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# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-000567-ME

T.W.S. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 08-AD-00054

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; T.L.M.; AND A.N.S., A CHILD APPELLEES

AND NO. 2009-CA-000568-ME

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OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, TWS, appeals the Judgment Terminating Parental Rights entered by the Boone Family Court on February 26, 2009. On appeal, TWS argues that the trial court's order terminating parental rights was made without sufficient evidence to support its findings, and that the trial court failed to consider the factors mandated under KRS 625.090(3)(d) and (f) in determining whether or not termination of parental rights was in the best interest of the children of TWS. Having reviewed the record, the argument of the parties, and the applicable law, we affirm.

TWS and TLM had two children, ANS, who was born on September 28, 2003, and SMES, born on August 11, 2006. In addition, TLM has an older child, DS, who was fathered by LS, the son of TWS. At the time of the Cabinet's initial involvement with the family in May of 2005, TWS, TLM, LS, ANS, and DS were all residing together in Covington. That initial involvement was pursuant to a report that LS had been observed striking DS in the head; subsequently LS was convicted of assault in the fourth degree.

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

At that time of the Cabinet's initial involvement with the family, a prevention plan was created in which TLM was to ensure that the children in the home had appropriate adult supervision. In addition, LS was to complete anger management, and DS and ANS were to be placed in day care and have their immunizations updated. TWS did not sign this prevention plan. He was not working at that time, but nevertheless failed to provide the adult supervision recommended by the plan.

In late July of 2005, the Cabinet was forced to return to the home of TWS, after LS had again struck DS while yelling obscenities. At that time, the Cabinet discussed with TWS, TLM, and LS that their home lacked the structure that the children needed, and also informed the parents that the children needed appropriate bedtimes. TWS admitted that the children went to sleep at the same time as the parents, and that the children were awake when their mother was asleep. Further, TWS and the Cabinet discussed the fact that DS and ANS had behavioral issues, and that both TWS and TLM were failing to appropriately address those behaviors. A prevention plan was again developed, and once again TWS did not sign it.

Thereafter, in September of 2005, TLM called the Cabinet, stating that she and TWS had no electric, water, or sanitation, as the services had been shut off because of nonpayment. At that time, the only people residing in the home were TLM, TWS, and the children ANS and DS. Despite the fact that they did not

have enough money to pay the bills, TWS did not seek employment. According to the Cabinet, the home was lit only by candles, and was messy.

At that time, the Cabinet called upon the Salvation Army and other charities to assist the family, and the social worker went to the water company and paid the water bill. The Cabinet also obtained preventative assistance, and made another day care referral for the children. Nevertheless, TWS and TLM did not use their childcare consistently, and it was discontinued in January of 2006. When TWS and TLM were asked why the children had not been sent to day care regularly, they responded that it was because the children had lice from October of 2005 to January of 2006.

Subsequently, on May 9, 2006, TWS met with a Cabinet social worker. At that time, he agreed to provide a safe and sanitary home for his children, to have the house cleaned by May 17, 2006, to have the water turned on by May 22, 2006, to submit to random drug screens within five hours upon request, and to cooperate with the Cabinet. TWS signed that plan on May 9, 2006. On the following day, ANS was taken to St. Elizabeth Hospital after running into a piano bench around midnight and sustaining a laceration to her chin.

Later that month, the Cabinet received a third report regarding the family, alleging that the water had been shut off, and that TWS and TLM were using cocaine. According to the Cabinet, home visits made during that time revealed that the home was filthy.[2] TWS was not working at that time. The

[2] According to the Cabinet, a visit to the home revealed piles of dirty dishes, a messy living room, and a toilet full of excrement.

Cabinet states that the children were filthy at that time as well. TWS and TLM failed to clean the home and have the utilities reinstated by May 23, 2006. TWS and TLM refused to complete drug screens, and were being evicted from their home.

On May 25, 2006, TLM advised the Cabinet that she and TWS had been evicted. At that time, TLM stated that she placed ANS with her sister, PT, and that DS had been placed with his father, LS. Thereafter, the Cabinet checked with PT to ensure that ANS was safe. At that time, the Cabinet was advised that PT had not been given permission to seek medical treatment for ANS, nor was she receiving any financial assistance to care for the child from the parents. PT sought Cabinet assistance to obtain legal custody. As both TWS and TLM remained homeless, the Cabinet filed a petition regarding ANS. Subsequently, on June 12, 2006, the Boone Family Court granted temporary custody of ANS to PT.

In June of 2006, a case conference was held in which the problems identified for the family were substance abuse, lack of stable housing and employment, and mental health issues. At that meeting, TWS reported that he had not worked in twelve years, and that he was living with a friend. TWS was asked to actively seek employment and to complete drug screens, but once again did not sign the treatment plan. Neither TWS nor TLM completed a drug screen as requested at the meeting.

