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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001499-ME

C.M. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 14-AD-500070T, 14-AD-500071T, 14-AD-500072T

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; A.R.M., MOTHER; AND L.R.M., C.S.M., M.S.M., MINOR CHILDREN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

ACREE, JUDGE: C.M. (Father) appeals from the Jefferson Family Court's August 31, 2015 findings of fact, conclusions of law, and order involuntarily terminating his parental rights to his three children. Father's chief argument on appeal is that the family court's best-interest finding is not supported by clear and convincing

evidence and, therefore, its termination decision must be reversed. We are not persuaded. We affirm.[1]

Father is the natural parent of three children: L.M., a female born November 18, 2001; C.S.M., a female born March 21, 2008; and M.M., a male born February 28, 2009. A.R.M (Mother) is the children's natural mother. The Cabinet became involved with this family in April of 2012 upon learning that all three children had suffered sexual abuse at the hands of Mother's boyfriend and Mother's boyfriend's brother, and learning that L.M. was sexually acting out with the two younger children. Both parents, at the Cabinet's request, entered into a safety plan. Mother and Father later violated that plan and, in July 2012, the Cabinet filed a dependency, neglect, and abuse action. The Cabinet, having been awarded temporary custody, placed the children in foster care where they remained throughout the case.[2]

Father was granted supervised visitation with the children. He was also ordered to: enroll in protective parenting classes; undergo psychological

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[1] Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

[2] L.M. has been in and out of various hospital and other placements due to her specific needs. C.S.M. and M.M. have been in the same foster placement, together, since removal.

testing and follow any recommendations; remain clean and sober; submit to random drug screens; cooperate with the Cabinet; and cooperate with all service providers.[3] Most of these tasks were later incorporated into the Cabinet's case plan which also required Father to: attend cognitive therapy; undergo substance abuse treatment; take mental-health medications, as prescribed; obtain stable housing; and obtain stable employment.

Father made little progress on his case plan at first. He completed the psychological assessment and enrolled in protective parenting classes, but failed to fully commit himself or actively participate. He did not have stable housing or steady employment. His drug addiction remained strong.

On January 30, 2013, Father underwent a substance abuse evaluation at the Jefferson Alcohol and Drug Abuse Center (JADAC). He was admitted to JADAC's inpatient rehabilitation program on February 18, 2013. He successfully completed that program.

On March 12, 2013, Father and Mother stipulated to the following statement: "During the first months of 2012, Mother and Father admit that due to improper supervision, in part due to Father's drug use, the children were sexually abused. Both parents take responsibility for improper supervision." (R. 122). The family court adjudged the children abused or neglected.

The Cabinet filed a petition to terminate both parents' parental rights on February 25, 2014. Mother and Father opposed the petition. Following several

[3] Father was also ordered to attend a Forecast assessment, but this task was subsequently deemed unnecessary and eliminated as part of the plan.

procedural delays, a termination trial was held on July 15, 2015. Before the taking of evidence, Mother consented to the voluntary termination of her parental rights. The termination hearing proceeded against Father.

Father's therapist, Kelli Carr, testified first. Carr had been involved with Father since August 2012, first as the therapist in charge of his protective parenting classes and later as his individual therapist. Carr testified Father was compliant with her services and had demonstrated a great deal of personal growth and maturity. She testified Father started protective parenting in August 2012, but made little progress, then left the group in December 2012, entered a drug rehabilitation program and, upon completion, returned to the protective parenting program in April 2013. Carr testified that she worked with Father to develop the skills needed to parent children who are victims of trauma, such as sexual and physical abuse, as well as psycho-educational skills that involved empathy building and safety planning. Through individual therapy, Carr worked with Father on being able to self-regulate and manage his sobriety, temper, and himself. Carr testified Father has progressed significantly in responsibility and accountability. He understands that his failure to supervise the children put them at risk and led directly to their sexual abuse. Carr had not seen Father interact with the children. She was unaware Father had a positive drug screen post-rehabilitation.

Margaret McKinley, a social services clinician with the Cabinet, testified next. McKinley testified that, while Father eventually complied with his case plan, he failed to make sufficient therapeutic progress to warrant unsupervised

visits with the children or to allow for their return to his care. McKinley described Father as engaged but not progressing as he should after three years of treatment. McKinley admitted Father had completed the ordered psychological evaluation, went through inpatient drug rehabilitation, had consistently visited with the children at Children's Place, and had drug screened twenty times resulting in seven positive drug screens. Father's most recent positive drug screen was on May 12, 2014 – almost a year after he completed rehabilitation; he testified positive for benzodiazepines and oxycodone.

