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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000186-ME

M.E.W. AND B.E.W.

APPELLANTS

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE WILLIAM E. MITCHELL, SPECIAL JUDGE
ACTION NO. 07-AD-00005

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; A.L.W., A CHILD; S.A.W.,
A CHILD; AND A.G.W., A CHILD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT AND THOMPSON, JUDGES.

LAMBERT, JUDGE: M.E.W. and B.E.W. appeal from the Christian Family

Court's order terminating their parental rights to their children, A.G.W., S.A.W.,

and A.L.W. After careful review of the record in this case, we affirm.

We initially note that the procedural history involving this family is quite extensive. M.E.W. (hereinafter the mother) and B.E.W. (hereinafter the father) are the parents of A.G.W., born April 4, 1999; S.A.W., born February 21, 2003; and A.L.W., born December 9, 2004. The mother and father were married from December 21, 1998, until their marriage was dissolved on May 22, 2007. The three children who are the subject of this action were all born during the parties' marriage; however, Mary had another daughter, A.P., from a prior relationship who was born on October 26, 1997.

A.G.W. first entered foster care on April 8, 1999, due to a previous finding of dependency. He was returned to his parents in November 1999. A new juvenile complaint was filed against both the mother and father in the Christian Family Court on January 13, 2000, alleging neglect. At an adjudication hearing on February 23, 2000, the mother and father stipulated to neglect with regard to A.G.W. A.G.W. reentered foster care for the second time on January 5, 2000, where he remained until August 1, 2002, at which time he was again returned to his parents.

Meanwhile, on August 1, 2000, the mother's parental rights to A.P., not a party to this appeal, were terminated. The mother acknowledged that she was struggling with drug addiction at that time and could not keep a job to properly care for her daughter. That daughter was subsequently adopted by her foster parents, B.G., and her husband, who are the same foster parents to the children at issue in this appeal, A.G.W., S.A.W., and A.L.W. During this time, the mother

was incarcerated at the Women's Correctional Facility at Peewee Valley. She was released from that facility on December 19, 2000, and entered the Women's Residential Addiction Program.

Between August 2002 and the filing of the next petition alleging neglect by the parents, the children remained in the home with the mother and/or father. From 2002 through 2005, the father primarily cared for the children, and there were no removals from his custody during this time. The record indicates that the mother was seldom present, if at all, during this time. However, the father maintained a home for the children, provided for them financially, and met their needs. The Cabinet for Health and Family Services (hereinafter the Cabinet) caseworker, Marsha Williams, testified the father and the middle son, S.A.W., had a close relationship. Ms. Williams also testified that during this time, the father worked two jobs to provide for the family and that he did the best he could under the circumstances.

In January 2005, the Cabinet filed a neglect petition while the children were in the mother's care. In April 2005, the Cabinet filed another neglect petition while the children were again in the mother's care but allowed the father to retrieve A.G.W. and maintain custody of his son. In May 2005, the January neglect petition was dismissed by the Court for insufficient proof, and in September 2005, the April petition was dismissed on motion by the County Attorney.

During October 2005, the mother obtained an emergency protective order granting her temporary custody of the three children, and thereafter, on or

about November 8, 2005, the mother was granted a domestic violence order (DVO) that also awarded her temporary custody of the three minor children. Ms. Williams testified that in October 2005, she witnessed a fight outside her office between the mother and father where the father jerked the mother out of the car while she was holding the baby. The father then proceeded to push the mother, and a Cabinet worker took the child from the mother's arms and broke up the fight. The father was arrested and completed a twenty-six week domestic violence program as required by the court's DVO.

During 2005, the father elicited the help of Jeanette Brown for childcare assistance with A.L.W., while the mother was absent from the home. Ms. Brown testified at the termination hearing that a Cabinet worker advised her to stop providing childcare for A.L.W. because it was enabling the parents to keep their children. Ms. Brown testified that she watched A.L.W. while the mother was in jail and the father was at work. She indicated that she kept A.L.W. during the week, and the father kept A.L.W., along with his other two children, on the weekends. Although Ms. Brown indicated that A.L.W.'s clothes smelled soured and mildewed, she indicated that she took no action to report A.L.W.'s condition to authorities.

