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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000058-ME

B. J. C. AND A. J. H. APPELLANTS

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 15-AD-00021

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; AND
Z. M. S., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

KRAMER, JUDGE: B. J. C. and A. J. H. appeal the Anderson Circuit Court's judgment terminating their parental rights to their minor child, Z. M. S. After a careful review of the record, we affirm because the circuit court properly

terminated their parental rights to Z. M. S., and because their claim that the circuit court improperly relied on the fact that the parents did not testify in making its ruling is purely speculative.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 25, 2015, the Cabinet for Health and Family Services filed a petition for the involuntary termination of the parental rights of B. J. C., the mother, and A. J. H., the father, to their minor child, Z. M. S. The child is a male child who was born in Kentucky on September 6, 2012.

A joint hearing was held concerning both this petition and the Cabinet's petition for the involuntary termination of the parental rights of the mother and the father to another child, J. Z. H., who is the younger brother of the child involved in the present appeal.[1] The parents were present at the hearing and represented by counsel. Following the hearing, the court entered its findings of fact and conclusions of law. In regard to Child 1, the court found that he had been in foster care under the Cabinet's responsibility for fifteen of the most recent twenty-two months preceding the filing of the petition. The court stated that Child 1 was currently residing with Child 2 in a state-approved foster home. The family court had previously found in the underlying juvenile actions that both children

[1] A separate appeal has been filed concerning the termination of the parental rights of the mother and father to J. Z. H., *i.e.*, appellate case number 2016-CA-00057. That appeal and the present appeal have been consolidated to the extent that they will be reviewed by the same panel of this Court. For simplicity's sake, we will refer to the older child, Z. M. S., who is the subject of the present appeal, as "Child 1" in both appellate opinions, and the younger child, J. Z. H., as "Child 2" in both opinions.

were neglected. In the circuit court's findings of fact in the present case, it also concluded that Child 1 was a neglected child.

The court then stated that the parents had, for a period of not less than six months, "continuously or repeatedly failed or refused to provide or ha[d] been substantially incapable of providing essential parental care and protection for [Child 1], and there [was] no reasonable expectation of improvement in parental care and protection, considering the age of [the] child." The court also determined that the parents,

> for reasons other than poverty alone, ha[d] continuously or repeatedly failed to provide or [were] incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for [Child 1's] well-being and there [was] no reasonable expectation of significant improvement in their conduct in the immediately foreseeable future, considering the age of the child.

The circuit court noted that the parents had "made few efforts or adjustments in their circumstances, conduct or conditions to make it in the best interest of the child to return to their home within a reasonable period of time, considering the age of the child." It further found that Child 1 had been in foster care under the Cabinet's responsibility "since July 18, 2013, or for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition for termination of parental rights."

The court determined that the Cabinet had

> rendered or attempted to render all reasonable services to the [parents] that might be expected to bring about a

> reunion of the family. Given the efforts made by the Cabinet and the Anderson Family Court to reunify this family, no additional services are likely to bring about parental adjustments enabling a return of the children to their parents within a reasonable time, considering the age of the children.

Additionally, the Cabinet "ha[d] met [Child 1's] physical, emotional and mental health needs since removal from the custody of the . . . parents and the prospects" for improvement in the child's welfare would be greater if termination was ordered. The circuit court concluded that it was in Child 1's best interests if the parental rights of the parents were terminated and custody of the child was transferred to the Cabinet with authority to place him for adoption.

The court then entered its judgment terminating the parental rights of the parents to Child 1 for the aforementioned reasons. The parents now appeal, contending that: (a) the Cabinet did not prove by clear and convincing evidence the facts necessary to meet the requirements of KRS[2] 625.090(2)(e) and (g); (b) the Cabinet did not prove by clear and convincing evidence that termination would be in the best interests of Child 1; and (c) the court improperly relied on the fact that the parents did not testify in making its ruling.

II. STANDARD OF REVIEW

In termination of parental rights cases, this Court has held that the appellate standard of review is as follows:

> 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

[2] Kentucky Revised Statute.

> termination. This Court's review in a termination of parental rights action is confined to the clearly erroneous standard in CR[3] 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.

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 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).

