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Commonwealth of Kentucky
Court of Appeals

NOS. 2017-CA-001759-ME AND 2017-CA-001760-ME

A.S.W.

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NOS. 17-AD-500173T & 17-AD-500174T

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

APPELLEES

NOS. 2017-CA-001761-ME AND 2017-CA-001762-ME

W. M.

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NOS. 17-AD-500173T & 17-AD-500174T

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

APPELLEES

AND NOS. 2017-CA-001776-ME AND 2017-CA-001777-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH & FAMILY
SERVICES

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NOS. 17-AD-500173T & 17-AD-500174T

A.S.W; W.M; A.K.M., A CHILD; AND
W.M., A CHILD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

ACREE, JUDGE: Appellants, Father and Mother, appeal the order and judgment terminating their parental rights to raise their two minor children. We find the order of termination is supported by substantial evidence and, therefore, affirm.

BACKGROUND

Father and Mother are the biological parents of two minor children who are the subjects of this action. Mother gave birth to the youngest child on April 2, 2016. Both Mother and child tested positive for cocaine. The Cabinet for Health and Family Services obtained an emergency custody order three days later. The next day, the Cabinet filed a dependency, neglect, or abuse petition, alleging concerns of substance abuse, Mother's mental illness, and home safety. Both Father and Mother stipulated to the allegations. As a result, the family court committed both children to the Cabinet.

The family court ordered the parties to: (1) complete substance abuse evaluations and treatments; (2) submit to random drug screens; (3) have supervised visitation; (4) cooperate with the Cabinet; (5) maintain sobriety; and (6) maintain stable housing. Additionally, Mother was to complete a psychological evaluation and undergo mental health treatment.

After several supervised visits, the Cabinet noted the visits were "very stressful." The parents regularly brought inappropriate food and medicine for their children, and the children screamed throughout many of the visits and exhibited behavioral problems. For example, the children would engage in severe tantrums, self-harming, and had nightmares for several nights after these visits.

The Cabinet eventually filed contempt motions because of the parents' non-compliance with court orders. The family court continued its earlier treatment orders but revoked both parents' supervised visitation and ordered no-contact. Neither parent has had any contact nor provided any support for either child since September 2016. Since then, the children have exhibited none of these negative reactions or behaviors.

Both Mother and Father have children by prior marriages. Father has one child who is emancipated. Mother has three children, who were permanently removed from her care due to her ongoing and untreated substance abuse issues and mental illness. The Cabinet offered the parents numerous treatment options to facilitate reunification with the children, but both parents failed to fully comply with the treatment options.

Father did attend all drug screens but tested positive for cocaine and marijuana on most screens and never regularly participated in any recommended treatment.¹ He eventually underwent a psychological evaluation. During the evaluation, he acknowledged his ongoing drug use and was diagnosed with unspecified anxiety disorder, depressive disorder, and personality disorder with antisocial and paranoid features. Further, the evaluator noted that Father appeared

¹ Twelve out of thirteen screens in 2017 were positive for controlled substances. Eight of the screens were positive for cocaine, while ten were positive for marijuana.

to lack insight, had a great deal of suspicion and resentment, and had several concerns regarding his own parenting abilities. The Cabinet discussed treatment options, but the Father denied needing any treatment and indicated he would only attend drug screens.

Mother was similarly non-compliant. Although Mother completed two psychological evaluations arranged by the Cabinet, she failed to comply with the recommendations. Those recommendations were: (1) participation in mental health and substance abuse treatment; (2) four to six months of clean drug screens; (3) attendance at 90 AA/NA meetings; and (4) continuous compliance with these requirements. The evaluator noted Mother was dishonest in the self-reporting of her criminal history and substance abuse, so the evaluator completed a second evaluation.

