RENDERED: AUGUST 26, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001908-ME

T.A.M. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 04-J-01608

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

TAYLOR, CHIEF JUDGE: T.A.M. brings this appeal from an October 5, 2010, Findings of Fact, Conclusions of Law and Order of the Fayette Circuit Court, Family Court Division determining T.A.M. was not "suited to the trust" of custody

under Kentucky Revised Statutes (KRS) 405.020 and, thus, an unfit parent. We affirm.

D.P. was born to A.P. on March 5, 2004. At the time, A.P. was unmarried, and a biological father was not identified on D.P.'s birth certificate. On September 19, 2004, approximately six months after D.P.'s birth, he was admitted to the hospital in respiratory distress. Blood tests revealed D.P. had been given phenobarbital and morphine. As a result, a temporary removal hearing was conducted, and an Emergency Custody Order was entered on September 21, 2004. The order removed D.P. from his mother's custody and awarded custody to the Cabinet. At the time of D.P.'s removal, A.P. identified T.A.M. as the child's biological father. The family court appointed counsel for T.A.M. An adjudication hearing was held, and D.P. was found to be a neglected child. T.A.M. did not appear at the adjudication hearing. Shortly after the hearing, D.P. was placed with a foster parent, W.D.

When the Cabinet removed D.P. from his mother's custody, T.A.M. was aware that A.P. had substance abuse issues and poor parenting skills but did nothing to protect D.P. T.A.M. made no attempt to establish paternity or in any way contact the Cabinet concerning D.P.'s welfare at this time. It was later revealed that T.A.M. also suffered from substance abuse issues.

On December 31, 2005, some fifteen months after being placed in a foster home, D.P.'s mother, A.P., died. Then, some two months thereafter, T.A.M. finally came forward to establish paternity and seek custody of D.P. At this point,

D.P. was approximately two-and-one-half years old and had been in the custody of the Cabinet with the same foster parent, W.D., for most of his life.[1]

After paternity was established, the Cabinet began providing services to T.A.M. in an attempt to place D.P. with T.A.M. In accord with the permanency plan to place D.P. with T.A.M., T.A.M. was required to familiarize himself with D.P.'s medical issues and attend his doctor's appointments. D.P. had been diagnosed as a special needs child with a variety of significant medical issues, including reactive attachment disorder (RAD), Attention Deficit Hyper Disorder (ADHD), severe failure to thrive, complex food allergies, eosinophilic gastroenteritis, and asthma. The RAD was the result of the severe neglect D.P. suffered during the first several months of his life with his mother. The food and environmental allergies were so serious as to cause D.P. to be chronically underweight and often rendered him unable to eat food. As a result, D.P. needed planned allergy appropriate meals with a minimum caloric intake and constant encouragement to eat.

Upon review of D.P.'s permanency plan, the Cabinet discovered that T.A.M. had not attended D.P.'s doctor appointments and made very little progress on his case plan. Despite this lack of progress, T.A.M.'s visitation with D.P. eventually evolved into overnight visits. During these visits, T.A.M. often failed to

[1]The Commonwealth of Kentucky, Cabinet for Health and Family Services, placed D.P. with a maternal aunt very briefly. D.P. had to be removed from his aunt's custody for violations of his protection plan. With the exception of that brief period, D.P. has remained in the same foster home and with the same foster parent since being removed from his mother's custody in September 2004, shortly after his birth.

follow the detailed visitation plan that had been established for D.P.'s protection. Specifically, T.A.M. and his wife ignored explicit directions not to discuss D.P.'s possible removal from his foster home with D.P. Due to the RAD diagnosis, the possibility of being removed from his established caregiver was detrimental to D.P. T.A.M. even stated that if he were granted custody he would not allow D.P. to have any contact whatsoever with his foster parent. Furthermore, T.A.M. and his wife believed that once D.P. came to live with them the RAD would disappear. The couple also expressed doubt concerning the ADHD diagnosis. Following extended visits with T.A.M., it was noted that D.P.'s behavior became aggressive and he began acting out at school. D.P.'s therapist was unsuccessful in his attempt to develop a strong bond between D.P. and T.A.M. As visits with T.A.M. began to decrease, so did D.P.'s negative behavior.

After some four-and-one-half years of attempting to reunify D.P. and T.A.M., the Cabinet changed D.P.'s "permanency plan" from reunification to adoption. The matter was eventually heard by the family court. T.A.M. argued that he was suited to exercise custody and sought permanent custody of D.P. Following an evidentiary hearing, the family court held that T.A.M. was not suited to the trust of custody under KRS 405.020(1) and awarded custody of D.P. to the Cabinet. This appeal follows.

T.A.M. contends that the family court erred by finding that he was not "suited to the trust" of custody under KRS 405.020 and, thus, unfit to parent D.P. For the reasons hereinafter set forth, we disagree.

KRS 405.020(1) states, in relevant part, as follows:

> If either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture, and education of the children who are under the age of eighteen (18).

Under the above statute, upon the death of a parent, the surviving parent is entitled to custody of the child unless such parent is not suited to the trust. Our courts have recognized that a parent not "suited to the trust" of custody under KRS 405.020(1) is equivalent to a parent being deemed unfit. *Rice v. Hatfield*, 638 S.W.2d 712 (Ky. App. 1982). And, the following factors are applicable to a finding of "unfitness:"

> (1) [E]vidence of inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children.

