

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT KNOXVILLE

FILED

May 28, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
DEPT. OF HUMAN SERVICES,)

Plaintiff/Appellee,)

VS.)

GEORGE LEWIS KERSEY and)
TERESA MARIE KERSEY,)

Defendants/Appellants.)

Bradley Juvenile No. 5989
Appeal No. 03A01-9507-JV-00211

APPEAL FROM THE JUVENILE COURT OF BRADLEY COUNTY
AT CLEVELAND, TENNESSEE
THE HONORABLE C. VAN DEACON, JR., JUDGE

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REVERSED AND REMANDED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

George and Teresa Kersey appeal the decision of the Bradley County Juvenile

Court which terminated their parental rights to Edward Kersey, born January 3, 1988; Crystal Kersey, born January 17, 1990; and twins April and Erica Kersey, born May 4, 1992. The lower court awarded custody to the Tennessee Department of Human Services ("DHS"), Appellee.

There is no question that both George and Teresa Kersey have serious drinking problems. There is also little question that the Kerseys' alcohol abuse was the basis for the lower court's termination of their parental rights. George has been arrested three times for driving under the influence of alcohol. Teresa has been arrested several times for public drunkenness, and twice for driving under the influence of alcohol. The second time Mrs. Kersey was arrested for driving under the influence of alcohol, July 2, 1992, she had all four of her children in the automobile. It was after this incident that the Kerseys' extensive involvement with DHS began.¹

As a result of Teresa Kersey's arrest on July 2, 1992, DHS received temporary custody of the four Kersey children. At a preliminary hearing held July 9, the court granted the Kerseys physical custody of the children although DHS maintained legal custody. On July 20, 1992, DHS developed a foster care plan. The foster care plan required the Kerseys to attend alcohol and drug counseling at Turning Point counseling center, to refrain from having alcohol in the house, to refrain from consuming alcohol, to develop a support system, and to attend therapy sessions addressing marital problems, stress relief, and parenting skills.

In late August, 1992, Mrs. Kersey began a 45 day jail sentence as a result of her July 1992 conviction for driving under the influence of alcohol.² During her jail term, Mrs. Kersey completed a five week drug and alcohol rehabilitation program through the Council

¹DHS received referrals concerning the Kerseys on January 16, 1991, in May of 1992, and on June 24, 1992. After the January 16, 1991 referral, the Kerseys agreed to seek counseling for alcohol abuse; however, they ceased treatment after several sessions. The record contains no evidence that the May and June, 1992, referrals were substantiated by DHS. For the purpose of this appeal, we consider DHS's involvement with the Kerseys beginning on July 2, 1992.

²DHS took physical custody of April and Erica Kersey at this time, while Mr. Kersey retained custody of the two older children. Mr. Kersey was unable to care for the younger children and maintain full time employment. DHS returned April and Erica to their parents' home in November, 1992.

for Alcohol and Drug Abuse Services, Inc. ("CADAS").

As a result of allegations that Mrs. Kersey was consuming alcohol, DHS again took physical custody of April and Erica on February 19, 1993. DHS permitted the older children, Edward and Crystal, to remain in the home under a safety plan. The safety plan required Mr. and Mrs. Kersey to refrain from the use of alcohol, to send the children to day care, to accept Home Ties and homemaker services, and to attend weekly counseling and Alcoholics Anonymous meetings

On May 11, 1993, DHS removed Edward and Crystal from the home due to a neighbor's allegation that Mrs. Kersey had been drinking. On May 23, 1993, Mr. Kersey was arrested for driving under the influence of alcohol. At a hearing held June 1, 1993, the court found that Mr. and Mrs. Kersey had failed to comply with the court's order of February 26, 1993, prohibiting alcohol use. The court granted DHS temporary physical custody of all four children.

Between June 1993, and February 1994, DHS gradually increased the Kersey children's home visits, eventually permitting overnight visits in December of 1993. However, on February 10, 1994, DHS filed a motion to terminate unsupervised visits based on two allegations that Mrs. Kersey was drinking. DHS's motion was heard on March 18, 1994, at which time the court ordered that DHS request random blood alcohol testing. The court permitted the Kersseys to have three hours of unsupervised visitation per week, subject to the requirement that the Kersseys' blood alcohol tests showed no alcohol use. Mrs. Kersey tested zero on a blood alcohol test administered April 8, 1994, but her blood alcohol test administered April 27, 1994, showed a result of .164. DHS did not request that Mr. Kersey undergo blood alcohol tests at this time.³ As a consequence of Mrs. Kersey's positive blood alcohol test, DHS reduced the Kersey's time with their children to one hour of supervised visitation per week.

