

RENDERED: JANUARY 25, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000582-ME

K. H., SR., FATHER

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 11-AD-500127

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY; AND K. A. H., JR.,
AN INFANT

APPELLEES

OPINION VACATING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: K.H., Sr. appeals the Jefferson Circuit Court's February 24, 2012, order terminating his parental rights to his son, K.H., Jr. After careful review, we vacate and remand for further findings consistent with this opinion.

This action commenced on April 12, 2011, when the Cabinet for Health and Family Services (hereinafter the Cabinet) filed a petition for involuntary termination of parental rights against the natural mother, T.T., and the father, K.H., Sr., to the child, K.H., Jr. The Cabinet first became involved with K.H., Jr. (hereinafter the child) when a petition was filed on June 26, 2009, alleging that the child had been abused or neglected by his mother when she was incarcerated (hereinafter referred to as the DNA petition or action). That petition alleged that the child and siblings were left home alone for an unspecified time without proper adult supervision.

A temporary removal hearing in the DNA action was held on June 29, 2009. The mother was the only person named as the person alleged to have committed the abuse or neglect. K.H., Sr. was named as the father, but was not present at the temporary removal hearing and did not have an allegation of abuse or neglect made against him at that time. Further, there is no evidence that the father was served notice of the temporary removal hearing.

At the hearing, the mother entered a stipulation admitting that the child and her other children were abused and/or neglected. The child was committed to the Cabinet on November 4, 2009, and has remained in the Cabinet's custody since that time.

On April 19, 2010, the trial court entered an order addressing the child's severe emotional trauma and developmental concerns. The trial court stated that the child had been diagnosed with attachment disorder, RAD (Reactive

Attachment Disorder), sexual abuse, post-traumatic stress disorder, ADHD (Attention Deficit Hyperactivity Disorder), and neglect. In June 2010, the Cabinet changed the goal from reunification to adoption. In November 2010, Cassandra Taylor, the Cabinet worker assigned to this case, left the Cabinet, and Sara Morrison was assigned to the case.

Trial was held on the termination petitions on February 12, 2012. Prior to the start of testimony, K.H., Sr.'s attorney made a motion to continue the trial because her client was not present. The motion was denied by the court, and K.H., Sr. was called by telephone and asked to appear later in the day. His attorney stated that since he was out of state, he wanted to participate by telephone, but the trial court held that it could not properly determine his credibility in that manner.

The Cabinet called Ms. Morrison as its first witness. Ms. Morrison testified about the above dependency and neglect petition, detailing how the Cabinet became involved with this case. In the DNA petition, the trial court made specific findings regarding K.H., Sr. and the mother, including that there were no relatives in town to care for the child. The mother's stipulation stated that she was arrested for public intoxication and disturbing the peace and that the children were left without supervision, placing them at risk. She also stated that K.H., Sr. did not play a big role in the child's life at that time.

Ms. Morrison testified that case planning services were initiated by the Cabinet beginning in July 2009, and a total of six case plans were conducted.

Specifically, the first case plan included that the parents comply with service providers; follow any court orders; attend any therapy with the child; maintain stable housing and employment; pay child support; attend substance abuse treatment; attend visitation with the child; complete drug screens; maintain contact with the Cabinet at least two times per month; cooperate with the Cabinet; and follow any mental health recommendations.

After the child was committed to the Cabinet in November 2009, the DNA records reflect that K.H., Sr. did not attend any of the DNA proceedings regarding the child, except for one hearing on June 29, 2010. Ms. Morrison's testimony was unclear, however, as to whether there was conclusive proof that K.H., Sr. was aware of the proceedings taking place in the DNA action. Ms. Morrison testified that the case plans were not signed by K.H., Sr. and there had been no face-to-face interview with K.H., Sr.

Thus, in February 2011, Ms. Morrison mailed all of the previous case plans to K.H., Sr., because there was nothing in the record to indicate he had received them prior to that date. The case plans were sent to K.H., Sr. after the goal had been changed from reunification to adoption in June 2010.

The January 2011 case plan mailed to K.H., Sr. required that he was to pay child support and attend any assessments the Cabinet recommended once he contacted them. On April 4, 2011, K.H., Sr. filed a motion in the dependency action for return of custody of the minor child. However, on April 12, 2011, the

termination petition was filed, approximately two months after Ms. Morrison sent the case plans to K.H., Sr.

An updated case plan was developed on August 9, 2011, in which tasks were added requiring K.H., Sr. to provide proof that he could provide a safe, stable environment for the child. Ms. Morrison explained to K.H., Sr. that he needed to provide documentation of his employment, how long he had worked there, what his wages were, etc. She further instructed him on how to provide proof of a stable home, and she explained that this information was necessary in order for the Cabinet to determine that he could provide a stable home for the child. Ms. Morrison testified that she knew the Cabinet was going to object to K.H., Sr.'s motion for return of custody, so she modified the case plan to add more tasks in August 2011.

Ms. Morrison further testified that when the child came into the Cabinet's care, he was eight years old. At that time, he exhibited severe aggression and sexual acting out behaviors toward his younger brother and sister, was aggressive toward his foster parents, and defecated on himself and on the floor. He was in the third grade but was reading on a kindergarten level. She testified that the child now has an Individualized Education Plan (IEP), is in special needs classes at school, and attends therapy two times per month to address his mental health needs. His aggressive behaviors are almost nonexistent now; he no longer exhibits sexualized behavior; no longer defecates on himself or on the floor; and is

doing pretty well in general. The child is currently in a concurrent planning foster home where permanency through adoption is the ultimate goal.

