

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001869-ME
AND
NO. 2015-CA-001870-ME
AND
NO. 2015-CA-001871-ME
AND
NO. 2015-CA-001872-ME

M.W.

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE LISA MORGAN, JUDGE
ACTION NOS. 15-AD-00002, 15-AD-00003,
15-AD-00004, AND 15-AD-00005

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

ACREE, JUDGE: M.W. (Father) appeals from the Woodford Family Court's
November 20, 2015 findings of fact, conclusions of law, and order involuntarily

terminating his parental rights to his four children. Father argues the family court erred by finding Father had failed to make sufficient rehabilitative progress to be a safe and adequate parent and, therefore, its termination decision must be reversed. We are not persuaded. Accordingly, we affirm.

Father is the natural parent of five children: B.N.W., a female born on May 14, 1997; M.J.W., a male born on January 1, 1999; C.T.W., a male born on October 25, 2000; J.M.W., a male born on October 24, 2002; and J.D.W., a male born on September 19, 2003. F.A.W. (Mother) is the children's natural mother. B.N.W. emancipated prior to the final trial in this matter and is not a subject of this appeal.

Father and Mother married in 1996. They have a long history with the Cabinet. Between 1998 and 2014, the Cabinet received 35 referrals related to this family, substantiated six incidents of neglect, and filed multiple dependency, neglect, and abuse petitions in family court.

On January 25, 2015, the Cabinet filed petitions to involuntarily terminate Mother's and Father's parental rights. Mother and Father opposed the petitions. A termination trial was held on October 19, 2015.

Emily Thomas, a social services clinician employed with the Cabinet for over seven years, was this family's caseworker from February 2014 to January 2015. Thomas began her testimony with a description of the various dependency and neglect petitions leading to the termination proceeding. She testified that, between 1999 and 2014, the Cabinet filed five dependency, neglect and abuse

petitions on behalf of M.J.W., four dependency, neglect, and abuse petitions on behalf of C.T.W., and three dependency, neglect, and abuse petitions each on behalf of J.M.W. and J.D.W.

The first neglect petition was filed in 1999. It involved the parents' failure to adequately care for M.J.W. as an infant. The second was filed in 2002 and involved M.J.W. and C.T.W. That petition alleged M.J.W. and C.T.W. were dependent because they had no place to live. Following issuance of a domestic violence order (DVO) against Father on behalf of Mother, Mother stated she did not want custody of the children and Father was homeless and could not assume custody. Father soon regained custody of the children by moving in with his mother.

The third petition was filed in 2009 and it involved all four children. The petition alleged the children were neglected because two of them were found on someone else's property and unsupervised and, when the police arrived, the parents attacked the police. They were arrested. The parents agreed on two prior occasions to adequately supervise the children. The children were committed to the Cabinet on July 15, 2009. On August 13, 2009, Father stipulated to neglect. Father and Mother regained custody of the children on June 17, 2010.

The fourth petition was filed in late 2012 on behalf of all four children alleging they were at risk of neglect because Father and Mother had failed to adequately supervise them, allowed a male visitor to stay overnight in B.N.W.'s room, permitted the older boys to smoke marijuana, and permitted M.J.W. to use

drugs in their home with their knowledge. At the adjudication hearing, the family court allowed amendment of the petition to include allegations that Father had two diluted drug screens evidencing drug use in the home. Father and Mother admitted to allowing the children to be exposed to marijuana use and stipulated to the risk of neglect. Thomas concluded her testimony by noting the outcome of that petition – the family court found the children to be neglected.

In January 2013, M.J.W. was committed to the Cabinet and placed in a residential treatment facility due to his continued drug use. The other three children were committed to the Cabinet in June 2013 and placed in a foster home in Adair County. Thomas testified Father was allowed to visit with them every other week, and he frequently asked the foster parents and children for money for gasoline.

In December 2013, the children were returned to the care of Father and Mother on a trial basis. That placement did not last. The Cabinet filed the fifth and final neglect petition on February 17, 2014, on grounds that, while the children were in their care, Father and Mother tested positive for Oxycodone. Father admitted they had crushed Percocet tablets and inhaled the powder through their noses shortly before a recent court hearing. The children were again committed to the Cabinet and again placed in foster care where they have resided ever since.