³The record reveals no instance in which George Kersey tested positive for alcohol use in a court ordered blood alcohol test.

On August 8, 1994, Mrs. Kersey voluntarily entered Reality House, a drug and alcohol halfway house, as recommended by her counselor at Turning Point. At this time, DHS increased Mr. Kersey's visitation with the children. On August 19, 1994, after smelling alcohol on Mrs. Kersey, a Reality House counselor asked Mrs. Kersey to submit to a urine test. She refused, and left the house. Mrs. Kersey called Reality House two days later and attempted to re-enter the program. However, she denied that she had been drinking on August 19. Mrs. Kersey's denial led to an argument, which caused the counselor to terminate their conversation. Mrs. Kersey did not return to Reality House.

On September 30, 1994, DHS filed a motion to stop visitation between Mr. and Mrs. Kersey and their children. This motion was based on Mr. Kersey's arrest for driving under the influence of alcohol, third offense, on September 16, 1994, and allegations that Mrs. Kersey smelled of alcohol during a September 28, 1994 visit with the children. The court granted DHS's motion. On October 5, 1994, DHS filed a petition to terminate the Kerseys' parental rights.

Mrs. Kersey voluntarily became an outpatient at Greenleaf Center, a psychiatric and chemical dependency hospital, on October 20, 1994. William Westerfield, the counselor who treated Mrs. Kersey at Greenleaf, testified that Mrs. Kersey faithfully attended the intensive outpatient program, eventually graduating to aftercare. When she was released on November 29, 1994, the Greenleaf Center gave Mrs. Kersey a prognosis of "good."

Prior to a scheduled Christmas visit with their children, George and Teresa took a court ordered blood alcohol test on December 21, 1994. Mrs. Kersey tested .033. Mr. Kersey's test result indicated no alcohol use.

On January 25 and 26, 1995, a final hearing was held to determine whether the Kerseys' parental rights should be terminated. The court found that termination was in the best interests of the four minor children.

LAW

The lower court determined that the evidence supported termination of parental rights pursuant to T.C.A. § 37-1-147(d) (Michie 1991). That section provides, in pertinent part:

After hearing evidence on a termination petition, the court may terminate parental rights if it finds on the basis of clear and convincing evidence that termination is in the child's best interest and that one (1) or more of the following conditions exist:

(1) The child has been removed from the custody of the parent by the court for at least one year and the court finds that:

(A) The conditions which led to the removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's return to the care of the parent(s) still persists;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be returned to the parent in the near future; and

(C) The continuation of the legal parent and child relationship greatly diminished the child's chances of early integration into a stable and permanent home . . .

The trial court also found that termination of parental rights was proper under T.C.A. § 37-2-403(a)(2) (Michie 1991 & Supp. 1995). That statute provides, in pertinent part:

The plan for any child in foster care shall include a statement of responsibilities between the parents, the agency and the caseworker of such agency. Such statement shall include the responsibilities of each party in specific terms and shall be reasonably related to the achievement of the goal [of, in the present case, returning the child to the parent] . . . Substantial noncompliance by the parent with the statement of responsibilities provides grounds for the termination of parental rights, and notwithstanding other statutory provisions for termination of parental rights, and notwithstanding the failure of the parent to sign or to agree to such statement if the court finds the parent was informed of its contents, and that the requirements of the statement are reasonable and are related to remedying the conditions which necessitate foster care placement.

The standard of review of a trial court's decision terminating parental rights is *de novo* upon the record with the presumption of correctness of the findings of fact by the trial court. In re Drinnon, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988); Dep't of Human Servs. v. Riley, 689 S.W.2d 164, 170 (Tenn. Ct. App. 1984). Because the rights of parents to the companionship, care, custody and management of their children are a fundamental liberty interest warranting great deference and [vigilant] protection under the law, Stanley v. Illinois, 405 U.S. 645, 92 S. Ct.1208, 31 L. Ed.2d 551 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), proceedings which would irreversibly terminate a parent's rights must comport with the highest standard of due process.⁴ Lassiter v. Department of Social Services, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

This Court will only terminate parents' rights to the care and custody of their children if there is clear and convincing evidence justifying such termination. T.C.A. § 37-1-147(d); Riley, 689 S.W.2d at 165 (citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed.2d 599 (1982)). Clear and convincing evidence is evidence which is more exacting than the preponderance of the evidence standard, but which does not require the level of certainty necessary for the beyond a reasonable doubt standard. O'Daniel v. Messier, 905 S.W.2d 182, 188 (Tenn. App. 1995). It is evidence which "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." Id.

