

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-001068-ME

D.R.M

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE HUGH SMITH HAYNIE, JUDGE  
ACTION NO. 15-AD-500025

CABINET FOR HEALTH AND  
FAMILY SERVICES; E.M.C., MOTHER;  
AND S.R.M, A MINOR CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

ACREE, JUDGE: D.J.M. (Father) appeals from the Jefferson Family Court's June 18, 2015 findings of fact, conclusions of law, and order involuntarily terminating his parental rights to S.R.M. (Child). Father's chief argument on appeal is that the

family court's termination decision is not supported by clear and convincing evidence and, therefore, must be reversed. We disagree and affirm.<sup>1</sup>

Father is the putative parent of Child, a male born on April 12, 2013.<sup>2</sup> Testing established Child was born with opiates and marijuana in his system. On that basis, and the fact that Father, along with Child's natural mother, E.M.C. (Mother), violated an agreed-upon safety plan,<sup>3</sup> the Cabinet for Health and Family Services filed a dependency, neglect, and abuse action on May 17, 2013. The Cabinet, having been awarded temporary custody, placed Child in a foster home where he remained throughout the case.

Mother and Father stipulated that their substance abuse issues placed Child at risk of harm. The family court entered an order on December 12, 2013, finding Child to be neglected. On July 2, 2014, the family court held its annual permanency review, after which Child's goal was changed to adoption. A petition to terminate Mother's and Father's parental rights was filed on January 15, 2015.

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<sup>1</sup> Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

<sup>2</sup> Father is named as Child's natural father on Child's birth certificate.

<sup>3</sup> Mother and Father had agreed not to allow Child around Father's parents unsupervised, agreed to enroll in drug screens and participate in random drug screens, and agreed that they would live with Mother's mother. Mother and Father disregarded every commitment made.

A termination trial was held on June 12, 2015. Prior to the family court receiving testimony, Child's paternal aunt appeared, through counsel, and moved the family court to continue the termination hearing and to place the child in her temporary custody until such time as Father could obtain sobriety, employment, and stable housing. The Cabinet and the Guardian Ad Litem (GAL) objected to the filing and substance of paternal aunt's motion. The family court denied paternal aunt's motion and denied her request for a hearing on that motion on grounds that she did not have standing to file the motion<sup>4</sup> and did not provide advanced written notice to the parties. Father did not object to this ruling.

The termination trial continued as usual. Two Cabinet workers, Father, and Child's paternal grandmother testified.

Kelsi Dennis, a social services worker with the Cabinet, testified she was the Child's ongoing case worker until April 2015. She became involved with this family in May 2013. Dennis testified the Cabinet developed case treatment plans for Father every six months. Father attended the first two case planning conferences in May and November, 2013, but did not attend subsequent planning conferences in May and November, 2014.

The Cabinet offered, and Father agreed to, a case plan. The case plan required Father to complete random drug screens; complete a substance abuse assessment and follow-up treatment, if required; attend parenting classes; visit with

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<sup>4</sup> The paternal aunt was not, and is not, a party to the underlying action. She has never filed a motion to intervene.

Child; and attend Child's medical appointments. Father failed to work his case plan.

Dennis asked Father to drug screen on several occasions. He never did. Dennis referred Father to Seven Counties Services, Inc., for a substance abuse assessment in July 2013. Father completed the assessment, but he declined to enroll in treatment. He was discharged due to noncompliance. Dennis referred Father to Home of the Innocents for parenting classes in July of 2013. Father enrolled in the program, but never completed it. Father did not attend any of Child's medical appointments.

Dennis testified Father was entitled to weekly supervised visits with Child. He visited sporadically at first, and later not at all. He often showed up late for visits. During visits Father held Child, but spent most of the time making excuses to Dennis as to why he could not complete his case treatment plan. His last visit with Child was on December 17, 2013. The family court subsequently entered an order in March 2014 suspending Father's visits until he had two clean drug screens and started working his case plan. Father failed to satisfy these nominal requirements.

Dennis described Father's minimal efforts to provide essential care and life necessities for Child. Father offered some clothing to the foster parents when Child was initially removed in May 2013. Since that date, he has not provided any food, clothing, shelter, medical care, or education for Child. Father has never paid child support for Child.

Dennis identified several barriers to reunification: Father's substance abuse issues; housing instability; lack of employment; and Child's medical issues. She testified she often lost contact with Father for months at a time. However, Dennis's office location and phone number have never changed. She also performed absent parent searches in an attempt to locate Father. At one point she discovered an address for him in Shepherdsville, Kentucky, but he left there in October 2013. Dennis later discovered Father was staying with family members in June 2014. Her last contact with him was in March of 2015. Dennis testified Father has never addressed his drug addiction issues and, to her knowledge, has never been gainfully employed.

Abigail Davis, also a social service worker with the Cabinet, testified next. Davis has worked in tandem with Dennis since April 2014. Davis spoke with Father in the Bullitt County jail on June 11, 2015. This was her only contact with Father. Father advised Davis that he had to serve thirty days in jail, after which he would be transferred to a drug rehabilitation program.

