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Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-0272-ME

J.W. APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 19-AD-00050

CABINET FOR HEALTH AND FAMILY SERVICES; E.W., A MINOR CHILD; AND S.E.B. APPELLEES

AND NO. 2021-CA-0274-ME

J.W. APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 19-AD-00051

CABINET FOR HEALTH AND FAMILY SERVICES; A.W., A MINOR CHILD; AND S.E.B. APPELLEES

AND NO. 2021-CA-0276-ME

J.W. APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 19-AD-00052

CABINET FOR HEALTH AND
FAMILY SERVICES; A.W., A
MINOR CHILD; AND S.E.B. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McNEILL, LAMBERT, AND TAYLOR, JUDGES.

McNEILL, JUDGE: On February 7, 2020, the Campbell Family Court entered three orders respectively terminating J.W.'s parental rights regarding the children at issue in this matter, E.W., A.E.W., and A.W. An appeal followed, and this Court vacated and remanded for additional findings and clarification. *See J.W. v. Cabinet for Health and Family Services*, No. 2020-CA-0357-ME, No. 2020-CA-0358-ME, No. 2020-CA-0359-ME, 2020 WL 6375196 (Ky. App. Oct. 30, 2020).

On January 12, 2021, the family court then entered new findings which, as before, were largely replicated throughout each of its judgments relating to the children; and, as before, the family court once again terminated J.W.'s parental rights. In this second appeal, J.W. contests the accuracy of virtually every finding of fact and conclusion of law that the Campbell Family Court made in support of its January 12, 2021 judgments terminating his parental rights. Upon review, we affirm.

We will briefly discuss the background of this matter, and then proceed to the relevant substance of the family court's judgments.

On September 6, 2018, pursuant to three emergency custody orders (ECOs) of the Campbell Family Court, the Cabinet for Health and Family Services (the Cabinet) removed the children from the custody of their mother, S.E.B. (Mother). As represented in the ECOs, the address of Mother and the children was "homeless;" and the details underpinning the removal – which the family court's ECOs incorporated from the Cabinet's dependency, neglect, and abuse (DNA) petition – were as follows:

> CHFS became involved with the family after receiving multiple reports concerning the safety of the children. Concerns include the following: substance use by the mother who is the primary caregiver, chronic homelessness, utilizing inappropriate caregivers, inadequate supervision by the mother, domestic violence and the children being exposed to this violence which resulted in an injury to [A.W.][1] [Mother] has a history

[1] The ECO relating to A.W. specified "1 year old child had black eye due to DV."

> with CHFS and her two oldest children[2] are in the permanent custody of the grandmother. There are additional concerns regarding [Mother's] mental health, her anger issues and her inability to consistently meet the children's health needs. [Mother] is currently on probation and is ordered to attend IOP. [Mother] reports she is not attending IOP consistently and has recently tested positive for Methamphetamines, Marijuana and Suboxone. She has also reported to taking non-prescribed opiates. [Mother] does not currently have a safe and stable place to reside with her children.

In a later report,[3] the Cabinet would also indicate each of the children suffered from "developmental and social delays;" and that it had "concerns for the diet and snacks that the children are provided while in the care of their birth mother," as all three "had significant dental/medical neglect of their teeth" and extensive tooth decay upon entering foster care, necessitating dental surgery with sedation.

The Cabinet's DNA petition also discussed J.W. to a limited extent, indicating he and Mother were unmarried; he had been identified by Mother as the children's father; his address was "unknown;" and that he had not been contacted about or considered for placement because "there are concerns regarding domestic

[2] Mother has five children. The "two oldest children" referred to here are not at issue in this matter, nor were they fathered by J.W.

[3] The information regarding the children's developmental delays and the state of their teeth was set forth in the Cabinet's January 16, 2019 review report.

violence and substance use with father[.]"[4] The Cabinet eventually located J.W., who resided in Cincinnati, Ohio. Due to J.W.'s status as the children's putative father,[5] the family court issued a summons directing J.W. to appear as a party in this matter.

On October 10, 2018, Mother filed a stipulation of facts and waived a formal adjudication hearing, admitting to "neglect or abuse" of the children based upon what was set forth in the Cabinet's DNA petition, and further representing she had "engaged in a pattern of conduct that makes [her] incapable of caring for the immediate and ongoing needs of the child[ren] including, but not limited to, parental incapacity due to alcohol and other drug abuse." Afterward, the family court directed the Cabinet to maintain custody of the children pending disposition of this matter. On November 28, 2018, the family court then held a dispositional hearing which Mother and J.W. attended with counsel, and it appears this was the first instance of J.W.'s participation in this matter. There, the family court entered

[4] In its original disposition of this case on February 7, 2020, the family court emphasized in its order of that date that Mother "has made allegations of domestic violence by [J.W.]." However, the significance of this statement in the context of this case was at best dubious. The only witness who testified about Mother's "allegations," Maurice Lee, qualified that Mother's allegations were unverifiable. Moreover, the court records adduced in this matter and discussed below indicate only that *Mother* had anger management issues and a record of committing domestic violence.

[5] *See* Kentucky Revised Statute (KRS) 625.065(1)(a).

an order adopting the substance and recommendations of a November 20, 2018 DNA report filed by the Cabinet.

