

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001634-ME

R. T. C.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 14-AD-00267

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND A.R.C., A CHILD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; NICKELL AND THOMPSON, JUDGES.

KRAMER, CHIEF JUDGE: R. T. C. appeals the Fayette Circuit Court's judgment terminating his parental rights and giving full care, custody and control of his female child, A. R. C., to the Cabinet for Health and Family Services, Commonwealth of Kentucky. After a careful review of the record, we affirm

because the circuit court properly denied his motion for a continuance and the court did not abuse its discretion in terminating his parental rights.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 2014, a termination of parental rights petition was filed against R. T. C., the father, and B. G. D., the mother, of A. R. C., their female minor child, who was born in June 2008.¹ The petition alleged, *inter alia*, that the child had been found in an underlying juvenile case to be a neglected child, “that reasonable efforts were made to prevent the child’s removal from the home and that the child should be placed for adoption.”

A non-jury trial was held. At the beginning of trial, the father requested a continuance on the basis that he had been made aware that the Inspector General was conducting an investigation into some alleged misconduct on the part of the social worker who was involved in both this case and the underlying juvenile case. The father wanted the continuance so that he could discover the results of the investigation, which would not be available until August 2015. In his appellate brief, the father contends that the alleged misconduct involved the social worker prematurely promising the child for adoption and an allegation that money was going to be exchanged, or had been exchanged, for the

¹ Although the father is the only appellant in the present appeal, the mother filed separate appeals concerning this case and a case involving another child of hers (*i.e.*, a daughter older than the child involved in the present appeal), in which the mother’s parental rights were also terminated (case numbers 2015-CA-001431-ME and 2015-CA-001432-ME, respectively). The mother’s two appeals have been consolidated with this case for purposes of being reviewed by the same appellate panel. Therefore, this panel of judges is also reviewing the appeals in 2015-CA-001431-ME and 2015-CA-001432-ME, and we will enter separate opinions concerning those cases.

adoption of the child. The Cabinet informed the circuit court that it had received the results of the investigation, but it requested that they be submitted to the court under seal because the results included the social worker's personal information. The circuit court stated that the results could be submitted under seal and the court stated it would wait until the trial was concluded before it determined if it needed to review the results of the investigation. The court then orally denied the motion for a continuance.²

During the trial, Nakia Walker, who is the Cabinet's social worker in this case, testified that the father or his family had provided some gifts for the child on holidays, including a bicycle for the child's birthday. Ms. Walker attested that the Cabinet and/or the foster parent had provided for the child's daily needs. She also testified that the child had been placed in foster care in January 2013, returned to the mother in November 2013, then removed from the mother's custody and placed into foster care again in December 2013, due to the violation of a no-contact order. Ms. Walker stated that the children had remained in foster care since that time. She further attested that the father had not completed all of the domestic violence perpetrator classes that were required as part of his case plan, and that he apparently did not learn from the classes he did take because he continued to commit acts of domestic violence and violate no-contact orders.

David Waters, a therapist for Crossroads Counseling Services, testified for the Cabinet. He attested that he provides domestic violence

² It does not appear that the results of the investigation were included in the record before us.

assessments, and he provided one regarding the father in this case. Mr. Waters testified that he recommended the father attend the 28-week Batterers Intervention Program. In April 2014, Mr. Waters was in contact with the father about the class that he was going to take in response to Mr. Waters's assessment. The father indicated to Mr. Waters that he was going to take a class at Advanced Solutions, and that there were fourteen sessions involved in completing that class. Mr. Waters testified that the fourteen sessions would not have satisfied the requirements the father had to complete as a result of Mr. Waters's assessment. He attested that his understanding of the regulations is that 28 weeks is required to satisfy the requirement. Mr. Waters also attested that although he is not an attorney, he understands the regulation because he is certified by the state to provide Batterers Intervention Programs, and the 28-week requirement is part of the regulation that supports that certification.

The father also testified during the July 2015 trial. During his testimony, he acknowledged that he had not paid child support since sometime between January and March, 2015, and he also acknowledged that he was uncertain if that child support was for the child in the case at hand or another child that he later had with the mother.

The circuit court entered findings of fact and conclusions of law. Ultimately, the court entered its judgment terminating the father's parental rights.

The father now appeals,³ contending that: (a) the circuit court abused its discretion in failing to grant a continuance so that he could properly prepare his defense based upon results of a pending investigation by the Inspector General's Office regarding alleged misconduct of the social worker; (b) the circuit court abused its discretion when it entered an order against the weight of the evidence; (c) termination of the father's parental rights was not in the best interest of the child; and (d) he has proven that the child would not be abused or neglected if she were returned to his care.

