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Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000012-ME

P.W.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 17-AD-00146

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND K.L.W.W., A CHILD

APPELLEES

NO. 2018-CA-000015-ME

P.W.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 17-AD-00147

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND K.N.W.W., A CHILD

APPELLEES

NO. 2018-CA-000028-ME

K.W.W.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 17-AD-00146

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND K.L.W.W., A CHILD

APPELLEES

NO. 2018-CA-000029-ME

K.W.W.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 17-AD-00147

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND K.N.W.W., A CHILD

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** **

BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

JONES, JUDGE: P.W. (“Mother”) and K.W.W. (“Father”) appeal from orders of the Fayette Circuit Court terminating their parental rights to their two children, K.N.W.W. (“Child 1”) and K.L.W.W. (“Child 2”). Following careful review of the record in conjunction with applicable legal authority, we affirm in part as related to the termination of Father’s parental rights, reverse in part as to the termination of Mother’s parental rights, and remand.

I. BACKGROUND

Mother is a refugee from Ghana, Africa, who came to the United States in 2007 when she was fourteen years old. She and Father were married in 2013. During the course of their marriage, Mother and Father had three children together, two of which are the subject of this appeal. Child 1 was born on September 26, 2013, and Child 2 was born on May 16, 2015.

In April of 2014, the Cabinet for Health and Family Services (the “Cabinet”) received a referral with respect to this family. A witness reported seeing Mother crying on the side of the road after being kicked out of a vehicle driven by Father. Concerned with possible domestic violence, Mara Clay, an investigative worker for the Cabinet, visited Mother and Father at their home. Mother initially agreed to speak with Ms. Clay on the porch. Mother informed Ms.

Clay that she and Father had gotten into an argument while Father was driving her to work. Mother explained that Father had broken her phone and tried to kick her, at which point Mother exited the vehicle to take the bus to work. Child 1, who was approximately six months of age, was in the vehicle with his parents at the time. Child 1 remained in the car and was taken home by Father.

Shortly after Mother began talking with Ms. Clay, Father came out onto the porch and told Ms. Clay to leave the property. Ms. Clay did so; however, she soon returned to the home with a police officer and was allowed into the home. This time, Ms. Clay requested that Mother undress Child 1 so that he could be examined for signs of physical abuse. Ms. Clay observed a dark marking on Child 1's bottom, which she believed to be a bruise. Mother informed Ms. Clay that the mark was a birthmark; Father alleged that Child 1 had been jumping into the air and landing on his bottom, which had caused bruising. Because of the inconsistencies in the parties' stories, combined with the fact that Child 1 was six months' old and unable to sit up, making Father's explanation inconceivable, Ms. Clay requested the parties take Child 1 to his doctor to be examined.

Mother and Father complied with Ms. Clay's request. They took Child 1 to his regular physician. When Ms. Clay called the doctor's office to confirm that Mother and Father were there, she was informed that the mark on Child 1 was not a cause for concern. However, because the doctor's office was

unable to confirm Ms. Clay's identity over the phone, medical personnel were unable to supply her with any additional information. Accordingly, Ms. Clay told Mother and Father to take Child 1 to UK Hospital to be examined. At UK Hospital, a doctor confirmed that the mark on Child 1 was a Mongolian spot, not a bruise. However, because Father displayed "erratic" and "manic" behaviors at the hospital, the examining physician placed Child 1 on medical hold and refused to let him leave with Mother and Father. Both Mother and Father became extremely upset when they were informed of this and ultimately had to be escorted off hospital property by security.

Based on the initial concerns of domestic violence, concerns about Father's mental stability, and concerns that Mother lacked the ability to protect Child 1, the Cabinet filed for and was granted emergency custody of Child 1 on April 3, 2014. A temporary removal hearing was held on April 7, 2014, and Child 1 was placed the Cabinet's custody. Both parents signed and began working case plans the following week. As part of the case plans, both parents were tasked with participating in parenting assessments and following all recommendations, participating in domestic violence assessments and following all recommendations, and contacting the HANDS¹ program to obtain parenting assistance. Additionally,

¹ Health Access Nurturing Development Services, a program offered through the Lexington-Fayette County Health Department.

Mother was required to successfully complete a psychosocial assessment through the TAP² program and follow recommendations. Father was required to complete a substance abuse assessment, remain drug and alcohol free, abide by all Community Alternative Program orders, and successfully complete a psychosocial assessment. Mother and Father were permitted weekly supervised visits with Child 1.

Mother and Father underwent a court-ordered psychological assessment conducted by Dr. David Feinberg. A report on that assessment was submitted to the Cabinet in November of 2014. Dr. Feinberg concluded that, while both parents were compliant with their case plans, they had not made significant strides in dealing with the “chronic mental health issues” that ultimately led to Child 1’s removal.³ Accordingly, Dr. Feinberg recommended that both parents undergo psychiatric evaluations to determine whether they could benefit from taking psychotropic medication. Dr. Feinberg additionally noted that both Mother and Father denied that any instances of domestic violence had occurred in their home.

² Targeted Assessment Program.

³ Based on his evaluation, Dr. Feinberg believed that Father exhibited behavior consistent with Bipolar Disorder and that Mother exhibited behavior consistent with Post-Traumatic Stress Disorder.

On December 4, 2014, Mother and Father both stipulated to dependency of Child 1. New case plans were developed for Mother and Father on January 6, 2015, which incorporated Dr. Feinberg's recommendations. Specifically, Mother was instructed to: participate in intensive individual mental health treatment to help her regulate her emotions and deal with past trauma; work through her domestic violence victimization with a qualified mental health provider and demonstrate skills learned; participate in Dialectical Behavioral Therapy ("DBT") and demonstrate skills learned; undergo a psychiatric medication evaluation; participate in weekly therapy sessions to adaptively manage chronic mental health problems; refrain from any violence or aggression in the home or in the community; and participate in a domestic violence support group. Additionally, based on observations of Mother's visits with Child 1, Mother was tasked with actively engaging with Child 1 during visitations to promote attachment and bonding. Father was required to: participate in intensive, individual mental health treatment to address poor reality testing, including paranoid and grandiose thinking; undergo a psychiatric medication evaluation; participate in individual weekly therapy sessions to manage chronic mental health problems; complete domestic violence classes; refrain from violence or aggression in the home and in the community; and allow separate interaction with Mother and Child 1 during visits.

Both parents were generally compliant with their updated case plans. Letters were submitted from Dr. Andre Fernandez indicating that he had completed a psychiatric evaluation of both parents and that neither currently indicated any psychiatric symptoms requiring treatment. In early May of 2015, both Mother and Father submitted numerous documents demonstrating that they were attending various therapy sessions and had either completed or were in the process of completing required classes. The CASA⁴ assigned to the case submitted a report on May 11, 2015. Therein, the CASA indicated that he had observed a visitation with the parents and Child 1 and noted that Mother had been interacting with Child 1 more than she had done in previous visitations. The CASA understood concerns of Cabinet workers that interactions between Mother and Child 1 may appear contrived; however, he found it was difficult to determine whether Mother's behavior was authentic, given the artificial setting of the visitation. The CASA had recently visited Mother and Father's home, which he observed was clean and appropriate for the care of children. He noted that Mother and Father continued to buy books and toys for Child 1 in anticipation of his return.

