RENDERED: MAY 10, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001374-ME

D.W. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TRACY H. BRISLIN, JUDGE
ACTION NO. 16-AD-00324

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

AND

NO. 2018-CA-001375-ME

D.W. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TRACY H. BRISLIN, JUDGE
ACTION NO. 16-AD-00325

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

GOODWINE, JUDGE: D.W. ("Father") appeals from the Fayette Family Court's August 24, 2018, order terminating parental rights to his children, D.L.W. and L.J.W. Father asserts the family court erred in terminating parental rights because it: (1) found termination of parental rights was in the best interest of the children; (2) violated his rights to due process by failing to make reasonable efforts to reunite the family; and (3) did not find the children would not be "abused and neglected" if returned to him. After careful review, we affirm.

BACKGROUND

W.M. ("Mother") and Father are the biological parents of the two children subject to this action: D.L.W.[1] and L.J.W.[2] The Cabinet for Health and Family Services ("Cabinet") first became involved with the family on March 19,

[1] Born April 25, 2008.

[2] Born August 13, 2009.

2007, due to issues regarding another one of Mother's children.[3] The following year, after the birth of D.L.W., a Cabinet worker met with the family. During the meeting, she smelled the odor of marijuana and saw a marijuana roach in the home. At that time, she questioned Father, and he admitted to actively smoking marijuana—but never around the baby. On May 9, 2008, the Cabinet filed nonremoval neglect petitions,[4] and D.L.W. came into its custody on June 2, 2008.

On June 9, 2008, Mother stipulated to neglect of D.L.W. That same month, Father was arrested for a probation violation, serving the remainder of the year, and part of 2009, in prison. Because of this, the family court awarded temporary custody of D.L.W. to maternal grandmother. In February 2009, Mother reunified with D.L.W., after cooperating and complying with the Cabinet and its services for the prior seven months.

On August 13, 2009, L.J.W. was born. Two months later, the police responded to an alleged domestic dispute at Mother's home. At the scene, police arrested Father for 4th degree assault, with Mother being the victim. While being arrested, Father admitted to smoking marijuana. Mother fled the scene with

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[3] It received a petition pertaining to Mother's third child, J.H., who is neither subject to this action nor the biological son of Father. Mother admitted to substance abuse issues and that she could not provide for J.H. Due to these admissions, J.H. was removed from the home.

[4] Mother was required to undergo drug screening, with results initially coming back negative, but then showing multiple positive results for cocaine use.

L.J.W., leaving her with a neighbor because she had an active warrant for her arrest—she did not return. D.L.W. and L.J.W. were present for the entire incident.

Because of the incident, the Cabinet requested, and received, emergency custody of D.L.W. and L.J.W. At that time, Father acknowledged paternity of L.J.W. During later court proceedings, Mother stipulated to neglect of the two children, and the family court made a finding of neglect against Father. Both parents were provided case plans and services.

At disposition, the family court placed the children in the temporary custody of paternal aunt, and suspended Father's visits because he made little case plan progress.[5] The family court found Father: (1) began working with Advanced Solutions, but was ultimately discharged because of noncompliance; (2) failed to drug screen; and (3) failed to appear in court. The family court then placed the children, again, in the custody of their maternal grandmother. Two years later, Father was incarcerated on a gun charge and involved in a second involuntary termination regarding another child.

Once again, the Cabinet became involved with the family in September 2013, due to a referral regarding Mother's other child, J.H. During the subsequent investigation, the Cabinet interviewed Mother, the children's maternal

[5] The family court rescinded custody a month later, due to truancy issues with the aunt's son. At that point, custody reverted to the Cabinet.

grandmother, and the other children residing in maternal grandmother's home. The Cabinet discovered Mother resided with maternal grandmother, even though she was ordered not to be there. At that time, Mother admitted to using marijuana. So, the Cabinet requested, and received, emergency custody of D.L.W. and L.J.W. Father was incarcerated during this time.