In the second evaluation, the evaluator noted Mother tended to underreport problems and was narcissistic, defiant, and bitter. The evaluator further found Mother had an adequate, but marginal, knowledge of basic parenting skills; however, she had inappropriate expectations of children, low empathy, and engaged in reversal of family roles. Mother was diagnosed with bipolar disorder, anxiety, and schizophrenia. She submitted to a few substance abuse treatment programs, but ultimately suffered a relapse with cocaine and failed to complete

treatment.² Therefore, the evaluator recommended ongoing, outpatient psychotherapy and substance abuse treatment.

Mother also failed to cooperate with mental health treatment. She eventually returned to treatment but was discharged as non-compliant. Her discharge summary stated she alternated between extreme aggression and withdrawal during sessions. She was argumentative with peers, inappropriate with staff, and needed more mental health treatment before she could engage in group treatment. Mother became pregnant, stopped psychiatric treatment, and failed to attend mental health counseling.

The family court held a hearing on August 7, 2017, for the involuntary termination of parental rights of both Father and Mother. The family court entered its order terminating both Father's and Mother's parental rights on September 25, 2017. This appeal followed. Father and Mother filed separate appeals. The Cabinet appeals the family court's refusal to enter into evidence the entirety of the medical records.

STANDARD OF REVIEW

When the sufficiency of the evidence is challenged on appeal, we are permitted to reverse only if the trial court's findings of fact are clearly erroneous. *Cabinet for Health & Family Servs. v. I.W.*, 338 S.W.3d 295, 299 (Ky. App. 2010).

² Mother claims the phlebotomist improperly obtained and tampered with her blood sample.

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

Both parents argue that substantial evidence does not support the grounds upon which the court based its termination decision. We are not persuaded.

Before terminating parental rights, the family court must find clear and convincing evidence to support each of three parts of the standard established by KRS³ 625.090. First, the child must have been found to be an “abused or neglected” child as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination must be in the child’s best interest. KRS 625.090(1)(c). Third, the family court must find at least one ground of parental unfitness. KRS 625.090(2).

Best Interest

Both Father and Mother believe the family court abused its discretion when it found termination of their parental rights to be in the children’s best interests. We disagree.

³ Kentucky Revised Statutes.

KRS 625.090(3) lays out the factors courts shall consider in determining the best interest of a child. These factors are: (a) mental illness that renders the parent unable to care for the child; (b) acts of abuse or neglect toward any child in the family; (c) the Cabinet's reasonable efforts to reunite the child with the parents if the child has been placed with the Cabinet; (d) the parent's efforts and behavioral adjustments that tend to make return of the child to the parent in that child's best interests; (e) the physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare; and (f) the parent's payment or the failure to pay a reasonable portion of cost of the child's physical care and maintenance. KRS 625.090(3)(a)-(f). All factors must be considered but not all need be proven to find termination is in the child's best interest. KRS 625.090(3). We review the family court's consideration of each factor.

Mental Illness – KRS 625.090(3)(a)

Father and Mother argue their mental illnesses are not a factor rendering them “unable to care for the immediate and ongoing physical or psychological needs of the child.” KRS 625.090(3)(a). Father also contends his mental illness was exacerbated, if not caused, when the Cabinet removed his children.

Both parents were diagnosed with mental illness and both demonstrated issues with basic parenting knowledge and expectations of children. Although Mother may have more alarming mental illnesses than Father, both parents showed an inability to participate in treatment and unwillingness to follow recommendations for their improvement. The parents argue they are capable of caring appropriately for the children, but their actions speak more loudly than their words. When given the opportunity, neither demonstrated an ability to provide adequate and continuing care for the children. Neither parent completed mental health treatment and, at times, even denied the need for treatment. The family court adequately considered this factor.

Abuse or Neglect – KRS 625.090(3)(b)

KRS 625.090(3)(b) requires the family court to consider the parent has engaged in any act of abuse or neglect toward any children in the family, including the children who are the subjects of the termination action. Here, the family court found that:

the totality of the evidence presented at trial is sufficient to convince this Court that the Petitioner children and other siblings have been abused or neglected within the meaning of KRS 600.020(1). This resulted from the Petitioner children and other siblings being subjected to substance abuse by their caregivers [Father and Mother] and to neglect of their material, emotional, and healthcare needs . . . [and] further abused or neglected by the Respondent parents' failure or inability to comply with this Court's remedial orders and the Cabinet's court-

approved case treatment plan so that the Petitioner children could be safely returned to parental custody

(Findings of Fact and Conclusions of Law, p. 8.)

