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Commonwealth of Kentucky

Court of Appeals

NOS. 2013-CA-000688-ME; 2013-CA-000690-ME
AND 2013-CA-000692-ME

K.N.T.

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JO ANN WISE, JUDGE
ACTION NOS. 12-AD-00227; 12-AD-00228 AND 12-AD-00229

J.M.T., L.S.T., L.J.T., MINOR CHILDREN;
J.M.T., FATHER; AND COMMONWEALTH
OF KENTUCKY, CABINET FOR
HEALTH AND FAMILY SERVICES

APPELLEES

AND NOS. 2013-CA-000689-ME; 2013-CA-000691-ME
AND 2013-CA-000693-ME

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ACTION NOS. 12-AD-00227; 12-AD-00228 AND 12-AD-00229

J.M.T., L.S.T., L.J.T., MINOR CHILDREN;
K.N.T., MOTHER; AND COMMONWEALTH
OF KENTUCKY, CABINET FOR
HEALTH AND FAMILY SERVICES

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: K.N.T. (Mother) and J.M.T. (Father) appeal from six separate orders of the Fayette Family Court terminating their parental rights.

Mother and Father have presented no persuasive grounds sufficient to overturn the family court's decision. We affirm.

I. Facts and Procedure

Though these two cases were tried together before the family court, Mother and Father filed separate notices of appeal and briefs before this Court. In the interest of judicial economy, we have consolidated the matters.

Mother and Father are the natural parents of three children: J.M.T., born June 10, 2004 (Older Daughter); L.S.T., born June 15, 2005 (Son); and L.J.T. born May 19, 2008 (Younger Daughter).

In July 2007, the Cabinet for Health and Family Services filed a dependency, neglect, and abuse petition claiming Older Daughter and Son¹ were neglected children due to their repeated exposure to domestic violence between Mother and Father. Mother reported that Father had hit her while she was holding the children, and threatened to kill her with a gun and a knife. The children were also struck during the altercation, and Father reportedly threw Son on the ground.

Mother confirmed this was not the first incident of domestic violence between her

¹ Younger Daughter had not yet been born.

and Father. Following an adjudication hearing, the family court adjudged the children to be neglected. They remained in the home with Mother subject to a safety plan by which Mother agreed Father would not be around the children. Mother filed for an EPO² and the family court ultimately issued a DVO,³ which included a no-contact order with Father. Additionally, Mother completed parenting and domestic violence classes. Father was incarcerated for his acts of domestic violence against Mother, and later pleaded guilty to possession of ammunition after being convicted of the misdemeanor crime of domestic violence, 18 United States Code (U.S.C.) § 922(g)(9), in federal district court in the Eastern District of Kentucky. Father was sentenced to a relatively short term of imprisonment followed by three years' supervised release.

Despite the no-contact order, Mother could not distance herself from Father; their relationship endured. In January 2008, Father was seen alone with Older Daughter at a video rental store. Because the family court's no-contact order was still in effect, the Cabinet filed neglect petitions and sought emergency custody of the children due to Mother's failure to ensure their safety. Following an adjudication hearing, the family court entered a finding that the children were neglected. The children were initially placed in foster care. Soon thereafter, their paternal grandparents were given temporary custody.

² Emergency Protective Order

³ Domestic Violence Order

A few months later, in May 2008, the Cabinet discovered the paternal grandparents were not enforcing the DVO and were allowing Father to visit the children. The Cabinet and Mother entered into another safety plan in which Mother again agreed not to allow any contact between Father and the children. Shortly thereafter, Father was discovered hiding in the closet at Mother's house; Younger Daughter was present in the home. Another round of neglect petitions followed. The Cabinet again sought emergency custody and the children were placed in foster care. Six days later, the children were returned to their paternal grandparents. At the adjudication hearing, the family court found that Father neglected the children, and Mother stipulated to neglect. The family court ordered the children to be returned to Mother's custody and, in accord with the recommendation of the Cabinet, ordered Mother to prohibit contact between the children and Father. Furthermore, the court ordered that Mother also refrain from any contact with Father and the paternal grandparents.