Thomas testified the Cabinet had developed fourteen case treatment plans with the parents between 2000 and 2015. Father's case plan required him to:

obtain stable housing; obtain steady employment; undergo a substance abuse assessment and follow all recommendations; remain clean and sober; enroll in individual therapy; complete parenting classes; undergo a psychological and parenting capacity examination with Dr. Paul Ebben and follow his recommendations; draft a monthly budget; develop a supervision plan for the children; develop a list of appointments for the children; be open and honest with the Cabinet; and refrain from discussing court matters with the children. Father made some progress on his case plan.

Father had stable housing. He had lived in a four-bedroom house in rural Anderson County outside Lawrenceburg, Kentucky, since 2013. The home had suitable living space for Father and all the children.

Father was employed. He had worked part-time at Kroger for “awhile” on the night shift earning \$9 per hour. He also recently obtained additional employment at a Nabisco factory working thirty hours per week on the dayshift and earning \$11.50 per hour. Father testified if the children were returned to his care, he would keep the Nabisco job with daytime hours.

Father completed a substance abuse program and had remained clean and sober since the spring of 2014. Father entered a chemical dependency program at the Schwartz Center in February 2014. He successfully completed that program in about thirty days. Since then, Father has faithfully attended AA and NA meetings multiple times per week. He has had no positive drug screens since spring 2014 despite regular testing.

Father engaged in individual therapy. After the substance abuse program, Father entered a therapy program at Bluegrass Comprehensive Care. He attended therapy three times per month for one year. Father testified the program focused on judgment and decision making, budget planning, parent/child communications, financial and employment stability, other parenting skills, and discipline.

Father completed parenting classes. Kim Black, Executive Director of Anderson County Recovery, testified Father completed a thirteen-week parenting class and a twenty-week substance abuse class between May 2014 and November 2014. Black testified Father faithfully and consistently attended class, always participated, and was a valuable member of the group. After completing the parenting program, Father came back for additional classes on his own initiative. Black conceded she did not have a degree or any related training in psychology or psychiatry, the classes were not led by a licensed therapist, and she had never seen Father interact with his children.

Thomas testified Father had failed to draft a monthly budget, failed to develop a supervision plan, and failed to develop a list of appointments for the children. She also testified Father had not been open and honest with the Cabinet on a consistent basis. Father disputed Thomas's testimony. He claimed he had family and friend support to help with the children, had worked on appointment scheduling in comprehensive care, and had been open and honest with the Cabinet

since day one. Father admitted he had no knowledge of his children's appointments or therapies.

Thomas also claimed Father failed to refrain from discussing court matters with the children. In April 2014, the family court entered an order prohibiting the parents from discussing any court action with the children. Despite this order, Father continued to do so. Thomas testified these discussions often upset the children. When asked about this at trial, Father testified to his belief that "they should know what is going on." At a July 2014 permanency review hearing, the family court entered an order waiving reasonable efforts and limiting Father's contact to therapeutic telephone communication due to inappropriate comments by Father to the children. Specifically, Father supposedly told the children he was "stockpiling guns and ammunition due to an upcoming war with the Illuminati."

Thomas further testified that Father had trouble completing his psychological and parenting capacity examination with Dr. Ebben. Father first submitted to an examination on January 31, 2013. He did not complete the mental health section of the personal history questionnaire, so Dr. Ebben was unable to make any diagnosis or recommendation for treatment. In a post-examination written report, Dr. Ebben stated he had "very serious concerns about" Father. Dr. Ebben described Father as uncooperative, defiant, oppositional, moody, agitated, sarcastic and, at times, paranoid. Dr. Ebben concluded Father's parenting capacity was poor and there was an "uncomfortable risk for maltreatment moving forward."

Father underwent a second examination on April 17, 2013. Dr. Ebben found that “nothing much [had] changed from [his] initial impressions” of Father. Dr. Ebben found Father presented as “self-centered, entitled, defiant and untouchable, with a certain disregard for authority.” He concluded that Father’s “parenting capacity remained guarded at best” and the “risk for maltreatment continue[d] to be at least moderately high.”