McKinley testified Father had never paid child support for the children nor provided other basic necessities. Although capable of working, Father did not obtain employment until the fall of 2014. He obtained housing in December 2014. McKinley testified Father did not permit her to conduct a home visit until April 2015, but upon doing so she found the home compliant and safe for the children: it was clean, provided separate living spaces for the children, and had alarms on the doors and windows.

McKinley spent significant time describing the current status of each child. She started with L.M. L.M., at the time of trial, was in a residential treatment program at St. Joseph Hospital in Louisville, Kentucky. L.M. had improved significantly while in this residential placement. L.M. was initially placed with her siblings in a foster home. While there, she continued to sexually act upon her siblings and displayed physical aggression both at home and at

school. Since then, she has been hospitalized several times, culminating in her most recent residential placement.

L.M. had reported sexual abuse by multiple perpetrators. L.M. then engaged in sexual contact with her siblings. L.M. had further reported observing domestic violence between Mother and Father, and suffering physical abuse by Father. L.M. had been diagnosed with mood disorder, post-traumatic stress disorder (PTSD), and attention deficit/hyperactivity disorder (ADHD). She has issues related to sexually reactive behavior, trust, and anger management.

C.S.M. has been in the same foster home since removal. She completed individual counseling. C.S.M. has had one family therapy session with Father. C.S.M. is intelligent and is doing well in school.

M.M. is in the same foster home as C.S.M. He has been in individual counseling since removal. M.M. often talks about L.M. and others sexually abusing him. He, at times, exhibits aggressive acts, inappropriately touches other children, and is disruptive. McKinley testified M.M.'s behaviors escalated after a family therapy session with Father.

The current foster parents are not willing to adopt C.S.M. and M.M. The Cabinet plans to transition the children into an adoptive home.

McKinley reiterated that Father had not progressed to the point that it was safe to allow supervised visits with the children, much less return the children to his care. She was unaware of any other services the Cabinet could offer Father to facilitate reunification.

Cindy Kramer also testified. Kramer is a principal social worker and therapist at Seven Counties Services, Inc. She is also a co-leader of the protective parenting group at Seven Counties. Kramer testified the protective parenting program can usually be completed in six months; it took Father three years.

Kramer is the current therapist for C.S.M. and M.M. She began working with M.M. in April 2014, and with C.S.M. a few months later. M.M.'s diagnoses include PTSD, adjustment disorder and neglect of child. C.S.M.'s diagnoses include PTSD and neglect of child.

Kramer's sessions with M.M. involved trauma-focused therapy, focusing on his sexualized behaviors and history of sexual abuse. M.M. talked to her about the sexual abuse he suffered at the hands of Mother's boyfriend and between his siblings. M.M. had also observed domestic violence between Mother and Father.

Kramer testified that she was unhappy with Father's rate of progress in the protective parenting classes. The last task in that program is for the parent to draft an apology letter to his or her child, and for the parent to present that letter in an apology session. Kramer testified she tried to begin collateral work with Father in June 2014 but he failed to show for his appointment. Father stated he forgot. Kramer reviewed Father's apology letters at a rescheduled appointment in August 2014. Kramer testified the letters were "mostly appropriate." The next step was for him to engage in an apology session with each child. But due to delays by Father, that did not occur until June 2015.

Kramer scheduled an apology session for October 2014. Father failed to show; he again stated that he forgot. Due to the delay, Kramer met individually with Father in November 2014 to discuss barriers to reunification and his ability to respond to difficult questions raised by the children. Kramer then had the children draft questions for Father, which Kramer conveyed to him. Father failed to respond to the children's questions for several months. In March 2015, Father informed Kramer that he had lost M.M.'s questions. Kramer was finally able to meet individually with Father in May 2015 to discuss his answers to the children's questions and to prepare for an apology session with C.S.M. and M.M.

C.S.M.'s apology session took place on June 1, 2015. Father read his apology letter to C.S.M., after which she became agitated and upset. Father offered no spontaneous response or comfort to C.S.M. Kramer testified she would have liked for Father to have asked C.S.M. if she was okay or if she needed anything. Instead, Father was "very flat."

