

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002181-MR

GEORGE GASTON AND
GLORIA GASTON, HIS WIFE

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 98-AD-00013

COMMONWEALTH OF KENTUCKY;
CABINET FOR FAMILIES & CHILDREN;
S.A.M.; B.G.M.; B.A.M, A CHILD;
AND M.D.M., A CHILD

APPELLEES

AND NO. 1999-CA-002642-MR

GEORGE GASTON AND
GLORIA GASTON, HIS WIFE

APPELLANTS

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JAMES R. DANIELS, JUDGE
ACTION NO. 98-CI-00895

COMMONWEALTH OF KENTUCKY;
CABINET FOR FAMILIES & CHILDREN;
S.A.M.; B.G.M.; B.A.M, A CHILD;
AND M.D.M., A CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, JOHNSON, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellees, Commonwealth of Kentucky and Cabinet for Families and Children ("Cabinet"), filed an action in McCracken Circuit Court terminating the parental rights of S.A.M. and B.G.M. in their two surviving minor children. S.A.M. and B.G.M. had severely abused and neglected their children, resulting in the death of one of their children prior to intervention by the Cabinet. The order terminating the parental rights of the biological parents is presently on appeal.

Appellants, George and Gloria Gaston ("the Gastons"), the aunt and uncle of the minor children, filed a motion to intervene in the termination action on August 5, 1998.¹ The circuit court denied this motion. The Gastons then filed a petition for custody of the minor children in September 1998. The Cabinet filed a motion to dismiss the Gastons' petition. The circuit court denied the motion to dismiss, and the Gastons amended their petition to request that they be allowed to adopt the surviving children. On August 24, 1998, the Gastons, who live out of state, attempted to file an out-of-state application for permission to receive or place a child with the Cabinet. The Cabinet refused to accept the application, stating that S.A.M. and B.G.M.'s parental rights had already been terminated. Therefore, the children were not available for independent adoption. The Cabinet refused to accept the Gastons' out-of-state application pursuant to KRS 199.473(1). KRS 199.473(1) provides, "nothing in this statute shall be construed to limit

¹George Gaston is the step-brother of the biological father, B.G.M.

the authority of the department . . . to determine the proper disposition of a child committed to it . . . prior to the filing of an application to place or receive." 922 KAR 1:1010 states, at section 6, that "an application for permission to place or receive a child shall not be processed if prior to receipt of the application, the child was committed to the Cabinet" Following the Cabinet's refusal to accept the out-of-state application, the Gastons filed a petition for custody in the circuit court on September 18, 1998. The circuit court terminated the parental rights of B.G.M. and S.A.M. on October 7, 1998. On November 23, 1998, the trial court entered an order declaring the Cabinet to be the legal representative of the minor children. The Cabinet asserts that this order was entered for the express purpose of allowing the Cabinet to place life insurance proceeds in trust for the minor children. The Gastons filed a motion to set aside the judgment dismissing their petition for custody. On August 16, 1999, this motion was denied. S.A.M. appealed the termination of her parental rights. In the same appeal, the Gastons appealed the trial court's denial of their motion to intervene in the action granting the Cabinet custody of the minor children.

On September 18, 1998, prior to the termination of the parental rights of the biological parents, the Gastons filed a separate action submitting a petition for custody of the minor children. The custody petition was amended to an adoption petition on May 26, 1999. Simultaneously, the Gastons filed a DSS-187 application for permission to receive a child. On June

10, 1999, the Cabinet denied the application claiming that the Cabinet was the legal representative of the children and that the legal custody had been vested in the Cabinet prior to receipt of the application. The trial court dismissed the Gastons' adoption petition on October 6, 1999. The Gastons also appealed that order, and the actions were consolidated.

The Cabinet asks that 1999-CA-02181-MR be dismissed as the Gastons were not parties to the underlying action and the appeal was not timely filed. 1999-CA-002181-MR is an appeal of the orders of the trial court entered on November 23, 1998 and August 16, 1999. The 1998 order declared the Cabinet to be the legal representative of the minor children. The 1999 order denied the Gastons' motion to set aside the judgment terminating the parental rights of the biological parents and awarding custody of the children to the Cabinet. The Gastons' motion to intervene in the termination of parental rights action was denied by the trial court. The Cabinet asserts that the November 23, 1998 order simply made the Cabinet the legal representative of the minor children for the limited purpose of controlling the life insurance proceeds. The Gastons' appeal of the November 23, 1998 order was not filed until ten months after entry of the order. The Cabinet asserts that as the trial court denied the Gastons' motion to intervene in the termination/custody action, the Gastons are not entitled to appeal the trial court's August 16, 1999 ruling.

