RENDERED: SEPTEMBER 5, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001006-ME

M.A.J. APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 12-AD-00094

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; A.L.T.;
M.T.; AND D.A.B., A CHILD APPELLEES

AND NO. 2013-CA-001007-ME

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COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; A.L.T.;
M.T.; AND D.A.B., A CHILD APPELLEES

AND NO. 2013-CA-001024-ME
AND
NO. 2013-CA-001025-ME

A.L.T.; D.A.B., A CHILD;
AND D.A.B., A CHILD APPELLANTS

APPEAL FROM FAYETTE FAMILY COURT
v. HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NOS. 12-AD-00094 AND 12-AD-00095

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES;
M.T.; AND M.G. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

MAZE, JUDGE: A.L.T. and M.A.J. are, respectively, the mother and putative father of two girls, D.A.B., born May 1997, and D.[A.]B.,[1] born October 1998. A.L.T. and M.A.J. appeal from separate orders of the Fayette Family Court terminating their parental rights. We conclude that the trial court's findings of fact were supported by substantial evidence and that its conclusions of law supporting the termination of parental rights were not clearly erroneous. Hence, we affirm.

[1] In accordance with this Court's policy and in the interest of protecting the child's privacy, we will refer to both parties and the children only by their initials. Since the two children have the same initials, we will hereafter refer to the younger child as D.B.

In February 2011, the Cabinet for Health and Family Services (the Cabinet) filed a neglect petition against A.L.T. on behalf of D.A.B. and D.B. A separate dependency petition was filed on the children's behalf shortly thereafter. On March 8, 2011, a temporary removal hearing was held, after which time custody of both children was given to the Cabinet.

On April 26, 2012, the Cabinet filed separate petitions to terminate A.L.T.'s parental rights. The trial court appointed counsel to represent A.L.T. in this proceeding. It was reported that A.L.T. was married to M.T. at the time of both children's birth. If such is the case, he would be presumed to the father of the children. However, he is not listed as the father on either of the children's birth certificates. Nevertheless, the Cabinet named M.T. as a party to the petition. Service on M.T. was attempted by warning order attorney, but it was returned unclaimed from his last known address.

There is no father identified on D.A.B's birth certificate, but M.A.J. is identified as the father on D.B.'s birth certificate. A.L.T. identified M.A.J. as father of both children, and the Cabinet named M.A.J. as the putative father on both petitions. M.A.J. is currently incarcerated in Nevada. He was served by warning order attorney and filed a response admitting paternity of both children. At his request, the trial court appointed counsel for him on this petition.

The trial court appointed a guardian *ad litem* (GAL) for both of the children, and her report is filed in the record. On November 26, 2012, the trial court conducted a bench trial on the petitions. In addition to the GAL's report, the

Cabinet presented the testimony of each of the children's therapists, and the family's caseworker, Sholanda Snowden. In addition, A.L.T. testified on her behalf. M.A.J. testified by phone. The court also interviewed the children.

Thereafter, on March 7, 2013, the juvenile cases were brought before the court for an annual permanency review. At that hearing, A.L.T. indicated that she had new evidence regarding her current circumstances. Based on this information, the trial court scheduled a supplemental hearing on May 2, 2013.

On May 13, 2013, the trial court entered findings of fact and conclusions of law in both petitions. The trial court noted that A.L.T. has a long history of mental health issues, violent relationships with men, and residential instability. Prior to moving to Kentucky in 2010, A.L.T. lived at various times in Hawaii, Nevada, North Carolina and Wisconsin. A.L.T. testified that she and the children moved from Wisconsin to Kentucky to flee from acts of domestic violence and alleged sexual abuse of the children. But after moving to Kentucky, she continued to be involved with a man who engaged in domestic violence and was also a registered sex offender.

Following removal of the children, the Cabinet gave A.L.T. a case plan to address her mental health issues and to stabilize her living arrangements. At the time of the first hearing, A.L.T. had not fully complied with the Cabinet's case plan. She was hospitalized several times for mental health evaluations, and she had been arrested for disruptive behavior. In addition, A.L.T. had been

homeless for several months in 2012. However, the court acknowledged that A.L.T. had recently made significant progress in addressing these issues.

The court noted that there was some testimony that the children were subject to abuse in Wisconsin, but there were no records from Wisconsin substantiating those allegations. After the Cabinet removed the children, D.A.B. was placed in two separate foster homes, but she disrupted from both placements due to her behavior. At the time of the first hearing, she was placed in a residential facility where she was undergoing treatment for behavioral and psychological disorders. D.B. was successfully placed in a foster home. At the second hearing, Snowden testified that the two girls were now together in the same foster home and were doing well.

The trial court noted that A.L.T. and the children have a good relationship, which they maintained during the time they were separated. Given that relationship and the age of the children, the GAL recommended, and the court agreed, that she continue to have some level of contact with the children. However, the court concluded that A.L.T. was still not capable of providing for either child's needs and there was no reasonable likelihood that the situation would improve.

