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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000803-ME

D.D.Y. APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 03-AD-00004

J.A.G. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND HENRY, JUDGES.

HENRY, JUDGE: D.D.Y. appeals from a February 24, 2005 order of the Caldwell Circuit Court denying his petition to involuntarily terminate J.A.G.'s parental rights to C.M.G., a minor. Upon review, we affirm.

E.B.Y. is the biological mother of C.M.G., who was born on January 31, 1999. E.B.Y. married J.A.G., C.M.G.'s biological father, on December 18, 1999. After separating in July 2000, the couple ultimately divorced on January 10, 2001. At that time, E.B.Y. was granted the sole care, custody, and

control of C.M.G., and child support was set at approximately $400.00 per month. J.A.G. was served with process but failed to make an appearance to contest the custody or child support issues. E.B.Y. subsequently married D.D.Y. on September 14, 2002. C.M.G. has lived with the couple since their marriage.

On February 27, 2003, E.B.Y filed a petition to involuntarily terminate J.A.G.'s parental rights to C.M.G. pursuant to KRS[1] 625.050.[2] As grounds for this petition, E.B.Y. set forth that J.A.G. had abandoned and neglected C.M.G. by failing to provide for her or to otherwise participate in her life as a parent. J.A.G. filed an answer challenging the petition, and the matter proceeded to a hearing that was conducted on January 10, 2005.

At the hearing, E.B.Y. testified that after she separated from J.A.G. in July 2000, she and C.M.G. went to live with her parents in Caldwell County. J.A.G. apparently made only two phone calls to schedule visitation with C.M.G. during the remainder of 2000, and – on each occasion – made arrangements to pick up the child only to fail to appear at the appointed time and place. E.B.Y. further testified that J.A.G. called only once during 2001 and made no attempts to call or visit during 2002 and 2003. He did see C.M.G. at his

[1] Kentucky Revised Statutes.

[2] The petition was later amended on June 7, 2004 to include D.D.Y. as a petitioner and to ask for him to be named as C.M.G.'s adoptive parent.

grandmother's funeral in 2002. E.B.Y. further indicated that during this period of time, C.M.G. became close to D.D.Y. and began referring to him as "Dad."

The only financial support provided by J.A.G. for C.M.G. from the July 2000 separation up until his incarceration in March 2002 was an $80.00 purchase at Wal-Mart in August 2000 and an additional $500.00 that was collected by the child support enforcement office. When J.A.G. was released from prison in October 2004, he immediately began paying $50.00 to $100.00 per week in support and had paid approximately $900.00 as of the hearing; however, he still owed over $5,000.00 in back support at that time.

The testimony further revealed that J.A.G. began using methamphetamine in 1999 and was charged with the crime of knowingly manufacturing methamphetamine in March 2002. After being released on bond the following month, J.A.G. was arrested and charged with additional methamphetamine-related offenses in June 2002. He was subsequently incarcerated until finally being released from prison in October 2004. He is currently on parole. While in prison, J.A.G. underwent a drug treatment program and currently participates in a twelve-step program. He also attends one meeting per week with a case worker.

J.A.G. also testified that he did make some additional efforts to contact C.M.G. in 2000 and 2001, but was unable to do

so, due in part to acrimony between himself and E.B.Y.'s family, with whom she was living at the time. However, he also admitted that the primary reason as to why he had previously had so little contact with C.M.G. and had failed to provide child support was his methamphetamine addiction. J.A.G. additionally indicated that, while in prison, he did write to C.M.G. approximately five times and sent her two birthday and Christmas cards containing money. He also sought visitation with C.M.G. after his release, but was denied by E.B.Y. It was also revealed that J.A.G. had voluntarily terminated his parental rights to his two other children, but that he now felt that this was a mistake. He had consequently begun making efforts to start a relationship with the children after his release from prison. J.A.G. further testified that he wanted to be a part of C.M.G.'s life and to contribute to her support.

