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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001373-ME

C.C.H., NATURAL FATHER — APPELLANT

APPEAL FROM DAVIESS CIRCUIT COURT
DIVISION II,
v. HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 16-AD-00029

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; T.N.H. (NATURAL
MOTHER); AND R.R.H. (A MINOR CHILD) — APPELLEES

AND
NO. 2016-CA-001375-ME

C.C.H., NATURAL FATHER — APPELLANT

APPEAL FROM DAVIESS CIRCUIT COURT
DIVISION II,
v. HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 16-AD-00030

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND

FAMILY SERVICES; T.N.H. (NATURAL
MOTHER); AND E.M.H. (A MINOR CHILD) APPELLEES

AND
NO. 2016-CA-001376-ME

C.C.H., NATURAL FATHER APPELLANT

APPEAL FROM DAVIESS CIRCUIT COURT
DIVISION II,
v. HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 16-AD-00031

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; T.N.H. (NATURAL
MOTHER); AND J.R.H. (A MINOR CHILD) APPELLEES

AND
NO. 2016-CA-001378-ME

C.C.H., NATURAL FATHER APPELLANT

APPEAL FROM DAVIESS CIRCUIT COURT
DIVISION II,
v. HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 16-AD-00032

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; T.N.H. (NATURAL
MOTHER); AND H.L.H (A MINOR CHILD) APPELLEES

AND
NO. 2016-CA-001413-ME

C.C.H., NATURAL FATHER APPELLANT

APPEAL FROM DAVIESS CIRCUIT COURT
DIVISION II,
v. HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 16-AD-00028

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; T.N.H. (NATURAL
MOTHER); AND J.M.H. (A MINOR CHILD) APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: C.C.H. (Father) appeals from the Daviess Circuit Court orders terminating his parental rights to five of his children, J.M.H.; R.R.H.; E.M.H.; J.R.H.; and H.L.H.[1] Because the circuit court's findings are supported by substantial evidence, we affirm.

The Cabinet for Health and Family Services became involved with Father regarding child protection issues sometime in 2005. In total, Father has nine biological children. T.N.H. (Mother) is the biological mother of his six youngest

[1] These orders also terminated the parental rights of the five children's mother. Her appeals, enumerated as 2016-CA-001882; 2016-CA-001883; 2016-CA-001884; 2016-CA-001885; and 2016-CA-001886, are addressed in a separate opinion.

children, including all five at issue in this case. Their oldest child reached the age of majority while in the Cabinet's custody.

Mother and Father kept custody of the five youngest children until July 2, 2014. At that time, the Cabinet filed a dependency, neglect, and abuse (DNA) petition in Daviess District Court on behalf of all five children. The Cabinet filed the petition in response to an incident where a physical altercation between the parents resulted in a burn by boiling water to one of the children. The allegations in the petition included ongoing domestic violence, substance abuse, medical neglect of the children, lack of supervision, and unstable housing. Mother and Father agreed to grant temporary custody of the three oldest children to a relative, while the Cabinet took custody of the two youngest children. Eventually the relative could no longer care for the three oldest children, and they were committed to the Cabinet in May 2015, joining their younger siblings in foster care. Mother and Father would ultimately never regain custody of any of the children.

In November 2014, both parents stipulated to the court's finding of dependency as to all children. Father was ordered to comply with the Cabinet's case plan. Due to Father's long history of substance abuse and incarceration, his plan focused extensively on substance abuse treatment but also directed him to: (1) obtain housing; (2) obtain stable employment; (3) complete parenting education; and (4) comply with the terms of his probation upon release from incarceration. Father was incarcerated for possession of a controlled substance, possession of marijuana, and possession of drug paraphernalia.

Father was released in February 2015 and made very little progress on his case plan before he was arrested again in September 2015. He pled guilty to charges of theft by unlawful taking of an automobile, operating a vehicle under the influence, fleeing and evading police, and resisting arrest. In December 2015, he was released for two months, but was incarcerated again in February 2016 for another two-month period. Also in February 2016, due to the lack of progress on both parent's case plans, the Cabinet moved to change the goals for each child to adoption, which the court granted.

Upon Father's release in April 2016, he began making progress on his case plan for the first time. However, despite this progress, the Cabinet moved forward with the termination.

The termination hearing was held in August 2016, and the circuit court heard from: (1) J.M.H.'s foster mother; (2) the four other children's foster mother; (3) the children's court appointed special advocate; (4) the cabinet worker assigned to the case; and (5) Father. After hearing the testimony and reviewing the evidence, the circuit court gave verbal findings and conclusions. In September 2016, the circuit court entered its formal findings of fact and ordered both parents' parental rights terminated.

Father timely filed this appeal arguing that it was error to terminate his parental rights because termination was not in the children's best interest and the circuit court failed to consider the recent progress on his case plan.

Our review in termination actions has been succinctly stated in *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014) as follows:

> The standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR[2] 52.01 based upon clear and convincing evidence. The findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. 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.

As a predicate to ordering an involuntary termination of parental rights (TPR), a trial court must find by clear and convincing evidence the child was previously adjudicated an abused or neglected child or make such a finding in the current proceeding. KRS[3] 625.090(1)(a)(1) and (1)(a)(2). The circuit court made such a finding, and Father does not dispute it.

Next, the circuit court must find clear and convincing evidence that termination would be in the best interest of the child. Pursuant to KRS 625.090:

> (3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:
>
> . . .
>
> (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

[2] Kentucky Rule of Civil Procedure.