Father asserts the family court improperly found he committed an act of neglect or abuse toward their older children; Mother makes the same assertion regarding her own conduct. We disagree.

For his part, Father claims the family court should have been swayed by the fact he has a 25-year-old son with whom the Cabinet had no interaction. He also claims the family court attributed to him Mother's conduct toward her other children.

The family court's attention was not diverted from the subject children by references to the parents' conduct toward their older children. Both Father and Mother stipulated that their substance abuse placed these children at risk of neglect or abuse. Such admitted "past behavior serves as the best predictor of [the parent's] future behavior." *Commonwealth, Cabinet for Health and Family Services v. T.G.*, 2007-SC-000436-DGE, 2008 WL 3890033, at *14 (Ky. Aug. 21, 2008). Although the trial court may not rely entirely on past behavior, it is indicative of future conduct, particularly when, as here, the Cabinet has already offered repeated opportunities for improvement. *M.E.C. v. Commonwealth, Cabinet for Health and Family Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008) (cannot base termination on past behavior only); *L.K.M. v. Department for Human*

Resources, 621 S.W.2d 38, 40 (Ky. App. 1981), *disavowed on other grounds in G.E.Y. v. Cabinet for Human Resources*, 701 S.W.2d 713 (Ky. App. 1985) (Family court held: “(N)othing in the evidence would indicate that these parents would do any better in the future than they have done in the past.’ The court’s finding on this issue is supported by the record.”).

The family court’s subsequent analysis under KRS 625.090(3)(c) and (3)(d), which we discuss below, has assured this Court that its decision to terminate parental rights was not based solely on the parents’ confession of this past abuse and neglect. As for the family court’s analysis under KRS 625.090(3)(b), we find no error.

Cabinet’s Reasonable Efforts – KRS 625.090(3)(c)

Reasonable efforts are defined as the “exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available . . . which are necessary to enable the child to safely live at home[.]”

KRS 620.020(11) (2010).⁴ The Cabinet offered the parents numerous services to both parents. Specifically, the Cabinet offered Mother:

- (1) substance abuse evaluations and treatments;
- (2) random drug screens;
- (3) parenting classes;

⁴ The statute was amended in 2019; subsection (11) is now subsection (13). 2019 Kentucky Laws Ch. 33 § 8 (HB 158)

- (4) mental health counseling;
- (5) psychological evaluations;
- (6) medication managements;
- (7) housing referrals;
- (8) transportation assistance;
- (9) financial provision for treatment;
- (10) family team meetings;
- (11) case management services;
- (12) home visits;
- (13) a family mentor;
- (14) re-engagement services; and
- (15) supervised visitation.

Likewise, the Cabinet offered the Father:

- (1) substance abuse evaluation and treatment;
- (2) random drug screens;
- (3) home visits;
- (4) mental health counseling;
- (5) psychological evaluation;
- (6) transportation assistance;
- (7) finances for treatment;

- (8) family team meetings;
- (9) case management services;
- (10) a family mentor; and
- (11) supervised visits.

This Court is unaware of any other services that could have been provided and neither parent has identified any. The family court summarized these offered services demonstrating it considered this factor and concluded that no other services could have been offered. That suffices under the statute for this factor.

Parents' Efforts and Adjustments – KRS 625.090(3)(d)

The next factor requires the family court to take into consideration the efforts and adjustments made by each parent. KRS 625.090(3)(d). Father acknowledges he was not fully compliant with the family court orders. However, he believes his brief periods of sobriety and his decision to begin intensive, outpatient treatment should demonstrate his ability to adjust his circumstances. Mother argues she made significant progress with her adjustments, but believes no matter what she did, the goal post would continue to move on her.

