

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001328-ME

G.E. III

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 09-AD-00049

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY,
AND S.A.E.M., A CHILD

APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE, CAPERTON AND WINE, JUDGES.

CAPERTON, JUDGE: The Appellant, G.E. III, appeals the June 9, 2010, order of the Kenton Family Court terminating his parental rights to his infant child, S.A.M. Having reviewed the record, the arguments made by G.E. III, and the applicable law, we affirm.

The instant matter began as a dependency, neglect, or abuse action brought against N.M.A.P, the mother of the child, alleging that she had a paramour who abused S.A.M. S.A.M. was born in June of 2008. G.E. III was established as the father of S.A.M. in October of 2008, and first met S.A.M. in December of 2008. On December 8, 2008, following completion of the dependency, neglect, and abuse action, G.E. III's aunt was given temporary custody of S.A.M. Although G.E. III was offered visitation with his daughter while she was staying with the aunt, he was told he could not take her to stay overnight with him in Ohio, where he was living with his grandmother at the time. On December 19, 2008, G.E. III signed a safety plan agreeing that he would not keep the child in Ohio overnight. G.E. III violated this agreement by taking his daughter to Ohio overnight in December of 2008, and keeping her there from December 19, 2008, through December 23, 2008. As a consequence, temporary custody of S.A.M. was taken from the aunt, and S.A.M. has resided in Foster care since December of 2008.

G.E. III was offered a two-hour per week visitation with his daughter and an interstate home evaluation, which was completed at the residence where he was residing with his wife, V.E., and her daughter, on March 9, 2009. The Ohio authorities did not approve the home placement with G.E. III because of alleged domestic violence¹, an unstable marriage, and G.E. III's request for mental health

¹ G.E. III asserted that the domestic violence allegations against him were "lies by his wife", and that the specific incident referenced in the home placement occurred because his wife told him she was having an affair, and the two had an altercation after which G.E. III was arrested and taken to the Hamilton County Detention Center. He was released later that night.

counseling following the incident of alleged domestic violence.² In addition, it was noted that G.E. III was no longer actually living in the residence with his wife and step-daughter. Another home evaluation was subsequently requested by G.E. III, but was never conducted.³ G.E. III also subsequently requested a home study evaluation to be conducted at his grandmother's home.⁴

G.E. III's visits with his daughter were initially inconsistent, as he missed visits between December 23, 2008, and February 2, 2009. He did visit with S.A.M. on February 2, 2009, and February 9, 2009. G.E. III again missed visits between February 16, 2009, and April 14, 2009. G.E. III asserts that the reason for those missed visitations was a conflicting work schedule. G.E. III states that once the conflict was resolved, he made every visit with his daughter from and after April 14, 2009.

² The night of the incident with his wife was apparently the same night that G.E. III requested to be placed on medication for his mental health. G.E. III asserts that the only time he stopped taking this medication was in November of 2009 after a week-long hospital stay. He began taking them again after a social worker advised him that he needed to take them if he wanted to be with his daughter. G.E. III was diagnosed with depression with unspecified episodic mood disorder, and unspecified personality disorder.

³ G.E. III had apparently called the social worker who had conducted the initial home evaluation, claiming that he and his wife were reunited, and that he wanted to continue with the home study. The social worker explained that the referral was closed due to the domestic violence incident, and that placement of an infant could not be recommended when the relationship with his wife was so unstable. G.E. III was advised that if he and his wife entered into counseling, she would be able to revisit the home study if the Cabinet sent a new referral. G.E. III stated in response that he did not have the money for counseling.

⁴ The record reveals that this request was also denied, as G.E. III was not actually permanently residing at his grandmother's home, continued to provide various addresses which he at times admitted were not residences where he actually lived, and moved from place to place rather frequently.

G.E. III asserts that he attempted to improve his life situation by attending classes at Cincinnati State College in the fall of 2009, as well as subsequent classes through the University of Phoenix. G.E. III testified that he was also receiving \$1,000 a month in workers' compensation benefits. He also testified that he had a job prospect at a family-owned business which he was to begin in mid-2010.

On March 24, 2009, S.A.M. was committed to the Cabinet for Health and Family Services, and on that same date reasonable efforts were waived. The Cabinet also advised the judge that a foster family wanted to adopt S.A.M. On April 24, 2009, the petition for termination of parental rights was filed. On June 9, 2010, the Kenton Family Court entered an order granting the petition, and specifically found as follows:

(1) The child, S.A.M., is an abused and neglected child as defined in KRS 600.020(1).