Two years passed without known incident. In April 2011, Mother was accused of medical and educational neglect. The Cabinet discovered the children had worms and Mother, despite knowing of the problem, had not sought medical treatment for them. The Cabinet also discovered that Older Daughter and Son had missed an unacceptable number of days from school. Further, during the Cabinet's investigation, they discovered Father was living in the home – and had been since about May 2010 – in violation of the family court's DVO and no-contact order, and that Mother and Father recently had married. The children reported witnessing

recent acts of domestic violence. Additionally, Older Daughter informed Cabinet workers she was not allowed to talk about what happened in the home.

The family court awarded the Cabinet emergency custody and, in May 2011, the children were once again placed in foster care; one month later, the Cabinet placed them with their great-aunt and great-uncle in Bowling Green, Kentucky. Mother and Father both stipulated to neglect.

In the summer of 2011, Father completed an in-patient substance-abuse program. In late 2011, Father was again incarcerated for several months.

The matter came before the family court for review in May 2012. The Cabinet reported that Older Daughter had been moved to a private child care foster home, but the younger children remained with their great-aunt and great-uncle, who, due to medical concerns, could no longer care for them. The family court committed all the children to the Cabinet's custody; they were placed together in an approved foster home.

The Cabinet filed a petition to terminate both parents' parental rights on October 26, 2012. Mother and Father opposed the petition. An evidentiary hearing was conducted on March 5, 2013. Before the taking of evidence, Father orally moved to continue the termination hearing. The circuit court denied Father's motion.

At the hearing, Nakia Walker, a social worker with the Cabinet, testified that treatment plans had been formulated for each parent since the children's very first removal. Mother and Father participated in some treatment services, but failed to

successfully complete all treatment goals. Walker explained the domestic violence between Mother and Father was ongoing throughout their relationship. The children reported seeing their parents fight, hit, and scream at each other. Once while at McDonalds, Younger Daughter saw a hole in the wall and remarked that “daddy did it” because “daddy punches holes in the wall.” On other occasions, the children talked about Father “taking them to where dogs were fighting.” The children told Walker they feared Father. Walker reported that Son thinks Father will kill him if he finds him. When Son speaks of Father, Walker explained, he becomes tearful, pulls at his clothes, and scratches his face.

Walker discussed Mother and Father’s current circumstances. She acknowledged Mother regularly visited the children, was employed, and had reliable transportation. However, Walker also testified Mother had failed to pay ordered child support resulting in a \$4,000.00 arrearage and Mother was inconsistent with her medication. Walker also referenced Mother’s repeated failures to abide by the family court’s no-contact orders. The children informed Walker that Mother directed them not to discuss the happenings of the house with anyone and, shortly before the termination hearing, told the children that things they had witnessed did not happen. In November 2012, Father was again incarcerated on allegations of violent behavior and intoxication by drugs and/or alcohol. Walker stated that, while incarcerated, Father completed a stress and anger management program, parenting classes, and received his general education degree (GED). Prior to his incarceration, Father had a mix of positive and negative

drug tests. In Walker's opinion, parent reunification was not feasible because of Mother and Father's inability to provide needed care for the children, Father's violent behavior and incarceration, Mother's failure to successfully complete her case plan to reduce the risk of harm to herself and the children, and Mother's continued failure to minimize the domestic violence and the effect it had on the children.

Walker testified the children are doing well in foster care and are making progress. They love their foster parents and are thriving under a structured scheme of discipline and routine. They are also doing better in school and receiving therapeutic services. Walker explained that, at one point, Older Daughter was placed in a crisis unit and then later admitted to an inpatient psychiatric facility. Upon her release, the children participated in sibling therapy and transitioned back together. They are now attached to each other.

Aimee Mau, a licensed clinical social worker with the Comprehensive Assessment and Training Services Project (CATS), testified as to the results of a 2012 CATS evaluation.⁴ Interviews for the project occurred in October 2011, and a CATS report for each child was provided to the family court in January 2012. Mau testified that all three children displayed significant emotional and behavioral dysregulation. Additionally, they all have mental-health diagnoses: Older Daughter has chronic post-traumatic stress disorder (PTSD), reactive attachment disorder (RAD), and ADHD; Son has Asberger's syndrome, PTSD, ADHD, and

⁴ The family court ordered the CATS evaluation.