On October 1, 2013, the family court made a finding of neglect for D.L.W. and L.J.W., eventually placing them in the Cabinet's custody, which resulted in Father's receiving a new case plan—but to no avail. Father, again, failed to drug screen or make any progress on the case plan tasks. While he did attend a couple of supervised visits, he became confrontational during a March 2014 visit and failed to attend any others. Due to these circumstances, the family court waived Father's reasonable efforts on May 5, 2014. Later, at some point in 2015, Father reported to the Cabinet's office to provide proof of completion of an intensive, outpatient drug treatment program through Advanced Solutions. He received new criminal charges involving substance abuse, which would require him to undergo a new substance abuse assessment. As a result, the Cabinet initiated a petition for termination of parental rights against Father and Mother. In 2017, he contacted the Cabinet and negotiated a new case plan over the phone. Since that time, he made no contact with the Cabinet.

The family court held a bench trial on August 7, 2018. During trial, Father testified on his own behalf.[6] He admitted that he: (1) was the biological father of D.L.W. and L.J.W.; (2) received a case plan in 2014 and 2016, but denied receiving the 2017 case plan; (3) has not maintained stable housing and employment in the past, but had an apartment and job lined up upon his release from prison; and (4) experienced multiple stints of incarceration.[7] Despite these admissions, Father asked the family court to grant him more time to work on his case plan tasks. On August 24, 2018, the family court entered findings of fact, conclusions of law, and a judgment terminating Father's parental rights. This appeal followed.

STANDARD OF REVIEW

"[T]ermination of parental rights is a grave action which the courts must conduct with 'utmost caution.' [It] can be analogized as capital punishment of the family unit because it is 'so severe and irreversible.' Therefore, to pass constitutional muster, the evidence supporting termination must be clear and convincing." *F.V. v. Commonwealth Cabinet for Health & Family Servs.*, 567 S.W.3d 597, 606 (Ky. App. 2018) (citations omitted). "Clear and convincing proof

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[6] At the time of the trial, Father was incarcerated in the Fayette County Detention Center and was awaiting sentencing in November for a probation violation. He was also serving time on a possession of methamphetamines charge in Franklin County, for which he pleaded guilty.

[7] The record reflects that Father served time in prison on five different occasions, spanning the years: 2008, 2011, 2012, 2013, 2014, 2016, and 2018.

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." *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934). Because "termination decisions are so factually sensitive, appellate courts are generally loathe to reverse them, regardless of the outcome." *D.G.R. v. Commonwealth, Cabinet for Health & Family Servs*., 364 S.W.3d 106, 113 (Ky. 2012).

ANALYSIS

At the outset, we note the wide discretion vested in the family court regarding termination of parental rights. *Commonwealth, Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). Thus, "[we are] 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." *Id*.

Here, Father appeals an order of the family court which terminated his parental rights of D.L.W. and L.J.W. He argues: (1) the family court incorrectly ruled that termination of his parental rights was in the best interests of the children; (2) the Cabinet violated his rights to due process by failing to make reasonable efforts to reunite the family; and (3) he proved the children would not be "abused or neglected" if returned to his care. While Father only appeals certain elements of

KRS[8] 625.090, for the purposes of this analysis, we shall examine the statute in full.

Under Kentucky law, a family court must strictly comply with, and prove by clear and convincing evidence, each element of KRS 625.090 to terminate parental rights. KRS 625.090 outlines a three-part test. First, the family court must find the child 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)(b). And third, the family court must find at least one ground of parental unfitness. KRS 625.090(2).

First, in the case at hand, the family court correctly found D.L.W. and L.J.W. to be abused and neglected children. KRS 625.090 states that:

> (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; . . . .

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[8] Kentucky Revised Statutes.

