

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-002093-ME

M.G.F., II

APPELLANT

v. APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 05-AD-00003

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN,
AS NEXT FRIEND OF M.C.F. AND V.N.F.

APPELLEES

OPINION
VACATING IN PART AND REMANDING

** ** * ** * **

BEFORE: ACREE, LAMBERT AND MOORE, JUDGES.

MOORE, JUDGE: M.G.F., II (M.G.F.), father of M.C.F. and V.N.F., appeals from an order and judgment of the Trigg Circuit Court in which the trial court involuntarily terminated M.G.F.'s parental rights. Because the trial court's finding that the Cabinet had provided reasonable services to M.G.F. was not supported by substantial evidence, we vacate that portion of the trial court's order and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal concerns the termination of the parental rights of R.M.F. and M.G.F. R.M.F., the mother, and M.G.F., the father, divorced in 2001. During their marriage, the parents had four children. After the divorce, M.G.F. took custody of the two oldest children and moved to Indiana, while R.M.F. took custody of the couples' two youngest daughters, M.C.F. and V.N.F., and remained in Trigg County, Kentucky.

In the spring of 2004, R.M.F. began dating Jeff West. From July through August, West began physically abusing R.M.F.'s youngest daughter, M.C.F., who was four years old at the time.¹ In the middle of September, the Cadiz Police Department learned of the abuse and began investigating the situation. The police contacted the Cabinet for Families and Children,² Department for Community Based Services (Cabinet). The Cabinet then began investigating the allegations of abuse. As a result of the Cabinet's investigation, the agency substantiated the claims of abuse, removed the girls from R.M.F.'s home and placed the children with R.M.F.'s parents.³

Not long thereafter, on October 19, 2004, the Cabinet took custody of the girls because the health of R.M.F.'s parents prevented them from caring for the children. Around the time the Cabinet took custody of the girls, the Cabinet contacted M.G.F., who was living in New Whiteland, Indiana. As a result of this contact, M.G.F. participated

¹ During this time, West struck M.C.F. numerous times, burned her, dropped her onto the floor and physically threw her into furniture, causing the child numerous injuries.

² The Cabinet for Families and Children is now known as the Cabinet for Health and Family Services.

³ Also as a result of the investigation, R.M.F. was convicted of complicity to commit criminal abuse in the first degree in July 2005 and was sentenced to serve six years in prison. Jeff West was convicted of criminal abuse in the first degree in August 2006 and was sentenced to serve six years in prison as well.

via telephone in the Cabinet's "five-day" conference regarding the children. Apparently, during that conference, M.G.F. informed the Cabinet that he was not able to take custody of the girls due to the fact that he was living with his mother at the time and did not have enough room for them. However, M.G.F. assured the Cabinet that he would secure a bigger home within ninety days so he could accommodate the girls. As a result, the Cabinet developed a case plan for reuniting the girls with M.G.F. Pursuant to the Cabinet's case plan, M.G.F. agreed to find a larger, alternative home within three months⁴ and agreed to maintain weekly contact with the girls by either telephone or letter. However, no evidence at the hearing in this matter illustrated that the Cabinet provided any services to M.G.F. to reunite him with his girls or that the Cabinet deemed that M.G.F. was not in need of any such services.

Despite the fact that M.G.F. only had two goals to accomplish, M.C.F. and V.N.F. were never placed with him; instead, they remained in foster care. Eventually, the girls were placed with Patsy Clark and Chuck Thompson. Clark and Thompson lived in Indiana, approximately twenty miles from M.G.F., and Clark was M.G.F.'s first cousin.

After the girls were placed with Clark, the Cabinet, on December 27, 2005, filed a petition with the Trigg Circuit Court to involuntarily terminate the parental rights of both parents. In due course, the circuit court held a final hearing regarding the Cabinet's petition on May 11, 2006, and both parents attended. At the hearing, the Cabinet called numerous witnesses in support of termination. R.M.F., however, presented no witnesses, and M.G.F. only presented his own testimony.

⁴ At this point, we note that the record does not disclose any explanation, other than M.G.F.'s claim that he could not take the girls at the time, for the Cabinet making this one of the goals of M.G.F.'s case plan. We are perplexed by this lack of explanation considering that 1) there is no evidence that M.G.F.'s residence at the time was unsuitable and 2) poverty alone is not a sufficient reason to remove a child from a parent's custody.

During the hearing, the girls' social worker testified that, from the time the girls entered the Cabinet's custody until the hearing dates, M.G.F. had only contacted the girls, by telephone, four times. The social worker testified that M.G.F. never visited the children while they were in the Cabinet's custody and that he provided no child support during that time, either. The social worker attested that she routinely maintained contact with M.G.F. After the girls had been with the Cabinet for seven months, M.G.F. informed the social worker that he was unable to find housing large enough to accommodate the girls as well as his two older children.

After the social worker testified, M.G.F. testified on his own behalf. Regarding housing, M.G.F. testified that, less than two weeks prior to the hearing, he had found a new, larger home, and claimed that he was scheduled to close on the house the day after the hearing. Regarding contact with the girls, M.G.F. admitted that he did not maintain contact with the girls as required by the case plan and admitted that he did not contact the social worker, but he claimed that he was denied access to the girls. M.G.F. claimed that it was his impression that the social worker would contact him, and he claimed that he had no knowledge regarding the girls' placements in foster care. Although M.G.F. blamed the social worker for his lack of contact with the girls, he admitted that the social worker had given him her telephone number but that he had lost it. He also admitted that he made no attempt to discover the social worker's number or contact her in anyway.

