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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000891-ME

G.A.S. APPELLANT

v. APPEAL FROM GALLATIN FAMILY COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 05-AD-00004

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; N.D.S., AN INFANT;
A.K.S., AN INFANT; A.J.S., AN INFANT;
N.A.S., AN INFANT; G.M.S., AN INFANT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: G.A.S. appeals from the order of the Gallatin Family Court terminating his parental rights to his five children. In this appeal, G.A.S. argues that the family court erred in finding that he failed, refused, or was incapable of providing parental care for his children. For the reasons set forth below, we affirm.

FACTS

G.A.S. and J.M.D.S. had five children; three girls – N.D.S., now age 10, A.K.S., now age 8, A.J.S., now age 3; and two boys – G.M.S., now age 7 and N.A.S., now age 5. Following the birth of the last child, A.J.S., the couple married. As of the time of the termination hearing the couple remained married. J.M.D.S. voluntarily agreed to terminate her parental rights to the children.

Personnel from the Cabinet for Health and Family Services (the Cabinet) first had contact with this family in 2003 following a telephone call indicating that J.M.D.S. was overwhelmed and could not take care of the five children. The Cabinet opened a case file and offered various services to both J.M.D.S. and G.A.S. The only service the couple took advantage of was the Family Preservation program, which is designed to assist with structuring and supervising in the home environment. During 2003, Cabinet social worker Patrick Helmers (Helmers) visited the family home two to three times a month. On those visits, Helmers found that the home was a mess and that J.M.D.S. was receiving little, if any, help from G.A.S.

On November 19, 2004,[1] Andrea Conley (Conley), an investigative social worker for the Cabinet, received a call from the family's case worker. The case worker indicated that she needed to see the children but had been unable to find them. Conley found G.A.S. at a relative's house and asked him where the children were. G.A.S., who was intoxicated, stated that J.M.D.S. had just driven away with the children and that she

[1] It is unclear from the record the extent of contact personnel from the Cabinet had with the family between 2003 and November of 2004. However, what may or may not have occurred during that time frame is not relevant to this appeal.

was intoxicated. G.A.S. then told Conley where J.M.D.S. was going. Conley found J.M.D.S., who was intoxicated, at a "rowdy party" with a number of other intoxicated people. Conley found the children in the house and telephoned the police. Eventually, the children were removed from the house and temporarily placed with relatives of G.A.S. and J.M.D.S. When it became apparent that long-term placement with relatives would not work, the Cabinet sought to have the children committed to its care, which the family court did in January of 2005. The children were then placed in foster care.

After the children were committed to the Cabinet, Helmers met with G.A.S. on a number of occasions to outline what steps G.A.S. needed to take in order to be reunited with the children. Those steps included undergoing a chemical dependency and mental health assessment; participating in parenting classes; establishing and maintaining stable housing and employment; undergoing random drug screens; and participating in anger management classes. Helmers testified that G.A.S. had not undertaken any of those steps. Helmers also testified that, while the children were in or near Gallatin County, G.A.S. participated in 90% of his visitations. However, during those visitations G.A.S. acted more like a big brother than a father and did not undertake any type of parental role.

In addition to the above, the evidence revealed that G.A.S. and J.M.D.S. had a relationship replete with domestic violence both before and after the children were committed to the Cabinet's care. A great deal of the violence related to G.A.S.'s failure to care for or support the children, which has been a chronic problem for G.A.S. As

evidenced by Helmers's testimony that, at the time of the termination hearing, G.A.S. had a substantial child support arrearage and, despite working for the preceding two months, had done nothing to reduce that arrearage. Finally, we note that Helmers and Conley both testified that Cabinet personnel were contacted on at least two occasions and advised that one or more of the children were out in the community unsupervised.

G.A.S. testified that he could not participate in a number of the programs recommended by the Cabinet because of financial and/or transportation problems. Notably, G.A.S. also testified that he did not participate in the parenting classes because he did not need them. However, G.A.S. testified that, if he were reunited with his children, that would provide incentive for him to begin participating in the other programs.

Additionally, G.A.S. testified that he had been living with his grandmother, Mary Roberts (Roberts), for several months, in a house big enough to house the children. According to G.A.S., Roberts could assist with supervising the children. However, we note that, although Roberts agreed that she could assist with the children and had done so in the past, Roberts had not contacted anyone at the Cabinet regarding becoming a guardian of the children. Finally, we also note that G.A.S.'s father also resides with Roberts and J.M.D.S. testified that G.A.S.'s father may have previously molested N.D.S.

As to the children's current status, Helmers testified that they have all improved and, for the most part, appear to be thriving in foster care. Furthermore, he indicated that two families have expressed an interest in adopting all five children.

STANDARD OF REVIEW

Our standard of review in termination of parental rights cases is set forth in *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky.App. 1998):

> The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, Ky.App., 552 S.W.2d 672, 675 (1977). This Court's standard of 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. *V.S. v. Commonwealth, Cabinet for Human Resources,* Ky.App., 706 S.W.2d 420, 424 (1986).
>
> 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. *Rowland v. Holt,* 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

With this standard in mind, we will address the issues raised by G.A.S. on appeal.

