

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000631-ME

S.L.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE SQUIRE WILLIAMS III, JUDGE
ACTION NO. 18-AD-00005

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
AND S.J.L., A CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * **

BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: S.L. brings this appeal from a March 22, 2019, Order

Terminating Parental Rights and Order of Judgment of the Franklin Circuit Court,

Family Court Division, terminating the parental rights of S.L. We affirm.

Appellant is the biological father and J.W. is the biological mother of S.J.L., who was born on November 25, 2014. S.J.L. was cared for by J.W. until 2015 when the Commonwealth of Kentucky, Cabinet for Health and Family Services, (Cabinet) filed a petition of dependency, neglect, and abuse. S.J.L. was placed in the custody of the Cabinet. Ultimately, J.W. voluntarily consented to the termination of her parental rights. Then, on March 9, 2018, the Cabinet filed a petition for the involuntary termination of parental rights against appellant. Following an evidentiary hearing, the family court rendered the following relevant findings of fact and conclusions of law:

7. The Respondent Father has failed to protect and preserve [S.J.L.’s] fundamental right to a safe and nurturing home, and the child is an abused or neglected child based on the following:

A. [S.J.L.] is an abused or neglected child as defined in KRS 600.020 based on the following:

1. [S.L.] has created or allowed to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means. Under *J.H. v. Cabinet for Health and Human Resources*, while incarceration is not enough to establish that a child has been abandoned under the meaning of the statute, the Court of Appeals established that when a parent dedicates one’s self to a criminal lifestyle, the court determined that parent “allows to be created a risk of physical or mental injury to the children.” 704 S.W.2d 661 at 664. [S.L.] has been in and out of incarceration since this case

began. Testimony was presented that he was in juvenile detention, released and has been incarcerated in Florida and North Carolina since then. While [S.L.] is young it is clear that he has consistently engaged in a pattern of conduct that is concurrent with a criminal lifestyle.

2. [S.L.] has engaged in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child. Testimony shows that [S.L.] has engaged in a pattern of behavior, including multiple criminal arrests leading to periods of incarceration that has led to an incapability for him to care for the immediate needs of the child. Testimony indicates multiple incarcerations in multiple states since this case has been open. His voluntary criminal choices have led to a lifestyle that has made it impossible to provide for the child's needs.
3. [S.L.] did not provide the child with adequate care, supervision, food, clothing, shelter, education or medical care necessary for the child's well-being. Testimony showed that Father has not been in contact with the Cabinet since he came into the Cabinet's office in July 2016. He did not show up for a subsequent meeting to sign a case plan, nor a planned home visit. While Father has been incarcerated during some of the case, including presently, he was not when he went to the Cabinet's office in 2016. Father also received later criminal charges in Florida, and is incarcerated in North Carolina. Father also submitted to a DNA test in August 2017. Therefore, he has spend [sic] some periods of time out of jail and has not provided any care for the child since the Cabinet opened their case. There is no evidence that [S.L.] even

inquired about the child since 2016. During [S.L.'s] periods of incarceration, he failed to contact the Cabinet, even if just to ask about his daughter.

4. [S.L.] has continuously or repeatedly failed or refused to provide essential parental care for [S.J.L.]. Testimony shows that he has not had contact with the Cabinet since 2016, when he was out of incarceration. There is no evidence he has provided any care or protection for the child since the case opened.
5. [S.L.] has failed to make sufficient progress toward identified goals as set forth in a court-approved case plan to allow for the safe return of the child to the parents that resulted in the child remaining committed to the Cabinet and remaining in foster care for a cumulative fifteen (15) of the most recent forty-eight (48) months. Testimony shows that the Cabinet attempted to case plan with Father, setting up a meeting and home visit that he did not attend. The child has been in care since November 2015.

B. Termination of parental rights is in the best interest of [S.J.L.] based on the following:

1. Prior to the filing of this petition, reasonable efforts have been made by the Cabinet to reunite the child with her father, but those efforts have been unsuccessful.
2. The Cabinet for Health and Family Services has attempted to or provide all reasonable services to the family, including case planning, referrals to community partners, and supervised visitation.

3. Despite the availability of these services, [S.L.], refused or have [sic] been unable to make sufficient effort an adjustments in their [sic] circumstances, conduct or conditions to make it in the interest to [S.J.L.] to his home within a reasonable period of time, considering the age of the child.
4. [S.J.L.] is currently in an adoptive home. She is very bonded to her foster family. She is doing well in her placement. She has had some regression in her mental health, but she is currently receiving treatment and all her needs are met in her foster home. She has been in the Cabinet's care for almost 39 months.

C. Pursuant to KRS 625.090(2), the following grounds exist for termination of the parental rights of [S.L.]:

1. That as a result of [S.L.'s] lifestyle, including a number of incarceration periods, and his failure to cooperate with the Cabinet to eliminate the risk of abuse or neglect, for a period of not less than six months, [S.L.] failed or refused to provided [sic] or has been substantially incapable of providing essential parental care and protection for the child, and there is no reasonable expectation of improvement in parental care and protection, considering the age of the child.
2. Due to the failure of [S.L.] to work toward reunification, and for reasons other than poverty alone, the father has failed to provide or have been incapable of providing essential food, clothing, shelter, medical care, or education necessary available for the child's well-being, and there is no reasonable

expectation of significant improvement in the immediately foreseeable future, considering the age of the child.

8. The Cabinet has offered reunification services and there are no additional services that would likely bring about lasting parental adjustments enabling a return of [S.J.L.] to Respondent Father.