Davis v. Collingsworth, 771 S.W.2d 329, 330 (Ky. 1989). Moreover, the unfitness of a parent must be proved by clear and convincing evidence. *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004). Upon the foregoing legal principles, we shall now review the evidence presented at the hearing. In so doing, we review the family court's findings of fact under the clearly erroneous standard and review issues of law *de novo*. Kentucky Rules of Civil Procedure (CR) 52; *Lexington H-L Services, Inc. v. Lexington-Fayette Urban Co. Gov't*, 297 S.W.3d 579 (Ky. App. 2009).

The family court ultimately found T.A.M. to be an unfit parent because he had inflicted emotional harm upon D.P., was morally delinquent, and had

abandoned D.P. *See Davis,* 771 S.W.2d 329. To support same, the family court made sundry findings of fact and outlined specific evidence. In finding that T.A.M. inflicted emotional harm upon D.P., the court considered the fact that T.A.M. refused to accept D.P.'s RAD diagnosis and continued to engage in behavior that exacerbated D.P.'s illness despite being directed otherwise by the Cabinet and mental health experts. T.A.M. and his wife stated they would not allow D.P. to continue having contact with his foster parent if they were granted custody of D.P. They also failed to follow the guidelines established for D.P.'s visitation, which limited exposure to child care providers unfamiliar with D.P.'s emotional issues and RAD diagnosis. Also, T.A.M. failed to appreciate the gravity of D.P.'s allergy and asthma conditions and even believed that D.P.'s conditions were similar to his own and would simply go away. Upon the whole, the record more than adequately supports the court's findings that T.A.M. inflicted emotional harm upon D.P.

As to the court's finding of T.A.M.'s moral delinquency, the family court believed that T.A.M.'s morality was "seriously in doubt." The Court noted that T.A.M. had previously struggled with substance abuse issues, had been incarcerated on criminal drug charges, had been incarcerated for flagrant non-support, and had failed to protect D.P. despite knowledge of A.P.'s substance abuse and her neglect of D.P. Also, the court noted that T.A.M. had not undertaken any treatment for his own substance abuse issues. Taken together, the

above facts are sufficient to support the family court's finding of moral delinquency.

As to the family court's finding that T.A.M. abandoned D.P., the facts in the record clearly supported same. Although T.A.M. was aware that A.P. had substance abuse issues and was not adequately caring for D.P., T.A.M. did nothing to protect D.P. T.A.M. knew D.P. was removed from his mother's custody and again took no action for D.P.'s well being. For the first two-and-one-half years of D.P.'s life, T.A.M. failed to provide D.P. with even the basic necessities of life. Instead, T.A.M. waited some fifteen months after D.P. had been placed with the Cabinet to seek to establish paternity. These facts support the family court's finding of abandonment.

Based upon the record as a whole, we believe there existed substantial evidence of a probative value to support the family court's findings of fact that T.A.M. was unfit to parent D.P. We also believe that such unfitness was proven by clear and convincing evidence.

T.A.M. next contends the family court erred by considering his intelligence level, income level, religious involvement, and wife's traffic violation in its determination that T.A.M. was unfit and not suited to the trust of D.P.'s custody. His wife's traffic violation, passing in a no passing zone on a blind curve, is particularly troubling since D.P. was in the car at the time of the incident. Moreover, she had no license or insurance. Even if we were to accept T.A.M.'s allegations as true upon these issues, we simply do not believe that T.A.M.'s

substantial rights were prejudiced so as to require reversal in this case. CR 61.01; *Davidson v. Moore*, 340 S.W.2d 227 (Ky. 1960). As hereinbefore pointed out, a plethora of evidence existed to support the family court's finding that T.A.M. was not suited to the trust of D.P.'s custody. Thus, we believe T.A.M.'s contention that the family court erroneously considered the above issues to be mostly without merit, and otherwise harmless error.

T.A.M. also maintains the family court judge should have recused herself pursuant to KRS 26A.015(2)(a). T.A.M. specifically asserts that the court's findings of fact that "[T.A.M.]'s morality is seriously in doubt" demonstrated the judge's bias against T.A.M.

KRS 26A.015(2)(a) provides:

> (2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:
>
> (a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding[.]

In this Commonwealth, a party seeking disqualification of a judge must file a motion with the presiding judge pursuant to KRS 26A.015 or file an affidavit with the circuit court clerk pursuant to KRS 26A.020. *Nichols v. Com.*, 839 S.W.2d 263 (Ky. 1992). The record clearly establishes that T.A.M. did neither. Furthermore, T.A.M.'s contention fails to recognize that an analysis of the factors relevant to evaluating parental fitness necessitates consideration of a parent's

"moral delinquency." Hence, we view as meritless T.A.M.'s contention that the family court judge erred by not recusing herself.

We view any remaining contentions of error by T.A.M. as moot or without merit.

In sum, we are of the opinion that the family court did not err by finding that T.A.M. was not suited to the trust of D.P.'s custody and, thus, was an unfit parent. KRS 405.020(1).

For the foregoing reasons, the Findings of Fact, Conclusions of Law and Order of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Anna S. Whites
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Terry L. Morrison
Lexington, Kentucky