

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000610-ME

G.D.

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT  
FAMILY COURT DIVISION  
HONORABLE REED RHORER, JUDGE  
ACTION NO. 03-AD-00033

v.

CABINET FOR FAMILIES AND CHILDREN,  
M.Y.S. and I.S., a child

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: G.D. appeals from findings of fact, conclusions of law, and an order and judgment of the Franklin Circuit Court, Family Court Division, terminating his parental rights in his daughter, I.S. We affirm.

I.S. was born on January 15, 1992. Her parents are G.D. and M.Y.S., who were not married. After I.S. was born, the Cabinet for Families and Children filed a paternity action against G.D. in the Fayette District Court. The district court

entered a judgment on March 29, 1993, determining that G.D. was I.S.'s father.

G.D. has had an extensive criminal history during the life of I.S. On July 31, 1992, he was sentenced by the Fayette Circuit Court to four years in prison for the crimes of possession of cocaine (two counts) and carrying a concealed deadly weapon. His sentence was probated. On April 1, 1993, G.D. was sentenced to one year in prison for the crime of possession of a handgun by a convicted felon. On April 6, 1993, the four-year probated sentence that G.D. had received on July 31, 1992, was reinstated and his probation was revoked because he had tested positive for cocaine use. The court ordered the one-year sentence received on April 1, 1993, and the four-year sentence reinstated on April 6, 1993, to run consecutively for a total sentence of five years.

G.D. was paroled from prison on March 28, 1994. However, he violated his parole, and it was revoked. G.D. was again paroled on August 18, 1995. Once again, G.D. violated his parole, and it was revoked in December 1996. He finally served out his sentence on May 24, 1997.<sup>1</sup>

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<sup>1</sup> G.D. apparently was not released from custody at that time due to other pending charges that led to convictions and sentences as set forth below.

On November 10, 1997, G.D. was again sentenced to prison due to having committed additional criminal offenses.<sup>2</sup> He was convicted of three counts of first-degree robbery, one count of first-degree burglary, and being a first-degree persistent felony offender. His total sentence was set at twenty years in prison, and he is not eligible for parole consideration until January 9, 2007.

On October 15, 1995, the Cabinet filed a neglect action against M.Y.S. in the Fayette District Court. This action was filed the day before G.D. was found guilty in a jury trial of the offenses which led to his twenty-year sentence. Although G.D. had been determined to be I.S.'s father in the paternity action filed by the Cabinet against him approximately three years earlier, the Cabinet listed I.S.'s father as being "unknown" in the neglect action against M.Y.S. Therefore, G.D. was not personally served with the Cabinet's neglect petition and was not given any notification of the pendency of the action. As a result, he did not appear or participate in that case. On November 2, 1995, the Fayette District Court entered a finding of neglect against M.Y.S.

During the next three and one-half years, the Cabinet submitted case plans setting forth its actions directed at

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<sup>2</sup> These crimes were committed on May 6, 1996, while G.D. was out of prison and on parole on the five-year sentence.

reuniting the family. Although these plans identified G.D. as I.S.'s father, the Cabinet did not set goals or offer any plans for integrating G.D. into I.S.'s life. Further, the Cabinet made no effort to investigate G.D. or his family in order to determine if they could play any role in providing care for I.S. In fact, there was no evidence that G.D. was ever notified of I.S.'s commitment to the Cabinet. Rather, the Cabinet determined that no services needed to be offered to G.D. since he was expected to remain in prison for the next few years. Thus, the Cabinet focused all its efforts at reunification on M.Y.S. and her family.

During this time, the child was placed with M.Y.S.'s step-aunt, A.S. Because M.Y.S. had made little or no progress under the Cabinet's plans, its goal for I.S. became permanent relative placement. With the support and encouragement of the Cabinet, A.S. filed a petition in the Fayette Circuit Court seeking permanent custody of the child.

G.D. was named as a party in the custody action and was given notice of the proceedings. G.D. opposed A.S.'s custody petition, and he actively participated in the proceedings even though he was in prison. In addition to testifying by telephone from prison at the final hearing, G.D. presented testimony from his parents. He urged the court to give his parents custody of the child as an alternative to

awarding custody to A.S. At the conclusion of the hearing, A.S.'s petition for custody was denied.

Despite evidence presented at the custody hearing concerning the willingness of G.D.'s parents to take custody of I.S., the Cabinet did not explore this option or attempt to integrate G.D.'s family into its plan or to offer them any services. The Cabinet maintained this position despite the fact that on three separate occasions the Fayette County Citizen's Foster Care Review Board specifically asked if G.D.'s parents were being considered for a role in I.S.'s care. The Cabinet's response to the Board was that it was focusing all its efforts on M.Y.S. and her family because the district court had placed the child with A.S. and because the Cabinet's goal was to reunite the child with her mother. Soon after the denial of A.S.'s custody petition, the Cabinet reversed its course and determined that M.Y.S. had met all the goals. Thus, the child was returned to her care.