RAD; and Younger Daughter exhibited clinically significant levels of anxiety, anger, and aggression. Older Daughter first displayed PTSD symptoms at the age of three, which Mau found concerning. Older Daughter's suicidal ideation and self-injurious behavior were so severe she required psychiatric hospitalization, which Mau testified is certainly atypical for a child her age. Mau reported that Older Daughter believed she was to blame for the breakdown of her family because she told authorities what was happening in the family home. Mau attributed the children's issues to exposure to repeated incidents of very frightening violence and very distressing losses in their family origin. Mau stated all the children display atypical levels of aggression and anxiety. They are psychologically fragile and are in need of safety and stability.

Mau also discussed the CATS teams' findings regarding Mother. Mau explained Mother minimized things. In particular, she minimized the difficulties the children were having, minimized the severity of the domestic violence, and displayed limited empathy for the children's experiences and maltreatment. Mother also relied heavily on Father for emotional support and, despite well-developed case plans which included therapy and treatment, Mother failed to comply with them. Mau opined Mother had difficulty meaningfully engaging in therapy and other services. The CATS team concluded Mother had a poor prognosis for changing her parenting. The CATS team did not recommend reunification with Mother.

Mother also testified as to her current status. She explained she had separated from Father and filed for divorce. She continues to attend monthly domestic violence classes and receives counseling for her mental-health issues. Mother testified she regularly visits with the children and has never missed a scheduled visitation. She also has stable housing and steady employment. Mother presented a written summary of what she would do to protect the children's physical and mental health if they were returned to her. She testified she has had no contact with Father. Mother explained she has changed for the better since the CATS interview in October 2011. She feels prepared and ready to parent the children. Finally, she introduced pay stubs from September 16, 2012, to March 2013, showing child support was being withheld from her pay checks. Mother testified she believes she complied with the Cabinet's requirements and that the family court should not terminate her parental rights.

Father did not testify and presented no witnesses.

The family court entered orders on March 18, 2013, and March 25, 2013, terminating Mother and Father's parental rights. The family court concluded there had been a previous adjudication of neglect, the evidence presented at the termination hearing supported a separate finding of neglect, and that termination would be in the children's best interest. The family court further found that: (1) Mother and Father had continuously or repeatedly inflicted or allowed to be inflicted emotional harm upon the children by other than accidental means, KRS⁵

⁵ Kentucky Revised Statutes

625.090(2)(c); (2) Mother and Father had continuously failed to provide essential parental care and protection for the children for the past six months and there was no reasonable expectation of improvement, KRS 625.090(2)(e); and (3) Mother had failed to provide for the children's essential needs for reasons other than poverty alone and there was no reasonable expectation of improvement, KRS 625.090(2)(g).

This appeal followed.

II. Standard of Review

Mother and Father each attack the sufficiency of the evidence to support the statutory criteria to involuntarily terminate a person's parental rights. KRS 625.090. They present similar yet distinguishable arguments. Nonetheless, our review standard is the same. Where the sufficiency of the evidence is challenged on appeal, we may only reverse if the family court's findings of facts are clearly erroneous. *Cabinet for Health & Family Servs. v. I.W.*, 338 S.W.3d 295, 299 (Ky. App. 2010). A finding supported by substantial evidence is not clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). Substantial evidence is that which is "sufficient to induce conviction in the mind of a reasonable person." *Rearden v. Rearden*, 296 S.W.3d 438, 441 (Ky. App. 2009).

In addition, Father contends the family court erred when it denied his motion for a continuance. We review the family court's decision in that regard for an abuse of discretion. *Guffey v. Guffey*, 323 S.W.3d 369, 371 (Ky. App. 2010). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary,

unreasonable, unfair, or unsupported by sound legal principles.”” *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (citation omitted).

III. Analysis

KRS 625.090 permits a family court to involuntarily terminate a person’s parental rights if it finds by clear and convincing evidence: (1) that the child is abused or neglected; (2) that termination is in the child’s best interest; and (3) the existence of one or more of ten specific grounds for termination. *M.B. v. D.W.*, 236 S.W.3d 31, 34 (Ky. App. 2007); KRS 625.090(1)(a)-(b), (2). Even upon satisfaction of all three factors, the family court may exercise its discretion not to terminate if the parents prove by a preponderance of the evidence that the children will not be abused or neglected in the future. KRS 625.090(5); *D.G.R. v. Commonwealth, Cabinet for Health and Family Services*, 364 S.W.3d 106, 111 (Ky. 2012).