On December 1, 2005, A.L.W. was admitted to the hospital for respiratory problems. During the examination of A.L.W., then a one-year-old, the healthcare providers discovered that she had a broken clavicle. The mother left A.L.W. at the hospital to drive to Hopkinsville to pick the other two children up

from daycare. The Cabinet filed a subsequent juvenile complaint that same day, alleging that A.L.W. had a broken clavicle and the mother's whereabouts were unknown. Melinda Reynolds, a social services clinician for the Cabinet, testified that she received a referral on December 1, 2005, that A.L.W. was admitted to the hospital with a broken clavicle, and the mother left the hospital one hour after the child was admitted and had not returned.

Since the authorities did not know how A.L.W.'s clavicle was broken, and the Cabinet could not locate the mother, they sought emergency custody of all three children. Ms. Reynolds testified that they did not contact the father and did not know his whereabouts. The complaint also alleged that A.L.W.'s siblings were at risk. The adjudication, which took place on February 1, 2006, indicated that A.G.W. was placed in foster care for the third time on or about December 1, 2005. A cabinet worker testified at the adjudication hearing that S.A.W. and A.L.W. entered foster care for the second time on December 1, 2005. At the hearing, the mother acknowledged neglect, and the court made a finding of neglect as against the mother. A.G.W., S.A.W., and A.L.W. have remained in foster care since December 1, 2005, and as stated above, were placed with the same foster parents that the mother's other daughter was living with.

After this removal, the mother again continued her substance abuse problems and was incarcerated or in rehabilitation most of the time from February 2006 until she was released in May 2008. Upon the mother's release on May 25, 2008, she moved to Louisville, Kentucky, where she resided at the Rose of Sharon

House, which provides programs and a residence for recovering adults. Ms. Williams brought the two younger children to visit the mother in Louisville in July 2008. The mother also travelled to Hopkinsville to visit her children in September 2008, and Ms. Williams reported that the mother did not engage in any type of inappropriate behavior during that visit, and she did not detect any adverse impact on the children. At this time, the mother indicated to Ms. Williams that she planned to visit the children when she came to Hopkinsville to attend the termination hearing on October 2, 2008.

After that hearing, Ms. Williams informed the mother that she would not be able to visit with the children anymore and presented the mother with a hand-written note by Dr. Stephen Montgomery, a doctor at Pennyroyal Mental Health Center (PMHC), who had been treating A.G.W. for mental health issues. The note stated that Dr. Montgomery was recommending that all contact between the mother and her children cease because it was having a detrimental impact on the children.

The PMHC records indicated that Ms. Griffey, the foster mother, had complained frequently to Dr. Stephen Glasscock and then to Dr. Montgomery that the parents' contact with the children was harming them. Ms. Griffey also reported to Dr. Montgomery that the mother was acting inappropriately during the visit and the person who was to be supervising the visits was not present at all times. The PMHC records also indicate that Ms. Griffey told Dr. Glasscock on a number of occasions that the children experienced severe negative emotional reactions after

the mother or father had a visit with the children. Dr. Glasscock expressed a written opinion in the records dated August 17, 2007, stating that he did not believe that contact between A.G.W. and his parents was the cause of the emotional and behavioral problems experienced by A.G.W.

Dr. Montgomery testified that he had never met with either the mother or father and had not provided any counseling sessions for S.A.W. or A.L.W., but that he had provided counseling to A.G.W., who had verbalized a desire to visit his parents. He further testified that to the best of his knowledge, neither parent had been invited to participate in any treatment team meetings for A.G.W.