To summarize, the report noted the children were residing together in a foster placement and that the permanency goal was "return to parent." Nevertheless, since the removal of the children, Mother had tested positive for various illicit substances over the course of approximately seven court-ordered random drug screens between September and November 2018. Also, the Cabinet had longstanding concerns with both Mother and J.W. In relevant part, the Cabinet's report stated:

> The Cabinet has a lengthy involvement with [Mother] and her children, due to her oldest children being removed from her custody. Services were offered to her in 2012, however she did not complete her case plan in order to prevent permanent custody being granted to her mother in 2013.
>
> . . .
>
> A report dated 5-13-15, allegations of partner abuse, alleged perpetrator was [Mother], [J.W.] the victim. A report from 7-13-15, indicated that Ohio DJFS had an open case with [Mother] and [J.W.] due to child – [E.W.] testing positive at birth for Oxy at birth [sic], family moved to Kentucky and had recent positive drug screens for Marijuana on: [Mother], 4-11-15, [J.W.] on 3-20-15. Two reports were received in Aug 2018, which prompted the current action.
>
> . . .

> The past case plan for [Mother] in 2012 offered services to address her mental health (medication management and individual therapy), housing, parenting, paternity, & substance abuse services, including random drug screens. A meeting was held with [Mother] on 11-9-18 (w/worker & FSOS). Upon meeting with her, [Mother] became upset due to concerns with her visits being discussed and she left the meeting prior to being able to establish a plan to address her current parenting, substance abuse, ongoing homelessness, exposure of the children to domestic violence & stable mental health.
>
> . . .
>
> Both parents have significant criminal charges/convictions: [Mother]; Assault and contempt of court, 2012, Possession of controlled substance, 2015 & 2016, traffic violations, 2017. [J.W.]; drug paraphernalia, buy/possession, 2014 and 2 probation charges.

The Cabinet noted that its continued efforts to reunify the family would include random drug screens, which Mother had been court-ordered to undergo since September 2018; and, among other requirements, "services to address domestic violence, anger management, criminal charges/convictions and stable mental health for [Mother]." Regarding its reunification plan for the family, the Cabinet offered recommendations for both Mother and J.W. It is unnecessary to discuss the family court's recommendations for Mother because she eventually terminated her parental rights voluntarily.

As for J.W.'s own reunification plan, its relevant substance – as well as the extent of J.W.'s progress and compliance with it over the course of the year

or so that followed – is discussed in our analysis, below. Suffice it to say that the family court deemed his progress and compliance insufficient for purposes of this termination of parental rights (TPR) matter. In its dispositive orders of January 12, 2021, the family court largely agreed with the salient points that the Cabinet eventually raised in its TPR petitions: (1) J.W. remained limited to the role of the children's *putative* father pursuant to KRS 625.065(1)(a);[6] (2) due to J.W.'s failure to protect and preserve the children's fundamental right to a safe and nurturing home, the children were abused or neglected as defined in KRS 600.020; (3) termination of J.W.'s parental rights was in the children's best interests; and (4) the termination grounds enumerated in KRS 625.090(2) existed, including KRS 625.090(2)(a), (e), and (g).

As stated at the onset, J.W. contests the accuracy of virtually every finding of fact and conclusion of law that the family court made in support of its January 12, 2021 judgments terminating his parental rights. Therefore, we will quote the relevant substance of each of the family court's findings of fact set forth in its January 12, 2021 orders:

> 3. There was an issue as to paternity of [each] child. The biological parents were never married. In order to clean up any issue regarding paternity, the November 28, 2018

[6] The Cabinet later introduced copies of the children's birth certificates at the January 10, 2020 hearing, and each certificate listed J.W. as the father. Accordingly, while no such finding was ever made or sought, J.W. could also be considered the children's putative father pursuant to KRS 625.065(1)(c).

Dispositional Order in the underlying Dependency Neglect and Abuse case required [J.W.] to establish paternity and to set up child support through the Campbell County Child Support Office. The Father never set up child support, and he did not take a genetic paternity test until about a month before the Termination of Parental Rights hearing on January 10, 2020. The genetic paternity test was required to establish legal paternity for the child[ren] and to remove any doubt as to the paternity issue. [J.W.] testified that it took so long to get the genetic test because Mother didn't cooperate with the testing. However, after the disposition the child[ren were] in Cabinet custody. The Court often has genetic testing cases where only the father and child need to give test swabs. Further, throughout the pendency of the case, Father never raised Mother's non-cooperation as an issue with the genetic testing.

4. The Father and Mother ceased residing together in April of 2018. The Father claims that the Mother was transient so that he only saw the child[ren] sporadically between April 2018 and September 2018. He also testified that he tried giving her money for support, but such was on a sporadic basis because Mother moved too much.

5. The child[ren were] . . . removed from Mother's care in September 2018. At that time, Mother was actively using drugs and was homeless. There were concerns about domestic violence in the home. The Cabinet worker, Maurice Lee, testified that the Mother alleged Father had perpetrated domestic violence, but Mr. Lee acknowledged that such could never be substantiated.

6. Mother admitted neglect on October 10, 2018. A Disposition was held on November 28, 2018. Mother subsequently consented to voluntarily terminate her parental rights to the child[ren]. The Father has contested such.