III. ANALYSIS

We begin our analysis with a notation that our review of the hearing has been impeded by the fact that the record before this Court does not contain the video recording of the hearing, despite the fact both the parents and the Cabinet

[3] Kentucky Rule of Civil Procedure.

cite to the hearing throughout their briefs.[4] "It is the Appellant's duty to ensure that the record on appeal is sufficient to enable the court to pass on the alleged errors." *Smith v. Smith*, 450 S.W.3d 729, 731 (Ky. App. 2014) (internal quotation marks and citation omitted). Despite this Court's order directing the parents to "file a designation of evidence on or before 10 days from the date of entry of this

[4] Although *Gambrel v. Gambrel*, ___ S.W.3d ___, 2016 WL 3213216 (Ky. App. June 10, 2016) is not final yet, we quote it herein, not as authority, but to illustrate the reoccurring problem this Court faces regarding video recordings. In *Gambrel*, the Court stated that:

> the appellant—in this case Denver—bore responsibility for ensuring the appellate court received a complete record. *Steel Techs., Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007), *abrogated by* *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012). He failed to carry his burden by not designating the November 9 hearing to be certified as part of the appellate record. Both Denver and Crystal cited the hearing throughout their briefs indicating they both had access to it and believed it was relevant to their positions.
>
> Some attorneys might read these two sentences within CR[] 98(3),
>
>> [t]he official video recordings, together with the clerk's written record, shall constitute the entire original record on appeal....
>>
>> (a) Preparation and Certification by Clerk. The circuit court clerk shall prepare and certify the entire original record on file in his/her office.
>>
>> ....
>
> and assume the circuit clerk will automatically certify as part of the appellate record any event recorded on court equipment. In this case, such an assumption, if made, was fatal since the Warren Circuit Court Clerk[] may have focused on another sentence in the same rule directing:
>
>> [t]o facilitate the timely preparation and certification of the record as set out in this rule, appellant or counsel for appellant, if any, shall provide the clerk with a list setting out the dates on which video recordings were made for all pre-trial and post-trial proceedings necessary for inclusion in the record on appeal.
>
> While both interpretations may have merit, in this case they demonstrate a quandary for the bar and an impossible situation for the bench. Without the recorded hearing, we cannot review Denver's claims and must assume the content of the hearing supported the trial court's entry of the DVO. *King v. Commonwealth*, 384 S.W.3d 193, 194–95 (Ky. App. 2012). Thus, without the ability to review Denver's claims on the merits, we affirm entry of the DVO.

order," the parents failed to do so. Consequently, although the termination hearing appears to have been video recorded, as both parties cite to the video record in their appellate briefs, the video recording was not included in the record on appeal. "[A] properly filed designation of record must provide the court clerk with a list of the untranscribed portions of the proceedings stenographically or electronically recorded as appellant wishes to be included in the record on appeal[.]" *Id*. (Internal quotation marks and citation omitted). Because the parents did not designate the video recording to be certified as part of the appellate record,[5] it was not included as part of the appellate record and, accordingly, we are unable to review it. *See id*. at 732. Furthermore, "[i]t has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Id*. (Internal quotation marks and citation omitted). Therefore, we are compelled to assume the omitted video record supports the circuit court's findings.

> We are constrained to reach this harsh result because each time we do not strictly apply the rules we erode them. We certainly hope this case serves as a warning to practitioners to carefully read and follow CR 98 to avoid missteps on behalf of their clients and to ensure a complete record—containing all relevant videos, CDs and DVDs—is certified to the appellate court. Additionally, we strongly encourage the Supreme Court of Kentucky to clarify this apparently grey area which predominantly occurs in family court practice to revise CR 98 to specify hearings resulting in a final determination (DVO, Dependency, Neglect and Abuse—DNA, Termination of Parental Rights—TPR, etc.) must be designated by the appellant to be included in the record on appeal, or circuit clerks must certify such hearings as part of the record automatically.

[5] In fact, it appears that the parents did not file any designation of record at all.

We do note that regardless of this constraint to our review, the parents acknowledge in their appellate brief that they do not dispute the finding that Child 1 was neglected, and it cannot be disputed that at the very least KRS 625.090(2)(j)[6] has been satisfied in this case. The circuit court found that clear and convincing evidence was presented during the hearing in this case that Child 1 had been in foster care under the Cabinet's responsibility since July 18, 2013, and the parents acknowledge this in their appellate brief. Additionally, the record reveals that the petition to terminate parental rights was filed June 25, 2015. Thus, Child 1 had been in foster care under the responsibility of the Cabinet for at least fifteen of the most recent twenty-two months preceding the filing of the petition.