Davis described Father's numerous criminal convictions, including three misdemeanor convictions and two felonies. Father's misdemeanor convictions include a December 2012 conviction for third-degree possession of a controlled substance (Jefferson County); a March 2014 conviction for fleeing/evading the police (Bullitt County); and a December 2012 conviction for third-degree possession of a controlled substance (Jefferson County). He has two felony convictions, both in Bullitt County, the first in September 2010 for

facilitation to manufacturing methamphetamine and the second in February 2015 for first-degree possession of a controlled substance (methamphetamine). Davis testified Father was referred to drug court three times in 2015, but was declined each time.

Davis testified Child is in a concurrent planning foster home with four other children. He has been in the same foster home since his removal in May of 2013. He is bonded to his foster parents and the other children in the home. The foster parents are available and willing to adopt Child.

J.M., Child's paternal grandmother (Grandmother), testified on Father's behalf over the Cabinet's and the GAL's objections.<sup>5</sup> Grandmother pleaded with the family court to give Father one more chance. She testified Father has never had an opportunity to face his substance abuse problems, but he is ready and willing to do so now. Grandmother testified she is a recovering addict who received no help for her addiction in the Bullitt County jail. Grandmother admitted the Cabinet offered Father numerous services, but he failed to avail himself of those services even when he was not in jail. Grandmother emphasized Father is now ready to complete treatment. She further stated that Father has another child, who is six years of age. That child is in the custody of his maternal grandfather. Father is entitled to supervised visits with this child.

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<sup>5</sup> The record reflects Father failed to identify Grandmother as a potential witness in his pretrial filings. On that basis, the Cabinet and the GAL objected to Grandmother's testimony. The family court overruled those objections.

Father testified last. He admitted he is Child's father. Father also admitted he has a substance abuse problem, but testified he never completed treatment due to transportation problems. Father testified he was not eligible for drug court due to an outstanding warrant and because he violated monitored court release. He stated there are no drug-addiction services in jail beyond AA,<sup>6</sup> which he attends for one hour one time per week. He asked the family court to give him another opportunity to complete drug treatment. Father admitted he has not seen Child since December 2013.

On June 18, 2015, the family court entered findings of fact, conclusions of law, and orders terminating Father's parental rights to Child. The family court found Child neglected. KRS<sup>7</sup> 625.090(1)(a). It also found that termination was in Child's best interest, KRS 625.090(1)(b), and found that Father was unfit to parent Child because: (a) he had abandoned Child for a period of not less than ninety days; (b) he failed to provide basic necessities for Child; (c) he failed to offer essential parental care and protection for Child; and (d) Child had been in foster care for fifteen of the most recent twenty-two months preceding the filing of the termination petition. KRS 625.090(2)(a), (e), (g), and (j). Father appealed.

This Court will only disturb a family court's decision to terminate a person's parental rights if clear error occurred. If there is substantial, clear, and convincing evidence to support it, the decision stands. KRS 625.090(1); *Cabinet*

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<sup>6</sup> Alcoholics Anonymous.

<sup>7</sup> Kentucky Revised Statutes.

*for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). The clear and convincing standard does not demand uncontradicted proof. All that is needed “is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people.” *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citation omitted).

Termination of a party’s parental rights is proper upon satisfaction, by clear and convincing evidence, of a “tripartite test.” *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). 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).

Father does not attack the family court’s neglect finding. We will proceed directly to the next step, which required the family court to determine whether termination is in Child’s best interest. The court, in conducting a best interest analysis, is guided by several factors enumerated in KRS 625.090(3). Those factors include, to the extent relevant: the mental illness or an intellectual disability of a parent; acts of abuse or neglect toward any child in the family; reasonable efforts made by the Cabinet to facilitate reunification; 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; 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 the payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so. KRS 625.090(3)(a)-(f).

Father argues, quite generally, that the Cabinet did not demonstrate by clear and convincing evidence that termination of his parental rights is in the best interest of Child. He does not challenge any particular finding or factor. We will discuss only those factors relevant to this case.<sup>8</sup>

The Cabinet offered Father a case plan along with numerous services to facilitate reunification. KRS 625.090(3)(c). It offered Father opportunities to seek much-needed treatment, visit with Child, and be involved in Child's medical care. Father declined to take advantage of any services offered by the Cabinet. He did not complete a single task. Father utterly failed to work his case plan. Further hindering the Cabinet's efforts was the fact that Father's location and contact information were ever changing and often unknown to his case worker. The Cabinet did make efforts to find him. Notably, the case worker conducted absent parent searches and exercised ordinary diligence in attempting to contact Father.

Father made little effort to better himself or his circumstances such that Child might be returned to his care. KRS 625.090(3)(d). Father refused to seek drug treatment. He declined to submit to drug screens. He failed to complete

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<sup>8</sup> We do not address the factors listed in KRS 625.090(3)(a) or (b). To our knowledge, there has been no evidence presented to indicate Father suffered from a mental illness or intellectual disability, and no evidence of other acts of abuse or neglect toward another child in the family.

parenting classes. He was unable to maintain stable housing or steady employment. He continued to commit criminal acts resulting in multiple incarcerations. Simply put, Father has been unable to obtain an appropriate lifestyle conducive to raising children.