7. The Father attended the Dispositional hearing in November of 2018, and he was ordered to do the following:

a. Cooperate with the Cabinet.

b. Obtain/maintain stable housing, present copy of lease to Cabinet within 48 hours of signing (or of current residence), complete Nurturing Group (Family Nurturing Center (525-3200), complete Parent Child Interactive Therapy, submit to random ETG & drug screens at CMS – BLUE & PURPLE, complete [UK] TAP assessment or comparable program in Ohio, complete Learning Center's employment program OR provide full-time pay stubs to the Cabinet the first business day of every month OR provide proof of total disability, establish paternity for his children, pay monthly child support, report to Campbell County Child Support Office to set up payments, will not commit any further crimes/be convicted of any criminal charges and follow all recommendations of the above providers.

At the Disposition, the Father was ordered to take a hair follicle drug screen – if the test was positive for other than marijuana, he was to screen randomly on blue and purple or five times per month. The hair follicle was positive for marijuana, methamphetamines and cocaine. At the January 16, 2019 Review date, he was ordered to test blue and purple as outlined above. At the January 16, 2019 Review date several items were added to his Dispositional Order. He was to attend NA/AA meetings, complete mental health/substance abuse assessment, successfully complete parenting class (Family Nurturing Center #525-3200, Catholic Charities #581-8974 and

CareNet #781-9878), and complete parent/child interactive therapy after parenting class was completed. Because of alleged financial issues, the Cabinet was ordered to pay for Father's drug screens at the aforementioned January 2019 Review.

8. Until approximately July of 2019, the Father failed to make any progress in his case plan. He failed to drug screen as ordered, failed to establish paternity, and failed to set up child support. Father did maintain a one-bedroom residence on Beekman Street in Cincinnati, OH and did maintain employment as a tree trimmer. Between November 2018 and July 2019 Father had no contact with the child[ren] because he did not comply with the Court's drug testing Order. While being ordered to test five times per month on a random basis (on the colors blue and purple), the Father only tested 5 times in a nine-month period of time[.]

9. Father continued to test positive until August 12, 2019. A test on August 12, 2019 was positive for cocaine. Father was previously ordered not to have contact with the child[ren] until he could have three clean drug screens. While he started accomplishing three clean screens in July of 2019, he would either miss a screen or test positive so that he was not able to have contact with the child[ren] until October of 2019. Father claimed the August 12, 2019 test was a false positive because he had consumed an energy drink before the test. Father testified he could not afford to have the test lab [sic] verified. However, he had previously testified in the summer he was earning between $200 to $250 per day. Nevertheless, he testified he could not afford the additional test verification because he had other bills to pay.

10. Father claimed that transportation and financial issues prevented him from making efforts to complete the case plan. However, the case was reviewed three times between January 2019 and May of 2019. At the January

16, 2019 Review the Court ordered the Cabinet to pay for Father's drug screens. Because of the Father's non-compliance with the drug screens, the County Attorney filed a Motion for Contempt and Father admitted contempt on May 15, 2019 for failing to drug screen. In addition, the other claimed difficulties were not brought to the Court's attention during the review hearings. No motion was made to remedy the alleged transportation issue and the financial issue was remedied by having the Cabinet pay for the screens in January of 2019. Per the father's testimony, his financial situation prevented him from doing parenting classes. He testified that it was not until he found CareNet that he was able to get that accomplished sometime in the fall of 2019. Evidently, CareNet did not charge him a fee for the parenting class. However, the Review Order in January of 2019 clearly gave him a route to find CareNet as well as the Family Nurturing Center and Catholic Charities for this service. Father was given the CareNet number in the January 2019 Review Report. The Father has completed some things on the case plan however it took nearly a year for him to do such. He did do a mental health assessment at Transitions on October 3, 2019. (Defendant's Exhibit #3). He did complete the parenting classes through CareNet. Pursuant to the clean drug screens it appears he is no longer using drugs since August of 2019. Furthermore, he did submit alleged proof that he attended NA/AA meetings beginning in October 2019.

11. However, there were some issues regarding the mental health drug assessment. The assessment noted the Father claims to only use marijuana. However, the testing clearly showed that he tested positive for both methamphetamines and cocaine. Further, Father did not report that he was ordered to attend NA/AA meetings in the January 2019 Disposition Review. Father did not start attending meetings until October of 2019. The social workers testified to concerns that Father's misrepresentation about his drug use would not yield a complete and accurate result regarding the drug

assessment. Father maintained that he only ever intended to use marijuana and that the other drugs were put into the marijuana, unknown by him, by the drug dealers he purchased the marijuana from on the street.

12. Further, the Guardian ad Litem had some issues with the NA/AA meeting attendance proof. While the Father attended multiple meetings in at least three different places (Oak Street, Dry Dock and N/A of Hamilton) at different times, with different parties attending the various meetings, the initials that verified his attendance were two different initials for all three attended locations. Furthermore, the Father testified that he did not have a sponsor with the NA/AA meetings. There is a problem with the credibility of the NA/AA meeting slips because it looks like the verification initials are fabricated. – see Defendant's Exhibit 2.

13. The Father admitted that he had not been in a caretaking role of the child[ren] since April of 2018. He also admitted that he did not initiate court proceedings to have custody or parenting time with the child[ren] between April of 2018 and September of 2018. He testified he was getting ready to do such when the Cabinet removed the child[ren] from Mother's care.