The CASA expressed his belief that Mother was taking her case plan very seriously and was working on improving herself and her ability to parent. The CASA opined that this belief was shared by all professionals working with

⁴ Court appointed special advocate.

Mother that he had interviewed. He indicated that none of the professionals that he interviewed noted any “red flags” that warranted keeping Child 1 out of the home. The CASA also believed that Father was strongly invested in working his case plan and that Father had been making great strides.

Child 2 was born on May 16, 2015. On May 19, 2015, the Cabinet filed for and was granted emergency custody of Child 2. In its petition, the Cabinet alleged that Child 2 was at risk of harm for neglect or abuse. In support of this allegation, the Cabinet stated that it had received a referral from hospital staff voicing concerns with the parents’ mental health and their ability to understand instructions regarding Child 2. Hospital staff reported that Mother was constantly breastfeeding Child 2 and when staff advised her of appropriate times to feed, Mother was found breastfeeding Child 2 in the bathroom of her hospital room. When a Cabinet investigator went to the hospital to question Mother and Father about this, the parents apparently reported that they were unsure of the size of Child 2’s stomach or at what times he should be fed. Because Mother and Father had been working with HANDS, the Cabinet was concerned about their ability to retain parenting information. Child 2 was placed in the same foster home as Child 1.

A second assessment of Mother and Father was conducted by Dr. Feinberg and submitted to the Cabinet on June 15, 2015. The report indicated that

Mother and Father had been compliant with their case plans. The report summarized notes taken by the Cabinet when supervising Mother and Father's visitations with the children. The Cabinet had noted that Father was controlling of Mother and Child 1 during visits, and would frequently mock Mother in front of Child 1. Further, the Cabinet stated that both parents demonstrated age-inappropriate expectations of Child 1, were consistently not attuned with Child 1's needs or interests, and refused to acknowledge the foster parents at the end of visits. Nakia Walker, the ongoing caseworker for the family, had noted that Mother had come to a visit in early May and had a black eye. Father had not been present at that visit, which was unusual. Ms. Walker had also informed Dr. Feinberg that she did not believe that Child 1 had a strong attachment to Mother. Dr. Feinberg had interviewed Sarah Reis, the investigative worker who had removed Child 2, who indicated that the Cabinet did not have any documentation from the hospital regarding concerns with Child 2 and that Child 2 had primarily been removed from Mother and Father due to Child 1 being in the Cabinet's custody. Dr. Feinberg recommended that the permanency goal should remain return to parents. Additionally, he recommended increased supervised visitation with both children, that Mother and Father be referred to intensive in-home services specializing in reunification, and that Mother and Father continue receiving individual therapy.

Notes from a docket sheet dated June 30, 2015, indicate that the circuit court made a finding of dependency for Child 2; however, there is no order of record documenting this finding. A report filed by the CASA on October 1, 2015, indicates that the Cabinet requested a permanency goal change to adoption on September 9, 2015; that request is likewise not in the record. The CASA expressed his shock, based on his interactions with Mother and Father and interviews with the providers working with them, at the Cabinet's request for a goal change. The CASA stated that he had followed up on many of the claims cited by the Cabinet in support of the request for goal change, and had found those claims to be unfounded. All of the providers with whom the CASA had spoken indicated that Mother and Father, while still having room for improvement, had made substantial strides since starting their initial case plans. The CASA stated that he believed that the concerns expressed by the Cabinet were "decidedly biased" against Mother and Father. He recommended that all efforts to reunify the family be taken immediately. A disposition report entered October 15, 2015, indicates that the permanency goal remained return to parents.

In January of 2016, the parents began having unsupervised visitation with the children. A Cabinet review report indicated that these visits appeared to be going well; however, Mother did become angry with Ms. Walker when she asked Mother too many questions. The parents were allowed unsupervised

overnight visits with the children starting in February of 2016, with the children staying with Mother and Father two nights a week and attending daycare during the day. A Cabinet report dated April 13, 2016, indicated that KVC in-home services began working with Mother and Father in March of 2016. The Cabinet stated that the KVC worker had expressed concerns about Mother and Father's unity in parenting and managing the home. The Cabinet had spoken with the children's daycare provider, who stated that sometimes Mother and Father dropped off the children later than expected. Father had forgotten to pack a bottle for Child 2 on one occasion. Unsupervised visitation with the children was gradually increased until November of 2016, when the children returned to Mother and Father. The Cabinet's case remained open at that time, and both Child 1 and Child 2 were required to continue attending daycare.

On December 19, 2016, the Cabinet received a referral that Child 1 had arrived at daycare with an injury. Pamela Handshoe, an investigative worker with the Cabinet, contacted the Kentucky State Police and she and a detective went to Mother's and Father's home where they were informed that the children were still at daycare. All four then travelled to the daycare, where Child 1 was observed to have a red mark on his face directly beside his left eye and extending to his left ear. Daycare workers indicated that they had noticed Child 1's injury shortly after he arrived at daycare. Child 1 told numerous daycare workers that Father slapped

him. When Ms. Handshoe questioned Father about the mark on Child 1's face, Father stated he had no knowledge of the injury and denied slapping Child 1. Father stated that Child 1 had been making up stories lately. Mother stated that she had not noticed any injury to Child 1 that morning when she had bathed him; however, Mother had gone to a doctor's appointment after getting the children dressed for the day. The children were still in the home with Father when she left and she was not with Father when he dropped them off at daycare later that morning.

Ms. Handshoe attempted to have the parents sign a prevention plan asking them to have Child 1 examined at UK Hospital. Both Mother and Father refused to sign the prevention plan; however, they agreed to take Child 1 to UK Hospital. En route to the hospital, the Cabinet determined that the children remained at risk while in Father's care. The Cabinet additionally raised concerns regarding Mother's protective capacity based on her failure to notice Child 1's injury, initial refusal to have Child 1 medically examined, and refusal to sign a prevention plan. Both children were returned to their prior foster home that evening.

Less than two weeks later, Father and Mother got into an argument at their home, which culminated in Father slapping Mother, biting her, taking her

phone, and sitting on her abdomen with his hand over her mouth.⁵ Mother contacted the police and obtained an emergency protective order (“EPO”) against Father for her and the children, which was later converted to a domestic violence order (“DVO”). Father ultimately pleaded guilty to two counts of fourth-degree assault—one count arising out of the incident with Child 1 and one count arising out of the incident with Mother. On February 9, 2017, Father stipulated to abuse of Child 1 and Child 2. Mother signed a new case plan on February 16, 2017. This case plan contained the same requirements as her initial case plan, except that Mother was to find new mental health providers for therapy treatments and maintain and comply with the DVO against Father.

A final evaluation of Mother and Father was conducted by Dr. Feinberg and he submitted a report in May of 2017. During Dr. Feinberg’s clinical interview with Father, Father reported that he had been living in his car since being released from jail on the assault charges and did not know where Mother was. Concerning the assault on Child 1, Father explained that Child 1 had been playing with an electrical socket and that he had slapped him when he would not stop. Father believed that daycare staff had been manipulating Child 1 and Child 2 into believing that they would be happier in their foster home. Father wished to reconcile with Mother, but stated that Mother refused to speak to him. During Dr.

⁵ Mother was five months pregnant with the parties’ third child at the time.

