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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002526-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND
CHILDREN, as Next Friend
of P.T.K., a Child, and
J.W.K, a Child — APPELLANT

V.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 97-AD-00001

L.S.; and W.S.K. — APPELLEES

OPINION REVERSING AND REMANDING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; DYCHE and MILLER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment, entered by the Breckinridge Circuit Court, denying a petition filed by the Cabinet for Families and Children (CFC) seeking to terminate the parental rights of appellees L.S. and W.S.K. For the reasons stated hereafter, we reverse and remand for further proceedings.

CFC filed a petition in March 1997 seeking to involuntarily terminate L.S. and W.S.K.'s parental rights to P.T.K. and J.W.K., who were born in July 1995 and October 1994, respectively. After a hearing was conducted in August 1999, the trial court found that the children had been neglected by both

parents. Especially pertinent to the issues on appeal are the court's following findings of fact:

> [L.K.] and [W.S.K.] have never married.
>
> . . . .
>
> The testimony established that [J.W.K.] has only one kidney. His blood pressure requires monitoring.
>
> [P.T.K.] . . . was born prematurely weighing a little over two pounds at birth. . . . As a result, he had very special needs. As a result of [L.S.'s] failure to bond with the child and failure to attend and complete cardiopulmonary resuscitation (CPR) training, Kosair Hospital and the Cabinet sought custody of [P.T.K.] The Breckinridge District Court found [P.T.K.] to be a dependent child by Order entered November 21, 1995. This custody continued from birth until October 10, 1997 when [P.T.K.] was placed back in the home of [L.S.] and [W.S.K.]. . . . The placement was made primarily due to the stability and financial support [W.S.K.] provided for the family. The Cabinet placed [P.T.K.] back with [L.S.] and [W.S.K.] even though it had already begun termination proceedings. . . .
>
> The Cabinet presented the testimony of three qualified employees who had been directly involved with [L.S.], [W.S.K.] and the boys. It is difficult, if not impossible, to ascribe the term "family" to this group. . . . [The evidence] indicates the repeated lack of follow up by [L.S.] to medical problems noted with the children. . . .
>
> [L.S.] and [W.S.K.] moved on a fairly regular basis. While [L.S.] had lived at her parent's residence, it was entirely unsuitable due to garbage being in improper receptacles, slop being kept in improper containers, improper or no sheets on the children's beds, dirty clothes stacked around and a foul odor about the premises.
>
> A treatment plan had been arranged with [L.S.] and [W.S.K.] when [P.T.K.] was returned in October 1997. [W.S.K.] attended a few meetings; however, he failed to

complete the plan. He is the primary financial support for the family. He keeps about one half his earnings each week for himself without any real explanation for what it is used. It is clear that the children's basic necessities were not being paid for by [L.S.] or [W.S.K.].

[L.S.] and [W.S.K.] moved . . . when [P.T.K.] was returned in October 1997. . . . While there, [W.S.K.] failed to participate in parenting sessions.

[L.S.] had been counseled and had a treatment plan to deal with parenting, nutrition and budgeting. She made a conscious effort to avoid meeting with social workers to meet the goals of the plan. She would absent herself from her home to avoid the social workers. She would take the children to her mother's to keep the social workers from observing their physical condition. [L.S.] would lie about where she had been. The social worker even passed her on the road and observed her in another vehicle when [L.S.] had said she couldn't attend a session.

[L.S.] would not fill out budgeting forms and would not keep receipts to show where the household income was spent.

Ms. Matthews would make unannounced visits. She would not find milk in the refrigerator, although she did observe alcoholic beverages in the house. At one point, had the worker not checked on the status of her electric bill delinquency, the electricity would have been shut off. There was no legitimate reason for the children to be without sufficient nutrition with [W.S.K.] working and [L.S.] in the WIC program.

[L.S.] has proven herself untrustworthy, unreliable and to have neglected the children. Tiffany Bland's main concern had been the inappropriate medical care provided the boys. [L.S.] did not follow through on requests to take the boys to a doctor. [L.S.] could not provide receipts for treatment on follow up visits.