M.M.'s apology session took place on June 15, 2015. Kramer testified M.M. was exceptionally aggressive the day before the session. After Father read his letter to M.M., M.M. became agitated, pulled up his legs, covered his face, and started to cry. Father again offered no spontaneous nurturing. In an individual session with M.M. following the apology meeting, M.M. stated he loved Father, but was sad and mad at him. After the apology session, M.M.'s behaviors regressed significantly.

Kramer testified Father's poor follow through and lack of initiative concerned her. She stated C.S.M. and M.M. would continue to need individual therapy as well as close monitoring and supervision as they are at high risk for re-victimization. Kramer testified she has provided all available services at her disposal. In her opinion, the children are not ready to be returned to Father's care.

Father testified. He admitted a domestic violence order was entered against him in 2012 as a result of domestic violence he perpetrated against Mother in front of the children. Father also admitted he did not properly supervise the children, resulting in them being sexually abused and removed.

Father admitted he used to be a drug addict. His drug of choice was opiates. He testified he has been clean and sober since 2013. He is actively involved in AA/NA, and he has a sponsor. He denied knowledge of a positive drug screen in May of 2014. Father testified he has been prescribed opiates following drug treatment, once due to injuries sustained in a car wreck and once following dental work. He stated he can now take prescribed opiates as directed and without issue.

Father described his history of mental illness. He testified he had been previously diagnosed as bipolar. He took mental-health medication until he was twenty-one years old. More recently, Father had been diagnosed with severe depression and mood disorder. He has been taking prescribed medication for these issues for a year and a half. The medicine helps balance his mood.

Father testified the Cabinet required him to undergo a psychological assessment and engage in individual therapy. He completed the first in the fall of 2012 and the latter in June 2015. The Cabinet referred him for a substance abuse assessment. Father completed the assessment in January 2013 and successfully completed an inpatient drug rehabilitation program. The Cabinet required Father to obtain steady employment. Father got a job in the fall of 2014. The Cabinet required Father to visit with the children. Father has consistently done so since their removal. The Cabinet required Father to obtain stable housing. He complied. Father testified he moved his parents to an apartment in December 2014 so that he would have room for the children. He also prepped the home appropriately with various safety measures: L.M. on a different floor than C.S.M. and M.M.; alarms on all doors and windows; and C.S.M. and M.M. in separate bedrooms with a direct line of sight to their rooms. The children's paternal grandmother (Father's mother) confirmed that Father has housing, that he lives there alone, that he has lived there for about one year, and that he pays $500 per month in rent.

Father admitted he has never paid child support for the children, but stated he was also never ordered to do so. Father testified he tried to take the children gifts during visits, but was prevented from doing so unless it was a birthday or holiday. Father admitted the children do not feel safe with him. He testified he has not had an opportunity to put what he has learned in protective parenting into effect. He testified he has a safety plan for raising the children,

including individual therapy, family therapy, and close monitoring and supervision. Father believes he is capable of parenting the children.

Lewis Tucker, Father's AA/NA sponsor, testified Father has demonstrated tremendous growth and progress. Tucker stated, at the beginning, Father was simply going through the motions, but that all changed about one year ago. Tucker testified Father has maintained his sobriety and is helping others achieve and do the same. Tucker also stated Father is active on the board of their group home, E-Z-DUZ-IT, and assists with budgeting and activity planning.

Marcie Bramer, Father's boss and direct supervisor, testified last. Father has worked for Bramer for about a year selling stereos. She testified he is the "head guy" of the stereo section. Father is responsible for ordering parts, selling merchandise, and scheduling installations. Bramer depends on Father. He is a reliable employee.

On August 31, 2015, the family court entered findings of fact, conclusions of law, and orders terminating Father's parental rights to the children. The family court found the children abused and neglected. KRS[4] 625.090(1)(a). It also found that termination was in the children's best interests, KRS 625.090(1)(b), and found that Father was unfit to parent the children because: (a) he continuously failed to provide the children essential parental care and protection; (b) he allowed the children to be sexually abused; (c) he continuously failed to provide basic necessities for the children; and (d) the children have been in foster care for fifteen

[4] Kentucky Revised Statutes.

of the most recent twenty-two months preceding the filing of the termination petition. KRS 625.090(2)(e), (f), (g), and (j). Father appealed.