The law permits a party to appeal the denial of a motion to intervene in a legal proceeding. See Cabinet for Human

Resources v. Houck, et al, Ky. App., 908 S.W.2d 673 (1995); Stovall v. Ford, Ky., 661 S.W.2d 467, 468 (1983). The Gastons cannot be successful on that issue, as KRS 625.060 prohibits intervention in a termination of parental rights action by any party. For this reason, the trial court's denial of the motion to intervene is affirmed.

S.A.M. did not file a brief supporting her appeal of the termination of her parental rights. Similarly, the Cabinet failed to submit any evidence or argument supporting the termination. A review of the file by this Court reveals that the termination of parental rights was in accordance with law, and the record reflects no reason to reverse the termination. The Cabinet is entitled to terminate the parental rights of individuals who abuse and neglect their children. See V.S. v. Cabinet for Human Resources, Ky. App., 706 S.W.2d 420 (1986).

The Gastons' appeal of the trial court's dismissal of the adoption petition is properly before this Court, and after review of the record, we affirm. The Cabinet asserts that at the time the children were removed from the home of the biological parents and placed with the Cabinet, it had the sole authority to place the children in any adoptive home which it believed was in the best interests of the children. KRS 199.473.

The Gastons assert that the Cabinet failed to follow its own policies regarding the placement of the minor children by denying family members the right to adopt the children. The Cabinet's placement policy states, in pertinent part, the following:

Children shall be placed in the most family-like, least restricting setting that meets their special needs and serves their best interests. Listed in order of increasing restrictiveness, settings for placements include: home of a relative

Cabinet Policy #350.

The Gastons assert that no immediate family members were aware that the children had been taken into custody by the Cabinet, and they did not know that the parental rights of B.G.M. and S.A.M. were being terminated. The Gastons show the Court that they had no earlier notice of the proceeding, and thus, they were not able to intervene in the action sooner. The Gastons filed the underlying action as soon as they became aware of the childrens' situation.

The Gastons also argue that the Cabinet should be required to accept an adoption petition by an out-of-state relative. Specific statutes and supporting regulations define when the Cabinet may deny an application for custody of a child. The Cabinet must show that such a denial is not arbitrary or capricious, unreasonable or predicated upon an erroneous factual determination. Department for Human Resources v. R.G., Ky., 664 S.W.2d 519, 522 (1984).

The Gastons argue that the children should have been placed with them, as the record shows that they were approved as having a satisfactory home following home study conducted by the Cabinet. The study clearly found the Gastons to be an appropriate placement for the children. The law does not require, however, that home study be binding upon the Cabinet.

Kentucky law permits the Cabinet to look at factors in addition to the home study when determining the best placement for a child. Department for Human Resources v. Basham, Ky., 540 S.W.2d 6, 7 (1976).

The Gastons ask this Court to find that even where the parental rights to a child have been terminated, a biological relative be given the first opportunity to adopt the child. The biological parents of the minor children requested, through counsel, that the Gastons be permitted to adopt the children. The Gastons argue that the children were not legally made wards of the Cabinet until October 7, 1998, the date of the termination of parental rights, and until that date the Cabinet was required to place the child with any relative who desired custody and had been found to be a fit placement. We decline to adopt such a strict interpretation of the statute and conclude that once a child is removed from the home he/she is in the custody of the Cabinet. Pursuant to its statutory authority, the Cabinet may determine the best placement for the child after the child has been removed from the home.

The Cabinet argues that consideration of placement with relatives is merely an option and not required by law. The Cabinet also asserts that it considered the Gastons as a placement for the children, but the Cabinet determined that it would not be in the best interests of the children to be placed with their relatives. The law does not permit this Court to make a determination as to the fitness of the Gastons, nor does it permit us to reverse the Cabinet's decision regarding placement

of the children, in the absence of an abuse of discretion on the Cabinet's part.

As the Gastons show, the Cabinet's own policies encourage placement of children with family members, even if such placement is not mandated. However, in this case, the children were placed in another home, a placement which the Cabinet asserts served the best interests of the children. The children were adopted by that family prior to the time that this action became final.

Where one home is already approved, and placement of the children in that home has taken effect, the Cabinet is not required to weigh the virtues of that home against other homes which become available. Department for Human Resources v. R.G., Ky., 554 S.W.2d 519, 522 (1984). After years of abuse, the children have been adopted into a permanent home, and we are unwilling to reverse that decision and wreak further upheaval upon them.

ALL CONCUR.

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