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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001157-ME

T.R.W. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LAUREN ADAMS OGDEN, JUDGE
ACTION NO. 17-AD-500413

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; A.J.H., A MINOR CHILD; AND C.D.H. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, K. THOMPSON AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: T.R.W. (hereinafter referred to as Mother) appeals from an order of the Jefferson Circuit Court, Family Division, which terminated her parental rights to her minor daughter, A.J.H. (hereinafter referred to as Child).[1]

[1] As this case involves a minor child, this Court will not use the names of the parents or child.

Mother argues on appeal that the trial court erroneously terminated her parental rights and that the court made evidentiary errors. We find no error and affirm.

Mother and C.D.H. (hereinafter referred to as Father) are the natural parents of Child.[2] Child was born on July 13, 2015. On July 21, 2015, the Cabinet for Health and Family Services filed a neglect action alleging that Child tested positive for amphetamines[3] when she was born, Mother and Father had not been compliant with their Cabinet case plans concerning their other three children, Mother and Father had substance abuse issues, and that Mother and Father had an abusive relationship. Child was placed in the custody of Child's great aunt. The great aunt cared for Child until her health made that impossible, at which time Child was placed in foster care. On March 31, 2016, the court officially placed Child into the custody of the Cabinet.

The Cabinet's case plan for Mother included her remaining sober, submitting to random drug tests, complete protective parenting classes, attend AA/NA meetings, be assessed by a psychologist, complete a substance abuse assessment, and have supervised visitation. Mother attempted to complete the protective parenting classes on six occasions from June 9, 2015, through February 27, 2018; however, she was unable to complete this program due to her relapsing

[2] Father did not appeal the termination of his parental rights.
[3] This was due to Mother's use of Adderall for which she had a prescription.

and abusing drugs. She also completed four drug rehabilitation programs but would inevitably fall back into old drug using habits. Mother also took 137 drug screens during this time. Of those screens, 6 were positive and 21 were no shows. At the time of the termination of parental rights trial, however, Mother had been clean and sober for 8 months.

On August 2, 2017, the Cabinet filed a petition for involuntary termination of Mother and Father's parental rights and a trial was held on May 18, 2018. At the trial, the Cabinet called the following people to testify: Amy Noll, a social services and mental health service provider; Troy Fessed, a licensed clinical social worker and mental health therapist; Dr. Karen Eisenmenger, a clinical psychologist; Kayla Holcomb, the permanent custodian for Mother's three other children; Lacy Adkins, foster mother of Child; and Hayley Hoover, the Cabinet's caseworker. Mother did not testify, nor did she have any witnesses testify on her behalf. Father did not appear for the trial. On June 12, 2018, the trial court entered an order terminating the parental rights of Mother and Father. This appeal followed.

Mother's first argument is that the trial court erred in adopting, *in toto*, the Cabinet's tendered findings of fact and conclusions of law. At the end of the trial, the court asked Mother and the Cabinet to prepare proposed findings of fact and conclusions of law and file them with the court. The court then chose to utilize

the Cabinet's findings and conclusions without making any changes. Mother claims this was in error. We disagree.

While this practice is frowned upon by the appellate courts of Kentucky, *Callahan v. Callahan*, 579 S.W.2d 385, 387 (Ky. App. 1979), it is only error if the trial court abdicates "its fact-finding and decision-making responsibility under [Kentucky Rule of Civil Procedure (CR)] 52.01." *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982). "[T]he delegation of the clerical task of drafting proposed findings of fact and conclusions of law under the proper circumstances does not violate the trial court's responsibility." *Id.* Here, we find the trial court did not commit reversible error. The court ordered both parties to submit a proposed judgment and the trial judge was actively engaged with the bench trial proceedings. *See Prater v. Cabinet for Human Res., Commonwealth of Ky.*, 954 S.W.2d 954, 956 (Ky. 1997). Furthermore, after the court entered its findings of fact and conclusions of law, counsel for Mother brought this issue to the court's attention. On July 9, 2018, the court entered additional findings and conclusions that were not prepared by either party. We see no evidence that the trial court abdicated its CR 52.01 responsibilities and find no error.

