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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001747-ME

D.D. APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE WILLIAMS, III, JUDGE
ACTION NO. 19-AD-00004

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; B.L.E.J.; J.S.B., SR.; AND D.J.D., JR., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND MCNEILL, JUDGES.

JONES, JUDGE: D.D. ("Father") appeals the Franklin Circuit Court's ("family court") findings of fact, conclusions of law, and order terminating parental rights to his minor child, D.J.D. ("Child"). Father argues the Cabinet for Health and Family Services ("Cabinet") did not produce clear and convincing evidence to justify termination of his parental rights where his paternity was not established by a DNA

test until shortly before termination was ordered. However, the evidence adduced at the termination hearing revealed that Father had known Child likely belonged to him since before Child's birth but had failed to establish a relationship with or support Child in any way. Additionally, Child had been in foster care with his half-siblings for over two years prior to termination being ordered, was thriving in his current placement, and was likely to be adopted in the event of termination. Considering these facts in conjunction with the other evidence of record, we cannot agree with Father that the family court erred in terminating Father's parental rights. Accordingly, we AFFIRM.

I. BACKGROUND

Father and B.J. ("Mother") were previously involved in a romantic relationship with one another but were never married. Mother became pregnant in 2014. Father was aware of Mother's pregnancy and the likelihood that he was the father of the unborn child Mother was carrying. Mother gave birth to Child in April of 2015; however, Father was not present at Child's birth because he was incarcerated for second-degree burglary. Mother took Child to see Father approximately a week later. It does not appear that Mother caused Father to question his paternity at that time. Nevertheless, there is no evidence that Father supported Child, monitored his progress, or otherwise engaged in any efforts to maintain a relationship with Child during his period of incarceration.

Sometime after Child's birth, Mother had another man, J.S.B., listed as Child's father on his birth certificate. Mother did not become acquainted with J.S.B. until *after* Child's birth so it was impossible for her to sincerely believe that J.S.B. was Child's biological father. Mother did not testify at the termination hearing or otherwise divulge her reasons for having J.S.B.'s name placed on Child's birth certificate.

In April of 2017, Mother gave birth to a child belonging to J.S.B. After the newborn tested positive for opioids and exhibited withdrawal symptoms, the hospital alerted the Cabinet. The Cabinet commenced an investigation and removed the newborn, Child, and Child's older sibling from Mother's and J.S.B.'s care.[1] On April 25, 2017, the Cabinet filed a dependency, neglect, and abuse petition alleging Mother and J.S.B. had neglected Child and his two siblings. At this time, the Cabinet believed J.S.B. was Child's biological father and, therefore, no one else, including Father, was notified. The family court determined the children were neglected and committed them to the Cabinet's custody.

Father was released from custody in December of 2017. Shortly thereafter, either Mother or one of Mother's family members told Father that Child had been removed from Mother's care and placed with a foster family by the

[1] J.S.B. was also listed as the older sibling's biological father but another man was subsequently established to be that child's father.

Cabinet. Father testified that he twice attempted to find out Child's whereabouts by calling the Cabinet but was unable to make any headway locating Child because he did not know which county to contact.

The Cabinet does not appear to have known about Father's paternity until sometime in March of 2018 when Mother finally confessed to the Cabinet that J.S.B. was not Child's actual father. Shortly thereafter, Mother executed a voluntary affidavit of paternity, identifying Father as Child's biological father. The Cabinet immediately began trying to locate Father. In the meantime, in April of 2018, Child's permanency goal was changed from reunification to adoption.

The Cabinet identified possible addresses for Father in Hopkinsville and Lexington and sent letters to both to no avail. In February of 2019, the Cabinet filed its petition seeking to terminate the rights of both Mother and Father. As the Cabinet had still not been able to locate Father, the family court appointed a warning order attorney for Father. In early May of 2019, the warning order attorney filed a report with the family court stating that he had been unable to locate Father. The Cabinet, however, continued its efforts. In mid-May, the Cabinet sent letters to three additional addresses (two in Hopkinsville and one in Lexington) it believed could belong to Father. Father received the letter the

Cabinet sent to the new Lexington address, and he immediately contacted Andi Mefford, the caseworker listed on the Cabinet's letter.[2]

During their initial conversation, Father told Ms. Mefford that he knew he had fathered Child, was aware that Child was born in April of 2015, and that he had seen Child once shortly after his birth but that he had not otherwise seen Child because he had been incarcerated from March 2015 until December 2017 for second-degree burglary. Additionally, Father admitted he became aware that Child was in the Cabinet's custody in February of 2018, but was not sure what county child was in. Father explained that he had attempted to reach the Cabinet twice but was unable to speak to anyone. Father said that he last attempted to contact the Cabinet in June of 2018.