Regarding the parents' argument that termination was not in Child 1's best interest--without the benefit of our review of the video recording of the hearing—we must presume that the trial court's determination on this issue is correct. 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."[7]

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[6] KRS 625.090(2)(j) provides:

> 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:
>
> (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

[77] KRS 625.090(3) provides:

Lest we be perceived as not having given this compelling matter as thorough a review as we can despite the limited record before us, we note that the circuit court made very detailed findings. As we are obligated to presume these findings are correct—and as the parents provide nothing to support that these findings are clearly erroneous, we set forth the circuit court's findings regarding why it found that the termination of the parents' rights is in the best interests of Child 1:

> 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.

15. Sarah McGaughey testified that she is a Social Service Clinician in the Anderson County Office of the Department for Community Based Services for the Cabinet for Health and Family Services. . . .

The Cabinet first became involved with this family when it received a report in July of 2013 that [Child 1] had bruises on his face and appeared to be malnourished. He was taken to the University of Kentucky Hospital, where it was determined that he was emaciated because she could see his ribs in the front and the back and there was no reflex to his skin. He was lethargic and was wobbly when he sat up. She identified five (5) photographs of [Child 1], which showed him to be emaciated and with wounds to his right eye and the back of his head. . . .

[Child 1] was fed every two (2) or three (3) hours in the hospital. She asked the nurse at midnight, before she left, to prepare his bottles and give them to [the mother] to feed him. When she arrived at the hospital at 10:00 a.m., she observed [the mother] for about 10 minutes in [Child 1's] hospital room. [Child 1] was awake in a hospital crib at one end of the bed, while his full, lukewarm bottle was between the slats at the other end of the bed. He could not crawl or stand up to get the bottle. [The mother] was asleep in a chair next to the bottom of the crib where the bottle was located. She woke up [the mother] and asked her why the bottle was between the slats. She could not explain the location of the bottle so Ms. McGaughery ordered her to leave the hospital because she was not caring for [Child 1] as directed. She also ordered [the father], who had just arrived at the hospital, to leave the hospital.

The Cabinet filed a Juvenile Dependency, Neglect and Abuse Petition on behalf of [Child 1] in the Anderson Family Court on July 18, 2013, alleging that he was neglected and abused because he was 10 months old and had been without formula for week [sic]; he had bruises to his face; the parents took [Child 1] to the doctor after prompting from the social worker and the doctor found that the child was lifeless, severely dehydrated, was 0% for his body weight and was a very sick child; [Child 1]

was taken by ambulance to [University of Kentucky] Hospital, where he was diagnosed with Failure to Thrive and malnourished; the parents had to be prompted, including being woken up, to feed the child; the parents left [Child 1] unattended in his crib and left the hospital; the child had delayed gross and fine motor skills and distended abdomen and could only lie in his crib.

The Court entered an Emergency Custody Order on July 18, 2013, placing [Child 1] in the emergency custody of the Cabinet. It entered a Temporary Removal Hearing Order on July 22, 2013, placing [Child 1] in the temporary custody of the Cabinet. The Court entered an Adjudication Hearing Order on September 12, 2013, in which the parents with counsel stipulated to neglect and the court found that the child was neglected. It entered a Disposition Hearing Order on March 12, 2014, committing the child to the Cabinet. Finally, the court entered an Order on January 15, 2015, changing the goal to adoption and waiving reasonable efforts to reunify the child with his parents.

The Cabinet filed a Juvenile Dependency, Neglect and Abuse Petition on behalf of [Child 2] in the Anderson Family Court on December 30, 2013, alleging that he was at risk of neglect as a result of the neglect and physical abuse of his older brother, [Child 1]; and there were criminal charges of Second Degree Child Abuse pending against the parents in the Anderson Circuit Court. The Court entered an Emergency Custody Order on December 30, 2013, placing the child in the emergency custody of the Cabinet. It entered a Temporary Removal Hearing Order on January 3, 2014, placing the child in the temporary custody of the Cabinet. The Court entered an Adjudication Hearing Order on February 4, 2014, in which the parents with counsel stipulated to risk of neglect and the court found that the child was neglected. It entered a Disposition Hearing Order on March 25, 2015, committing the child to the Cabinet and changing the goal to adoption.

Ms. McGaughey admitted on cross-examination that Amy Perry, a former Social Service Worker with the

Cabinet, was the main investigator for this case. Ms. Perry received the report and completed the investigation. She asked Ms. McGaughey to go to the hospital with [Child 1] and observe what was happening there.