Feinberg's clinical interview with Mother, Mother reported that she had been taking a lot of classes in addition to working full-time cleaning rooms at a hospital. Mother informed Dr. Feinberg that she had her own apartment, where she lives alone with her dog. She stated that she was happier with Father out of her life and now had more freedom. Mother stated that she wanted her children to know Father, but that if Father were to see the children he would have to be supervised. Mother believed that Father had anger problems. She now realized that Father had abused her in the past. Mother explained that in Africa, getting hit by your husband is normal and is not considered abuse. Mother was attending therapy sessions and had supervised visitation with the children on a weekly basis. At the conclusion of the report, Dr. Feinberg recommended that the permanency goal for the children should be changed to termination of parental rights and adoption.

Following submission of Dr. Feinberg's assessment, the Cabinet filed petitions to terminate the parental rights of Mother and Father to Child 1 and Child 2. A three-day bench trial took place on September 28, September 29, and October 9, 2017. Mother and Father were represented by separate counsel and the interests of Child 1 and Child 2 were represented by a guardian ad litem ("GAL").

Dr. Feinberg testified first for the Cabinet. He testified that beginning in 2014, he had done a series of evaluations on Mother and Father at the request of the Cabinet. Dr. Feinberg stated that the Cabinet had initially been

concerned with domestic violence, attachment, psychopathology, and anger-management issues for both Mother and Father. Dr. Feinberg had also noted that there were cultural issues facing both parents. Mother had been moved around to various countries before coming to the United States, and had difficulty adjusting to life here. Dr. Feinberg believed that Father's family had been even more dysfunctional. The Cabinet—or its counterpart in sister states—had been involved in Father's life continually since his early childhood. Dr. Feinberg testified that in early sessions with the couple, Mother and Father were unwilling to acknowledge the extent of control and violence issues within the marriage. Both parents, Father in particular, believed that they were being unfairly targeted by the Cabinet. Dr. Feinberg testified that Mother would generally agree with Father and appeared quiet and submissive. While Dr. Feinberg had held the belief that domestic violence was present in the relationship, both Mother and Father denied it.

Dr. Feinberg testified that Mother and Father were generally very willing to participate in services offered by the Cabinet and seemed to respond favorably to those services. However, his team remained concerned that neither parent had a clear idea of appropriate developmental behavior for children and that the level of attachment that should be present in a parent-child relationship was missing. Dr. Feinberg believed that both parents needed assistance in different ways of dealing with their anger—this concern was stronger for Father. Dr.

Feinberg testified that he observed Father's behavior to sometimes be out of control, and stated that Father often had trouble with reality. Dr. Fienberg lacked faith that, absent medication, Father could sustain reasonable ways of dealing with his emotions. Mother was better at complying with her therapists' recommendations. However, Dr. Feinberg questioned how much Mother really understood what was going on. Dr. Feinberg attributed Mother's lack of understanding to both cultural and intellectual factors. He had recommended that Mother undergo DBT to help her better regulate her emotions. While Mother was compliant with DBT sessions, Dr. Feinberg testified that he had no evidence that the sessions were helping Mother. Generally, Dr. Feinberg did not believe that either parent benefitted from their parenting classes or domestic violence classes. Dr. Feinberg specifically noted that Mother had come to one session with a black eye, but had denied that Father had hit her.

Dr. Feinberg testified that he had continued recommending that Child 1 and Child 2 be reunited with Mother and Father because he had no substantiated evidence to support a recommendation of termination of parental rights. Until recently, Mother and Father had adamantly denied any domestic violence in their marriage and had maintained that their elevated stress levels were caused by the Cabinet's involvement in their lives. When he saw Mother and Father for their final session in 2017, everything had changed. At that time, Mother and Father

had separated and Mother became more open about domestic violence that had occurred. Father alternated between blaming the Cabinet and Mother for his slapping Child 1. He also suggested that Child 1 should take responsibility for Father slapping him, as Father had slapped Child 1 due to misbehavior. Dr. Feinberg testified that Father's attitude about the incident made it abundantly clear that Father had a personality disorder, was antisocial, and narcissistic. In talking with Mother, Dr. Feinberg noted that she was very cooperative and had stated that she was done with Father. Dr. Feinberg noted, however, that he had heard many domestic violence victims make the same statement and then reunite with their perpetrator as soon as court proceedings concluded. Dr. Feinberg testified that Mother continued to believe that Father was a good father, except for the most recent incidents. While Mother did express her belief that Father would need to be supervised if allowed around the children, Dr. Feinberg testified that he did not believe that Mother was "getting it." Dr. Feinberg expressed his belief that Mother was a "perennial codependent victim" and that if it was not Father abusing her, Mother would be abused by someone else. He testified that Mother appeared to be angrier about the loss her children than the fact that Father had abused her. When he asked Mother about domestic violence, Mother informed him that she had not realized that slapping was a form of domestic violence, as it is normal behavior where she grew up. Dr. Feinberg noted that Mother had completed numerous

hours of domestic violence classes, and should have already realized that slapping was a form of domestic violence. Dr. Feinberg testified that, even with Father out of the picture, he did not believe that Mother could properly parent the children. Dr. Feinberg stated that Mother has poor stress-management skills and that it was difficult for him to envision Mother being able to parent the children without assistance.

On cross-examination, Dr. Feinberg acknowledged that Mother had obtained a DVO on behalf of herself and the children against Father, which she had never done in the past. However, Dr. Feinberg testified that he did not give Mother much credit for doing so. Dr. Feinberg admitted that he had done little to no research on Mother's cultural background. He stated that while Mother's cultural background would have been relevant in his first evaluation of Mother, it was not relevant now. The fact that Mother had continually maintained stable employment did not alter his recommendation that her parental rights should be terminated. Dr. Feinberg acknowledged that he had not personally observed Mother with her children. Dr. Feinberg testified that he was concerned about Mother's ability to protect her children against potential future male partners.

Stevanie Smith, Mother's former DBT provider and individual therapist, testified next on Mother's behalf. Ms. Smith testified that she had worked with Mother for approximately two years. During that time, Ms. Smith

had worked with Mother on developing a skill set for mindfulness, working through past trauma, and cultural differences in parenting styles and bonding. She believed that the sessions were helpful, and that Mother had made a lot of progress. Ms. Smith had observed Mother with the children and testified that Mother appeared to be bonded to them; however, there was more of a distance between Mother and Child 1. Ms. Smith testified that Mother was often reluctant to discipline the children when they misbehaved because she was fearful that the Cabinet would use any instance of discipline against her.

On cross-examination, Ms. Smith testified that before the December 31, 2016, incident, she did not have any reason to believe that Mother was being abused. While she had some concerns about Father, these were more “gut-based” and not based on any evidence. She had gone with Mother to obtain the EPO against Father. Ms. Smith testified that she put Mother in contact with resources to help her get a motel room so that she did not have to go home to Father. Once the EPO was approved, Ms. Smith testified that she and her husband helped Mother change the locks at her home. While she was at Mother and Father’s home, Ms. Smith had walked through the home. She had observed a box addressed to Father, which contained chemicals that she believed were used to manufacture methamphetamine. Ms. Smith had also found a box in the basement containing marijuana paraphernalia. When Ms. Smith questioned Mother about this, Mother

did not know how those items came to be in the house. Ms. Smith testified that she had seen Mother become very upset when dealing with the Cabinet, but she believed that her reactions were typical.

