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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-1897-ME

J.D. APPELLANT

v. APPEAL FROM HENRY CIRCUIT COURT
HONORABLE DOREEN S. GOODWIN, JUDGE
ACTION NO. 18-AD-00007

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY;
D.B.D., A MINOR CHILD; AND L.N. APPELLEES

AND
NO. 2019-CA-1898-ME

J.D. APPELLANT

v. APPEAL FROM HENRY CIRCUIT COURT
HONORABLE DOREEN S. GOODWIN, JUDGE
ACTION NO. 18-AD-00008

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF KENTUCKY;
J.Z.L.D., A MINOR CHILD; AND L.N. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: J.D. (hereinafter referred to as Father) appeals from orders of the Henry Circuit Court, Family Division, to involuntarily terminate his parental rights to J.Z.L.D. (hereinafter referred to as Child 1) and D.B.D. (hereinafter referred to as Child 2).[1] Father argues that the trial court violated his procedural due process rights and made erroneous findings of fact. We find no error and affirm.

FACTS AND PROCEDURAL HISTORY

Father is the biological father of Child 1 and Child 2. L.N. (hereinafter referred to as Mother) is the biological mother of the two children. The Cabinet has a long history with Father and Mother. The Cabinet first became involved with the children in 2012 when Father assaulted Mother. Since that time, the Cabinet has intervened five times. The Cabinet's concerns for the children

[1] This case involves the neglect of minor children; therefore, we will not identify the parties by their names in order to protect the privacy of the children.

have been because of the parents' substance abuse, domestic violence in the home, and Father's anger issues. The most recent involvement of the Cabinet occurred in November of 2016. The Cabinet filed a neglect petition in November of 2016 after Father ran over Mother's foot, during a verbal altercation, while the children were in the car. The children were placed in the Cabinet's custody and Father was required to complete a batterer's intervention program, a mental health assessment, a substance abuse assessment, parenting assessments, and to submit to random drug screenings. Father was also required to follow any recommendations given from the assessments.

During 2017, Father completed the mental health assessment and a few drug screens. Some of Father's drug screens were negative and some were positive. Father also participated in supervised visitation with the children. In June of 2017, Father became incarcerated for striking Mother with the car. While Father was incarcerated, the Cabinet informed him that visitation with the children at the jail was going to stop based on the recommendation of the children's therapist. A court order was also entered reflecting the cessation of visitation at the jail.

Father was released from jail in July of 2017. That same month he completed a substance abuse assessment and started a batterer's intervention program. Father was discharged from the batterer's program for noncompliance.

Father was reincarcerated on July 19, 2017, and was released on shock probation in January of 2018.

In February of 2018, Father underwent a mental health evaluation performed by Penny Moers, a social worker and outpatient therapist. Based on the evaluation, Ms. Moers recommended Father participate in individual and group therapy. Father attended some therapy sessions, but missed others. Ms. Moers believed Father made very little progress and closed his case in July of 2018 for noncompliance. Ms. Moers reopened services for Father in August of 2018 and recommended individual therapy and parenting classes. Father began the parenting classes on September 6, 2018; however, he did not finish the program. Ms. Moers also wanted Father to participate in individual therapy sessions with her every two weeks. Father attended nine sessions between August of 2018 and February of 2019. Ms. Moers believed Father made some progress during therapy, but he has not been back since February of 2019 and there was more work that needed to be done.

In March of 2018, Father underwent a parenting and psychological assessment. This assessment was performed by Dr. Michael Whitten. Dr. Whitten believed Father suffered from emotional dysregulation. This is where a person has trouble controlling their emotional responses. Dr. Whitten also believed Father was prone to outbursts of anger.

In January of 2018, Father and Mother met with the current Cabinet social worker, Charlene Roberts, to discuss their case plans. Additional case plans were developed in July of 2018 and January of 2019. Father's case plan tasks included the following: Father would submit to random drug screens; complete protective parenting classes and demonstrate the skills learned; complete a mental health assessment and follow all recommendations; complete a substance abuse assessment and follow all recommendations; complete a batterer's intervention program; maintain stable housing and income; actively participate in services; follow all court orders; avoid acts of domestic violence; and complete couple's counseling with Mother if they intended to cohabitate.