Father immediately entered an appearance in the termination proceedings, which were scheduled for a final hearing in June. Father asked the family court to continue the hearing to allow him time to confirm his paternity by DNA testing and otherwise prepare for the final hearing. The family court granted Father's motion. After DNA testing established Father's paternity, Father entered into a case plan with the Cabinet. The plan required Father to: (1) obtain/maintain stable housing; (2) obtain/maintain stable employment; (3) comply with the terms

[2] During the conversation, Father told Ms. Mefford that he had never resided in Hopkinsville but that there was a man who lived there that had the same name as him and that they had been confused with one another in the past.

of his parole and not accumulate any new criminal charges; and (4) remain drug and alcohol free. Based on the record, it appears Father complied with his case plan. While it is unclear whether Father requested visitation with Child at this time, it is undisputed that Father did not see Child or otherwise provide any support to him. Father told the Cabinet that while he desired to be a part of Child's life, he believed it was important for Child to maintain a bond with his half-siblings.

On September 23, 2019, the family court conducted a final termination hearing.[3] Mother did not attend the hearing. With respect to Child, Father testified on his own behalf, and the Cabinet called Ms. Mefford.

Father admitted knowing about Mother's pregnancy, his likely paternity, and Child's birth. He testified that he had seen Child once shortly after his birth but was unable to maintain a relationship with Child because of his incarceration. Father testified that he wanted to be involved in Child's life and believed that he had the means to support and parent Child. He explained that since being released from custody, he had secured employment and housing, had not incurred any more charges, and was sober. He testified that he had a child from a previous relationship that he was supporting who was in the custody of the

[3] The hearing involved not only Child but also Child's maternal half-siblings. Mother and the half-siblings' biological fathers were also parties to the termination.

state of Ohio. He emphasized that he took parenting classes while in custody for the purpose of maintaining his parental rights to that child and believed he had learned valuable parenting skills. Finally, Father testified that he wished to remain in Child's life; however, he would not want to separate Child from his half-siblings.

Ms. Mefford testified for the Cabinet. She explained how Child came to be in the Cabinet's custody, the initial confusion regarding Child's paternity, and the steps the Cabinet took to attempt to locate Father once the Cabinet was made aware he was Child's biological father. Ms. Mefford testified that she believes that if Father had contacted the Cabinet after his release, any local agency would have been able to assist him in locating Child. She explained that Father had not established any type of bond with Child or attempted to establish a relationship with him since his release. The Cabinet had placed Child in a foster home with his half-siblings. The foster parents wanted to adopt all the children. Child had bonded with his foster parents and was thriving in their care.

On October 23, 2019, the family court entered separate factual findings, conclusions of law, and a subsequent order, terminating Father's rights to Child.[4] This appeal by Father followed.

[4] The order also terminated Mother's rights to Child and his siblings as well as the rights of the siblings' biological fathers. Only Father's rights to Child are at issue as part of this appeal.

II. STANDARD OF REVIEW

Family courts are afforded a great deal of deference in determining if termination of parental rights is warranted. *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116 (Ky. App. 1998). As such, this Court will not set aside the family court's findings of fact unless they are clearly erroneous. CR[5] 52.01. Factual findings are clearly erroneous if the record is devoid of substantial evidence to support them. *Yates v. Wilson*, 339 S.W.2d 458, 464 (Ky. 1960). "The standard of proof before the trial court necessary for the termination of parental rights is clear and convincing evidence." *V.S. v. Commonwealth of Kentucky, Cabinet for Human Res.*, 706 S.W.2d 420, 423 (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." *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

III. ANALYSIS

Termination of parental rights is governed by KRS[6] 625.090. Under this statute, termination is proper if a three-part test is satisfied. First, the court

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Therefore, our analysis focuses only on the parts of the order that deal with Father's rights to Child.

[5] Kentucky Rules of Civil Procedure.

[6] Kentucky Revised Statutes.

must find that the child is abused or neglected, as defined by KRS 600.020(1). KRS 625.090(1). Second, one of the factors enumerated in KRS 625.090(2) must be present. Finally, termination must be in the child's best interest. KRS 625.090(3). KRS 625.090 requires the court to make a finding of abuse or neglect as to each parent.

