

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-001733-ME

N.Y.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KATHY STEIN, JUDGE  
ACTION NO. 18-AD-00098

CABINET FOR HEALTH AND FAMILY  
SERVICES, COMMONWEALTH OF  
KENTUCKY; AND S.Y., A MINOR CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, JONES AND K. THOMPSON, JUDGES.

ACREE, JUDGE: Appellant, N.Y., appeals the Fayette Circuit Court's October 29, 2018 order terminating parental rights to his biological child, S.Y. Father argues that the family court's findings of fact were unsupported by substantial evidence and the order was clearly erroneous. After review, we affirm.

## FACTS AND PROCEDURE

The child at the heart of this termination proceeding is S.Y. (Daughter). Her mother, S.R. (Mother), was married when Daughter was born on January 21, 2017, but not to Daughter's father. When Daughter was conceived and when she was born, Mother lived with the Appellant, N.Y. (Father).

Mother already had lost her parental rights to prior children. This is why the Cabinet for Health and Family Services was involved in Daughter's life almost from the start. Mother stipulated to neglecting Daughter; Daughter was temporarily placed in the custody of the Cabinet.

After paternity testing proved N.Y. was the father, the Cabinet developed case plans that would ensure a return of Daughter to Mother's and/or Father's custody. Because Mother does not challenge the family court's termination order, our primary focus is on Father's case plan and his efforts to work it. The facts surrounding the plan and those efforts were elicited at the termination hearing where the first witness was the original case worker, Lauren Barker.

Barker stated that when the emergency custody order was filed, Mother refused to work a case plan, failed to complete drug abuse counseling, and had no appropriate relatives for placement at the time Daughter was born.<sup>1</sup> On

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<sup>1</sup> Father's immediate relatives were not contacted because paternity had not yet been established.

January 30, 2017, Mother stipulated to neglect and was ordered to drug screen, while Father was ordered to take a paternity test.

On February 8, 2017, Barker met with Mother and Father (deemed at that time the putative father) to set up a case plan following Mother's stipulation of neglect. After Father's paternity was established on February 23, 2017, the Cabinet considered placement with Father but ultimately decided against it because Mother was still living with Father and she had established a history of child neglect and admitted neglecting Daughter. Father's employment was unstable and he had difficulty paying bills. He had three other children not in his custody and struggled to support them. He also claimed he could not afford a drug screen to ensure the Cabinet that he was not a user or abuser of drugs or alcohol. Consequently, the Cabinet retained custody and established reunification case plans for both Mother and Father to work.

Father interprets the record before us as establishing that, until July 2017, he was successfully working his case plan. But Mother, who was entirely unsuccessful in working hers, was still living with Father and there is evidence of domestic violence during this period. The clearer proof is that after this initial and questionable period, Father became progressively less compliant with the family court's orders and the Cabinet's recommendations in his case plan.

Father's visits with Daughter, which had been unsupervised, were now supervised. He became unreliable in his communications with the Cabinet. He changed his phone number multiple times, as many as six or eight times. When Father did make contact, interactions with the Cabinet and the foster mother were sometimes inappropriate.

In September 2017, Barker transferred the case to Cabinet social worker Alona Medyna. Medyna stated that from September to December 2017, she had difficulty maintaining contact with Father and, although Father was not fully non-compliant with drug screens, he missed a few and tested positive for alcohol on two occasions. Despite the positive alcohol screens, Father refused to take part in alcohol abuse assessments.

Medyna testified that during this time Father had stable housing but was unable to produce pay stubs to ensure his employment status. She also stated that during supervised visits Father failed to bring necessary items for Daughter such as a diaper bag or a bottle for feeding. As of December 2017, Father also failed to complete a domestic violence assessment, failed to complete a substance abuse assessment, and failed to complete a parenting assessment. Later that month, Medyna attempted to devise a new case plan for Father, but he refused to sign it because he did not believe he needed to take part in the assessments and wanted to speak with his attorney first.

On December 18, 2017, the permanency goal to return Daughter to either parent was changed to termination and adoption because of a lack of progress by both Mother and Father on their case plans and due to the substantial amount of time Daughter had been in the Cabinet's custody.

Medyna also testified that the Cabinet attempted placement of Daughter with Father's parents and the family court conducted a special hearing on the matter at which Father failed to appear. An evaluation for Father's parents' home was attempted on March 21, 2018. The Cabinet did not approve the home because Father's parents cut short the visit for a medical appointment and minimized their concern over Father's positive alcohol screens and allegations of domestic violence. Father eventually completed his recommended assessments on June 9, 2018, but he did not comply with any of the counselors' recommendations.

On July 18, 2018, Father's supervised visits with Daughter were suspended due to, what Medyna perceived, as threats against her and the family court. By the time of the parental rights hearing, Daughter had been in the custody of the Cabinet for twenty-one months.

