

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001867-ME
AND
NO. 2012-CA-001868-ME

T.G., SR.

APPELLANT

v. APPEALS FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NOS. 11-AD-500280 & 11-AD-500281

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
T.G., JR., A MINOR CHILD; A.G., A MINOR CHILD;
AND A.L., MOTHER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: T.G., Sr. (father), appeals the termination of his parental rights to T.G., Jr. (son) and A.G. (daughter) (collectively the children), claiming

that the Cabinet for Health and Family Services (the Cabinet) did not satisfy its burden by clear and convincing evidence.

Father and A.L. (mother)¹ lived together with their children until domestic violence and the Cabinet's orders separated them. Father and mother became parents in late 2006, when son was born. Mother was seventeen and father was eighteen. Son's development was atypical. When he was a toddler, son was diagnosed as having autism and received First Steps early intervention services. Daughter was born about a year and a half after son.

On January 12, 2010, father was arrested after mother called the police, claiming that father shattered a window in front of daughter, head butted mother, grabbed mother's arms and spit in her face. Mother had a visible injury to her right eye. On January 25, 2010, following father's guilty plea, father was convicted of assault fourth, domestic violence with minor injury. He was sentenced to 104 days and served fourteen days in jail with the remaining sentence conditionally discharged. A domestic violence order was entered ordering him to have no contact with mother. On February 15, 2010, the no contact order was amended to no unlawful contact.

On February 3, 2010, the Cabinet received a report that mother was abusing prescription drugs. Mother admitted to taking Lortab, which she was not

¹ Because mother does not appeal the termination of her parental rights, we will only discuss mother's actions and the Cabinet's termination case against her to the extent necessary to resolve father's appeal.

prescribed, claiming she took it for a toothache. Mother tested positive for marijuana, benzodiazepine and oxycodone.

On February 12, 2010, the Cabinet filed a dependency, neglect and abuse action, alleging the children were abused or neglected due to father inflicting domestic violence against mother in the children's presence and drug and alcohol abuse by the parents. At the temporary removal hearing held on February 17, 2010, the children were ordered to remain in the custody of mother, father was ordered to move out and complete the Batterer's Intervention Program (BIP) and father was permitted supervised visitation on condition that "he was clean and sober." Both parents were ordered to have substance abuse evaluations, follow all recommendations, enroll and complete domestic violence counseling, have random drug screens at the Cabinet's request with missed screens to be considered positive, and cooperate with the Cabinet and all service providers.

On March 17, 2010, father and mother entered a written stipulation that the children were present during the domestic violence, previous orders were renewed and father was ordered to continue the recommended drug treatment. On April 1, 2010, father was convicted following a guilty plea to violation of an EPO/DVO and sentenced to 180 days, conditionally discharged for two years. On April 21, 2010, father and mother admitted to being in contempt of court for failing to follow the family court's orders and ordered to serve thirty days incarceration, conditionally discharged.

On July 3, 2010, the family court placed the children in the emergency custody of the Cabinet after son was found by police wandering outside his home and into other people's apartments. The police found mother passed out in the home, apparently under the influence of drugs, and daughter unattended.

On July 8, 2010, the children were temporarily placed with their aunt. Although the children were well cared for, the aunt was having trouble coping with son's behaviors and did not have sufficient support from family. On September 1, 2010, the children were again placed with the Cabinet after the relative placement failed. The children were placed with a therapeutic foster family, the Shelleys, through St. Joseph's Children's Home. Father was ordered to have in-patient drug treatment as recommended by the Jefferson Alcohol and Drug Abuse Center (JADAC) and follow recommendations, with previous orders renewed.

While the children were with the aunt, father exercised visitation supervised by the aunt. Father continued to exercise consistent supervised visitation through St. Joseph's Children's Home when the children were placed with the Shelleys.

In July 2010, father was briefly hospitalized for treatment of severe alcohol withdrawal and hallucinations. He tested positive to two alcohol tests that month. He was scheduled to begin in-patient drug treatment but cancelled.

On September 15, 2010, father finally began inpatient alcoholism treatment and was discharged on September 30, 2010, after he met his treatment goals. Upon father's release from treatment, his assigned halfway house refused to

accept him because he tested positive for barbiturates administered to him as part of treatment. Father refused to attend another half-way house.

On October 6, 2010, the parents stipulated that the children were abused or neglected as a result of their continued drug use and contact with each other in violation of a domestic violence order. The parents stipulated to contempt of court and ordered incarcerated for sixty days, conditionally discharged. Father was ordered to enroll in protective parenting classes, follow the recommendation for inpatient treatment, and the previous orders were renewed.

