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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001943-ME

A.M.C.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NOS. 17-AD-500258 AND 17-AD-500258T

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; J.D.M.; AND A.D.W., A MINOR
CHILD

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: ACREE, JOHNSON¹ AND SMALLWOOD, JUDGES.

¹ Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office on November 20, 2018. Release of the opinion was delayed by administrative handling.

ACREE, JUDGE: A.M.C. (Mother) appeals from the Jefferson Family Court's October 30, 2017, order terminating parental rights to her son, A.D.W. (Child). Mother asserts the family court erred in terminating her parental rights because certain statutory findings were not supported by clear and convincing evidence. After careful review, we affirm.

FACTS AND PROCEDURE

Mother is the biological parent of the minor child subject to this action, born November 16, 2004. Mother and Child's father never married. The Cabinet for Health and Family Services (the Cabinet) became involved with this family when it received a report concerning the parents on January 24, 2013. The report alleged that Mother suffered from hallucinations and other bizarre behaviors resulting from substance abuse. At the time the Cabinet filed its report, Child was present in the home with Mother and his half-brother, J.C.²

The Cabinet filed a petition for guardianship of the child, and the family court held a temporary removal hearing on March 13, 2013. Neither Mother nor Father came to the hearing, and their whereabouts were unknown at the time. After the hearing, the family court granted the paternal grandmother guardianship of Child, placing him in her custody in Meade County, Kentucky.

² This action only pertains to A.D.W.; however, Mother had another child also subject to dependency, neglect, or abuse proceedings.

On July 17, 2013, Mother stipulated to drug use and placing the child at risk of harm. Child remained with paternal grandmother until June 2015, when grandmother passed away. Because of the dependency petition filed by paternal grandmother's long-term partner, the Cabinet obtained custody of Child. On October 13, 2015, the final disposition took place. At that time, the family court committed Child to the Cabinet and ordered the natural parents to cooperate.

The Cabinet initially placed the child in a Jefferson County foster home. However, Child's therapist recommended that he be placed in a Meade County foster home. The Cabinet followed this recommendation, and he remains in that foster home.

Initially, Mother failed to comply with the Cabinet's reunification plan. She was incarcerated for drug related charges, prostitution, DUI, and non-support of her children. Once Mother was released from jail in November 2015, she enrolled in a treatment program and began working her reunification plan.

Complying with the reunification plan, Mother participated in supervised, bi-weekly visits with her child and twice-a-week phone conversations. At times, Mother even brought Child money, but did not provide for him otherwise. Eventually, the supervised visits were approved to take place at the maternal grandmother's home. But sadly, during a visit in April 2016, Mother relapsed and overdosed.

After this episode, the drug court sanctioned Mother, ordered her to a week in jail, and ordered a mental health assessment. Unfortunately, Mother relapsed again. This time drug court sanctioned her to thirty days in jail and six months at a halfway house. Mother eventually completed a mental health assessment but was given no recommendations for treatment.

In January 2017, Mother tested positive for energy and diet pills, which the drug court considered a failed drug test and relapse. Despite this event, Mother resumed bi-weekly visits with Child from January 2017 through April 2017. However, at this juncture, the Cabinet filed a petition for involuntary termination of parental rights. The Cabinet filed the petition with the Jefferson Family Court on May 8, 2017.

The family court held a termination of parental rights hearing on October 19, 2017. However, during the hearing, a social worker testified that Mother's primary barrier to reunification is her long history of opiate and amphetamine substance abuse without much evidence of a changed lifestyle. According to the social worker, there is a lack of bond or attachment between the Mother and Child. She stated that Child bonded with his foster family, so much in fact, that they wish to adopt him if the family court terminates parental rights.

Child's foster mother also testified. She stated that she cared for the child continuously for the last twenty-five months. She testified that, initially,

Child had behavioral and academic issues, but therapy and medication for hyperactivity and anxiety helped him steadily improve. Since being in her care, the child improved several grade levels in reading and markedly improved his writing. She also testified that Child made friends at school and participates in sports.

Finally, Mother testified concerning her history and relationship with Child. She stated she wants to be Child's mother and has no desire to continue with her drug use. In fact, she was on track to graduate from the post-drug court program in December 2017 and is still subject to random drug screens. Mother reported that she has been employed since September 2016 and remained compliant with drug court for the last ten months.

On October 30, 2017, the family court terminated Mother's parental rights.³ The family court found that Child was abused or neglected and that it would be in Child's best interest to terminate the parental rights of his biological parents. Mother's appeal followed.

STANDARD OF REVIEW

Where the sufficiency of evidence is challenged on appeal, we are permitted to reverse only where the trial court's findings of facts are clearly erroneous. *Cabinet for Health & Family Servs. v. I.W.*, 338 S.W.3d 295, 299 (Ky.

³ The family court also terminated parental rights as to the biological father, but he is not a party to this appeal.

App. 2010). All that is needed “is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citation omitted).

ANALYSIS

Mother asserts two issues: (1) the family court erred in relying on an unconstitutional statute, KRS⁴ 625.090(1)(a)1, and finding that the Cabinet met its burden of proof; and, (2) insufficient evidence was introduced to terminate her parental rights.