Dr. Montgomery's testimony showed that Ms. Griffey had provided inaccurate information to him about the impact of the mother's visits with the children and that he had been misled by Ms. Griffey. In fact, the record indicates that Ms. Griffey met with him on September 8, 2008, just days after a visit with the mother, and the record gave a glowing report of A.G.W.'s behavior. Ms. Griffey contacted Dr. Montgomery just before the termination hearing was scheduled to begin on October 2, 2008, to report that contact with the parents was having a detrimental effect on all the children. Dr. Montgomery testified that based solely on Ms. Griffey's oral report, he wrote the recommendation of no visitation. He affirmatively stated that if he had known the true facts, he would not have recommended termination of the communication between the mother and her children. He stated that his main error in the recommendation was that he did not differentiate between the parents in making his decision to stop contact with the

parents. Finally, he told the court that he did not have any professional concerns about the mother resuming her visits with the children.

The record also indicates that since her release in 2008 and her subsequent move to Louisville, the mother has maintained a drug-free lifestyle for more than two years. Upon her release from incarceration on May 23, 2008, she was accepted at The Rose of Sharon Restoration House, which is a recovery center for women. Upon her acceptance, she signed a contract in which she agreed to abide by the requirements for residing in the rehabilitation center. Those requirements include attending at least five Alcoholics Anonymous sessions per week, obtaining a sponsor, following the twelve steps program, submitting to random drug testing, keeping all mental health appointments and all probation or parole appointments, and contributing financially to the cost of residing there. According to the director of The Rose of Sharon, Sharon Thomas, the mother has complied with her contractual requirements and has been clean and sober the entire time and passed all random drug testing. Ms. Thomas also reported that the mother had obtained brief employment with a landscaping company and then obtained another job at Waffle House before she quit her job with the landscaping business. She completed the twelve steps program and moved out in November 2008.

As of the date of the termination hearing, the mother had been employed continuously with Waffle House for more than eighteen months. She normally works five days each week from 7:00 a.m. to 2:00 p.m. She is paid on a

weekly basis, and her paystubs for the period ending May 12, 2010, indicated year to date gross earnings of \$6,018.19. She received tips on average of \$200.00 to \$300.00 per week, and her current child support payment of \$100.00 per week is paid through a wage assignment from her pay from Waffle House.

The mother has also maintained the same residence since August 2009, which is a mobile home located in a mobile home park. The mobile home is completely furnished with a bedroom for A.L.W. and a bedroom for A.G.W. and S.A.W., which has bunk beds. She testified that she would be eligible to receive Section 8 housing assistance when she gains custody of her children and would then be able to obtain a larger residence. Ms. Williams visited her residence in September 2009 and December 2009 and reported that her residence was appropriate and met the conditions under her case plan for a clean and appropriate place for the children to live.

The mother was open and honest about the terrible impact which her substance abuse problem has had upon her children. She explained that she has been struggling with substance abuse nearly her entire life but that she has been sober since she was incarcerated in the spring of 2006 and for the two years since her release from prison in May 2008. She testified that this has been the longest period she has maintained sobriety in her life, stating that she has kept in contact with the support system she developed at The Rose of Sharon.

The mother testified that the Cabinet did not provide any reunification services to her since her release from prison, other than facilitating a few visits

with her children before visits terminated in October 2008. She expressed a lack of understanding as to why the Cabinet terminated her visits because her prior visits in July and September had gone very well. Ms. Williams informed the mother that the children believe that their foster mother is their mother; however, the mother stated that when she had the last visit with the children in February 2010, they all called her “Mommy.” The mother testified that the Cabinet did not work with her to maintain a relationship with her children between October 2008 and February 2010. When she visited in February 2010, she prepared a birthday party for S.A.W. At the end of that visit, the mother made arrangements to have another visit with the children on April 2, 2010. She brought Easter baskets for the children, but when she arrived for the visit, the Cabinet told her that there was no visitation scheduled.