14. Despite being ordered to establish paternity and child support in November of 2018, the Father did not do the DNA exam until December of 2019. He didn't set up child support, either. Father claimed he asked the foster mother if she needed money and he claimed that she declined. The Father did give Christmas and birthday gifts to the child[ren] in 2018.

15. The Father, by his admission, testified his housing is inadequate for him and his three children. He testified that he had contacted a rehabber in Newport, Kentucky who is rehabbing a three-bedroom home. The Father testified that as soon as the home was completed that he could rent such. However, there was no written

> agreement regarding such, and no other collateral proof or witness testimony presented to verify the arrangement.
>
> 16. The Father had begun phone contact with the child[ren] in October of 2019. Father was able to achieve such because of his clean drug screens after August of 2019. Initially these occurred every week, but because of the hectic nature of the calls with three young children, Father agreed to call every other week. Father claims the child[ren] seemed pre-occupied with other things when he called. The social worker testified that the child[ren] had escalating negative behaviors after his calls.
>
> 17. The Father gave conflicting testimony as to his work schedule and his availability for the child[ren]. He testified that during the busy time of the year – which is essentially the summer months – he worked between 6:30 a.m. and 7:00 p.m. The reason for such is that as a tree trimmer, once a tree cutting process has started, he must stay until the job is completed. When asked on cross examination how he could parent with the child[ren] with this schedule, the Father stated that he could work less hours if he wanted.

Before progressing to the conclusions that the family court drew from these findings, we pause here for a moment to address a series of overlapping contentions J.W. has with respect to their accuracy.

First, with respect to paragraphs "3" and "14," J.W. notes that he completed his portion of the paternity testing *before* "December 2019." We agree. His testimony at the January 10, 2020 termination hearing – along with that of the Cabinet's representative, Ashley Valenzuela – indicated he completed his portion of the testing sometime in late October 2019. Thus, it took him *eleven* months to

comply with the family court's November 28, 2018 order, as opposed to what the family court represented was approximately twelve or thirteen. For purposes of the family court's disposition of this matter, however, that minor disparity makes no meaningful difference.

J.W. also represents "the caseworker [*i.e.*, Maurice Lee, the Cabinet's social services specialist who oversaw this matter for the Cabinet from mid-January through July 30, 2019] further testified that he did not provide the paternity testing info to [him] until July 2019." J.W. omits, however, Lee's testimony that J.W.'s requirement to establish paternity was a conversation they had "every time" they were in contact; that Lee testified he met with J.W. in person on at least one other occasion (June 19, 2019); that Lee had maintained contact with J.W. since January 2019 through phone calls and text messaging; and that any limit in their contact was due to J.W.'s forgetfulness or unwillingness to meet. Likewise, J.W. forgets his own admission at the January 10, 2020 hearing that "prior to July 1st of 2019, [he] didn't do near what [he] w[as] supposed to do" with his case plan.

Next, J.W. takes issue with paragraph "8," insisting the family court clearly erred because, in that paragraph, it overlooked that he had made progress in his case plan as of January 2020. To be clear, however, the subject of paragraph "8" was J.W.'s progress – or lack thereof – as of *July* 2020. J.W. also adds that he

"made so much progress that his caseworker recommended he and the children begin [parent child interaction therapy] PCIT in July." True. The next month, however, the recommendation for PCIT was rescinded when J.W. then tested positive for using cocaine – a result J.W. chose not to contest, as reflected in paragraph "9" set forth above.

Next, J.W. again takes issue with paragraph "8," in conjunction with paragraphs "7" and "9," asserting the family court "erroneously found [he] did not have contact with his children because he did not comply with the court's drug testing Order." Specifically, he claims that because he provided three negative drug screens in July 2019, he had an "immediate right to visitation," and he faults the Cabinet for "fail[ing] to initiate any contact at all until October, and then only by phone instead of beginning PCIT."

J.W. misrepresents the record. The family court's April 17, 2019 review hearing order directed J.W. "to establish paternity *and* drug screen as previously ordered with CHFS *before* visitation occur [sic]." (Emphasis added.) Regarding the former requirement, J.W. eventually supplied his genetic material for his part of the paternity test in *late October 2019*, but his paternity was never *established* in this matter prior to the January 10, 2020 hearing. With respect to the latter requirement, J.W. omits that he undisputedly tested positive for cocaine on August 12, 2019; and, as Valenzuela testified, that his pair of missed drug screens

in September 2019 resulted in two more positive results pursuant to Cabinet policy – and *that* was why he was not permitted telephonic contact with the children until October 2019. Apart from the assertions of his brief, J.W. also points to nothing – and we have discovered nothing of record – indicating he ever requested anything beyond telephonic contact with the children. However, J.W. was aware of these prerequisite visitation requirements – or should have been aware of them – at all relevant times.

Next, J.W. argues paragraph "10" is "clearly erroneous." In this vein, while taking stock of the family court's examples regarding his poor case plan progress until October 2019, J.W. insists he "substantially completed his case plan prior to trial." Absent from his statement, however, is any contention that the family court misunderstood any of the evidence it quoted in that paragraph. To be sure, the family court's summary of the evidence was accurate.