A. Constitutionality of KRS 625.090(1)(a)1

We decline to entertain this argument. Not only is there a failure to identify whether, and how, Mother preserved this argument for review as required by CR⁵ 76.12(4)(c)(v), but we also find nothing in the record indicating compliance with KRS 418.075. KRS 418.075 provides in relevant part:

- (1) In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

⁴ Kentucky Revised Statutes.

⁵ Kentucky Rules of Civil Procedure.

(2) In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

“Unless the record shows that the requirements of KRS 418.075 have been observed, any judgment rendered which decides the constitutionality of a statute shall be void.” *Maney v. Mary Chiles Hosp.*, 785 S.W.2d 480, 482 (Ky. 1990).

This notice requirement is mandatory. *Homestead Nursing Home v. Parker*, 86 S.W.3d 424, 425 n.1 (Ky. App. 1999). Nothing in the record indicates that Mother complied with KRS 418.075. Therefore, this argument is not properly preserved for appeal.

B. Sufficiency of Evidence to Terminate Mother's Rights

Mother asserts the family court terminated her parental rights based on insufficient evidence proving that Child was abused or neglected and erred in its determination that termination was in Child's best interest. We disagree.

The termination of a party's parental rights is proper upon satisfaction, by clear and convincing evidence, of a three-part test. First, the child must be found 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) (2012). Third, the family court must find at least one ground of parental unfitness. KRS 625.090(2). The family court's termination decision will only be reversed if it is clearly erroneous. *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). Such a decision is clearly erroneous if there is no substantial, clear, and convincing evidence to support the decision. *Id.*

The statutory authority for the termination of parental rights states:

(1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:

(a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or

3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and

...

(b) Termination would be in the best interest of the child.

KRS 625.090(1) (2012).

Children are deemed abused and neglected when placed at risk of abuse and neglect pursuant to KRS 600.020. The statute states in relevant part:

(1) “Abused or neglected child” means a child whose health or welfare is . . . threatened with harm when:

(a) His or her parent . . . :

. . .

7. Abandons or exploits the child[.]

KRS 600.020. The family court has broad discretion to determine whether a child is abused or neglected. *R.C.R. v. Commonwealth, Cabinet for Human Res.*, 988 S.W.2d 36, 38 (Ky. App. 1998). “[T]he findings of the [family] court will not be disturbed unless there exists no substantial evidence in the record to support its findings.” *Id.*

The family court’s findings are governed by the requirements of the termination of parental rights statutes. It relied specifically upon three sections:

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

. . .

(e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

...

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

KRS 625.090(2)(a), (2)(e), (2)(g). With these provisions in mind, the family court analyzed the facts presented and drew reasonable inferences concerning future parental conduct and its potential effect on the child. According to KRS 625.090, the family court only needs to find by clear and convincing evidence that *one or more* of the grounds listed within it exists.

Here, the family court made a finding that Mother abandoned Child for a period of not less than 90 days from April 17, 2016 until July 2017. During that time, Mother inquired as to Child's well-being, but did not request a visit with Child until after a pre-trial conference on July 12, 2017. The family court also found that Mother did not avail herself of reunification services available from the Cabinet and otherwise failed to make progress on the court-approved case treatment plan.

Additionally, the family court found Mother's "failure or inability . . . to fully engage in treatment and reform behaviors which led to the removal of [Child] from parental custody" prevented the Cabinet from recommending

reunification of Mother and Child. Here, the family court made multiple findings related to factors of KRS §§ 625.090(2)(a), (2)(e), (2)(g). The family court fully satisfied its requirement to make a finding based upon one or more of the listed factors. Therefore, in the context of this argument, Mother's appeal will result in reversal only if she can demonstrate to this Court that the family court's findings cannot support even one of the factors identified as applicable. She has not done that. While it is commendable that Mother is on the long road of substance abuse recovery, it does not negate the lack of parental responsibility she owed her child.

Next, in determining the best interest of the child, the family court duly considered the statutory authority contained in KRS 625.090(3):

- (3) 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.

KRS 625.090(3).

The family court addressed all six factors in its findings and applied the clear and convincing evidence standard. Again, KRS 625.090(3) does not require the family court to make a determination based on *every* factor listed in the statute. It instead is to *consider* the factors. Regardless, the family court addressed each factor and determined the proper weight, even though it is not required. It is not within the scope of our authority to reverse a family court's decision based on an allegation that the family court improperly distributed weight to certain factors.

As stated above, we are only to reverse if the findings are clearly erroneous. *I.W.*, 338 S.W.3d at 299. 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.*, 979 S.W.2d at 117. The family court addressed:

(1) Mother's substance abuse; (2) her neglect of Child's material, emotional, and healthcare needs; (3) her abandonment of the child for a period of not less than 90 days as the basis for finding that Child was an abused or neglected child; (4) the Cabinet's reasonable efforts to reunification; (5) the efforts and adjustments made by Mother; (6) the child's physical, mental, and emotional improvements; and (7) Mother's lack of financially providing for her child.

The record contains sufficient evidence to satisfy the clear and convincing standard and to affirm the family court's termination of Mother's parental rights. The family court's review of the evidence and application of appropriate statutory factors supports the finding that the child is abused or neglected, and that termination of Mother's parental rights is in the child's best interest. Accordingly, we find no error.

CONCLUSION

For the foregoing reasons, we affirm the October 30, 2017, order of the Jefferson Family Court terminating A.M.C.'s parental rights.

ALL CONCUR.

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