By findings of fact and conclusions of law entered on December 27, 2010, the trial court concluded that both parents’ parental rights to the three minor children should be terminated pursuant to Kentucky Revised Statutes (KRS) 625.090 and entered an order terminating the parental rights of the mother and father with respect to each child. This appeal follows.

When reviewing a termination of parental rights case, this Court is limited in its review by the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure (CR) 52.01, and “the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings.” *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d

36, 38 (Ky. App. 1998) (citing *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986)). KRS 625.090(1) requires the Cabinet to prove entitlement to termination by clear and convincing evidence. Therefore, we will not disturb the trial court's findings unless no substantial evidence exists in the record to support them.

KRS 625.090 provides that a court may involuntarily terminate all parental rights of a parent to the named child if it finds by clear and convincing evidence that: (1) the child has been abused or neglected; (2) termination would be in the child's best interest; and (3) one or more of several listed grounds for termination are present.

In the instant case, the Christian Circuit Court adjudged that the three children had been determined to be neglected in other proceedings throughout the twelve-year case history. Specifically, the trial court found that with regard to A.G.W, both parents had stipulated neglect at the adjudication hearing on February 23, 2000. With regards to A.L.W. and S.A.W., the mother acknowledged neglect and the court made a finding as against the mother at an adjudication hearing on February 1, 2006. Finally, all three children were placed in foster care on or about December 1, 2005, and have remained in foster care since that time. Thus, the trial court found by clear and convincing evidence that the children were neglected.

The trial court also found that termination would be in the best interests of each child. In support of this finding, the trial court noted that A.G.W., the oldest child, is a "special needs child" and has been diagnosed with adjustment

disorder, ADHD, disruptive behavior disorder, communication disorder, enuresis (wetting on himself), and encopresis (defecation outside of the toilet). Dr.

Montgomery, who has been treating A.G.W. since March 2008, testified that A.G.W. had described instances of abuse wherein his father hit him on the head, in the knee, and put his head in the toilet after he defecated on himself. Dr.

Montgomery explained that A.G.W. needs a lot of consistency, structure, and nurturing, but that he had made substantial progress with his anger control and communication, and that he was doing better with his enuresis and encopresis. Dr.

Montgomery believes the foster family has “gone above and beyond the call of duty” with A.G.W. because they are very involved in all aspects of his treatment, and they got him occupational and speech therapy even though the school would not provide these services. Further, he stated that he knows of few homes that would have tolerated the enuresis and encopresis for long. Finally, Dr.

Montgomery stated that he thinks A.G.W. will continue to improve if he remains with the foster parents.

The trial court also found that termination was in S.A.W. and A.L.W.’s best interests. S.A.W. was doing very well in school with his foster parents’ support and was maintaining an “A” average. Although A.L.W. is not currently in school (or was not at the time of the hearing), the foster mother testified that she works with A.L.W. on colors and numbers and that she did not need speech therapy. Ms. Williams testified that when A.L.W. was in her mother’s care, she repeatedly had respiratory problems and that her respiratory problems

have stopped since being placed in foster care. Regarding this, the foster mother testified that A.L.W. suffers from asthma and cannot be around smoke. Ms. Williams testified that the foster parents do not smoke, and A.L.W. has not had an asthma episode in over twelve months. Ms. Williams testified that based on her experience with the family and her experience as a social worker, termination of parental rights would be in the best interest of the children because the children need a stable home, they do not need to witness domestic violence, they need someone to follow through on all their medical and psychiatric needs, and they need to observe healthy relationships. Finally, Ms. Williams testified that the Cabinet has not and does not recommend that the children return home to either parent.

Further, the trial court found that the foster parents intended to adopt all three children and that the foster mother indicated that she loves all three children, who have been with her and her husband most of their lives. Their biological half sister also lives with the foster parents and has since her adoption. The trial court's finding was further supported by the testimony of the Guardian Ad Litem, who testified that the children are emotionally bonded with one another and with their foster parents and that termination of parental rights was in the children's best interest.

