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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000448-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
S.N.B.; M.E.B.; AND M.A., A/K/A M.A.B.[1] APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NO. 08-AD-00034

B.B. AND E.K.B. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,[2] SENIOR JUDGE.

NICKELL, JUDGE: In November 2008, the Cabinet for Health and Family Services initiated an action for involuntary termination of parental rights (TPR)

[1] Pursuant to Court policy, participants in an action for termination of parental rights are referred to by initials only.

[2] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

against the biological mother (B.B.) and father (E.K.B.) of three minor children. The family[3] had received numerous government services since 2001 when the Cabinet responded to concerns about the couple's fourth child, E.B.[4] The three children at the center of this appeal were committed to the Cabinet and placed in foster care in October 2006 where they remain today.[5] Finding the Cabinet did not clearly and convincingly prove the parents had abused or neglected their three youngest children, the circuit court denied the TPR request after a trial that lasted two hours and twenty-five minutes. The Cabinet appeals, claiming it was denied due process when the circuit court terminated the trial before the Cabinet had completed its case-in-chief. The Cabinet alleges it was denied the opportunity to elicit testimony from the foster mother[6] about the children eating from the garbage can upon arriving in her home and the children's improvement since entering foster care. The circuit court deemed this testimony to be irrelevant to the issue of whether the biological parents had abused or neglected the children. No avowal testimony from the foster mother was spread upon the record. On appeal, the

[3] The biological mother and father of all three children are separated and living apart but remain married. E.K.B. lives in Cincinnati, Ohio. B.B. lives in Campbell County, Kentucky. S.N.B., a girl, was born to them on November 25, 1997. M.E.B., a girl, was born to them on September 9, 1999. M.A. A/K/A M.A.B., a boy, was born to them on March 15, 2004.

[4] E.B. was born in 1991. He was committed to the Cabinet in December 2005. He was seventeen years old at the time of trial but the Cabinet had no desire to terminate parental rights as to him.

[5] At the time of trial, no formal request had been made for the children to be returned to the biological parents. The court stated at trial that if such a motion were filed it would be considered at a different time.

[6] At trial, the Cabinet said it wanted to call the foster *father*. On appeal, the Cabinet claims it was denied its due process right to call the foster *mother* as a witness.

Cabinet seeks reversal of the order denying the TPR petition and remand of the matter for a full hearing at which the Cabinet may present all of its desired proof. Having reviewed the trial, exhibits, and record, and considered the applicable law, particularly the rules governing preservation of issues for appellate review, we affirm.

FACTS

The Cabinet filed a TPR petition on November 5, 2008, alleging B.B. and E.K.B. did not and could not provide a safe and nurturing home for their children who were "abused and neglected" as that term is defined in KRS 600.020. The petition further alleged TPR was in the best interest of the children; the parents had physically injured or emotionally harmed the children or allowed them to be injured or harmed on a continuing basis; they allowed the children to watch B.B. and E.K.B. engage in sex acts and acts of domestic violence; for at least six months, the parents had not or could not care for and protect the children and improvement was unlikely; B.B. could not care for her children's physical or psychological needs due to her own mental illness; and, for reasons other than poverty, the parents had not provided "essential food, clothing, shelter, medical care or education reasonably necessary and available for the children's well-being" and improvement in the near future was unlikely. Finally, the petition alleged the children had been in foster care for fifteen of the last twenty-two months and while the Cabinet had provided many services[7] to the family with a goal of reunification,

[7] Services offered by the Cabinet included "foster care, parenting training, interstate home evaluation, psychological evaluations, treatment planning conferences, CATS assessment,

completion of many of those services had not resulted in improvement such that returning the children to B.B. and E.K.B. was in the children's best interest.