This Court will only disturb a family court's decision to terminate a person's parental rights if clear error occurred. If there is substantial, clear, and convincing evidence to support it, the decision stands. KRS 625.090(1); *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). The clear and convincing standard does not demand uncontradicted proof. All that is needed "is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citation omitted).

Termination of a party's parental rights is proper upon satisfaction, by clear and convincing evidence, of a "tripartite test." *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). First, the child must have been found to be an "abused or neglected" child, as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination must be in the child's best interest. KRS 625.090(1)(b). Third, the family court must find at least one ground of parental unfitness. KRS 625.090(2).

Father does not challenge the family court's termination decision as a whole. Rather, his attack is more precise; the primary target of his appeal is the family court's best-interest finding, the second statutory prong.

As referenced, the family court may not terminate a parent's parental rights unless it first finds that doing so would be in the child's best interest. The

court, in conducting a best-interest analysis, is guided by several factors enumerated in KRS 625.090(3). Those factors include, to the extent relevant: the mental illness or an intellectual disability of a parent; acts of abuse or neglect toward any child in the family; reasonable efforts made by the Cabinet to facilitate reunification; 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; 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 the payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so. KRS 625.090(3)(a)-(f).

KRS 625.090(3)(a) takes into consideration a parent's mental illness[5] or intellectual disability,[6] as specifically defined by statute, "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[.]" Father testified he had been diagnosed with severe depression and mood disorders. He also testified he takes prescribed medication which has stabilized his moods. We agree with the family court that there is no evidence that Father's mental health issues prevent him from providing consistent and appropriate care for the children.

[5] KRS 202A.011(9).

[6] KRS 202B.010(9).

Next, KRS 625.090(3)(b) examines any "acts of abuse or neglect as defined by KRS 600.020(1) toward any child in the family." The family court found the children to be abused or neglected. There is substantial evidence in the record to support the family court's finding.

The children in this matter have been subjected to domestic violence between Mother and Father. Even worse, they have suffered horrific sexual abuse due to the failure of Father (and Mother) to properly supervise them. It is undisputed that all three children had been sexual abused by at least two perpetrators and, in turn, L.M. engaged in sexual contact with C.S.M. and M.M. KRS 600.020(1)(a)5, (b). Father allowed this abuse to occur. Further, Father had inappropriately disciplined L.M. on at least one occasion. All of these acts have negatively impacted the children, resulting in physical and emotional harm. KRS 600.020(1)(a)1. Father admitted his drug addiction prevented him from providing essential parental protection, and prevented him from meeting the children's material, emotional, and medical needs. KRS 600.020(1)(a)3, 4, 8. Further, while Father eventually complied with his case plan, it took him a surprisingly long time to do so. The delay was of Father's own making. KRS 600.020(1)(a)9. And, despite all the services offered and treatment obtained, Father failed to make sufficient progress to warrant unsupervised visits or reunification. *Id.* KRS 625.090(3)(b); KRS 600.020(1)(a), (b).

We are convinced that there is sufficient evidence in the record to support the family court's finding that each child in this case had been abused or neglected. KRS 625.090(3)(b); KRS 600.010(1)(a).

KRS 625.090(3)(c) requires the family 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[.]" The family court found the Cabinet had rendered all reasonable reunification services to Father. We again find substantial evidence to support the family court's finding.

Reasonable efforts are defined by KRS 620.020(11) "as the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community . . . which are necessary to enable the child to safely live at home[.]" The Cabinet offered Father a psychological assessment, a substance abuse assessment, drug rehabilitation, individual counseling, protective parenting classes, and family counseling. It also offered the children individual and, when appropriate, family counseling. When asked at the termination trial, the Cabinet worker was unable to articulate any additional services which may be offered to Father to bring about reunification. We agree that the Cabinet made reasonable efforts to reunite Father with his children prior to the filing of the termination petition.

KRS 625.090(3)(e) "takes into account the child's physical, emotional, and mental health coupled with whether improvement will continue if termination is ordered." *K.H.*, 423 S.W.3d at 213. All three children suffer from

trauma and other mental and emotional issues as a direct result of the sexual abuse and violence that occurred while in the family home. As stated, L.M. suffers from mood disorder, PTSD, and ADHD; C.S.M. suffers from PTSD and neglect of child; and M.M. suffers from PTSD, mood disorders, and neglect of child.