She further admitted that the Cabinet had asked the parents to bring [Child 1] to the office to examine him due to the allegations of bruises on his body. It advised the parents to immediately take him to Danville Pediatrics to be examined, but they failed to do so. It had to prompt the parents several times before they finally took him to the doctor.

Ms. McGaughey also admitted that [Child 1] was about 10 months old when he was taken to the hospital. He was fed with a bottle, not through a feeding tube. He was discharged from the hospital about 24 hours after he entered the hospital.

16. Annette Riley testified that she is a Social Service Clinician in the Anderson County Office of the Department for Community Based Services for the Cabinet for Health and Family Services. She has been employed by the Cabinet for about 14 years. She has worked with this family since July of 2014.

The Cabinet developed Case Treatment Plans with the parents every six (6) months, setting forth tasks that it wanted them to complete in order to be reunified with their children. They attended the five (5) day conference on July 24, 2013. While she had the case, they both attended the treatment planning conference that was held in August of 2014. They were given copies of their Case Treatment Plans, either in person or by mail, at the conclusion of the treatment planning conferences. The Cabinet wanted the parents to submit to random drug screens; complete a mental health assessment and treatment, if necessary; complete a psychological and parenting assessment and follow all recommendations; complete parenting classes; complete an essay on what Failure to Thrive means; attend the children's medical

appointments; maintain stable housing and employment; and visit with their children.

[The Cabinet] sent [the mother] for monthly, random drug screens, starting in July of 2013, all of which were negative. It referred her to the Comprehensive Care Center for a mental health assessment and treatment. These services are provided to a patient based upon what problems the patient reports to Comp Care. Between May of 2014 and September of 2014, she attended eight (8) appointments, cancelled four (4) appointments and missed two (2) appointments. She completed a psychological and parenting assessment with Dr. Kristin McCrary. She completed parenting classes with Joan Martin in November of 2013. And she completed an essay on what Failure to Thrive means.

[The mother] attended less than one-half of the children's appointments. She does not drive, so she relies on [the father] to provide transportation. If one of them has to work or they have car trouble, they are unable to attend these appointments.

She also visited with the children in the Cabinet's Office two (2) hours per week. Again, she relied on [the father] to provide transportation. If one of them had to work or they had car trouble, they were unable to attend these visits. She was appropriate and nurturing with the children during these visits. However, although she brought food and toys during the visits, she overcompensated and brought too much. She also failed to read the labels because the children are allergic to some foods, such as apples and strawberries, so they cannot have any food, including juices, which contain those fruits.

[The Cabinet] sent [the father] for monthly, random drug screens, starting in July of 2013, all of which were negative. It referred him to the Comprehensive Care Center for a mental health assessment and treatment. These services are provided to a patient based upon what problems the patient reports to Comp Care. Between May of 2014 and September of 2014, he attended eight

(8) appointments, cancelled four (4) appointments and missed two (2) appointments. He completed a psychological and parenting assessment with Dr. Kelli Marvin. He completed parenting classes with Joan Martin in November of 2013. It was unknown if he had completed an essay on what Failure to Thrive means because it could not be located in the Cabinet's file.

[The father] attended less than one-half of the children's appointments. He was the only person who drove. If he had to work or he had car trouble, he was unable to attend these appointments.

He also visited with the children in the Cabinet's Office two (2) hours per week. Again, he was the only person who drove. If he had to work or he had car trouble, he was unable to attend these visits. He was appropriate with the children during these visits. Although he brought food and toys during the visits, he overcompensated and brought too much. He also failed to read the labels because the children are allergic to some foods, such as apples and strawberries, so they can[not] have any food, including juices, which contain those fruits.

The parents have resided together in the same home for the past 16 months. They are in the process of moving to another home, but they have not moved as of the day of trial.

The parents were unemployed when the first juvenile petition [*i.e.*, the petition concerning Child 1] was filed on July 18, 2013. [The father] sold his plasma to pay bills. They have worked at temporary agencies until recently. They are now both employed full-time at a factory in Versailles and paying their child support of $60.00 per month each by wage assignment.

[The father] has only one (1) conviction. He was convicted of Trafficking in Marijuana in the Bullitt Circuit Court on February 26, 2013. He was sentenced to two (2) years in jail, which was diverted for three (3)

years. This conviction will be dismissed on February 26, 2016 if he has no further convictions by that date.

