

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000123-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES AS NEXT FRIEND OF
A.N.O., A CHILD; S.E.L.O., JR., A CHILD;
W.K.O., A CHILD; AND M.L.O., A CHILD

APPELLANTS

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 05-AD-00068

A.M.E.O.; A.D.R.; S.E.L.O.; A.N.O., A CHILD;
S.E.L.O., JR.; A CHILD; W.K.O., A CHILD;
AND M.L.O., A CHILD

APPELLEES

AND NO. 2008-CA-000124-ME

A.M.E.O.

APPELLANTS

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 05-AD-00068

CABINET FOR HEALTH AND
FAMILY SERVICES

APPELLEES

OPINION
2008-CA-000123-ME - REVERSING AND REMANDING
2008-CA-000124-ME - AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; GUIDUGLI, □ SENIOR JUDGE.

ACREE, JUDGE: This case involves two appeals from an order of the Daviess Circuit Court terminating the parental rights of A.M.E.O. (Mother) and S.E.L.O. (Father) to two of their children and dismissing the petition to terminate the parents' rights to two other children. The Cabinet for Health and Family Services (Cabinet) appeals from the portion of the order dismissing the petition to terminate the parents' rights regarding their two older children. Mother appeals from the portion of the order terminating her parental rights to the two younger children. Father did not participate in either appeal. We affirm the circuit court's order in part, reverse and remand in part.

The family in this case has a long and troubling history of involvement with the Cabinet. The four children who were the subject of the Cabinet's petition are A., a daughter born June 16, 1999; S., a son born September 17, 2000; W., a son born November 20, 2001; and M., a daughter born December 20, 2002. The Cabinet first opened a child protective services case, involving Mother and a child from a previous marriage not involved in the present action, in 1997. Less than ten months after that marriage ended, Mother gave birth to A., who was found to be the child of Father. Mother and Father then married and had

three more children together. Since that time, at least five petitions alleging dependency, abuse, or neglect of these children have been filed.

All four children suffer from asthma and, in addition, S. was born with congenital emphysema. By the time he was three months old, a portion of one lung had already been surgically removed. He had also experienced failure to thrive since birth. A. is psychologically impaired and experienced developmental delays in speech and motor skills. From the period of time between 2001 and 2003, the Cabinet made extensive efforts to intervene in an attempt to assist parents and children in functioning as a family. The efforts included occupational therapy and speech therapy for A. and S.

The children were first removed from the home in February 2003 after a petition was filed alleging that their home was always unclean and smelled of bodily waste. The petition also alleged that two year-old W. had been left unattended in a filled bathtub for fifteen minutes, had unexplained burns on his left inner thigh, and a severe diaper rash with blisters. S. was also alleged to have a severe diaper rash and an unexplained burn. The petition further stated that, in disregard of medical advice, S. was being exposed to tobacco smoke which exacerbated his breathing problems. All four children remained in foster care until November 2003, with their parents being allowed weekly visits. Mother continued to rely on the foster parent to provide child care, even overnight care, after regaining custody. The children were removed for a week in December 2003, after a petition alleging medical neglect was filed. However, this petition was dismissed

and the children were returned to their parents. Further petitions, which did not result in removal, were filed in March 2004.

Throughout this period, the individuals who provided medical care and other forms of assistance to these children noted a lack of progress while they were in the care of their parents and a marked improvement in their condition while they were in foster care.

In April 2004, the children were removed again after allegations were made that Father had sexually abused A. and another child outside the family. Although criminal charges against Father were dismissed in 2005 due to insufficient evidence, the juvenile court found that the sexual abuse had occurred. On August 24, 2005, the juvenile court entered findings that all four children had been abused and neglected. Mother stipulated to the findings and agreed to work on the case treatment plan provided by the Cabinet. Father refused to attend a court-ordered sexual offender treatment program, expressing a fear that to do so would amount to self-incrimination. He has had no contact with the children since they were removed in April 2004. Father pays his child support through a wage garnishment and expresses his intention to reunite with his children after they reach the age of eighteen.

The Cabinet filed a petition to terminate the parental rights of Mother and Father on December 15, 2005. The guardian ad litem recommended termination on August 9, 2007. The trial began four days later, but had to be continued until October 22, 2007. Final arguments were heard in November 2007

and, at that time, the guardian ad litem withdrew the recommendation that parental rights be terminated. At some point during these proceedings, the parents split up and, at the time of the hearing, Mother was in what appears a stable cohabiting relationship with her boyfriend and his children.