An attorney filed an answer on B.B.'s behalf seeking dismissal of the TPR petition. B.B. denied being mentally ill, but acknowledged suffering from depression which is controlled with medication. She stated the Cabinet removed her children from her care because she had received an eviction notice and her water had been shut off on the day a social worker stopped by for a surprise visit. B.B. said she was in the process of moving that day, the home was clean, it afforded adequate space for the children, and it was stocked with food. Shortly after the children were removed from her care, B.B. rented a four-bedroom[8] home where she has lived the last three years. She had also passed all of her drug screens and had "done virtually everything the cabinet had asked her to do." B.B. also stated her psychiatrist and therapist believed she was "sufficiently capable of taking care of the children." Without assistance of counsel, E.K.B. filed a letter with the circuit court opposing TPR and asserting he too had done all the Cabinet had asked him to do.

A trial was set for February 23, 2009. The order did not specify the amount of time allotted for the matter to be heard. Trial began on the appointed date at 1:42:10 p.m. and was terminated by the court at 4:07:50 p.m.

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ongoing individual counseling, Vocational Rehabilitation, budgeting training, random drug screens and visitation."

[8] B.B.'s home is described both as having four bedrooms and three bedrooms. One room, which B.B. has chosen to use as a home office, could also be used as a fourth bedroom.

The Cabinet began its proof by calling Nycole Brundidge, the first of only two planned witnesses. Brundidge is the Cabinet social worker assigned to the family's case since March 2008. She described the events[9] leading to the removal of the children from B.B.'s home on October 14, 2006. She further testified that despite the Cabinet having provided numerous services to the family, the problems[10] being addressed persisted.

Brundidge stated B.B. and E.K.B. had hit and yelled at S.N.B. in early 2004; B.B. and E.K.B. did not curb violence between the children; B.B. was frequently overwhelmed by the children; the children were often unkempt and exhibited poor hygiene; because B.B. missed food stamp appointments, she had inadequate food for the children in her home; B.B. was unemployed; B.B. did not seek child support from E.K.B.; B.B. had been diagnosed with anxiety disorder, post-traumatic stress disorder, and adjustment disorder by history; B.B. had also suffered from depression and had attempted suicide at the age of fourteen. Both parents had previously been ordered to pay child support; E.K.B.'s current arrearage was $1,091.36 and at one point, B.B. had been jailed for her failure to pay.

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[9] A social worker, other than Brundidge, made an unannounced visit to B.B.'s Newport, Kentucky, home, learned she was to leave the premises due to nonpayment of rent, the water had been turned off, and M.A.'s diaper was soaked and had not been changed.

[10] Issues within the family addressed in 2001 included unstable housing; mental health concerns with the children; on-going issues without improvement; E.B.'s behavioral issues; financial instability; problematic discipline; and domestic violence.

Brundidge testified E.K.B. did not have a full-time job and while he had said he would help out his family when he could, he did not do so. According to Brundidge, E.K.B. had said he did not have money to pay for the children and refused to develop a treatment plan with the Cabinet. She also testified that Ohio had not approved E.K.B.'s Cincinnati home for placement of the children and E.K.B.'s military pension was insufficient to support himself and three children.

Brundidge testified parental visits and phone calls to the children had been inconsistent since 2006. She also testified that during visits, E.K.B. acted appropriately with the children, but B.B. was often on the phone or "in her own world" rather than interacting with the children.

Brundidge confirmed B.B. had completed several services arranged by the Cabinet but could not maintain a lifestyle change. She acknowledged B.B. sees a psychiatrist, has a stable home and works part-time. Brundidge admitted the only part of the Cabinet's plan B.B. had not completed was a budgeting class. Brundidge stated the Cabinet had provided all available services to the family and there were no additional services to offer. She testified that if the court granted TPR, the foster parents would adopt all three children.

On cross-examination, Brundidge reiterated there was nothing inadequate about the home in which B.B. has lived for the last three years. Additionally, since separating from E.K.B., there have been no new domestic violence charges and B.B. now works at Wendy's. Brundidge again admitted B.B. had completed much of her case plan.

When cross-examination of Brundidge concluded at 2:46:05 p.m., the court confirmed with Brundidge that B.B. had completed all the Cabinet's requests except the budgeting class. The court then pointed out that so far it had heard only "concerns" that B.B. could not parent, but no "proof" she could not do so. He also questioned whether there was evidence of the children being sexually abused because so far he had neither heard nor seen any proof in support of such an accusation.