KRS 625.090(1). As seen, KRS 625.090(1)(a) states that the family court may find "abuse or neglect" from a prior ruling of the same "by a court of competent jurisdiction[.]" *Id.* Here, the family court found D.L.W. and L.J.W. had "been adjudged to be [] neglected child[ren] previously . . . on December 7, 2009 and October 1, 2013." R. at 79.[9]

Also, the family court found the children to be "abused or neglected," as defined by KRS 600.020(1). The statute 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 . . .
>
> . . .
>
> 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;
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> 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;

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[9] We note this appeal involves two, separate cases. Because this matter involves two children, D.L.W. and L.J.W., the cases were separated at the trial level to pertain to each respective child. That consistency follows on appeal. But due to the separate cases, there is some discrepancy between record citations. To remain consistent, we cite only to the record for L.J.W.'s case (2018-CA-001374-MR) but note that each document cited has its respective counterpart in D.L.W.'s case file (2018-CA-001375-MR).

> 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
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> . . .
>
> 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; or
>
> 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).

In the case at hand, the family court found that Father violated five of the nine factors in KRS 600.020(1)(a). Specifically, it found that he:

> created or allowed to be created a risk of or emotional injury to the child[ren] by other than accidental means. On October 29, 2009, the Cabinet became involved after a domestic dispute which resulted in [Father] being arrested for assault 4th degree of [Mother]. While the criminal case was ultimately dismissed, the acts of violence in the presence of his children create a risk of physical or emotional harm.

R. at 79; KRS 600.020(1)(a)(2).

> engaged in a pattern of conduct that rendered him incapable of caring for the immediate and ongoing needs of the child[ren] including, but not limited to, parental incapacity due to alcohol or other drug abuse. Testimony and exhibits established that [Father] has a long history of substance abuse and criminal activity. At the first removal of his son in 2008, [Father] admitted to using drugs and his most recent criminal conviction in June 2018 is for possession of drugs. While he has completed some treatment in 2015, he has been unable to refrain from using and has not engaged in any further treatment or services with the Cabinet. Additionally, his criminal lifestyle has led to multiple long periods of incarceration. This criminal behavior and substance abuse puts [sic] his children at risk of neglect.

R. at 79-80; KRS 600.020(1)(a)(3).

> continuously or repeatedly failed or refused to provide essential parental care and protection for [D.L.W. and L.J.W.]. Testimony provided [Father] has been involved with the Cabinet since 2008. He has also engaged in extensive criminal behavior that has led to multiple periods of incarceration lasting from a couple months to over a year at a time. Even at trial, [Father] has been incarcerated since May 2018 and was not expected to be released until November 2018 at the earliest. As a result, [Father] continuously refused to provide care for his child[ren] both before and after his incarceration, resulting in neglect of his children.

R. at 80; KRS 600.020(1)(a)(4).

> did not provide the child[ren] with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. Testimony provided [Father] has been involved with the Cabinet since 2008. He has also engaged in extensive criminal behavior that has led to multiple periods of incarceration lasting from a couple months to over a year

> at a time. Even at trial, [Father] has been incarcerated since May 2018 and was not expected to be released until November 2018 at the earliest. As such, he failed to provide any essential care, including material care for his children whatsoever.

R. at 80; KRS 600.020(1)(a)(8); and

> failed 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[ren] to the parent that results in the child[ren] remaining committed to the Cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months. Testimony and exhibits showed that [Father] received case plans, at a minimum, in 2014 and 2016. [Father] did complete some drug treatment in 2015, however, continued to use drugs and even received new criminal drug charges since that time. He has failed to address the other issues on his case plan. This failure to work with services has resulted in his children remaining committed to the Cabinet for more than fifteen of the most recent twenty-two months.

R. at 80-81; KRS 600.020(1)(a)(9).

Under KRS 625.090, the family court need only find one factor present, by clear and convincing evidence, to make a finding of "abuse or neglect." As seen here, the family court found Father violated not only one, but *five* of the *nine* factors. From our review, the family court satisfied its requirement to make a finding based on one or more of the listed factors. Therefore, to succeed in his appeal, Father must prove to this Court, by clear and convincing evidence, that each of the family court's five factors listed was incorrectly found. He has not.