J.W. argues paragraph "11" is "clearly erroneous" because "the Cabinet did not offer any evidence to prove there were any misrepresentation [sic]" from J.W. during his drug abuse and mental health assessments. We disagree, but some additional background is necessary to address this point.

The record does not contain a report regarding J.W.'s first substance abuse assessment, nor does it indicate what date the assessment took place while Lee supervised this case for the Cabinet between January and July 2018. However,

it is undisputed that J.W. underwent the assessment during Lee's period of supervision (J.W. testified it occurred in Ohio). And, Lee testified that upon contacting the assessor, he was informed J.W. had reported to the assessor "he was only using marijuana and that he had been testing clean." Consequently, the assessor had not recommended any substance abuse treatment services for J.W. However, J.W.'s report to the assessor – as related by Lee – was verifiably false: when J.W. appeared for any of his court-ordered drug screens, *all* of them – until July 2019 – had been positive for THC; and two of them (*i.e.*, his drug screens from November 28, 2018, and January 31, 2019) had been positive for cocaine and methamphetamine.

As for Valenzuela, she noted that on October 3, 2019, J.W. completed a comprehensive assessment at Transitions, Inc. (which assessed both his mental health and substance use). However, she testified, the results were the same as his prior substance abuse assessment: no problems were identified and no services were recommended because, as before, J.W. had omitted any mention to the assessors of his use of substances he had previously tested positive for – cocaine and methamphetamine. Valenzuela testified she believed this demonstrated a concerning lack of candor from J.W.

With respect to what Lee and Valenzuela testified had been his "misrepresentations" during his substance abuse and mental health assessments,

J.W. admitted he was aware of his positive test results for cocaine and methamphetamine prior to his assessments. But, he assigned blame to the assessors for not asking him whether he had *indirectly* or *unintentionally* or *infrequently* used cocaine or methamphetamine. Insisting that he had only used cocaine or methamphetamine by smoking "laced" marijuana, J.W. asserted he had consequently been under no obligation during the assessments to disclose his positive test results relating to those drugs.

As an aside, the record provides no means of verifying exactly what questions the assessors asked J.W. And, when asked by the Cabinet if it was possible (considering what J.W. himself had represented about his drug dealers frequently lacing the marijuana he purchased from them) that he may have *often* indirectly or unintentionally used cocaine or methamphetamine, J.W. conceded he did not know.

With that in mind, we now return to the substance of J.W.'s contention regarding paragraph "11." If J.W. is referring to direct evidence of a misrepresentation adduced by the Cabinet, his assertion is correct: Lee and Valenzuela could only testify about their recollections or impressions to that effect, and they had no direct knowledge of what the assessors may have asked him.

That aside, J.W. misses the point. As the family court indicated in paragraph "11," both Lee and Valenzuela testified they were concerned J.W. was

and would remain unwilling to be completely forthcoming about his history with substance abuse, as it would prevent him from receiving necessary treatment services and, thus, prevent him from being an adequate custodian for the children. The repeated omission of J.W.'s history with methamphetamine and cocaine during his assessments highlighted their concerns, and the reason behind the omission depended upon J.W.'s credibility. The family court had only J.W.'s *word* that he involuntarily used cocaine and methamphetamine. The family court had only J.W.'s *word* that the assessors did not ask him the right questions during the assessments to elicit information from him about his use of cocaine and methamphetamine. As set forth below, the family court ultimately determined J.W.'s word had little value.

Next, J.W. takes issue with the substance of paragraph "12," which related the family court's concerns with the credibility of J.W.'s AA/NA attendance records. Again claiming "clear error," J.W. essentially asserts that because his testimony and the AA/NA attendance sheet he produced at the January 10, 2020 hearing was the only evidence adduced relative to his participation in AA/NA, the family court was required to believe it. We disagree.

Again, some additional background is necessary for context. At the hearing, J.W. represented he had been attending NA/AA meetings regularly since October 10, 2019. The only evidence of record supportive of his attendance

consisted of (1) J.W.'s testimony to that effect; and (2) a handwritten list of locations, dates, and times of these meetings – purportedly bearing the verifying initials of each meeting's facilitator – as set forth on two sheets of lined notebook paper that J.W. adduced as an exhibit at the January 10, 2020 hearing. The notations and initials on the first sheet are written in the same ink; the notations and initials on the second sheet are written in the same ink; and the notations are written in the same handwriting. J.W. testified the meetings were held in three different locations: "NA of Hamilton," "Dry Dock," and "Oak Street." He testified the speakers at each location were different. Specifically, the speaker at Dry Dock was always woman with the initials "D.S.," and the speaker at Oak Street was always "a guy."

However, as the Guardian *ad litem* (GAL) pointed out while cross-examining J.W., the sole notation representing J.W.'s attendance at Oak Street (*i.e.*, reciting an attendance date of November 27, 2019) bore an unintelligible mark, but next to it the verifying initials of "D.S." written in what appears to be the same hand as each of the other "D.S." initials immediately above and below it. Again, "D.S." was, according to J.W., the woman who facilitated the *Dry Dock* meetings. Upon being asked by the GAL if he had simply taken two pieces of paper and "filled them all out before [he] came to court," J.W. denied doing so.

However, despite purporting to attend AA/NA from "10/10/19" through "1-3-19,"[7] J.W. also denied having a sponsor; represented he was not participating in "any twelve-step program" because doing so was optional; and represented that the program had no requirement regarding how often he needed to attend meetings.

