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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-0450-ME

R.L.D.

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 18-AD-00077

R.E.H. AND A.T.H., A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; TAYLOR AND L. THOMPSON,
JUDGES.

THOMPSON, L., JUDGE: R.L.D. (hereinafter referred to as Father) appeals from
an order terminating his parental rights to A.T.H. (hereinafter referred to as Child).

Father argues that the trial court made erroneous legal conclusions and that his
parental rights should not have been terminated. R.E.H. (hereinafter referred to as
Mother) argues that the trial court made no errors and requests that we affirm the

trial court. We find that Father’s parental rights were properly terminated and affirm the judgment on appeal.

FACTS AND PROCEDURAL HISTORY

When Mother was 15 years old and Father was 28 years old, Mother and Father began a sexual relationship which resulted in Mother becoming pregnant and giving birth to Child. This relationship occurred in the state of Ohio. As a result of this sexual relationship, Father pleaded “no contest” to three counts of unlawful sexual conduct with a minor,¹ a felony. Father was incarcerated for a period of two years and required to register as a sexual offender. Father was also ordered not to have contact with Mother.

On October 4, 2018, Mother filed a petition for the involuntary termination of Father’s parental rights to Child. Mother not only brought this action to involuntarily terminate Father’s parental rights pursuant to Kentucky Revised Statutes (KRS) Chapter 625, but also raised KRS 403.322 and KRS 405.028. The most current version of KRS 403.322 states in relevant part:

(1) The Commonwealth recognizes that certain victims of sexual assault may conceive a child as a result of the sexual assault and may choose to bear and raise the child. The Commonwealth also recognizes that victims of a sexual assault who have elected to raise a child born as a result of the sexual assault, as well as that child, may suffer serious emotional or physical trauma if the

¹ Ohio Rev. Code Ann. § 2907.04.

perpetrator of the assault is granted parental rights with the child.

(2) Except as provided in subsection (3) of this section, any person who has been convicted of a felony offense under KRS Chapter 510, or a comparable offense from another jurisdiction, in which the victim of that offense has conceived and delivered a child, shall not have custody or visitation rights, or the rights of inheritance under KRS Chapter 391 with respect to that child.

The most current version of KRS 405.028 states in relevant part:

(1) Except as provided in subsection (2) of this section, any person who has been convicted of a felony offense under KRS Chapter 510, or a comparable offense from another jurisdiction, in which the victim of that offense has conceived and delivered a child, shall not have custody or visitation rights, or the right of inheritance under KRS Chapter 391 with respect to that child.

We must note that when Mother filed her petition to involuntarily terminate Father's parental rights, KRS 403.322 and KRS 405.028 did not contain the "or a comparable offense from another jurisdiction" language. These statutes were amended during the pendency of this case at the trial level and the new versions became effective in July of 2020. This will become relevant later in our Opinion.

A termination of parental rights hearing was held on January 29, 2021. Mother testified that at the time of the hearing, Father had been out of jail for one and one-half years. Mother testified that Father has had no contact with Child and has provided no support for Child since Child's birth. Mother also

testified that she has been in therapy due to Father's sexual misconduct. Father did not testify.

On March 24, 2021, the trial court entered an order terminating Father's parental rights to Child. The trial court held that Father had not provided any resources for the child, such as food, clothing, or shelter. The court also held that Father had not provided any parental care or protection for the child. The court also held that it would be in Child's best interests for Father's parental rights to be terminated. This appeal followed.

ANALYSIS

Father's first argument on appeal is that the trial court erred when it denied his motion to dismiss. In November of 2019, Father filed a motion to dismiss arguing that KRS 403.322 and KRS 405.028 did not apply to him. He claimed that while he was convicted of a sexual offense similar to those in KRS Chapter 510, he was not convicted of an offense under that chapter. In other words, because he was convicted of a sexual felony in Ohio, he was not convicted of a sexual offense found in KRS Chapter 510.

The trial court denied the motion. The court held that since the offense for which he was convicted was similar to those found in KRS Chapter 510, KRS 403.322 and KRS 405.028 still applied to this case. Alternatively, the trial court held that even if KRS 403.322 and KRS 405.028 did not apply, Mother

could still seek to terminate Father's parental rights pursuant to KRS 625.090, the involuntary termination of parental rights statute.