For over a decade, Father served multiple periods of incarceration and dealt with persistent substance abuse issues, all at the expense of D.L.W. and L.J.W. From our review of the record, which included Father's, Mother's, and the Cabinet's testimony, we find the family court correctly adjudged the children to be "abused or neglected[.]" Father has failed, and would continue to fail, "to protect and preserve the children's fundamental right to a safe and nurturing home." *C.R.G. v. Cabinet for Health & Family Servs*., 297 S.W.3d 914, 916 (Ky. App. 2009). Furthermore, Father has not seen either of the children for, at least, five years, all the while not providing for them.

Second, once we find the children to be "abused or neglected[,]" we then must determine whether the family court correctly found termination to be in the best interest of the children. KRS 625.090(3):

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

> (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 . . . .

Here, the family court found it in the best interest of D.L.W. and L.J.W. to terminate parental rights. It made this finding by relying on KRS 625.090(3)(c) and (e). In its findings of fact and conclusions of law, the family court found that the Cabinet "made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents." KRS 625.090(3)(c). Under Kentucky law, reasonable efforts is "the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community . . . which are necessary to enable the child to safely live at home." KRS 620.020(11).

From our review of the record, the Cabinet exhausted all reasonable means necessary to accommodate Father's reunification attempts with the children. Specifically, the family court found:

> (1) Prior to the filing of this petition, reasonable efforts have been made by the Cabinet to reunite this child with his parents but those efforts have been unsuccessful.

R. at 81; KRS 625.090(3)(c)

> (2) The Cabinet for Health and Family Services has offered or attempted to offer all reasonable services to the family, including case planning, attempted referrals to community partners, no-cost drug screening, home visits, and supervised visitation services.

Id.

> (3) Despite the availability of these services, the [Father] has failed or refused or has been unable to make sufficient effort and adjustments in his circumstances, conduct, or conditions to make it in the best interest to return [D.L.W. and L.J.W.] to his home within a reasonable period of time, considering the child[ren]'s age.

Id.

It is an uncontroverted fact that the Cabinet gave Father at least two case plans—once in 2014 and another in 2016. Father failed to comply with each case plan. Furthermore, while Father contests this termination, "[D.L.W. and L.J.W. are] currently in an adoptive home. [They are] bonded to [their] foster family and [are] thriving. All of [their] needs are being met and it is expected that [they] will continue to improve with a permanent adoptive placement." R. at 81; KRS 625.090(3)(e).

As previously noted, we may only reverse when the family court's findings are clearly erroneous. *Cabinet for Health & Family Servs. v. I.W., Jr.*, 338 S.W.3d 295, 299 (Ky. App. 2010). Therefore, evidence "is sufficient if there 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). Given our review of the record, and considering this standard, we find an "ordinarily prudent-minded [person]" would agree with the family court's findings that: (1)

termination was in the best interest of the children; and (2) the Cabinet exhausted all reasonable means necessary to reunify Father with the children. *Id*.

Third, the final factor of our analysis is to review whether the family court correctly found at least one ground of parental unfitness. KRS 625.090(2).

> (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:
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> . . .
>
> (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;
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> . . .
>
> (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;
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> . . .
>
> (j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights.

From our review, the family court found three factors present, which led it to make a finding of parental unfitness. It first found Father was "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). In making this finding, it noted Father's habitual stints of incarceration, drug use, and refusal to comply with case plans, as well as the fact that he has not seen either D.L.W. or L.J.W. for, at least, five years. For these reasons, it found that he

> has failed to provide any essential care for his children for more than six months. While [Father] attempted to make some progress on his case plan in 2015, he has failed to actively participate in treatment or communicate with the Cabinet to attempt to rebuild the relationship with the children. Considering [Father's] long history of non-compliance with the Cabinet, his lack of case plan progress or lifestyle change over the last decade, his continued criminal lifestyle, and the length of time his children have been in foster care, there is no reasonable expectation of improvement.