Neither Mother nor Father attack the family court’s neglect findings or best-interest determination. We limit our review, then, to the arguments they present on appeal, namely; (i) whether substantial evidence supports the family court’s conclusion that grounds for termination existed under KRS 625.090(2); (ii) whether Father proved by a preponderance of the evidence that the children would not continue to be abused or neglected if returned to his care, KRS 625.090(5); and (iii) whether the family court abused its discretion when it denied Father’s motion for a continuance.

A. Grounds for Termination

KRS 625.090(2) presents a number of circumstances which warrant termination of parental rights. The family court must find that the evidence supports at least one of the grounds enumerated in KRS 625.090(2) before it may terminate. KRS 625.090(2) (“No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds[.]”). Relevant to both Mother and Father, the family court found three such circumstances existed:

(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;

. . . .

(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;

. . . .

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonable necessary and available for the child’s well-being and that there is no reasonable expectation of significant improvement in the parent’s conduct in the immediately foreseeable future, considering the age of the child[.]

KRS 625.090(2)(c), (e), and (g). If the evidence supports *any* of the three findings, we must affirm the family court’s conclusion that grounds for termination existed.

Mother first contends there was insufficient evidence to support the family court's finding under KRS 625.090(2)(c) that she continuously or repeatedly inflicted or allowed to be inflicted emotional harm upon the children other than by accidental means. We disagree. In fact, there is more than ample evidence to support the family court's finding. Since at least 2007 – and perhaps earlier – Mother and Father subjected the children to severe domestic violence. The evidence is clear that Father repeatedly engaged in acts of domestic violence in the home and in front of the children. Despite Cabinet and court intervention, Mother failed to protect the children from further displays of domestic violence. Mother repeatedly violated both the active safety plan developed by the Cabinet and multiple no-contact orders entered by the family court when she rekindled her relationship with Father and, in turn, allowed Father continued, and at times unsupervised, contact with the children. Notably, in May 2010, Mother allowed Father to return to the family home, where he remained until discovered by the Cabinet in April 2011. During this time, the domestic violence continued. Mother then proceeded to lie to both the family court and the Cabinet about these violations. Further, Mother minimizes the domestic violence and the effect it had on the children, and seeks to blame others for her own failures. More disturbingly, Mother minimizes the severity of the children's maltreatment, the difficulties the children were experiencing in her care, and the level of danger to which she exposed the children. Mother instructed the children not to tell anyone what was happening inside the home and, shortly before the termination hearing, told the

children that things they had witnessed did not happen. Due to the trauma and upheaval in the children's lives, they have all experienced severe emotional trauma. Mau testified as to the extent of that trauma. Older Daughter and Son have both been diagnosed with RAD and PTSD, and Younger Daughter was diagnosed with clinically significant anxiety, anger, and aggression. These children are very young and are certainly incapable of protecting themselves from emotional and physical harm. Protecting her children from emotional and physical harm was Mother's responsibility and she failed in every respect to meet it. We are wholly convinced there is substantial evidence to support the family court's finding that grounds for termination existed under KRS 625.090(2)(c).

Mother also argues there was insufficient evidence to support the family court's findings under KRS 625.090(2)(e) and (g). While we again disagree with Mother, because we have found substantial evidence supports the family court's finding under KRS 625.090(2)(c), we need not ascertain whether the remaining subsections were adequately supported by the proof as to Mother. The family court need only find the existence of one ground under KRS 625.090(2) to support termination. *D.G.R.*, 364 S.W.3d at 112.

Similarly, Father argues there was insufficient evidence to justify the family court's finding under KRS 625.090(2)(e) and (g). Father notes that these subsections require proof on two prongs. First, that the parent failed to provide essential care and, second, that there is no reasonable expectation of improvement in the parent's conduct in the immediately foreseeable future. KRS 625.090(2)(e),

(g). Father admits he failed to carry out his parental duties under these subsections, but claims the record is void of substantial evidence to support the family court's finding that there is no reasonable expectation of significant improvement in his parenting conduct in the immediately foreseeable future. Father points out that, while incarcerated, he put his time to good use and continued to work his case plan. Notably, Father completed anger and stress management classes; parenting classes; a substance-abuse program; and received his GED. Father also claims he is partially compliant with his drug testing. In light of these steps, Father asserts it cannot reasonably be argued that there is not a good chance that, upon his release from prison, his parenting conduct would be significantly improved.