The overriding consideration in cases concerning termination of parental rights is what is in the best interest of the child. Riley, 689 S.W.2d at 169. T.C.A. § 37-1-147(e) (Michie 1991) provides guidelines to assist this Court in determining whether termination is in a child's best interests:

⁴Counsel for the Kerseys argues that due process was violated at the Kerseys' termination hearing. This allegation is based on the fact that Judge C. Van Deacon, who presided over the termination proceeding, issued an order in this case on June 1, 1993, which stated that DHS "shall pursue termination of parental rights should the parents continue to abuse alcohol." We agree with counsel that the fact that Judge Van Deacon called for the institution of termination proceedings, and then presided over the final termination hearing, may have been improper. See Code of Judicial Conduct, Rules of the Supreme Court, Rule 10, Cannon 3(C). However, the record contains no evidence that counsel objected to Judge Van Deacon presiding over the termination proceedings, see Dupis v. Hand, 814 S.W.2d 340, 342 (Tenn. 1991), nor do we find evidence of fundamental unfairness in the termination proceeding.

(1) Whether the parent has made such an adjustment of circumstances, conduct or conditions as to make it in the child's best interests to return home in the foreseeable future;

(2) Whether the parent has failed to effect a lasting adjustment after reasonable efforts by available social agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether there is brutality, abuse or neglect toward other children in the family;

(4) Whether there is such use of alcohol or controlled substances as may render the parent consistently unable to care for the child;

(5) Whether the parent has paid a reasonable portion of substitute physical care and maintenance when financially able to do so;

(6) Whether the parent has maintained regular visitation or other contact with the child which was designed and implemented in a plan to reunite the child with the parent.

I.

We first consider the trial court's ruling that termination of parental rights was proper pursuant to T.C.A. § 37-1-147(d). DHS initially removed the Kersey children not because George and Teresa Kersey are alcoholics, but because they endangered their children as a result of alcohol impaired judgment. We recognize that alcoholism is a very serious disease; however, we are not willing to find that an alcoholic parent is, *per se*, an unfit parent. Thus, while alcoholism itself does not provide a statutory basis for termination of parental rights, the potential effects of a parent's alcoholism, such as neglect or abuse, may provide grounds for termination. Under T.C.A. § 37-1-147(d), we must determine whether the effects of the Kersey's alcoholism, which caused the children's removal, persist and, if so, whether it is likely that the prohibited behavior will cease in the near future.

Testimony at trial indicated that, despite Mr. and Mrs. Kerseys' problems with alcohol, these parents cared for their children's physical environment, medical needs, and educational needs. The record reveals that the children were attached to their parents, even after long periods in foster care. Several DHS employees testified that Mrs. Kersey

was a good parent who related well to her children. The testimony was clear that, despite her drinking problem, Mrs. Kersey had good housekeeping skills and her children were well nourished and properly clothed. The record contains no substantiated evidence of physical or sexual abuse.⁵ Although DHS employees testified that the Kersey children have been traumatized, the evidence indicates that the children's emotional problems are due to their removal by DHS as well as to their parents' alcoholism. Any abuse, in the form of endangerment or neglect, that these children suffer results not from direct mistreatment by their parents, but from their parents self-abuse, caused by alcohol addiction.

The Kersseys have participated in a number of alcohol rehabilitation programs. It is apparent to this Court, as it was to Judge Van Deacon, that the Kersseys, particularly Teresa Kersey, were not immediately successful in defeating their alcoholism. However, the evidence shows that the Kersseys have made attempts at sobriety. They have attended Alcoholics Anonymous meetings since August, 1992, though at times sporadically. Both George and Teresa participated in alcohol abuse counseling at Turning Point counseling center. Their counselor reported slow progress initially, with periods of significant improvement as well as periods of relapse. Mrs. Kersey attempted three long term alcohol rehabilitation programs, completing two. Mrs. Kersey testified at trial that she was a recovering alcoholic. However, her blood alcohol test little more than a month earlier indicated that she had been drinking (positive result of .033). At the time of trial, Mrs. Kersey was active in an outpatient alcohol rehabilitation program through Greenleaf counseling center.

