

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002277-MR

J.T.S.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA SANDERSON, JUDGE
ACTION NO. 02-AD-00007

T.S.S.;
D.S.S., a minor child; and
T.G.S., a minor child

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

EMBERTON, CHIEF JUDGE. J.T.S. appeals from an order terminating his parental rights to his two children, D.S.S., born January 1, 1994, and T.G.S., born January 9, 1998. The circuit court found that J.T.S. abused the children, failed to provide parental support, and abandoned the children for a period of not less than ninety days. We affirm.

J.T.S.'s former wife and mother of the children, T.S.S., initiated this action in February 2002. J.T.S. is incarcerated serving a ten-year sentence for burglary first degree, and a twelve-month sentence for terroristic threatening to be served concurrently. The events leading to J.T.S.'s incarceration occurred in August 1998 when J.T.S., with three other men, wearing ski masks, camouflage gear, and carrying shotguns, broke into a home where T.S.S. and the children were spending the night. T.S.S. testified that while she held the children in her arms, J.T.S. held a gun to her head and threatened to kill her. At the termination hearing, J.T.S. admitted that he should have handled the situation differently.

The evidence reveals that J.T.S. engaged in a pattern of abusive behavior that subjected the children to physical harm. Although J.T.S. denies that he endangered the children, there is testimony to the contrary, including an incident when he flipped T.S.S. and the oldest child off a mattress, took the mattress outside, and set it on fire. T.S.S. also testified as to incidents of abuse inflicted by J.T.S. in the children's presence. Additionally, there was testimony from T.S.S. and her mother that J.T.S. did not provide for the family financially and that at times there was no food or electricity in the house.

J.T.S. testified that, except for the act for which he is incarcerated, he did not abuse T.S.S. either in the presence

of the children or otherwise. He testified that he worked and provided for the children. An affidavit submitted by J.T.S.'s parents corroborated his testimony.

KRS¹ 625.090 sets forth grounds for termination of parental rights and requires a finding that the child is, by clear and convincing evidence, an abused or neglected child and that termination is in the child's best interest. The standard of review in parental rights termination cases is stated in M.P.S. v. Cabinet for Human Resources:²

The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. Department for Human Resources v. Moore, Ky. App., 552 S.W.2d 672, 675 (1977). 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. V.S. v. Commonwealth, Cabinet for Human Resources, Ky. App., 706 S.W.2d 420, 424 (1986).

"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." Rowland v. Holt, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

¹ Kentucky Revised Statutes.

² Ky. App., 979 S.W.2d 114, 116-117 (1998).

J.T.S. is correct when he argues that incarceration alone is insufficient to terminate parental rights.³ However, other than J.T.S.'s incarceration, there is more than adequate evidence to support the trial court's findings. Despite J.T.S.'s vehement denial, there was convincing evidence that J.T.S.'s terrorist-style attack in August 1998 was not an isolated one and that he engaged in a pattern of abuse during his relationship with T.S.S. Many of the violent incidents were not only directed at T.S.S. but also at the children and occurred in their presence. Additionally, there was persuasive testimony that J.T.S. consistently failed to provide financial support for his family. Given the age of the children and J.T.S.'s history, there is little hope that continuing the parental relationship would benefit the children.

Finally, J.T.S. maintains that his guardian ad litem did not provide him effective assistance of counsel. An action to terminate parental rights is a civil matter thus, contrary to what appears to be the theory advanced by J.T.S., the relief from judgment afforded under RCr⁴ 11.42 has no application. The alleged erroneous admission of hearsay testimony is not properly preserved for this court's review.⁵

³ J.H. v. Cabinet for Human Resources, Ky. App., 704 S.W.2d 661 (1985).

⁴ Kentucky Rules of Criminal Procedure.

⁵ See Kesler v. Shehan, Ky., 934 S.W. 2d 254 (1996).

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE:

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