There were several barriers to the parents' reunification with their children. First, they have not completed their Case Treatment Plans, including the recommendations of the psychologists who evaluated them. And second, their visits have always been supervised in the Cabinet's office.

[The children] are residing in a state-approved foster home in Franklin County, Kentucky. They are the only children in the home. They are healthy and thriving, although [Child 1] has developed RSV.[8] They are meeting their milestones. They are bonded to their foster parents, who are available to adopt them.

Ms. Riley admitted on cross-examination that the parents have not verbally acknowledged responsibility for the neglect of the children. Although they are nurturing of the children while they are in the Cabinet's Office, it is unknown if they understand the seriousness of what happened to [Child 1]. Also, while they have asked her to increase their visits, they have never asked the Court to increase them.

She also admitted that the parents attended less than one-half of the medical appointments for the children. Some of these appointments were routine appointments, while other appointments were for specialists, such as the kidney specialist for [Child 1]. [Child 1] recently went to Comp Care, but the parents did not attend. They only have one (1) car and [the father] is the only person who has a driver's license. They have no plan as to how the children would get to their appointments if [the father] was not available to take them.

Finally, she admitted that the parents had completed their Case Treatment Plans. They completed their treatment at the Comprehensive Care Center, but only the treatment that they had requested. They did not complete the recommendations that Dr. McCrary and Dr. Marvin had

[8] An explanation for this acronym was not provided.

made that they engage in weekly therapy for six (6) to nine (9) months and acknowledge that they had neglected the children. The parents provided nothing from the Comprehensive Care Center, which indicated that they were invested in their treatment or had accepted responsibility for what happened to [Child 1]. Also, the children have been in foster care for a long time and need permanency.

17. Dr. Kristin McCrary testified that she has been a psychologist in private practice with Dr. Kelli Marvin since October of 2014. Prior to that date, she completed a two-year fellowship with Forensic Mental Health Services in the Division of Forensic Medicine for the Department of Pediatrics at the University of Louisville School of Medicine. She has a bachelor's degree in Psychology from Clemson University and master's and doctorate degrees in Clinical Psychology from Spalding University. She also has been a licensed psychologist in Kentucky since March of 2014.

She evaluated [the mother] in the Cabinet's Office in Anderson County on February 7, 2014. Her evaluation consisted of a review of the records, including Cabinet, Court and hospital records; a clinical interview with [the mother]; and psychometric testing of [the mother]. She spent about three (3) hours interviewing [the mother] and one (1) hour administering psychometric tests to her.

Dr. McCrary's review of the Cabinet and Court records indicated that the Cabinet received a report in July of 2013 that [Child 1] was lifeless, dehydrated, and at 0% of body weight. He had lost one (1) pound between April of 2013, when he was last weighed, and July of 2013. He also had injuries to the area below his right eye and the back of his head. Also, the parents let him cry for 35 minutes without picking him up or soothing him.

She also reviewed the report issued by Dr. Melissa Currie, the Director of the Division of Pediatric Forensic Medicine for the Department of Pediatrics at the University of Louisville School of Medicine. Dr. Currie

found that the injuries to [Child 1's] face and the back of the head were diagnostic of inflicted physical abuse.

Dr. McCrary also reviewed the undated letter that [the mother] had written on Failure to Thrive. This paper demonstrated "a rudimentary understanding of the subject child [Child 1's] malnutrition and Failure to Thrive."

She learned during her clinical interview with [the mother] that she was a high school graduate with no learning disabilities. When asked what had happened to [Child 1], she projected blame for his condition on [the father's] father, claiming that [Child 1's paternal grandfather] exaggerated [Child 1's] injuries because he had a poor relationship with [the father]. She claimed that [Child 1] hit the back of his head by falling backward and hitting his head on the hardwood floor. She denied that she or [the father] had physically abused [Child 1].

[The mother] also claimed that she fed [Child 1] properly. She fed him eight (8) ounces of milk, or four (4) ounces of milk with food, every three (3) or four (4) hours. She had no explanation as to why [Child 1] was malnourished.

She also denied the accuracy of allegations made against her and [the father]. Danville Pediatrics had noted that, when they brought [Child 1] in to the examining room, [Child 1] sat by himself and rocked himself back and forth, while they sat on the other side of the room. She denied that she had no maternal bond with [Child 1] during her visits with him. She denied that there were any deficits in her judgment, including empathizing with the children and anticipating their needs. She denied minimizing the seriousness of [Child 1's] weight at removal, although she and [the father] did not take him to the doctor until ordered to do so. She minimized her responsibility and failed to acknowledge that [Child 1] was underfed and physically abused.

