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Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-0138-ME

D.M. APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE MICA WOOD PENCE, JUDGE
ACTION NO. 19-AD-00051

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

AND

NO. 2021-CA-0139-ME

D.M. APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE MICA WOOD PENCE, JUDGE
ACTION NO. 19-AD-00052

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND

FAMILY SERVICES; AND G.M.M., A CHILD — APPELLEES

AND

NO. 2021-CA-0174-ME

D.M. — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE MICA WOOD PENCE, JUDGE
ACTION NO. 19-AD-00050

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; AND L.F.H., A CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, GOODWINE, AND LAMBERT, JUDGES.

GOODWINE, JUDGE: D.M. ("Mother") appeals the December 30, 2020 judgments of the Bullitt Circuit Court, Family Division, involuntarily terminating her parental rights to her minor children, L.F.H., J.L.M., and G.M.M. After careful review, we affirm.

BACKGROUND

The Cabinet for Health and Family Services ("Cabinet") has been involved with this family since 2007. The termination of parental rights ("TPR") actions stem from two dependency, neglect, and abuse ("DNA") petitions filed by the Cabinet in 2018. First, on May 23, 2018, the Cabinet filed a petition for removal of the children for neglect based upon Mother's paramour, A.F.'s, threat to set L.F.H. on fire. The Cabinet also expressed concerns about Mother's home due to exposed nails and wiring, as well as a chainsaw found within reach of the children. Based upon the petition, the family court removed the children from Mother's custody and placed them in the Cabinet's care. The children have remained in foster care since their removal. After adjudging the children neglected, the court ordered any contact between Mother and the children to be at the discretion of the children's therapist.

The Cabinet filed a second petition on December 7, 2018, alleging neglect based upon the children's reports of Mother's physical abuse and use of illicit substances. The family court again found the children had been neglected. The children remained in foster care and Mother was ordered to complete a case plan.

Mother's case plan included: (1) completion of the University of Kentucky's Targeted Assessment Program ("TAP"); (2) completion of a parenting

assessment; (3) completion of a psychological assessment; (4) compliance with random drug screening; (5) cessation of all contact with A.F.; (6) securing and maintaining stable housing; (7) securing and maintaining employment; and (8) compliance with all recommendations from assessment providers. Upon Mother's completion of the TAP assessment, the provider recommended she complete the CHOICES program. Mother completed a parenting assessment at Centerstone and was instructed to complete a protective parenting course.[1]

In addition to completing the TAP and parenting assessments, Mother completed the CHOICES program and complied with drug screens.[2] By her own admission, Mother did not complete the psychological assessment or the protective parenting classes.[3] She also admits to communicating with A.F. on multiple occasions during the pendency of the DNA actions. Although Mother has continuously lived with her sister since 2018, she also admitted her sister did not wish for the children to move into her home. Mother was inconsistently employed throughout the pendency of the DNA and TPR actions. At the time of trial, she had been employed for three weeks.

[1] Centerstone is also referred to throughout the court record and briefs as Seven Counties. For consistency, we will refer to the agency as Centerstone.

[2] The Cabinet concedes substance abuse was not a significant issue in Mother's case. For this reason, during the DNA actions, drug screening was removed from her case plan.

[3] At trial, Mother testified to having completed some but not all of the protective parenting classes through a provider other than Centerstone.

Due to Mother's lack of compliance with her case plan and the length of time the children had been in foster care, the family court changed the goal of the DNA cases from reunification to adoption on May 21, 2019. Petitions to involuntarily terminate Mother's parental rights were filed on October 16, 2019.[4] At trial, only Mother and Rebecca Harbin, a Cabinet caseworker, testified. Copies of the court records for the underlying DNA actions were entered as exhibits at trial. The family court entered judgments terminating Mother's parental rights on December 30, 2020. These appeals followed.

STANDARD OF REVIEW

The family court has "a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination." *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998) (citation omitted). This Court reviews judgments terminating parental rights under the clearly erroneous standard found in CR[5] 52.01, based on clear and convincing evidence. *C.R.G. v. Cabinet for Health and Family Services*, 297 S.W.3d 914, 916 (Ky. App. 2009) (citation omitted). "Clear and convincing proof does not necessarily mean uncontradicted

[4] The Cabinet also petitioned to terminate L.F.H.'s biological father's parental rights. He is now deceased. At trial, Mother identified individuals she claimed were J.L.M.'s and G.M.M.'s biological fathers. Neither individual was a party to the actions below nor are they parties to these appeals.