Ms. Bland did state [W.S.K.] was living in the home from October 1997. [W.S.K.] had been cooperative in attending visits and

foster care reviews prior to getting custody of [P.T.K.] in October 1997.

. . . .

The last straw for the Cabinet apparently was broken on a visit on March 19, 1998. That day a social worker found the boys in the home apparently unsupervised. Though she tried to call out to see if anyone was home, . . . [an adult male friend who allegedly was watching the children] could not be aroused. One child had on wet shoes at the time. The worker took the children with her from the home. . . . When she took the children, [P.T.K.'s] eyes were matted.

At a hearing, [L.S.] stipulated and the Breckinridge District Court found the boys to be neglected by [L.S.] (not [W.S.K.]) . . . . Both boys were committed to the CFC by Order entered April 28, 1998 to present. Since the boys' removal from their house, [L.S.] and [W.S.K.] have had supervised visitation with the boys.

The boys are presently thriving in their foster home environment.

Since removal of the children, [L.S.] refused to cooperate with the available social workers. . . .

At the hearing, [L.S.] testified she is again living with her mother and had been there with [W.S.K.] since March 27, 1999. . . . She admitted to a shortage of heat in the yellow house . . . . She admitted not keeping milk for a while. Her explanation why she didn't cooperate with the treatment plan was she didn't get along with Dottie Watson. Ms. Watson was "aggravating her." She admitted neglecting the children's medical needs. She has never completed the budgeting or parenting classes.

. . . .

. . . [W.S.K.] testified that he also now lives with [L.S.'s] mother. Apparently, he and [L.S.] now have another eight-month-old child . . . . He had signed a Case Plan on October 6, 1997 and October 7, 1998. He did not complete the Plans.

> Both [L.S.] and [W.S.K.] have recently entered guilty pleas to Flagrant Non-support felony charges in relation to the boys in the Breckinridge Circuit Court.
>
> There is no foreseeable prospect of improvement in the parenting skills, ability, effort, care, protection of the children or efforts to foster the physical, mental, and emotional health of the children.

The court found that the children had been neglected by both parents, and that clear and convincing evidence existed to support the termination of L.S.'s parental rights. However, concluding that such evidence did not exist as to W.S.K., the court declined to terminate the rights of either parent. This appeal followed.

KRS 625.090, concerning the involuntary termination of parental rights, provides in pertinent part:

> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
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> 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
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> 3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child . . .; and
>
> (b) Termination would be in the best interest of the child.

(2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

. . . .

(e) That the parent, for a period of not less than six months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

. . . .

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

. . . .

(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

. . . .

(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;

. . . .

> (6) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:
>
> (a) Terminating the right of the parent; or
>
> (b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

Here, the circuit court concluded that the initial threshold requirements of KRS 625.090(1)(a)(1) and (2) were met by the district court's finding that the children were neglected by L.S., and by its own finding that they were neglected by W.S.K. The question before the court then became whether the termination of parental rights would be in the children's best interests.

In determining the children's best interests and the issue of whether clear and convincing evidence existed to show continuous or repeated negligence pursuant to KRS 625.090(2)(e) and/or (g), the court considered the factors set out in KRS 625.090(3). Key to the court's analysis was the evidence relating to the parents' efforts and adjustments in their "circumstances, conduct, or conditions" to make it in their children's best interests to return home "within a reasonable period of time." KRS 625.090(3)(d). The court summarized this evidence in pertinent part as follows:

> . . . [L.S.] has been a failure at every level of treatment. She has made no legitimate effort or adjustment in her circumstances, conduct or condition to make it possible to consider it in the boys' best interest to return them to her. In fact, she

has rebelled against almost all the help which has been offered her. She blames her own failures on everyone else's behavior. To make matters worse, [L.S.] and [W.S.K.] have now created another child. Certainly, this in part indicates an ambivalence or lack of concern for the boys' future development, food, clothing, shelter, and medical care. Her new child creates an even greater drain on their already strained resources. [L.S.] presented herself at the hearing as a poor witness and poor mother for the two boys.