> Dr. McCrary administered the MMPI-2-RF[9] to assess [the mother's] personality and possible psychopathology. She produced a "valid and interpretable MMPI-2-RF protocol," that [was] within normal limits. Although there were "some indications that she presented herself in an overly positive light by denying shortcomings, such a presentation [was] not uncommon among parental capacity examinees and [did] not invalidate the testing results."
>
> She also administered the Child Abuse Potential Inventory to [the mother]. This is a "self-report inventory designed to provide information about an individual's potential for child abuse." [The mother] "yielded an invalid profile" due to "an elevation on a Validity scale designed to detect desirable responding." Therefore, "her results [were] not interpretable."
>
> Dr. McCrary concluded that [the mother] was of normal intelligence and had no mental illness. She also determined that [the mother] had no substance abuse issues. While [the mother] accepted some responsibility for [Child 1's] condition, *i.e.*[,] she went too far, she denied that the child was underfed or abused. She presented as an
>
> > . . . emotionally immature, naïve, and guarded informant who offered a spontaneous narrative designed to minimize the seriousness of the child's condition at the time of removal from parental care as well as her own responsibility for the child's compromise.
>
> Dr. McCrary concluded that [the mother] was "presently unable to assume safe and minimally adequate care of the subject children at this time owing to the presence of risk factors and parental skills/knowledge deficits that are directly related to the instant incident."
>
> Dr. McCrary recommended that [the mother] engage in weekly, "insight-oriented mental health therapy to

[9] There was no explanation provided as to what this is, but we assume it is some sort of test.

address her lack of insight into the seriousness of [Child 1's] medical and developmental status and denials of complicity with regard to the abuse and neglect suffered by this child." During this therapy, she needed to demonstrate knowledge of abuse and neglect of a child and to understand how she contributed to [Child 1's] condition. This therapy needed to last a year. Her prognosis was unfavorable unless she exhibited insight into her shortcomings.

She also recommended that [the mother] complete "modules of psychoeducation, focusing on the age at which children achieve developmental milestones, Failure to thrive, nutritional protocols and the socioemotional needs of children as they age." She needed a specific module on toilet training because she was unaware of when this milestone was typically achieved. Also, there is a high risk of abuse or neglect during toilet training.

Finally, she recommended that [the mother's] visitation with the children remain supervised by the Cabinet "until such time as she has invested in treatment, completed modules of psychoeducation, and demonstrated improved insight (as determined by her therapist) with regard to the previously denoted deficits." Once she has demonstrated that she has completed her treatment, visitation can be increased in frequency. If supervised visitation is successful, it can be changed to unsupervised.

Dr. McCrary admitted on cross-examination that she saw [the mother] only one (1) time on February 7, 2014. She had no follow-up appointment to determine if she had complied with her recommendations. [Dr. McCrary] also admitted that she had no contact with [the father].

She also admitted that [the mother] had certain strengths. She was cognitively intact and could read at the college level. She could intellectually understand that [Child 1] was not fed right. She had no mental illness or substance abuse disorder. However, she needed to invest in her treatment for a year and treatment that lasted only four (4) or five (5) months was insufficient.

Finally, she admitted that it was not unusual for [the mother] to focus on [Child 1] as the "target" child. [Another child of the mother's from another relationship, a female child], who was a year older, lived with [that child's] father [who is not part of this action], who cared for her. Even if [the mother] knew how to feed [that female child], that did not translate into her knowing how to care for [Child 1].

18. Dr. Kelli Marvin testified that she has been a psychologist in private practice with Dr. Kristin McCrary since October of 2014. Prior to that date, she was the Director of Forensic Mental Health Services in the Division of Pediatric Forensic Medicine for the Department of Pediatrics at the University of Louisville School of Medicine for five (5) years. She also worked for seven (7) years with the Manhattan criminal and family courts conducting evaluations. She has a bachelor's degree in Psychology and master's and doctorate degrees in Clinical Psychology. She also has been a licensed psychologist in Kentucky since 2006 or 2007.