We agree with Father that “KRS 625.090(2)(e) and (g) require that the [family] court also consider the parents’ prognosis for improvement within a reasonable amount of time.” *C.A.W. v. Cabinet For Health & Family Services, Commonwealth*, 391 S.W.3d 400, 407 (Ky. App. 2013). However, KRS 625.090(2)(c) contains no such consideration and Father does not take issue with the family court’s finding, as it pertains to Father, under this subsection.⁶ Again, only one finding is “required to satisfy this part of the statute.” *D.G.R.*, 364 S.W.3d at 112.

⁶ The family court found that Father, no later than 2007, continuously and repeatedly inflicted emotional harm on the children by his acts of domestic violence in the home and in front of them. KRS 625.090(2)(c).

In sum, we find substantial evidence supports the family court's finding that grounds existed for termination under KRS 625.090(2). On this issue, we affirm.

B. KRS 625.090(5)

Father next argues that, because he proved by a preponderance of the evidence that the children would not continue to be neglected if returned to him, the family court should have exercised its discretion under KRS 625.090(5) not to terminate his parental rights. That statute provides that:

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)

KRS 625.090(5) is plainly permissive. The family court may opt not to terminate a parent's parental rights if the parent proves that the child will not continue to be an abused or neglected child. However, nothing compels the family court to choose this option; it ultimately leaves that decision to the family court's discretion. As applied to this case, even if Father proved it was more likely than not that the children would not continue to be neglected if returned to his care, the family court still retained the discretion and authority to terminate his parental rights. The family court proceeded in this manner, and we cannot say that, in doing so, the family court abused its discretion.

C. Denial of Motion for Continuance

Finally, Father contends the family court's decision to deny his motion for a continuance amounts to an abuse of discretion. Father moved the family court to continue the termination hearing because his most recent criminal case was scheduled for a court hearing three days later and Father believed his pending criminal charges would be resolved at that point. Father believed he was unfairly forced to choose between testifying on his own behalf in the termination proceeding and possibly harming himself in the pending criminal matter, or not testifying in the termination proceeding and possibly harming his chance of retaining his parental rights.

The Kentucky Supreme Court has identified various factors to consider when reviewing the denial of a motion for a continuance. Those factors include: "1) length of delay; 2) previous continuances; 3) inconvenience to litigants, witnesses, counsel and the court; 4) whether the delay is purposeful or is caused by the accused; 5) availability of other competent counsel; 6) complexity of the case; and 7) whether denying the continuance will lead to identifiable prejudice." *Guffey v. Guffey*, 323 S.W.3d 369, 371 (Ky. App. 2010) (quoting *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991)). Of course, in analyzing these factors, we must consider the totality of the circumstances. *Id.*

In this case, we cannot say the family court abused its discretion when it denied Father's motion to continue. Father's chances of release from incarceration, and his belief that his criminal charges would be shortly resolved, were speculative at best. In reality, criminal proceedings often linger for years.

The Cabinet indicated from the start that its case did not rest on the events that resulted in Father's *current* criminal charges. In fact, those charges were initiated in November 2012, yet the majority of the Cabinet's evidence consisted of events and conduct that occurred before that time. Nothing prohibited Father from testifying to events prior to November 2012. Further, the family court set this matter for trial in January 2013, at which time Father was already incarcerated, yet Father waited until the morning of the hearing to request a continuance. Most importantly, the family court weighed the effect delaying the proceedings would have on the parties, particularly the children. The children had had multiple removals and placements, had lingered in foster care for over a year, and desperately needed permanency. In sum, considering the totality of the circumstances, we cannot say the family court abused its discretion when it denied Father's motion to continue the termination hearing.

IV. Conclusion

The March 18, 2013 and March 25, 2013 judgments of the Fayette Family Court terminating Mother and Father's respective parental rights to J.M.T., L.S.T., and L.J.T. are affirmed.

ALL CONCUR.

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