[5] Kentucky Rules of Civil Procedure.

proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *M.P.S.*, 979 S.W.2d at 117 (citation omitted). The family court's findings will not be disturbed unless the record is without substantial evidence supporting them. *Id.* at 116 (citation omitted).

ANALYSIS

Before reaching the merits of Mother's appeal, we must first address a serious deficiency in her brief. An appellant's argument must include "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." CR 76.12(4)(c)(v). Mother's brief is devoid of preservation statements. Mother's noncompliance with this rule hinders our ability to review her claims.

Where the appellant fails to include preservation statements within her brief, we may (1) ignore the deficiency and proceed with review on the merits; (2) strike the brief or the offending portions under CR 76.12(8)(a); or (3) review for manifest injustice. *Ford v. Commonwealth*, 628 S.W.3d 147, 155 (Ky. 2021). Because Mother's brief fails on its merits, we ignore the deficiency and proceed with review of her claims.

Mother's argument on appeal is that the Cabinet failed to prove the following elements by clear and convincing evidence: (1) the children were

abused or neglected; (2) the existence of at least one condition listed in KRS[6] 625.090(2); and (3) that the Cabinet made reasonable efforts to reunite the family under KRS 625.090(3)(c).

First, Mother claims the family court inappropriately relied on the findings of neglect at adjudication in the DNA actions rather than making a separate finding of neglect in the TPR cases. The family court found:

> The Petitioner children, [L.F.H., J.L.M., and G.M.M.], have previously been adjudged to be neglected children by the Bullitt Family Court, a court of competent jurisdiction, on two occasions, in case numbers 18-J-00234, 18-J-00236, and 18-J-00235, respectively. KRS 625.090(1)(a). The Court emphasizes that, while the standard in the juvenile case is preponderance of the evidence, it was presented with clear and convincing evidence of neglect during the adjudication hearing in April 2019.

Record ("R") at 399.[7]

Mother cites to *S.S. v. Cabinet for Health and Family Services*, No. 2020-CA-0508-ME, 2021 WL 519718, at *4 (Ky. App. Feb. 12, 2021), in arguing the family court erred in referring to the findings in the DNA case because, at adjudication in a DNA action, neglect or abuse must only be proven under the lower standard of preponderance of the evidence, whereas TPR requires proof of

[6] Kentucky Revised Statutes.

[7] Citations to the record are in Bullitt Circuit Court Case No. 19-AD-0052. The judgments and court records in the three actions are nearly identical.

abuse or neglect by clear and convincing evidence.[8] Mother's reliance on an unpublished case is misplaced. "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state[.]" CR 76.28(4)(c). The civil rules allow certain unpublished opinions to be cited for consideration by this Court. *Id.* Because there is published case law which adequately addresses this issue, we will not consider *S.S.*

> In relevant part, KRS 625.090 states
>
> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> (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; [or]
>
> 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[.]

Kentucky law plainly allows a finding of neglect or abuse in a separate DNA action to form the basis for TPR so long as the Cabinet proves by clear and convincing evidence that the finding was made by a court of competent

[8] At the time of briefing, *S.S.* was not final but had been ordered to be published by this Court. However, after briefing in this matter was complete, the Supreme Court of Kentucky denied review in *S.S.* and ordered this Court's opinion depublished. *Cabinet for Health and Family Services v. S.S.*, No. 2021-SC-0094-DE.

jurisdiction. *M.A.B. v. Commonwealth, Cabinet for Health and Family Services*, 456 S.W.3d 407, 412 (Ky. App. 2015). Herein, the family court's findings satisfy both the requirements of KRS 625.090(1)(a)1. and 2. Therefore, we find no error.

Next, Mother argues the Cabinet did not prove by clear and convincing evidence any of the grounds listed in KRS 625.090(2). The statute requires the family court find the existence of only one of the statutory factors. The family court found the following four grounds exist in these cases:

> (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) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights[.]