She evaluated [the father] in the Cabinet's Office in Anderson County on February 7, 2014. Her evaluation consisted of a review of the records, including Cabinet, Court and hospital records; a clinical interview with [the father]; and psychometric testing of [the father]. She spent about three (3) hours interviewing [the father] and one (1) hour administering psychometric tests to him.

Dr. Marvin's review of the Cabinet, Court and medical records indicated that [Child 1] was born with "diminished tone and decreased respiratory effort requiring resuscitation with positive pressure ventilation, oxygen and deep suctioning." He later was transferred to the Neonatal Intensive Care Unit, where he remained until he was discharged at three (3) days old.

[Child 1] was born with a kidney anomaly in that one of his kidneys [did not] work properly. His parents were advised to have him seen by the pediatrician at two (2)

weeks of age for hydro-nephrosis of his right kidney, but they failed to do so. After he was placed in foster care, he was referred to Dr. Cameron Schaeffer, a pediatric urologist. Dr. Schaeffer examined [Child 1], performed a renogram and concluded that [Child 1] had "negligible functioning in his right kidney." If the kidney failed to fully involute, it would have to be removed.

After the Cabinet received the report about [Child 1], it directed the parents to take [Child 1] to Danville Pediatrics to be examined. The pediatrician noted that [Child 1] was "lifeless" and "seriously dehydrated." He was "0% for body weight" and "a very sick child." Also, the parents provided a "suspicious narrative regarding how the child sustained bruising." The doctor noted that there were concerns about the parents' bond with the child. [Child 1] was left on the exam table by himself, rocking and cooing, while the parents sat on the other side of the room. Finally, [the mother] did not know what kind or how to mix [Child 1's] formula and the parents did not know the status of his immunizations.

She also review[ed] the report issued by Dr. Melissa Currie, the Director of the Division of Pediatric Forensic Medicine in the Department of Pediatrics at the University of Louisville School of Medicine. Dr. Currie found that the injuries to [Child 1's] face and the back of the head were diagnostic of inflicted physical abuse. She found that he had "sustained multiple inflicted injuries and had been neglected for a significant portion of his life." She would have "grave concerns for this or any other child's safety if placed in the environment where these injuries occurred." She concluded that "a high likelihood of maltreatment was estimated if [Child 1 was] returned to the respondent parents' residence, and it was unknown what further services the Cabinet could provide to decrease the aforementioned risk of maltreatment."

Dr. Marvin learned during her clinical interview with [the father] that he was a high school graduate and read at the college level. When asked what had happened to [Child 1], he denied any responsibility and had no regret or remorse about the child's suffering. He insisted that

[Child 1] had been fed properly. He had no insight into [Child 1's] medical compromise or his behavior. He also had no insight into the behaviors leading to the abuse and neglect of [Child 1]. He claimed that it was someone else's responsibility to get [Child 1] to the kidney doctor, even though he was the only person in the household who had a driver's license and a car to get him there.

Dr. Marvin administered the MMPI-2-RF to assess [the father's] personality and possible psychopathology. He achieved "elevated scores on the validity scales, which raised concerns about possible under-reporting of psychological distress and maladaptive personality features. He sought to portray himself in an unrealistically virtuous light and denied even ordinary human flaws." He endorsed items indicating interpersonal dysfunction and high levels of over-assertiveness. She concluded that "those who achieve[d] scores like [him] often view[ed] themselves as having leadership qualities, yet are perceived by others to be domineering, self-centered and possibly even grandiose."

She also administered the Child Abuse Potential Inventory to [the father]. This is a "self-report inventory designed to provide information about an individual's potential for child abuse." [The father] "yielded an invalid profile" due to "an elevation on a scale designed to detect desirable responding. Therefore, his results [were] not interpretable."

Dr. McCrary found that [the father] was an "intellectually intact, emotionally immature, self-aggrandizing, and initially a socially reciprocal informant." When gently confronted, his deportment was "covertly hostile." When vigorously confronted with picture-based evidence of [Child 1's] medical compromise, he was "overtly hostile, confrontational, and slightly antagonistic."

She noted that, although he had completed parenting classes as of the date of their interview, he still was unsure if [Child 1] had evinced or still evinced developmental delays and the nature of those delays. He also was unaware of the essential nutritional information

pertaining to infants and toddlers. Most concerning [were] his current views "regarding the developmentally typical propensity of [Child 1] to buck backwards and lead by his head," which [the father] characterized as "negatively tinged, willful and attention seeking on the part of the child." Dr. Marvin concluded that [the father did not] meet minimally acceptable parenting standards, which placed the children at risk of future harm.

