

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000881-ME

K.M.H.

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE PAULA SHERLOCK, JUDGE  
ACTION NO. 10-AD-500233

CABINET FOR HEALTH AND FAMILY SERVICES,  
COMMONWEALTH OF KENTUCKY; K.J.M., A CHILD;  
J.A.H., A CHILD; K.K.A., A CHILD; R.M.M., FATHER;  
J.H., FATHER; AND B.R.A., FATHER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: K.M.H. (mother) appeals from orders of the Jefferson Family Court terminating her parental rights to her children, K.J.M., J.A.H., and K.K.A (the children). On appeal, mother argues that the Cabinet failed to prove the statutory requirements by clear and convincing evidence, including that termination would be in the best interest of the children. In a related argument, she

asserts that additional services would lead to lasting parental adjustment and services already provided to her were adequately addressing her poverty and depression. Finally, mother urges this Court to deviate from existing law and hold that termination should be avoided unless the child is in danger of serious harm. Upon a thorough review of the record, we conclude that pursuant to KRS 625.090, the Jefferson Family Court properly terminated mother's parental rights.

The children, ages three, two, and one, were removed from mother's care on April 1, 2009, after mother's home was found to be filthy, unsanitary, and unsafe. There was no food in the house other than one package of ramen noodles. Garbage and debris were littered throughout the house, the beds had no sheets, and clothes were piled on the couches and beds.

Mother had prior contact with the Cabinet when her two older children were removed from her custody approximately seven years earlier. At the termination trial, she admitted that she had prior episodes of depression that resulted in an unsanitary and unsafe home. She had been treated for mental illness and attempted suicide on one occasion.

A petition alleging neglect was filed and a temporary removal hearing held on April 6, 2009. At that time, the children were placed in the temporary custody of the Cabinet, and mother was ordered to undergo a psychological evaluation and participate in supervised visitation with her children. On April 16, 2009, mother appeared in court and stipulated to having neglected the children and the court continued its prior order. By this time, mother had gone to University

Hospital on her own to have her mental health needs assessed. The hospital provided mother with a prescription for medication, but she did not have money to pay for the prescription. The trial court acknowledged that mother needed financial help.

In June 2009, a dispositional hearing was held. The family court refused to commit the children to the Cabinet and set a hearing on whether the Cabinet was making reasonable efforts to provide mother services. The Cabinet was ordered to refer mother for a U.K. Targeted Assessment.

On July 9, 2009, mother completed her psychological evaluation. The evaluator noted that mother had a strong motivation to care for the children and was open in discussing and acknowledging her mental health concerns. The evaluator opined that mother had an adequate understanding of parenting in all areas except behavior management, and recommended that she participate in a psycho educational parenting class and consult with a psychiatrist to address her anxiety and bipolar disorder. Testing showed mother had an average “verbal” IQ score, but a “performance” IQ score that was extremely low: 0.3%. The evaluator felt this suggested potential brain impairment, possibly related to her history of seizures and stated that the split between mother’s verbal and performance scores indicated mother may have difficulty in interpreting nonverbal material, which could make it difficult for her to parent young children.

On July 23, 2009, mother underwent a U.K. Targeted Assessment. The assessment recommended that mother become involved in mental health

treatment and concluded that until mother stabilized her symptoms, she would not be able to maintain a household or maintain employment.

The family court held a hearing on July 30, 2009. The children were committed to the Cabinet, and the Cabinet was ordered to assist mother with receiving mental health treatment and medications. A review was set for August 27, 2009.

In August 2009, mother began mental health counseling and psychiatric treatment at Seven Counties. Michael Barrett, a certified clinical psychologist, diagnosed mother with major depressive disorder. He observed that mother had reduced energy, insomnia, low self-worth and that she was withdrawn, overwhelmed, and depressed.

Mr. Barrett opined that her depression had been in remission since the summer of 2010, but mother had increased distress at the time of the termination trial. Mother's cooperation and progress were sporadic and, at the time of the termination trial, her mental health had deteriorated. She was prescribed Wellbutrin to manage her anxiety but failed to attend several visits with the children and missed two weeks of work due to depression. Despite her depression, she had not seen her therapist for over one month.

Mother's group counselor, Dr. Kinnetz, reported that mother struggles with controlling J.A.H. who exhibits behavioral problems when mother is present. Although he opined that mother loves the children, her emotional distress prevents

her from responding to their needs. He noted that at the time of the termination trial, mother's mental health seemed to be deteriorating.

In October 2009, mother was permitted unsupervised visitation but the children returned with unexplained injuries. In February 2010, a Cabinet social worker made an unannounced visit to the home during an unsupervised visit. One of the children was not present and mother did not know his location. As a result, the visits again became supervised during which mother demonstrated agitation and left early each time. Because mother was so frustrated and overwhelmed with the two-hour visits, her time was reduced to one hour.

Despite having missed three consecutive visits with her children, on December 4, 2010, the family court granted unsupervised visitation. However, the children were visibly upset by the visits and, on one occasion, J.A.H. returned with an unexplained black eye. After one unsupervised visit, J.A.H. returned wet with urine and the youngest child returned wearing the same diaper he had on four hours earlier soaked with urine. Mother canceled a late December visitation and, at the time of the termination trial, had last visited with the children on January 8, 2011.