The Cabinet stated it intended to call the foster father before resting its case. The court denied the Cabinet's request to call him on direct examination because he could not give relevant testimony about whether the biological parents had abused or neglected the children. The court did, however, say the Cabinet could call the foster father as a rebuttal witness.

Thereafter, the court swore both B.B. and E.K.B. Through a series of questions posed to E.K.B., the court established that he had lived in his current home since February of 2002; had worked as a custodian for fifteen years at St. Mary's Missionary Baptist Church; had been paying child support for seven to eight years; and was about $1,000.00 in arrears on his child support obligation.

At 3:08:00 p.m., B.B.'s attorney questioned her on direct examination. According to B.B., around 2005, when S.N.B. was about seven years old, she told one of B.B.'s friends that a neighbor had touched her inappropriately when the family lived in Ludlow, Kentucky. A doctor examined the child but found no evidence S.N.B. had ever been touched inappropriately.

B.B. testified she and E.K.B. separated after M.E.B. was born in 1999. Acknowledging she and E.K.B. occasionally disagreed, B.B. denied any physical violence between them. B.B. also denied using a belt to discipline her children, but acknowledged E.K.B. may have used a belt once.

B.B. testified she had done all the Cabinet had asked her to do, including attending budgeting classes until she learned that service was being discontinued, a fact the Cabinet did not refute. B.B. testified she had completed the seventh grade and for the past year has worked fifteen to twenty hours a week as a dining room assistant at Wendy's. During that time she received raises and has rented her current home for the last three years. She admitted she was depressed when her children were committed to the Cabinet in 2006.

Next, the *guardian ad litem* (GAL) appointed to represent the children questioned B.B. She asked about the frequency of B.B.'s visits with her children; her phone calls to her children, a Christmas visit during which B.B. argued with E.K.B. and would not allow the children to play with their presents, some of her duties at Wendy's, and B.B.'s belief that she was able to care for her children. The GAL concluded her examination by saying she had no further questions of B.B.

On cross-examination by the Cabinet, B.B. admitted she had suffered a nervous breakdown and a severe stroke, and currently suffers from depression. She also acknowledged that M.E.B., her youngest daughter, had alleged being sexually abused. Delving into B.B.'s finances, the Cabinet elicited that she earns $7.20 per hour at Wendy's and receives a total of about $800.00 each month in

pay, child support and disability benefits. She pays $39.00 a month in subsidized rent and receives food stamps.

Much of B.B.'s testimony refuted Brundidge's testimony. For example, B.B. stated she reported the sexual abuse alleged by her two daughters to the authorities. She also recalled receiving only one phone call while visiting with her children, but said she quickly told the caller she could not talk, ended the conversation, and turned off the phone. B.B. stated her therapist and psychiatrist had both signed a letter dated July 20, 2008, saying her children should be returned to her.

The Cabinet questioned B.B. about her childhood, counseling she received for alleged behavioral problems reported by her fifth grade teacher, and counseling she received after her father abused her. B.B.'s attorney objected on grounds of relevance when the Cabinet asked B.B., now forty-eight years of age, how her father had physically abused her. The court sustained the objection stating there was no need to go back forty years, especially since B.B.'s mental health file was part of the record.

The Cabinet then inquired into three circumstances under which B.B. had been hospitalized for psychiatric reasons. The first occurred when B.B. suffered a complete breakdown following her mother's death. The second occurred around 1986 following the infliction of mental and physical abuse by her first husband. The third occurred in 2004 after she experienced problems at her church and suffered a severe stroke. Reading from B.B.'s mental health file, the

Cabinet noted B.B. had reported a significant history of sexual abuse at the hands of her father and half-brother, and stated she had been raped by three men when she was eighteen. The Cabinet considered this significant because these incidents could impact B.B.'s ability to care for her children, especially since both of B.B.'s daughters had now reported being sexual abuse victims.