In short, paragraph "12" is not indicative of error. There were objective reasons to doubt the veracity of J.W.'s AA/NA attendance records, and the family court did not misstate the evidence of record. Moreover, it was the family court's prerogative to assess the credibility and weight of that evidence. *See Moore v. Asente*, 110 S.W.3d 336, 353-54 (Ky. 2003). And, contrary to J.W.'s insinuation, no rule of law required the family court to take as conclusive the uncontradicted evidence of an interested witness. *See Grider Hill Dock, Inc. v. Sloan*, 448 S.W.2d 373, 374 (Ky. 1969).

Next, J.W. claims paragraph "13" is clearly erroneous. We disagree. He identifies nothing about that paragraph misstating the evidence of record, and we need not address this point further.

Next, with respect to paragraph "14," J.W. argues:

> Finding No. 14 is clearly erroneous as the Father did establish paternity. The Father testified to having difficulty setting up child support. The Cabinet could have obtained an order to pay child support, but it did

[7] Chronologically, J.W.'s final three handwritten notations on his sheets indicating his attendance at AA/NA meetings were dated "12-20-19," "12-27-19," and "1-3-19."

> not. The trial court is holding the Father to a higher standard than the government trying to take his children.

We disagree. First, his paternity was not established prior to the January 10, 2020 hearing.[8] J.W. did "indeed . . . go for DNA testing" prior to the January 10, 2020 hearing in this matter. But, the *results* of the paternity testing were not determined prior to the January 10, 2020 hearing; nor is there any indication in the record before us indicating what those results *were*. Second,

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[8] In its original disposition of this case on February 7, 2020, the family court emphasized in its judgments of that date that "Father has not established paternity, despite having the information necessary to complete the task. As a result, he also has not established child support." In our subsequent appellate review, our Court took issue with this finding, stating:

> We agree with Father that the finding that he has not completed parenting classes and the finding that he has not established paternity are clearly erroneous and they are hereby set aside. Testimony at the hearing established that Father had indeed completed parenting classes and that *he did go for DNA testing*.

J.W., 2020 WL 6375196 at *9 (emphasis added).

Upon closer scrutiny of the record, however, it is unclear what "error" this Court was attempting to highlight in our italicized statement set forth above. True, J.W. did "indeed . . . go for DNA testing" prior to the January 10, 2020 hearing in this matter. But, the *results* of the paternity test were not determined prior to the January 10, 2020 hearing; nor is there any indication in the record before us indicating what those results *were*. As J.W. himself testified at the January 10, 2020 hearing:

> CABINET: Paternity isn't completed.
>
> J.W.: Um, I've done that a long time ago. They've [the children] just now got the swab test what, a couple days ago? I did it. I've been, mine, mine was done months ago.
>
> CABINET: Maybe if you'd cooperated from the beginning, that'd be complete?

Stated otherwise: nothing suggests J.W. ever *established* his paternity through DNA testing; and, irrespective, nothing suggests J.W. made any attempt to establish child support prior to when the family court entered its February 7, 2020 order terminating his parental rights.

despite J.W.'s assertion to the contrary, much of the evidence in this matter, as correctly summarized by the family court in paragraph "3" set forth above, demonstrates his "difficulty setting up child support" was of his own making. Third, until J.W. established his paternity, the Cabinet could not have obtained a child support order against him.[9] Lastly, if J.W. wished to be regarded as the children's father, the absence of a child support order did not absolve him of the responsibility for supporting the children. "Kentucky law imposes a duty upon a parent – and not the state – to support his or her child regardless of whether or not a child support order has been entered against the parent." *C.A.W. v. Cabinet For Health & Family Services*, 391 S.W.3d 400, 406 (Ky. App. 2013) (citation omitted).

Lastly, J.W. takes issue with paragraphs "15" and "17." He argues these paragraphs were indicative of clear error because:

> The Father had sustained housing and work throughout the duration of these proceedings. The Father had the ability to obtain a larger residence it was just taking time to get assistance as he did not have physical custody of

[9] As merely a *putative* father within the meaning of KRS 625.065(1)(a), J.W. could not have been legally obligated to provide child support in this proceeding. While KRS 205.715 provides that "[t]he payment of public assistance to or on behalf of a dependent child shall create a debt due and owing the state by the parent or parents of the child[,]" KRS 205.710(14) defines "parent" in this context as "a biological or adoptive mother or father of a child born in wedlock or a father of a child born out of wedlock *if paternity has been established* in a judicial proceeding or in any manner consistent with the laws of this or any other state, whose child is entitled to support, pursuant to court order, statute, or administrative determination[.]" (Emphasis added.)

> the children. Regarding his work hours and ability to exercise parenting time, the Father testified that someone had to stay until the job was done, not that someone had to be him. He also said he could work less hours now that the job was closer to home. (VR [Video Record] 1/10/2020 10:39:28). The Father was not further questioned regarding the specifics of future childcare.