9. [S.J.L.] will continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to Respondent Father.

10. The Cabinet for Health and Family Services have facilities available to accept the care, custody and control of the child, and is the agency best qualified to receive custody.

March 22, 2019, Findings of Fact and Conclusions of Law at 6-9. Based upon the foregoing, the family court involuntarily terminated S.L.'s parental rights. This appeal follows.

Kentucky Revised Statutes (KRS) 625.090 sets forth the statutory grounds to involuntarily terminate parental rights. Thereunder, parental rights may be terminated if the court finds by clear and convincing evidence: (1) the child is abused or neglected under KRS 600.020, (2) termination of parental rights is in the child's best interest, and (3) one or more of the factors set forth in KRS 625.090(2) are present. KRS 625.090; *M.L.C. v. Cabinet for Health and Family Services*, 411 S.W.3d 761, 765 (Ky. App. 2013). And, under KRS 600.020(1), an

abused or neglected child “means a child whose health or welfare is harmed or threatened with harm when:”

(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
2. 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;
3. 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 a substance use disorder as defined in KRS 222.005;
4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
7. Abandons or exploits the child;
8. 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;

9. 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) cumulative months out of forty-eight (48) months; or
10. Commits or allows female genital mutilation as defined in Section 1 of this Act [2020 c. 74, § 1] to be committed[.]

Appellant initially contends that the family court erred by finding that S.J.L. was abused or neglected. In particular, appellant maintains that the family court improperly found that S.J.L. was abused or neglected solely due to appellant's incarceration. In so doing, appellant claims that the family court committed an error of law as incarceration alone is never sufficient to support termination of parental rights. Appellant also alleges that the family court erred by concluding that he engaged in a criminal lifestyle or pattern of conduct that rendered him incapable of caring for S.J.L. And, appellant asserts that

incarceration was the only reason he did not adequately provide S.J.L. with essentials, adequate care for S.J.L., or make progress on his case-plan with the Cabinet.

In the court's findings of fact and conclusions of law, the family court determined that S.J.L. was abused or neglected. The family court found that appellant's repeated incarcerations and other facts convinced the court that appellant committed himself to a criminal lifestyle that allowed to be created a risk of physical or emotional harm to S.J.L. The family court also considered this unlawful pattern of conduct as rendering appellant incapable of caring for the needs of S.J.L. The family court further found that appellant did not make progress on his case-plan with the Cabinet to allow for the return of S.J.L. At the hearing, the evidence established that appellant was incarcerated numerous times throughout S.J.L.'s short life. Appellant was incarcerated in Kentucky, North Carolina, and Florida, for crimes ranging from theft of a motor vehicle to sixteen counts of burglary. And, the evidence establishes that appellant failed to provide S.J.L. with the necessities of life, including food, clothing, or shelter, and failed to provide S.J.L. with parental care. Appellant only met once with the Cabinet concerning his case-plan. He missed an at home visit and visits with the Cabinet at its office. So, the evidence supports the family court's finding that appellant did not make progress on his case-plan to allow for the return of S.J.L. Upon the

whole, we are of the opinion that the family court's finding that S.J.L. was neglected or abused was supported by clear and convincing evidence. And, it is readily apparent that the family court did not merely rely on appellant's incarceration in so finding.

Appellant next maintains the family court erroneously determined that termination of his parental rights was in the best interest of S.J.L. Appellant argues that the family court's findings were not supported by clear and convincing evidence. Appellant alleges that the Cabinet did not make reasonable efforts to reunite S.J.L. with him, including case planning, referrals to community partners, and supervised visitation. Appellant also believes that insufficient evidence was introduced concerning whether "S.J.L. is doing well in her foster home." Appellant's Brief at 20.

As previously pointed out, appellant only met once with the Cabinet about his case-plan. He missed other scheduled visits, including a home visit. As noted, throughout S.J.L.'s life, appellant was periodically incarcerated, not only in Kentucky, but also in North Carolina and Florida. It is clear that appellant refused to cooperate with the Cabinet and to take advantage of the Cabinet's services. Moreover, the caseworker for the Cabinet testified that S.J.L. has bonded with her foster family and that all of S.J.L.'s needs were being met by the foster family.

Considering the whole, we hold that clear and convincing evidence supports the family court's determination that termination was in S.J.L.'s best interest.

Appellant also argues that clear and convincing evidence did not support the family court's conclusion that two grounds under KRS 625.090(2) were present. Appellant maintains that incarceration was the sole reason he was incapable of providing parental care, essential food, clothing, medical care, or education. Appellant believes that the family court impermissibly relied upon his incarceration as the sole reason to terminate parental rights.

In its findings of fact and conclusions of law, the family court found grounds (e) and (g) of KRS 625.090(2) to be present. KRS 625.090(2)(e) and (g) provides:

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:

....

(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[.]

The family court did not only consider appellant's incarceration but also his unlawful lifestyle, his inability to provide necessities or care to S.J.L. for nearly four years, his noncontact with S.J.L. for nearly four years, and his refusal to cooperate with the Cabinet in his case plan. In sum, there existed clear and convincing evidence to support the family court's determination that the grounds set forth in KRS 625.090(2)(e) and (g) were present.

Accordingly, we are of the opinion that the family court did not commit error by involuntarily terminating the parental rights of appellant.

For the foregoing reasons, the Findings of Fact and Conclusions of Law and Order Terminating Parental Rights of the Franklin Circuit Court, Family Court Division, are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

W. Steven Middleton
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Leslie M. Laupp
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