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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000061-ME

S.P. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NOS. 13-AD-500353 AND 13-AD-500354

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
K.L.P., A MINOR CHILD; AND
K.M.P., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND STUMBO, JUDGES.

JONES, JUDGE: This appeal concerns an order entered by the Family Division of the Jefferson Circuit Court ("family court") terminating the parental rights of S.P.

("Mother") as related to her two minor children, K.L.P and K.M.P ("Children").[1] For the reasons set forth below, we affirm.

I. Background

Mother and Father are married and have been during all relevant times.[2] During their marriage, the couple had two children: a daughter born in February of 2008 and a son born in April of 2009. Children resided with Mother and Father until November 8, 2012. On that date, the Louisville Metro Police Department received several complaints about a reckless driver in the Lexington Road and Payne Street area of Louisville, Kentucky. A short time later, the police received a report concerning a vehicle in the parking lot of a food mart in the same area. Upon arrival, the police noted that the vehicle matched the description of the vehicle in the reckless driving reports. The police found Mother and Father passed out in the front of the vehicle and Children, who were three and four at that time, unrestrained in the backseat.

Father was unconscious in the driver's seat. The car was in drive and Father's foot was on the brake. Mother was in the passenger's seat. Mother and Father were not easily roused. At one point, the vehicle began rolling backwards before the police were able to get it into park. The officers on the scene eventually got all of the occupants out of the car. Police described Mother as "being out of it," barely able to stand, and unable to clearly communicate. Police also described

[1] The order also terminated the parental rights of Children's father, K.L.P. However, only Mother has filed an appeal.

[2] Mother and Father were not residing together at the time of the termination hearing.

Father as appearing to be severely impaired.[3] Mother and Father were arrested. Children's maternal grandmother, Vickie Marion, was called to pick up Children.

Soon thereafter, Marion alerted the Cabinet for Health and Family Services ("Cabinet") that she did not believe that she was able to properly care for Children. On November 14, 2012, the family court issued an Emergency Custody Order removing Children from Marion's care and placing them in the Cabinet's custody and control.

Thereafter, the Cabinet filed petitions alleging that Children were abused and neglected children as a result of their parents' ongoing substance abuse and related failure to provide adequate care and protection ("DNA proceedings"). On November 19, 2012, the family court placed Children in the Cabinet's temporary custody. The family court also entered a remedial order directing Mother and Father to take certain actions with the hopes that the family could eventually be reunited. Specifically, Mother and Father were ordered to: 1) attend protective parenting classes; 2) undergo substance abuse assessments; 3) take part in random drug screens; 4) remain clean and sober; 5) have supervised visitation with Children for so long as they were compliant with court orders; 6) neither use or nor threaten corporal punishment of Children; and 7) cooperate with the Cabinet and with all treatment and service providers and follow their recommendations.

On January 29, 2013, the family court found that Children were abused and neglected within the meaning of KRS[4] 600.020(1). This finding was

[3] A subsequent blood test revealed the presence of a narcotic and a depressant.
[4] Kentucky Revised Statutes.

based on a written stipulation filed by Mother and Father indicating that "children were placed at risk due to parents' drug/substance abuse issues[;] children were unrestrained in car when police approached automobile [and] not in proper car seats at the time." Children were ordered to remain in the Cabinet's custody with the goal being eventual reunification with Mother and Father.

The family court conducted a follow-up proceeding in the DNA action on March 19, 2013. Neither Mother nor Father appeared at this proceeding. As a result, the family court suspended Mother and Father's supervised visitation pending compliance with all court orders and two consecutive negative drug screens.

After Mother and Father failed to maintain contact with the Cabinet for a substantial period of time, complete any of the ordered assessments and classes, submit to drug screens, and maintain contact with Children, the Cabinet changed the permanency plan from reunification with Mother and Father to adoption.

On September 4, 2013, the Cabinet filed a petition for involuntary termination of parental rights. Therein, the Cabinet alleged that Mother and Father had failed to protect and preserve Children's fundamental rights, failed to provide a safe and nurturing home for Children, abused or neglected Children as defined in KRS 600.020, and that termination of Mother and Father's parental rights was in Children's best interests. A guardian ad litem was appointed to represent Children's rights and separate counsel was appointed for both Mother and Father.