We disagree. J.W. is taking issue with the family court's accurate factfinding, or with reasonable inferences the family court drew from the evidence. Regarding his first point, J.W. repeatedly admitted during the hearing that the housing he had sustained throughout the duration of these proceedings was inappropriate for the children. Regarding his second point, apart from his unsupported testimony which the family court ultimately chose not to credit, J.W. adduced no proof that he had secured or had made any efforts to secure a residence appropriate for the children. Regarding his third point, J.W. did not testify that "*someone* had to stay until the job was done." His testimony was, "*We* gotta stay on the job until the job's done. *We* just can't leave it." (Emphasis added.) In turn, that statement does indeed tend to conflict with J.W.'s added assertion that he could work less hours if he wished.

Likewise, when J.W. *was* questioned "regarding the specifics of future childcare" – specifically about how he would be able to both maintain his work schedule (along with an additional hour-long NA/AA meeting) *and* adequately parent the children, J.W.'s only answer was that he could cut his current ten-to-

fourteen-hour workday back "to just a regular eight-hour workday from six in the morning to roughly four o'clock in the afternoon." The Cabinet and the family court were not responsible for pressing him further on that subject.

Having said that, we now turn to the family court's relevant[10] legal conclusions:

> 1. The Mother has made a voluntary and informed consent to adoption thereby consenting to the termination of her parental rights.
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> 2. Regarding the Father, by clear and convincing evidence the Court finds the Father neglected the child[ren] as follows:
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> . . . .
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> b. . . . [G]rounds for finding that Father neglected the child[ren] is [sic] found in KRS 600.020(1)(a)(4) [sic] in that he continuously or repeatedly failed to provide essential parental care for the child[ren]. Father left the care of the child[ren] in April 2018. He testified that he did so because of Mother's instability causing evictions and frequent moves. Despite his testimony, he made no effort to gain court ordered custody or visitation of the child[ren]. Father could provide no specific period of time after April 2018 that he cared for the child[ren]. Father was actively using drugs between at least November 2018 and August 2019 which prevented him from having contact with the child. His choice to refrain from testing and choice to use drugs prevented him from being in a caretaking role. All the children are very

[10] The family court also cited "abandonment" as another basis of neglect. *See* KRS 600.020(1)(a)7. It is unnecessary to address this alternative basis, and we have omitted any reference to that point in the family court's judgments.

young – between the ages of 3 and 6 years old and need a high level of supervision and care.

c. Further, Father neglected the child[ren] pursuant to KRS 600.020(1)(a)(8). He failed to provide adequate care, supervision, food, clothing, shelter, education and medical care. After the Father left the caretaking role in April of 2018, he could only provide general, vague testimony about providing money for the child[ren] on a sporadic basis between April and September 2018. At the Disposition in November of 2018 he was ordered to legally establish paternity and set up child support at the Campbell County Child Support Office. He failed to set up child support and did the genetic testing nearly a year after being ordered. He testified that he offered money to the foster mother but again such was general in nature without specifics of amount and time. Sporadic offers of payment, when he failed to set up child support as ordered, is not evidence of the Father attempting to give adequate resources or care to his child.

3. Termination of Father's parental rights is in the child[ren]'s best interest[s] under KRS 625.090(1)(c). As mentioned above, because Father failed to test and continued to utilize illegal substances including meth, cocaine and marijuana between November 2018 and September 2019 he was not able to have contact with his child[ren] . . . .

4. In addition, the Father, for a period of not less than six (6) months failed or refused to provide essential parental care for the child[ren]. KRS 625.090(2)(e). Father has not cared for the child[ren] since April 2018. Father's choice to avoid drug screening and to use illegal substances prevented him from being in a caretaking role or having contact with the child[ren] between November 2018 and September 2019. Further, he currently does not have sufficient housing for the child[ren]. His testimony that he had available housing could not be verified by any written document or collateral evidence. He could

not produce a lease or a contract or even a receipt for an alleged deposit that he put down on the home. The individual who owned the rehabbed home was not identified in his testimony. No credible evidence was given to indicate the Father could take the child[ren] into his home in a reasonable amount of time.

5. Finally, Father for reasons other than poverty alone continuously or repeatedly failed to provide essential food, clothing, shelter, medical care or education and there is no reasonable expectation for improvement. KRS 625.090(2)(g). Father was ordered to set up a child support account in November 2018. Father failed to do so – child support would have aided in providing for the child[ren]. His general statements that he offered money to the foster mother are not credible when he was clearly ordered to set up a child support [sic] in the November Disposition Order. He has failed to support the child[ren] for more than a year – November 2018 through the date of the January 2020 termination of parental rights hearing. There is no reasonable expectation for improvement because he has ignored the responsibility for over a year and his reasons for failing to set up child support were not credible. Father testified that the Mother did not cooperate in going with him to the child support office to file acknowledgements of paternity. The requirement to set up the child support and finish the paternity process was ordered in November 2018. Perhaps his communication with the Mother delayed the process for one or two months, but after such time, in the Spring of 2019 when the Father knew Mother was no longer going to cooperate, he should have gone and set up the child support obligation. Additionally, there were several reviews of his case throughout the Spring of 2019. The Mother's failure to cooperate was never brought up in the reviews.