The first requirement for termination is that the subject child must either have been previously adjudged to have been abused or neglected or found to be an abused or neglected child as part of the termination proceedings. KRS 625.090(1)(a). While Child was previously determined to have been neglected as part of the dependency, neglect, and abuse proceedings, we are cognizant that Father was not a party to those proceedings, and that the termination statute requires that the child was abused or neglected by the parent whose rights are being terminated. *See Cabinet for Health and Family Servs. v. K.H.*, 423 S.W.3d 204, 210 (Ky. 2014). In this case, the family court explicitly stated that it found abuse and neglect as to each parent, including Father, as part of the termination proceeding. Since Father does not directly attack this portion of the family court's order as part of his appeal, we do not need to review the propriety of this finding. *See Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000) ("Any part of a judgment appealed from that is not briefed is affirmed as being confessed."). Nevertheless, we observe that while there may not have been any evidence of physical or

emotional abuse by Father, there was ample evidence that Father neglected Child. A parent is guilty of neglect when he "[c]ontinuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child[.]" KRS 600.020(1)(a)4. It is undisputed that Father did not feed, clothe, educate, provide for, or otherwise care for Child at any time from his birth to the eventual termination of Father's parental rights. There is ample evidence to support the family court's finding of neglect by Father.

We will next address KRS 625.090(2) because this is the prong that Father asserts the Cabinet failed to satisfy. This section provides that "[n]o 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 factors enumerated in KRS 625.090(2)(a)-(k). Only one of the factors must be met.

Subsection (j) permits termination when "the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights[.]" In this case, Child was placed in foster care under the Cabinet's responsibility on April 25, 2017, and remained there continuously through the filing of the petition on February 15, 2019, a period of over twenty-one months. Therefore, we can affirm the family court's termination as proper under KRS 625.090(2) without a consideration of any of the other prerequisites for

termination. Nevertheless, because the parties' briefs and the family court's opinion focus most heavily on subsection (a) and abandonment, we will address whether substantial evidence supports the family court's conclusion that Father abandoned Child.

Father asserts that the family court's abandonment finding is not supported by substantial evidence because he has never been given an opportunity to parent Child. He cites the fact that he was incarcerated when Child was born, and following his release, the Cabinet failed to locate him once it discovered he was Child's father. He believes the Cabinet should have been more diligent in locating him. Father made these same arguments to the family court. It rejected them as follows:

> The Court finds [Father] abandoned [Child] from December 2017 until May 2019, a period far exceeding the ninety (90) day statutory time frame for abandonment. The Court is cognizant [Father] was incarcerated until December 2017 and has not factored his time of incarceration into the abandonment period. [Father] admitted he knew [Mother] was pregnant with his child. He admitted he saw [Child] when [Child] was a week old. By all accounts, [Father] knew he impregnated [Mother] and knew he was [Child's] father. [Father] admitted he has known since at least February 2018 that [Child] was in foster care. Yet [Father] made minimal effort to locate [Child]. [Father] admitted he only twice (2) called the Cabinet to inquire about [Child], and he has made no further effort to do so since June 2018.

[Father] blames the Cabinet for not notifying him of the underlying juvenile case or notifying him that [Child] was in foster care. The testimony and exhibits introduced at trial demonstrate the Cabinet did make efforts to locate [Father]. The Cabinet conducted absent parent searches for [Father] in February 2018 and in October 2018 using the only identifying information for [Father] known to the Cabinet. It then sent letters to the last known address discovered from those absent parent searches. The Cabinet had no knowledge there were two (2) gentlemen [with Father's name] in Kentucky or that it initially sent letters to the wrong [individual]. [Father] knew his child was in foster care. [Father] had better information to find [Child] than the Cabinet had to find [Father]. The Court finds, based on the facts and circumstances of this case, that the Cabinet exercised ordinary diligence in attempting to locate [Father] based [on] the identifying information it had for him, which was minimal at best.

The Court is aware that DNA genetic testing was not completed until July 2019. But as explained previously, [Father] was fully aware of [Child's] existence and had every reason to believe that he was [Child's] biological father. As explained in the case of *W.K. v. Cabinet for Health and Family Services*, 2015-CA-000I14-ME, 2016 WL 97769, at *5 (Ky. App. Jan. 8, 2016), "[t]his is not a case in which a man, oblivious even to the existence of a child, is surprised by the prospect that a child is his. Rather, this is the story of a man who had every reason to believe in the possibility, even probability, that he had a son and yet still refused the opportunity of fatherhood until the miracle of DNA science declared him the father. While we have not always had that miracle, we have always had fatherhood—a state of being that has always been capable of legal determination in one way or another."

The simple fact is that [Father] knew he had a child and, upon his release from incarceration in

> December 2017, made little effort to locate his child. Except for two (2) contacts with the Cabinet, he made no additional effort to find his child or be part of his child's life. Simply put - he knew as early as February 2018 that his child was in foster care and he did nothing to remedy that situation until the Cabinet located [him] in May 2019. [Father] admitted he has not seen [Child] since April 2015. He admitted he has not paid any child or other financial support for his child. [Father] has not been part of [Child's] life in many years. The Court heard no evidence that [Father] has provided [Child] with any emotional support or that [Father] has parented this child in any capacity since [Child] entered Cabinet custody.
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> . . . The cause for [Father's] year and a half long indifference toward [Child] cannot be laid upon the Cabinet any more than the end of that indifference can be legally presumed on the basis of a DNA test. [Father's] indifference and his inaction were of his own making. He knew he had a child and he knew his child was in foster care. Yet, from December 2017 until May 2019, he made very little effort to locate his child or be part of his child's life. During this year and a half period, [Father] was content to leave his child in foster care. He was content to only make two attempts to contact the Cabinet to locate [Child]. He was content not to provide any financial or emotional support for his child. His actions evidence a settle[d] purpose to forego his parental duties and relinquish his claims to his child for a period far exceeding ninety (90) days.

