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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000012-ME

P.W.

APPELLANT

ON REMAND FROM SUPREME COURT  
(FILE NO. 2019-SC-000020-DGE)

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

AND

NO. 2018-CA-000015-ME

P.W.

APPELLANT

ON REMAND FROM SUPREME COURT  
(FILE NO. 2019-SC-000021-DGE)

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

AND

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

AND

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 ON REMAND  
AFFIRMING

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BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

JONES, JUDGE: These appeals involve the termination of the parental rights of P.W. and K.W. to their two minor children. They are before us on remand from the Kentucky Supreme Court. *See Cabinet for Health and Family Services v. P.W.*, 582 S.W.3d 887 (Ky. 2019). We previously affirmed the trial court’s termination of K.W.’s parental rights but reversed the termination of P.W.’s parental rights. With respect to P.W., the children’s mother, we held that sufficient evidence did not support the trial court’s finding that she neglected or abused her children.<sup>1</sup> The Cabinet for Health and Family Services (“Cabinet”) petitioned the Kentucky Supreme Court for discretionary review.<sup>2</sup> The Court granted review. Ultimately, the Court held that we erred when we determined that sufficient evidence did not support the trial court’s finding of abuse and neglect, the first

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<sup>1</sup> Judge Maze dissented in a lengthy opinion; he disagreed with the majority’s determination on the neglect and abuse element and indicated that he would have affirmed the terminations with respect to both K.W. and P.W. The Kentucky Supreme Court ultimately agreed with Judge Maze’s position on the abuse and neglect element.

<sup>2</sup> K.W., the children’s father, did not petition for discretionary review. Therefore, the Supreme Court’s opinion concerned only the mother, P.W. Likewise, on remand we limit our consideration to the termination of P.W.’s parental rights. Our prior opinion affirming the termination of K.W.’s parental rights stands as it was not challenged above.

requirement for termination. The Court then remanded the appeals to us to determine whether sufficient evidence supported the trial court's finding that the remaining requirements of Kentucky Revised Statute ("KRS") 625.090 were met with respect to the termination of P.W.'s parental rights.<sup>3</sup>

In compliance with the Court's directive we have reviewed P.W.'s arguments with respect to the additional requirements of KRS 625.090. While we might not have reached the same conclusions as the trial court with respect to those requirements, we are unable to say that the trial court's findings and conclusions amount to an abuse of discretion. Substantial evidence supports them. Accordingly, we are bound to affirm.

## **I. BACKGROUND**

The relevant procedural and factual background is succinctly set forth in the Kentucky Supreme Court's opinion as follows:

P.W. was born in Ghana, Africa. She came to the United States in 2007 when she was fourteen years old. K.W. was born in Indiana and grew up in California. P.W. and K.W. were married in 2013. During their marriage, P.W. and K.W. had three children. Two of those children, K.N.W.W. and K.L.W.W., are the subjects of this appeal.

K.N.W.W., was born on September 26, 2013. In April of 2014, the Cabinet received a report that P.W. was seen crying on the side of the road, after being kicked out of a

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<sup>3</sup> We did not address those elements in our prior opinion based on our erroneous conclusion that the Cabinet had not adduced sufficient evidence to support the trial court's finding of abuse and neglect as to P.W.

car being driven by K.W. Concerned with possible domestic violence, Mara Clay, an investigative worker for the Cabinet, visited the home of P.W. and K.W. Clay was forced to return with law enforcement, at which point she observed a dark marking on K.N.W.W.'s bottom. She requested that the mark be evaluated by the child's pediatrician. The pediatrician, while unable to give specific information to Clay over the phone, assured her that he did not have any concerns about the child's wellbeing. Despite this, Clay told P.W. and K.W. to bring the child to the University of Kentucky (U.K.) Hospital. At U.K. Hospital, a doctor confirmed that the spot on K.N.W.W. was a Mongolian spot and not a bruise, however K.W. began acting erratically. He was very paranoid and aggravated. He accused the examining doctor of sexually touching K.N.W.W. Therefore, the physician placed K.N.W.W. on a medical hold and would not release him to K.W. and P.W. Both K.W. and P.W. became very upset and had to be escorted off the property by security.

Based on these events and resulting concerns about domestic violence in the home, mental health issues, and low cognitive functioning, the Cabinet filed for and was granted emergency custody of K.N.W.W. on April 3, 2014. A temporary removal hearing was held on April 7, 2014, and K.N.W.W. was placed in the Cabinet's custody. Both parents signed and began working case plans the following week. On December 4, 2014, both parents stipulated to dependency of K.N.W.W. New case plans were developed and the family continued to work with the Cabinet.

On May 16, 2015, while K.N.W.W. was still in the custody of the Cabinet, K.L.W.W. was born to P.W. and K.W. Hospital staff reported concerns to the Cabinet regarding P.W.'s constant breastfeeding of K.L.W.W. Sara Reis, investigative worker for the Cabinet, met with the family at the hospital. P.W. became hysterical and could not finish the interview. Based on continuing

concerns about mental health issues, low cognitive functioning, and domestic violence, the Cabinet requested and received emergency custody of K.L.W.W. on May 19, 2015. He was placed in the same foster home as K.N.W.W. On June 30, 2015, the family court made a finding of dependency against both parents. The family continued to work with the Cabinet.

