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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001010-MR

D.A.E. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEVIN GARVEY, JUDGE
ACTION NO. 00-FC-007818

J.T.E.; T.E.E.; A.W.E.; T.A.E.;
AND CABINET FOR FAMILIES & CHILDREN,
COMMONWEALTH OF KENTUCKY APPELLEES

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

BEFORE: DYCHE, MILLER, AND TACKETT, JUDGES.

TACKETT, JUDGE: D.A.E. appeals from an order of the Jefferson Family Court terminating his parental rights to three minor children, T.E.E, A.W.E., and J.T.E. We affirm.

At the time of D.A.E.'s marriage to his wife, T.A.E., she was already pregnant with twin boys. The putative father is one Greg Martin; however, the Cabinet for Families and Children (Cabinet) has been unable to locate him. D.A.E., therefore, is the legal father of T.E.E. and A.W.E. although he is not their biological father. D.A.E and T.A.E. also had a son, J.T.E., who

was born in 1992. The Cabinet was actually involved with the family prior to the birth of this youngest child due to domestic violence issues and, in 1993, all three children were removed from the home for the first time.

The children were removed and returned numerous times between March 1993 and October 2000 when the present petition for termination of parental rights was filed. D.A.E. and T.A.E. received extensive services from the Cabinet addressing issues such as safety, supervision, housekeeping, medical neglect, speech, parenting, and counseling for both parents and children. During this time some nineteen case plans were worked out between the Cabinet and the parents in order to maintain this family as a unit. In March 1998 the children were placed in foster care, and their parents stipulated to neglect on May 7, 1998. D.A.E. and T.A.E. finally separated from one another and D.A.E. began trying to regain custody of the three children.

At this time, D.A.E. began to fluctuate regarding whether he wanted all three children or just his biological child, J.T.E. In January 2000, D.A.E. began to have visitation with all three children on alternating weekends and overnight visitation with each child in turn on Wednesday nights. A prior petition for termination of parental rights was dismissed at the Cabinet's request, and the children were returned to D.A.E. in June 2000. Despite receiving extensive support services, D.A.E.'s ability to parent all three children began to deteriorate immediately. In August 2000, the children were removed from D.A.E.'s home, and he announced that he wanted to

seek custody of the youngest child only from that point on. Nevertheless, D.A.E. proved unable to parent his biological child and the Cabinet moved for termination of parental rights to all three children on October 17, 2000. After a lengthy hearing and detailed findings of fact, the trial court concluded that there were several grounds that justified terminating both D.A.E.'s and T.A.E.'s parental rights. This appeal followed.

D.A.E. argues that the trial court erred in its determination that the Cabinet proved the grounds for terminating his parental rights by clear and convincing evidence. His argument centers on the Cabinet's request to dismiss a prior petition to terminate parental rights and a letter written by members of the family's treatment team that D.A.E. had made significant progress in his ability to parent the three boys. This letter and the subsequent decision to dismiss the first petition for termination resulted in the children being removed from foster care and placed in D.A.E.'s home in June 2000. There were numerous problems during that time which culminated in the Cabinet's decision to remove all three children from the home on August 26, 2000. On that date, an aide from Seven Counties Services arrived at the home to find one of the twins jumping on the couch, the youngest child holding a table up off the floor as though he intended to throw it, a bed jacked up near the ceiling on a car jack, and their father in the kitchen asking for help.

Kentucky Revised Statute (KRS) 625.090, governing involuntary termination of parental rights, describes a three-prong test which must be met by clear and convincing evidence

prior to terminating parental rights. First, the child must be abused or neglected as defined by KRS 600.020. Termination of parental rights must also be in the child's best interests under the standard set forth in KRS 625.090(1)(b). Finally, the court must find the existence of at least one of ten specific conditions enumerated by KRS 625.090(2). The trial court has a great deal of discretion in determining whether this test has been met. MPS v. Cabinet for Human Resources, Ky. App., 979 S.W.2d 114 (1998). Our review of a decision terminating parental rights "is confined to the clearly erroneous standard in [Kentucky Rule of Civil Procedure] 50.02 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." RCR v. Cabinet for Human Resources, Ky. App., 988 S.W.2d 36, 38 (1999). (Citations omitted.) "Clear and convincing proof does not necessarily mean uncontradicted proof. It means proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." Rowland v. Holt, Ky., 70 S.W.2d 5, 9 (1934).

The first prong of the test for terminating parental rights is found in KRS 625.090(1)(a) which states as follows:

> 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;

> 2. The child is found to be an abused or neglected child, as defined by KRS 600.020(1), by the Circuit Court in this proceeding. . .

These children had previously been committed to the Cabinet as neglected children by the Taylor District Court in 1995 and by the Jefferson Family Court in 1998. In neither instance, did D.A.E. or his wife appeal the determination that their children were neglected. The trial court here made a finding that the children were abused and neglected pursuant to KRS 600.020(1). There are by statute nine circumstances on which a finding of abuse or neglect can be based. Included among these are allowing a risk of physical danger to be created by other than accidental means, a parent's failure to provide adequate supervision, repeatedly failing to provide essential care and protection, and failing to make significant progress towards identified goals which would allow the children to be returned to the parent.

The twins were first removed from the home in 1993 due to allegations that they had been physically abused. Three weeks later, J.T.E. was removed due to medical neglect. In 1998, one of the twins suffered scratches from a coat hanger and burns from a cigarette lighter, these injuries being afflicted on him by one or both of his brothers. On one occasion while in D.A.E.'s care, the twins set the curtains on fire. The children were frequently unsupervised, and D.A.E. admitted to social workers that he often could not account for the whereabout of each child. J.T.E. suffered medical neglect when he sustained facial injuries after falling from a bunk bed and his parents waited until it was too late for stitches to seek treatment. Despite some eleven years

of services being provided by the Cabinet, D.A.E. has not been able to care for the children in his home except for a period in 2000 which lasted less than three months and ended in their removal and return to the foster home. Consequently, we believe that the trial court correctly found that D.A.E.'s children were abused or neglected as defined by KRS 600.020(1).