Terry Mehok, who worked with Mother and Father through the HANDS program, testified next on Mother's behalf. Ms. Mehok testified that she had worked with the family during all three of Mother's pregnancies, and was still working with Mother and the parties' third child. Ms. Mehok stated that Mother had reached out to the HANDS coordinator on her own volition. During Mother's pregnancies, Ms. Mehok would discuss family values, goals, planning for birth, and breastfeeding with Mother. Following Mother giving birth, she and Ms. Mehok would work more on developmental milestones and developing skills in parenting. Ms. Mehok stated that Mother was mostly receptive to the topics discussed, and would try to let her know what topics she was interested in. Ms. Mehok testified that she had observed Mother interacting with Child 1 and Child 2. During those observations, Ms. Mehok had noted that Mother would bring toys for the children, would read and sing to them, and would play with them. Mother acknowledged what the children wanted and tried to respond quickly. Ms. Mehok testified that she believed Mother's behavior with the children was overall appropriate.

On cross-examination, Ms. Mehok testified that the curriculum she used with Mother does not have a set beginning and end, but rather has topics that can be used at any time and that can be repeated. Because the HANDS program is voluntary, Mother can receive services through HANDS as long as she wants. Ms. Mehok testified that she had observed both Mother and Father with Child 1 and Child 2. Initially, Father would spend more time with Child 1 and Mother would spend more time with Child 2; however, Ms. Mehok saw that change over time.

Susan Noel, a psychiatric and mental health nurse practitioner, testified next for the Cabinet. Ms. Noel testified that Mother, Father, and Child 1 had begun seeing her in October 2016 for parent-child interaction therapy (“PCIT”), which focused on developing and enhancing the quality of the parent-child relationship. During the time that the family was seeing Ms. Noel, they had undergone five observed and coached sessions of parenting time. Ms. Noel testified that after observing the first session, she believed that the parents could benefit from PCIT as both demonstrated limited positive parenting skills. Ms. Noel testified that, initially, Child 1 seemed to be much more engaged with Father. Generally, Father was more enthusiastic and engaging, while Mother was quieter and more reserved. Over time, Ms. Noel observed Child 1 becoming more responsive to Mother and engaging Mother more. Ms. Noel testified that both parents were compliant with their sessions and open to coaching. There were

times when Mother and Father would have disagreements, but nothing out of the ordinary.

Ms. Noel stopped working with the family when Child 1 and Child 2 were removed from the home in December of 2016. At that time, Mother and Father had not yet achieved “skills mastery,” but that was not unusual given the number of sessions they had been through. Ms. Noel continued to work with Child 1 after he was returned to foster care. She testified that Child 1 was more aggressive in his play and had more difficulty regulating his emotions following his return to foster care. Ms. Noel worked with Child 1 on being able to identify and express his feelings, identifying who was a “safe person” to talk to, and learning things to do when he was feeling upset. Ms. Noel testified that Child 1 had shown improvement in these areas.

Next, the Cabinet called Ms. Clay, who testified about the events surrounding the initial removal of Child 1 from Mother and Father. Ms. Clay testified that Mother had been inconsistent and vague when she questioned her about domestic violence. When she questioned Father about domestic violence, he had denied any abuse, but did inform her that he had spanked Mother in the past. Mother had corroborated this. Ms. Clay understood the spanking to be a disciplinary act. Ms. Clay testified that when she told Father that he needed to take Child 1 to UK Hospital for further evaluation he became angry. Child 1’s treating

physician had called her to report that Mother and Father had left the doctor's office with Child 1 and were very upset. Ms. Clay testified that at UK Hospital, Father had been very paranoid and refused all care. Father attempted to record everything that was happening. When she informed the parents that Child 1 would have to stay at the hospital overnight, Mother became extremely upset—screaming and cursing at the doctors and staff. Ms. Clay testified that she had visited Child 1's maternal grandmother as a potential placement for Child 1. However, the grandmother had not appeared to understand the gravity of the situation. Further, Father informed her that he did not want Child 1 to be placed with the maternal grandmother because he was fearful that she would molest Child 1. Ms. Clay acknowledged that Child 1's examination had not revealed any evidence of physical abuse.

The Cabinet next called Ms. Reis to testify about the events surrounding Child 2's initial removal from Mother and Father. Ms. Reis testified that after she arrived at the hospital and informed the parents why she was there, Mother became extremely upset and was unable to be interviewed. Father informed her that he was unaware of how much to feed Child 2, which concerned Ms. Reis because she knew that the family had been working with the HANDS program. On cross-examination, Ms. Reis acknowledged that no medical professional ever submitted anything stating that Mother had been over

breastfeeding Child 2 in the hospital, or that too much breastfeeding was likely to endanger Child 2. Ms. Reis testified that she believed that nurses had failed to put this concern into written documentation.

Ms. Handshoe testified next for the Cabinet. Ms. Handshoe testified that her involvement with the case began when the Cabinet received a referral that Child 1 had arrived at daycare with a mark on his face. Ms. Handshoe stated that Mother and Father both refused to sign the prevention plan she presented to them. Mother was extremely upset, and stated that she would not take Child 1 to the hospital to be evaluated; however, Father agreed to do so. At the hospital, Mother became irate and tried to record everything. Ms. Handshoe testified that police officers had to be called to the room, and eventually Mother had to be escorted out of the room. Ms. Handshoe testified that Mother “came at her” and fell to the floor. Both Child 1 and Child 2 were examined at the hospital. Doctors confirmed that the mark on Child 1’s face was consistent with a slap. Child 2 showed no signs of abuse. Ms. Handshoe testified that had Mother signed the prevention plan and agreed to take Child 1 to the hospital, the children could have remained in Mother’s care if Father left the home. However, because Mother did not wish to sign the prevention plan, the Cabinet was concerned about Mother’s protective capacity.

Alicia Hall, the children's foster mother, testified next on the Cabinet behalf. Ms. Hall testified that both children were healthy, well-behaved, and got along well with her biological children. Ms. Hall stated that Child 1 and Child 2 had been out of her home for approximately five weeks when she received a call from Ms. Walker about the slapping incident. Ms. Hall testified that she noticed a change in the children's behavior when they returned to her home. Child 1 had been sneaking into the pantry, taking food, and hiding with Child 2 while they ate. Both Child 1 and Child 2 were more easily startled and fearful of loud noises. The children were scared to have their bedroom door shut; this fear was so extreme that Ms. Hall ended up removing the children's bedroom door from the hinges for a period of time. Over time, these behaviors ceased. Ms. Hall testified that both children now appear to be thriving and interact well with children and adults. Ms. Hall testified that Child 1 does become anxious before going to visitations with Mother, and often expresses concern that Father will be at the visit. Ms. Hall stated that the children are bonded with her family and that their home is an adoptive home, should the children come available for adoption.

Ms. Walker testified next for the Cabinet. Ms. Walker testified that, for their initial case plans, both parents were compliant in that they attended all classes, participated in assessments, maintained employment, and had stable housing. Ms. Walker testified that when she observed Mother and Father's

visitations with Child 1 during 2014, she noted that Father had unrealistic age expectations of Child 1—he believed that Child 1 could already read, say his ABC’s, and hold a bottle on his own. Father tended to dominate the visits with Child 1 and would talk down to Mother and tell her that what she was doing was wrong. Ms. Walker testified that she had initially had concerns about domestic violence, which were increased when a provider at The Nest, where Mother attended domestic violence classes, told her that Father would bring Mother to classes and tried to join in on Mother’s sessions.