Father tested positive for drugs in April of 2018, but also tested negative numerous times. Unfortunately, he did not consistently participate in random drug screens so Ms. Roberts testified he was not compliant with the task. Father has also participated in eight or nine classes, but has not completed the program. It appears Father is only one class short of completing the program.

As previously mentioned, Father underwent some mental health treatment with Ms. Moers, but was not consistent with his treatment and has not participated in individual therapy sessions since February of 2019.

Ms. Roberts also referred Father to substance abuse treatment on several occasions. Father did not participate in any substance abuse treatment.

Father did complete a domestic violence offender treatment program; however, Ms. Roberts was concerned with his participation in the program. The program is a 26-week program. After completing the 26 weeks, a participant then goes once a month for an additional 12 months. Father started and stopped the program multiple times. In other words, Father completed the program, but did not do so during consecutive weeks as it was designed. Furthermore, Ms. Roberts does not believe Father changed his violent behavior as Mother indicated to her that Father was still violent toward her.

Additionally, Mother and Father are living together, but have not started couple's counseling. Mother and Father have lived in multiple locations during Ms. Roberts' association with the case and she does not believe they have stable housing. Furthermore, Father has no income.

Ms. Roberts' testimony in this case indicated that despite 16 case plans and seven years of Cabinet services, the issues that were raised by the Cabinet have not abated and Father has not made significant progress on his case plan.

The Cabinet filed a petition for involuntary termination of parental rights against Father on July 18, 2018. A hearing was ultimately scheduled for June 25 and June 26, 2019. On June 24, 2019, Father requested a continuance due to his recovering from surgery. Father indicated his doctor recommended he not

travel until July. The trial court denied the motion because there had been other continuances in the case. The court allowed Father to participate by phone and he was able to communicate with his attorney via email throughout the trial. After the two days of trial in June, another day of testimony was scheduled for September 11, 2019. Father personally appeared for that day of the hearing.

In November 2019, the trial court terminated Father's parental rights to Child 1 and Child 2. These appeals followed.

ANALYSIS

> The standard for 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). Therein, it is established that this Court's standard of review in a termination of parental rights case is the clearly erroneous standard found in Kentucky Rules of Civil Procedure (CR) 52.01, which is based upon clear and convincing evidence. Hence, this Court's review is to determine whether the trial court's order was supported by substantial evidence on the record. And the Court will not disturb the trial court's findings unless no substantial evidence exists on the record.
>
> Furthermore, although termination of parental rights is not a criminal matter, it encroaches on the parent's constitutional right to parent his or her child, and therefore, is a procedure that should only be employed when the statutory mandates are clearly met. While the state has a compelling interest to protect its youngest citizens, state intervention into the family with the result of permanently severing the relationship between parent and child must be done with utmost caution. It is a very serious matter.

M.E.C. v. Commonwealth, Cabinet for Health and Family Services, 254 S.W.3d 846, 850 (Ky. App. 2008) (citations omitted).

> The standard of proof before the trial court necessary for the termination of parental rights is clear and convincing evidence. "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."

V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420, 423-24 (Ky. App. 1986) (citations omitted).

Father's first argument on appeal is that the trial court violated his procedural due process when it refused to continue the hearing due to his being unable to participate in person. When it comes to procedural due process,

> we have held that "[d]ue process requires, at the minimum, that each party be given a meaningful opportunity to be heard." *Wright v. Wright*, 181 S.W.3d 49, 53 (Ky. App. 2005). In turn, a party has a meaningful opportunity to be heard where the trial court allows each party to present evidence and give sworn testimony before making a decision. *Id.*

Holt v. Holt, 458 S.W.3d 806, 813 (Ky. App. 2015).