[3] Kentucky Revised Statute.

petition made reasonable efforts as defined in KRS 620.020 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 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.

Father contends that termination was not in the children's best interest because the circuit court failed to consider the progress he made on his case plan in the weeks preceding the final hearing. Therefore, he argues the court erred in terminating his parental rights. We disagree.

Evidence was presented at the final hearing to show that Father's drug abuse, coupled with his failure to care for the immediate and ongoing needs of the children, amounted to "acts of abuse or neglect" as contemplated by the statute. *See* KRS 625.090(3)(b) and KRS 600.020(1)(a)(3).[4] The cabinet worker testified that the Cabinet has been involved with Father and his children since 2010, and he

[4] In pertinent part KRS 600.020(1)(a)(3) states an "[a]bused or neglected child means a child whose health or welfare is harmed when . . . his or her parent . . . [e]ngages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including . . . parental incapacity due to alcohol and other drug abuse[.]"

had been given ample opportunities to comply with his case plan. *See* KRS 625.090(3)(c). Further, she testified that prior to Father making progress on his case plan from May 2016 until the final hearing, he had made little to no progress prior to that date. Thus, Father had made very few adjustments in his circumstances in order to make it in the child's best interest to be returned to him within a reasonable time. *See* KRS 625.090(3)(d). The court appointed special advocate, cabinet worker, and both foster parents testified that all children's behavior and general welfare was vastly improved since being removed from their biological parents' home. *See* KRS 625.090(3)(e). Also, although Father had paid child support consistently since May 2016, he was still more than $3,000 in arrears as of the date of the final hearing. *See* KRS 625.090(3)(f). Therefore, the factors set forth in KRS 625.090(3) that weigh against Father far outnumber those that are in his favor. Consequently, there was clear and convincing evidence to support the circuit court's finding that termination of Father's parental rights was in the children's best interest.

Finally, the circuit court must find clear and convincing evidence of at least one ground listed in KRS 625.090(2). The cabinet worker and court appointed special advocate testified to at least two of them—failure to provide parental care and protection for at least six months with no expectation of improvement under KRS 625.090(2)(e); and failure to provide essential food, clothing, shelter, medical care, or education with no expectation of improvement in the immediately foreseeable future under KRS 625.090(2)(g).

Father argues that termination was not appropriate because he presented enough compelling evidence to demonstrate that there is "a reasonable expectation of improvement of his circumstances" and, thus, the grounds listed in KRS 625.090(2)(e) and 625.090(2)(g) do not apply. We disagree. In support of this argument, Father again asserts the progress he has made with the case plan following his most recent release from incarceration. In Father's view, this progress is evidenced by: (1) completing an inpatient substance abuse program; (2) attending substance abuse groups; (3) enrolling in parenting classes; (4) maintaining sobriety; (5) maintaining employment; and (6) making child support payments.

The record supports the circuit court's decision to terminate Father's parental rights. The children were removed from his custody on July 2, 2014, but he did not begin working on his case plan in a meaningful way until May 2016. While it is true that "incarceration alone cannot be considered grounds for termination of parental rights[,]" *see M.E.C. v. Cabinet for Health and Family Servs.*, 254 S.W.3d 846, 849 (Ky. App. 2008) (citing *J.H. v. Cabinet for Human Res.*, 704 S.W.2d 661 (Ky. App. 1985)), he was only incarcerated for approximately twelve of the twenty-five months between the children's removal and the final hearing. He was not incarcerated for approximately thirteen months and chose not to participate in his case plan for the majority of that time. Indeed, approximately twelve weeks before the final hearing Father did start making progress, however, other than parenting classes, all the tasks on the Cabinet's case

plan were identical to the tasks he was required to complete to comply with his probation. Stemming from his drug abuse and addiction, Father has continuously been incapable of providing the children with essential food, clothing, shelter, medical care, or education reasonable necessary for the children's well-being. *See* KRS 625.090(2)(g). And although he was making improvements, Father's tendency to relapse into a criminal lifestyle, coupled with his testimony that it would be at least twelve months until he could obtain housing suitable for the children, show that there is no "reasonable expectation of significant improvement in the parent's conduct *in the immediately foreseeable future*[.]" *Id*. (Emphasis added.)

Given the long history of these children in the Cabinet's care and what they had been exposed to while in their parents' care, the circuit court found the totality of Father's history of drug abuse, domestic violence, and failed parental care more telling than his twelve weeks of recovery; such is the court's prerogative. "[T]he trial court, as the finder of fact, has the responsibility to judge the credibility of all testimony, and may choose to believe or disbelieve any part of the evidence presented to it." *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006). While the record does contain evidence that Father was attempting to improve his life, the record is also replete with his repeated failure to comply with the case plan both before and after his children were removed in July 2014. Moreover, it was Father himself who testified that his children have "most definitely" been affected negatively from the domestic violence that occurred while they were in the home.

The circuit court's determination that Father's drug abuse and domestic violence placed the children at risk, after years of services from the Cabinet is not in error. Further, as we have already pointed out, "[c]lear and convincing proof does not necessarily mean uncontradicted proof." *B.L.*, 434 S.W.3d at 65. The record contains substantial evidence to support the findings of the circuit court, and for that reason the circuit court did not err in terminating Father's parental rights.

In light of the foregoing, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES:

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