Ms. Walker testified that new case plans were developed for the parents following Child 2’s removal. At that time, she was still very concerned with possible domestic violence, based on her observations of Father’s interactions with Mother. Ms. Walker was also concerned about Mother’s attachment with Child 1. Ms. Walker testified that during visitation, Father would primarily interact with Child 1 while Mother spent most of her time with Child 2. Ms. Walker testified Mother would interact with Child 1 when she was coached to do so, but that it was not something that she would do on her own initiative. She stated that even today, she sees the younger children receiving more attention from Mother than Child 1 does.

Ms. Walker testified that after she learned about Mother obtaining an EPO against Father, she attempted to have Mother work a new case plan. While

Mother initially did not wish to do so, Mother did sign a case plan in February of 2017. Ms. Walker testified that after Mother obtained the EPO, she began to talk to her about domestic violence differently than she had in the past. Mother then began discussing the way Father spoke to her with Ms. Walker, and started asking questions about what constituted domestic violence. Mother informed her that she did not realize that smacking was a form of domestic violence until recently, when she began taking domestic violence classes at GreenHouse17; this concerned Ms. Walker as Mother had attended numerous domestic violence classes. Ms. Walker testified that Mother did not believe that Father had slapped Child 1 until she was informed that he had pleaded guilty to an assault charge. Ms. Walker testified that Father was also offered a new case plan in February of 2017. However, the only tasks that Father wished to do were to have marriage counseling with Mother and therapy with Child 1. The Cabinet could not put those tasks on a case plan because of the DVO against Father, and, therefore, Father refused to sign a new case plan.

Ms. Walker testified that, even with Father gone, she does not believe the situation with the family is “solved.” Ms. Walker stated that she thinks that Mother still struggles with understanding what domestic violence is, and that Mother is not clear of the role that she played in the abuse or neglect of her children—she only blames Father. Ms. Walker did not believe that Mother fully understood how domestic violence impacts her and the children emotionally, or

how she could protect the children. She testified that she has not seen an improvement in Mother's emotional regulation when it came to Mother's interactions with her or other Cabinet workers. Additionally, Ms. Walker testified that Mother sometimes appears overwhelmed when visiting with all three of her children, which appears to be caused by a lack of discipline. She testified that she still has to coach Mother to be in "mommy mode." Ms. Walker stated that she did not believe Mother's difficulties to be cultural because Mother has never requested an interpreter and has stated that she can understand and grasp materials taught to her.

Brandy Griffin,⁶ Mother's current DBT therapist, testified next on behalf of Mother. Ms. Griffin testified that she has been working with Mother since May of 2017 and sees Mother biweekly. Ms. Griffin testified that Mother had been making progress and was able to demonstrate skills learned through DBT. Ms. Griffin acknowledged that Mother still had work to do on her frustration tolerance. She believed, however, that much of Mother's frustration came from being unsure of what more she needed to do with the Cabinet to get her children back. On cross-examination, Ms. Griffin testified that she did not get the impression from Mother that Mother had been through two years of DBT before

⁶ Documents appearing in the court record lists Mr. Griffin's name as both Brandi Griffing and Brandy Griffin. We adopt the spelling as it appears in the trial court's order.

starting sessions with her. However, Ms. Griffing testified that it was not uncommon for individuals to relapse and that therapy is a work in progress.

Amy Smith testified next for Mother. Ms. Smith stated that Mother initially came to her in March of 2017 for parenting classes, but has voluntarily continued to meet with her after completing those classes to further work on parenting skills. Ms. Smith testified that Mother comes to sessions with insightful questions about interacting and engaging with the children. On cross-examination, Ms. Smith testified that Mother did not present to be someone who was receiving parenting information for the first time. Ms. Smith testified that even if Mother had gone through the same material previously, it would be beneficial to repeat it. Ms. Smith testified that nothing has come up in her sessions with Mother to lead her to believe that Mother should not raise children.

Laurel Seegert, a social worker at GreenHouse17, testified next on Mother's behalf. Ms. Seegert testified that she had been providing Mother with weekly domestic violence counseling and classes since February of 2017. In those classes, they had gone over what healthy and unhealthy relationships are, what domestic violence looks like, how domestic violence affects children, and different kinds of abuse. Ms. Seegert testified that Mother did not have a clear understanding of what domestic violence was when they first started meeting. Ms. Seegert believed that Mother now has a clear understanding of what domestic

violence is, and has expressed that to her. Mother has been able to discuss examples of an unhealthy relationship that occurred in her relationship with Father.

Mother testified next. Mother testified that she has had consistent employment throughout the Cabinet's involvement with her family; currently, Mother was working two jobs. Mother testified that she lived alone, except for her dog, and paid all her own bills. Mother stated that she has taken, and continues to take, parenting classes. She testified that she has learned how to read and respond to a child's cues, appropriate discipline, and age-appropriate behavior in her classes. Mother testified that she has a good relationship with all her children. She denied being overwhelmed at visits, and stated that the only time she gets overwhelmed is when a social worker comes in and tries to talk with her while she is busy with the children. Mother stated that she would want to continue working with HANDS if the children are returned to her because she can come to them with questions and they provide her with answers and resources.

Mother testified that she is currently undergoing individual therapy and DBT at SAFY of Kentucky. Mother completed a consultation for medication and was told that she does not need to take any medications. Mother testified that in DBT, she has learned about calming herself down and managing her stress. She testified that DBT is not something that was available in Africa. Mother testified that in Africa, emotional outbursts were normal—if someone upsets you, you let

them know. She now knows different techniques to help her deal with her stress.

Mother testified that Ms. Walker and Dr. Feinberg had never asked her about skills learned in DBT.

Mother testified that she has completed all domestic violence classes. She had previously taken three weeks of domestic violence classes at The Nest. Mother testified that in classes at The Nest, her therapist focused only on Father's behavior in his previous relationships and Father's prior criminal charges; no one worked with her to develop an understanding of what domestic violence was. Accordingly, Mother's understanding of domestic violence was based on things Father had been accused of doing in his past relationships. For example, a previous paramour of Father had accused him of smashing her head into a wall. Father had never done this to her, so Mother did not think that Father had committed domestic violence against her. Mother testified that the phrase "domestic violence" is unheard of in Africa. In Africa, the men have all the power, so they can treat their spouses how they want. Mother testified that she has a good understanding of domestic violence now, after discussing it with Ms. Seegert. She understands how witnessing domestic violence can have a negative effect on children.

Mother testified that she did not get an EPO when Father slapped Child 1 because no one explained to her that she could do this to protect her

children. Mother stated that she first learned what an EPO was when she contacted Ms. Smith after Father attacked her. Mother testified that she had not been present when Father slapped Child 1; she had been at a doctor's appointment. If she had been present when Father slapped Child 1, she would have reported it. Mother testified that she would do anything for her children and that she could raise them without Father. She testified that she would follow all court orders and would not allow Father around the children.

Father testified next. In response to Ms. Smith's testimony that Father had chemicals used to manufacture methamphetamine in the home, Father testified that he did have a box of chemicals, but that they were used to clean beer lines. Father testified that he had previously worked for a company that installed draft systems for restaurants and bars, so he wanted to expand on that business by offering services to clean those draft systems. Father denied keeping marijuana in the home that he had shared with Mother. Father testified that he is currently living in his car, but has full-time employment. While he would sometimes lose his job due to having to miss work to comply with his case plan, Father testified that he has generally maintained employment throughout the pendency of the Cabinet's involvement with his family.

