

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002358-ME

M.N., FATHER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 06-AD-00023

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES; AND
I.N., AN INFANT

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

STUMBO, JUDGE: "M.N."² appeals from findings of fact, conclusions of law and judgment of the Kenton Circuit Court terminating his parental rights to a child, "I.N." The termination was based on the court's finding that M.N. had

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² This appeal is from an action of the type normally directed by statute to be kept confidential in the circuit court. In accordance with Court of Appeals Administrative Order No. 2006-01, the appellate record is designated as confidential and may be viewed only by the Court, the parties or their attorneys, an agency authorized by statute to review the records, or by Court Order. As such, the parties' names in this opinion shall remain confidential.

abandoned the child and continuously or repeatedly inflicted or allowed to be inflicted physical injury or emotional harm. M.N. contends that the court erred in finding that it was in the child's best interest for M.N.'s parental rights to be terminated. For the reasons stated below, we affirm the judgment on appeal.

The child, I.N., was born on March 2, 2000, to parents "D.S." (mother) and M.N. (father). On November 22, 2005, the Kenton District Court rendered an order committing I.N. to the Cabinet for Health and Family Services. Prior to that date, I.N. resided intermittently in foster care since 2001. The order committing I.N. to the Cabinet resulted from his parents' repeated drug offenses and incarcerations which rendered them incapable of providing proper care to I.N.

On April 3, 2006, the Cabinet filed a petition for involuntary termination of parental rights in Kenton Circuit Court. The petition sought to permanently terminate the parental rights of D.S. and M.N. as to I.N., and it followed a prior termination proceeding wherein D.S.'s parental rights were involuntarily terminated as to a second child and voluntarily terminated as to a third. The petition to terminate the parties' parental rights as to I.N. was based on the Cabinet's allegation that the respondents had abandoned I.N. for a period not less than 90 days; had continuously or repeatedly failed to provide food, clothing, shelter, medical care and education;

and, had failed to accept increased parental responsibility despite the Cabinet's offer to maintain and rehabilitate the family through foster care, visitation and an in-patient drug treatment program.

The matter proceeded to a bench trial in Kenton Circuit Court on August 24, 2006. After hearing the proof, the court rendered the findings of fact, conclusions of law and judgment on September 7, 2006, which form the basis of the instant appeal. The court found, in relevant part, that the respondent parents had failed to provide for I.N.'s essential needs, and that there was no reasonable expectation of significant improvement in their conduct. It found as substantiated the Cabinet's claim that the respondent parents had continuously or repeatedly inflicted or allowed to be inflicted, by other than accidental means, physical injury or emotional harm upon I.N. It noted that I.N. wished not to be returned to his parents, made substantial improvements while in foster care, and based on expert testimony is expected to make more improvement upon termination of the parental rights. In sum, it found that it was in I.N.'s best interest to have the respondents' parental rights terminated, with custody transferred to the Cabinet with authority to place I.N. for adoption. This appeal followed.

M.N. now argues that the trial court committed reversible error in terminating his parental rights as to I.N. D.S. does not appeal. M.N. contends that the court erred in

finding that the termination of his parental rights was in I.N.'s best interest. He directs our attention to the statutory elements for termination set forth in KRS 625.090(3), and maintains that a close examination of each element necessarily leads to the conclusion that termination of his parental rights was not in I.N.'s best interest. While conceding that section (e) of the statute weighs against him (i.e., consideration of the child's physical, emotional, and mental health needs, and the prospect for improvement if termination is ordered), he notes that many of the other statutory factors weigh in his favor. For example, he points out that no evidence was introduced that he suffers from a mental illness or retardation (KRS 625.090(3) (a)); nor that he committed acts of abuse or neglect (KRS 625.090(3) (b)); nor, that he failed to pay child care or maintenance (KRS 625.090(3) (f)). He notes that other factors not addressed by the statute also support his claim that termination was not warranted. For example, though he is currently serving a ten year prison sentence, he claims that there is a "realistic chance" that he may be released "very soon". He also notes that he has completed two twelve-week drug treatment programs, has learned job skills while incarcerated, and completed a "Life Without a Crutch" program. Ultimately, he expresses a desire to be a father to I.N., and argues that a careful analysis of the facts illustrates that termination was not in I.N.'s best interest.

We have closely examined the record, the arguments and the law, and find no error in the judgment on appeal. As noted above, KRS 625.090(3)³ sets forth the factors to be considered in a petition for involuntarily termination. It 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; 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.

³ Westlaw indicates that KRS 625.090 has been held unconstitutional, and in support of this assertion directs the subscriber to the unpublished opinion of *T.G. v. Kentucky, Cabinet for Health and Family Services*, 2007 WL 1452572. *T.G. v. Kentucky*, however, which has been submitted to the Kentucky Supreme Court for discretionary review, does not hold KRS 625.090 unconstitutional. Rather, it states in relevant part that a circuit court may perform an independent review of the evidence submitted in a prior dependency action and make its own determination of abuse or neglect based upon the elevated standard of proof in the termination proceeding. It expressly states, "we hold that KRS 625.090(1)(a) is constitutional, so long as it is correctly applied." (Emphasis added). 2007 WL 1452572 at p. 7. This is not an issue in the matter at bar, as the Kenton Circuit Court conducted its own review of the facts and did not rely on evidence submitted in a prior dependency action. Accordingly, even if discretionary review is granted by the Kentucky Supreme Court and that Court subsequently affirms, we do not regard *T.G. v. Kentucky* as affecting the issue at bar.

(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; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

(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 mental retardation 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.

The determinative inquiry in the matter at bar is whether the circuit court properly applied section (3) to the facts in concluding that the termination of M.N.'s parental rights was in I.N.'s best interest. Those factors look to the presence of mental illness or retardation, acts of abuse or neglect, whether the Cabinet has made a reasonable effort to reunite the parent and child, the effort the parent has made to change the conditions in the home, the physical, emotional, and mental health of the child coupled with his prospects for improvement if

termination is ordered, and the payment for substitute physical care and maintenance if financially able.

The Kenton Circuit Court expressly applied these factors to the facts at bar. It noted that M.N. had a long history of drug use and incarceration, and that I.N. had been in foster care since 2001. It found that M.N. failed or refused to provide essential parent care, and had abandoned I.N. for the statutory period. Parroting the statutory language, the court found that the respondent parents "for reasons other than poverty alone, have continuously or repeatedly failed or refused to provide or are 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 parents' conduct in the immediately foreseeable future, consider the age of the child."

These findings are supported by the record. It is uncontroverted that M.N. has a long history of drug use and incarceration, and is currently serving a ten year sentence in prison. It is further uncontroverted that he has not provided for I.N.'s basic needs, resulting in I.N. being placed in foster care intermittently since 2001. M.N. goes so far as to acknowledge that an examination of KRS 625.090(3)(e), to wit, "the physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if

termination is ordered," weighs against him. Furthermore, testimony was adduced at trial upon which the court reasonably concluded that I.N. "has made substantial improvements while in foster care, and is expected to make more improvements upon termination of parental rights."

When viewing the record in its entirety, we must conclude that the Kenton Circuit Court properly concluded that I.N.'s best interests are served by termination of M.N.'s parental rights. Accordingly, we find no error.

For the foregoing reasons, we affirm the findings of fact, conclusions of law and judgment of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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