M.Y.S. and the child, along with another child born to M.Y.S. on July 15, 1998, by another father, moved from Fayette County to Franklin County. On November 13, 2000, the Cabinet filed a neglect petition in the Family Court Division of the Franklin Circuit Court. Once again, the Cabinet failed to name G.D. as I.S.'s father. As a result, G.D. did not receive notice of the case and did not participate in it. The court, having no

information concerning the paternal relatives, agreed with the Cabinet's recommendation to place the children with M.Y.S.'s family. This time, the children were placed with an aunt, E.S. As a result of E.S.'s drug addiction, however, the children were removed in December 2000 and placed in foster care.

On January 26, 2001, the family court entered a neglect finding against M.Y.S. In accordance with its procedures, it filed case plans addressing the needs of the children. However, no mention was made of G.D.'s relationship with I.S. Although the record indicates that the Cabinet caseworker testified in the termination proceeding that she had no knowledge that G.D.'s paternity had been established and also testified that M.Y.S. had never identified G.D. as the father by affidavit, the caseworker nevertheless admitted in her testimony at the termination hearing that M.Y.S. had told her that G.D. was I.S.'s father and G.D. had informed her that he was the child's father. In short, the Franklin Family Court had no information concerning G.D. or his family when it dealt with the Cabinet's neglect petition.

Near the end of July 2003, G.D. managed to contact the foster mother by telephone. Although he was able to talk with I.S. once, the Cabinet denied him permission for further contact with the child. On August 15, 2003, the Cabinet filed its petition for involuntary termination of the parental rights of

G.D. as to I.S. and M.Y.S. as to both I.S. and her brother, N.S. Although G.D. had never been identified as the father during the neglect action, he was so identified in the involuntary termination action.

A final hearing on the petition was held in November 2003. Once again, G.D. took an active role in the proceedings. In addition to his own testimony, G.D.'s parents also testified. They stated that they would accept custody of I.S. and would facilitate contact between her and her father while he remained in prison. The family court found that G.D.'s mother had, in fact, brought the child to see G.D. in prison on a prior occasion. The court also found that G.D. had maintained contact with his two children from a prior relationship. He testified as to his ability to maintain such contact by noting that under the prison rules he was allowed daily phone calls and weekly visits with his children.

As to his relationship with I.S. prior to his incarceration, G.D. testified that he had lived with the child and M.Y.S. and had provided the child with a home when he was not incarcerated. He stated that although he had tried to maintain contact with M.Y.S. and the child while he was in prison, M.Y.S.'s transient lifestyle, the Cabinet's failure to name him in the neglect actions, and the Cabinet's refusal to allow him permission to contact her once he located her in

foster care, all served to limit his ability to maintain a relationship with I.S. By suggesting that his parents could receive custody of the child, G.D. offered an alternative placement that would facilitate his ability to maintain a relationship with her.

The Cabinet argued to the court that consideration for relative placement played no role in termination proceedings and that the fact they had not placed the child with G.D.'s parents had no bearing on the issue before the court. The Cabinet also stressed the fact that both I.S. and N.S. had adjusted to their foster home and had become attached to their foster parents. The Cabinet argued that to deny termination of G.D.'s parental rights as to I.S. would result in the separation of I.S. and N.S., as N.S. was not G.D.'s son. The Cabinet asserted that since the children were close, such a determination would not be in their best interests. On March 9, 2004, the Franklin Family Court entered its findings of fact, conclusions of law, and order and judgment terminating the parental rights of G.D. and M.Y.S. to I.S. This appeal by G.D. followed.

A circuit court may involuntarily terminate the parental rights of a parent of a child if the court finds certain facts by clear and convincing evidence. Those facts are

set forth in KRS<sup>3</sup> 625.090(1). As that statute pertains to this case, the court had to find either that the child had been adjudged to be neglected by a court of competent jurisdiction or the court had to find in this proceeding that the child was neglected. Id. Further, the court had to find by clear and convincing evidence that termination would be in the best interest of the child. Id. Once that threshold was met, the court had to find by clear and convincing evidence the existence of one or more of the ten grounds set forth in KRS 625.090(2). See Commonwealth, Cabinet for Families and Children v. G.C.W., 139 S.W.3d 172, 175-76 (Ky. App. 2004).