6. The Cabinet made reasonable efforts to reunite the child[ren] with the Father by giving the Father tasks to complete. The Father presented two (2) sheets of paper

purposing to verify twenty-six (26) NA/AA attendance[s] beginning in October of 2019. The Father did start to screen consistently clean beginning in September of 2019. The Father did attend and complete CareNet classes in November 2019. The Father completed a psychological assessment through Transitions on October 3, 2019. However, as mentioned above, there are problems with credibility of the NA/AA meeting slips. Further, the Father has not shown proof that he could provide a residence for the child[ren]. Even though the Father completed a good number of the tasks that were ordered in Disposition, it took him over a year to do so – all the while the child[ren were] in a foster home and per the social worker [are] bonded with the foster family. The Father failed to pay a reasonable portion of substantive physical care. Per his testimony, at least during the summer months he earns $200 - $250 per day, but he did not provide any support for th[ese] child[ren]. Based on the failure to obtain suitable housing and Father's lack of credibility in his testimony, the Court feels that it is in the child[ren]'s best interest[s] to terminate the parental rights of the Father.

7. The Father did not prove by a preponderance of evidence that neglect would not continue if returned to his care. Father was not able to articulate a workable schedule for childcare if the child[ren were] returned. He gave conflicting testimony – on the one hand once a tree cutting job was started, he could not leave the site; on the other hand, he testified he could work less hours which would mean he would have to potentially leave a job site early. He was not able to set forth a workable childcare plan for when he worked. Finally, his testimony about acquiring suitable housing was not specific enough to be given credibility. Father had over one year to arrange such and did not.

> 8. The Father did not set forth additional services that could be offered that would bring about paternal adjustment enabling a return of custody to Father.[11]

Having stated the relevant substance of the family court's findings and conclusions, we now turn to the applicable law. To begin,

> The Commonwealth's TPR statute, found in KRS 625.090, attempts to ensure that parents receive the appropriate amount of due process protections. KRS 625.090 provides for a tripartite test which allows for parental rights to be involuntarily terminated only upon a finding, based on clear and convincing evidence, that the following three prongs are satisfied: (1) the child is found or has been adjudged to be an abused or neglected child as defined in KRS 600.020(1); (2) termination of the parent's rights is in the child's best interests; and (3) at least one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) exists.

Cabinet for Health and Family Services v. K.H., 423 S.W.3d 204, 209 (Ky. 2014).

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[11] In his brief, J.W. now asserts: "There was nothing of record to indicate that the Father would not complete additional services to bring about additional parental adjustment, if asked to do so. The Cabinet is there to offer services and help with enrollment into programs which it failed to do."

Essentially, J.W. contends that one of the "best interest" factors of KRS 625.090(3) – specifically KRS 625.090(3)(c) – was absent. That section provides that when considering a child's best interests, one consideration should be: "If 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[.]" With that said, both Lee and Valenzuela testified the Cabinet had made the requisite "reasonable efforts," which they extensively detailed. J.W.'s statement to the effect that *if he had to have more services from the Cabinet, he would get them* is irrelevant to this factor. Moreover, to the extent that J.W. is now asserting the Cabinet failed to help him "with enrollment into programs," he cites no evidence – apart from his own testimony which the family court deemed not credible – that this was indeed the case.

Here, the family court made findings satisfying the tripartite test. Specifically, it found J.W. had neglected his children over the course of this proceeding[12] within the meaning of KRS 600.020(1). Among its bases for determining neglect, the family court cited KRS 600.020(1)(a)4. and 8.[13] Citing the children's bond with their foster family, their age, their extended lack of

[12] *See* KRS 625.090(1)(a)2.

[13] In relevant part, KRS 600.020 provides:

> (1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:
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> (a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:
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> . . .
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> 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
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> . . .
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> 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[.]

contact with J.W.; and after considering J.W.'s progress with his case plan since November 28, 2018, and his lack of support of the children, the family court determined the children's best interests would be served by terminating J.W.'s parental rights. *See* KRS 625.090(3). Moreover, the family court determined that J.W.'s conduct had given rise to at least two of the aggravating factors enumerated in KRS 625.090(2), factors (e) and (g).[14]

J.W. claims the family court's findings were erroneous. As to why, he largely restates his claims of error relating to the family court's findings, set forth

[14] In relevant part, KRS 625.090(2) provides:

> No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:
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> . . .
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> (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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> . . .
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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[.]

above. We have rejected those claims and will not restate our analysis. Suffice it to say that the overarching theme of J.W.'s appeal has always been that the family court, in his view, should have weighed the evidence more in his favor.

That is not a basis of reversible error, nor is it the standard of our review. As explained in *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 715-16 (Ky. App. 2010),

> Our review of actions involving termination of parental rights is confined to the clearly erroneous standard set forth in CR[15] 52.01, which is based on clear and convincing evidence. *W.A. v. Cabinet for Health and Family Services*, 275 S.W.3d 214, 220 (Ky. App. 2008). As this Court has previously stated, clear and convincing proof does not mean uncontradicted proof. *Id*. Rather, 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." *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986) (quoting *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)). "In a trial without a jury, the findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be 'clearly erroneous.' CR 52.01; *Stafford v. Stafford*, Ky. App., 618 S.W.2d 578 (1981). This principle recognizes that the trial court had the opportunity to judge the witnesses' credibility." *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998). We review the application of the law to the facts *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

[15] Kentucky Rules of Civil Procedure.

Upon consideration of all that is set forth above, the family court's findings of fact were supported by substantial evidence, and we discern no legal error. Accordingly, we AFFIRM.

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