KRS 625.090(1)(b) only allows involuntary termination of parental rights when it in the best interest of the child. There are several factors, listed in KRS 625.090(3), which the trial court is directed to consider in determining whether termination is in the best interest of the child. In determining that termination of D.A.E.'s parental rights would be in the children's best interest, the trial court considered the following factors found in KRS 625.090(3)(c) and (e):

> (c) If a child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition, made reasonable efforts . . . to reunite the child with the parents; . . .
>
> (e) The physical, emotional, and mental health of the child and the prospects of the improvement of the child's welfare if termination is ordered. . .

The Cabinet has been involved with this family since 1990 and has provided a myriad of services, both inside the home and out, to both parents, and to the three boys. Sandra Braunstein, a social worker for the Cabinet, testified that each time services were provided the parents were initially cooperative and interested and then would lose interest and fail to keep appointments. Donna Franklin, an aide with Seven Counties Services, was working

with the family during the period between June and August 2000 when the boys were removed from the foster home and living with D.A.E. She testified that she was providing help with behavioral modification to address following directions and unsafe situations. Although she had seen them follow directions in their foster home, D.A.E. did not consistently enforce rules with the result that the boys ignored his directions.

The Cabinet also presented testimony from Faye Rogers who has had the boys in foster care, along with six other children, since March 1998. She testified that they arrived at her home dirty, emotionally unstable, and with medical problems. While in her care, they were clean, healthy, progressing well in school, and living in a structured environment. After living briefly with their father in the summer of 2000, they returned to her home exhibiting the same negative behaviors that they had initially when she first cared for them. Moreover, even though D.A.E. now has visitation with only his biological son, J.T.E., the child returns from his father's home tired, with bags under his eyes and, on one occasion, sick from eating too much junk food. She concluded her testimony by stating that she would be willing to continue to foster all three boys until a permanent home could be found. Relatives of the boys' mother have expressed an interest in adopting them. We believe that the evidence before the trial court supported its finding that termination of D.A.E.'s parental rights was in each child's best interest.

KRS 625.090(2) also requires the trial court to find that one of ten grounds for termination of parental rights exists by clear and convincing evidence. The trial court found the following three grounds for terminating D.A.E.'s parental rights:

> (e) That the parent, for a period of not less than six (6) 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;
> . . . .
>
> (j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights;
> . . .

At the time the petition was filed on October 17, 2000, the children had been in foster care since March 1998 with the exception of a three month period from June through August 2000. Clearly, the trial court was entitled to find that the ground for

termination stated in KRS 625.090(2)(j) was proven by clear and convincing evidence.

The trial court also entered a finding under KRS 625.090(2)(e) that D.A.E. was unable to provide essential parental care and that there was no expectation of his improvement. Matthew Veroff, a Licensed Clinical Social Worker certified by Kentucky, was D.A.E.'s primary therapist and did family work with D.A.E. and the children. He testified that D.A.E. was a model client who attended counseling consistently and made a good faith effort to implement suggested changes in his parenting behaviors. At the same time, D.A.E. was also unable to set limits with the boys, made inappropriate comments while J.T.E. was present in therapy sessions with him, and failed to distinguish between his own wants and needs and those of his children. Matt testified that, although D.A.E. had received hundreds of hours of therapeutic treatment since 1999, there had been no progress in D.A.E.'s parenting abilities.

In addition to finding grounds for termination under KRS 625.090(2)(e) and (j), the trial court also found that (g) applied in that D.A.E., for reasons other than poverty alone, was unable to provide for the childrens' needs and there was no reasonable prospect of improvement. Much is made in D.A.E.'s brief of the fact that the Cabinet always felt that all three boys should remain together as they are extremely bonded to one another and to their parents and that the twins are unaware that D.A.E. is not their natural father. Nevertheless, after all three were removed from D.A.E.'s home on August 26, 2000, the

Cabinet continued to provide services to D.A.E. and to allow him to visit with J.T.E. D.A.E.'s sister, who is a schoolteacher, testified that her brother is incapable of parenting even the youngest child alone. According to the sister, she and her cousin paid the deposit on D.A.E.'s apartment, set up furniture, and cleaned. From time to time, she has had to buy food for her brother. She testified that D.A.E., who is diabetic, often refuses to take his medication even though he becomes easily agitated when his sugar level is too high. While supervising D.A.E.'s visitation with J.T.E., the sister further observed that D.A.E. was doing his son's homework and that J.T.E. was completely illiterate. She expressed the opinion that D.A.E. and J.T.E. interacted more as friends rather than parent and child and that D.A.E.'s home lacked a structured environment. D.A.E. admitted that he and his sister are close, that she had no motive to lie, and that she only had his son's best interest at heart. Matt Veroff testified that J.T.E. is more intelligent than his father and that D.A.E. is easily manipulated by his son. In light of all this testimony, we believe that sufficient evidence supported the trial court's conclusion that D.A.E.'s parental rights should be terminated to all three children.

For the foregoing reasons, the order of the Jefferson Family Court terminating the parental rights of D.A.E. is affirmed.

DYCHE, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT ONLY.

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NO BRIEF FOR APPELLEES, J.T.E.; T.E.E; A.W.E.; AND T.A.E.