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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000415-ME

B.A., JR. APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 15-AD-00036

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY
AND P.A., A CHILD APPELLEES

AND

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HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 15-AD-00037

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY
AND B.A., III, A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

JONES, JUDGE: This consolidated appeal arises from two orders entered by the Greenup Circuit Court terminating the parental rights of E.A. ("Mother") and Appellant, B.A. ("Father"), to their two minor sons (the "Children). On appeal, Father contends that the circuit court erred on two counts: (1) it failed to consider all of the factors set out in KRS[1] 625.090(3) to determine the Children's best interests; and (2) it abused its discretion by terminating Father's parental rights despite the fact that he proved by a preponderance of the evidence that the Children would not continue to be abused or neglected if returned to his care.[2] After a careful review of the record, we AFFIRM the circuit court's orders.

I. BACKGROUND

The Children were born on June 9, 2009, and October 24, 2010, respectively. While Father was present for the births of both children, he was incarcerated in late 2010. Father remained in prison until October of 2013, when he was moved to a halfway house in Youngstown, Ohio. Father had very limited contact with the Children during this time due to his incarceration. This lack of

[1] Kentucky Revised Statutes.

[2] While Mother was a party to the underlying action, she has not contested the circuit court's orders and is not a party to this appeal.

contact was later exacerbated in 2013 when the Children were removed from Mother's custody and placed in foster care following a court finding of abuse and neglect against Mother.

In 2014, Father left the halfway house and moved to South Point, Ohio where he began working a case plan with Appellee, the Cabinet for Health and Family Services (the "Cabinet"), to regain custody of the Children. As part of this plan, Father began having supervised visits with the Children and regularly talking to the Children on the telephone in hopes of developing a bond. While initially there was no attachment between Father and Children, as the visits progressed, the Children did begin to develop a bond with Father. However, Father soon became inconsistent with his visits and phone calls. On several occasions, the Children would arrive at the Cabinet's office for their scheduled visit only to be told that Father would not be coming. In July of 2014 Father relapsed into substance abuse, which resulted in the visits stopping altogether in September of 2014, following Father's accidental overdose. All communication between Father and the Cabinet ceased the following November.

Sometime in the winter of 2014 Father reconnected with an old friend – now his fiancé – who encouraged him to begin making changes in his life. Father began seeking help for his drug addiction by regularly attending church support groups, Narcotics Anonymous meetings, and a Suboxone clinic. In addition to obtaining a full-time job, Father began managing several rental properties for his mother. Father reinitiated contact with the Cabinet in March of

2015 and asked to start working his case plan again. The Cabinet informed Father that it was currently working towards a goal of terminating his parental rights over the Children so that they would be available for adoption; however, the Cabinet stated that it would work with Father if he wanted to try to regain custody of the Children.

Father did not start a case plan at this time, stating that he wanted to wait until after the annual permanency review in order to ascertain what his chances were of regaining custody of the Children. At the permanency review, the court stated that it would not allow Father to resume visitation with Children due to the length of time he had gone without contact. Following the court's decision, a case worker contacted Father and scheduled a meeting for May 2015 to set up a case plan. Father did not attend this meeting, stating that he would not come in until he had the chance to speak with someone in Frankfort about his case. Father did not negotiate and begin working on a case plan until June of 2015.

While his case worker did testify that Father had been making progress on his case plan, the Cabinet nonetheless filed petitions to terminate Father's parental rights to the Children on August 24, 2015. On February 1, 2016, the circuit court held a hearing on both petitions. Father attended the hearing and was represented by counsel. Mother did not attend the hearing, but her interests were represented by her Guardian ad Litem. The circuit court entered orders terminating Mother and Father's parental rights on February 19, 2016. This appeal by Father followed.

II. Standard of Review

"The trial court has broad discretion in determining whether a child fits within the abused or neglected category and whether the abuse or neglect warrants termination." *W.A. v. Cabinet for Health and Family Servs.*, 275 S.W.3d 214, 219 (Ky. App. 2008). Therefore, our review in this action is "confined to the clearly erroneous standard in CR[3] 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 *R.C.R. v. Commonwealth Cabinet for Human Res*., 988 S.W.2d 26, 38-39 (Ky. App. 1998)). "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Bowling v. Natural Res. & Envtl. Prot. Cabinet*, 891 S.W.2d 406 (Ky. App. 1994).