The trial court's finding that termination of parental rights was in the best interest of the children is supported by substantial evidence throughout the record. Namely, that the parents have not maintained a safe and secure home for

the children consistently throughout the twelve-year period this case has spanned. The evidence also clearly demonstrates that the children are functioning well with their adoptive parents and are bonded to each other, their foster parents, and their half sister. While it does appear in the record that at various times both parents have made progress toward their reunification goals, the progress simply has not been enough. The evidence indicates that the father is completely incapable of caring for the children at this time, and while the mother has been mostly stable since 2008, she was away from the children for three or four years with little to no contact. Further, the record indicates that when caring for the children alone, she has failed to provide a safe and secure home and has in fact, relapsed.

Accordingly, the trial court's finding that termination of parental rights is in the children's best interests is supported by substantial evidence in the record.

The trial court also found that one or more grounds listed in KRS 625.090(2) were present. First, the trial court found that both parents had abandoned the children for a period exceeding ninety days. *See* KRS 625.090(2)(a). Marsha Williams' testimony at the May 2010 hearing supported this finding. Ms. Williams testified that the father had failed to communicate with her since January 2010 and had no contact with the children during that time. Ms. Williams also explained that the mother had custody of her children for less than six months over a twelve-year period and that as recent as March 2009 through September 2009, the mother had no contact with her to inquire about the children's well-being. The trial court's finding that the parents had abandoned the children

for a period in excess of ninety days was supported by substantial evidence, and we cannot overturn it on appeal.

The trial court also found that the parents, for reasons other than poverty alone, had continuously or repeatedly failed to provide or were incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the children's well-being and that there was no reasonable expectation of significant improvement in the mother or father's conduct in the immediately foreseeable future, considering the age of the children. *See* KRS 625.090(2)(g). In support of this finding, the trial court noted that the parents' case plan has always required them to establish and maintain a safe and secure home and for the parents to learn to deal with the emotional and mental health needs of their children. Both parents were also supposed to seek and maintain employment. In addition to that, the mother was to remain clean and sober and to submit to drug testing.

However, contrary to the case plan, the father testified that he lived rent free with an individual named Rex Temple and since 2005 has had difficulty providing a home approved by the Cabinet. Ms. Williams testified that she had issues with the father living with Mr. Temple and would not do a home evaluation on Mr. Temple's home because she had been informed by the mother and another client that Mr. Temple's home was involved in drug and prostitution activities. Ms. Williams testified that the father was aware of these activities in the home and that she would not do the home inspection because it was not the father's home and

he was not demonstrating that he could function independently. When asked what he had done to prepare himself for a special needs child, he responded, "I don't guess anything, really." At the May 2010 hearing, the father testified that he was currently unemployed after taking a voluntary lay off from his employer in April 2009. He currently has no source of income. Ms. Williams testified that the only thing that the father has been able to show is that he enjoys seeing his children, as demonstrated by his visits with them; however, he is unable to provide a home for them on his own. Finally, Ms. Williams testified that in April 2009 the father came to her and told her that he wanted to terminate his parental rights.

Based on the above, the trial court found that the father had made no efforts or adjustments in his circumstances, conduct, or conditions since the children were initially placed in foster care. In fact, his situation at the time of the hearing was actually worse than when the children entered foster care, and therefore it was not in the children's best interest to return home with the father.

Regarding the mother, the trial court found that she was living in a mobile home and as of a recent home evaluation in May 2009, the home was appropriate. However, as of the May 2010 hearing, the mother testified that she was thirteen to fourteen weeks behind in rent and admitted that on one occasion her landlord intended to evict her. Ms. Williams testified that the mother has not attended the ADHD training to be able to handle A.G.W., which was a part of her case plan. Ms. Williams also testified that the mother has not been to any counseling regarding her children's special needs and that due to the mother's lack

of communication with her, she has not been able to confirm her sobriety or conduct drug tests. Ms. Williams testified that although there has been a substantial improvement in the mother's condition, the mother has acknowledged on several occasions that she cannot deal with the children's problems by herself, and this is a significant concern for the Cabinet at this time. Ms. Williams pointed out that throughout the history of her work with this family, when the mother has had to deal with the stress of raising her children, she has relapsed. The Guardian Ad Litem stated in his report that he believes that for the mother, "the limited room for error can increase emotional and physical stress and fatigue, and could lead to failure. In [the mother's] case, failures may, and often have, led to relapse, and the cycle that brought the children before the Court to begin with would begin with all over again."

