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Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-0966-ME

T.W. APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 19-AD-00053

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; J.R.W.; AND
M.K.W. APPELLEES

AND

NO. 2020-CA-0967-ME

T.W. APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 19-AD-00054

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; N.N.W.; AND
M.K.W. APPELLEES

AND

NO. 2020-CA-0968-ME

T.W. APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 19-AD-00056

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; A.N.W.; AND
M.K.W. APPELLEES

AND

NO. 2020-CA-0969-ME

T.W. APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 19-AD-00057

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; D.A.W.; AND
M.K.W. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, McNEILL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: T.W. (Father) appeals from Findings of Fact, Conclusions of Law, Order Terminating Parental Rights, and Order of Judgment entered by the Shelby Circuit Court, Family Court Division, on July 9, 2020, in four separate cases terminating his parental rights to his four minor children. We affirm.[1]

This case involves four minor children: J.R.W., born October 25, 2003; N.N.W., born January 8, 2005; A.N.W., born July 20, 2006; and D.A.W., born August 28, 2008.[2] The Commonwealth of Kentucky, Cabinet for Health and Family Services (the Cabinet) has a significant history with the family dating back to 2005. In all, there have been 29 referrals to the Cabinet resulting in multiple investigations involving various issues such as domestic violence, substance abuse,

[1] M.K.W. (Mother) did not appeal the termination of her parental rights in any of the four cases.

[2] The family court dismissed the fifth child, D.N.W., from the action prior to the final hearing due to her age. D.N.W. was born December 31, 2002, and was not in the parents' care during the proceedings.

sexual abuse by a relative and, most recently, sexual abuse by Father during this period of time. Four dependency, neglect, or abuse (DNA) petitions have been filed from the referrals received by the Cabinet. The children were removed from the home in 2005, again in 2017, and finally on February 27, 2019. They have remained in foster care since that time and are currently placed together in the same foster home.

The most recent DNA petition, filed on February 27, 2019, alleged, in relevant part, domestic violence between the parents, sexual abuse of J.R.W. by Father, and substance abuse. An adjudication hearing was held on January 6, 2020. Mother stipulated to neglect, but a trial was held as to Father. The family court found Father had sexually abused J.R.W. and that the children witnessed domestic violence between Father and Mother. Disposition orders were entered on January 16, 2020, wherein the children's permanency goals were changed to adoption and reasonable reunification efforts were waived. Father did not appeal these orders.[3]

The Cabinet filed the underlying petitions for involuntary termination of parental rights on December 20, 2019, during the pendency of the DNA

[3] "[A] disposition order, not an adjudication order, is the final and appealable order with regard to a decision of whether a child is dependent, neglected, or abused." *J.E. v. Cabinet for Health and Family Services*, 553 S.W.3d 850, 852 (Ky. App. 2018).

proceedings. The trial was postponed due to the COVID-19 pandemic, and ultimately held by electronic means on June 18, 2020. Father's parental rights were terminated in all four cases by orders entered July 9, 2020. These appeals followed.

Involuntary termination of parental rights is governed by Kentucky Revised Statute (KRS) 625.090. To involuntarily terminate parents rights under the statute, the family court must find by clear and convincing evidence that the following three-prong test is satisfied: (1) the child has been adjudged an abused or neglected child as defined by KRS 600.020(1) by a court of competent jurisdiction or the child is found to be abused or neglected as defined in KRS 600.020(1) in this proceeding; (2) termination of parental rights is in the child's best interest; and (3) the existence of at least one of the grounds enumerated in KRS 625.090(2). *Cabinet for Health and Family Servs. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014).

The applicable standard of appellate review of findings by the family court in a termination of parental rights case is the clearly erroneous standard; thus, the findings of fact will not be set aside unless unsupported by substantial evidence. *M.L.C. v. Cabinet for Health and Family Servs.*, 411 S.W.3d 761, 765 (Ky. App. 2013); *see also* Kentucky Rule of Civil Procedure (CR) 52.01. A family court has broad discretion in determining whether the best interests of the child

warrant termination of parental rights. *C.J.M. v. Cabinet for Health and Family Servs.*, 389 S.W.3d 155, 160 (Ky. App. 2012) (citation omitted).

Father broadly contends that there was insufficient evidence to support termination of his parental rights. His arguments center primarily on what he asserts was improper admission of prior DNA files and his criminal records into evidence. We disagree.

Turning to Father's first argument, he contends that prior records of DNA cases were improperly admitted into evidence and used by the family court to demonstrate the children were abused or neglected pursuant to KRS 625.090(1)(a) and KRS 600.020(1). He states that the family court erred by allowing the Cabinet to supplement the record with certification after the trial. Father's argument is unpreserved. Although Father objected to admission of the DNA records at trial, the record before us reveals that the objection pertained only to any hearsay contained therein, not whether the records were properly certified. The objection was not renewed when the court ordered the clerk's certifications be filed after the trial. Appellants may not raise new arguments for the first time on appeal. *See Pope v. Thompson*, 519 S.W.3d 781, 784 (Ky. App. 2017). Father does not specifically challenge the family court's findings, only admission of the

DNA records into evidence. However, because Father's argument is unpreserved, we decline to address it further.[4]

Father also broadly asserts that the best interests of the children pursuant to KRS 625.090(3) were determined using improper admission of his criminal records. Father points out that he objected to admission of the criminal records due to lack of certification at the trial and repeats the argument to this Court. Close examination of the record reveals the Cabinet's Exhibit 12, Father's criminal records, were certified by both the Shelby County and Henry County District/Circuit Court Clerks. Each record corresponding to a separate criminal action had been certified with the clerk's seal and signature. Furthermore, we agree with the Cabinet that "the introduction of [Father's] prior criminal convictions are relevant on the issue of [his] violent nature, mental state and thus his general ability or fitness to parent." *G.E.Y. v. Cabinet for Human Resources*, 701 S.W.2d 713, 716 (Ky. App. 1985). Father's argument is without merit.

