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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000881-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 13-AD-00023

C.L.H.; B.C.; AND
S.H., A CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR AND NICKELL, JUDGES.

MAZE, JUDGE: The Commonwealth of Kentucky, Cabinet for Health and Family Services (CHFS) appeals from an order by the Whitley Circuit Court granting a directed verdict and dismissing its petition to terminate the parental rights of C.L.H. (Father) to S.H. (the Child). CHFS argues that Father's incarceration is a

relevant factor to consider in determining whether termination of Father's parental rights would be in the best interests of the Child. Although we agree that Father's incarceration may be considered in this determination, we conclude that the fact and length of Father's incarceration, without more, cannot support the finding of abandonment necessary for an involuntary termination of his parental rights. Hence, we affirm the trial court's dismissal of the petition.

The underlying facts of this case are not in dispute. The Child was born in March 2008. CHFS became involved with the Child's mother, B.C. (Mother), and a half-sibling around the same time. Father had some involvement with the Child until 2010, when he was incarcerated on drug-related charges.[1] Subsequently, Father was convicted of Federal drug charges relating to the manufacture of methamphetamine. He is currently serving a sentence in Federal prison on those charges, with an expected release date in 2019. In 2011, Mother was incarcerated on state felony charges. After a brief attempt at relative placement, the Child was placed in the custody of CHFS in December 2011. The Child has been in foster placement since that time.

Although Mother was released in 2012, she did not cooperate with the CHFS's reunification program, and she has had no contact with CHFS or the Child since August 2013. CHFS developed a case plan for Father. Father participated in services and enrolled in prison programs where and when available. CHFS also

[1] According to CHFS, Father was convicted in 2001 on state charges of manufacturing methamphetamine. He was released on parole in 2004, but his parole was revoked in 2010 based upon conduct which led to the Federal charges.

arranged monthly visits between Father and the Child. However, his participation in prison programs and the monthly visits was interrupted several times by various transfers to other facilities.

On September 16, 2013, CHFS filed a petition to involuntarily terminate the parental rights of Mother and Father. CHFS attempted to serve Mother by warning order attorney, but she could not be located and did not respond to the petition. The trial court appointed a guardian *ad litem* for Father as required by CR[2] 17.04. Father responded *pro se* and objected to involuntary termination of his parental rights. Thereafter, the trial court appointed counsel for Father.

Subsequently the Child's guardian *ad litem* filed a report recommending termination of both Mother's and Father's parental rights. The matter then proceeded to a bench trial on May 8, 2014. CHFS first called its social worker, Bobbye McClain, who testified about the history of the placement of the child, the involvement of the parents, and the time the child has spent in foster care since her commitment to the Cabinet. McClain further testified about Father's visitation with the Child and other matters relating to his case plan. The trial court also directly questioned Father about these matters. CHFS next called the Child's therapist, who testified about the problems the Child had and the improvements observed since she was placed in foster care.

[2] Kentucky Rules of Civil Procedure.

At the close of CHFS's case, Father moved for a directed verdict. The trial court granted the motion, concluding that CHFS had failed to prove by clear and convincing evidence that Father had abandoned the child or that termination of the Father's parental rights would be in the Child's best interests. The trial court separately entered findings of fact, conclusions of law and an order terminating Mother's parental rights. That matter has not been appealed.

CHFS now appeals the trial court's directed verdict dismissing the petition to terminate Father's parental rights.

> When a directed verdict is appealed, the standard of review on appeal consists of two prongs. The prongs are: "a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). "A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988*),* citing *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (1944).

Daniels v. CDB Bell, LLC, 300 S.W.3d 204, 215 (Ky. App. 2009).

The central question in this case is whether CHFS presented sufficient evidence to go forward on its petition to terminate Father's parental rights. KRS[3] 625.090(2) sets out three requirements which CHFS must prove by clear and convincing evidence in order to involuntarily terminate parental rights: 1) that the child is abused or neglected as defined by KRS 600.020(1); 2) that termination is

[3] Kentucky Revised Statutes.

in the best interests of the child; and 3) that one of the factors listed in KRS 625.090(2) is present, including that the child has been abandoned for not less than ninety days or that the parent has "continuously or repeatedly failed or refused to provide" for the child.

The Kentucky Supreme Court has explained that, "incarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights . . . ." *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). Instead, incarceration is merely a factor to consider when applying a parent's conduct to the KRS 625.090(2) standard. *Id.* If this were not the case, detention so lacking in intent "would make servicemen, prisoners of war, ship captains, or person requiring prolonged hospitalization . . . likely candidates to have their parental rights terminated." *Id.,* quoting *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985).

This Court has also applied this rule, stating that "[i]ncarceration alone can never be construed as abandonment as a matter of law." *M.L.C. v. Cabinet for Health and Family Services*, 411 S.W.3d 761, 766 (Ky. App. 2013), quoting *J.H. v. Cabinet for Human Resources*, 704 S.W.2d at 663. In *M.L.C.*, this Court vacated and remanded the trial court's order to terminate parental rights because the "trial court did not provide ample support for its findings of fact and conclusions of law and appear[ed] to have relied primarily on M.L.C.'s incarceration alone . . . ." 411 S.W.3d at 766. We explained that based on the record the "trial court . . . did not explain or cite to any specific evidence which

supported its decision . . . [f]or instance, the trial court did not detail any reunification efforts made by [CHFS] . . . ." *Id.* at 765.

While acknowledging this authority, CHFS argues that Father's extended incarceration may be considered as an "act[] of abuse or neglect toward any child in the family" as part of the determination of whether termination of parental rights is in the best interests of the Child. *Rogeski*, 909 S.W.2d at 661, citing KRS 625.090(2)(b). CHFS also notes that Father's incarceration should be considered because it resulted from his voluntary "adoption of a criminal lifestyle." *Commonwealth ex rel. Marshall v. Marshall*, 15 S.W.3d 396 (Ky. App. 2000). Given the unlikeliness of reunification between the Child and Father in the foreseeable future, as well as the Child's need for a permanent home, CHFS contends that the trial court should have at least considered whether termination of his parental rights would be in the Child's best interests.

We are certainly sympathetic to these considerations. Nevertheless, natural parents have a fundamental liberty interest in the care, custody, and management of their child, and that 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, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599 (1982). "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention

into ongoing family affairs." *Id.* at 753, 102 S. Ct. at 1395. For this reason, courts are extremely hesitant to equate incarceration, even resulting from voluntary criminal activity, with abandonment sufficient to terminate a parent's rights. Rather, CHFS must point to some additional conduct beyond incarceration to support a finding of abandonment.

In this case, Father had a positive involvement with the Child and the family prior to his incarceration in 2010. While in prison, Father completed his General Equivalency Degree (G.E.D.), and has participated in educational and drug-treatment programs. When possible, Father maintained regular monthly visits with the Child while in prison. CHFS concedes that those visits were positive and beneficial to the Child. CHFS faults Father for failing to keep it advised of his transfers to other facilities, but does not claim that those transfers were the result of any misconduct on his part.

In essence, CHFS maintains that the length of Father's incarceration warrants findings that additional reunification efforts would be futile and that termination of Father's parental rights would be in the best interests of the Child. Based upon the current requirements of KRS 625.090, we cannot find that this evidence was sufficient to support the necessary finding of abandonment or neglect. Therefore, we conclude that the trial court properly granted Father's motion for directed verdict and dismissed the petition to terminate his parental rights.

Accordingly, the order of the Whitley Circuit Court is affirmed.

ALL CONCUR

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