The circuit court entered an order which carefully outlined the factual circumstances surrounding the Cabinet's petition before concluding, as a matter of law, that there was sufficient evidence to support termination of parental rights to all four children. The circuit court then proceeded to grant the Cabinet's petition as to W. and M., the two younger children, but to dismiss the petition as to the older children, A. and S. The Cabinet and Mother each appealed from that portion of the order adverse to their interests. These appeals have been consolidated and will be disposed of in a single opinion.

On appeal, Mother argues that the circuit court was clearly erroneous in finding that the Cabinet made reasonable efforts to reunite her with her children, that she failed to complete her case treatment plan, and that she is unable to provide a suitable home for her children. Involuntary termination of parental rights is governed by Kentucky Revised Statute (KRS) 625.090 which allows a circuit court to terminate parental rights after finding that a child has been abused or neglected, as defined in KRS 600.020(1), and that termination would be in the child's best interests. KRS 625.090(1)(a) and (b).

The juvenile court made adjudicatory findings that the children had been abused and neglected in August 2005, and Mother stipulated to the juvenile

court's findings. KRS 625.090(1)(a). In order to determine, pursuant to KRS 625.090(1)(b), that termination would serve the best interests of the child, the circuit court must consider the following factors:

(a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect as defined in [KRS 600.020\(1\)](#) toward any child in the family;

(c) 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 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;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

KRS 625.090(2). In addition, the circuit court is prohibited from terminating parental rights unless it also finds one or more factors listed in KRS 625.090(3), which include:

(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;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

. . . ; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

Cases involving termination of parental rights are reviewed for clear error, pursuant to Kentucky Civil Rule 52.01. *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky.App. 2006). The circuit court's order included a lengthy recitation of the history of this family and the services they were provided by the Cabinet.

During the time these parents were married to one another, Father was employed as a long-haul trucker, leaving Mother with virtually sole responsibility to care for four children born within a three and one-half year period. As previously mentioned, all four children have asthma, while the oldest two also have serious psychological, developmental, or physical health issues. Mother has been diagnosed with bipolar disorder since high school, low intelligence, and

numerous other psychological problems. During the time that she had these four children in her custody, she was not taking any medication to help control her bipolar disorder.

Beginning in March 2001, the Cabinet arranged for “First Steps the Early Intervention Program” to provide an occupational therapist to work with A. and S. Dale Lynn assessed the two children and provided occupational, speech, and physical therapy to S. Initially, these visits occurred twice a month, later increasing in frequency to weekly visits. Due to his physical weakness, S. required therapy to learn to eat, sit, crawl, and walk. Lynn continued to provide S. with occupational therapy until 2006. He worked with A. for a few months in 2002, primarily to overcome attention problems. Lynn reported that both children seemed interested and participated in their therapy. On a less optimistic note, he noted the unclean condition of their home.

Mary Fuqua, of Wellspring Academy, worked with A. and S. in an attempt to oversee their developmental delays. She observed that they made limited progress while in their Mother’s home, but their progress improved while they were in foster care. Fuqua, who was in the home for one hour every week for nearly three years, found it alarming that she often had to ask Mother to change the children’s diapers and that they would bleed from blisters caused by diaper rash. As a result, she made a referral to Helping Hands, another in-home care provider. Fuqua stated that S. had greater improvement in six weeks of foster care than he had in the preceding years while in his parents’ care.

Sheila Calhoun, who provided speech therapy for A. and S., expressed her concern that the parents did not participate in their children's treatment regimen. She also reported two occasions when Mother engaged in poor parenting behavior in her presence. On one occasion Calhoun observed S. using sign language to communicate that he was hungry. Mother's only response was to throw a cookie across the floor for him to pick up and eat. This incident was particularly disturbing to Calhoun since S. was, and always had been, severely underweight. In addition, Calhoun observed W. being left unsupervised in chest-high water in the bathtub. She also noted the dirty condition of the home, Mother continuing to smoke around the children, and S.'s persistent diaper rash. Within two weeks of their entry into foster care, Calhoun noted that all four children were clean and well fed and that S.'s verbal communication skills had improved.

