

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000934-MR

B.R.C., JR.

APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 00-AD-00009

D.G. and
A.S., a minor,
and R.C.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: B.R.C., Jr., appeals from an order of the Webster Circuit Court dismissing his petition for the adoption of his stepdaughter. We affirm.

D.G. is the child's father, and R.C. is the child's mother. D.G. and R.C. were never married, but they had a relationship which resulted in the birth of a child, A.S., on October 20, 1990. R.C. allowed D.G. to have regular contact and

visitation with the child from the child's birth until 1993. On July 15, 1993, R.C. married the appellant, B.R.C., Jr.

Following the marriage of R.C. and B.R.C., D.G. was allowed little visitation with the child. R.C. testified in her deposition that from the time A.S. was three or four years old until February 11, 1997, D.G. requested visitation "probably once a month" but was refused over 90% of the time.¹

D.G. was arrested on February 14, 1996, was held in custody for approximately 30 days, and was then released to enter a 30-day drug rehabilitation program. On July 10, 1996, D.G. was sentenced to one year in prison on a drug charge, and he was released from custody on January 31, 1997. R.C. testified in her deposition that D.G.'s last request for visitation was on February 11, 1997.²

On May 7, 1997, D.G. moved the circuit court to award him visitation with the child. A hearing was held on October 6, 1997. A domestic relations commissioner (DRC) conducted the hearing, and a recommended order was entered on October 16, 1997, and adopted by the court on November 4, 1997. The DRC recommended that D.G. submit to a drug test, that both parties and the child attend counseling sessions, that pending receipt

¹ R.C. testified in her deposition that she did not force A.S. to go with D.G. for visitation when she did not want to go and that she did nothing to encourage visitation.

² R.C. testified that she kept a journal of D.G.'s visitation with the child.

of the results of the drug test that D.G. not contact R.C.'s home, that the parties exchange information necessary to determine the amount of child support to be paid by D.G., and that the DRC would review the visitation motion upon the filing of the counselor's report. D.G. then underwent a drug screen and tested positive for marijuana. Apparently, no further action occurred in the case until 2000.

In September 2000, D.G. had contact with A.S. at a football game where A.S. was a cheerleader. On October 17, 2000, B.R.C. filed a petition for adoption in the Webster Circuit Court in his capacity as A.S.'s stepfather. D.G. then renewed his motion for visitation and submitted a negative drug screen. The DRC held the motion for visitation in abeyance pending the outcome on the adoption petition.

A final hearing on the adoption petition filed by B.R.C. was held on January 7, 2002. On April 3, 2002, the circuit court rendered an order denying the petition for adoption. The court stated in part as follows:

It is obvious that B.R.C. and R.C. have provided excellent parenting for A.S. since their marriage in 1993. Without question, D.G. has not provided very much in the way of parental help. It is clear that A.S. has been and is much better off with B.R.C. and R.C. than she would have been with D.G. D.G. has been in prison and has not been around to provide as much parental involvement as he should have. A.S. probably prefers the adoption. But these

are not the issues that must be decided by the Court.

The law recognizes the seriousness of termination of parental rights by making it very difficult to do so unless by agreement. Termination is so final. At the time of filing to terminate, a petitioner must be able to prove by clear and convincing evidence the specific grounds of termination enumerated in KRS 625.090 and KRS 199.502. Petitioner simply has not met the statutory requirements of proof in this case.

Throughout A.S.'s life, D.G. has attempted to exercise some visitation with her. His testimony is that he offered to help with her support but was told by B.R.C. they would not accept it and ordered away. R.C. admitted in her testimony that D.G. was denied visitation ninety (90%) per cent of the time he asked for it.

A pattern or scheme manifests itself through the evidence whereby B.R.C. and R.C., having sufficient money from their disability and disability related income, did not need D.G.'s financial assistance and refused it. The Court understands that they would like to have D.G. out of their and A.S.'s life and even admits that under the circumstances it might very well be in A.S.'s best interest if D.G. were out of her life. But when R.C. and D.G. engaged in the union that produced A.S., they were equal parents with equal rights, and R.C. cannot simply decide that she will exclude D.G. from her life. He is her father.

D.G. took legal action seeking visitation in 1997. Court ordered counseling in 1997 resulted in a recommendation that D.G. be allowed visitation. Pending its decision, the Domestic Relations Commissioner prohibited D.G. from visiting A.S. So at the time of petitioner's petition, D.G. was prohibited

from visitation by court order, not because he had abandoned the child for more than ninety (90) days as required by the statute.

From the evidence presented, the Court can find no "settled purpose" by D.G. to forego all parental duties as required by DMS v. FAH, 684 W.D. 2d 320 (Ky. App., 1985). The Court also agreed with respondent that Wright v. Howard, 711 S.W.2d 492 (Ky. App., 1986) is controlling here. The evidence is that D.G., while encountering problems mostly of his own making, but also because of R.C.'s determination to exclude him from A.S.'s life, never had much chance to exercise his parental rights with A.S.

This appeal by B.R.C. followed.

