

RENDERED: JULY 1, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000750-ME & 2015-CA-000751-ME

A.S.L., MOTHER

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY, JR, JUDGE
ACTION NO. 14-AD-00016 AND 14-AD-00017

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES
AS NEXT FRIEND OF J.A.A., A CHILD
J.M.A., A CHILD, J.A.M., FATHER

APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

JONES, JUDGE: This consolidated appeal arises out of two orders from the Marshall Circuit Court terminating A.S.L.'s parental rights to her two minor children. On appeal, A.S.L. asks us to reverse the family court. Having reviewed

the record in both actions, we find no error by family court. Accordingly, we must AFFIRM the family court's orders of termination.

I. Background

A.L.S. ("Mother") has two children in common with J.A.M. ("Father").¹ Mother and Father have never been married to one another. The first child, J.A.A., was born on March 12, 2009. The second child, J.M.A., was born on April 24, 2011.

The Cabinet first became involved with this family on April 23, 2012, when it was alleged that a passerby had observed two small, unsupervised children playing near Sharpe-Alva Road and Highway 68. Cabinet employee, Kelli D. Covington, and two law enforcement officers were dispatched to investigate further. Ms. Covington testified that upon investigation they discovered that Mother had left J.A.A. and J.M.A. in the care of a relative, Brittany Martin. Ms. Martin told Ms. Covington that J.A.A. and her young son had wandered off when she went inside the residence to change J.M.A.'s diaper. Ms. Covington requested Ms. Martin call Mother and ask her to come back to the residence.

When Mother arrived at the residence, Ms. Covington attempted to speak with her about the children. Ms. Covington testified that Mother became combative and loud when she attempted to question her about the children's well-being. Ms. Covington observed that Mother had pinpointed pupils and she asked Mother to submit to a drug screen. Mother refused. Mother denied that there was

¹ Father's parental rights were also terminated as part of the same proceedings. Father has not appealed. Therefore, our review is limited to the record as it pertains to Mother.

anyone she could call to come take the children and told Ms. Covington that she would shoot anyone that tried to take her children away from her.

Before leaving the residence, Ms. Covington advised Mother that she would need to submit to a drug screen by six o'clock that evening. When Mother failed to show up for the screen, Ms. Covington called her. At first, Mother told Ms. Covington that she was trying to locate money to pay for the screen. By the end of the conversation, however, Mother indicated that she would neither take a drug screen nor voluntarily meet with Ms. Covington.

The following day, Ms. Covington tried to contact Mother, but was unable to reach her. After speaking with her supervisor about the situation, Ms. Covington filed a petition for non-removal. The family court conducted a temporary custody hearing on April 26, 2012. Mother appeared at the hearing. Mother's demeanor at the hearing was combative and scattered. As a result, the family court found that the children were at risk of harm or neglect. Maternal Grandmother was awarded temporary custody of the children and Mother was directed to work with the Cabinet to complete a prevention plan.

Mother finally submitted to a drug screen on May 1, 2012. The results of the screen were positive for THC and opiates. Ms. Covington met with Mother on May 16, 2012. At this time, Mother was apologetic. She told Ms. Covington that she suffered from depression and anger issues and was struggling to cope because Father was not paying child support. She explained that in December of 2011, she became so angry at Father that she punched a window out

of a car. The children were inside the home when this occurred. Mother also admitted to using marijuana while the children were with their maternal grandmother. Ms. Covington encouraged Mother to get counseling to assist her with her substance abuse and mental health issues.

The family court conducted another hearing on May 22, 2012, at which time Mother stipulated to neglect of the children in that she left them alone and had THC in her system while she was caring for the children. The children were placed in the Cabinet's care. Mr. Dwayne Holland took over the case for the Cabinet following the May hearing. Because Maternal Grandmother and Step-grandfather were not certified foster parents at this time, the children were placed with another foster family. Mr. Holland testified that the foster family reported difficulties with the children's behavior following visits with Mother (vomiting, diarrhea, refusal to eat, etc.). The foster family requested that the children be removed from their home in the fall of 2012. By this time, Maternal Grandmother and Step-grandfather had been approved as foster parents so the children were returned to their care.