M.A.J. testified by telephone at the termination hearing. He stated that he lived with the family "on and off" until sometime around 2005, when the relationship ended amid allegations of domestic violence. M.A.J. last saw the children for several weeks in 2009, and he was incarcerated shortly thereafter. He

is currently serving a sentence of eight to twenty years for burglary and being a habitual offender and may be eligible for parole in 2016. After considering all of the evidence, the trial court concluded that M.A.J. had abandoned the children, had failed to provide essential care and protection for the children, and there was no reasonable likelihood that the situation would improve in the foreseeable future.

Based on these findings of fact and conclusions of law, the trial court entered separate orders terminating the parental rights of A.L.T., M.A.J. and M.T. to both children. A.L.T. and M.A.J. filed separate notices of appeal from those orders. Their appeals have been consolidated before this Court.

On review of an order terminating parental rights, we ask whether the trial court's findings were clearly erroneous. *Cabinet for Families and Children v. G.C.W.*, 139 S.W.3d 172, 178 (Ky. App. 2004). "Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010).

Kentucky Revised Statutes (KRS) 625.090 provides for the involuntary termination of parental rights upon the court's finding that clear and convincing evidence establishes that "a child is or has previously been adjudged, abused or neglected, and that termination is in the child's best interest. Then, the circuit court must find the existence of one or more of ten specific grounds set

forth in KRS 625.090(2)." *See also M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 851 (Ky. App. 2008).

In her appeal, A.L.T. concedes that the children were previously found to be dependent in the prior district court proceedings. However, she takes issue with the trial court's findings under KRS 625.090(2)(e) and (g):

> (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 reasonably 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;

A.L.T. notes that she moved to Kentucky to get the children away from the abusive conditions in Wisconsin. She also contends that the trial court failed to consider the substantial progress which she made in addressing her mental health and stability issues while the children were committed to the Cabinet. Finally, A.L.T. points out the trial court's own findings concerning the close relationship which she and the children have. Considering this relationship and the age of the children, A.L.T. argues that the trial court clearly erred in finding that a termination of her parental rights would be in the best interests of the children.

In determining the best interests of the child and the existence of grounds for termination, the court may consider mental illness, as certified by a qualified mental health professional, to the extent that the condition renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time. KRS 625.090(3)(a). Despite A.L.T.'s recent progress, the trial court found that her "ability to parent the children remains limited."

This conclusion was supported by substantial evidence. Although A.L.T. made efforts to comply with the Cabinet's case plan, she did not fully comply with that plan until after the first hearing was held. Despite these efforts, the Cabinet was not convinced that A.L.T. truly understood either the nature of her own problems or the needs of the children. Indeed, A.L.T. admitted that she often did not understand the Cabinet's medical and psychological case plans for the children.

In addition, the trial court acknowledged the generally positive relationship which A.L.T. has with her children. However, the trial court was also required to consider the children's physical, emotional, and mental health, coupled with whether improvement will continue if termination is ordered. KRS 625.090(3)(e). The trial court noted that both children (and particularly D.B.) had deep-seated psychological and emotional issues arising from their time with A.L.T. Although those issues were being addressed while the children were in foster care,

the trial court was not convinced A.L.T. would be capable of addressing the children's needs at any time in the foreseeable future.

Termination of parental rights is almost always a difficult and regrettable situation, and is particularly so where a parent like A.L.T. has tried to comply but was simply unable to meet most of the Cabinet's directives. While we place a high value on the continuance of the parent-child relationship, the needs of the children cannot be placed on hold indefinitely. Under the circumstances, the trial court's factual findings are sufficient as required by KRS 625.090 and are amply supported by clear and convincing evidence. Based on these findings, the trial court did not clearly err in finding that termination of A.L.T.'s parental rights would be in the best interest of D.A.B. and D.B.

In his appeal, M.A.J. does not take issue with any of the trial court's findings relating to him. However, he complains that the Cabinet failed to contact him about its removal of the children from A.L.T.'s care until the current termination petitions were filed. M.A.J. notes that KRS 625.090(3)(c) required the court to consider "whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents[.]" In the absence of such a showing and given the lack of prior notice, M.A.J. argues that the Cabinet was not entitled to seek termination of his parental rights.

The Cabinet's failure to provide M.A.J. notice and representation at all critical stages of the proceedings is not fatal to the termination proceedings where

it can be shown that the lack of notice had no effect on the subsequent termination petition. *See R.V. v. Commonwealth Dept. for Health and Family Services*, 242 S.W.3d 669, 673 (Ky. App. 2007). M.A.J. was incarcerated throughout the time the children have been in the Cabinet's care, and he will likely remain so for some time to come. Moreover, the trial court found that M.A.J. was "barely present for these two children" for most of their lives even before he was incarcerated. Based on this evidence, there clearly was substantial evidence supporting the trial court's findings under KRS 625.090(2)(e) and (g), and the alleged prior lack of notice had no effect upon this fact.

Accordingly, the May 15, 2013 orders by the Fayette Family Court terminating the parental rights of A.L.T. and M.A.J. are affirmed.

ALL CONCUR.

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