

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001806-ME

JAMES WEBB

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 03-AD-00007

TONYA WEBB

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment terminating the parental rights of appellant to his infant daughter. We adjudge that the findings of the trial court relative to termination were supported by substantial evidence. Hence, we affirm.

Tonya Webb and James Webb are the natural parents of L.W. born September 7, 2001. James was present when L.W. was

born, but sometime thereafter went to jail.¹ He got out of jail on October 24, 2001, and Tonya and James separated on October 26, 2001. At some point, Tonya filed for divorce. The court allowed James to have weekly supervised visitation with L.W. at the local office of the Kentucky Cabinet for Families and Children (the "Cabinet"). James' first visit with the child was on November 7, 2001. Tonya testified at the hearing in this case that on the second visit with the child, on November 14, 2001 (L.W. was two months old), James was so doped up that he could not stand up and his speech was slurred. Tonya testified that, because of his condition, all available caseworkers at the Cabinet office that day sat in on the visit. According to an affidavit by Michelle Meade, the Cabinet's caseworker for the Webb family, the last time James visited L.W. was on November 13, 2002, and there is no record of him contacting the Cabinet regarding L.W. anytime after that date. It is undisputed that from November 7, 2001, to November 27, 2002, James had only nine visits with L.W., and on two of those visits he was arrested on outstanding warrants.²

Sometime in June of 2002, James was arrested for Driving Under the Influence of Intoxicants. In July of 2002, James was arrested and jailed for violation of a Domestic

¹ The record does not contain information regarding the offense for which James was jailed.

² The record does not contain information regarding the offenses for which he was arrested.

Violence Order regarding Tonya. According to James' testimony, he was arrested for writing a letter to Tonya.³ From November 28, 2002, to March 17, 2003, it is undisputed that James was incarcerated in West Virginia for driving under the influence. While in jail in West Virginia, the decree of dissolution was entered in his divorce from Tonya on January 21, 2003. On March 23, 2003, less than a week after being released from jail in West Virginia, James was incarcerated in Kentucky for the felony offense of driving under the influence ("DUI"), fourth offense.

On July 2, 2003, Tonya filed the petition for termination of James' parental rights as to L.W. Thereafter, James filed a response contesting the termination. At the time of the termination hearing on May 14, 2004, James was still incarcerated on the DUI, fourth offense in Kentucky. However, James was allowed to attend and participate in the termination hearing. Tonya and James were the only witnesses at the hearing. On August 4, 2004, the court entered its order terminating James' parental rights to L.W. This appeal by James followed.

KRS 625.090 provides in pertinent part:

(1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds

³ There is no further information in the record regarding the details of this DVO.

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; or

3. 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; and

(b) 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;

. . .

(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;

. . .

(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:

. . .

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

. . .

(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.

The definition of an "abused or neglected child" is set out in KRS 600.020(1), which provides in pertinent part:

(1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when his parent,

guardian, or other person exercising custodial control or supervision of the child:

. . .

(c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;

(d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

. . .

(g) Abandons or exploits the child; or
(h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. . . .

A trial court's findings of fact in a termination of parental rights case will not be disturbed unless they are clearly erroneous, that is, not supported by substantial evidence. M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114 (Ky. 1998). It has been held that incarceration of the parent cannot be the sole grounds for termination of parental rights. J.H. v. Cabinet for Human Resources, 704 S.W.2d 661 (Ky.App. 1985).

The trial court based its decision to terminate James' parental rights on the following findings: James has had no contact with L.W. since November 13, 2002, for reasons other

than poverty or incarceration; James abandoned the child for a period in excess of 12 months and failed to protect and preserve her right to a safe and nurturing home; James continuously and repeatedly failed to provide essential parental care and protection for the child, and there is no reasonable expectation of improvement in such care and protection in the future; and, for reasons other than poverty or incarceration alone, James continuously and repeatedly failed to provide essential food, clothing, shelter, medical care, and education for the child, and there is no reasonable expectation of improvement in the parent's conduct in the future.

James' first argument is that the trial court did not consider the best interest of L.W. in its judgment pursuant to KRS 625.090(1)(b). To the contrary, the court specifically found, "that it is in the best interest of [L.W.] that the termination of the parental rights of James Webb be granted."

James next argues that there was no substantial evidence to support the court's findings. In particular, James complains that all the evidence demonstrated that his lack of contact with and support of L.W. was solely due to his incarceration. The evidence established that from the time of the child's birth on September 7, 2001, until November 27, 2002, when James was incarcerated in West Virginia, James only had nine visits with L.W. On two of those visits, he was arrested,

and on one of the visits he was visibly under the influence of intoxicants. Although the record is unclear if or how long James was incarcerated from September 7, 2001, to November 27, 2002, James testified that he worked for six months in 2001 and that he received SSI. However, James paid nothing toward the support of the child during that time. James has made only one child support payment, on May 5, 2003. Thus, the condition in KRS 625.090(2)(g) was clearly met in this case.

As to the court's finding of abandonment (KRS 625.090(1)(a)2. and (2)(a); KRS 600.020(1)(g)), we believe the court correctly found that James' conduct since the child's birth amounted to an abandonment of the child. While incarceration of the parent cannot alone justify termination of one's parental rights, it is a factor to be considered in making its decision on whether or not to terminate parental rights. Cabinet for Human Resources v. Rogeski, 909 S.W.2d 660 (Ky. 1995). It has also been acknowledged that 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. J.H. v. Cabinet for Human Resources, 704 S.W.2d at 664. The Court referred to such a lifestyle as "incompatible with parenting." Id.

In the present case, James has been incarcerated for the better part of L.W.'s life (for some periods between October

2001, and July 2002, and from November 28, 2002 to at least May 14, 2004) for multiple violations. At the time of the hearing, James was incarcerated for fourth offense DUI. This was not a case of the parent's incarceration for an isolated offense. See Rogeski, 909 S.W.2d 660. Hence, James' abandonment of L.W. was not solely due to his incarceration, but to his recidivist behavior.

We would also note that James' alcohol problem, evident from the fact that he was on his fourth DUI offense, was another factor the court could have considered in finding L.W. to be an "abused and neglected child" pursuant to KRS 625.090(1)(a)2. and KRS 600.020(1)(c). James is incapable of caring or providing for his daughter when he is intoxicated or repeatedly being arrested and incarcerated for DUI.

For the reasons stated above, the judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II
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BRIEF FOR APPELLEE:

Samuel P. Chandler
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