Dr. McCrary recommended that [the father] engage in weekly, "insight-oriented mental health therapy to address his lack of insight into the seriousness of [Child 1's] medical and developmental status and denials of complicity with regard to the abuse and neglect suffered by this child." During this therapy, he needed to demonstrate knowledge of abuse and neglect of a child and to understand how he contributed to [Child 1's] condition. This therapy needed to last about six (6) to nine (9) months. His prognosis was unfavorable unless he exhibited insight into his shortcomings.

She also recommended that [the father] complete "modules of psychoeducation, focusing on the age at which children achieve developmental milestones, Failure to Thrive, nutritional protocols and the socioemotional needs of children as they age." He needed a specific module on toilet training because he claimed that he was toilet trained at one (1) year of age, which was physically impossible. Also, there is a high risk of abuse or neglect during toilet training.

Dr. Marvin also recommended that [the father] complete an "Anger Management curriculum that focused on contending with the challenging behaviors of children." He appeared to irritate very quickly during their session and needed to learn to control this behavior.

Finally, she recommended that [the father's] visitation with the children remain supervised by the Cabinet "until such time as he ha[d] completed the anger management curriculum and modules of psychoeducation, and [had] invested in and demonstrated improved insight (as determined by his therapist) with regard to the previously

> denoted deficits." Once he had demonstrated that he had completed his treatment, visitation could be increased in frequency. If supervised visitation were successful, it could be changed to unsupervised.
>
> Dr. Marvin admitted on cross-examination that she saw [the father] only one (1) time on February 7, 2014. She had no follow-up appointment to determine if he had complied with her recommendations.
>
> She also admitted that [Child 1] had special needs as [a] result of what happened to him. He was malnourished and was diagnosed with Failure to Thrive and hydronephrosis. [The father] did not understand the significance of these special needs.
>
> Finally, she admitted that [the father's] stipulation of neglect at the Adjudication Hearing did not necessarily mean that he accepted responsibility for what happened to [Child 1]. The Court notes that the Adjudication Hearing was held on September 10, 2013, while [the father's] appointment with Dr. Marvin was on February 7, 2014. It further notes that [the father] did not accept responsibility for what happened to [Child 1] during his clinical interview with Dr. Marvin.

(Internal citations omitted). The circuit court then determined that, based upon the aforementioned findings of fact, termination of the parents' rights was in the best interests of Child 1.

Moreover, as noted by the circuit court, Dr. McCrary concluded that the mother was "unable to assume safe and minimally adequate care of the subject children at this time owing to the presence of risk factors and parental skills/knowledge deficits." Additionally, "Dr. Marvin concluded that [the father did not] meet minimally acceptable parenting standards, which placed the children at risk of future harm." Thus, the circuit court found that the factual findings show

that the parents have made insufficient efforts or adjustments in their circumstances, conduct, or conditions to make it in Child 1's best interests to return him to his home within a reasonable period of time. Further, the circuit court's findings show that the mother does not drive; the parents missed multiple doctor appointments for Child 1, who had serious health problems and needed to be seen by various doctors, including specialists; and the parents had "no plan as to how the children would get to their appointments if [the father] was not available to take them." Consequently, the circuit court found that termination of parental rights was appropriate after considering the physical, emotional, and mental health needs of the children since removal from the parents' custody and the prospects for improvement if parental rights were terminated. The circuit court also concluded that the Cabinet had "rendered or attempted to render all reasonable services to the Respondent parents that might be expected to bring about a reunion of the family," and that "no additional services are likely to bring about parental adjustments enabling a return of the children to their parents within a reasonable time." Consequently, the circuit court determined that it was in Child 1's best interests to terminate parental rights. And, we cannot disagree with this conclusion.

C. FAILURE TO TESTIFY

Finally, the parents allege that the circuit court improperly relied on the fact that the parents did not testify in making its ruling. The parents were present at the hearing and represented by counsel. However, the parents have not stated whether they preserved this issue or where they preserved it. *See* CR

76.12(4)(c)(v).[10] And, of course, even if they so cite the record regarding this, the video recording is not before this Court for us to make a determination on this issue. Thus, we are precluded from reviewing this alleged error.

Accordingly, the judgment of the Anderson Circuit Court is affirmed.

ALL CONCUR.

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[10] CR 76.12(4)(c)(v) requires:

> [a]n "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.