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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001856-ME

M.W.S. APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NOS. 05-AD-00049; 05-AD-00051

M.A.S.; J.S., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: M.W.S. appeals from an order of July 11, 2006, of the Madison Circuit Court, Family Court Division, terminating his parental rights to his minor son, J.A.S. Having reviewed the briefs, the record, and the applicable law, we conclude that substantial evidence supports the findings of the family court and, therefore, we affirm.

[1] Senior Judge Michael Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

J.A.S. was born in 1999. On July 29, 2002, his parents, M.W.S. and M.A.S., were divorced by decree of dissolution of the Estill Circuit Court. They were awarded joint custody of J.A.S., with his mother, M.A.S, designated as the primary residential custodian. M.W.S. was granted standard visitation privileges, and was ordered to pay child support. He failed to meet his child support obligation, however, and on May 3, 2003, he was ordered to pay arrears of approximately $1,460.00 via wage assignment. Shortly thereafter, M.W.S. was terminated from his employment at Paul Miller Ford due to his addiction to drugs. On September 26, 2003, the circuit court entered an ex parte emergency order awarding M.A.S. sole custody of J.A.S. after it was discovered that, while exercising his visitation rights, M.W.S. had left the child unattended in a running motor vehicle for approximately one hour. In its order, the court also noted that M.W.S. had not exercised his visitation rights for ninety days, and had admitted to M.A.S. that he was using crack cocaine.

M.A.S. initially filed a petition to terminate M.W.S.'s parental rights in the Estill Circuit Court. M.W.S. filed a successful motion to dismiss the petition on grounds of improper venue. M.A.S. then filed the petition in Madison Circuit Court, on October 21, 2005. M.W.S. responded by filing a petition for visitation on November 19, 2005. A hearing was held on his petition on December 19, 2005, at which the court told M.W.S. he would be granted supervised visitation with his son during the upcoming holidays if he was able to pass a drug test, filed proof that he was undergoing drug treatment, and paid his child support. M.W.S. failed a drug screening administered on that day, testing

positive for marijuana use. He made a single payment of $1,500.00 towards his child support obligations. The following month, he entered the Hope Center in Lexington, where he received treatment and counseling for his drug addiction. He was still residing at the Hope Center on June 21, 2006, when the court held a hearing on M.A.S.'s termination petition.

At the termination hearing, M.A.S. testified that M.W.S. had not exercised visitation or seen his son for over three years. She described an inadvertent encounter with M.W.S. on Halloween night of 2005, when M.W.S. was so intoxicated that he did not recognize J.A.S. She stated that J.A.S. is afraid of M.W.S. and still recalls the incident when he was left alone in the running automobile. According to M.A.S., M.W.S.'s child support arrears exceed $11,000.00. She also testified that he had failed to maintain medical insurance for J.A.S. as required under the terms of the dissolution order. M.A.S. explained that she has remarried and has been in a stable relationship with her husband for four years. She testified that J.A.S. has bonded with his stepfather and calls him "Daddy."

M.W.S. testified that he has been addicted to drugs and alcohol since the age of thirteen but that he had been sober for the past five months while living at the Hope Center, where he was employed as a counselor earning $80.00 per week. He admitted that he could show no proof that he was unable to obtain more lucrative employment. He also admitted that he had previously resided at the Hope Center during the summer of 2005. On that occasion, he had remained sober for fifty-nine days, but had

then relapsed. He also testified that he had driven under the influence of drugs several times while J.A.S. was in the vehicle.

On cross-examination by J.A.S.'s guardian ad litem, M.W.S. admitted that he had lied to her on one occasion when he told her that he was sober, that he had missed two scheduled appointments, and was two hours late for his last appointment with her. He also showed a lack of awareness of certain AA/NA (Alcoholics Anonymous/Narcotics Anonymous) protocols and directives even though he had described himself as a "counselor" at the Hope Center.

M.W.S.'s mother and sister testified that they knew of his lengthy addiction to drugs and alcohol, and that he had suffered from these addictions while exercising visitation with J.A.S., but denied that he had actually been under the influence of drugs or alcohol during the visitation periods. They expressed a belief that M.W.S. had changed and was now sober.