ANALYSIS

G.A.S. argues on appeal that there was not sufficient evidence to support the family court's findings that he failed, refused, or was incapable of providing parental care for the children and that there was no reasonable expectation that situation would change in the foreseeable future.

The General Assembly provided the mechanism for the involuntary termination of parental rights in KRS 625.090. The statute creates a three-pronged test,

whereby the Cabinet must prove, and the family court must determine, that 1) the child is abused or neglected; 2) termination would be in the child's best interest; and 3) one of several listed grounds exists. In deciding the second and third prongs, the circuit court is required to consider several enumerated factors, including "[t]hat the parent has abandoned the child for a period of not less than ninety (90) days[,]" KRS 625.090(2)(a), or:

> [t]hat 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.

KRS 625.090(2)(e).

Going through the statutory steps in order, the first determination the family court must make is whether the child is, or has been adjudged to be, abused or neglected as defined in KRS 600.020(1). In pertinent part, KRS 600.020(1) defines an abused or neglected child as follows:

> (1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:
>
> . . .
>
> (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. . . . ;
>
> (i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months.

In the present case, the circuit court found that the children had been abused or neglected and noted the testimony that the children had been:

> 6. [F]ound unsupervised at a party where marijuana was being smoked and alcohol being consumed. . . . The children could not be supervised by the Respondent, [G.A.S.] as he was also under the influence of alcohol. . . .
>
> 7. The Respondent parents have a long standing history of failing to appropriately supervise their children. The Cabinet for Health and Family Services had worked with the family from 2003 regarding supervision issues, without success. Neither parent demonstrated any desire to parent and supervise these children.
>
> . . .
>
> 12. Neither [parent] has completed anything on their case plan. Neither have full time consistent employment, despite being physically and mentally healthy. Neither have independent housing nor have they paid their court ordered child support. The Respondent, [G.A.S.], was before the Gallatin District Court in 05-F-00163 for flagrant non-support of these children. . . . [G.A.S.] was to pay $55.00 per week in child support from January 24, 2006 forward. The only payment that has been made since January 24, 2006 was a tax intercept. [G.A.S.] testified that he has been working lately, but admitted he did not use the income to pay his child support for these children. . . .

. . .

> 14. The children have made substantial improvements while in foster care, and are expected to make more improvements upon termination of parental rights.

The evidence, as summarized by the family court and as summarized hereinabove, is sufficient to convince ordinarily prudent-minded people that the children were neglected or abused. Therefore, we discern no error in the family court's finding of neglect or abuse.

We next address whether the termination is in the best interest of the children. To determine whether termination would be in a child's best interest, a trial court is required to consider the following factors, which are set forth, in pertinent part, in KRS 625.090(3):[2]

> (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
>
> (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020[3] to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;
>
> (d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's

[2] A trial court must also consider these factors when determining whether a ground for termination exists pursuant to KRS 625.090(2).

[3] "Reasonable efforts" is defined as "the exercise of ordinary diligence and care by the department to utilize all preventative and reunification services available to the community in accordance with the state plan for Public Law 96-272 which are necessary to enable the child to safely live at home[.]" KRS 620.020(10).

> best interest to return him to his home within a reasonable period of time, considering the age of the child;
>
> (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
>
> (f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

As noted in the testimony of Helmers, the Cabinet made significant efforts to assist both J.M.D.S. and G.A.S. to develop and/or improve their parenting skills before and after the children were removed from the home. However, with the exception of limited participation in one pre-termination program and making post-termination visits with the children, G.A.S. took no initiative to participate in any programs designed to help him parent the children. Furthermore, G.A.S., by all accounts, did not participate in the care of the children nor has he provided for their support. Finally, as noted by Helmers, the children have improved significantly while in foster care and continued improvement is anticipated. Thus, there is clear evidence of substance that it is in the best interest of the children to terminate G.A.S.'s parental rights and we discern no error in the family court's finding.

The third and final prong to be considered by the trial court is whether there is clear and convincing evidence of one or more of the following grounds enumerated in KRS 625.090(2). In pertinent part, those grounds are:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;

. . .

> (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[.]

From the evidence, it is clear that G.A.S. has consistently failed to provide parental care or support for his children since at least 2003. J.M.D.S. testified that G.A.S. did not help with the children in any significant way before the children were committed to the Cabinet. The overwhelming evidence indicates the G.A.S., faced with loss of his children, did not find steady work or stable housing, did not participate in any programs recommended by the Cabinet, and has not, of his own volition, paid any child support. These facts clearly support the family court's findings that G.A.S. failed to provide parental care for his children and that it is unlikely that G.A.S.'s behavior will improve. Therefore, we will not disturb the family court's findings.

CONCLUSION

For the reasons set forth above, we affirm the Gallatin Family Court's order terminating G.A.S.'s parental rights to his children.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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