Father argues that he was not able to participate in a meaningful way because he was not present for the first two days of the hearing. He claims he had a hard time hearing some witnesses while participating over the phone, was unable

to assist his counsel, and was unable to see the exhibits utilized by the Cabinet. We disagree.

Due to discovery, Father had a copy of all the Cabinet's exhibits before the hearing. In addition, Father was able to participate in the hearing by phone and was able to communicate with his counsel by email during the course of the hearing. When Father was unable to hear testimony, he informed his counsel who then informed the court. The court also allowed Father's counsel opportunities to consult with Father as needed. Finally, Father was present in the courtroom on the third day of the hearing, called witnesses on his behalf, introduced his own exhibits, and testified himself. Father's due process rights were not violated.

Father's second argument on appeal is that the trial court erred in finding that the children could not return to Father's custody within a reasonable period of time considering the age of the children. Specifically, Father takes issue with the court's findings regarding Kentucky Revised Statutes (KRS) 625.090(3)(d) and KRS 625.090(2)(e).

When determining if parental rights should be terminated, a court must determine if terminating parental rights would be in the best interests of a child. KRS 625.090(1)(c). KRS 625.090(3) lists factors to consider when determining the best interests of a child. KRS 625.090(3)(d) states that the court

should consider "[t]he 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[.]"

The trial court found that while Father had made some progress in his case plan, he has not made sufficient progress. Father did complete the batterer's intervention program, but he did not do so as contemplated by the program. His treatment sessions were not consecutive as he would begin and then stop the program. In addition, there was testimony at the termination hearing that Father was still being violent toward Mother even after he completed this program. Furthermore, testimony indicated that Father needed to undergo additional mental health and substance abuse treatments before he would be ready to successfully parent. Finally, the court relied on the testimony of Dr. Whitten to find that Father would likely need years of intensive therapy to effect behavioral change. All of this evidence is supported by the record. The fact is that the Cabinet has been helping this family for over seven years, but Father still has not gotten his anger and violence issues under control. The trial court did not err in finding that Father had not made sufficient adjustments to his circumstances to make it in the children's best interests to return them to his custody.

As for KRS 625.090(2)(e), that statute states:

> 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[.]

When terminating parental rights, a trial court must also find one of the factors listed in KRS 625.090(2) is present. The court found KRS 625.090(2)(e) was applicable, and we agree. As stated above, Father has not completed his case plan and needs to undergo further mental health treatment. Father also has a habit of starting and then stopping treatment programs, and the trial court found this lack of consistent participation troubling. As Father has not made lasting changes in his lifestyle and behavior, the court did not err in finding there was no reasonable expectation of Father improving his parental care and protection in the near future.

Father's third and final argument on appeal is that the trial court erred in finding that the Cabinet exhausted all reasonable efforts to reunite the family. As part of the trial court's examination of the best interests of a child, KRS 625.090(3)(c) states that the court should consider whether the Cabinet made reasonable efforts to reunite the children with the parents. Reasonable efforts are defined as "the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community . . . which are necessary to enable the child to safely live at home[.]" KRS 620.020(13).

Father claims that the Cabinet did not make reasonable efforts in this case because once he was incarcerated in June of 2017, he was not able to see his children again. In addition, he argues that the Cabinet did not provide reunification therapy for the children. While these facts are true, we believe the Cabinet satisfied the reasonable efforts requirement. Since 2012, Father was given 16 case plans, none of which were completed. Father was given multiple opportunities to complete a plethora of services, but was inconsistent and failed to complete most of them. Finally, the children's therapist indicated that the children did not want to visit Father and were scared of him. This fear was so bad that the children would not even read a letter Father had written to them. The trial court found that based on the evidence presented during the hearing, the children were not ready for visits with Father. If family reunification therapy was available in this case, it was not unreasonable for the Cabinet to fail to offer it in this situation because Father was not consistent with his mental health treatment and the children were terrified of him. We find no error.

CONCLUSION

Based on the foregoing, we find no error and affirm. The trial court properly terminated Father's parental rights to the children.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Erin S. Kennedy Startzman
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BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

Kate Morgan
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