The definition of a neglected child is set forth in KRS 600.020(1). I.S. was found to have been a neglected child by both the Fayette District Court and the Franklin District Court. Further, the Franklin Family Court in this proceeding determined that she was a neglected child.

While it is true that G.D. was not notified of the neglect actions in either the Fayette District Court or the Franklin Circuit Court, he was properly notified and made a party to the termination proceeding in the Franklin Family Court. That court made an independent determination of neglect, thus satisfying KRS 625.090(1)(a)2, assuming the finding was supported by clear and convincing evidence. Since that portion

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<sup>3</sup> Kentucky Revised Statutes.

of the statute may be relied upon as grounds for terminating G.D.'s parental rights, it is unnecessary to examine whether the neglect findings by the two district courts were proper in the absence of notifying G.D. of those proceedings.

G.D.'s argument in this case is that the Franklin Family Court involuntarily terminated his parental rights in an unlawful manner since it based its finding that he had failed to provide adequate parental care solely on the fact that he was incarcerated. In support of his argument, G.D. cites J.H. v. Cabinet for Human Resources, 704 S.W.2d 661 (Ky. App. 1986). In that case this court agreed that incarceration alone is not enough to terminate parental rights. Id. at 663. We noted that "[i]ncarceration alone can never be construed as abandonment as a matter of law." Id. However, we stated that "absence, voluntary or court-imposed, may be a factor to consider in determining whether the children have been neglected[.]" Id. at 664.

In Cabinet for Human Resources v. Rogeski, 909 S.W.2d 660 (Ky. 1995), the Kentucky Supreme Court recognized that while incarceration for an isolated criminal offense may not alone justify terminating one's parental rights, it is a factor to be considered. Id. at 661. See also M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 117 (Ky. App. 1998). Dedication of one's self to a criminal lifestyle which causes him or her to be

incarcerated may support a finding that the parent substantially and continuously neglected the child. See J.H., 704 S.W.2d at 664. The court therein referred to such a lifestyle as "incompatible with parenting." Id.

The circuit court in this case found that G.D. had been convicted of multiple offenses, had been incarcerated for most of I.S.'s life, had twice been paroled and then returned to prison as a parole violator, and was presently serving a twenty-year sentence with parole eligibility in 2007. The court properly concluded that mere incarceration did not alone justify termination of G.D.'s parental rights, but that it was a factor to be considered. Citing the J.H. case as well as Mays v. Department for Human Resources, 656 S.W.2d 252 (Ky. App. 1983), the court concluded that where incarceration was caused by the dedication of the parent to a criminal lifestyle, termination of parental rights may lie if such is in the child's best interest.

The court further concluded that G.D. and M.Y.S. had continuously failed or refused to provide essential parental care and protection for the children and that there was no reasonable expectation of improvement in the future in those areas. In addition, the court concluded that G.D. and M.Y.S. had continuously or repeatedly failed to provide or were incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available

for I.S. and N.S. The court also concluded that there was no reasonable expectation of significant improvement in this area in the immediate foreseeable future. To summarize the court's conclusions as they pertained to G.D., the court determined that his parental rights should be terminated because of his neglect of the child due to his incarceration which was caused by his dedication to a criminal lifestyle.

"The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination." M.P.S., 979 S.W.2d at 116, citing Department for Human Resources v. Moore, 552 S.W.2d 672, 675 (Ky. App. 1977). Further, our standard of review is based on the clearly erroneous standard in CR<sup>4</sup> 52.01, and the court's findings will not be disturbed if there is substantial evidence in the record to support them. Id., citing V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420, 424 (Ky. App. 1986).

The court's findings in this case are supported by substantial evidence. Within a few short months after I.S.'s birth, G.D. committed the crime of possession of cocaine (two counts) and carrying a concealed deadly weapon. That led to a four-year prison sentence that was probated but later reinstated. Approximately one year after I.S.'s birth, G.D.

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<sup>4</sup> Kentucky Rules of Civil Procedure.

committed the crime of possession of a handgun by a convicted felon. This led to a one-year prison sentence. Then, the four-year sentence that had been probated earlier was revoked due to G.D. having tested positive for cocaine use.

While serving his five-year prison sentence, G.D. was paroled twice. Both times, however, his parole was revoked due to violations. Further, he committed the additional crimes of first-degree robbery (three counts) and first-degree burglary. These new crimes led to a prison sentence of twenty years. In short, there is substantial evidence to support the court's conclusion that G.D. dedicated himself to a criminal lifestyle and that the resulting incarceration led to his lack of parental care for I.S. and the subsequent determination of neglect.

The order and judgment of the Franklin Family Court is affirmed.

ALL CONCUR.

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