Father testified that he has been through numerous case plans, and has always been compliant with them. Father explained that when he slapped Child 1,

it was because Child 1 and Child 2 had been using toys to try to take the protective covers off of electrical outlets. Father testified that he had told Child 1 numerous times that this was dangerous. Father acknowledged that he had made a mistake by slapping Child 1. He had not told Mother that he had slapped Child 1 because he knew that she would have yelled at him. Father testified that he would usually punish Child 1 by telling him to stay in his room until he could behave. Father stated that he would never close the door all the way when he did this, and that he never put Child 1 in a dark room or a closet. Father testified that at the time that he slapped Child 1, he had pretty much given up on everything. When he would pick the children up from daycare, Child 1 would tell him that Ms. Hall had come to visit him at daycare and that he did not want to go with Father. Father noticed that Child 1 would be wearing new clothes when he picked him up from daycare, which he believed were gifts from Ms. Hall. Father testified that after the children were removed from the home, Mother was constantly blaming him for the removal. Father testified that it was his fault that the children had been removed, but that he could not handle being told this every day. Father testified that his intent is to get his life back on track. He had stopped attending therapy after Child 1 and Child 2 were removed from the home in December of 2016. Father testified that he did not see the point in working a new case plan when he was not allowed to see his children. Father stated that he would like to be involved in his children's

lives, but that right now he needed to focus on his job and getting his life back in order.

At the close of all evidence, the circuit court instructed the parties to prepare proposed findings of fact and conclusions of law. On December 6, 2017, the circuit court entered the findings of fact and conclusions of law prepared by the Cabinet, as well as orders terminating the parental rights of Mother and Father. This appeal followed.

II. STANDARD OF REVIEW

“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.” *W.A. v. Cabinet for Health & Family Servs.*, 275 S.W.3d 214, 220 (Ky. App. 2008). Accordingly, our review is “confined to the clearly erroneous standard in CR⁷ 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.” *Id.* (quoting *R.C.R. v. Commonwealth Cabinet for Human Res.*, 988 S.W.2d 36, 38-39 (Ky. App. 1998)). “Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative

⁷ Kentucky Rules of Civil Procedure.

value to induce conviction in the mind of a reasonable person.” *Bowling v. Natural Res. & Env'tl. Prot. Cabinet*, 891 S.W.2d 406 (Ky. App. 1994).

III. ANALYSIS

“In order to protect the rights of natural parents, Kentucky courts require strict compliance with statutory provisions governing the involuntary termination of parental rights.” *P.C.C. v. C.M.C., Jr.*, 297 S.W.3d 590, 592 (Ky. App. 2009) (citing *Day v. Day*, 937 S.W.3d 717 (Ky. 1997)). KRS⁸ 625.090 permits a court to involuntarily terminate a parent’s parental rights of a child if the court finds by clear and convincing evidence that a three-pronged test has been satisfied. First, the court must find that the subject child has been abused or neglected, as defined in KRS 600.020(1). KRS 625.090(1)(a). Next, the court must find that at least one of the listed factors in KRS 625.090(2) is present. Finally, the court must consider the factors enumerated in KRS 625.090(3) and determine that it would be in the child’s best interests to terminate parental rights. KRS 625.090(3). Despite a finding of the following, the court may, in its discretion, choose not to terminate parental rights if the parent “proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent[.]” KRS 625.090(5).

⁸ Kentucky Revised Statutes.

On appeal, Mother argues that the circuit court made erroneous findings of fact and that its conclusion that her parental rights should be terminated was clearly erroneous. Mother contends that there is no substantial evidence demonstrating that she had abused or neglected Child 1 or Child 2, that termination of her parental rights is not in the children's best interests, that the circuit court failed to find by clear and convincing evidence that any of the grounds listed under KRS 625.090(2) applies to her, and that the Cabinet failed to provide reasonable efforts to prevent removal of Child 1 and Child 2. Father likewise argues that termination of his parental rights is not in the children's best interests and that the Cabinet failed to make reasonable efforts to reunify the family. He additionally contends that he has proved by a preponderance of the evidence that the children would not be abused if returned to his care.

Looking to the first prong—whether Child 1 and Child 2 had been abused or neglected—we note that Father stipulated to abuse of Child 1 and Child 2 on February 9, 2017. Additionally, Father was convicted of fourth-degree assault of Child 1, which, under KRS 625.090(1)(a)(4), was sufficient for the circuit court to find that both children had been abused by Father without making further

findings. The circuit court cited to the following provisions of KRS 600.020(1)(a) in finding that Mother had abused or neglected the children:⁹

- (1) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
- (2) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
- (3) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
- (4) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
- ...
- (9) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) cumulative months out of forty-eight (48) months[.]

KRS 600.020(1)(a)(1)-(4), (9).

⁹ The same provisions of KRS 600.020(1)(a) were cited by the circuit court to support its finding that Father had abused or neglected Child 1 and Child 2. However, because Father stipulated to abuse of both children and was convicted of fourth-degree assault for abuse of Child 1, we analyze the circuit court's findings on abuse or neglect of the children only as related to Mother.

For subsections (1)-(4), the circuit court relied on the same findings of fact to support its finding of abuse or neglect: that Mother had continually been dishonest with the Cabinet by denying domestic violence perpetrated by Father, had therefore failed to report instances of domestic violence or aggression by Father to the Cabinet, and, accordingly, had failed to protect Child 1 from being slapped by Father. To support its finding under subsection (9), the circuit court found that while Mother had complied with almost every request of the Cabinet, she was unable to demonstrate and apply any of the skills learned in her classes. The circuit court found that Mother's inability to demonstrate skills learned was evinced by the fact that both she and Child 1 were injured by Father shortly after the children had been returned to Mother and Father's home.

We cannot agree with the circuit court that sufficient evidence existed to support its finding that Child 1 and Child 2 were abused or neglected by Mother. A reading of KRS 600.020(1)(a) shows that for a parent to abuse or neglect a child, she must intend to do so. *See K.S. v. Commonwealth*, --- S.W.3d ---, No. 2018-CA-000088-ME, 2018 WL 3945299, at *4 (Ky. App. Aug. 17, 2018).¹⁰ “A child who suffers harm as a result of a parent's intentional acts is neglected or abused. In contrast, a child is dependent if the harm results from a parent's unintentional

¹⁰ A motion for discretionary review of this Court's opinion in *K.S. v. Commonwealth* is currently pending in the Kentucky Supreme Court. Kentucky Supreme Court Case No. 2018-SC-000523-DE.

acts, or from a cause unrelated to parental culpability.” L. GRAHAM & J. KELLER, 15 KY. PRACTICE SERIES, DOMESTIC RELATIONS LAW § 6:9 (2017). We do not see evidence of such intent on Mother’s part.

No evidence was presented suggesting that Father had abused either child previous to the incident that occurred in December of 2016. Both Mother and Father testified that Mother was not at home when Father slapped Child 1; there was nothing she could have done to prevent that incident from occurring. When the children were returned to Mother and Father’s care, there was nothing in the visitation agreements requiring Mother to supervise Father when he was with the children. Accordingly, we cannot see how Mother intentionally failed to protect the children or subjected them to a risk of physical abuse.