The circuit court's order also included a summary of testimony from physicians who treated the children. Dr. Lee Clore, a pediatric allergist, treated S. post-surgery until May 2007. S. was hospitalized several times as an infant, and had to be repeatedly transported by air to Kosair Children's Hospital in Louisville in serious condition. Clore expressed concern about the number of medical appointments S. missed, the parents' failure to follow medical advice, their use of tobacco in S.'s presence, and the filthy condition of all four children. He testified that he saw them four or five times while they were in foster care and their condition had improved dramatically. In his opinion, S. presented one of the worst cases of medical neglect he had ever seen. Clore contacted the Cabinet numerous

times, as well as writing to the district court to express his concerns. This was the first time in fourteen years in practice that he had taken such actions. In his deposition, Clore stated that he believed there was no question that S. would not survive childhood if he were returned to his parents' care. Prior to their final removal in 2004, Clore became so concerned about S. that he contacted the children's pediatrician, Dr. Stephanie Russell, and asked her to have S. removed from his home. Mother responded by obtaining S.'s medical records from both physicians and firing them both.

Russell had provided pediatric care to the children, beginning in 2000 and ending in 2004. She noted that they all had frequent diaper rashes due to lack of parental care. Mother failed to follow medical advice. She did not give A. and S. necessary nebulizer treatments or consistently provide the children's day care with access to their medications. Russell testified that the parents' poor caregiving became worse over time. Mother endangered S.'s life when she failed to seek immediate medical care for him while he had pneumonia in January 2004. She also continued to smoke in his presence despite the doctor's repeated warnings. Russell reported to social services that the children were being medically neglected and became involved in meetings with mother and Cabinet employees. She expressed frustration that more was not being done to protect the children, especially S.

The oldest child, A., suffered from asthma and developmental delays in speech and motor skills. Her parents kept her dirty and she often had a diaper

rash. The circuit court found that she experienced medical neglect. Further, the juvenile court substantiated sexual abuse against A. by Father. After the children were removed from their home in 2004, they were initially returned to the same foster care placement in which they had spent the majority of time the previous year. However, A. had to be removed from the foster home after threatening to harm her siblings. She was hospitalized at Valley Institute of Psychiatry, then placed in the Home of the Innocents in Louisville. A. was evaluated and diagnosed with reactive attachment disorder, a serious and chronic condition resulting from parental absence or neglect. Mark Zakem, a therapist at Home of the Innocents, was optimistic about her prognosis in a therapeutic environment, but expressed the opinion that she would need long-term care and treatment for her attachment disorder. Further, he opined that even a well-meaning environment would decrease A.'s chances of a positive outcome if it was not also a therapeutic environment. At the time of the hearing, she maintained an awareness of Mother's identity. However, they had little contact, due to the distance between A.'s placement in a therapeutic foster care program operated by the Home of the Innocents and Mother's home in Owensboro.

S., the oldest son, suffered from asthma and congenital emphysema. He had experienced failure to thrive since birth, weighing only thirty pounds at age five. S. was also removed from the foster home he shared with his siblings because of his medically fragile condition. He was placed in a therapeutic foster care setting where he finally showed enough progress to be measured on the low

end of the weight percentile charts. During the times when he lived with his parents, S. was always so underweight that he could not be measured by even the lowest range of the charts. The circuit court noted that S. had spent the majority of his life in foster care, but that he was not upset by visits with Mother.

W. and M., the two youngest children are also asthmatic. They have spent most of their lives away from their parents' care. The circuit court found that these two children have little emotional attachment to their parents and are fearful and upset when Mother visits them.

With regard to Mother's caregiving abilities, the circuit court found that she was emotionally disconnected and had to be told to do such tasks as changing diapers. While in her care, the children missed numerous medical appointments. When they were seen by physicians, the children were filthy and smelled "like a barnyard." The circuit court found that Mother failed to take any steps to regain custody of her children for more than a year after they were removed. She further did not attempt to participate in the case treatment plan until after her children were adjudicated as abused and neglected by the juvenile court. Mother also failed to attend a court-ordered sexual abuse victimization program. Although she visited all of the children, except A., the circuit court found that the visits were chaotic. The CASA worker who observed her visits with the children testified that Mother was skeptical, secretive, and combative towards the Cabinet's efforts to assist her in improving her home conditions. At the time of the circuit

court's order, Mother had not had custody of these children for over three and one-half years. Neither had she paid any child support, despite sporadic employment.