Ms. Morrison's testimony revealed that K.H., Sr. reported being employed at the same facility for three years, but she testified that he had not provided proof of his employment to her via paystubs or through written documentation, as required by the case plan. Ms. Morrison also testified that K.H., Sr. advised her that he was paying child support, as wages were being garnished from his check. Ms. Morrison testified that she does not actually check the child support records and has no proof as to whether the child support was or was not being paid. Finally, Ms. Morrison testified that she was aware that K.H., Sr. wanted custody of his son, but never contacted an out-of-state custody worker in Ohio to cooperate with the Cabinet. Ms. Morrison's reason for not contacting a case worker in Ohio was that the goal had already been changed from reunification to adoption. With regard to visitation, Ms. Morrison testified that there was not a visitation schedule set up for K.H., Sr. to visit his son; however, a court order was obtained by K.H., Sr. in April 2012 for telephonic contact between the two.

K.H., Sr. also testified at the termination hearing. He testified that prior to the Cabinet's involvement, he saw the child approximately two times a month and was minimally involved in the child's life. Prior to splitting with the child's mother, K.H., Sr. claims he helped raise the child from birth through age five. He also testified that when he saw that the child was struggling in school, he obtained assistance from a tutor for the child.

K.H., Sr. stated that he was ready to take the child home that day and felt that it was a father's duty to care for his child. However, he testified as to a very limited understanding of the child's extensive behavioral issues and mental health needs. Further, he testified that he currently lives with his grandparents and has no stable home of his own. K.H., Sr. stated that the child could live at his grandparents' home with him. When asked why he could not get to court for the termination hearing, he stated that he had once again experienced car trouble.

After the termination hearing, the trial court entered findings of fact and conclusions of law and an order terminating the parental rights of both parents. The trial court found that the mother stipulated to the abuse and neglect allegations and failed to comply with her case plan by failing to attend alcohol counseling and treatment as required. The mother was never successful in regaining visitation or custody of this child or his siblings. Further, she has had her parental rights to two other children terminated. The trial court found that the father had failed to cooperate with service providers and maintain visitation with the child, had failed to provide proof that he could provide a stable home, and had failed to provide proof that he would ensure that the child's many mental health needs would be met.

The trial court found that the child's needs had been met by the Cabinet and that the child is expected to make even more improvement upon the termination of the parental rights of the mother and K.H., Sr. Based on these

findings, the trial court concluded that the child was abused and/or neglected and termination was in the best interests of the child. This appeal now follows.¹

The Kentucky termination statute, Kentucky Revised Statutes (KRS) 625.090, provides that a circuit court may involuntarily terminate parental rights if the court finds by clear and convincing evidence that a three-pronged test has been met. First, the child must be abused or neglected, as defined in KRS 600.020. *See* KRS 625.090(1)(a). Second, termination of parental rights must be in the child's best interest. KRS 625.090(1)(b). Third, the trial court must find that any one of a number of specified grounds exists supporting termination. KRS 625.090(2).

The trial court has a great deal of discretion in an involuntary termination of parental rights action. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998); *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977). The standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01, based upon clear and convincing evidence. *M.P.S.*, at 116. We will not disturb the findings of the trial court unless there exists no substantial evidence in the record to support them. *Id.*

On appeal, K.H., Sr. argues simply that the trial court did not have substantial evidence to support a finding of abuse and neglect as to him, and that it did not have evidence to support its determination that termination of his parental rights was in the child's best interest. We agree with K.H., Sr.

¹ T.T. has not appealed from the termination of her parental rights.

The first prong of the Cabinet's burden is to show by clear and convincing evidence that the child subject to this action is abused or neglected, as previously adjudged by a Court of competent jurisdiction or found to be abused or neglected in the present proceeding. *See* KRS 625.090(1)(a)(1) and (a)(2). We certainly agree that the Cabinet satisfied this burden with regard to the mother, T.T. However, under KRS 625.090(6), K.H., Sr. is entitled to have an independent decision of abuse or neglect specific to him.

As there had not been a prior determination of neglect or abuse on behalf of K.H., Sr. toward the child, the trial court would have had to make a determination of abuse or neglect in **this** proceeding. Simply put, it failed to do that. The trial court's order recites the extensive history and failures of the mother, but is mostly silent as to any actions or inactions by K.H., Sr. It appears to this Court that the trial court placed more reliance on the Cabinet's recommendation than the circumstances warrant. It appears that the mother's stipulation of abuse and neglect has impermissibly spilled over to the father, whose behavior must be adjudged separately and apart from that of the mother.

K.H., Sr. also argues that the trial court erred in its determination that termination of parental rights was in the child's best interest. Here, his argument is basically that the Cabinet did not give him an opportunity to show that he was capable of parenting the child and providing a stable home. He argues that the entire case focused on the mother and her inability to parent and care for the child. Again, we agree. Ms. Morrison's testimony in this case, while not indicative that

the father can in fact properly care for the child, did not establish that termination of the father's parental rights was in the child's best interest. It does not appear to this Court that the Cabinet made reasonable efforts to reunify the father with the child. Most importantly, it appears that any efforts were made **after** the goal had been changed to adoption, which defies logic. There is very little evidence provided by the trial court supporting the finding that termination of the father's parental rights was in the best interest of the child. Our standard of review requires substantial evidence, and the trial court simply fell short in this regard.

Because the trial court's finding of abuse or neglect by K.H., Sr. was not supported by substantial evidence, we vacate the trial court's findings of fact and conclusions of law and the order terminating the parental rights of K.H., Sr. to his son, K.H., Jr. We remand for further findings establishing neglect by K.H., Sr. and further findings that termination of K.H., Sr.'s parental rights was in the child's best interests.

ALL CONCUR.

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