Father underwent a third examination on October 9, 2014. Father admitted he had been addicted to pain pills for the past four to five years, but had been clean for the past eight months. Dr. Ebben observed that Father appeared “disorganized and unkempt” and continued “to present with issues that pertain to substance abuse, financial limitations, [and] situations that have led to poor judgment or were based on poor judgment.” Dr. Ebben noted Father was “struggling to care for himself without his children, which of course is a concern from a parenting standpoint.” He diagnosed Father with substance dependency disorder and “personality disorder with narcissistic, antisocial, and perhaps dependency traits.” He also found Father to be a “moderately needy parent” and that he presented a “moderate risk” to the children, meaning Father was “unable to provide minimally acceptable care . . . without additional interventions[.]”

Thomas testified there were several barriers to reunification. First, Father continued to make poor choices regarding his children. Second, he was unable to meet their mental health needs. And, third, he lacked the financial ability to care for all four children.

Chelsea Sinkhorn, a social services worker with the Cabinet, became the ongoing case worker in January 2015. Sinkhorn testified that Father and Mother engaged in a domestic dispute in 2014, resulting in a court order prohibiting any contact between them. At some point around this time, Mother and Father divorced. Father testified at the termination trial that his history of domestic violence and substance abuse stemmed from his relationship with Mother, but that he no longer struggles with these issues and can focus on his children since their separation and divorce. However, Sinkhorn testified that, despite the standing no-contact order, Father and Mother lived together between February 2015 and July 2015. Father also admitted to this at trial. Sinkhorn testified that it was her understanding that Father and Mother were divorced, but trying to reconcile. Sinkhorn also received a new domestic violence referral related to Mother and Father in May 2015.

Sinkhorn discussed the status of each of the children. She testified all the children are in foster homes in Owensboro, Kentucky. J.M.W. and J.D.W. are placed together in one home, and M.J.W. and C.T.W. are placed together in a different home. Both homes are concurrent, meaning the foster parents are open to adopting the children.

Sinkhorn clarified that J.D.W. was placed in a residential facility for a period of time in February 2015 for physically aggressive behavior, but was able to return to the foster home with J.M.W. Additionally, J.D.W. used to struggle with behavior issues, and J.M.W. struggled with eating issues. They are both in mental

health therapy to address these problems, and have made significant progress.

They are thriving and have bonded with their foster parents.

M.J.W. and C.T.W. are also doing very well in their foster placement.

M.J.W. was in a residential treatment facility for substance abuse issues for a time, but is doing better. Like their brothers, they also attend mental health therapy twice a month, and have made noticeable progress. They are thriving and have bonded to their foster parents.

Sinkhorn testified Father had regular monthly telephone contact with the children between November 2014 and July 2015. He has not talked to the children since July 28, 2015. Father is permitted to call the children's therapist to schedule telephone communications during therapy sessions, but has chosen not to.

Sinkhorn testified Father has provided no food, clothing, medical care, school supplies, or other basic necessities for these children. Father has also not paid child support or other financial support for them. Thomas confirmed Sinkhorn's testimony.

Father's testimony repeated and elaborated upon much of the testimony of medical and social services workers that cast him in a positive light. He described in detail the progress he has made on his case plan. He had a job and a house. He completed a substance abuse assessment and treatment. He has never failed a drug screen since treatment. He continues to attend AA and NA. He attended comprehensive care three times a month for over a year. He had arranged for child care and help with family and friends. He completed a divorce education

program, parenting classes, and a substance abuse education program. He called the children daily and saw them every week until early 2014. Father testified he is a changed person who is willing, able, and capable of caring for his children. If the children were returned to him, he would focus on them and their needs.

On November 20, 2015, the family court entered findings of fact, conclusions of law, and orders terminating Father's parental rights to the children. The family court found the children to be abused or neglected. KRS¹ 625.090(1)(a). It also found that termination was in the children's best interests, KRS 625.090(1)(b), and found that Father was unfit to parent the children because: (a) he had abandoned them for a periods of not less than ninety days; (b) he failed to offer essential parental care and protection for them; (c) he failed to provide basic necessities for the children for reasons other than poverty alone; and (d) the children had resided in foster care for more than fifteen of the most recent twenty-two months prior to 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 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

¹ Kentucky Revised Statutes

“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 challenge the family court’s best interest or parental unfitness findings. Instead, he only attacks the family court’s neglect finding. KRS 625.090(1)(a). He argues there is not substantial evidence to support the family court’s finding that he failed to make sufficient progress toward rehabilitative goals as set forth in his court-approved case plan to allow for the safe return of the children to his care. As such, Father contends the family court erred in finding the children to be “neglected,” thereby negating one prong of the tripartite test and rendering the family court’s termination decision erroneous. We are unpersuaded.