II. ANALYSIS

A. CONTINUANCE

The father first alleges that the circuit court abused its discretion in failing to grant a continuance so that he could properly prepare his defense based upon the results of a pending investigation by the Inspector General's Office regarding alleged misconduct of the social worker.

“[W]hether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case. The factors are:

- (1) length of delay;
- (2) previous continuances;

³ We pause to note that although the father listed the minor child as a party in the caption of the notice of appeal, he did not list the child as an appellee in the body of his notice of appeal. However, the certificate of service attached to the notice of appeal and the circuit court's docket sheet both stated that the child's guardian *ad litem* was served a copy of the notice of appeal. Accordingly, this is sufficient to satisfy the requirements of Kentucky Rules of Civil Procedure (CR) 73.03 to provide sufficient notice to the parties that the child was also an appellee. *See Morris v. Cabinet for Families and Children*, 69 S.W.3d 73, 74 (Ky. 2002).

(3) inconveniences 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) (internal quotation marks and citations omitted).

In the present case, the length of the delay would not have been long – considering that the trial was held in July 2015 and the father stated that the results of the investigation would be available for discovery in August 2015.

Additionally, no previous continuances were requested in the termination of parental rights case. There would have been some inconvenience to the litigants, witnesses, counsel, and the court from having to reschedule the trial, but particularly to the child, who remained in foster care while this case was pending.

Regarding whether the delay was purposeful or caused by the accused, the Cabinet claims on appeal that “[t]he subject matter of the request for a continuance was that [the father] had complained to the [Cabinet’s] ombudsman that the social worker, Nakia Walker, had ‘sold’ [the child] to the foster parents.” The father claimed during trial that he had been interviewed regarding these allegations against the social worker, but he did not subpoena anyone he had

spoken to so that they could testify during the trial in this case. Additionally, his counsel informed the court that the father had not met with her to discuss the investigation of the social worker, and that she had just learned of the investigation the morning of trial, so she was unable to subpoena any witnesses to testify at trial about it. The court properly found that the father could have and should have met with counsel before trial to discuss defenses and which witnesses should be subpoenaed to testify on his behalf at trial. Thus, because the father did not meet with counsel before trial to discuss these things, despite the fact that his counsel was appointed to represent him in March 2015, the trial had been scheduled since May 2015, and trial did not occur until July 28, 2015, the requested delay was purposeful and caused by the accused.

Because there was no issue with counsel's competence, the availability of other competent counsel is not applicable here. Regarding the complexity of the case, the termination of parental rights is always a serious matter, but this case was not particularly complex.

As to whether denying the continuance would lead to identifiable prejudice, it would not because if the father had simply met with his counsel to discuss the investigation concerning the social worker, his defenses to the termination of parental rights petition, and which witnesses should be subpoenaed concerning these topics, he could have put the evidence before the court that he wanted without needing the continuance. Consequently, there would be no identifiable prejudice in denying the continuance. Therefore, because the delay

requested by the motion for a continuance was caused by the father, and because he could have presented the evidence he wanted to present during trial if he had only informed his counsel of the investigation and which witnesses to subpoena, the circuit court properly denied the father's motion for a continuance.

Accordingly, this claim lacks merit.

B. EVIDENCE

The father next asserts that the circuit court abused its discretion when it entered an order terminating his parental rights against the weight of the evidence. With regard to the appellate standard of review concerning termination of parental rights cases, this Court has noted that:

The trial court has broad discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. This Court's review in a termination of parental rights action is confined to the clearly erroneous standard in CR^[4] 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.

In a trial without a jury, the findings of the trial court, if supported by sufficient evidence, cannot be set aside unless they are found to be clearly erroneous. This principle recognizes that the trial court had the opportunity to judge the witnesses' credibility.

⁴ Kentucky Rules of Civil Procedure.

W. A. v. Cabinet for Health and Family Services, Commonwealth of Kentucky, 275 S.W.3d 214, 220 (Ky. App. 2008) (internal quotation marks and citations omitted).

Additionally, this Court has held as follows:

KRS^[5] 625.090 provides that parental rights may be involuntarily terminated only if, based on clear and convincing evidence, a circuit court finds: (1) that the child is abused or neglected as defined in KRS 600.020(1); (2) that termination is in the child's best interests; and (3) the existence of one or more of ten specific grounds set out in KRS 625.090(2).

W. A., 275 S.W.3d at 220 (internal quotation marks and citation omitted).

In the issue at hand, the father alleges that the circuit court terminated his parental rights “without making specific findings as to why and those findings are not supported by the weight of the evidence.” Specifically, he asserts that the elements of KRS 625.090(2) were not met in this case.⁶ KRS 625.090(2) provides as follows:

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:

⁵ Kentucky Revised Statutes.