We now move on to Mother's primary arguments regarding the factors the court must consider when involuntarily terminating parental rights.

Kentucky Revised Statute (KRS) 625.090[4] states in relevant part:

> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
>
> 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
>
> 3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and
>
> (b) Termination would be in the best interest of the child.
>
> (2) 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;

[4] KRS 625.090 was amended shortly after Mother's parental rights were terminated. We will utilize the old version of the statute since that is what was used by the trial court. Additionally, the changes to the statute would not affect the outcome of this case.

(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.

(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

(a) Mental illness as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

> (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
>
> (f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

M.E.C. v. Com., Cabinet for Health and Family Services, 254 S.W.3d 846 (Ky. App. 2008), sets forth the relevant standard of review for this case.

> The standard for review in termination of parental rights cases is set forth in *M.P.S. v. Cabinet for Human Resources,* 979 S.W.2d 114, 116-17 (Ky. App. 1998). Therein, it is established that this Court's standard of review in a termination of parental rights case is the clearly erroneous standard found in Kentucky Rules of Civil Procedure (CR) 52.01, which is based upon clear and convincing evidence. Hence, this Court's review is to determine whether the trial court's order was supported by substantial evidence on the record. And the Court will not disturb the trial court's findings unless no substantial evidence exists on the record.
>
> Furthermore, although termination of parental rights is not a criminal matter, it encroaches on the parent's constitutional right to parent his or her child, and therefore, is a procedure that should only be employed when the statutory mandates are clearly met. While the state has a compelling interest to protect its youngest citizens, state intervention into the family with the result of permanently severing the relationship between parent and child must be done with utmost caution. It is a very serious matter.

M.E.C. at 850 (citations omitted).

> The standard of proof before the trial court necessary for the termination of parental rights is clear and

> convincing evidence. "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people."

V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420, 423-24 (Ky. App. 1986) (citations omitted).

Mother argues that the trial court erred when it found Child was abused or neglected pursuant to KRS 600.020, which is the first requirement in KRS 625.090(1)(a). KRS 600.020[5] states in relevant part:

> (1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:
>
> (a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:
>
> 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;

[5] This statute was also amended, but we will use the older version used by the trial court.

> 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
>
> 5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
>
> 6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
>
> 7. Abandons or exploits the child;
>
> 8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a 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) of the most recent twenty-two (22) months[.]

Mother claims that the trial court used conclusory statements and did not provide substantial evidence to support its finding that child had been abused or neglected. We disagree. First, the court found that Child had been previously adjudged abused or neglected when Mother and Father stipulated to same in the previous dependency, neglect, and abuse action. The court also found that Child

had been neglected based on the evidence presented at the termination trial. The court found Child was neglected pursuant to KRS 600.020(1)(a)1, 3, 4, 8, and 9.

We find that there is substantial evidence in the record to support the neglect factors listed by the court: Child was born with amphetamines in her system that came from Mother's use of amphetamines (Adderall) prescribed to her; however, she did not inform her prescribing physician of her pregnancy, KRS 600.020(1)(a)1; Mother continuously abused drugs over the two-year period after Child had been removed by the Cabinet, KRS 600.020(1)(a)3; Mother went from one abusive relationship to another during the times relevant to this case and did not complete her protective parenting class, KRS 600.020(1)(a)4; Mother did not pay child support or provide other necessities for Child's benefit while Child was in the custody of the Cabinet, KRS 600.020(1)(a)8; and Mother was unable to complete her case plan resulting in Child being in the Cabinet's custody for over 16 months and out of her care for around 3 years, KRS 600.020(1)(a)9. The trial court was not clearly erroneous in finding that Child had been neglected.

Mother's next argument concerns the requirement that at least one of the factors listed in KRS 625.090(2) be present. The court found that KRS 625.090(2)(e) and (g) applied to Mother. Those state:

> (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the

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

KRS 625.090(2). Mother claims on appeal that there was no evidence to support the court's finding that there was no reasonable expectation of improvement as required by these statutes because by the time of trial, she had improved and been sober for 8 months. Again, we disagree with Mother's argument.