An adoption without the consent of a natural parent "may be granted without the consent of the biological living parents of a child if it is pleaded and proved as a part of the adoption proceedings that any of the provisions of KRS 625.090 exist with respect to the child." KRS³ 199.500(4). KRS 625.090(2) provides in relevant part that a circuit court may not terminate parental rights unless it first finds "by clear and convincing evidence" the existence of one or more of several grounds. Those grounds include the following three grounds that are relevant to this case:

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

³ Kentucky Revised Statutes.

- (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)(a), (e), and (g). See also KRS 199.502(1)(a), (e), and (g).

B.R.C.'s first argument is that he presented clear and convincing evidence that D.G. had abandoned A.S. for periods in excess of 90 days. In support of his argument, B.R.C. asserts that D.G. had limited contact with the child between 1994 and 1997 and that D.G. voluntarily abandoned the child between 1997 and 2000. He notes that D.G. never again sought visitation after the positive drug screen in 1997 until he (B.R.C.) sought to adopt the child in 2000. In further support of his argument, B.R.C. cites Lester v. Looney, Ky. App., 461 S.W.2d 81 (1970).

The burden was on B.R.C. to prove by clear and convincing evidence that D.G. had abandoned A.S. for a period of not less than 90 days. See D.S. v. F.A.H., Ky. App., 684 S.W.2d 320, 322 (1985); KRS 625.090(2)(a); and KRS 199.502(1)(a). The mere fact that a child would have a better home elsewhere or that the natural parent may provide less parental care than the adopting parent is not ground to terminate the parental rights of a natural parent in an adoption proceeding. O.S. v. C.F., Ky. App., 655 S.W.2d 32, 34 (1983). Further, the parental rights of a natural parent should not be severed "because a parent has temporary abdicated his parental responsibility in favor of a kindred." Id. Also, "abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." Id.

In Wright v. Howard, Ky. App., 711 S.W.2d 492 (1986), the case relied upon by the circuit court herein, this court held that there could be no abandonment of a child where the parent was under a court order not to exercise visitation. Id. at 497. Also, in L.S.J. v. E.B., Ky. App., 672 S.W.2d 937 (1984), this court held that a parent's separation from a child due to incarceration of the parent is not tantamount to abandonment of the child. Id. at 940.

The circuit court in the case *sub judice* found no "settled purpose" by D.G. to forego his parental duties and relinquish his parental claims to A.S. In the first few years after R.C. married B.R.C., D.G. requested to exercise visitation rights, but R.C. usually denied his requests and prevented him from doing so. In the years that followed D.G.'s short period of incarceration, he was under a court order not to have contact with R.C.'s home. Considering these facts, we cannot conclude that the circuit court's determination that D.G. did not abandon the child was clearly erroneous. See CR⁴ 52.01.⁵

B.R.C.'s second argument is that the court erred in its finding on the issue of whether D.G. failed to provide the essential food, clothing, and shelter for A.S. If such failure is proven by clear and convincing evidence, then the parental rights of the parent may be terminated. See KRS 625.090(2)(g) and KRS 199.502(g).

⁴ Kentucky Rules of Civil Procedure.

⁵ B.R.C. relies on the Lester case in an attempt to convince this court that the circuit court erred on the abandonment issue. As in this case, the natural parent in the Lester case initiated court proceedings to obtain possession of her child but subsequently abandoned the proceedings. Ultimately, the appellate court affirmed the trial court's determination that the child had been abandoned by the parent. The court cited CR 52.01 and held that the trial court's findings were not clearly erroneous. Likewise, we hold that the circuit court's determination on the abandonment issue was not clearly erroneous, although the result reached herein is opposite from the result in the Lester case.

D.G. testified that he offered to pay child support but that R.C. refused to accept child support payments. The circuit court stated that “[a] pattern or scheme manifests itself through the evidence whereby B.R.C. and R.C., having sufficient money from their disability and disability related income, did not need D.G.’s financial assistance and refused it.”

This situation has some similarity with the facts in G.R.M. v. W.M.S., Ky. App., 618 S.W.2d 181 (1981). Therein, the mother refused child support from the natural father and thereafter filed a nonsupport action against him for the purpose of obtaining his consent for her new husband to adopt the child. Likewise, the mother had not allowed the natural father visitation rights. This court held that “[t]o terminate a father’s parental rights on this basis under this provision flies in the face of the true spirit and intent of the statute, which is to sever relations between innocent children and a deadbeat, disinterested dad.” Id. at 184.

Likewise, this court held in the Wright case that there was no abandonment, desertion, or neglect that evinced a settle purpose to forego parental duties and claims to a child when the natural father was under a court order prohibiting visitation and not establishing an amount for child support. 711 S.W.2d at 497. Similarly, in the case *sub judice*, D.G. was

prohibited by court order from exercising visitation. As for any child support obligation, R.C. refused to accept child support payments from him. Further, R.C. never provided her income figures to the circuit court in response to the court's order relating to the 1997 visitation motion filed by D.G.

We will not disturb the circuit court's fact determination that R.C. refused to accept child support payments from D.G. Thus, we conclude that the circuit court's determination in this regard was not clearly erroneous.

The order of the Webster Circuit Court dismissing B.R.C.'s petition for adoption is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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