III. Analysis

Parents have a fundamental liberty interest in the care and custody of their children. This interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State[.]" *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Therefore, when the state petitions to terminate parental rights, parents must be provided with "fundamentally fair procedures." *Id.* Kentucky's termination of parental rights statute, KRS 625.090, "attempts to ensure that parents receive the appropriate amount of due process

[3] Kentucky Rules of Civil Procedure.

protections." *Commonwealth Cabinet for Health and Family Servs. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). Under KRS 625.090, parental rights may be involuntarily terminated only if a circuit court finds, by clear and convincing evidence, that: (1) the child is abused or neglected as defined in KRS 600.020(1); (2) termination is in the child's best interests; and (3) one or more of the ten grounds set out in KRS 625.090(2) is in existence. *M.B. v. D.W.,* 236 S.W.3d 31, 34 (Ky. App. 2007). On appeal, Father takes issue only with the circuit court's finding that it is in the Children's best interests that his parental rights be terminated.

KRS 625.090(3) lists six factors that a circuit court must consider when determining the best interests of a child. Father asserts that the circuit court did not abide by this statutory mandate when deciding what was in the Children's best interests. Specifically, Father argues that the circuit court neglected to consider KRS 625.090(3)(d), which requires a court to consider "[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." In support of this allegation, Father notes that while a significant amount of the hearing was devoted to the substantial changes he has made in his life, the circuit court's findings of fact and conclusions of law "failed to provide explanation as to why the significant and continuing modifications to [his] circumstances, conduct, and conditions did not make it in the [Children's] best interests to be returned" to his home.

Father is correct that the circuit court did not explain why the changes he has made in his life were insufficient to support a finding that it would be in the Children's best interests to be returned to his custody. However, while this lack of explanation may be frustrating to Father, a circuit court's failure to expound on its reasoning does not equate a failure to consider all factors under KRS 625.090(3). *See K.H.*, 423 S.W.3d at 212 ("While the family court's written order did not specifically address each factor, its findings lead us to believe that each factor was properly considered.").

Father and his witnesses did provide ample testimony regarding his new-found sobriety, employment, and general change in lifestyle; however, there was no evidence presented that any of these changes were undertaken for the Children's benefit. Father testified that it was not the loss of the Children that prompted the changes in his life, but encouragement from his fiancé after they reconnected. Father acknowledged the fact that even after becoming sober, he did not attempt to reconnect with the Children until March of 2015, and did not actually take steps to reconnect with the Children until June of 2015. Father further testified that, despite the fact that he holds two jobs, he has never attempted to pay child support or otherwise support the Children.

We must also note that the language of KRS 625.090(3) states that "in determining the best interest of the child and existence of a ground for termination, the Circuit Court *shall consider* the following factors[.]" (Emphasis added). There is no requirement that the court find that each of the listed factors are present to

determine that it is in a child's best interests that parental rights be terminated. *See D.G.R. v. Commonwealth Cabinet for Health and Family Servs.*, 364 S.W.3d 106, 115 (Ky. 2012) ("As the statute itself notes, the factors are to be 'considered' in deciding whether termination is in the child's best interest. They do not necessarily dictate a result and are always subordinate to the best-interest finding that the court is tasked with making."). The circuit court's findings do indicate that it considered each of the factors found in KRS 625.090(3) when making its best interest determination, and that there was substantial evidence to support its conclusions. However, after considering the factors in combination with one another, the circuit concluded that termination of Father's rights was in the best interest of the Children.

We cannot say that the evidence compelled a different conclusion. While Father's life changes are commendable, they have come after a substantial time away from the Children. He has never been a steady presence in their lives, has never supported them, and until very recently made very little effort to adjust his life to meet the needs of the Children. Given the very substantial passage of time and Father's past inconsistent conduct, it was not unreasonable for the trial court to conclude that termination was in the Children's best interest.

Finally, Father asserts that the trial court disregarded KRS 625.090(5), which provides that: "[i]f 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." (Emphasis added). Father would have us read this provision as requiring the trial court to forego termination where the parent meets his evidentiary burden.

KRS 625.090(5) is plainly permissive. The family court may opt not to terminate a parent's parental rights if the parent proves that the child will not continue to be an abused or neglected child. However, nothing compels the family court to choose this option; it ultimately leaves that decision to the family court's discretion. As applied to this case, even if Father proved it was more likely than not that the Children would not continue to be neglected if returned to his care, the family court still retained the discretion and authority to terminate his parental rights. The family court proceeded in this manner, and we cannot say that, in doing so, the family court abused its discretion.

IV. CONCLUSION

In light of the substantial evidence supporting the circuit court's findings and the broad discretion granted to a trial court in determining whether termination of parental rights is warranted, we find no clear error in the circuit court's orders to terminating Father's parental rights. As such, we AFFIRM the orders of the Greenup Circuit Court.

ALL CONCUR

BRIEF FOR APPELLANT:

Damian Gallaher
Ashland, Kentucky

BRIEF FOR APPELLEE:

Mary Hall Sergent
Ashland, Kentucky