But neither parent could fully accomplish any of the tasks assigned by the family court or the Cabinet. Neither parent demonstrated any significant effort or adjustment. The parents even failed to make the few modifications to their home as suggested by the Cabinet. They demonstrated an inability or

unwillingness to change their circumstances. That supports the family court's finding that, considering the children's ages, the parents' efforts and adjustments were inadequate under KRS 625.090(3)(d) to make it in the children's best interest to return them to the parents' home. We find no error regarding the family court's analysis under this factor.

Physical, Emotional, and Mental Health of the Children – KRS 625.090(3)(e)

The family court was required to consider whether the children have prospects for improvement if termination is ordered. KRS 625.090(3)(e). The court found affirmatively under this factor and we conclude the finding was supported by the evidence.

As a starting point, the family court found the children's needs were "met while in the Cabinet's care and custody and the children are expected to make continuing improvements." (Findings of Facts and Conclusion of Law p. 10.) More than this, the court addressed the improvement in the children's wellbeing after removal from the parents' home.

While in the parents' custody – and even while the parents had supervised visitation – both children suffered from developmental delays, medical problems, and behavioral issues. The elder child was overweight at 17 months, lacked adequate clothing, lacked gross and fine motor skills, lacked language development, displayed severe tantrums, and had nightmares. The severity of her

delays was present long before foster care. Even though the younger child was a newborn at placement, the drug addiction she suffered at birth resulted in early health problems.⁵

The evidence supports the court’s finding that “the children are doing much better since removal” and “have demonstrated remarkable progress The children are now on target, or nearly so, with their development, their health and their behaviors.” (*Id.*) Since the family court revoked supervised visitation with the parents, the children no longer suffer from nightmares and no longer display tantrums. We can find no evidence to contradict these findings. Nor is there evidence that the children would be supported physically, emotionally, or mentally if returned to these parents who demonstrated incapacity for achieving reunification by mere compliance with court orders and Cabinet recommendations.

Failure to Support – KRS 625.090(3)(f)

The last factor the family court must consider is the parent’s “payment or . . . failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.” KRS 625.090(3)(f). Father argues there was no court order requiring him to pay child support and he had no contact with his children. Mother echoes Father’s argument, but adds she provided her kids

⁵ The youngest child suffered from acid reflux, sensory issues, and structural abnormalities due to her drug exposure in utero.

with food, gifts, and clothing until she was advised the children do not receive these items and that she was wasting her money.

Kentucky law imposes a duty upon a parent to support his child regardless of whether a child support order has been entered against the parent. *Barnes v. Turner*, 280 S.W.2d 185 (Ky. 1955). Both parents failed to pay child support or provide their children with any necessities since November 2016. The parents' arguments did not persuade the family court and they are unavailing here.

Involuntary Termination Grounds

Only Mother argues that substantial evidence does not support the family court's findings under KRS 625.090(2)(e) and (2)(g) that she:

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;

. . . .

[and], 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)(e), (2)(g).

The family court concluded that Mother is incapable of providing parental protection to her children. She demonstrated this incapacity by failing, through the entirety of the action, to complete any of the reunification services offered. Her children have been in the custody of the Cabinet since April 2016, a period of far more than six months, and Mother has yet to change any of the circumstances that gave rise to removal in the first place. The family court's conclusion that Mother is incapable of providing essential parental care and protection to her children, and that there is no reasonable expectation of improvement, is supported by substantial evidence.

The only care Mother demonstrated in this regard was bringing clothes and inappropriate snacks, once or twice, during supervised visits. Mother's history makes it unreasonable to expect improvement in the foreseeable future. Her inability to work through the reunification process and failure to change her lifestyle is a demonstration that for reasons other than poverty she failed to provide for her children.

Medical Records

The Cabinet argues the family court improperly excluded relevant portions of the medical records. However, this argument is moot. The family court's ruling is affirmed without the entry of these medical records.

CONCLUSION

The Jefferson Family Court's September 25, 2017 order terminating the parental rights of A.S.W. and W.M. is affirmed.

ALL CONCUR.

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