The Cabinet inquired about a time when the children had visited in B.B.'s home and E.K.B. allegedly simulated a sex act on the couch in their presence. B.B. explained the incident was E.K.B.'s response to her admission that she had cheated on him.

The Cabinet explored various health and hygiene issues of B.B.'s two daughters. B.B. explained the toilet-training issues as having a medical origin, and not a failing on her part as a parent. B.B. also denied that one of her daughters had tried to suffocate M.A. B.B. said she was unaware of her children being educationally deficient because they were doing well in school before the Cabinet removed them from her care. B.B. denied her children ate out of garbage cans and stated they were lying if they alleged such. B.B. admitted she had struggled at times to care for her children, but denied that it was a constant or ongoing struggle. At 4:01:53 p.m., the Cabinet said it had no further questions of B.B. When asked, the children's GAL said she had no questions of B.B. either.

At 4:02:00 p.m., E.K.B. addressed the court. He stated he had taken out $20,000.00 life and accident insurance policies on all three children about seven months earlier; has been visiting his children; has a full-time job as a church

custodian, has lived in the same home since 2002, and takes home $340.00 each month after his child support obligation is deducted.

At 4:05:10 p.m., while the children's GAL was questioning E.K.B. about his job status and pay, the circuit court stated he thought the litigants were losing focus of the real issue and the last hour had been spent on issues unrelated to the case. As a result, he ended the trial. His handwritten notes stated:

> [Mother] "admitted dependency in 11/06 as to all 3 children, primarily due to poverty and being evicted and water turned off. No evidence of neglect or abuse by mother or father, and parents have relatively consistently visited the children. It appears [father] has paid child support for some 7 years. [Mother] has completed all requested programs and is also employed and maintained a 3-bedroom home for 3 yrs. And court finds sufficient progress has been made by mother in the court-approved case plan and has been receiving treatment for her "depression." With insufficient evidence of neglect or abuse, the court cannot grant judgment terminating parental rights.

After announcing his ruling from the bench, the Cabinet requested the opportunity to create a record for appeal purposes and asked the court to issue specific findings. Thereafter, the Cabinet stated the court had prohibited it from calling the foster father as part of its case-in-chief to show the difficulties the children had when they entered foster care and their subsequent improvement. The court stated testimony from a foster parent would be irrelevant to proving B.B. and E.K.B. had abused or neglected the three subject children. The court then said it would issue more complete findings and at 4:07:50 p.m., adjourned the proceedings for the day.

On March 16, 2008, the court entered a three-page typewritten order reiterating much of its prior handwritten order in greater detail. The order said B.B. had “admitted the children were dependent in November, 2006, when there were allegations based on ‘open cases’ regarding unstable housing and untreated mental health ‘concerns[.]’” The court went on to state it could not terminate parental rights because the Cabinet had not established clearly and convincingly that the children were abused or neglected within the parameters of KRS 600.020(1). Further, the court stated the Cabinet did not sufficiently prove the parents had inflicted physical or emotional injury upon the children or that the parents created or allowed:

> to be created a risk of physical or emotional injury, or sexual abuse, or that the Respondent parents have failed to make sufficient progress toward identified goals as set forth in a Court approved case plan to allow for the safe return of the children to the natural parents. In fact, the testimony presented indicates that [B.B.] completed all of the requirements as set forth by [the Cabinet], that she is employed, and has maintained a three bedroom home for the past three years. The court finds that [B.B.] has made sufficient progress pursuant to the requirements to the Court approved case plan and has been receiving treatment for her depression. The court further finds that there has been no Court approved case plan established by the [Cabinet] for the father, [E.K.B.]. It appears from the testimony that [E.K.B.] has paid child support for seven years. It also appears from the testimony presented that the parents have consistently visited with the children.

This appeal followed. We affirm.

ANALYSIS

TPR is governed by KRS 625.090(1). Unless a parent, whose rights the Cabinet seeks to terminate, stands convicted of a criminal charge stemming from the abuse or neglect of a child, TPR is prohibited absent a finding by the circuit court, based on clear and convincing proof, that a court of competent jurisdiction has previously adjudged the child to be abused or neglected, or finds in a current proceeding that the child is abused or neglected. *Santosky v. Kramer,* 455 U.S. 745, 770, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). In addition to this threshold finding of abuse or neglect, the trial court must determine termination would be in the best interest of the child. *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 324 (Ky. 2006).