On October 2, 2014, the family court conducted a bench trial in this matter. The following witnesses testified at the trial: Officer Steven McAtee; Officer Ronald Pugh; Brittany Pape, a licensed therapist with Seven Counties; Margaret McKinley, the Cabinet's caseworker; Mother; Father; and Vickie Marion, Children's maternal grandmother.

Officers McAtee and Pugh were two of the officers dispatched to the food mart to investigate on November 8, 2012. They described their observations of Mother, Father, and Children. Specifically, Officer McAtee noted that Children were in the backseat of the car, unrestrained, and leaning out the windows when he arrived. He testified that he discovered the car was still in drive, that he had difficulty rousing Mother and Father, and that the car began to roll while the officers were trying to wake Mother and Father and get the vehicle into park. He further testified that he interacted with Mother after she was awakened. He testified that she could hardly keep her eyes open, speak, or stand up. Based on his personal experience and expertise, he believed her to be severely impaired. Officer Pugh testified that based on his experience as a drug recognition officer, and after having conducted field sobriety tests, he determined that Father was intoxicated or impaired by some substance.

Brittany Pape, a licensed therapist with Seven Counties, testified that she provided therapeutic services to Children following their removal from Mother and Father. She testified that for approximately two months, she met with Children together, three to four times a month for an hour a time. She testified that

during their time with her, Children did not appear to be upset at being removed from Mother and Father. She also indicated that Children reported witnessing domestic violence between Mother and Father. Child 2 described an incident in which Father burned him with a cigarette. Pape relayed that Child 2 appeared to be very distressed about this incident, telling her about it multiple times and pointing to his hand.[5]

Margaret McKinley, the Cabinet's caseworker, testified regarding Mother and Father's compliance (or lack thereof) with the case plan, Mother and Father's contact with Children, and her observations as to Children's current status. McKinley testified that Mother was largely noncompliant with her case plan until she was released from jail in September 2014.[6] McKinley testified that Mother had been advised to have at least monthly contact with the Cabinet, but failed to do so for at least the six months *preceding* her incarceration in June of 2013. McKinley further testified that while incarcerated from June of 2013 until September of 2014, Mother wrote Children three or four times. Regarding support, McKinley stated that Mother had not provided any support, monetary or otherwise, for Children's care since they were removed in November of 2012.

[5] As noted by the family court, Pape assumed Child 2 was referring to his biological father as having burnt his hand, but on cross-examination she acknowledged that it was "possible" that Child 2 was referring to his foster father, not his biological father. However, subsequent testimony at the trial revealed that at the time Children were seeing Pape, they called their foster parents "Nanna" and "Papaw" and not "Mom" and "Dad." Child 2 referred to the individual that burned him with the cigarette as "Dad."

[6] Mother was incarcerated in June of 2013 and released in September of 2014. Children were removed in November of 2012.

McKinley testified that Mother contacted the Cabinet after she was released on shock probation in September of 2014. McKinley testified that since that time, Mother completed and passed one drug screen on September 16, 2014. However, she also indicated that Mother failed to show up for a meeting with her on September 5, 2014.

McKinley testified that Children were originally placed with an older couple, but had since been switched to another family who was willing to adopt Children. McKinley stated that the current foster family had received the Cabinet's permission to relocate Children to Georgia, where they were living at the time of the hearing, after the foster father, a military serviceman, was transferred there. Based on reports she had reviewed and visits with Children prior to their move, McKinley believed Children to be well-bonded with their current foster family. She further indicated that both Children showed behavior improvement since having been in the Cabinet's custody.

Mother admitted that she actively used drugs (marijuana, lortab, and heroin with heroin being her drug of choice) until she was incarcerated in June of 2013. She also admitted that she was largely noncompliant with the family court's orders and the Cabinet's case plan until her incarceration. She stated that she would have written Children more in prison, but McKinley told her that it was a waste of time because the foster mother would not give any letters to Children.[7]

[7] When recalled to the stand, McKinley denied making such a statement.

Mother testified that she wished to regain custody of Children and believed she deserved a "second chance" to prove herself to the Cabinet and the family court. She explained that her prior conduct was fueled by a drug addiction, which she had overcome in prison. Mother testified that while in prison, she completed several drug education programs. Mother acknowledged that she was presently unable to care for Children because she was unemployed, did not have transportation, and did not have her own housing.[8] Mother admitted to having been diagnosed with bipolar and borderline personality disorder, but indicated that she was not undergoing treatment.