KRS 625.090(2)(a) allows the family court to find grounds for termination if "the parent has abandoned the child for a period of not less than ninety (90) days[.]" "Generally, abandonment is demonstrated by facts or

circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983) (citing 2 AM. JUR. 2D *Adoption* § 32 (1962)). Father testified that he knew that he was the biological father of Child, yet he made little to no attempt to parent Child. Father only saw Child on one occasion in nearly five years, when Child was one week old. Father made few attempts to locate Child after being released from incarceration. Even when Father found out that Child was in the custody of the Cabinet, he only attempted to contact the Cabinet twice in a nearly one-and-a-half-year period, and, on both occasions, did not actually speak to a Cabinet worker. Even after being contacted by the Cabinet, there is no evidence that Father attempted to provide any financial support or parental care for Child.

A similar conclusion was reached in *W.K. v. Cabinet for Health and Family Services*,[7] No. 2015-CA-000114-ME, 2016 WL 97769 (Ky. App. Jan. 8, 2016), which the family court cited. In *W.K.*, this Court held that termination was proper because W.K. had abandoned his child. *Id.* at *5. Factually, the cases are similar. W.K. had intimate relations with a woman who then became pregnant with, presumably, his child. W.K.'s relationship with the mother did not last. *Id.* at *3. W.K. knew of the child's birth but had reservations regarding the child's

[7] We cite to *W.K.* for illustrative purposes only as we recognize that it is unpublished, and therefore, nonbinding. *See* CR 76.28(4)(c).

paternity because of the mother's behavior. *Id.* W.K. never met the child or attempted to be involved with the child's life. *Id*. W.K. did not know that the child had been placed in the custody of the Cabinet. *Id.* The Cabinet attempted to locate W.K. though an absent parent search to no avail. *Id*. at *2. However, W.K. was eventually located through a warning order attorney and, upon learning of the pending proceedings, reached out to the Cabinet. *Id.* W.K. expressed to the Cabinet that he wished to wait until paternity was confirmed before moving forward with the case. *Id.* Eventually, paternity testing confirmed the child to belong to W.K., and the family court ultimately terminated W.K.'s parental rights. *Id*. at *2-4. This Court, in affirming the family court's order terminating W.K.'s parental rights, held that "[t]he cause for W.K.'s two-year long indifference toward Child cannot be laid upon the Cabinet any more than the end of that indifference can be legally presumed on the basis of a DNA test. W.K.'s indifference and his inaction were of his own making." *Id.* at *5.

In the present case, Father had significantly more knowledge that he was the biological father of Child and where Child was residing than W.K. Even though Father may not have willfully desired his parental rights to be terminated, his actions in abandoning Child were certainly willful insomuch as he knew of the strong probability of his paternity, yet failed to do anything for Child. His inaction belongs to him alone; he cannot lay the blame at the Cabinet's feet. Father's

failure to provide support and establish a relationship with his son constitutes abandonment, and the family court did not err in so finding.

Finally, the family court may terminate parental rights if termination is in the child's best interest. KRS 625.090(3). While Father does not expressly argue the best interest of the Child, throughout his brief he criticizes the Cabinet's efforts to locate him and reunify him with Child. One of the best interest factors requires consideration of whether the Cabinet made reasonable efforts at reunification. KRS 625.090(3)(c).

KRS 620.020(13) defines reasonable efforts as being the "exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community[.]" In the present case, the Cabinet made several attempts to locate Father after becoming aware of his paternity. We cannot say that its efforts were either unreasonable or insufficient. Once Father was located, the Cabinet established a case plan for Father. We commend Father's efforts to engage and work with the Cabinet once it made contact with him. However, we cannot excuse Father's failure to establish a relationship with Child independent of the Cabinet. By the time the Cabinet located Father, Child was over four years old. He had been with his Father once, when he was one week old. In contrast, Child had been with his foster family for

almost two years and was bonded with them. Given these realities, we cannot appreciate any error in the family court's assessment of the best interest prong.

IV. CONCLUSION

For the foregoing reasons, we affirm the Franklin Circuit Court.

ALL CONCUR.

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