In her defense, Mother argued that Father had provided no help caring for the children while he was on the road, nor did she have any family support. Mother admitted that the condition of her home was poor, but contended she was overwhelmed by A.'s and S.'s serious medical and developmental needs. She also stated that she had not been taking any medication to treat her bipolar disorder but, at the time of the hearing, was receiving mental health treatment. The circuit court found that her two and one-half year relationship with her cohabiting boyfriend was stable. Mother was employed and, in addition, cared for her boyfriend's daughters, participating in Little League and Junior Achievement activities. She told the circuit court that she was doing better and hoped to soon be able to provide a safe and healthy home for her children.

Mother's boyfriend expressed his confidence in her ability to care for her own children. He testified that his children had been introduced to all of her children, except A., and that he foresaw no problems merging their families. Mother's sister told the court that she had improved her housekeeping and organizational skills and was taking better care of herself. The sister also testified that she trusted Mother's ability to parent. This opinion was echoed by Mother's pastor and one of her boyfriend's daughters.

Patricia Derosier, a licensed clinical social worker who had been treating Mother for her mental health issues and monitoring her medications, also

testified. Derosier believed that Mother's prognosis was positive, but did not support the immediate return of the children. She testified that Mother loved her children and truly wanted to be with them.

KRS 625.090(2) prohibits a circuit court from terminating parental rights unless it finds, by clear and convincing evidence, the existence of one or more of the grounds enumerated in subsection (2)(a)-(j). The circuit court made specific findings that each parent had failed to provide essential parental care and protection for over three and one-half years and that there was no reasonable expectation of improvement considering the ages of each child. KRS 625.090(2)(e). The order contained a further finding that Father caused A. to be sexually abused. KRS 625.090(2)(f). The circuit court also recognized that all four children had spent twenty of the twenty-two months preceding the order in foster care. KRS 625.090(2)(j). The evidence clearly supports the circuit court's finding on each of these grounds.

KRS 625.090(3) lists six factors which the circuit court must consider in determining the child's best interests and the existence of grounds for termination. The circuit court considered the fact that Mother has bipolar disorder, but found that her mental illness did not render her incapable of caring for her children. KRS 625.090(3)(a). Subsection (3)(b) of the statute requires the circuit court to consider any acts of abuse or neglect toward a child in the family. The circuit court's order is replete with examples of abuse or neglect within the definition of KRS 600.020(1). In addition, the circuit court concluded that W. and

M. were thriving in foster care and had no significant attachment to their parents due to the amount of time they had spent in the custody of the Cabinet. The order found that W. and M. would not suffer a sense of loss if their parents' rights were terminated, but rather would benefit from a permanent adoptive placement. KRS 625.090(3)(e). The record established that Father's only financial support of these children after their removal was by payment of child support through a wage assignment, but Mother did not contribute financially toward the children's support. KRS 625.090(3)(f).

Subsection (3)(d) requires the circuit court to consider "efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child[.]" The circuit court noted that Father had made no efforts to change his circumstances in such a way as to be able, in the future, to provide a safe home for the children. Indeed, Father stated he planned to wait until the children were over eighteen to resume contact with them.

In Mother's case the record was more mixed. The circuit court noted that she had moved on to a new relationship and made improvements in the stability of her overall circumstances. However, Mother's improved functioning was found to be, at least partially, the result of not having had the stress of caring for her children for over three and one-half years. In addition, the circuit court pointed out that she had not completed the mental health assessment or attended the sexual victimization program as required by her case treatment plan.

Consequently, the circuit court made a finding that Mother could not provide a suitable home for these children and would be unable to do so within a reasonable time.

The most contentious finding in the order involves KRS 625.090(3)(c) which requires the circuit court to consider “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[.]” The circuit court’s order contained the following finding regarding the Cabinet’s efforts:

The Court finds the Cabinet has, prior to filing the petition terminate parental rights, made reasonable efforts as defined in KRS 620.020 to reunite the [children] with the parents. The Cabinet has investigated and monitored home conditions since 1997 in Ohio and Daviess counties and [has] instituted juvenile court proceedings, referred the family to Wellspring Academy for developmental assessment and intervention for the children, referred the children to speech therapy through Sheila Calhoun of First Steps, provided respite foster care during [S.’s] frequent hospitalizations, referred the family to sexual abuse treatment, and ongoing foster care for 3 ½ years since the sexual abuse removal. To much [effort of] the Cabinet social workers and service providers [Father] has been absent and [Mother] was resistant, uncooperative, suspicious, manipulative, secretive or combative.