KRS 625.090(2).

Mother argues she did not abandon the children under KRS 625.090(2)(a) or fail to provide them with care and protection under KRS 625.090(2)(e) because court orders prevented her from communicating with them. Within the DNA cases, the family court ordered Mother to have no contact with the children and for any future contact to be at the discretion of the children's therapist. R. at 199. As found by the family court, at no time did Mother request the no-contact order be lifted. Mother also made minimal efforts to contact the Cabinet regarding the children's well-being.

Furthermore, Mother did not sufficiently alter her circumstances to allow for contact with the children as evidenced by her noncompliance with her case plan. While she completed some tasks, substantial portions of her case plan remained incomplete at the time of trial, including the psychological assessment and protective parenting classes. Mother failed to maintain consistent employment and suitable housing. She also continued to communicate with A.F. in violation of court orders. These facts support the family court's findings under KRS 625.090(2)(a) and (e).

Mother further argues the family court erroneously based its finding under KRS 625.090(2)(g) on her failure to pay child support where no support had been ordered. She claims that, while she did not pay child support, she provided the children gifts and can now financially support them. The record corroborates Mother's assertion that she was not ordered to pay child support in the DNA actions. However, KRS 625.090(2)(g) does not directly address child support. While failure to pay support where it has been ordered may be grounds for a finding under KRS 625.090(2)(g), it is not the only manner by which the Cabinet may prove existence of this ground.

In addition to finding Mother had not paid child support, the family court made extensive findings as to Mother's complete failure to support the children. At trial, Mother admitted that she had not provided any material support, food, clothing, or educational supplies for the children other than giving them gifts on a single occasion in 2018. Mother did not obtain suitable housing and admitted that, while she had saved some funds to rent a home, she did not have sufficient funds at the time of trial. Despite her claim of being able to support her children, Mother had only been sporadically employed since 2018. At the time of trial, she had been employed for only three weeks. Taken together, these facts support the family court's finding under KRS 625.090(2)(g).

Finally, Mother does not contest the length of time the children have been in foster care but claims the family court's finding under KRS 625.090(2)(j) was improper where the Cabinet hindered her ability to complete her case plan. Mother does not specifically allege any way in which she believes the Cabinet's actions prevented her from completing her case plan. We cannot grant relief based on mere conclusory statements. *Jones v. Livesay*, 551 S.W.3d 47, 52 (Ky. App. 2018). Furthermore, Mother "consistently makes excuses for her behavior and poor decision-making. She takes little responsibility for her actions that caused her children to be removed and that have caused her children to remain in foster care for almost two and a half years." R. at 392. It is undisputed that the children have continuously been in foster care since May 2018. On this basis, the family court did not err in its finding under KRS 625.090(2)(j).

Finally, Mother argues the Cabinet did not make reasonable efforts to reunite the family as required by KRS 625.090(3)(c). In determining whether TPR is in the best interest of the child, the family court must consider factors including

> [i]f the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court[.]

KRS 625.090(3)(c). Reasonable efforts are defined as "the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community . . . which are necessary to enable the child to safely live at home[.]" KRS 620.020(13).

Mother argues the Cabinet did not adequately assist her with completing her case plan. However, Mother admitted to meeting with caseworkers on several occasions to review her case plan. Mother's caseworkers provided her with copies of her case plan, referred her to Centerstone for services, coordinated her TAP assessment, provided the necessary information to providers for Mother to complete protective parenting classes, attempted to schedule Mother's psychological assessment, and attempted to contact Mother on multiple occasions. These constitute reasonable efforts under Kentucky law. *See P.S. v. Cabinet for Health and Family Services*, 596 S.W.3d 110, 118 (Ky. App. 2020).

CONCLUSION

Based on the foregoing, the judgments of the Bullitt Circuit Court, Family Division are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tammy R. Baker
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Jennifer Ellen Clay[9]
Louisville, Kentucky

[9] At the time of briefing, Kate R. Morgan was counsel for the Cabinet. She is now the Clerk of the Court of Appeals. On July 20, 2021, this Court entered an order disclosing this information pursuant to Canon 3(E) of the Code of Judicial Conduct, SCR 4.300. No party objected to Ms. Morgan's involvement.