First, TPR is a grave matter meriting scrupulous protection of due process of law. In the context of this appeal, due process was owed to B.B. and E.K.B. because the government sought to terminate their parental rights. Due process was also owed to the children at the heart of this matter because had the court granted the TPR petition, they would have been permanently separated from their biological parents. Due process was not, however, owed to the state as the Cabinet alleges.

Under the Fifth Amendment to the United States Constitution, no "person" shall "be deprived of life, liberty, or property without due process of law." This provision has been held to protect one's right to wed, reproduce and rear children without undue government interference. *Washington v. Glucksberg,* 521 U.S. 702, 719-20, 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772 (1997) (internal

citations omitted). Similarly, the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property without due process of law." Thus, choices about child-rearing are also sheltered from state involvement. *M.L.B. v. S.L.J.,* 519 U.S. 102, 116, 117 S.Ct. 555, 564, 136 L.Ed.2d 473 (1996). The critical word in both amendments is "person" and the United States Supreme Court has held "a state is not a person for the purposes of the Due Process of Law Clause of the Fifth Amendment." 16B Am.Jur.2d, Constitutional Law §930 (1998); see also *State of S.C. v. Katzenbach*, 383 U.S. 301, 323-4, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Therefore, the Cabinet's protests about being denied due process by the court's *sua sponte* termination of trial before it closed its case-in-chief and without calling a rebuttal witness are for naught.

Furthermore, we give no credence to the claim that the children were denied due process of law by the court's action. The children's GAL participated in the trial and there is no indication any question was left unasked or unanswered. The Cabinet specifically claims the GAL was not allowed to complete her cross-examination of E.K.B. However, without any objection or request from the GAL during trial, and without some showing of relevant testimony that was not explored, there is no proof of actual harm as required by KRE[11] 103(a)(2), and therefore no basis for reversal.

Second, as an appellate court, we accord the trial court much discretion in a TPR proceeding and apply the clearly erroneous standard of review

[11] Kentucky Rules of Evidence.

under CR[12] 52.01. If the record contains substantial evidence to support the trial court's findings, we are without authority to set them aside. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). After reviewing the record, we agree with the trial court – there was no evidence upon which to make a finding of abuse or neglect. Thus, the trial court's denial of the Cabinet's TPR petition must stand.

Third, the Cabinet argues it would have proven the children were abused or neglected and termination was in their best interest if the court had allowed the foster mother to testify about the children's conduct[13] when they entered foster care and their subsequent improvement. Despite the Cabinet's allegations, we cannot say whether the foster mother's testimony would have saved the day because no avowal was placed on the record. KRE[14] 103 sets forth the

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[12] Kentucky Rules of Civil Procedure.

[13] In its brief, the Cabinet states the foster mother:

> would testify as to the children's behavior when they entered foster care, i.e. trying to eat out of garbage cans, hoarding food, and fighting; one child being behind in school despite having an average I.Q.; another child being intellectually challenged and not being in special education classes when she entered foster care; the needs of the children for mental health counseling, medication and for assistance with school work; the progress the children made since they entered foster care; and, most telling, that M.E.B. stated she would kill herself if she was forced to return to her parents.

This explanation is far more expansive than the one given at trial. We will not permit a litigant to "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

[14] Kentucky Rules of Evidence.

procedure for preserving a claim of error concerning the exclusion of evidence. The rule reads in pertinent part:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> ....
>
> (2) Offer of proof. If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

The Cabinet correctly alludes to the fact that as of 2005, language pertaining to avowals was deleted from CR 43.10 and RCr[15] 9.52. However, avowals are still permitted, and indeed required, under KRE 103(a)(2). In this case, the substance of the foster parent's anticipated evidence was not apparent from the record and at trial the only thing the Cabinet's attorney claimed the foster parent would discuss was the children eating from the garbage can and their improvement since entering foster care. Therefore, an avowal was necessary to preserve the alleged error for our review. Because there was no avowal and no proffer, any issue concerning improperly excluded evidence was not preserved for appellate review and we will say no more about it. *Commonwealth v. Ferrell*, 17 S.W.3d 520, 525 n. 10 (Ky. 2000) ("Appellate courts review records; they do not have crystal balls.").