Ms. Williams also testified at the May 2010 hearing that within the last six weeks, the mother had expressed her frustration that she is not able to pay her bills on a regular basis and that she was behind in her rent. The mother explained that her phone number had changed frequently because she was not able to pay the bill to keep it activated.

Based on the above testimony, the trial court found that the mother had made more progress on her case plan than she had in the past; however, most of the progress was made within the last twelve months and well over four years after the children were placed in foster care for the last time. The court concluded that the mother had failed to make enough timely progress to establish an

appropriate relationship with her children and found that she had failed to make reasonable efforts or adjustments in her circumstances, conduct, or conditions to make it in the children's best interest to return home with her.

The findings of the trial court that both parents were unable to provide for the children are amply supported by substantial evidence, and we will not disturb those findings on appeal.

The trial court also found that the parental rights of the mother had also been terminated to another child, the children's half sister, on August 1, 2000, and that all three children in the instant case were born subsequent to or during the pendency of the previous termination. *See* KRS 625.090(2)(h). Ms. Williams testified that she was also the social worker involved in the termination proceedings for A.P., and that the events that led up to the decision to terminate were that the mother had relapsed, had not completed drug rehabilitation, and was unable to maintain employment or provide a home for A.P. The trial court found that the mother had not completed the case plan that was designed to reunite her with A.P. or her other children. The trial court's findings in this regard were supported by the record and thus are not clearly erroneous under CR 52.01.

The trial court also found that the testimony indicated that the children have been in foster care for fifteen out of the most recent twenty-two months preceding the filing of the petition to terminate parental rights in March 2007. *See* KRS 625.090(2)(j).

Both at the trial court level and now on appeal, the parents argued that the Cabinet has failed to make reasonable efforts as defined in KRS 620.020 to reunite the children with their parents. *See* KRS 625.090(4). However, Ms. Williams' testimony indicates that the Cabinet has made all reasonable efforts to reunite the children with their parents, but that the parents simply are not capable of taking proper care of the children, given their financial and emotional states of being. To be sure, Ms. Williams testified that the Cabinet has provided twenty-two services to the parents, including counseling, preventative assistance to help pay utilities, providing a family preservation worker, preventative daycare assistance, WIC, food stamps, supervised visitation, and parenting classes. The evidence also indicates that the Cabinet encouraged the father to attend anger management counseling, ADHD counseling, parenting classes, and offered to help him prepare a budget. Further, the Cabinet encouraged the mother to attend AA meetings, counseling, parenting classes, and paid for her to attend drug programs on three occasions and paid for the expenses of the programs. Accordingly, the trial court found that the Cabinet had met its burden of providing reunification services to this family. Based on the record, we agree that the Cabinet attempted to reunify this family throughout the twelve-year period it has been involved. Accordingly, the trial court's findings are supported by the evidence and will not be disturbed on appeal.

In conclusion, we are cognizant of the fundamental liberty interest of natural parents in the care, custody, and management of their children. While any

termination of parental rights saddens this Court greatly, the Cabinet met its burden of proving that termination of parental rights was justified in this case. The trial court's conclusions that the children were neglected, that factors supporting termination were present, and that termination was in the best interest of the children are supported by substantial evidence. Therefore, we affirm the trial court's December 27, 2010, order terminating the parental rights of B.E.W. and M.E.W. to their children, A.G.W., S.A.W., and A.L.W.

ALL CONCUR.

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