Following the hearing and the recommendation from C.M.G.'s guardian ad litem,[3] the trial court entered findings and an order denying the petition for involuntary termination on the general basis that it could not find by clear and convincing evidence that J.A.G. "had a fixed and intentional design of

[3] The guardian recommended that it would be in C.M.G.'s best interests for the termination petition to be denied. While he acknowledged that the trial court "would be fully justified in terminating the parental rights of J.A.G." because of his abandonment of C.M.G. from August 2000 to early in 2002, he felt that the efforts made by J.A.G. after his release from prison to re-establish his relationship with her and aid in her support were sincere.

abandonment of his minor child[.]" The court's justification for its decision reads as follows:

> [While] failure to pay child support does not in and of itself constitute abandonment, it is a fact that the Court can consider toward that end. O.S. vs. C.F., 655 S.W.2d 32 (1983). Incarceration alone can never be construed as an abandonment as a matter of law. J.H. vs. Cabinet for Human Resources, 704 S.W.2d 661 (1985).
>
> The issue of abandonment is a matter of intent which is proven by circumstances surrounding the natural father's failure to provide child support or make serious attempts to have a serious relationship with the child. J.H. vs. Cabinet for Human Resources, supra.
>
> It is also true that if a father is dedicated to a criminal lifestyle which forces him to be imprisoned, such a criminal lifestyle may serve as a basis for the Court finding that he has substantially and continually neglected his child. J.H. vs. Cabinet for Human Resources, supra.
>
> It does not appear to the Court that the Respondent/natural father is committed to a lifestyle of crime and incarceration. The biological father was 28 years old before he was convicted of the felonies for which he was imprisoned. He maintained a job and according to his own testimony became hooked on methamphetamine which not only led to the ruination of his marriage but also to his subsequent incarceration. During his incarceration he received drug treatment to which he has apparently responded well, and he has been on parole since October of 2004 without incident and he is still receiving treatment including weekly meetings for his drug addiction. In his appearance and testimony at trial, he appeared to the Court to be well dressed, clean, clear headed, honest and forthright—in short a person who had, at least at this point in his life, recovered from his drug

addiction. Remove a short two year period from this 31 year old's history—from July of 2000 to his incarceration in March of 2002—and he appears to have lived a law abiding upstanding life. At least he hardly seems to qualify, at least for now, to being "dedicated to a criminal lifestyle" which would cause him to be "substantially and continuously neglectful" of his child. See J.H. vs. Cabinet for Human Resources, supra.

Up to his criminal misconduct beginning on March 17, 2002, the Respondent/father had no criminal record except for some minor traffic offenses. He appears to have been employed by the Commonwealth of Kentucky as a Vehicle Enforcement Officer as well as a police officer for the City of Princeton where he was promoted to the rank of Sergeant. He was shot in the line of duty while working for the City of Princeton.

It is obvious from his record before his offense in 2002 and his record since incarceration that something drastically altered his behavior for a period of time; and based upon the Pre-Sentence Investigation Report as well as his testimony, it is apparent to the Court that something was the methamphetamine addiction.

It is common knowledge these days, not only in the court system and law enforcement circles, that methamphetamine is the most lethal and addictive drug that has come down the illicit substance pike in our lifetime. While this is not an excuse for neglecting one's child, it does provide a reason why the natural father in this case failed miserably in his father's duties. The Court does not believe that the circumstances and the time span of his neglect constitute justification for him to lose his child.

Undoubtedly during this critical period of time, the natural father was a lousy father. Termination of parental rights forever, however, is a drastic decree and not only deprives the father of a relationship with his child, but more importantly deprives a child of a

relationship with her natural father. In this case, to allow termination would in effect eliminate potential for the child to have two fathers instead of one. The long range effect of termination upon the child in this case is of course unknown. It cannot help but be complicated, however, by the fact that even though at a tender age, she must have some recognition and an eventual recollection of her natural father; and with them living in the same community, they are bound to encounter each other from time to time.

...

A two year hiatus due to the affliction of drug addiction from an otherwise upstanding and respectable life combined with an apparent repentance and rehabilitation cause this Court to resolve this close question in favor of the natural father. If the father has indeed picked up the pieces and resumes a productive life, this child will not only benefit by having two fathers but also by having one which can lend special wisdom and support to this child based upon his bitter experiences.

The case law in Kentucky has held that abandonment is "a matter of intent which may be proved by external facts and circumstances." J.H. vs. Cabinet for Human Resources, supra. Neither incarceration for a crime nor drug addiction are admirable conditions worthy of praise, but they are both in their own way equally debilitating, just as prolonged hospitalization is.

Therefore the Court cannot find by clear and convincing evidence that the Respondent J.A.G. has had a fixed and intentional design of abandonment of his minor child [C.M.G.]. Therefore this request for termination is DENIED.