At the time of the termination of parental rights trial, Child had been out of Mother's care for almost 3 years. During that time, Mother was unable to complete her protective parenting class despite attempting six times. In addition, Mother was involved in two abusive relationships and kept falling back into her drug using habits during this time. Finally, Mother did not provide child support or other necessities to Child.

"Just because the child . . . [is] committed to the Cabinet does not mean that the parent has no further responsibilities to the child. The Cabinet developed a case plan, and continually offered services. Nevertheless, [M]other

neglected her duties and failed to complete the goals set by the Cabinet." *Cabinet for Health & Family Servs. on behalf of C.R. v. C.B.*, 556 S.W.3d 568, 573 (Ky. 2018) (citations and quotation marks omitted). While it is certainly good news that Mother may now be sober, at the time of the trial, she had still not completed her protective parenting class. Also, she had almost 3 years to get her life in order and complete her case plan but was unable. Finally, Mother did not testify at trial in order to give us her opinion on the changes she has made in her life and her expectations for the future. We find that the court did not err in finding that there was no reasonable expectation of improvement in Mother's situation within a reasonable amount of time.

Finally, as it pertains to KRS 625.090(2), we note that the Cabinet proved that Child had been in foster care for 15 of the most recent 22 months preceding the filing of the petition to terminate parental rights. This would fall under KRS 625.090(2)(j) and would be sufficient to satisfy this prong of the termination of parental rights statute.

Mother's next argument on appeal is that the trial court erred when it admitted into evidence the files from the dependency, neglect, and abuse (DNA) proceedings of Child and her three siblings. Mother argues that the court erroneously relied on the previous DNA actions when finding Child was neglected

for the purposes of the termination of parental rights and that the DNA documents were irrelevant. We find no error.

The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

It is clear from the trial court's order that it made independent findings regarding Child's neglect based on the testimonial evidence produced at trial and did not simply rely on the DNA adjudications. In addition, the abuse or neglect of other children in the family is relevant to these proceedings. KRS 625.090(3)(b). Finally, these documents were admissible because they were not excluded by hearsay, Kentucky Rule of Evidence (KRE) 803(8), and were self-authenticating public documents. KRE 901(b)(7);[6] KRE 902(4);[7] KRE 1005.[8] The trial court did not abuse its discretion in admitting these documents into evidence.

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[6] "Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept."

[7] "Official records. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by an official having the legal custody of the record." Here, the records were certified by the Jefferson Circuit Court Clerk.

[8] "The contents of an official record . . . may be proved by copy, certified as correct in accordance with KRE 902[.]"

Mother also claims that the trial court erred in admitting into evidence court records regarding a domestic violence action filed by Mother against Father. Again, these were properly admitted into evidence. They were relevant to the termination proceedings because domestic violence in the household can impact the emotional and physical safety of a child. Further, the domestic violence documents were admissible for the exact same reasons the DNA documents were admissible. The court did not abuse its discretion.

Mother next argues that the court erred when it permitted the social worker to testify regarding drug test results. Mother claims the social worker was not qualified to testify about the results and that they were not properly authenticated. We find that the court did not err.

The Cabinet required Mother to attend drug counseling and to take part in drug screenings. These results were highly relevant to the case and are routinely used by the Cabinet. Additionally, they were self-authenticating pursuant to KRE 902(11) as a business record. Finally, they were self-authenticating medical records pursuant to KRS 422.305. That statute allows medical records to be authenticated by the record custodian signing a document in front of a notary public indicating that the records are true and complete copies made in the regular course of business. The court did not abuse its discretion.

Mother's final argument is that the court's additional findings and conclusions entered on July 9, 2018, contained facts not in evidence, namely that Child was briefly placed back into Mother's care and then removed again. Mother is correct that this is an erroneous finding. Mother's three other children were briefly placed back into her care before being removed again, not Child. We find that this was a harmless error.

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

CR 61.01.

"When considering a claim of harmless error under CR 61.01, the court determines whether the result probably would have been the same absent the error or whether the error was so prejudicial as to merit a new trial." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52 (Ky. 2010) (citations and footnotes omitted). Absent this mistake, the result of the termination of parental rights proceeding would have been the same and the order does not need to be reversed.

Based on the foregoing, we affirm the judgment of the Jefferson Family Court.

ALL CONCUR.

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