(Circuit Court’s order on Cabinet’s motion to terminate parental rights, entered December 12, 2007).

On appeal, Mother argues that the circuit court erred in finding that the Cabinet had made reasonable efforts at reunification and, thus, it was an abuse of discretion to terminate her rights where the majority of the Cabinet’s services to

the family were provided before the children were removed in 2004. She points out that, since their removal in April 2004, the children have been in foster care where she has been permitted only supervised visitation with the three younger children held inside a state office building. Mother has seen A. only once since she was removed. She maintains that the Cabinet has made no efforts to reunite her with her children. “[N]ot a single time during that period [prior to the filing of the petition to terminate her rights] was she ever encouraged or allowed to take the children for a walk in a park, for a visit to McDonald’s, or any other activity outside the four walls of the office space.” (Appellant A.M.O.’s brief at page 4).

The definitions of reasonable efforts and reunification services are found in KRS 620.020(10) and (11). Subsection (10) requires the Cabinet to “exercise . . . ordinary diligence and care . . . to utilize all preventive and reunification services available to the community . . . to enable the child to safely live at home[.]” Reunification services are defined by statute as “remedial **and preventive** services which are designed to strengthen the family unit, to secure reunification of the family and child where appropriate, as quickly as practicable, and to prevent the future removal of the child from the family[.]” KRS 600.020(11)(emphasis supplied). The circuit court’s order provides a detailed examination of the services provided by the Cabinet during its involvement with this family. Despite Mother’s assertion to the contrary, not all of these services were provided prior to removal of the children from the home. The children spent nine months in foster care in 2003, during which time the Cabinet continued to

provide them with an array of services. Regrettably, after their return to their parents' custody, Mother once again proved unable to care for their needs. Even more deplorably, Father committed sexual abuse against one of the children, resulting in their current removal less than six months after they were returned to their parents' custody.

Carol Sanders, the social worker assigned by the Cabinet to assist this family, testified to the contents of the case treatment plan and the services offered to both children and parents. Sanders told the circuit court that Mother had access, free of charge, to psychiatric evaluation and therapy services, child protection classes, parenting classes, the family preservation and family reunification programs, and other services specifically targeted to assist parents. After the children were removed in 2004, the Cabinet arranged for visitation. Mother did not visit at all for nearly the first three months, and visited sporadically thereafter. According to Sanders, Mother did not stop missing visits until after the Cabinet filed the petition to terminate her rights. Further, Sanders testified that Mother delayed seeking therapy for a year after her children were removed. Sanders was unaware of any additional services which the Cabinet could offer.

Derosier, Mother's mental health worker, criticized the Cabinet's handling of the case, though she acknowledged never having met the children or reviewed any documentation of the Cabinet's efforts. Derosier believed the Cabinet should have referred Mother to family counseling when the case was

opened. However, she admitted that such therapy would only yield benefits in the long term and was not guaranteed ever to succeed.

Mother argues that, because her children have been in foster care since April 2004, “[i]t should be manifestly clear from the entire record that the ‘failure’ of [Mother] to provide care and protection to her children cannot in any way be attributed to her.” (Appellant A.M.O.’s brief at page 4)(emphasis in original). We simply cannot accept this characterization of events. The Cabinet has a lengthy history of attempting to shore up this family by offering services for both children and parents. Despite these efforts on behalf of this family, the circuit court concluded that Mother would not be able to provide a suitable home for any of her children for the foreseeable future. The circuit court did recognize that Mother was finally making an effort to improve both her mental health and the condition of her home. Unfortunately, these efforts were and are a case of too little and too late.

The circuit court’s order is amply supported by the evidence in the record and clearly contains findings sufficient to meet all the necessary criteria for termination of parental rights found in KRS 625.090. Mother has failed to prove that the circuit court erred when it found sufficient grounds to terminate the parents’ rights to all four children. Consequently, the circuit court’s order terminating the rights of Mother and Father to W. and M. must be upheld.