George Kersey also testified that he was a recovering alcoholic. He testified that he had not consumed alcohol since September, 1994. Mr. Kersey participated in a 30 day inpatient alcohol treatment program through CADAS. At the time of trial, Mr. Kersey was involved in outpatient alcohol rehabilitation counseling at Another Chance. His counselor, Patricia Miller, testified that Mr. Kersey put a great deal of effort into the rehabilitation

⁵Sandra Holder, a former Bradley County DHS case worker, testified that Mrs. Kersey alleged that Mr. Kersey sexually abused Crystal. This allegation is completely unsubstantiated in the record. Ms. Holder stated that the CPI intake unit investigated Mrs. Kersey's allegation; however, the results of the investigation are not before us.

program.

After carefully reviewing the extensive record in this case, we find that the evidence is not clear and convincing that the best interests of these children require termination of the Kerseys' parental rights. We emphasize that "[t]here is no judicial determination which has more drastic significance than that of permanently severing a natural parent-child relationship. It must be scrutinized deliberately and exercised most cautiously. When we do this, we make a decision on human frailties and their consequences." McCormick v. Dep't of Human Resources, 161 Ga. App. 163, 164, 288 S.E.2d 120 (1982).

We do not find, nor does counsel cite us to, any Tennessee decision concerning termination of parental rights with facts similar to the case at bar. Unlike so many of the cases involving termination of parental rights, this case does not involve parents who have sexually or physically abused their children, nor is there a question of significant neglect. See, e.g. Dep't of Human Servs. v. Hauck, 872 S.W.2d 916 (Tenn. Ct. App. 1993); In re Drinnon, 776 S.W.2d 98 (Tenn. Ct. App. 1989); Dep't of Human Servs. v. Riley, 689 S.W.2d 164 (Tenn. Ct. App. 1984); Dep't of Human Servs. v. Tate, No. 01-A-01-9409-CV-00444, 1995 WL 138858 (Tenn. Ct. App., W.S. Mar. 31, 1995); Dep't of Human Servs. v. Roberts, No. 03A01-9408-CV-00282, 1995 WL 129189 (Tenn. Ct. App., E.S. Mar. 28, 1995); Dep't of Human Serv. v. Adams, No. 03A01-9403-CV-00114, 1994 WL 579911 (Tenn. Ct. App., E.S. Oct. 24, 1994). These children are well fed and properly clothed. When DHS initially became involved with the Kerseys, all four children were on a developmental level commensurate with their respective ages. The Kerseys' home is adequate and properly furnished. Mr. Kersey maintains full time employment.

We do not question that, as a result of their parents' alcoholism, these children have been harmed and, on at least one occasion, endangered.⁶ However, T.C.A. § 37-1-

⁶In the series of events between the Kersey family and DHS which lead to the present termination proceeding, the greatest endangerment occurred on July 2, 1992, when Mrs. Kersey drove her car while under the influence of alcohol, with her children as passengers. DHS removed the children for two days after this incident. We realize that DHS did not approve of Mrs. Kersey's conduct; however, even after this act of endangerment, DHS did not find that the best interests of these children required that the children remain in DHS's physical custody.

147(e)(4) indicates that termination is proper where a parent(s) is *consistently* unable to care for their children because of alcohol abuse. Additionally, T.C.A. § 37-1-147(e)(2) states that termination is warranted where a lasting adjustment "does not reasonably appear possible." The testimony presented by the State fails to establish that the Kerseys, particularly George Kersey, were *consistently* unable to care for their children due to their alcoholism. We are also unable to conclude, based on the efforts the Kerseys have made to overcome their alcohol addiction, that a lasting adjustment is "not reasonably possible."

We hold that the record before us does not present the statutory elements required to terminate parental rights. We have "serious and substantial doubt" concerning the lower court's decision that these children would be best served by being separated from their parents and, in all likelihood, each other. The evidence is not clear and convincing that there is "little hope for improvement," nor are we convinced that this family cannot be reunited in the near future.

II.