We agree with the trial court. Even if KRS 403.322 and KRS 405.028 did not apply, Mother could still seek to involuntarily terminate Father's parental rights pursuant to KRS 625.090. KRS 403.322 and KRS 405.028 were not the only statutes invoked by Mother in seeking to terminate Father's parental rights. The trial court did not err in denying Father's motion because the termination of parental rights found in KRS 625.090 was still applicable.

Father also raises other arguments regarding the applicability of KRS 403.322 and KRS 405.028 to this case, but we find they are without merit. While the trial court discussed KRS 403.322 and KRS 405.028, and considered the legislative intent of these statutes, it did not terminate his parental rights pursuant to these statutes. The trial court merely considered them as part of its analysis of the involuntary termination of parental rights factors found in KRS 625.090.

Father's final argument on appeal is that the trial court's findings of fact were not supported by substantial evidence. He claims that because of his criminal conviction and the order to stay away from Mother, he has been unable to parent Child.

The standard for review in termination of parental rights cases is set forth in *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998). Therein, it is established that this Court's standard of

review in a termination of parental rights case is the clearly erroneous standard found in Kentucky Rules of Civil Procedure (CR) 52.01, which is based upon clear and convincing evidence. Hence, this Court's review is to determine whether the trial court's order was supported by substantial evidence on the record. And the Court will not disturb the trial court's findings unless no substantial evidence exists on the record.

Furthermore, although termination of parental rights is not a criminal matter, it 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. While the state has a compelling interest to protect its youngest citizens, state intervention into the family with the result of permanently severing the relationship between parent and child must be done with utmost caution. It is a very serious matter.

M.E.C. v. Commonwealth, Cabinet for Health and Family Services, 254 S.W.3d 846, 850 (Ky. App. 2008) (citations omitted).

KRS 625.090 states:

- (1) 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;
 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding;

3. The child is found to have been diagnosed with neonatal abstinence syndrome at the time of birth, unless his or her birth mother:

a. Was prescribed and properly using medication for a legitimate medical condition as directed by a health care practitioner that may have led to the neonatal abstinence syndrome; or

b. Is currently, or within ninety (90) days after the birth, enrolled in and maintaining substantial compliance with both a substance abuse treatment or recovery program and a regimen of prenatal care or postnatal care as recommended by her health care practitioner throughout the remaining term of her pregnancy or the appropriate time after her pregnancy; or

4. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated;

(b) The Cabinet for Health and Family Services has filed a petition with the court pursuant to KRS 620.180; and

(c) Termination would be in the best interest of the child.

(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:

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

(b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;

(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;

(d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;

(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;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(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;

(h) That:

1. The parent's parental rights to another child have been involuntarily terminated;
2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect;

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights; or

(k) That the child has been removed from the biological or legal parents more than two (2) times in a twenty-four (24) month period by the cabinet or a court.

(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

- (a) Mental illness as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;
 - (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
 - (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;
 - (d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;
 - (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
 - (f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.
- (4) If the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and

whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.

- (5) If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights.
- (6) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:
 - (a) Terminating the right of the parent; or
 - (b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

Citing KRS 600.020(1)(a)8., the trial court held that Father had neglected Child by not providing Child with “care, supervision, food, clothing, shelter or educational or medical care necessary for the child’s well-being.” The trial court found that Father had not provided any resources to support Child since Child’s birth. The trial court also found that KRS 600.020(2)(e) and (g) were applicable. Finally, the court stated that it would be in the best interests of Child to terminate Father’s parental rights. The court based this finding on Father’s criminal conviction, the trauma inflicted upon Mother, Father’s lack of contact

with Child since Child's birth, Child's having been properly cared for by Mother, and the intended adoption of Child by Mother's husband.

As stated previously, Mother was the only person to testify and present evidence in this case. Based on her testimony, we find that the trial court's decision was supported by substantial evidence. Mother testified as to the family support she and Child have, the intention of her husband to adopt Child, her part-time job, and her soon-to-be completed college education. In addition, she testified that Father has had no contact with Child and has not sought to support Child financially. This is true even during the one and one-half years that Father has been out of jail prior to the hearing in this case. While Father could not contact Mother, he could have utilized the court system to seek visitation or set up child support. Father has lost his parental rights because he committed a sexual crime against Mother, did not seek to have contact with Child, and did not present evidence during the termination of parental rights hearing.

CONCLUSION

Based on the foregoing, we affirm the judgment of the trial court which terminated Father's parental rights to Child.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey J. Otis
Covington, Kentucky

BRIEF FOR APPELLEE:

Delana S. Sanders
Crescent Springs, Kentucky