Father was incarcerated for twelve days in November 2010, when he was arrested for violation of the DVO with mother. Following his guilty plea, on November 15, 2010, father was sentenced to 135 days incarceration, with the time remaining to be served on the home incarceration program. Father only missed visitation during the two weeks he was in jail and on December 29, 2010, the same day he also failed to submit to a random drug screen.

On January 3, 2011, father began intensive evening outpatient treatment at JADAC and completed the program on March 2, 2011. The program included outpatient treatment five days a week and attending Alcoholics Anonymous meetings five times a week. He met all of his treatment goals. He kept all but two of his appointments with JADAC between September 8, 2010, and March 2, 2011.

On January 13, 2011, father tested negative on a ten panel drug screen and an eighty-hour alcohol test. From that date, every subsequent drug screen father completed was negative. However, he did have several failures to appear.

On January 19, 2011, the family court ordered father to begin BIP classes within two weeks and attend to completion. Although father almost completed BIP classes, he was required to begin the classes again because he had violated the DVO in November. Father agreed to waive any hearing regarding the revocation of his conditionally discharged sentence in the event of further non-compliance. On March 17, 2011, father was released from home incarceration.

In a Cabinet staffing meeting held in April 2011, the goal was changed to adoption. The social worker recommended the goal change but the facilitator did not agree. A supervisor agreed with the social worker's recommendation.

Although father had been ordered to attend parenting classes, the classes could not be scheduled until he completed his substance treatment classes. He had difficulty finding available classes, but began taking weekly parenting classes at the Home of the Innocents in June 2011 and completed the program in October 2011. He had good attendance and only missed one session.

On November 6, 2011, father completed the BIP, taking a total of fifty-four classes rather than the typical twenty-eight, because he had to start over after he completed twenty-six classes.

On December 6, 2011, at the termination trial, mother was served by a warning order attorney but did not file an answer or otherwise appear. The family court heard testimony from Stella Wright, records custodian from JADAC; Abby Nordquist, a child therapist for the St. Joseph's Children's Home who also supervised some of father's visits with the children; Erin McGohon, the current caseworker for the Cabinet; father; and the children's paternal grandmother.

The witnesses testified that father had a period of noncompliance with the case plan, but eventually followed most of its requirements. McGohon and father agreed that he missed some drug testing. McGohon testified that father was actively avoiding her calls.

Father testified to various reasons why he had trouble receiving McGohon's phone calls and avoided attending random drug screens. He had problems with his phone. He was frequently out of state to help a relative in Mississippi by taking care of her children while she was undergoing chemotherapy. He would travel to Mississippi, but then return to Kentucky to exercise his visitation and attend his required classes. He did not like to attend scheduled drug tests in the middle of the day because they adversely impacted his ability to work. However, all of father's recent screens were negative and he successfully completed his JADAC treatment program.

McGohon and Nordquist testified about son's autism and special needs. They testified that son's autism is on the severe side because he does not talk and that he requires constant supervision. Son has a condition called PICA

which gives him the desire to eat non-edible objects; he tries to eat many non-food items which could be dangerous to him, including feces. Son will also open doors and attempt to leave. Son has extreme temper tantrums. He has to be maintained on a special diet, receives multiple therapies and must be taken to numerous appointments. Son benefits from consistency, including a set schedule. Father testified that the Cabinet had not given him any special guidance on how to parent an autistic child and he sought information on his own.

All of the witnesses agreed the children are bonded to each other and keeping them together is very important. Nordquist testified son prefers daughter to anyone else. Daughter tries to keep son safe.

All the witnesses testified that father obviously loves the children and is very reliable in exercising his visitation. Nordquist testified that daughter appears bonded to father, is always happy to see him and demands attention from her "Daddy St. Joe" during visitation. Father testified that both children are bonded to him and are always excited when he visits.

However, McGohon and Nordquist expressed concern that father spends more time with daughter during the visitation and has trouble managing both children. While McGohon and Nordquist believed that father was consistent and appropriate during visitation, they were concerned that he does not give enough attention to son's needs. Although Nordquist has redirected him to pay more attention to son, he continues to focus mostly on daughter.

Father testified he supports his children by bringing the children snacks, drinks and clothing at his visits but acknowledged he did not provide for all their needs. He had not been paying child support because he did not know he was required to pay under the case plan. His wages had been garnished for the three weeks preceding trial.

Father testified he loves his children and is capable of parenting them, they miss him when he is gone and he should be given credit for all that he has accomplished. He is consistently working, could support them and his mother could supervise them while he is at work.

During the paternal grandmother's testimony, it was revealed that she had a substance abuse conviction for cocaine and had been found by the Cabinet to have physically and emotionally abused her own children. Additionally, her work schedule was problematic.

At the close of the termination hearing, the family court stated it was satisfied that father maintained sobriety for at least this year, regularly exercised visitation, complied with the BIP requirements following a technical violation and with the parenting classes requirement. The court opined there was no question that father loves his children and they love him.

The court determined that termination was appropriate. The court explained it was not in the best interests of the children to separate them from one another. The court found there was no evidence that father had the ability to care for son's extraordinary needs, not because he did not love him, but because he

lacked recognition of his special needs. Paternal grandmother was not a viable alternative placement for the children.

The court determined the Cabinet met its burden by clear and convincing evidence that termination was in the children's best interests. Father was unable to provide care for son, failed to provide financial support and the children had been in the care of the Cabinet for more than fifteen of the last twenty-two months.

Father appealed. While the appeal was pending, father moved, pursuant to CR 60.02, to set aside the judgment due to evidence not available at the time of the trial. Father became aware of Facebook postings made by Beth Shelley, the children's foster mother, in which she expressed her intent to only adopt daughter or if she adopted both children to have son institutionalized. Father shared this information with the Cabinet and the Cabinet removed the children from that placement and placed them together through the Home of the Innocents in a new potential adoptive home.

The family court granted father's motion to reopen the case in order to consider whether son's needs were so great that he would not be able to remain with daughter in a conventional home. Father was granted supervised visitation pending the new trial. The parties agreed the court could consider prior testimony presented in the first trial.

The second trial was held on September 13, 2012. The family court heard testimony from Melissa Robinson, a supervisor with the Cabinet's adoption

unit; Shannon Winfield, a family consultant for the Home of the Innocents who both served as the children's case manager and oversaw some of the supervised visits; Laura LaPradd, a therapist for the children and the administrative director of autism services at the Home of the Innocents who also oversaw some of the supervised visits; April Wilkerson, the children's current foster mother; Beth Shelley, the children's former foster mother; and father.

Robinson testified that the Cabinet has a strong policy of making every effort to maintain sibling groups. She testified there was no current plan to separate the children. She explained that sometimes one foster home would be able to handle children that another home could not.

LaPradd, Winfield and Wilkerson testified that son could remain in a conventional home based upon Wilkerson's experience as their current foster mother. They testified son's behavior has improved in his current foster home placement. Son's aggression has substantially decreased, his communication has increased and he can now communicate with simple signs, make vocalizations and has begun to say some words. Son can be taken into a grocery store and to church, has learned to follow simple commands, is working on potty training, and is learning to calm himself when upset.

Wilkerson testified she spends individual time with both children and her large extended family also helps with the children. She testified that daughter calls her foster parents Mommy and Daddy; daughter calls father "Daddy St. Joe."

Recently son has been referring to the foster father as “Da.” Wilkerson testified she would like to adopt both children.

Winfield testified that son requires a consistent schedule, which can be provided in a home. LaPradd testified that the level of consistency son needs is good for daughter also because she may have some special needs. LaPradd testified that son has thrived in his current home and the Wilkerson family deserves the credit for the improvements in son’s behavior.

Beth Shelley, the children’s former foster mother, testified about her concern that son’s behavior impacted his ability to remain in a conventional home. While she had the children, she could not find a church where she could take son and it was difficult to go on outings with him. While caring for son, she was apprehensive about how she would physically handle him when he became older.

Shelley also testified about her concern that trying to maintain the children together in the same home was not best for daughter. Shelley worried daughter would not be able to get the attention she needed in a home with son and being with son would hinder her ability to get a home. She believed daughter was more attached to her and her daughter than to son.

Winfield, LaPradd and Wilkerson testified about the strong sibling bond between son and daughter. Daughter knows what son wants and tries to take care of him.

Son is similarly attached to daughter. Son initiated hugs with daughter. Son stays close to daughter and chooses to sit by her. Son tries to comfort daughter when she is crying.

Son has altered his typical aggressive behavior around food when it comes to daughter. Son allows daughter to give him food or take it away from him; he allows her to eat off his plate and he shares his food with her. He only exhibits these behaviors with daughter.

Winfield and LaPradd testified about their observations during visitation. Winfield testified that father is consistent with visitation and loves the children. However, he has an easier time engaging with daughter than son.

LaPradd testified that father is open to learning what works with son and does well with both children. She believes anyone parenting the children is going to have to deal with son's issues.

Winfield had safety concerns about father's ability to parent son. Two separate times while Winfield was observing visitation, she saw son put a plastic bag in his mouth. Father did not notice because he was engaged by daughter.

Father testified the children should be returned to him because they were bonded and he would always maintain them together as a family. He consistently exercises visitation and the children are always happy to see him. He is able to effectively parent both children, can manage son's behaviors and will continue to seek out help to do so. He can provide for the children. He has complied with the case plan and believes he has done everything asked of him.

On October 4, 2012, the family court again terminated the parents' parental rights. The family court found father's progress, although laudable, had been sporadic and extended over a period of twenty-one months. "Although the father ultimately has finally completed most if not all of the remedial tasks assigned to him and clearly loves his children, it is clear to this court that the children would remain at risk of neglect in his care for various reasons." The court explained that even after completing twenty-six out of twenty-eight BIP classes, father demonstrated his judgment had not improved by violating the DVO. Father also failed to provide support for the children.

The court found, based upon the testimony from Nordquist and Winfield, father was incapable of parenting son:

Despite knowing from the Court's earlier ruling that [father's] inattentiveness to [son's] needs was disconcerting, he has made no improvement. While he may be able to parent [daughter] individually, he has shown no ability to parent [son], and it is not in the children's best interest to separate them.

The court found that the paternal grandmother was not an appropriate placement and both children were doing well or improving in their current placement, were attached to their foster parents and each other. The court was satisfied that son's needs would not prevent him from remaining in a conventional home with daughter.

The family court concluded as follows: The children were abused or neglected; the children remained in foster care for fifteen of the most recent

twenty-two months; parents had for a period of not less than six months continuously or repeatedly failed to provide or been substantially incapable of providing essential parental care or protection for the children and there was no reasonable expectation of improvement in parental care and protection considering the ages of the children; parents had 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 or available for the children's well being and there is no reasonable expectation of significant improvement in parents' conduct in the immediately foreseeable future considering the ages of the children; mother had abandoned the children for a period of not less than ninety days; the Cabinet rendered all reasonable services to reunify the family and additional services were unlikely to result in unification within a reasonable time considering the ages of the children; and the Cabinet met the children's needs and the prospects are for continuing improvement in the children's welfare if termination is ordered.

Father appealed, claiming the Cabinet did not prove the statutory elements for involuntary termination by clear and convincing evidence, failed to make reasonable efforts to reunify the family and the court erred by failing to consider placement with the children's paternal grandmother. Having determined that the family court had proper grounds to involuntarily terminate father's parental rights under KRS 625.090, we affirm.

A family court has a great deal of discretion in determining whether children are neglected and whether the neglect warrants termination. *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116 (Ky.App. 1998). A family court's decision to terminate parental rights must be based upon clear and convincing evidence, which we review under the clearly erroneous standard. *D.J.D. v. Cabinet for Health and Family Services*, 350 S.W.3d 833, 836 (Ky.App. 2011). "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." *W.A. v. Cabinet for Health & Family Services, Commonwealth*, 275 S.W.3d 214, 220 (Ky.App. 2008).

We defer to the family court's ability to assess the credibility of witnesses:

It has long been held that the trier of fact has the right to believe the evidence presented by one litigant in preference to another. The trier of fact may believe any witness in whole or in part. The trier of fact may take into consideration all the circumstances of the case, including the credibility of the witness.

Commonwealth v. Anderson, 934 S.W.2d 276, 278 (Ky. 1996) (internal citations omitted). If there is clear and convincing evidence to support the findings of neglect, any of the listed grounds for termination relied upon and termination would be in the children's best interests, we must affirm.

After reviewing the record, we conclude that clear and convincing evidence existed to support termination. Father stipulated to neglect and there was clear and convincing evidence on each ground for termination, including that father was

incapable of caring for son and there was no reason to anticipate that he could learn to successfully parent son in the future. The evidence was overwhelming that the children's emotional health required that they remain together, thus keeping them together was in their best interests. While there is evidence to support contrary conclusions and a different outcome, we may not substitute our decision for that of the family court. *R.C.R. v. Commonwealth, Cabinet for Human Res.*, 988 S.W.2d 36, 39 (Ky.App. 1998).

Accordingly, we affirm the Jefferson Family Court's termination of father's parental rights to T.G., Jr. and A.G.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Bricking
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BRIEF FOR APPELLEE, CABINET
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