Father also argues the family court erred in considering the mental health of the children when their therapist did not testify at the trial. Father cites no legal authority for this argument in contravention of CR 76.12(4)(c)(v). However, Cassie Roy, the children's Therapeutic Support Specialist from

[4] The DNA records, including the video disc from the January 15, 2020, disposition hearing were introduced at trial pursuant to Family Court Rules of Procedure and Practice 32(3). The clerk's certification of the video disc was entered on June 18, 2020, prior to the court's judgment.

Benchmark, the children's foster care agency, did testify regarding the therapy the children receive and the medications they take. KRS 625.090(3)(e) requires only that the family court consider "[t]he physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered[.]" The statute does not require the testimony of a therapist or other mental health professional. Therefore, we believe the family court properly considered the physical, emotional, and mental health of the children pursuant to KRS 625.090(3)(e).

In turning to Father's final argument, we note that the family court must find only one of the factors listed in KRS 625.090(2) exists by clear and convincing evidence. In the case *sub judice*, the family court found clear and convincing evidence of the existence of three of the factors. To wit,

> (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;
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> . . . .
>
> (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;
>
> . . . .
>
> (j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights[.]

KRS 625.090(2)(e), (g), and (j).

Father argues that the family court improperly relied on his current incarceration for its finding pursuant to KRS 625.090(2)(e). This is unsupported by the record. Father participated in making three separate case plans after the children were removed in February 2019. The tasks contained in the case plans included: practice protective parenting; participate in random drug screens; maintain stable housing for a minimum of six months; maintain stable employment for a minimum of six months; complete a mental health assessment and follow all recommendations; complete domestic violence perpetrator classes; complete an anger management assessment and follow all recommendations; and complete a sex offender assessment and follow all recommendations. Father completed the mental health assessment and random drug screens prior to his incarceration in October 2019, but did not complete the domestic violence perpetrator class, anger management assessment, the sex offender assessment, and did not practice protective parenting. Father also tested positive for methamphetamine in

September 2019. The family court did find that Father is currently incarcerated with no end in sight due to the seriousness of the charges for which he was incarcerated. However, the extensive history of Father's involvement with the Cabinet and the family court contained in the record before this Court is replete with domestic violence, sexual abuse, neglect, and substance abuse which demonstrate he has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection to the children and there is no reasonable expectation of improvement. Thus, even if Father's criminal records had been excluded, the record supports the family court's findings pursuant to KRS 625.090(2)(e).

Father also argues that KRS 625.090(2)(g) was not satisfied because Father was not ordered by the court to pay child support. The record does show that Father was not ordered to pay child support at any point; however, this is unrelated to the family court's finding that Father has "not provided any necessary materials of life [to] the children" including food, clothing, shelter, school supplies, shoes, and regular medical care. Findings of Fact and Conclusions of Law at 39. The family court found that Father's failure to provide these necessities was not due to poverty alone, but rather, due to his failure to utilize services offered by the Cabinet. Since entering foster care, the children's needs have been met and the

record reveals that they are now thriving. The family court's findings are supported by the record.

Finally, Father puts forth the perplexing argument that the children have not been in foster care "for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights" pursuant to KRS 625.090(2)(j). The record shows that the children were in foster care from May – November 2017, and from February – December 2019, when the petition to terminate parental rights was filed. This is clearly greater than fifteen (15) cumulative months in the forty-eight months preceding the filing of the petition.[5]

We further note that the family court made extensive findings of fact in these cases to support the court's conclusions to terminate Father's parental rights to each child. Included was an exhaustive summary of the substantial evidence supporting its judgment that totaled more than eleven pages. We find no error in the court's findings nor did it abuse its discretion in concluding that it was in the best interest of all four children to terminate Father's parental rights.

For the foregoing reasons, the orders of the Shelby Circuit Court, Family Court Division, terminating Father's parental rights are affirmed.

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[5] Cumulative is defined, in relevant part, as "[f]ormed by adding new material or parts of the same kind; consisting of portions gathered or collected one after another[.]" *Cumulative*, BLACK'S LAW DICTIONARY 479 (11th ed. 2019).

ALL CONCUR.

BRIEF FOR APPELLANT:

Pamela M. Workhoven
Louisville, Kentucky

BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY:

Kate R. Morgan[6]
Shelbyville, Kentucky

[6] At the time of briefing, Kate R. Morgan was counsel for the Cabinet. She is now the Clerk of the Court of Appeals. On September 14, 2021, this Court entered an order disclosing this information pursuant to Canon 2 of the Code of Judicial Conduct. Kentucky Supreme Court Rule 4.300.