Since their placement in foster care, the children have shown marked improvement. L.M. has made vast improvements in her behavior and grades since being placed in the most recent residential treatment program. C.S.M. completed her individual therapy, and restarted therapy related only to the family sessions. M.M.'s moods seemed to stabilize while in foster care and his behaviors improved. It is particularly noteworthy that M.M.'s behavior noticeably regressed immediately following the apology session with Father.

Despite the progress made by the children, their needs are not insubstantial. The children will require extensive therapy, services, supervision, and monitoring going forward. The therapist for C.S.M. and M.M. specifically testified they are not ready to return to Father's care and custody. The family court appropriately considered all these facts in finding the children's physical, mental, and emotional health called for termination.

KRS 625.090(3)(f) is another factor the family court must consider when conducting a best-interest analysis. It examines "[t]he payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so." *Id.* Father has never paid child support for the children, even after he obtained employment and was financially able to do so. He argues

he was never ordered to pay child support. But a parent should not need a court order to prompt him or her to provide financial care for his or her child. It is the duty of every parent to provide for his or her children. At the very least, Father could have made arrangements with the Cabinet or the foster parents to provide basic necessities for the children, such as clothing, school supplies, bathing items, and/or personal hygiene supplies. He chose not to do so.

Lastly, KRS 625.090(3)(d) required the family court to consider "[t]he 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." This factor appears to weigh in favor of Father.

Unlike most parents we see in termination appeals, Father *did* complete *every* task asked of him by the Cabinet. He obtained stable housing. He obtained steady employment. He went through drug treatment and has been clean and sober for a respectable period of time. He consistently visited with the children. He engaged in individual therapy. He completed protective parenting classes. Father certainly took advantage of the services offered by the Cabinet.

The concern raised by the family court is the length of time it took Father to complete these tasks. Father did not obtain employment until fall 2014 – over two years after removal. Father did not obtain housing until December 2014 – two and a half years after removal and almost a year after the filing of the termination petition. Father did not complete individual therapy and parenting

classes until June 2015, mere weeks before the termination trial and three years after removal. And, the Cabinet called into question Father's sobriety, noting he tested positive for benzodiazepines and oxycodone in May 2014, over a year after he completed drug rehabilitation. Father's failure to *timely* work his case plan has resulted in these children lingering in foster care for over three years. Clearly the protective parenting program was a vital service Father needed to facilitate reunification. Yet he struggled to complete the program for years. By fall 2014, Father had only one task left – write and present an apology letter to C.S.M. and M.M. It took Father almost an entire year to complete this simple task. What was his excuse for the delays? He forgot his appointments.

Further, the record clearly reflects that reunification is still not feasible for the children. This is particularly evidenced by C.S.M. and M.M.'s strong reactions to – and regressive behaviors following – the apology sessions with Father. The children's therapist also indicated Father is lacking essential parental nurturing skills, which are particularly important when parenting children who have sustained significant trauma.

The family court, after weighing all the evidence, found that Father's conduct in failing to achieve the needed levels of responsibility and accountability at an earlier date was why the possibility of reunification was delayed. Whether because of inability or unwillingness, he has not made the necessary progress on parenting adjustments nor has he created the necessary conditions to make it in the

children's best interest to return to him within a reasonable time. We cannot say the family court's determination is clearly erroneous.

In sum, while Father certainly made commendable efforts to adjust his circumstances and lifestyle to facilitate reunification, that is not, in itself, the determining factor. The family court's factual findings are supported by substantial evidence and we are not convinced the family court abused its discretion in ruling that termination of Father's parental rights was in the best interest of these children.

Finally, Father argues that he proved by a preponderance of the evidence that the child would not continue to be abused or neglected if returned to him. He emphatically states he is no longer the person who allowed his children to be hurt. He is taking care of his mental health needs; he is no longer self-medicating and escaping life in a drug-induced fog; he is cognizant of the damage he has caused children; and he has, and will continue to, successfully engage in therapy and all other services needed to ensure he is a better person and a better parent to his children. Taking all this into consideration, Father argues, the family court should have exercised its discretion under KRS 625.090(5) not to terminate his parental rights. We are not convinced.

KRS 625.090(5) provides:

> 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.

Id. (emphasis added). The statute is plainly permissive. It utilizes the term "may," which implies discretion. 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.

We affirm the Jefferson Family Court's August 31, 2015 findings of fact, conclusions of law, and order terminating Father's parental rights to L.M., C.S.M. and M.M.

ALL CONCUR.

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