In its separate appeal, the Cabinet argues that the circuit court's dismissal of its petition to terminate Mother's and Father's parental rights as to A. and S. was erroneous. In its order the circuit court found that

the Cabinet has presented sufficient evidence to terminate the parental rights of both [Father] and [Mother] to all of [their] children. The GAL for the children has withdrawn his recommendation to terminate parental rights apparently because he is satisfied that [Mother] is no longer a threat to neglect the children, and he is hopeful that if her progress continues she may one day be able to provide them a safe and healthy home. The court concurs that there has been some progress but **the children have already been in foster care too long to wait any longer on [Mother's] potential.** . . . [I]n light of the evidence of improved stability on the part of [Mother] and pursuant to KRS 625.090(5) the Court finds that [Mother] has proven by a preponderance of the evidence as to [A.] and [S.] only that she will not cause them or continue them to be abused or neglected children as defined in KRS 600.010(1) and the Court in its discretion elects not to terminate the parental rights; the children should continue in their therapeutic foster placements in the custody of the Cabinet pursuant to law.

(Circuit Court's order on Cabinet's motion to terminate parental rights, entered December 12, 2007)(emphasis supplied).

The Cabinet contends that the circuit court improperly relied on the following statute as grounds to dismiss the petition to terminate the parents' rights as to A. and S.:

If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) **if returned to the parent** the court in its discretion may determine not to terminate parental rights.

KRS 625.090(5)(emphasis supplied). The Cabinet notes that the circuit court failed to find that A. and S. would not continue to be abused or neglected if returned to Mother. Rather, the order contained findings that the children had been out of Mother's care for a significant period, yet she had not made sufficient progress for them to be returned. The circuit court found that Mother had not demonstrated her ability to provide a safe and permanent home for the children. Finally, the order stated that she was "not currently able to provide a suitable home for the children and will not be able to do so within a reasonable time." (Circuit Court's order on Cabinet's motion to terminate parental rights, entered December 12, 2007). Since Mother clearly did not prove that A. and S. would not continue to be abused or neglected if they were returned to her care, the circuit court abused its discretion in relying on KRS 625.090(5) as grounds to dismiss the Cabinet's petition to terminate her parental rights to these two children.

The Cabinet next argues that the circuit court erred by failing to find that termination was in the best interest of A. and S. As we have already discussed most of the grounds which the statute directs the circuit court to consider in reaching a conclusion about the best interests of a child, we will not belabor the point here. However, we will point out that the circuit court's own factual findings do not support its conclusion under KRS 625.090(3)(e) and, consequently, do not support dismissal of the petition.

In deciding the outcome of a petition to terminate parental rights, the circuit court is directed to consider the "physical, emotional, and mental health of

the child and the prospects for the improvement of the child's welfare if termination is ordered[.]” KRS 625.090(3)(e). With regard to the oldest child, A., the circuit court found the following:

[A.] would likely be unaffected by the termination of parental rights because her contact with her parents for the last 3 ½ years has been minimal and her attachment disorder probably makes her in capable of feeling loss to some degree. However the Court does not find that some increase in contact with [Mother] would harm her and it could prove beneficial.

(Circuit Court’s order on Cabinet’s motion to terminate parental rights, entered December 12, 2007). The circuit court’s speculative conclusion that A. would be neither helped, nor harmed, by termination because of her attachment disorder is not supported by the evidence. Zakem, her therapist at the Home of the Innocents, gave his expert opinion that A. would have a positive outcome if she continued to receive long-term treatment for her attachment disorder in a therapeutic environment. However, he also testified that a positive outcome would be doubtful if she were placed in a non-therapeutic setting. The circuit court’s consideration of all of the remaining factors listed in KRS 625.090(3) supported termination as being in the best interests of all four children. Consequently, we agree with the Cabinet that it was clearly erroneous for the circuit court not to find that termination was in A.’s best interests as well.

The circuit court’s findings regarding S. present a more mixed picture due to his ongoing relationship with Mother. The court’s order found as follows:

[S.] is thriving in therapeutic foster care despite his medically fragile condition. **His life depends on strict adherence to his medical regimen.** As an infant, [S.'s] life was threatened by the poor care he received from his parents. [S.], being a little older, has some relationship with his parents especially [Mother] as she has continued to maintain visits with him. [S.] requires the structured care and medical supervision he receives in the therapeutic foster home. The same would be required for an adoptive placement. That he is friendly and outgoing implies that he has a desire for relationship with others. The Court has not heard that he is otherwise with his mother. The Court does not find that continued contact with [Mother] would harm [S.]