R. at 82; KRS 625.090(2)(e).

Further, the family court found Father "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[.]" KRS 625.090(2)(g). It noted "[Father] has not provided for his children materially or otherwise since at least 2008. . . . [nor] seen his children

since March 2014." R. at 83. And it also found that given his "long history of non-compliance with the Cabinet, his lack of case plan progress or lifestyle change over the last decade, his continued criminal lifestyle, and the length of time his children have been in foster care, there is no reasonable expectation of improvement." *Id.*

Also, in its evaluation of KRS 625.090(2)(j), the family court determined D.L.W. and L.J.W. have "been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights." R. at 83-84. It noted the children "entered foster care on September 6, 2013 which was more than thirty-six months prior to the termination petition being filed on November 28, 2016." Accordingly, we agree with the family court's findings, which clearly show a pattern of Father's unfitness to be a parent. From our review, the family court provided clear and convincing evidence for each of the three findings made regarding KRS 625.090(2).

In sum, we have "reviewed the [family] court's (1) neglect and abuse determination; (2) finding of unfitness under KRS 625.090(2); and (3) best-interests determination. In light of our review, we . . . perceive no basis warranting relief on appeal." *A.C. v. Cabinet for Health & Family Servs*., 362 S.W.3d 361, 372 (Ky. App. 2012).

Briefly, we address Father's contention that the family court erred when it terminated his parental rights, since, according to him, he established by a preponderance of the evidence that the children would no longer be "abused or neglected" if returned to him. *See* KRS 625.090(5). The family court possesses discretion to make decisions to terminate parental rights, therefore, we review only for an abuse of discretion. *Guffey v. Guffey*, 323 S.W.3d 369, 371 (Ky. App. 2010). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (citation omitted).

Under the termination statute, "[i]f 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 the court in its discretion may determine not to terminate parental rights." KRS 625.090(5). "Notably, the statute does not mandate that a family court must decide not to terminate the parental rights in such a situation. Plainly, the use of the word 'discretion' in the statute renders it permissive." *See C.A.B. v. Cabinet for Health & Family Servs*., No. 2014-CA-001144-ME, 2015 WL 509582, at *3 (Ky. App. Feb. 6, 2015).

Here, Father acknowledges the language of the statute is "permissive" but contends the evidence in this matter mandates reunification. We disagree. Per his brief, Father stated that "he is willing to do anything necessary to obtain his son and he completed the following: 1. Intensive Outpatient; 2. Stable Housing; 3. Stable Employment; and 4. Commitment to change; Plus, [he] said he would be willing to attend any additional classes or assessment necessary."

Like the family court, we do not see the "abuse or neglect" of the children ceasing if we allow reunification. On the contrary, while anything is possible, it seems almost inevitable that continued "abuse and neglect" would occur. In our review, the Cabinet provided Father many bites at the proverbial apple for reunification, with him failing each time. From our review, the Cabinet provided Father case plans in 2014, 2016, and 2017. He failed to complete each of them. And Father has a lengthy record of unhealthy life choices, which includes numerous incarcerations and habitual acts of substance abuse. As early as last year, he served time on a possession of methamphetamines charge. We note that this was *after* he completed an outpatient treatment program. While Father has stable housing and a job awaiting him, he has provided no indication that his unhealthy lifestyle would cease upon reunification. Therefore, Father did not prove that the preponderance of the evidence weighs in his favor, and we will not afford him reunification with D.L.W. and L.J.W.

CONCLUSION

For the foregoing reasons, we affirm the Fayette Family Court's August 24, 2018 order terminating Father's parental rights.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Crystal McVay Shepard Lexington, Kentucky	Tiffany L. Yahr Lexington, Kentucky