Thereafter, on July 11, 2006, the Boone Family Court ordered TWS and TLM to follow the recommendations of the Cabinet as contained in the court

report, and referred them to the child support office. The recommendations of the Cabinet for TWS were that he complete a substance abuse assessment and follow all treatment recommendations, find and maintain stable housing and employment, submit to random drug screens, provide the Cabinet with an address and phone number where he could be reached, and have supervised visitation with his child.

One of the Cabinet social workers, Jeff Tarren, ceased his involvement with the family in July of 2006, after fourteen months. Tarren stated that during that time, the parents had made no progress toward rectifying any of the problems that existed in the family, and that TWS remained unemployed during the entire fourteen-month period. According to Tarren, TWS failed to regularly clean the home, failed to establish an appropriate bedtime and routine for ANS, and denied substance abuse issues.

A short time later, on August 11, 2006, SMES was born. TLM disclosed to hospital staff that she had used heroin three days prior to the birth, and had not received any prenatal care. At that time, both parents were living in a motel in Florence. Accordingly, the Cabinet filed a petition concerning SMES, and the Boone Family Court granted emergency custody of SMES to the Cabinet on August 16, 2006. TWS did not appear in court for the hearing.

Thereafter, the court held an adjudication hearing for SMES, for which TWS also failed to appear.[3] Subsequently, TWS met with the Cabinet, and

[3] At that time, the Cabinet was unable to locate TWS, as he had not provided the Cabinet with his address and current telephone number, despite a previous court order directing him to do so.

executed various prevention plans on May 11, 2007, December 14, 2007, January 28, 2008, April 15, 2008, and December 8, 2008. The issues addressed in those plans included chemical dependency, stable housing and employment, and domestic violence.[4] The Cabinet asserts that despite signing these five plans, TWS failed to comply with the objectives. Specifically, the Cabinet notes that despite assertions that he was not using drugs, TWS tested positive for drugs on January 16, 2008, August 20, 2008, October 30, 2008, December 8, 2008, December 16, 2008, December 25, 2008, and December 26, 2008.

On January 15, 2008,[5] the Cabinet filed a petition regarding ANS, as she had severe behavioral issues for which PT could not provide. On July 29, 2008, TWS appeared at a court hearing regarding his children, at which time the court determined that he had received no drug treatment and had not paid child support. The court changed the permanency goal for the children to adoption. Thereafter, on August 13, 2008, the court ordered TWS to pay child support for both children in the amount of $275.80 per month, effective immediately.

The Cabinet notes that on November 10, 2008, TWS began chemical dependency treatment. However, by December 31, 2008, he had been discharged due to a failure to adhere to the total abstinence requirement of the program. In addition, the Cabinet notes that TWS no longer had stable housing, and had been

[4] With respect to the allegations of domestic violence, TWS asserts that he has never had a Domestic Violence Order or an Emergency Protective Order filed against him, and states that, although he has repeatedly asked the Cabinet for details concerning the domestic violence allegations, he has never received a response.

[5] ANS has been in foster care since that time.

evicted from the home he had previously shared with TLM for use of cocaine and opiates. At the time of the termination hearing, TWS was apparently living in the home of his son.

The Cabinet acknowledges that TWS did obtain employment at Wal-Mart, although it was unclear how many hours he worked. TWS testified that he had maintained steady employment with Wal-Mart for a year at the time of trial, and had been promoted twice to the level of department manager. In addition, TWS testified that he had successfully parented his three older children from a previous marriage to adulthood, and had never had any problems or troubles with those children. Testimony below also revealed that TWS had participated in couples counseling with TLM at Catholic Charities, and that he also completed a bio/psycho/social assessment and clinical assessment with North Key Community Care on December 12, 2007, at which time he was diagnosed with Narcissistic Personality Disorder.

The Cabinet asserts that TWS has not visited his children, noting that SMES entered foster care on August 16, 2006, and that TWS failed to arrange for his court-ordered supervised visitation for a period of at least ninety days. At trial, TWS conceded that the last time he saw SMES was in January of 2008, and that the last time he saw ANS was in February of 2008. TWS asserts that he has not visited the children because the only day that the Cabinet could provide supervised visitation was on Monday, which would conflict with the visitation time of TLM.

TWS states that he cannot afford to pay for supervised visitation through other agencies.

The Cabinet also states that TWS did not provide any financial support for the benefit of his children until he was ordered by the court to do so on August 13, 2008. TWS has made all payments since that time, and also states that he carries both children on the health insurance he has through his employer.

Ultimately, the court involuntarily terminated the parental rights of TWS with respect to both ANS and SMES in two February 26, 2009, judgments, but refused to do so for TLM. It is from those judgments that TWS now appeals to this Court.

In addressing the arguments of the parties, we note that the standard of review for a finding of termination of parental rights is confined to the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure (CR) 52.01. Accordingly, the findings of the trial court will not be disturbed unless no substantial evidence exists in the record to support its findings. *See M.P.S. v. Cabinet for Human Resources,* 979 S.W.2d 114, 116 (Ky.App. 1998). Further, we note that the family court has a great deal of discretion in determining whether a child fits within the abused or neglected category. *See Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky.App. 1977).