Based on the evidence presented at the hearing, in the pleadings, and in the earlier record of the case, the family court entered an order terminating M.W.S's parental rights. This appeal followed.

Under the terms of Kentucky Revised Statutes (KRS) 625.090(1), a circuit court may terminate an individual's parental rights only after completing a three-pronged analysis. The court must find by clear and convincing evidence both that the child is abused or neglected and that termination would be in the best interest of the child.

Additionally, the court must find by clear and convincing evidence the existence of one or more of the grounds listed in KRS 625.090(2).

In this appeal, M.W.S. specifically contests the family court's findings and conclusions under the "best interest of the child" prong of the test.

Our standard of review requires that we accord considerable deference to the findings of the lower court.

> This Court's review in a termination of parental rights action is confined to the clearly erroneous standard in CR 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. 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.

R.C.R. v. Commonwealth Cabinet for Human Resources, 988 S.W.2d 36, 38-39 (Ky.App. 1998)(internal citations and quotation marks omitted).

In determining whether termination would be in the best interest of the child, the court is directed to consider a series of six factors set forth in KRS 625.090(3). In this case, the court relied on factors (d) and (f), which require the court to assess

> (d)The 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;
>
> [and]

> (f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

The application of these factors to the evidence led the family court to conclude as follows:

> This Court specifically finds that the respondent [M.W.S.] has not made the efforts and adjustments in his circumstances to make it in the child's best interests to return him to his home within a reasonable period of time, considering the age of the child and considering the failure of the respondent to pay a reasonable portion of substitute physical care and maintenance as the respondent is able-bodied and financially able to do so.

On appeal, M.W.S. argues that the family court failed to recognize and give sufficient weight to his efforts to be a sober and productive individual and parent, namely, his efforts to regain his visitation privileges, his attendance at a parent education clinic, his payment of $1,500.00 towards his child support obligation, and his participation in drug abuse treatment at the Hope Center. He contends that the court set him up to fail by telling him at the hearing of December 19, 2005, that if he became sober, paid his child support and received drug treatment, he would be allowed to regain his visitation privileges. He contends that he has been trying to meet these conditions and has succeeded in achieving sobriety, but has not been able to make child support payments because he has not been able to work a regular job during his stay at the Hope Center. He takes particular exception to the court's comment that "there is nothing wrong with you

so that you can't work." He also describes as "clearly erroneous" the trial court's comment that "based upon the statute I have to terminate."

Although there is evidence that M.W.S. has made some effort to improve his situation, many of these efforts were made only after the filing of the petition to terminate his parental rights. Significantly, M.W.S. made no effort to regain his visitation privileges following the entry of the emergency ex parte order of September 26, 2003, until M.A.S. filed the petition for termination of parental rights some two years later. He then filed his petition to regain visitation privileges, yet failed the drug test administered on the very day the hearing on that motion was held. Although his attendance at the Hope Clinic may well have hindered his efforts to gain more lucrative employment, he had already accumulated significant child support arrears during the period when he was apparently employed on a full-time basis at Paul Miller Ford. When we add to these facts the evidence that he had resumed his drug use after attending the Hope Center in 2005, that he left J.A.S. alone in a running car, admitted that he had driven under the influence of drugs while J.A.S. was in the car, and neglected to keep his appointments with J.A.S.'s guardian ad litem, we can only conclude that the circuit court did not commit clear error in terminating his parental rights. The court's comment that "based upon the statute I have to terminate," merely reflects the fact that when the evidence is evaluated under the statutory criteria it strongly supports the decision to terminate M.W.S.'s parental rights. While the analysis in such cases necessarily focuses

on the conduct of the individual whose parental rights are subject to termination, the inquiry ultimately concerns the best interest of the child and that child's need for "some stability and permanency." *Cabinet for Human Resources v. J.B.B.*, 772 S.W.2d 646, 647 (Ky.App. 1989) .

For the foregoing reasons, the order of the Madison Circuit Court is affirmed.

ALL CONCUR.

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