As referenced, before terminating a person’s parental rights, the family court must first find the child has previously been adjudged by an appropriate court to be an abused or neglected child, KRS 625.090(1)(a)1, or make

its own finding of abuse or neglect in the termination proceeding, KRS

625.090(1)(a)2. Relevant to this case, KRS 600.020(1) clarifies that an “[a]bused or neglected child” means a child whose health or welfare is harmed or threatened with harm when” his or her parent:

1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
7. Abandons or exploits the child;
8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason

alone. This exception shall not preclude a court from ordering necessary medical services for a child; [or]

9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months[.]

KRS 600.020(1)(a).

First, we note that, according to evidence presented at the termination hearing, the family court had already adjudged all four children to be neglected on two occasions, first in 2009 (failure to supervise the children) and again in 2012 (failure to supervise the children and exposing them to drug use). KRS 625.090(1)(a)1. This is enough to satisfy KRS 625.090(1)(a).

Setting this aside, there was also more than ample evidence presented during the termination hearing from which the family court could, and did, conclude that the children were neglected. KRS 625.090(1)(a)2. The fact that Father made meaningful progress on his case plan did not preclude the family court from finding the children to be neglected. A parent's failure to adequately work his or her case plan is only one way a child may be deemed neglected. The statute includes eight alternative means. KRS 600.020(1)(a)1-9.

The evidence indicated Father has an established history of failing to adequately supervise the children, allowing them to be exposed to drug and marijuana use, and exposing them to domestic violence. All of these certainly contributed to the children's mental and emotional harms, and came about as a

direct result of Father's (and Mother's) failure to provide essential parental care and protection. KRS 600.020(1)(a)3, 4. Notably, upon entering foster care, J.D.W. struggled with behavior issues, including physically aggressive behaviors; J.M.W. struggled with an eating disorder; and M.J.W. was addicted to drugs. The children have been removed from Father's care several times since 2009 because Father was unable to get his life together in a timely fashion. Father claims he has changed his ways, blaming many of his problems on his past relationship with Mother. Yet, Father, by his own admission, was continuing to pursue a relationship with Mother as recently as summer 2015. The family court was simply not convinced that Father had made the lasting lifestyle changes needed to ensure no repetition of his past pattern of conduct that rendered him incapable of caring for his children's immediate and ongoing needs.

Father has also had little meaningful contact with the children for a significant period of time. While Father maintained regular monthly phone contact with the children for a while, he has not physically seen the children since their removal from his care in February 2014. This was Father's choice. He was directed not to discuss court matters with the kids. Yet, according to Thomas, he continued to do so, resulting in the court order allowing only therapeutic telephone contact. Further, Father admitted he has not spoken with the children at all since July 2015. It was not clearly erroneous for the family court to conclude that Father's minimal contact with the children failed to qualify as the requisite care and protection called for by KRS 600.020(1)(a)(4).

There was also evidence presented at the termination hearing that Father failed to provide essential food, clothing, medical care, or education. KRS 600.020(1)(a)8. Thomas testified Father has failed to provide any basic necessities for the children, and had paid no support for them despite working two jobs, since their removal in early 2014. Father also appeared to have a limited understanding of his children's mental-health needs; he was unaware of their therapies or related appointments. It is certainly questionable whether Father is capable of handling his children's mental-health issues. Additionally, despite having completed a substance abuse program, parenting classes, and individual counseling, Dr. Ebben noted in October 2014 that Father was still struggling to take care of himself without his children. KRS 600.020(1)(a)8.

We again acknowledge the progress Father made on his case plan. But this fact alone did not prevent the family court from finding the children to be neglected. We have described the substantial evidence in the record to support the family court's neglect conclusion. Accordingly, we cannot say the family court erred in ruling that the first prong of KRS 625.090 was met.

We affirm the Woodford Family Court's November 20, 2015 findings of fact, conclusions of law, and orders terminating Father's parental rights to his four children.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mark R. Brengelman
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Barbara M. Gunther
Shelbyville, Kentucky