Finally, we are reminded that in determining whether to grant a petition for involuntary termination of parental rights pursuant to KRS 625.090, a trial court must have clear and convincing evidence of three elements: (1) that the

child is abused or neglected as defined by KRS 600.020(1); (2) that one or more of the grounds stated in KRS 625.090(2) exists, and (3) that termination would be in the best interest of the child. *See N.S. v. C. and M.S.*, 642 S.W.2d 589 (Ky. 1982).

As his first basis for appeal, TWS argues that the trial court's order terminating his parental rights was made without sufficient evidence to support its findings. TWS directs this court to what he asserts is a stable employment and housing situation, as well as consistent payment of support per the court order of August 2008. Further, while acknowledging his ongoing problems with substance abuse, TWS asserts that for a court to terminate parental rights, it must find no reasonable expectation of significant improvement in the immediately foreseeable future. TWS argues that such is not the case in the matter *sub judice*.

In a related argument, TWS asserts that the trial court failed to consider the factors to determine the best interest of the children pursuant to KRS 625.090(3)(d)[6] and (f)[7]. TWS again directs our attention to the fact that he has maintained stable employment and housing, and has made what he deems significant effort toward compliance with mental health and substance abuse treatment. Additionally, TWS argues that he has clearly shown that for more than

[6] KRS 625.090(d) provides that the court is to consider, "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 concerning the age of the child . . . ."

[7] KRS 625.090(f) provides that the court is to consider, "The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so."

six months at the time of the hearing, he has been financially capable of supporting his children. He also reminds this Court of his consistent child support payments.

Having reviewed the record, we are compelled to disagree. As we have previously noted herein, the trial court has significant discretion in determining whether a child qualifies as abused or neglected as defined by KRS 600.020(1). While it is true that TWS has obtained what appears to be stable employment and has consistently been paying support as ordered by the court since August of 2008,[8] our review of the trial court's order reveals that it was based upon a thorough assessment of the record, and was founded on substantial evidence.

Specifically, we note that the trial court found that the children were neglected pursuant to KRS 600.020(1)(d),(g),(h), and (i), finding that TWS continuously or repeatedly failed or refused to provide essential parental care and protection for the children considering their ages; that he abandoned the children; that he failed to provide the children with adequate care, supervision, food, clothing, education, and medical care necessary for their well-being; that he failed to make sufficient progress toward the goals identified in his court-approved case plan, which resulted in the children remaining committed to the care of the Cabinet for fifteen of the most recent twenty-two months. Our review of the record indicates that sufficient evidence exists to support each of those findings.

[8] While this Court finds it commendable that TWS has been paying support pursuant to the court's order, we nevertheless note that the language of KRS 600.020 does not limit the type of support a parent should provide to that which is mandated by the court. Certainly, every concerned and responsible parent should be aware that their children need support whether or not such support is mandated by the court.

Further, we note that the court below found, by clear and convincing evidence, that the Cabinet had met its burden of proving one of the grounds set forth in KRS 625.090(2), and had done so by establishing that TWS abandoned his children for a period of not less than ninety days, and had, for a period of not less than six months, failed to provide essential parental care and protection. Further, the court found no reasonable expectation of improvement in parental care and protection considering the ages of the children, and that TWS, for reasons other than poverty alone, continuously or repeatedly failed to provide essential food, shelter, medical care, or education reasonably necessary for the children's well-being, and that there was no reasonable expectation that he would significantly improve in the future. Our review of the record indicates that these findings were supported by substantial evidence.

While TWS argues that the court erred in finding that there was no reasonable expectation of significant improvement in his conduct as a parent, we must disagree. While some strides toward improvement may have been made, we simply cannot find that the trial court was clearly erroneous in its determination that over the last two years, TWS largely failed to provide food, shelter, and care for either of his children, and that this failure was not due to poverty alone. A review of the record indicates an ongoing pattern of substance abuse, a failure to visit or interact with the children, and a failure to obtain stable and independent housing. We believe this evidence to be of a nature substantial enough to support the findings of the court below.

While we find the strides which TWS made toward obtaining employment and paying support commendable, these alone are not sufficient to overturn the determination of the trial court. Indeed, it is well established in this Commonwealth that 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 the evidence sufficient to convince ordinarily prudent-minded people. *See M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky.App. 1998), citing *Rowland v. Holt*, 70 S.W.2d 5, 9 (Ky. 1934). We believe the trial court based its judgment upon substantial evidence in the matter *sub judice*, and considered all relevant statutorily mandated factors in doing so.

Wherefore, for the foregoing reasons, we hereby affirm the February 26, 2009, Judgments of the Boone Family Court, the Honorable Linda Rae Bramlage, presiding.

ALL CONCUR.

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