(2) The respondent parents of the child, for a period of not less than six months, have continuously or repeatedly failed or refused to provide or have been substantially incapable of providing essential parental care and protection of S.A.M., and there is no reasonable expectation of improvement in parental care and protection, considering the age of the child.

(3) That the respondent mother abandoned the child for a period of not less than ninety (90) days.

(4) The respondent parents, for reasons other than poverty alone, continuously or repeatedly failed to provide or are incapable of providing essential food, clothing, shelter, medical care or education reasonably

necessary and available for the child's well-being and there is no reasonable expectation of significant improvement in the parental conduct in the immediately foreseeable future, considering the age of the child.

(5) Termination of parental rights is in the best interest of the child.

(6) The Cabinet for Health and Family Services is best qualified to receive custody of the child.

Moreover, in a separate document titled, "Findings of Fact and Conclusions of Law" entered on the same date, the family court made numerous other findings pertinent to its order terminating the parental rights of G.E. III and the parental rights of N.M.A.P. Specifically, the court found, in addition to the findings set forth in its order terminating parental rights, that based upon clear and convincing evidence presented at trial G.E. III never provided parental care or protection for S.A.M. The court found that G.E. III was given ample opportunity to correct his mental health and anger issues during the pendency of the dependency, neglect, and abuse action, as well as during the involuntary termination of parental rights action. The court further found that G.E. III posed a risk of harm to any child placed in his care, as he was found to present a high risk for violence and impulsivity based on his past behavior. The court stated that from October of 2008 through the final trial date of April 15, 2010, G.E. III failed to make any lifestyle changes that would alleviate the risk of harm he would pose to S.A.M. if she were placed in his care.

In so finding, the court noted that the Cabinet had attempted to render services either directly or by referral in an effort to keep the family together, including working with the family while the child was placed in foster care. It also stated that as G.E. III chose to reside in Ohio, beyond the area in which the Kentucky Cabinet could provide services, the Cabinet was forced to rely on the Hamilton County, Ohio Department of Jobs and Family Services to complete two home studies regarding G.E. III. The court noted that after both studies, G.E. III's home was denied due to untreated mental health and anger management issues, and the fact that G.E. III lied about where he lived.⁵ After G.E. III's home was denied as a suitable residence for S.A.M. on the first occasion, the Kenton Family Court waived the Cabinet's obligation to make reasonable efforts to reunite G.E. III and S.A.M. It is from these findings and the aforementioned order terminating his parental rights that G.E. III now appeals to this Court.

On appeal, G.E. III argues that the family court committed reversible error by terminating his parental rights, and that the court erred in finding that valid reasons existed to negate the Cabinet's duty to exercise reasonable efforts to reunify the family. In reviewing the decisions of the trial court, we note that the trial court makes its findings based upon clear and convincing evidence, and that our review of those findings is under a clearly erroneous standard of review. *See* CR 52.01, and *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky.App. 1986). We note that clear and convincing proof does not necessarily

⁵ In response to this allegation, G.E. III asserts that he sometimes provided his mother's address for various reasons, but never actually resided at her house.

mean uncontradicted proof, and that 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*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934)). Thus, a trial court's findings of fact will not be disturbed if supported by substantial and probative evidence in the record. *Id.* at 116. We review the arguments of G.E. III with this in mind.

On appeal, G.E. III states that it is not in S.A.M.'s best interest to be separated from him, as "a child is always best served by being with their natural parents."⁶ In support of that assertion he notes that he continuously visited with his daughter from April 14, 2009, until the end of the case. He further asserts that although he was diagnosed with various mental disorders, these do not preclude him from being able to provide parental care for S.A.M. G.E. III claims that he was doing all he could to ensure that he was taking care of his mental health and that a mental illness alone is not enough to terminate a parent's rights.⁷ G.E. III also asserts that there was no testimony below that he did not have the earning capacity to provide "the essentials of life," and notes his attendance in college classes, his workers' compensation benefits, and his job prospects for mid-2010.

Beyond these arguments, G.E. III also asserts that the Cabinet failed to exercise reasonable efforts to reunify the family and that the court erred in

⁶ See brief of G.E. III, p. 6.