The lower court found that the Kerseys failed substantially to comply with the foster care plan established by DHS. To the contrary, we find that the Kerseys made substantial efforts to fulfill the requirements of their foster care plan. The Kerseys' efforts to overcome their addiction to alcohol are discussed *supra*. We reiterate that the Kerseys' inability to cure their addiction immediately, as required by DHS's foster care plan, does not convince us that George and Teresa Kersey will not be able to overcome their problem in the future.

In addition to refraining from alcohol use, the foster care plan required the Kerseys to establish a support system. There was testimony at trial that Mrs. Kersey received counseling from her pastor at Saint Therese Catholic Church, as well as from a church counselor. Mrs. Kersey also receives spiritual counseling from the Family Worship Center. Mr. Kersey testified that, since the children have been removed from their home, he and Mrs. Kersey have become closer, relying more on each other for support. The Kerseys

attended parenting classes, as required by the foster care plan. The Kerseys also took part in family counseling, another plan requirement, through CADAS.

Counsel for DHS cites this Court to two unpublished cases in which parents failed substantially to comply with a foster care plan established by DHS. We find both cases distinguishable from the case at bar. In Department of Human Services v. Himes, 1988 Tenn. App. LEXIS 465 (July 22, 1988), only the children's father appealed the lower court's decision to terminate parental rights. In Himes, the foster care plan called for the father to visit his children, to contribute money for their support, to maintain communication with DHS, to find adequate housing and supervision for the children, and to maintain regular employment. Mr. Himes never obtained adequate housing. He changed employment often and failed to keep in contact with DHS. Mr. Himes rarely visited his children and paid very little support. When DHS first came into contact with the Himes' children, they were unclean and had matted hair and soiled clothes. These children "described their life with their father in such terms as having to cook for themselves, being dirty, with people laughing at them . . . and have made it clear that they do not want to return to their father." Id. at *2.

In Department of Human Services v. Griffith, No. 01A01-9303-CV-00128, 1993 Tenn. App. LEXIS 636 (Sept. 29, 1993), DHS established a foster care plan that required the defendant to receive mental health counseling, obtain housing, find employment, cooperate with homemaker services, and visit her children regularly. The foster care plan also required the defendant to attend her children's Child Intervention Program ("CHIPS") classes, which focus on behavior modification.

The defendant attended 22 of 55 scheduled mental health sessions. She testified that her failure to attend these sessions was due to a "lack of effort." Id. at *2. The defendant attended 36 out of 129 CHIPS sessions with one daughter, and 36 out of 97 CHIPS sessions with another daughter. The defendant failed to cooperate with homemaker services, and visited with her children 68 times in close to three and one half

years, missing 45 scheduled visits. Id.

Unlike the parents in Himes and Griffith, the Kerseys have made marked, if imperfect, efforts to comply with their foster care plan. Pursuant to T.C.A. § 37-2-403(a)(2), *substantial noncompliance* with the terms of a foster care plan establishes grounds for termination of parental rights. We hold that *substantial noncompliance* does not exist in the present case.

CONCLUSION

This Court is not convinced that George and Teresa Kerseys' parental rights should be terminated. We emphasize that "it is one thing to say to parents that they are deprived of custody; but it is an altogether different thing to say that they are no longer parents." Riley, 689 S.W.2d at 172 (Nearn, J., dissenting opinion).

The lives of George and Teresa Kersey, as well as the lives of their young children, have been seriously damaged by the affliction of alcoholism. We admonish these parents, however, that alcoholism is an affliction which many have overcome. While this court does not find, at present, that the Kerseys' alcohol addiction warrants termination of their parental rights, we would not hesitate so to find at a later date should their behavior, affected by alcohol abuse, continue to endanger the lives of their children.

Upon remand, we direct the trial court to hold a hearing to determine what progress, if any, the Kerseys have made in overcoming their alcoholism. If Mr. and Mrs. Kersey, together or individually, have made no attempt to end their abuse of alcohol, then DHS may institute termination proceedings as to either one or both parents. If, however, the lower court finds that these parents have made reasonable efforts to combat their addiction, then DHS shall formulate a new foster care plan and continue to make all reasonable efforts to reunite this family. Should DHS implement a new foster care plan, we direct the trial court to set a date for review of this case within three months of the plan's implementation, and periodically thereafter, as is necessary to determine what

progress is being made in reuniting these children with either or both of their parents.

For the reasons stated herein, we hereby reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion. Costs are adjudged against the appellee.

HIGHERS, J.

CONCUR:

CRAWFORD, P.J., W.S.

FARMER, J.