Father also admitted to actively using drugs, including heroin, up until his incarceration in June of 2013. He testified that he has been sober since being released from prison in the summer of 2014. Father completed a number of drug rehabilitation programs while in prison. Father testified that he has been clean since release from prison and was compliant with the terms of his probation. He testified that he was currently residing with his father in Bullitt County. Father indicated that he is not currently employed. Father testified that he did not return McKinley's calls regarding his case plan after his release because he was afraid it would somehow be used against him.

Marion is Children's maternal grandmother. Her testimony was largely irrelevant. She denied ever having supplied Mother with drugs. She also testified that Children were originally placed with her, but they had to be removed

[8] Mother was living in a trailer with a friend at the time of the hearing. The friend's children also lived in the trailer.

from her home because she was under a lot of stress at the time and did not think she could take care of them.

Following the trial, the family court terminated Mother and Father's parental rights. Mother now appeals.

II. Standard of Review

The family court has wide discretion in terminating parental rights. *Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010) (citing *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006)). Appellate "review is limited to a clearly erroneous standard which focuses on whether the family court's order of termination was based on clear and convincing evidence." *Cabinet for Health & Family Servs. v. K.H.*, 423 S.W.3d 204, 211 (Ky. 2014). "Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *Id.* "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Bowling v. Natural Res. & Envtl. Prot. Cabinet,* 891 S.W.2d 406, 409 (Ky. App. 1994).

III. Analysis

A circuit court may involuntarily terminate parental rights if it finds by clear and convincing evidence that a child is or has previously been adjudged, abused or neglected, and that termination is in the child's best interest. KRS

625.090. Then, the circuit court must find the existence of one or more of ten specific grounds set forth in KRS 625.090(2). *See M.E.C. v. Commonwealth, Cabinet for Health & Family Servs.*, 254 S.W.3d 846, 851 (Ky. App. 2008). Those grounds are:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
> (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
> (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
> (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
> (e) 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;
> (f) That the parent has caused or allowed the child to be sexually abused or exploited;
> (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;
> (h) That:
>
> > 1. The parent's parental rights to another child have been involuntarily terminated;
> > 2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and

> 3. The conditions or factors which were the basis for the previous termination finding have not been corrected;
> (i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or
> (j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

KRS 625.090(2).

Mother argues that the family court erred in finding abuse and neglect pursuant to KRS 625.090(1)(a)(2) based on a single traffic stop. She also argues that the family court erred in finding that she abandoned Children pursuant to KRS 625.090(2) because she has attempted to work her case plan since her release from incarceration. We disagree with both arguments.[9]

A. KRS 625.090(a)

The first requirement necessary to terminate a parent's rights is set forth in KRS 625.090(a). It provides that the family court must find at least one of the following three requirements to be present by clear and convincing evidence:

> (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
> 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or

[9] Mother has not included any argument in her appellant brief with respect to the best interest prong of KRS 625.090(1)(b). Therefore, we have not addressed that prong in our opinion. Suffice to say, however, the family court engaged in a lengthy best interest analysis wherein it analyzed each of the required considerations.

> 3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated[.]

KRS 625.090(a)(1)-(3).

As part of the DNA proceedings, Mother and Father stipulated to having abused or neglected Children. That stipulation resulted in a finding of abuse and neglect in the DNA proceedings. The finding of abuse and neglect as part of the prior DNA proceeding is sufficient to satisfy the "abuse or neglect" prong. *See* KRS 625.090(1)(a)(1).

Furthermore, even if Mother and Father had not stipulated to abuse and neglect, as the family court concluded, the November 8, 2012, incident certainly qualifies. The testimony of Officers McAtee and Pugh belies Mother's characterization of this incident as a "routine traffic stop" in which Children were simply found to be unrestrained. Mother and Father were found totally unconscious inside a running car, which was still in gear, while Children, who were three and four at the time, were unrestrained in the backseat. There is nothing routine about this situation. We shudder to think of the harm that could have befallen these Children had Father's foot slipped off the vehicle's brake or had Children exited the car and wandered into traffic. Substantial evidence certainly supports the family court's conclusion that Mother's actions put Children in a

situation in which they were exposed to "a risk of physical or emotional injury." KRS 600.020(1).