⁶ We pause to note that the circuit court found in its findings of fact and conclusions of law that the child “is an abused or neglected child as defined in [Kentucky Revised Statute] 600.020,” as required pursuant to *W. A.* However, the father does not challenge the finding that the child was an abused or neglected child, so any claim he may have concerning it is waived on appeal. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004). Regardless, even if he did challenge this finding on appeal, social worker Nakia Walker testified in this case that in the underlying juvenile action, both parents were found to have neglected the child. The father did not challenge that testimony during trial. Additionally, the child's mother acknowledged during her trial testimony that the child was previously adjudged to be a neglected child. Therefore, sufficient evidence was introduced at trial to show that the child had been adjudged to be a neglected child.

- (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
- (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
- (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;
- (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
- (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;
- (f) That the parent has caused or allowed the child to be sexually abused or exploited;
- (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;
- (h) That:
1. The parent's parental rights to another child have been involuntarily terminated;
 2. The child named in the present termination action was born subsequent to or

during the pendency of the previous termination; and

3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

Upon review of the circuit court's findings of fact and conclusions of law, it is apparent that the court found the existence of the grounds set forth in KRS 625.090(2)(e), (g), and (j), and those were the bases upon which the court terminated the father's parental rights. In regard to KRS 625.090(2)(e), the evidence in the record establishes that the history of domestic violence between the father and the mother dates back to at least 2010, with multiple DVO/EPO violations since then, as well as multiple convictions for assault over the years since the initial DVO/EPO was entered. Nakia Walker also testified that despite there being a no-contact order in place, the father and the mother signed a lease for a home together and they had another child. Additionally, Ms. Walker attested that there continued to be domestic violence incidents between the father and the mother, including allegations of domestic violence incidents between them in October 2014, November 2014, and December 2014. As mentioned above, KRS

625.090(2)(e) provides that parental rights may be terminated upon a showing by clear and convincing evidence:

[t]hat 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.

Because the father in this case had multiple convictions for assault and DVO/EPO violations brought against him over the course of a four-year period between 2010 and 2014, and those charges pertained to events that occurred between him and the mother, this established the existence of the ground for terminating his parental rights under KRS 625.090(2)(e).⁷ Additionally, although the father did not satisfy his case plan by completing the 28 required domestic violence perpetrator classes, because the father nevertheless continued to commit acts of domestic violence and violated no-contact orders even after the insufficient domestic violence classes that he did take, he clearly did not learn from those classes, and he continued to be a domestic violence threat, which rendered him unable to provide protection to the child.

The circuit court also found the KRS 625.090(2)(g) ground for terminating the father's parental rights. That statute provides that parental rights may be terminated upon a showing, by clear and convincing evidence:

That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is

⁷ The father's counsel stipulated to the father's criminal history.

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[.]

In the present case, the social worker testified that the father or his family had provided some gifts for holidays, including a bicycle for the child's birthday.

However, the social worker attested that the Cabinet and/or the foster parent had provided for the child's daily needs. The father did not show that he was financially unable to provide for the child's daily needs. In fact, the father attested that he had paid child support in the past, but that he had not paid child support in at least four months as of the time of trial. Therefore, the circuit court properly based the termination of the father's parental rights on KRS 625.090(2)(g).

Moreover, the circuit court found the KRS 625.090(2)(j) ground for terminating the father's parental rights. That statute provides that parental rights may be terminated by showing "[t]hat the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights." As previously mentioned, the social worker testified that the child had been placed in foster care in January 2013, returned to the mother in November 2013, then removed from the mother's custody and placed into foster care again in December 2013, due to the violation of a no-contact order. Ms. Walker stated that the children had remained in foster care since that time. The petition to terminate

parental rights was filed in October 2014. Therefore, it is apparent based upon Ms. Walker's testimony that the child was under the responsibility of the Cabinet and in foster care for at least fifteen months of the twenty-two months preceding the filing of the petition. Consequently, the circuit court properly based the termination of the father's parental rights on KRS 625.090(2)(j). Accordingly, the elements of KRS 625.090(2) were met in this case.

C. BEST INTEREST

The father next contends that the termination of his parental rights was not in the best interest of the child. Pursuant to KRS 625.090(1)(b), a parent's rights may not be involuntarily terminated unless the court finds, *inter alia*, that "[t]ermination would be in the best interest of the child." KRS 625.090(3) provides:

In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

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

The Cabinet properly notes that the father testified at the trial in this case that it had been months since he last paid child support. In fact, he attested that he had last paid child support sometime between January and March, 2015. The trial was held on July 28, 2015, so at least four months had passed since he last paid child support, and the father never claimed that he was financially unable to pay child support, nor does he claim so now. Moreover, the social worker testified that the Cabinet and/or the foster parent was providing for the child's daily needs. Therefore, there was clear and convincing evidence that it was in the child's best interest to terminate the father's parental rights pursuant to KRS 625.090(3)(f).