In January of 2016, K.W. and P.W. began having unsupervised visitation with the children. In February of 2016, they began having unsupervised overnight visits with the children. Unsupervised visits were gradually increased until the children were returned to their parents' home in November of 2016.

About 10 days after the children returned home, their pediatrician reported to the Cabinet that K.N.W.W. came into his office without a shirt in cold weather and with an upset stomach. He made the referral to the Cabinet because P.W. and K.W. could not answer questions from the medical staff.

On December 19, 2016, the Cabinet received another report that K.N.W.W. arrived at daycare with a red mark on his face. He told daycare workers that K.W. had slapped him. K.W. denied slapping K.N.W.W. and stated he had no knowledge of the injury. P.W. told the Cabinet worker that she hadn't noticed the mark on K.N.W.W.'s face before she left him with K.W. that morning. K.W. and P.W. refused to sign a prevention plan but agreed to take K.N.W.W. to U.K. Hospital. The Cabinet worker was concerned about the safety of the children if left in the care of K.W. and about P.W.'s ability to protect them in the home with K.W. Therefore, both children were returned to their previous foster home that night.

Less than two weeks later, K.W. assaulted P.W. P.W. notified police and sought and obtained an emergency protective order, and then a domestic violence order, against K.W. for her and the children. K.W. eventually

pled guilty in criminal cases to two counts of assault in the fourth degree – one count for slapping K.N.W.W. and the other count for assaulting P.W. He also stipulated in family court to abuse of both K.N.W.W. and K.L.W.W. P.W. signed a new case plan that included complying with the domestic violence order against K.W. However, P.W. did not believe that K.W. had slapped K.N.W.W. until after she was told K.W. had pled guilty to the criminal charge of assault. She further stated that she didn't know that slapping was domestic violence despite participating in therapy, parenting classes, and domestic violence classes over the previous two years.

Over the next two years, P.W. continued to work with the Cabinet and work on her various case plans. Despite this work, the ongoing Cabinet worker continued to have concerns about P.W.'s ability to safely parent her three children on her own. Also, during this time period, Dr. David Feinberg, a licensed clinical psychologist, completed an evaluation of the family. This was Dr. Feinberg's fourth family evaluation with the first occurring in November 2014 and the last occurring in May 2017. Dr. Feinberg's first three evaluations all recommended that the Cabinet continue to provide services to the family with the ultimate goal of reunification. In his final evaluation, however, he opined that P.W. lacked insight into domestic violence, took no responsibility for the removal of her children, and could not apply the skills she learned to life. Dr. Feinberg believed that she could not parent the children on her own due to her limited stress management skills and that there were no additional services the Cabinet could provide to assist in reunification.

On [June 15, 2017], the Cabinet filed petitions to terminate the parental rights of K.W. and P.W. to both K.N.W.W. and K.L.W.W. After a three-day bench trial, the trial court terminated the parental rights of both parents to both children, entering findings of fact and conclusions of law on December 6, 2017.

*P.W.*, 582 S.W.3d at 889-891 (footnote omitted).

## II. STANDARD OF REVIEW

We follow the standard of review set forth by the Kentucky Supreme Court in *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204 (Ky. 2014):

[T]he trial court has wide discretion in terminating parental rights. *Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010) (citing *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006)). Thus, our review is limited to a clearly erroneous standard which focuses on whether the family court’s order of termination was based on clear and convincing evidence. Kentucky Rules of Civil Procedure (“CR”) 52.01. “Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family court’s findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them.” *T.N.H.*, 302 S.W.3d at 663. Due to the fact that “termination decisions are so factually sensitive, appellate courts are generally loathe to reverse them, regardless of the outcome.” *D.G.R. [v. Com., Cabinet for Health and Family Services]*, 364 S.W.3d 106, 113 (Ky. 2012)].

*Id.* at 211.

## 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.2d 717 (Ky. 1997)). KRS 625.090

permits a court to involuntarily terminate a parent’s parental rights to 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 above, 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). The Kentucky Supreme Court has already determined that the trial court did not err with respect to its findings that the children were abused and/or neglected. Therefore, we confine our review on remand to the remaining two requirements of KRS 625.090.

At the time this proceeding took place, KRS 625.090(2)<sup>4</sup> provided as follows:

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<sup>4</sup> KRS 625.090 has been amended twice since the termination order in this action was entered. The first amendment became effective July 14, 2018. It governed until the most recent amendment became effective on June 27, 2019. All citations in this opinion relate to the statute in effect at the time the termination proceedings in this action occurred before the trial court.

No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

- (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
- (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
- (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
- (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
- (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;
- (f) That the parent has caused or allowed the child to be sexually abused or exploited;
- (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;
- (h) That:
  - 1. The parent's parental rights to another child have been involuntarily terminated;
  - 2. The child named in the present termination action was born subsequent to or

during the pendency of the previous termination; and

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

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

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

KRS 625.090(2) (effective July 12, 2012 to July 13, 2018).