The fact that Mother did not report Father’s domestic violence against her until December of 2016 is certainly documented by the record and is uncontested by Mother. Whether Mother was *dishonest* with the Cabinet about domestic violence is questionable—Mother, as well as several professionals who had worked with Mother, testified that she did not know that Father slapping her or spanking her constituted domestic violence. Based on her cultural experiences growing up, Mother thought that this behavior was a normal part of a marriage. While Mother had previously taken domestic violence classes, she testified that her classes at The Nest did not instruct her on the multitude of acts that can constitute

domestic violence. When Mother did learn about acts that constitute domestic violence, and experienced such violence, she took steps to remove herself from the situation and to protect herself and the children from Father.

Additionally, it is important to recognize that victims of domestic violence seldom report the first incident and often go to great lengths to hide the violence from others. The fact that Mother stayed in the home is not atypical. There is nothing in the record to suggest that Father physically abused the children or threatened to do so before the slapping incident. We cannot say that Mother intentionally or knowingly exposed the children (as opposed to herself) to harm in doing so. We also cannot condone a result that would further encourage victims of domestic violence to remain silent. If a parent believes that her past failure to report domestic violence against herself could result in her parental rights being terminated, she may continue to remain in an abusive situation for fear of losing her children.

“[T]he risk of harm must be more than a mere theoretical possibility, but an actual and reasonable potential for harm.” *K.H. v. Cabinet for Health & Family Servs.*, 358 S.W.3d 29, 32 (Ky. App. 2011). Dr. Feinberg testified that Mother was a “perineal victim” and suggested that she would continue to allow male abusers into her life and continue to be unable to protect Child 1 and Child 2 from those abusers. With all due respect to Dr. Feinberg, this testimony amounts

to nothing more than a theoretical possibility that Mother will allow Child 1 and Child 2 to be subjected to a risk of harm in the future. It suggests that once a person is a victim of domestic violence she will always be a victim. There were no objective facts presented to substantiate this conclusion. No one testified that Mother was in a romantic relationship with another potential abuser. The possibility that Mother might date a male who might abuse her at unknown point in the future is nothing more than speculation. It is nowhere near the kind of evidence necessary to prove a future risk of harm sufficient to terminate parental rights.

Mother has never been given the chance to care for Child 1 and Child 2 without Father. She should be given that chance. Because we conclude that the circuit court was clearly erroneous in finding that Mother had abused or neglected Child 1 and Child 2, the portion of the circuit court's order terminating Mother's parental rights must be reversed. Accordingly, the remainder of this opinion concerns only Father's appeal.

In support of his argument that it was not in the children's best interests that his parental rights be terminated, Father notes that he worked multiple case plans, was continually employed, and provided for Child 1 and Child 2's needs while they were in his care. Father contends that it can never be in a child's

best interests to terminate parental rights if the parent proves that the child would not continue to be abused or neglected if returned to the parent's care.

To determine whether it is in a child's best interests to terminate parental rights, circuit courts are instructed to consider the factors listed in KRS 625.090(3). In this case, the circuit court found that termination of parental rights was in the children's best interests based on the following: Dr. Feinberg's reports and testimony that Father suffered from a mental illness, which rendered Father unable to change or adapt his behavior to provide care for the children; the fact that the Cabinet had provided multiple case plans, referrals to community partners, and in-home services to the family over the past three years; and that Father had failed or had been unable to make sufficient efforts or adjustments in his circumstances, conduct, or conditions to make it in the best interests of the children to return home.

The only one of those findings with which Father takes issue is the finding that the Cabinet made reasonable efforts to reunify the family. Father argues that, following the most recent removal of the children, the Cabinet refused to give him a new case plan to work. The testimony does not support this argument. Ms. Walker testified that Father was offered a new case plan; however, because of the DVO Mother had against him, Father was not permitted to have visitation with Child 1 or attend group therapy with Mother. Because Father was

not allowed to do those things, he refused to sign a new case plan. This does not demonstrate a lack of reasonable efforts on the Cabinet's part. The evidence in this case clearly demonstrated that the Cabinet provided Mother and Father with numerous case plans and services to help reunify the family over the years.

Additionally, Father's statement that a court cannot find that it is in a child's best interests to terminate parental rights if the parent proves that the child will not be abused or neglected if returned to his care is incorrect. "If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child . . . if returned to the parent[,] the court *in its discretion may determine* not to terminate parental rights." KRS 625.090(5) (emphasis added). While a circuit court retains this discretion, it is by no means obligated to decline to terminate parental rights if a parent makes such showing. Further, we cannot find that Father made any such showing. Father did admit that he should not have slapped Child 1. This admission alone, however, is insufficient to prove by a preponderance of the evidence that Father will not do so again if Child 1 and Child 2 are returned to him. Accordingly, we find no error in the circuit court's conclusion that Father's parental rights should be terminated.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the portions of the orders of the Fayette Circuit Court terminating Father's parental rights, **REVERSE** the

portions of the orders terminating Mother's parental rights, and REMAND the matter for additional services to Mother.

TAYLOR, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

MAZE, JUDGE, CONCURRING IN PART AND DISSENTING IN

PART: I must respectfully, but strongly dissent from the portion of the majority opinion which vacates the termination of Mother's parental rights. To support an involuntary termination of parental rights, the family court must find by clear and convincing evidence the elements set out in KRS 625.090. On review of an order terminating parental rights, we ask whether the family court's findings were clearly erroneous. *Cabinet for Families & Children v. G.C.W.*, 139 S.W.3d 172, 178 (Ky. App. 2004). Due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. The family court's factual findings will not be disturbed unless there exists no substantial evidence in the record to support them. *V.S. v. Commonwealth, Cabinet for Human Res.*, 706 S.W.2d 420, 424 (Ky. App. 1986). Unfortunately, the majority opinion intrudes on the family court's role in judging the weight and credibility of the evidence.

The majority takes issue with the family court's findings that Mother allowed Father to abuse the children. While the majority agrees that Father clearly abused the children, the majority maintains that there was no evidence that Mother

intended to allow him to do so. I cannot agree with the majority’s reasoning or its conclusion.

The majority relies on *K.S. v. Commonwealth*, --- S.W.3d ---, No. 2018-CA-000088-ME, 2018 WL 3945299 (Ky. App. Aug. 17, 2018), even though there is a motion for discretionary review pending in that case.¹¹ Furthermore, the holding in *K.S.* turned on the distinction between a finding of abuse or neglect, as required by KRS 625.090(1), and a finding of dependency as defined in KRS 600.020(20). The mother in *K.S.* never had an opportunity to independently care for the child. Under these circumstances, this Court held that the mother’s inability to care for the child merely showed that the child was dependent, but not that the child was at risk of abuse or neglect. *Id.* at *4.

The majority points to the language in *K.S.* holding that “for a parent to neglect a child, he or she must intend to do so.” *Id.* However, the panel in *K.S.* made that observation as part of its analysis of the definition of “abused or neglected child” in KRS 600.020(1). The panel noted that “[w]hile dependency may occur in circumstances similar to neglect, it lacks the requisite intent on the part of the parent.” *Id.* The majority reads this discussion as a requirement of direct proof that Mother actively intended to allow Father to abuse the children.

¹¹ No. 2018-SC-000523.

But neither the statute nor *K.S.* supports that reading. Rather, the cited language of KRS 600.020(1) indicates that that such intent can be proven from circumstantial evidence.