After the children's removal from mother's custody and losing her apartment, mother was transient. Although the Cabinet had referred mother to a community shelter, she failed to attend and instead lived with various friends and relatives. In August 2010, she moved into an apartment and, in October 2010,

obtained employment with KFC Restaurant. However, at the time of the termination trial, she was behind on her rent.

After conducting a termination hearing on January 12, 2011, the family court found that although mother has participated in treatment services, she was not in full compliance with her mental health treatment, failed to provide for the children's material needs, and was inconsistent and overtly hazardous to her children's well-being during visitation. It concluded that given her history of abuse and neglect of the children, and her other children, and failure to complete her treatment, mother demonstrated a lack of ability to provide for the children.

Based upon the above evidence, the family court ultimately granted the petition to terminate mother's parental rights. Mother appealed.

Our standard of review was concisely stated in *C.R.G. v. Cabinet for Health and Family Services*, 297 S.W.3d 914, 916 (Ky.App. 2009):

The trial court has broad discretion in determining whether a child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky.App.1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01, based on clear and convincing evidence. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky.App. 1986). However, the clear and convincing proof does not necessarily mean uncontradicted proof. It requires that there be proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people. *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

To grant a petition for the involuntary termination of parental rights under KRS 625.090, a trial court must have clear and convincing evidence of three elements: (1) that the child is, or had previously been found to be, abused or neglected as defined in KRS 600.020(1); (2) that one or more of the grounds stated in KRS 625.090(2) exist; and (3) that termination would be in the best interest of the child. *M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846 (Ky.App. 2008). Mother stipulated to neglect. Therefore, the parties have focused on the remaining two elements.

The family court found that there was clear and convincing evidence that termination was appropriate for the following reasons: (1) for a period of not less than six months, mother has continuously or has been substantially incapable of providing essential care and protection for the children and there is no reasonable expectation of improvement in parental care and protection, considering the age of the children, and (2) for reasons other than poverty alone, mother has “continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the [children’s] well-being and that there is no reasonable expectation of significant improvement in [mother’s] conduct in the immediately foreseeable future, considering the age of the [children].” KRS 625.090(2)(e) and (g). Finally, it found that the children’s physical and mental conditions had improved since entering foster care and that termination of mother’s parental rights was in the children’s best interests. KRS 625.090(3).

The evidence is clear and convincing that mother suffers from mental illness that precludes her from providing parental care and protection for the children. Her episodes of depression are severe and diminish her functioning resulting in an unsafe and unsanitary home. She was provided mental health services in the past after her two other children were removed from the home, yet, her mental illness rendered her unable to provide food, shelter, or medical care for the children. Until August 2010, the same month the petition was filed, mother did not have a home despite that finding a home was part of her case plan. By the time of the termination hearing, mother was already behind in her rent and demonstrated signs of deterioration in her mental illness. Moreover, there was testimony that her mental illness prevented her from appropriate interaction with her children during visitations, and that the children returned with soiled clothing and unexplained injuries.

There was also clear and convincing evidence that there was no “reasonable expectation of improvement” on the part of the mother. While mother was participating in the services offered to her, she was not in full compliance with her case plan. She had not provided for her children’s material needs with any regularity and continued to lack the demonstrated ability to provide for their care and protection. As stated, mother was already behind in her rent by the time of trial, though she had only been in the apartment for approximately six months. Further, mother testified to missing approximately two weeks of work due to



depression. Unfortunately, mother continues to demonstrate a consistent pattern of mental relapse and the inability to care for her children.

There was clear and convincing evidence to support the family court's findings that mother failed, for reasons other than poverty alone, to provide for and parent the children under KRS 625.090(2)(e) and (g). We now turn to a determination of the best interests of the children.

Under KRS 625.090(3), the trial court must consider the following six factors:

- (a) Mental illness as defined by KRS 202A.011(9), or intellectual disability 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.

We conclude that the family court did not err when it determined that it was in the children's best interests to terminate mother's parental rights. Mother has a diagnosed mental illness that prevents her from caring and providing for her children. She has been offered treatment for over seven years without success, at least in part, due to her inconsistent attendance at her counseling sessions.

Although mother has made some improvements in her life, at the time of the termination trial, she showed signs of mental deterioration. The children were physically ill, malnourished, without immunizations, and developmentally delayed when removed from the home but have thrived since being placed in foster care.

Finally, we address whether the Cabinet made reasonable efforts to reunite mother and the children. Mother points out that she was not provided mental health services until September 2009, when she was seen at Seven Counties. The delay was apparently attributable to budget constraints. We agree with mother that reasonable efforts by the Cabinet include providing mental evaluations in a timely manner. However, mother was provided treatment within a reasonable amount of time, and treatment continued to be offered at the time of the termination hearing in January 2011. Most importantly, regardless of the delay, it

remains that services were offered but not fully utilized by mother and that her condition was deteriorating at the time of the hearing.

In light of the foregoing, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, CABINET  
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