Fourth, the Cabinet faults the trial court for halting the trial without giving the parties any warning that only a limited amount of time had been set

[15] Kentucky Rules of Criminal Procedure.

aside in which to try the case. The Cabinet suggests it should have been allowed to present its evidence without restriction. However, it is the trial court that controls the docket and the admission of evidence, not the litigants. *Commonwealth v. Gonzalez,* 237 S.W.3d 575, 579 (Ky. App. 2007).

The Cabinet suggests more time was needed to impeach E.K.B.'s credibility, but a review of the record shows neither the Cabinet nor the GAL was making headway in that regard. According to the Cabinet's social worker, E.K.B. did not have a job at all. In contrast, E.K.B. testified he worked full-time as a church custodian and although he was in arrears, he had been paying child support for the last seven or eight years. Since the only other witness the Cabinet intended to introduce was a foster parent, impeaching E.K.B. on his employment and financial status was unlikely. The Cabinet says E.K.B. did not offer written proof of employment. However, it was the Cabinet's burden to prove lack of employment and inability to provide for the children; it was not E.K.B.'s burden to prove anything.

While the GAL had the opportunity to question E.K.B. and did so, the Cabinet never asked to cross-examine E.K.B. Because the Cabinet did not call its unfulfilled desire to cross-examine E.K.B. to the trial court's attention, we will not consider the alleged error on appeal. *Smith v. Commonwealth,* 567 S.W.2d 304, 307 (Ky. 1978); *Huff v. Commonwealth,* 560 S.W.2d 544, 547 (Ky. 1977) (trial court must be given opportunity to rule on alleged error).

Fifth, we will not reverse and order a new trial just because the Cabinet did not formally rest its case-in-chief. This was a bench trial. Therefore, the Cabinet's reliance upon CR 43.02 for the order in which the trial was to occur is unpersuasive since that provision applies to jury trials.

The Cabinet's brief sets forth in great detail its anticipated proof and information contained in the exhibits in an attempt to show the trial court prematurely issued its findings and failed to consider documentary proof. However, so long as the trial court's findings are supported by substantial evidence, we are not in a position to reverse its decision. *M.P.S.*, 979 S.W.2d at 116. After hearing testimony from the Cabinet's social worker and both biological parents, the trial court stated there had been no prior finding that B.B. and/or E.K.B. had neglected or abused the children, and the Cabinet had not offered proof of abuse or neglect during the current trial. The court had already determined that testimony from a foster parent would not be relevant to proving abuse or neglect by B.B. and/or E.K.B. since the foster parent entered the picture *after* the children had already been removed from the care of the biological parents. While relevant evidence is generally admissible, irrelevant evidence is inadmissible. KRE 402.

In its brief, the Cabinet asserts it could have established B.B. and E.K.B. "did not provide the children with adequate care, supervision, food, clothing shelter and education or medical care." However, its own social worker testified that B.B. had completed all of her case plan except a budgeting class, which according to B.B., and without contradiction from the Cabinet, was being

discontinued. The social worker confirmed there was nothing inadequate about B.B.'s home, and no one challenged B.B.'s employment at Wendy's or that two mental health professionals had signed a letter urging return of the children to B.B. Rather than concentrating on the present and the statutory requirements of involuntary TPR, the Cabinet chose to dwell on B.B.'s less than idyllic childhood and the traumatic events she had endured. As a result of the Cabinet's failure to prove the statutory requirements for involuntary termination, the trial court concluded it could not grant the TPR petition. Based upon the record before us, we cannot say the trial court erred.

For the foregoing reasons, the decision of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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No brief filed.