⁷ While we agree that this is so, the record below clearly indicates numerous reasons for terminating G.E. III's parental rights, beyond mental health reasons alone.

determining, after the first home assessment in Ohio, that the Cabinet's further duties in reunifying the family were waived. In support of his assertions in this regard, G.E. III argues that the only "reasonable efforts" he was offered by the Cabinet to attempt reunification were visitation with his daughter and an interstate home placement evaluation. G.E. III asserts that the Cabinet did not appropriately assist him in obtaining mental health counseling. He argues that none of the circumstances required the waiver of reasonable efforts in this matter.

As G.E. II correctly notes, KRS 625.090 explains the grounds for involuntary termination of parental rights. In order to terminate parental rights, the circuit court must find by clear and convincing evidence that the child has been abused or neglected as defined in KRS 600.020(1).⁸ The circuit court must then find by clear and convincing evidence the existence of at least one of the enumerated statutory grounds for the termination of parental rights.⁹ After the circuit court finds the existence of at least one enumerated ground, the court's final

⁸ KRS 600.020(1) provides that an " 'Abused or neglected child' means a child whose health or welfare is harmed or threatened with harm when his parent ... (d) continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child; ...;(h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child."

⁹ Included in these grounds are the following: (1) the abandonment of the child for a period of not less than ninety (90) days; (2) the continuous and repeated failure or refusal to provide essential parental care and protection for the child for a period of not less than six (6) months; and (3) the continuous and repeated failure or refusal, for reasons other than poverty alone, to provide essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being. KRS 625.090(2)(a), (e), and (g).

step is determining whether the termination is in the best interest of the child. KRS 625.090(3).

Having reviewed these findings of fact, we conclude that the family court's findings are supported by substantial evidence in the record and, accordingly, are not clearly erroneous. The evidence before the family court was of a probative and substantial nature sufficient to convince ordinarily prudent-minded people that the facts were as the family court determined. The family court correctly applied the involuntary termination statute to the facts as set forth in its order, and we find no reason to disturb those findings on appeal.

With respect to G.E. III's assertion that the Cabinet failed to exercise reasonable efforts to reunify the family, we note that KRS 610.127¹⁰ sets forth grounds upon which the court can find that parental circumstances negate the Cabinet's requirement to make reasonable efforts to reunify the child with his or

¹⁰ KRS 610.127 provides that: Reasonable efforts as defined in KRS 620.020 shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction determines that the parent has: (1) Subjected the child to aggravated circumstances as defined in KRS 600.020; (2) Been convicted in a criminal proceeding of having caused or contributed to the death of another child of the parent; (3) Committed a felony assault that resulted in serious bodily injury to the child or to another child of the parent; (4) Had their parental rights to another child terminated involuntarily; (5) Engaged in a pattern of conduct due to alcohol or other drug abuse as defined in KRS 222.005 for a period of not less than ninety (90) days that has rendered the parent incapable of caring for the immediate and ongoing needs of the child, and the parent has refused or failed to complete available treatment for alcohol or other drug abuse; (6) Mental illness as defined in KRS 202A.011 or mental retardation as defined in KRS 202B.010 or other developmental disability as defined in KRS 387.510 that places the child at substantial risk of physical or emotional injury even if the most appropriate and available services were provided to the parent for twelve (12) months; or (7) Other circumstances in existence that make continuation or implementation of reasonable efforts to preserve or reunify the family inconsistent with the best interests of the child and with the permanency plan for the child.

her family. As noted, our review of the record indicates that G.E. III chose to reside in Ohio and, thus, beyond the reach of the Kentucky Cabinet. It also indicates that G.E. III provided false information as to his actual address.

Accordingly, the court found that after G.E. III's home was denied after the first interstate home assessment conducted by the Hamilton County Department of Jobs and Family Services, any further duty on the part of the Cabinet to make reasonable efforts to reunite G.E. III and his family were properly waived. We believe that the findings of fact made by the court in this regard were supported by substantial evidence of record and were not clearly erroneous and, moreover, that the court correctly determined that these facts clearly fell within the parameters of KRS 610.127. We thus find no error in the court's determination to waive the Cabinet's duty to make any further attempts at reunification, and we affirm.

Wherefore, for the foregoing reasons, the June 9, 2010, order of the Kenton Family Court, terminating the parental rights of G.E. III is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

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