Child is doing well in his one and only foster placement. He is bonded to his foster family. They are the only family Child knows. If termination occurs, the prospects for the improvement of Child's welfare is all but certain. Child deserves permanency. KRS 625.090(3)(e).

Further, Father has paid no child or other financial support for Child since May 2013. KRS 625.090(3)(f). The little bit offered then was meager.

Based on the foregoing, we find there to be substantial, clear, and convincing evidence to support the family court's determination that termination of Father's parental rights is in Child's best interest. Father has identified nothing which convinces us otherwise.

Father also argues that there is insufficient evidence to support the family court's finding that he is unfit to parent Child under KRS 625.090(2). Specifically, he takes issue with two of the termination grounds found by the family court: that Father is incapable of providing essential parental protection and care, KRS 625.090(2)(e), and that Father failed to provide essential food, clothing, medical care, or education, KRS 625.090(2)(g). In an effort to contradict the family court's findings, Father directs this Court to the dependency, neglect, and abuse court file wherein a case worker, in May 2013, stated "Strengths[:] N[atural ]

F[ather] is involved and wants to be active with baby. Both parents have strong family support. Family has needed supplies for baby.” This single statement made by a social worker at the earliest stages of the neglect proceeding is insufficient to negate the substantial evidence submitted during the termination hearing in support of the family court’s findings. The case worker testified Father was a drug addict who refused to undergo treatment, was currently incarcerated, lacked stable housing, and was unemployed. We fail to see how Father was capable of providing Child with essential parental care. The case worker further testified Father failed to provide Child with *any* essential food, clothing, or shelter since Child’s removal in May 2013 except for a few articles of clothing. Father refused to participate in Child’s medical care. The case worker’s testimony constitutes clear and convincing evidence in support of the family court’s finding.

For purposes of this appeal, however, we will take Father’s assertions as true. We will assume, solely for argument’s sake, that the family court’s findings indeed lack supportive clear and convincing evidence.<sup>9</sup> Even so we see no need to reverse the family court’s termination decision.

The family court found clear and convincing evidence to support four of the termination grounds enumerated in KRS 625.090(2). Only *one* ground, however, is needed to satisfy this statutory parameter. *See id.* (termination shall only be ordered if the family court finds the existence of at least one of the

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<sup>9</sup> We are convinced that all of the family court’s findings are fully supported by clear and convincing evidence. Nothing in this opinion should be construed otherwise. We are willing to entertain Father’s position simply for argument’s sake.

statutory grounds enumerated in KRS 625.090(2)). Father focuses his argument on two of the family court's parental-unfitness findings, but utterly fails to address or attack the family court's other two findings.

It is clear that Father abandoned Child for a substantial part, if not all, of his young life. KRS 625.090(2)(a). While he may have visited Child a handful times, he has not seen Child, by his own admission, since December 2013, well past the ninety days required for abandonment. *Id.* He was not prevented from visiting Child. He chose not to. Notwithstanding the family court's no contact order of March 2014, Father was permitted to visit Child provided Father satisfied two basic requirements – two clean drug screens and a record of working his case plan. Father made no effort to comply.

It is equally clear that Child had lingered in foster care for at least fifteen of the most recent twenty-two months preceding the filing of the termination petition. KRS 625.090(2)(j). Child was placed in foster care in May of 2013. The termination petition was filed twenty months later, in January of 2015. This statutory factor has been satisfied.

Again, the family court need only find “at least one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) exists.” *K.H.*, 423 S.W.3d at 209. The family court found evidence to support four such grounds. Two of the grounds unmentioned by Father are undoubtedly supported by clear and convincing evidence. Finding no error here, we conclude the family court's

findings of parental unfitness are supported by clear and convincing evidence in the record. This Court, therefore, will not interfere on this basis.

Finally, Father raises a procedural point. He contends the family court erred when it denied the Child's paternal aunt's request to testify at the termination hearing, but then allowed Grandmother to testify despite counsel's failure to identify Grandmother as a witness in pretrial filings. Father takes the position that the family court's "double standard" caused him prejudice. Father misconstrues the procedural and factual posture of this case. Child's paternal aunt was not seeking to simply serve as a witness on Father's behalf. Instead, paternal aunt, represented by separate counsel than Father, filed a motion to continue the trial and for temporary custody of Child despite not being a party to the underlying action and despite failing to serve the motion on opposing counsel prior to trial. It was fully within the family court's discretion to decline to allow paternal aunt to participate in that manner in the termination trial.

We affirm the Jefferson Family Court's June 18, 2015 order and judgment terminating Father's parental rights.

ALL CONCUR.

BRIEF FOR APPELLANT:

David S. Davis  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Barbara M. Gunther  
Shelbyville, Kentucky