(Circuit Court's order on Cabinet's motion to terminate parental rights, entered December 12, 2007)(emphasis supplied). Although the circuit court opined that continued contact with Mother would not harm S., the court's order also recognized that his very life depends on being in a therapeutic environment where his medical regimen will be followed without deviation. The evidence clearly supports a finding that, considering his physical health pursuant to KRS 625.090(3), termination is in S.'s best interests. Coupled with the circuit court's findings that all of the other factors in KRS 625.090(3) supported termination as being in the best interests of all the children, we agree with the Cabinet that the circuit court erred in failing to find that it was S.'s best interests for his parents' rights to be terminated.

Finally, the Cabinet argues that sufficient grounds to terminate both parents' rights to A. and S. were supported by substantial evidence and by the circuit court's findings. The circuit court's order concluded that the Cabinet had

proven the existence of grounds for termination of parental rights to all four of the children. However, as previously mentioned the circuit court claimed it was entitled to exercise discretion not to terminate the parents' rights to A. and S., and ordered them to remain in therapeutic foster placements in the Cabinet's custody pursuant to law. Mother argues that KRS 625.090(6) supports the circuit court's decision. We disagree.

The statute in question reads as follows:

Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:

(a) Terminating the right of the parent; or

(b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

KRS 625.090(6). Because subsection (b) allows the circuit court to dismiss the termination petition while leaving a child in the Cabinet's custody, Mother claims the circuit court did not abuse its discretion when it found that the Cabinet had presented sufficient evidence to terminate her rights, yet declined to do so. This Court has previously considered the limits placed on the circuit court's discretion under the statute.

In *Cabinet for Human Resources v. J.B.B.*, 772 S.W.2d 646 (Ky.App. 1989), the Cabinet appealed from an order dismissing its petition to terminate parental rights. The circuit court in that case had found sufficient cause to

terminate the parents' rights to their children, but declined to do so subject to their compliance with the conditions set forth in the court's order. The Cabinet appealed, arguing that the circuit court's order exceeded the scope of its authority.

This Court reversed the circuit court, reasoning as follows:

Although it is clear that the circuit court sought to order what it believed would be in the best interests of all parties, it is also clear that the circuit court exceeded the limited authority granted it by this statute and we must reverse. The legislature did not provide for judicial parenting in [KRS 625.090(6)], and the Cabinet is not equipped to provide unlimited, open-ended supervision in this case. Most of all, the child needs some stability and permanency. If the parents are fit to be parents, the action by the Cabinet should be dismissed.

J.B.B., 772 S.W.2d at 647.

We have no doubt that the Daviess Circuit Court also sought to provide for the best interests of A. and S. in the case at hand. However, these children had been in foster care for over three and one-half years when the circuit court's order was issued in 2007. Even before they were removed in April 2004, the children had spent the majority of the pervious year in foster care. Despite the passage of all this time wherein Mother might have focused on achieving a living situation suitable to caring for her children, the circuit court found that she still was unable to do so. Further, the order dismissing the Cabinet's petition to terminate as to A. and S. contained a finding that Mother would not be able to provide a suitable home for her children within a reasonable time considering their ages.

This finding was coupled with the circuit court's conclusion that grounds for termination were sufficiently proven for all four children.

The circuit court's order makes it clear that, considering the mental and physical health issues of these two children and their Mother's ongoing inability to care for them, the Cabinet would be expected to provide the type of open-ended supervision which we found to be inappropriate in *J.B.B.* Moreover, their special needs notwithstanding, these children have a right to be placed in a position where they can achieve stability and permanency. As the circuit court's own order stated, "the children have already been in foster care too long to wait any longer on [Mother's] potential[.]" Further, as we have previously noted, Father told the circuit court that he did not plan to resume contact with any of his children until after they have reached age eighteen. Consequently, the circuit court exceeded its discretion under KRS 625.090 when it dismissed the Cabinet's petition to terminate parental rights as to A. and S. after finding that grounds existed to do so and that their parents remained unable to provide them with a suitable home within a reasonable time.

For the foregoing reasons, the order of the Daviess Circuit Court is affirmed as to the termination of parental rights regarding W. and M. The circuit court is reversed and remanded for further orders consistent with this opinion as to the dismissal of the Cabinet's petition to terminate parental rights as to A. and S.

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