Mother had supervised visitation with the children until the late summer of 2013, when the visits stopped. It was recommended that the visits be stopped due to the children's reaction to Mother's presence. During one supervised visit, the older child stopped playing when Mother came into the room, tried to hide from Mother, refused to talk, and had a bowel movement in his pants. Additionally, around this time, both Mother and Father were arrested for

possession of heroin. Shortly before their arrest, the police found a safe containing three-thousand dollars hidden in Mother's home, which the police believed was connected to drug activity. Mother was released in November of 2013, but was re-arrested on heroin-related charges in early 2014.

When Mother was arrested for the second time in early 2014, her children had been out of her care for close to two years. However, Mother had not taken any substantial steps toward completing her case plan. Given Mother's lack of progress, failure to maintain consistent contact with the Cabinet, and continued use of drugs, Mr. Holland asked the family court to change the permanency plan from reunification to adoption.

Mother was released in late 2014. At this time, she took efforts to reenroll in the parenting classes. By this time, however, the family court had changed the permanency goal for the children from reunification to adoption.

Mr. Holland testified at the final hearing, that neither Mother nor Father had paid any child support or provided for the needs of the children since their original removal in 2012. Mr. Holland also testified that neither Mother nor Father had completed their case plans or made their homes safe for the children's return. Mr. Holland explained that Mother had lied to him about having reemployment, failed to complete parenting classes, and had tested positive for opiates, morphine and heroin in May of 2013, a year after the children were first removed from her care. Mr. Holland believed the children were thriving in care of Maternal Grandmother and Step-grandfather, who wished to adopt the children.

Mr. Holland believed the children would continue to improve, if they were adopted.

On April 14, 2015, the family court entered its findings of fact, conclusions of law, and orders terminating Mother's parental rights with respect to both children. Pertinent to our review, the family court's orders include the following findings and conclusions: 1) Mother stipulated to neglect on May 22, 2012, as part of the dependency, neglect and abuse proceedings; 2) Mother was ordered to cooperate with the Cabinet to bring about reunification with children, but failed to work her reunification plan in that she failed to cooperate with the Cabinet, was routinely dishonest, and failed to maintain sobriety; 3) Mother has a long history of drug abuse; 4) the children have been in the Cabinet's custody since 2012, are doing well in their current placement with Maternal Grandmother and Step-grandfather, and are well bonded with them; 5) the children are neglected as defined by KRS 600.020(1); 6) Mother abandoned the children for a period of not less than ninety days, KRS 625.090(2)(a); 7) Mother, for a period of six months, repeatedly failed to provide essential parental care and protection for the children and there is no reasonable expectation of improvement in parental care and protection, considering the age of the children, KRS 625.090(2)(e); 8) Mother, for reasons other than poverty alone, has repeatedly failed to provide essential food, clothing, shelter, medical care, or education reasonably necessary and available for the children's well-being and there is no reasonable expectation of significant improvement in Mother's conduct in the immediately foreseeable future,

considering the age of the children, KRS 625.090(2)(g); 9) the children have been in foster care under the responsibility of the cabinet for fifteen of the most recent twenty-two months preceding the filing of the petition to terminate parental rights, KRS 625.090(2)(j); 10) termination of Mother's parental rights is in the best interests of the children, KRS 625.090(1)(b); 11) Mother presented insufficient evidence for the court to conclude that additional services would bring about lasting parental adjustment enabling a safe return of the children; and 12) there was insufficient evidence presented for the court to conclude that the children would not continue to be neglected if returned to Mother.

II. Standard of Review

"The trial court has wide discretion in terminating parental rights."

Cabinet for Health & Family Servs. v. K.H., 423 S.W.3d 204, 211 (Ky. 2014).

"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.L.C. v. Cabinet for Health & Family Servs.*, 411 S.W.3d 761, 765 (Ky. App. 2013).

"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. Nat. Res. & Env'tl. Prot. Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994).

III. Analysis

The General Assembly provided the mechanism for the involuntary termination of parental rights in KRS 625.090. Termination of a party's parental rights is proper upon satisfaction, by clear and convincing evidence, of a three-part test. First, the child must have been found to be an “abused or neglected” child, as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination must be in the child's best interest. KRS 625.090(1)(b). Third, the family court must find at least one ground of parental unfitness. KRS 625.090(2).