Additionally, the Cabinet properly notes that evidence was presented to prove that the child was thriving in foster care. Lindsey Dodgen, who is a case manager for Necco Foster Care, testified that the child was gaining a lot of independence since entering foster care, as opposed to how the child had relied "a

great deal” on her sister when she first entered foster care. As for academics, the child was “average” when she entered foster care, and by the time of trial, her reading skills had increased so much that she was testing “off the charts” and she was reading at a much higher level. Ms. Dodgen attested that she expected the child to continue improving if parental rights were terminated. Consequently, there was clear and convincing evidence that it was in the child’s best interest to terminate the father’s parental rights pursuant to KRS 625.090(3)(e).

Further, although the father contends that he attended classes through Advanced Solutions, Mr. Waters, the therapist, testified that the Advanced Solutions class did not satisfy the requirements for completion of a Batterers Intervention Program, which the father was required to complete as part of his case plan. Additionally, although a no-contact order was in place, the father and the mother nonetheless entered into a lease agreement for a home together and they had another child, and there were allegations of more domestic violence incidents between the father and the mother in October 2014, November 2014, and December 2014. Therefore, there was clear and convincing evidence produced to show that it was in the child’s best interest to terminate the father’s parental rights pursuant to KRS 625.090(3)(d).

The circuit court found that the Cabinet had

rendered or attempted to render reasonable services to . . .
[the father] which reasonably might be expected to bring
about a reunion of the family, and no additional services
are likely to bring about lasting parental adjustments

enabling a return of the child to [the father] within a reasonable time, considering the age of the child.

As previously mentioned, a case plan was established for the father and a therapist (Mr. Waters) provided an assessment of the father in which he recommended that the father complete the 28-week Batterers Intervention Program. However, the father did not want to complete this program, so he allegedly attended some classes through Advanced Solutions, but, the Advanced Solutions classes did not satisfy the requirement for completing the Batterers Intervention Program, according to Mr. Waters's testimony. Additionally, the social worker, Ms. Walker, testified that the father withdrew his consent for Advanced Solutions to share his records with her, so she was unable to even verify how much training he received through Advanced Solutions. Therefore, the circuit court properly found, pursuant to KRS 625.090(3)(c), that prior to filing the petition, the Cabinet had made reasonable efforts to reunite the child with the father, but the father failed to satisfy or refused to comply with the requirements for reunification. Accordingly, the termination of the father's parental rights was in the best interest of the child.

D. CHILD WOULD NOT BE ABUSED OR NEGLECTED

The father also alleges that he proved that the child would not be abused or neglected if she were returned to his care. Pursuant to KRS 625.090(5), "[i]f 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.” The father contends that he completed his case plan as requested by the Cabinet until a no-contact order was imposed that prevented any further demonstration of his ability to provide for the child. He also asserts that he

had a full mental health evaluation from [Mr.] Waters and followed the resulting orders which resulted in him seeking individual therapy at Behavioral Health for anxiety and anger management and took medication; took domestic violence classes online and at Advanced Solutions[; and] participated in . . . church group counseling. He maintained employment and apprised the Cabinet of his housing.

However, Mr. Waters attested that the father did not satisfy the requirements for the case plan because he did not complete the Batterers Intervention Program, and the classes at Advanced Solutions did not satisfy that requirement. Additionally, Ms. Walker, the social worker, attested that the father withdrew his permission for her to see his records from Advanced Solutions, so she was unable to verify if he had even completed the Advanced Solutions class for which he had registered. Therefore, because the father failed to complete his case plan, he cannot prove that the child would no longer be an abused or neglected child if she were returned to his care.

Finally, the father asserts that the Cabinet should have placed the child with a relative, rather than terminating his parental rights. However,

[u]nder KRS Chapter 625, proof that this alternative has been considered is not required to terminate parental rights. Once the conditions of terminating parental rights are met, it is the duty of the Cabinet to then act in the best interests of the children. Placement with relatives may be an option for consideration, but nothing more.

R. C. R. v. Commonwealth, Cabinet for Human Resources, 98 S.W.2d 36, 40 (Ky. App. 1998), *as modified* (Ky. App. 1999). Therefore, the Cabinet was not required to place the child with a relative, and the father's claim lacks merit.

Accordingly, the Fayette Circuit Court's judgment terminating the father's parental rights is affirmed.

NICKELL, JUDGE, concurs.

THOMPSON, JUDGE, concurs in result only.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Kristin Wehking
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