In the current case, there is abundant circumstantial evidence supporting a finding that Mother intentionally created or allowed a risk of physical injury to the children. Unlike in *K.S.*, the Cabinet returned the children to Mother and Father's care in 2016, and then Father subjected the children to abuse.

Mother's behavior during that period demonstrates an exceptional unwillingness to accept that Father was abusing the children. Mother consistently minimized or denied Father's conduct in spite of overwhelming evidence. When coupled with her lack of candor to the Cabinet regarding the extent of domestic violence in the household prior to this time, I believe that there was evidence supporting a strong inference that Mother allowed the children to be exposed to abuse by Father.

I further disagree with the majority that the risk of future harm to the children is only a theoretical possibility. The majority discounts Dr. David Feinberg's testimony that Mother will continue to allow the children to be subjected to abuse as "nothing more than a theoretical possibility." However, the family court's findings detail the factual bases for Dr. Feinberg's opinion:

[Mother] presented as very angry and was adamant that she was finished with her relationship with [Father]. However, the more they spoke, the more she verbalized she believed [Father] could be a good father and that the

children needed him. [Mother] also told Dr. Feinberg that she didn't realize slapping was a form of domestic violence based on her cultural experiences. However [Mother] had already been through significant domestic violence education and treatment and that if she was ever going to be able to recognize the signs of domestic violence she would have never made the statement. This showed a remarkable lack of insight. [Mother] presented as a co-dependent victim and could not describe anything she could have done to prevent the injuries to her son. Moreover, Dr. Feinberg believed that if [Mother] has not been able to change her life after everything she has experienced and all the services she has received, she is not likely to ever[] be able to change. She also still takes no responsibility for the removal of the children and does not see where she failed to protect. While [Mother] had been attending DBT therapy, she appears to not be able to apply the skills learned to life. She functions well as an individual but not with the children. Without [Father], [Mother] would not be able to parent the children on her own due to her limited stress management skills. She does well in consistent, rule-based structured environments which is the opposite of the environment associated with parenting small children. Continued therapy would be beneficial for [Mother] but it would not make a difference in her being able to be an effective parent. [Mother] also remains at risk for continued victimization even with the DVO and a divorce from [Father]. Dr. Feinberg believed there are no other services the Cabinet could offer that could allow for reunification.

Other witnesses confirmed Dr. Feinberg's assessment as well. When the children were removed following the abuse in December 2016, Mother continued to deny any abuse and refused to cooperate with the Cabinet to prevent

further abuse. The family court cited the testimony of caseworker Nakia Walker, who has worked with the family since April 2014, that

[F]rom a big picture standpoint, [Walker] continues to have concerns with the family, and specifically with [Mother's] ability to parent the children on her own. The Cabinet has completed at least eleven case plans, prevention plans, or visitation agreements with the family since April 2014. [Walker] believes that the domestic violence situation is not cured by [Father] being eliminated as [Mother] takes no responsibility for her own actions and does not see how her inaction resulted in an injury to her son. Additionally [Mother] is still not being open about what she's learning in therapy or domestic violence and has not made any statements that she regrets not coming forward sooner. [Mother] has also expressed ideas about her next relationship and Ms. Walker does not believe [Mother] understands how domestic violence impacts her children. From a mental health standpoint, Ms. Walker testified that she has not seen much improvement in [Mother's] ability to regulate her emotions or use the skills she's learned in DBT therapy.

Even Mother's witnesses admitted to her limited progress by the time of the hearing in 2017. Mother's therapist, Brandy Griffin, testified that Mother "is compliant with attending sessions and with the homework assigned but she still needs intervention." And on cross-examination, Ms. Griffin admitted that "[Mother] did not speak about her treatment with a prior therapist and did not demonstrate or speak about having a prior understanding of any DBT skills." Laurel Seegert, Mother's domestic violence educator, also made a similar observation.

Based on this testimony, the family court found that both Mother and Father engaged in a pattern of conduct that renders them incapable of caring for the immediate and ongoing needs of the child. The family court's findings are quite pointed on this matter:

Testimony and exhibits entered established that [Child 1] was initially removed from [Father] and [Mother] after an altercation where [Mother] was left on the side of the road, crying, claiming she had been hit and kicked. The Cabinet intervened and consistently raised domestic violence as a concern with the family. It was only after [Father] slapped [Child 1] and subsequently attacked [Mother] causing injuries to both, that [Mother] admitted ongoing violence in the home. She asserted that she did not know she was a domestic violence victim despite three years of psychoeducation, therapy, and various services from the Cabinet. [Father] may have committed the physical acts of violence but [Mother] did nothing to protect her children as she failed to report to any service provider the instances of aggression by [Father]. As a result, the children were returned home on a trial visit in October 2016 and [Child 1] was abused shortly thereafter. [Father] and [Mother], through overt acts and failure to act protectively, created a risk of physical or emotional injury to their children by other than accidental means.

...

[Father] engaged in a pattern of domestic violence and aggression that poses a serious threat to his children's physical and emotional safety and renders him incapable of meeting the needs of his children.

[Mother] has also engaged in a pattern of conduct incompatible with safe parenting. Despite the concerns of the Cabinet, [Mother] denied domestic violence in her relationship with her husband to every service provider. Dr. Feinberg points out [Father's] controlling demeanor and [Mother's] black eye in his reports as signals of

domestic violence. [Mother] was provided with multiple outlets to seek help for herself and her children including support services from The Nest, therapists, and social workers. She was unable or refused to seek services, which ultimately led to [Child 1] being injured while in her home. Her pattern of being unable to identify and protect her children from dangerous situations renders her unable to meet the basic ongoing needs of her children.

The definition of “abused or neglected child” also includes a child whose health or welfare is harmed or threatened when his or her parent

Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) cumulative months out of forty-eight (48) months[.]

KRS 600.020(1)(a)(9).

The family court specifically noted Mother’s lack of progress toward reunification and the effect that it has had on the children. The majority does not take issue with the sufficiency of the evidence supporting this finding. And in its best-interests findings, the family court specifically cited Dr. Feinberg’s testimony that “both parents’ mental illnesses render them unable to change or adapt their behaviors to provide care for the children.” When viewed in its entirety, Dr. Feinberg’s testimony was well-supported by the substantive evidence of record. Therefore, I must conclude that the family court did not err in relying, at least in part, on that testimony.

I would agree that there was contrary evidence which would have allowed the family court to forego terminating Mother's parental rights at this time. And I am fully mindful that the cycle of domestic abuse is not easily broken. It is often difficult for victims to recognize the extent of an abusive relationship. Mother's cultural background and her mental-illness issues add to this difficulty. I have no desire to place obstacles in the way of a parent who is actively trying to escape that cycle.

However, these children had been in Cabinet custody for more than three years at the time of the hearing. Mother was undergoing regular therapy and with close Cabinet intervention and services for the entire period. The children were abused while on a trial unsupervised visit with the parents. But even with all of this intervention, there is very little indication that Mother understands the gravity of Father's conduct.

Given Mother's limited progress, the children are entitled to some degree of permanency. There was substantial evidence to support the family court's findings to terminate both Mother's and Father's parental rights. I cannot conclude that the children should remain in limbo on the remote possibility that Mother may be capable of change and improvement with continued support from the Cabinet. Therefore, I would affirm the family court's order terminating her parental rights.

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