B. KRS 625.090(2)

Next, we turn to the family court's determination with respect to the factors set out in KRS 625.090(2). Of those ten factors, the family court found three to be present in this case:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
> . . . .
>
> (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;
>
> [and]
>
> (e) 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.

While the family court found the presence of three factors, one would have been sufficient to justify termination. Because we believe substantial

evidence supported the family court's conclusion with respect to the first factor, we will not analyze the remaining two as it is unnecessary to do so.

The family court recognized that incarceration cannot serve as the entire basis for a finding of abandonment. *See J.M. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985). Therefore, in finding abandonment, the family court focused primarily on the time before Mother was incarcerated. The family court found that from the time Children were removed up until the time of Mother's incarceration in June of 2013, a seven-month period, Mother had "continually failed to comply with the court's remedial orders and the case treatment plan so that [she] could visit [Children] and then dropped out of sight for months prior to [her] incarceration." The family court concluded this conduct constitutes abandonment. We agree.

Furthermore, we observe that Mother never provided Children with any necessities in the twenty-three month period they were in the Cabinet's custody, including the period after Mother was released from incarceration. Likewise, during this entire twenty-three month period, Mother saw Children only once, wrote only three or four letters, and sent a single card. Such conduct is abandonment; it is entirely inconsistent with behavior indicative of a desire to reunite one's family.

Mother argues in her brief that the Cabinet thwarted her opportunities to have visitation because it allowed Children to relocate to Georgia, and therefore, her lack of visitation should not have been held against her. While we do not

believe allowing foster children to leave the state prior to termination of parental rights is good practice, Mother cannot complain that it deprived her of her visitation in this instance. While Children were still in Kentucky, well before Mother was incarcerated, the family court suspended Mother's visitation until she passed two consecutive drug screens. Even at the time of the termination hearing, Mother had not satisfied this condition. Therefore, Mother would not have been able to exercise her visitation even if Children were still in Kentucky.

Mother analogizes her case to *M.E.C. v. Commonwealth*, 254 S.W.3d 846. In *M.E.C.* we reversed the termination of a mother's parental rights where we failed to find abuse and neglect and where the mother had trouble completing some parts of her plan during her incarceration. In so doing, we held that incarceration alone could not serve as a basis for termination. Aside from incarceration, there are few similarities between this case and *M.E.C.* In *M.E.C.,* we observed that the mother had been mostly complaint before, during, and after her incarceration. She maintained contact with the Cabinet; she regularly visited her children; she brought the children toys, clothing, and treats when she visited them; she paid child support to the Cabinet; she secured employment following her release from incarceration; and she successfully enrolled in parenting classes with little assistance. This is a far different case than *M.E.C.* At no point during the entire period her children were in the Cabinet's custody did *M.E.C.*'s mother ever cease in working toward reunification. She consistently maintained contact with the Cabinet from day one, provided for her children, exercised her visitation, and took substantial steps

toward completion of her plan. Incarceration only served to slow her progress, not stop it. In contrast, Mother totally abandoned Children until she became incarcerated, months after they had been removed from her care. At the time of the hearing, twenty-three months after losing custody, Mother had yet to really begin working her plan.

IV. Conclusion

This is a difficult and sad case. We commend Mother for getting off drugs while she was in prison. We regret that Mother did not do so when she lost her children in November of 2012. That was Mother's second chance. She let drugs steal that chance from her and her children. Instead of waking up to the reality of her situation and making the types of decisions that would allow her to regain custody of her children, Mother continued to abuse drugs, miss visitations, defy court orders, and ignore the Cabinet's repeated attempts to contact her. During this time, Children celebrated birthdays, started school, and no doubt achieved many more milestones without so much as a card or letter from Mother until she was incarcerated several months later. And, even during her fourteen months of incarceration Mother sent only a handful of letters and a single card, hardly the behavior one would expect from a loving, nurturing Mother who desires reunification with Children.

While Mother is no doubt sincere in her request for "another chance" to prove herself, it cannot be forgotten that Mother is not the only one whose interests are at stake. Children deserve stability. They deserve an opportunity to

develop bonds with parents who love, support, and do not abandon them for months at time. They deserve a family that chooses them over drugs. In this case, Mother chose drugs over Children for too long. As the family court concluded, Mother's decisions led her to place Children in danger and to abandon them.

Finding no error, we affirm the decision of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Nellie Drause Stallings Louisville, Kentucky	Erika L. Saylor Louisville, Kentucky