The trial court first determined that KRS 625.090(2)(b) applied to P.W.'s actions. The trial court explained its findings and conclusions as follows:

[P.W.] knowing [K.W.'s] history of using physical violence, failed to take any action to protect her children such as notify any service providers or social worker for help. Had [P.W.] been honest with the Cabinet about the domestic violence going on in the home, she could have prevented [the child's] injury.

Substantial evidence supported these findings and conclusions. The Cabinet's various witnesses testified to a history of domestic violence in the home, which P.W. failed to acknowledge even after counseling. The evidence also showed that P.W. left the children alone with K.W. knowing of his propensity to be physically abusive. This evidence supports the trial court's conclusion. While we commend P.W.'s ultimate decision to seek help on behalf of herself and her children, her delayed response caused the older child to suffer violence at the

hands of his father and exposed the younger child to a substantial risk of suffering similar harm.

The trial court also relied on KRS 625.090(2)(c). It cited P.W.'s failure to address the domestic violence occurring in the home over an extended period and determined it allowed emotional harm and physical injury to be inflicted on the children. Substantial evidence also supports this finding and conclusion. The children were exposed to domestic violence inflicted on P.W. by K.W., which is emotionally harmful. Additionally, K.W. inflicted harm on the older child when he slapped him. While we are mindful that P.W. herself was a victim of domestic violence, the statute does not provide an exception in this regard. P.W. failed to protect her children from domestic violence over a prolonged time period and engaged in conduct devised to hide or minimize the abuse.

The trial court also found that P.W. “for a period of not less than six (6) months, 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[.]” KRS 625.090(2)(e). To this end, the trial court reviewed the evidence relating to the substantial services the Cabinet had provided to P.W. since the inception of its involvement. Despite participating in numerous parenting classes and receiving

counseling on domestic violence, for the majority of the time at issue, P.W. refused to acknowledge that K.W. was abusive to herself and the children. Her inaction prevented her from being able to ensure that the children were provided with essential care and protection. In sum, the trial court concluded that P.W.'s "pattern of being unable to identify and protect her children from dangerous situations renders her unable to meet the basic ongoing needs of the children." With respect to the prospects of improvement, the trial court relied heavily on the testimony of Dr. Feinberg to conclude that "both parents' mental illnesses render them unable to change or adapt their behaviors to provide care for the children." The testimony and evidence are sufficient to support both the failure of P.W. to meet the needs of her children and the likelihood that there is no reasonable expectation of improvement.

The trial court also relied on KRS 625.090(2)(j), which allows the second prong to be satisfied if "the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights." To this end, the trial court found that the children "have remained committed to the Cabinet's custody and in foster care well over the most recent fifteen of the twenty-two months." The older child was committed to the Cabinet's custody on or about April 3, 2014. He was returned to the parents for a short time in

November 2016 but was returned to foster care in December 2016. The petition was filed on or about June 15, 2017. During the twenty-two months preceding the petition the older child had been in foster care for over three years with the exception of a few weeks in November/December 2016, a period well over fifteen months. The same is true for the younger child. He was committed to the Cabinet's custody on or about May 19, 2015, shortly after his birth. He resided in foster care from that time until the petition was filed over two years later in June 2017. Like his brother, he spent a few weeks in the care of his parents in November/December 2016 before returning to foster care. His time in foster care also well exceeds the fifteen-month threshold.

Having concluded that substantial evidence supported the trial court's conclusions that several of the grounds set forth in KRS 625.090(2) were met, we now turn to the final consideration, KRS 625.090(3). To determine whether it is in a child's best interest to have to terminate parental rights, trial courts are instructed to consider the factors listed in KRS 625.090(3).

The trial court entered a lengthy opinion summarizing the testimony and evidence. In considering the best interest factor, the trial court pointed out the long period both children had been with the foster family, the fact they were both thriving in the foster home, and the strong attachment they had to the foster parents, who were able to care for the children and meet their needs. The trial

court relied heavily on Dr. Feinberg's assessment that P.W. lacked the skills, coping mechanisms, and insight to parent the children despite the substantial services she had received over the years from the Cabinet. He believed that there was a strong possibility for future neglect and/or abuse if the children were returned to her care. The trial court considered the appropriate factors with respect to best interests, and the trial court's findings are supported by substantial evidence of record.

Finally, "[i]f 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 trial court retains this discretion, it is by no means obligated to decline to terminate parental rights if a parent makes such a showing. In this case, however, the trial court's findings make it abundantly clear that it was not convinced by P.W. that the children would not suffer additional abuse and neglect if returned to her care. The trial court did not abuse its discretion when it elected to terminate P.W.'s parental rights.

#### **IV. CONCLUSION**

For the foregoing reasons, we **AFFIRM** the Fayette Circuit Court orders terminating P.W.'s parental rights to the two children at issue in these appeals. Our prior opinion affirming the termination of K.W.'s parental rights

stands as K.W. did not pursue a petition for review and that portion of the opinion was not altered by the Kentucky Supreme Court's review.

ALL CONCUR.

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