As for [W.S.K.], he appears to be a man of limited intelligence and resources trying to keep his children together. He has a severe financial burden created by his own lack of self control. He continues to make poor decisions. The lack of medical care provided the children by both [W.S.K.] and [L.S.], after listening to their own witnesses' testimony, is probably directly related to their own upbringing. It seems clear he, nor [L.S.], were raised to go to the doctor except in a dire emergency. This is not an excuse, however, for these children not being provided medical care. [W.S.K.] had to be aware living in the house they were not getting to the doctor. The social workers' demands to [L.S.] to get medical treatment for the boys was ignored and/or not related to [W.S.K.]

To his credit, [W.S.K.] does have a sincere desire to keep his children. Up to December 1997, the Cabinet's records indicate the children had "adequate" care. He was at work when the last visit resulting in the children's removal occurred. [P.T.K.'s] lack of weight gain should have been noticed. [W.S.K.] has exercised his supervised visitation rights. However, he has a long way to go before he could ever hope to get custody. Supervised visitation is also a continuing drain on the Cabinet's resources.

The quandary herein is that [W.S.K.] and [L.S.] are still together though unmarried.

It is virtually impossible for this Court to terminate only one parent's rights under the circumstances. The reality is with [W.S.K.] and [L.S.] being together, termination of only one parent's rights leaves the continued opportunity and

> certainty of contact with the children even if [L.S.'s] parental rights are terminated. It is only because of [W.S.K.] this Court has any hesitation regarding termination of parental rights. This parallels the same situation and the Cabinet's prior rationale for returning [P.T.K.] because of [W.S.K.'s] positive points. [W.S.K.], however, needs to take control of the parties' finances and to be more involved in day to day care and decision making.
>
> . . . .
>
> What really concerns the Court most is that since their removal in April 1998 nearly 1 ½ years ago, neither [W.S.K.] nor [L.S.] have yet to fulfill the goals of the case permanency plan. The budgeting, parenting and nutrition have not been completed.
>
> With their present child support arrearage, current support obligation and new child's need, [W.S.K.'s] ability to provide for the children has been stretched to, if not beyond, his capabilities.

Thus, although the court was persuaded that clear and convincing evidence existed to support a termination of L.S.'s parental rights, it declined to terminate those rights based on its conclusion that similar grounds did not exist to support the termination of W.S.K.'s parental rights. In our view, these conclusions are inconsistent with one another and amount to an abuse of the trial court's discretion.

The detailed evidence concerning chronic and substantial neglect of the children's medical and physical needs was certainly sufficient to support the court's conclusion that grounds existed for terminating L.S.'s parental rights. Although the court apparently was reluctant to attribute blame for the neglect to W.S.K. because he and L.S. were not married, their marital status in fact seems irrelevant to this particular issue

since it is uncontroverted that L.S. and W.S.K. resided together throughout most if not all of the time in question. More specifically, evidence was adduced to clearly show that neither parent provided adequate physical and medical care for the children. Moreover, although the court found that P.T.K. was placed in his parents' home in October 1997 "primarily due to the stability and financial support [W.S.K.] provided for the family," little if any evidence exists to show that W.S.K. thereafter provided adequate levels of stability or financial support. Instead, the court's findings noted that both parties failed to provide for the children's basic necessities, that there was no accounting for the expenditure of much of W.S.K.'s income, that W.S.K. failed to complete the CFC treatment plan, and that he failed to participate in parenting sessions. Although W.S.K. evidently was at work when the children were found unsupervised at home in March 1998, that event clearly was only one incident among many leading to the petition to terminate parental rights, and the record contains nothing to show that W.S.K. thereafter took any steps to ensure that such an event would not be repeated. Moreover, the record contains nothing to indicate that after the children's removal, W.S.K. made any efforts which were independent of, or greater than, those made by L.S. to promote the return of the children to his care. We are therefore constrained to conclude that it was inconsistent and an abuse of the trial court’s discretion to find that, although clear and convincing evidence existed to support a termination of L.S.'s parental rights, the evidence did not support a similar

finding as to W.S.K. The court's judgment therefore must be reversed.

The trial court's judgment is reversed, and this matter is remanded to the trial court with directions to enter an amended judgment consistent with the views expressed herein.

ALL CONCUR.

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