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
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).

Mother asserts in her brief that there was insufficient evidence to prove that she ever abused or neglected the children while they were in her care.

However, as part of the prior dependency, neglect, and abuse proceedings, Mother

stipulated to neglect by leaving her children unsupervised and being under the influence of THC while in a care giving role for them. That stipulation resulted in a finding of neglect in the DNA proceedings. The finding of neglect as part of the prior DNA proceeding is sufficient to satisfy the “abuse or neglect” prong.

B. 625.090(1)(b)

The second prong of KRS 625.090 requires a finding that the termination of parental rights would be in the best interest of the child. In determining the best interest of the child and the existence of a ground for termination, the circuit court is required to consider the following factors set forth in KRS 625.090(2):

- (a) Emotional illness, mental illness, or mental deficiency of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;
- (b) Acts of abuse or neglect toward any child in the family;
- (c) If the child has been placed with the cabinet or a child-placing agency or child-caring facility, whether the cabinet has rendered or attempted to render all reasonable services to the parent which reasonably might be expected to bring about a reunion of the family, including the parent's testimony concerning the services and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within a reasonable period of time, considering the age of the child;
- (d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

- (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
- (f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

We see no basis to conclude that the trial court erred in determining that it was in the best interests of the children that Mother's parental rights be terminated. There was ample evidence submitted that the Children experienced negative reactions to Mother's visits, had been in their Maternal Grandmother's care for most of the last three years, were well bonded with Maternal Grandmother and Step-grandfather, and were showing marked behavioral improvement, which the social worker expected to continue if left in the care of Maternal Grandmother and Step-grandfather.

C. 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 four to be present in this case:

- (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
....
- (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.

(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]

(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.

Having reviewed the record, we believe substantial evidence supported the family court's findings. The family court specifically noted that Mother: 1) did not consistently work her case plan; 2) did not contact the Cabinet to check on the children's wellbeing; 3) did not appear at the DNA review hearings on October 4, 2013, and July 11, 2014; 4) failed to maintain sobriety; 5) failed to cooperate with the Cabinet; 6) failed to timely begin parent classes; 7) never paid any of the court-ordered support for the children; and 8) did not provide anything of substance for the children the entire time they were out of her custody.

We acknowledge that Mother was incarcerated during a portion of the time period at issue. We likewise acknowledge 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). While Mother was incarcerated during various periods of time throughout these proceedings, there were significant

periods of time when she was not. In finding abandonment, the family court focused primarily on the times when Mother was not incarcerated. During much of this time, at least prior to her most recent release, Mother failed to provide any support for children. Instead of meeting children's basic needs, Mother chose to purchase and use heroin. And, she did so even though she knew it could prevent her from regaining custody.

Mother argues that since her most recent release, she has taken steps which show she is likely to improve in her role as a parent. Mother has taken steps to turn her life around. The trial court acknowledged Mother's efforts. However, it also considered that Mother had struggled with substance abuse issues for many years and relapsed several times. In balancing the competing evidence, the family court cited to Mother's "lack of credibility" as a factor going against Mother's assertions that she would continue in her sobriety.

This is a difficult and sad case. We commend Mother's efforts at sobriety. While we hear Mother's plea for a second chance, we cannot ignore the fact Mother already had her second chance. She first lost custody of her children in 2012. Instead of turning to sobriety at that point, she continued to put heroin and other drugs before the needs of her young children. She let drugs steal her second chance away. Almost three full years passed before Mother began working her case plan. During those three years, children celebrated birthdays, started school, and no doubt achieved many more milestones without Mother's emotional or financial support. While Mother may be 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 years at time.

It is clear to us that the family court appropriately considered all of the evidence. In doing so, it determined there was no reasonable expectation of improvement in parental care and protection, considering the age of the children. We cannot find any error in this regard, especially considering the fact that even since her release Mother had failed to pay any of the previously ordered support for children.

IV. Conclusion

For the reasons set forth above, we AFFIRM the parental termination orders of the Marshall Family Court.

ALL CONCUR.

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