D.D.Y. subsequently filed a motion to alter, amend, or vacate on March 7, 2005, but the motion was denied by the trial court in an order entered on March 17, 2005. This appeal followed.

KRS 625.090 governs the termination of parental rights. In summary, the statute requires a finding, by clear and convincing evidence, that the child is an abused or neglected child pursuant to KRS 600.020(1), and that termination would be in the best interests of the child. If this threshold is met, the circuit court must find the existence of one of the numerous grounds recited in KRS 625.090(2) (including abandonment, infliction of serious physical injury or emotional harm, sexual abuse, or neglect in providing access to basic survival needs) in order to terminate parental rights. Cabinet for Families and Children v. G.C.W., 139 S.W.3d 172, 175-76 (Ky.App. 2004); see also R.C.R. v. Commonwealth of Kentucky Cabinet for Human Resources, 988 S.W.2d 36, 38 (Ky.App. 1998). However, even if all of these factors are satisfied, KRS 625.090 still leaves the termination decision to the trial judge's discretion. See KRS 625.090(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....") (Emphasis added).

"The trial court has broad discretion in determining whether the child fits within the abused or neglected category

and whether the abuse or neglect warrants termination." R.C.R., 988 S.W.2d at 38, citing Department for Human Resources v. Moore, 552 S.W.2d 672, 675 (Ky.App. 1977). "This Court's review in a termination of parental rights action is confined to the clearly erroneous standard in CR[4] 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings." Id., citing V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420, 424 (Ky.App. 1986). "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." Id. at 38-39, quoting Rowland v. Holt, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

KRS 600.020(1) defines an "abused or neglected child" as follows:

> (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:
>
> (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;

[4] Kentucky Rules of Civil Procedure.

(b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;

(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;

(e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

(f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;

(g) Abandons or exploits the child;

(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 parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or

(i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that

> results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months.

We initially note that the trial court failed to make an explicit finding as to whether or not C.M.G. was an "abused or neglected child" pursuant to KRS 600.020(1), although its order arguably suggests that she was. Nevertheless, while such a finding generally should be made in all termination cases, it was perhaps unnecessary or irrelevant here, as a practical matter, as the language of the trial court's order indicates – albeit implicitly - that it would not be in C.M.G.'s best interests for J.A.G.'s parental rights to be terminated. In this context, the court particularly stated: "If the father has indeed picked up the pieces and resumes a productive life, this child will not only benefit by having two fathers but also by having one which can lend special wisdom and support to this child based upon his bitter experiences."

Of particular relevance here is KRS 625.090(3), which sets forth that, in determining the best interests of the child and the grounds for termination, the trial court should consider, among other things, "[t]he 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" and "[t]he physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered." KRS 625.090(3)(d)-(e). We agree with the trial court that J.A.G. appears to have made a drastic and commendable turnaround in his life and has gone a long way in recovering from his methamphetamine addiction. He has also taken clear and obvious steps to remedy his past conduct as it pertains to the care and support of C.M.G. and his general absence from her life. The record also does not reflect any sort of basis for a belief that C.M.G.'s life would somehow improve if J.A.G.'s parental rights were terminated. Consequently, we do not believe that the trial court was "clearly erroneous" in concluding that C.M.G. would benefit from a relationship with her biological father and that, accordingly, it would not be in her best interest for his parental rights to be terminated.

As termination of parental rights under KRS 625.090 requires satisfaction of all factors set forth above, our conclusion that the trial court was not "clearly erroneous" as to its best interests determination renders consideration of the evidence supporting abandonment unnecessary even though D.D.Y. argues that the evidence strongly supports the fact that J.A.G. "abandoned" C.M.G. We acknowledge that the record would amply support a decision contrary to that reached by the trial court.

Indeed, were we to consider this matter afresh, we may well have arrived at a different conclusion. However, the fact that the record contains evidence that would support a different result does not automatically obligate us to reverse the trial court under the "clearly erroneous" standard – particularly given the considerable deference and broad discretion that is afforded to trial courts in these matters. As noted above, we believe that the record contains evidence in support of the court's ultimate conclusions – specifically that termination would not be in C.M.G.'s best interests. Consequently, the court's decision should stand.

The judgment of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jill L. Giordano
Princeton, Kentucky

NO BRIEF FOR APPELLEE: