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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000025-ME

R.G. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 14-AD-500092

A.G, AN INFANT;
and COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT AND THOMPSON, JUDGES.

DIXON, JUDGE: This is an appeal from the Jefferson Circuit Court's August 26, 2014, judgment terminating the parental rights of appellant, R.G. After careful consideration we affirm.

On January 28, 2013, A.G. was born addicted to opiates. A.G.'s father, R.G., also tested positive for opiates and marijuana a couple days after her birth. A.G.'s mother tested positive for opiates three days after A.G.'s birth. The Cabinet for Health and Family Services (the "Cabinet") filed a petition to remove A.G. from the parents'[1] custody, alleging that A.G. was an abused or neglected child. The family court granted the Cabinet temporary custody on February 6, 2013. A.G. remained in the hospital until March 4, 2013. During her hospitalization, the Cabinet arranged visits with the biological parents once per day. The child's mother, C.S., did not comply with the family court's requirement that she provide clean drug screens before visiting the child upon release from the hospital.

The family court accepted R.G.'s stipulation that A.G. was neglected and abused and ordered that she remain in the Cabinet's custody. The family court also renewed a previous order for R.G. to complete random drug screens, attend supervised visits and undergo substance abuse treatment at the Jefferson Alcohol and Drug Abuse Center ("JADAC").

In April 2013, R.G. reported to JADAC but was not admitted due a medical concern which he had to address prior to admission. R.G. failed to return to treatment and failed to engage in any other substance abuse treatment for another three months. R.G. eventually sought out substance abuse treatment at The Healing Place in July of 2013. R.G. advised Rebecca Harbin, a social worker with

[1] C. S. is the biological mother. She was constructively served via warning order attorney and has not participated in the termination process or appealed.

the Cabinet, that he had maintained treatment compliance at The Healing Place continuously since July 2013, and that he resided in the male-only boarding house associated with this treatment provider.

Prior to the August 1, 2014 hearing, Harbin began to suspect that R.G. had experienced a drug relapse due to recent behavioral changes. R.G. had missed visits with A.G. He had failed to maintain a working telephone number. Further, R.G. had left A.G. with an unapproved caregiver at an unapproved location. However, on the evening prior to trial, Harbin spoke with R.G. by telephone wherein he denied having had a drug relapse.

The termination hearing was set to begin at 9:00 a.m. on August 1, 2014, and commenced at 9:11 a.m. without R.G.'s presence, despite his counsel's admission that he had spoken with R.G. about the hearing the previous day. R.G. arrived at the termination hearing at 9:22 a.m. Harbin testified first. She confirmed that R.G. had sought treatment at The Healing Place. R.G. had completed treatment there prior to A.G.'s birth, and had returned there as an alumni to receive additional support. However, to Harbin's surprise, R.G. had returned to detox treatment in June of 2014 and again in July 2014.

Harbin discussed R.G.'s visitation with A.G. She testified that R.G. visited with A.G. at the Family and Children's Place for a time but because R.G. missed several visits due to his work schedule, the facility could not continue to provide for visits. Harbin testified R.G. began unsupervised visits in May 2014, for two hours each week for the first month and five hours each week thereafter,

continuing up until the Sunday before the hearing. However, those visits have remained sporadic and R.G. continued to be late to pick A.G. up and late to drop her off after visitation.

During R.G.'s testimony he acknowledged that he had relapsed for three days in June 2014 and had relapsed again, just the week before the hearing. He testified that his next step would be a week of detoxification and then one month at The Healing Place and follow-up treatment. According to R.G., he would need anywhere from four to six months before he could independently care for A.G. In the meantime, R.G. requested that his mother would be a suitable relative with whom the Cabinet could place A.G.

Regarding relative placement however, Harbin countered that R.G.'s mother had been considered as a relative placement; however, she was not suitable since the state of Virginia, where she lived, did not approve her home. According to R.G.'s mother, M.G., who testified remotely via telephone at trial, she was not approved because her husband had a felony conviction from 1990 for breaking and entering.

Following the trial, the family court found that (1) A.G. was an abused and neglected child; (2) R.G. had not provided or was substantially incapable of providing essential parental care and protection for a period not less than six months, and there was no reasonable expectation that would improve considering the age of the child; (3) R.G. failed to provide or was incapable of providing essential food, clothing, shelter, medical care or education reasonably

necessary and available for the child's well-being, and there was also no reasonable expectation that would improve considering the age of the child; and (4) termination of R.G.'s parental rights was in the best interests of the child. The trial court then terminated R.G.'s parental rights. This appeal followed.

Permanently severing the relationship between a parent and child is a serious affair, *see V.S. v. Commonwealth, Cabinet for Health and Family Services*, 194 S.W.3d 331, 335 (Ky. App. 2006). However, a trial court may do so

> if it finds, by clear and convincing evidence, that the child is an abused or neglected child as defined in KRS 600.020(1) and that termination serves the best interest of the child. KRS[2] 625.090(1)(a)–(b). Lastly, the circuit court must ascertain under KRS 625.090(2) that clear and convincing evidence has been provided to show the existence of one or more of ten factors.

C.J.M. v. Cabinet for Health and Family Services, 389 S.W.3d 155, 160 (Ky. App. 2012). Clear and convincing evidence must be "sufficient to convince ordinarily prudent-minded people" but does not have to be irrefutable. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky. App. 1998). Furthermore, since CR[3] 52.01 is based on clear and convincing evidence (*see M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 850 (Ky. App. 2008)), "[t]his Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard." *M.P.S.*, 979 S.W.2d at 116.

At the outset of his appeal, R.G. argues that the family court erred in finding that two of the ten factors enumerated in KRS 625.090(2) were present in

[2] Kentucky Revised Statutes.
[3] Kentucky Rules of Civil Procedure

this case. First, R.G. claims that the Cabinet presented insufficient evidence to justify a finding under KRS 625.090(2)(e) that for a period of not less than six (6) months, he had continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for A.G. and that there was no reasonable expectation of improvement in parental care and protection, considering A.G.'s age. Second, R.G. contends that his poverty alone served as the basis for the family court's finding under KRS 625.090(2)(g):

> [t]hat [he], 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 [R.G.'s] conduct in the immediately foreseeable future, considering the age of the [A.G.]

Both Harbin and R.G. testified at trial that R.G. had not sustained himself, let alone A.G., financially for as long as A.G. has been alive. R.G. has lived in sober-living homes provided by The Healing Place. While R.G. has apparently been employed most of the eighteen months of A.G.'s life, these jobs have been at minimum wage working for a temp agency. Harbin did testify that R.G. had provided for A.G.'s needs while she was in his care for the several hours of visitation; however, he never provided for her while she was in foster care, nor paid any child support for A.G. Moreover, due to R.G.'s recent substance abuse relapse, his ability to do so in the near future was improbable. While R.G. testified at trial that the longest he had been sober was two and one-half years, the medical

records introduced at trial indicate R.G. had told his treatment providers the longest he had gone without using drugs was eighteen months. These records reflect he began using illicit drugs when he was only thirteen years old. At the time of trial R.G. was forty-two years old. His medical records reflect a man who has struggled with addiction for almost thirty years. His repeated relapses, significantly just prior to proceedings to terminate his parental rights, do not reflect a probability that R.G. would ever be able to consistently provide for the needs of A.G.

R.G. finally argues that the trial court erred by finding that the Cabinet used reasonable efforts at reunification and by finding that termination was in A.G.'s best interest. His primary argument seems to be that because the state of Virginia declined to approve R.G.'s mother, M.G., for A.G.'s placement, the Cabinet had somehow failed in its obligation to attempt reunification.

Contrary to the R.G.'s condemnation of the Cabinet's rejection of R.G.'s mother as a possible alternative, the proof before the family court clearly showed that the Cabinet followed the statutorily mandated protocol in its efforts to place A.G. with the grandmother. Harbin submitted the proper paperwork to Virginia and received notification that the grandmother's home state rejected her as a proper placement for A.G. The Cabinet has no control over the length of time another state takes in evaluating its citizens as possible relative placements. Furthermore, there is nothing in this record to indicate that the Cabinet failed to initiate "the correct process" for the investigation of a relative placement by

another state. At the hearing in this case, grandmother testified by phone and confirmed that her state had rejected her home as a possible placement. There is no statutory authority for a "direct placement" by the court to A.G.'s grandmother as suggested by R.G. R.G.'s argument otherwise is meritless.

We are not without sympathy for R.G.'s desire to raise his daughter, as well as the daily struggle he faces with his substance abuse addiction. However, we are also mindful that a child's life—through no fault of her own—has been placed in limbo for years as a result of R.G.'s addictions. Stability for A.G.'s future is paramount. We believe the trial court's considered judgment here is supported by clear and convincing evidence and, as such, is not clearly erroneous.

For the foregoing reasons, the order terminating the parental rights of R.G. is affirmed.

THOMPSON, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

D. LAMBERT, DISSENTING: With all due respect, I must dissent. As the majority correctly notes, there is nothing routine about terminating a parent's rights to raise his or her child. It is an extreme measure, reserved for parents clearly unfit for the role. The decision to terminate must be supported by sound legal conclusions, supported by adequate factual findings, with all efforts taken to avoid putting the Cabinet's interests above those of the child. After reviewing the record,

I do not believe the family court's decision adhered to this fundamental requirement.

First, I believe the family court failed to properly consider R.G.'s mother as a potential relative placement. The record clearly showed that A.G.'s grandmother went to great lengths to prepare for her granddaughter to live with her: she attended months of classes and adapted her home to accommodate an infant. And the only explanation the Cabinet gave to offset this evidence was that Virginia ultimately decided to reject the grandmother's household based on her husband's remote felony conviction. The family court did not evaluate what precisely occurred during the interstate compact process, and in doing so, inappropriately determined that a permanent solution, *i.e.*, adoption by a foster family, served A.G.'s best interests better than remaining with her family temporarily.

Second and finally, by relying on factual findings that do not bear on R.G.'s prospective ability to care for A.G., the family court did not properly explain why R.G. should no longer be A.G.'s legal parent. The family court's finding that R.G.'s past drug abuse, which included a relapse one week before the hearing, prevents him from being able to provide for A.G. in the future is flawed because it ignores the progress R.G. made during his most recent attempt to get custody of A.G. R.G. remained sober for several months leading up to the hearing and consistently visited A.G. during that time. He was also employed full time, albeit at a minimum wage job, and had researched affordable housing programs

available for similarly situated families. Accordingly, R.G.'s rights were given short shrift, especially in light of the inadequate housing services provided to R.G. The Cabinet should have expended proper efforts to assist R.G. Had R.G. then been unable to parent A.G., termination would have been appropriate. I would have reversed.

BRIEF FOR APPELLANT:

Paul J. Mullins
Louisville, KY

BRIEF FOR APPELLEE:

Erika L. Saylor
Louisville, KY