors requirement of KRS 625.090(2); however, they are equally relevant to the abuse and neglect determination pursuant to KRS 600.020(1)(a)(3) and (4).

Furthermore, the trial court found that despite having knowledge of Child, Father took no affirmative steps to establish paternity or have a relationship with Child until CHFS contacted him in January 2019, when Child was almost four years of age. Father takes issue with this finding, arguing it is speculative in nature given his incarceration. However, the trial court is in the best position to determine credibility, and there is substantial evidence to support the findings where Father conceded he had knowledge of Child, but he was unable to detail any other interactions with, or concerning, Child after 2016. While Father vaguely asserts this was a result of his incarceration making it difficult to maintain contact, he provided no testimony regarding any effort to ascertain, at a bare minimum, Child's wellbeing. Accordingly, we conclude the trial court did not err in determining Child was abused or neglected.

Father's second argument is the trial court erred in granting TPR where CHFS failed to make reasonable reunification efforts. To determine the best interest of the child, the trial court is required to consider multiple factors, including whether CHFS made reasonable reunification efforts prior to filing the TPR petition. KRS 625.090(3)(c). Reasonable efforts are defined as "the exercise of ordinary diligence and care by [CHFS] to utilize all preventive and reunification services available to the community . . . which are necessary to enable the child to safely live at home[.]" KRS 620.020(13).

Father argues the trial court's findings are erroneous where the testimony from the social workers revealed CHFS made no reunification efforts at all. Prior to Father's paternity being established in July 2019, CHFS sent him one letter and spoke with him once telephonically regarding steps to take upon his release. After July 2019, CHFS made no contact directly with Father, and efforts were limited to multiple unsuccessful attempts to contact his prison caseworker regarding the availability of programs. No case plan was made for Father, and the TPR action was filed a mere two months later. In response, CHFS argues the finding is proper considering the steps it took to establish Father's paternity, its attempts to effectuate relative placement, and the fact Father was not able to have custody of Child.

While acknowledging CHFS certainly could have done more, we cannot say the trial court's finding is erroneous under these facts. Further, the efforts of CHFS are merely one factor for the Court to consider regarding Child's best interest and are not independently determinative of the result. In considering the remaining factors, the trial court found that Child's welfare had improved while in foster care, and Father had not demonstrated sufficient adjustments in his circumstances, conduct, or conditions to make it in Child's best interest to be placed with Father within a reasonable time, considering her age. Father does not challenge these findings.

CONCLUSION

Therefore, and for the foregoing reasons, the order of the Graves Circuit Court terminating parental rights is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Todd Elmore
Mayfield, Kentucky

**BRIEF FOR APPELLEE CABINET
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