Approximately three months after the hearing, the trial court entered its order and judgment resolving the Cabinet's petition. Regarding M.G.F., the trial court made the following findings:

8. The father [M.G.F.], while not being a party to the infliction of abuse upon the children, has simply been a disappearing and neglectful father through the whole process. [M.G.F.] has for a period of not less than six months failed to provide the necessities of life which are reasonably necessary for the children's welfare.

9. The case plan established by the Cabinet for [M.G.F.] required him to maintain contact with the children and to obtain his own permanent residence. He failed to do this as well as failed to maintain contact with the children as required by the Cabinet up until immediately prior to the hearing on this matter. In other words, as a father he has neglected his children in their time of maximum need. The Court does not doubt his sincerity in his late attempt to reestablish a relationship with his children, but he failed to provide essential parental care and protection and therefore neglected their welfare and interest. Any potential or reasonable expectation of significant improvement in his conduct in the immediate foreseeable future comes only after the goal was shifted from unification to adoption.

. . .

13. The Court further finds by clear and convincing evidence that the Respondent/father [M.G.F.] has abandoned the children for a period of at least ninety days in accordance with KRS 625.090(2)(a).

14. The Court finds by clear and convincing evidence that for a period of not less than six months, both parents have repeatedly and continuously failed or refused to provide necessary care and protection to these children.

15. The Cabinet for Families and Children has prior to the filing of this petition rendered or attempted to render all reasonable services to the parents which reasonably might be expected to bring about a reunion of the family.

The trial court concluded its order and judgment by terminating R.M.F.'s and M.G.F.'s parental rights.

II. STANDARD OF REVIEW

This Court's 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, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings.

M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116 (Ky. App. 1998)(citation omitted).

III. ANALYSIS

In his appellate brief, M.G.F. points out that, because the girls were in the Cabinet's custody, the trial court was required, pursuant to Kentucky Revised Statute (KRS) 625.090(3)(c), to find by clear and convincing evidence that the Cabinet made all reasonable efforts to reunite him and the girls. Furthermore, M.G.F. points out that "reasonable efforts," as defined by KRS 620.020, mean the Cabinet exercised ordinary diligence and used all the preventative and reunification services available to the community. The trial court found that the Cabinet had rendered or had attempted to render all reasonable services to both parents. However, M.G.F. claims that this finding was not supported by substantial evidence in reference to him because the record discloses no evidence regarding the services offered by the Cabinet to reunite him with the girls.

According to KRS 625.090(1), a trial court may only involuntarily terminate a person's parental rights to a named child if the court finds by clear and convincing evidence that: 1) the child has been adjudged as abused or neglected as defined by KRS 600.020(1); and 2) termination would be in the child's best interest. As part of the trial court's best interest analysis, one factor that must be considered is "[i]f the child has been placed with the cabinet, whether the cabinet has, prior to the filing of

the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents[.]” KRS 625.090(3)(c).

In this case, the Cabinet formulated a case plan for M.G.F. that called for him to obtain alternative housing. While the Cabinet devised this goal for M.G.F., the girls’ social worker did not testify regarding *any* services offered to M.G.F. to assist him in achieving this goal or to otherwise help reunite him with his girls. As it stands, the record contains no evidence one way or the other regarding this issue. Thus, when the circuit court specifically found that the Cabinet had provided or attempted to provide reasonable services to the parents, that finding in regard to M.G.F. was not supported by any evidence, substantial or otherwise. This leaves us no choice but to vacate that portion of the circuit court’s order terminating M.G.F.’s parental rights.

This brings us to M.G.F.’s other assignments of error, which we will address briefly. M.G.F. avers that the trial court found that he had abandoned the girls for at least ninety days and found that, for a period not less than six months, he failed or refused to provide essential parental care and protection. According to M.G.F., neither of these findings was supported by substantial evidence.

We disagree with M.G.F.’s interpretation of the evidence regarding these findings. The record discloses that, from October 2004 until May 2006, M.G.F. engaged in a total of four telephone conversations with his daughters, M.C.F. and V.N.F., despite agreeing, in the Cabinet’s case plan, to contact them on a weekly basis. During this time, M.G.F. did not attempt to visit his children even after they were placed with M.G.F.’s cousin a mere twenty miles away from his home. Furthermore, the record shows that

M.G.F. made no attempt to stay in contact with the girls' social worker in order to learn either their location or status.

Regarding M.G.F.'s failure to provide essential parental care and protection, the record also reveals that from October 2003 until the final hearing in May 2006, M.G.F. made no attempt to provide financial support for his daughters.⁵ This evidence coupled with the evidence discussed *supra* constitutes substantial evidence to support the trial court's finding that M.G.F. failed, for a period of not less than six months, to provide essential parental care and protection to his estranged daughters.

We agree with a majority of the trial court's findings. However, as analyzed *supra*, there was no evidence to support the trial court's specific finding that the Cabinet provided reasonable services to M.G.F. for reunification. Perhaps, the Cabinet did not believe services were necessary. If this is so, this evidence needs to be presented to the trial court and would buttress the finding of abandonment, i.e., a capable parent who simply refused to be a parent for an extended period of time. Additionally, because KRS 625.090(3)(c) includes that if circumstances enumerated in KRS 610.127 are met for not requiring reasonable efforts, the trial court certainly may consider this.

Unfortunately, without this evidence, we have no foundation on which to affirm the trial court on this issue. Because this is a factor to be considered under the best interests standard of KRS 625.090(3) and because no evidence was presented on this issue, the matter must be remanded for an evidentiary hearing on KRS 625.090(3)(c).

Accordingly, this matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

⁵ We note that, at the final hearing, M.G.F. claimed that, prior to October 2003, he sporadically paid R.M.F. an unspecified amount of child support.

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