Father's testimony presented a somewhat different view. He stated he did not believe the Cabinet was justified in taking Daughter into custody when she was born. Regarding the domestic violence, Father said it never happened, that he was confused by the accusation, and did not want to take part in the assessment

because he was not permitted to explain his side of the story. He acknowledged missing drug screens but reiterated that he consistently screened negative for drugs. He sometimes tested positive for alcohol but claimed he did not know he was being tested for alcohol use. He agreed he should not use alcohol while caring for Daughter. Furthermore, Father claims the counselors never gave him any sort of recommendations, but he intended to complete all the requirements necessary to be reunited with Daughter.

After hearing the evidence, on October 29, 2018, the family court terminated Father's parental rights. The court found Daughter was an abused or neglected child and found it would be in her best interests to terminate the parental rights of her biological parents. Father's appeal followed.

### **STANDARD OF REVIEW**

Where the sufficiency of the evidence is challenged on appeal, we are permitted to reverse only where the trial court's findings of facts were clearly erroneous. *Cabinet for Health & Family Servs. v. I.W.*, 338 S.W.3d 295, 299 (Ky. App. 2010). All that is needed "is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citation omitted).

## ANALYSIS

Father raises several grounds for reversal, all based on his belief the evidence was insufficient to prove the statutory requisites for termination.

Termination of a party's parental rights is proper upon satisfying a three-part test by clear and convincing evidence. *Cabinet for Health and Family Serv. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). First, the court must find the child "abused or neglected," as defined by KRS<sup>2</sup> 600.020(1). 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). The family court's termination decision will only be reversed if it is clearly erroneous. *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). Such a decision is clearly erroneous if there is no substantial, clear, and convincing evidence to support the decision. *Id.*

After reviewing the record, we find it contains sufficient evidence to support the family court's decision to terminate Father's parental rights.

Father argues the family court erred in finding he neglected Daughter. The Cabinet, to the contrary, asserts it presented clear and convincing evidence that Daughter was a neglected child pursuant to KRS 600.020(1)(a)(9). We agree.

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<sup>2</sup> Kentucky Revised Statutes.

Relevant to this case, the statute clarifies that an “[a]bused or neglected child” means a child whose health or welfare is harmed or threatened with harm when” his or her parent:

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; [or]

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

....

7. Abandons or exploits the child; [or]

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 . . . . [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).

There was sufficient evidence presented during the termination hearing, and applicable under these standards, from which the family court could, and did, conclude that Father neglected Child. KRS 625.090(1)(a). Father missed



nineteen scheduled visits with Daughter between March 2017 and July 2018; he tested positive for alcohol twice at the end of 2017 and did not complete an assessment for alcohol abuse until six months later; he failed to drug screen seven times between October 2017 and June 2018; and he failed to make significant progress and failed to fully comply with the terms of the case plan. The Cabinet designed that case plan specially to address Father's circumstances and established achievable criteria which, if Father met them, would accomplish the goal of reuniting Father and Daughter. Father chose to prioritize other things as more important than that goal.

The family court has broad discretion to determine whether a child is abused or neglected. *R.C.R. v. Commonwealth, Cab. for Human Res.*, 988 S.W.2d 36, 38 (Ky. App. 1998). “[T]he findings of the [family] court will not be disturbed unless there exists no substantial evidence in the record to support its findings.” *Id.* We must affirm because there is such evidence in this case.

Father also asserts that the termination of his parental rights was not in the best interests of Daughter. The Cabinet argues it proved by clear and convincing evidence that the termination of Father's parental rights was in Daughter's best interests. Father argues that the family court abused its discretion when it agreed with the Cabinet. We disagree.

KRS 625.090(3) lays out the factors courts must consider in determining the best interest of a child. These factors are: (1) mental illness which renders the parent unable to care for the child; (2) acts of abuse or neglect toward any child in the family; (3) the Cabinet's reasonable efforts to reunite the child with the parents if the child has been separated from them; (4) the efforts and adjustments the parent has undertaken to make it in the child's best interest to reunify the child and the parent; (5) the physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare; and (6) the payment or the failure to pay a reasonable portion of the child's physical care and maintenance. KRS 625.090(3)(a)-(f). All these factors must be considered by the court. All were considered in this case.

There is no evidence that Father suffers from debilitating mental disease that would render him incapable of caring for Daughter. However, the proof was that Father neglected Daughter in several ways, including by declining opportunities for visitation with her. He failed to accomplish achievable tasks recommended by the Cabinet that would evince his willingness not to neglect her. Daughter has bonded with her foster family where she has been placed, with her sibling, for adoption. According to the evidence of record, Daughter is now thriving. Father has done little, if anything, to contribute to Daughter's physical

care or maintenance or to demonstrate that reunification would be in Daughter's best interests.

Finally, the family court was required to find, and did find, at least one ground under KRS 625.090(2) to justify termination of Father's parental rights. In fact, the court found three.

Applying KRS 625.090(2)(e), the family court said Father, for a period of not less than six (6) months, continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child. There is substantial evidence to support that finding in Father's refusal to address the domestic violence in his home, failure to address Mother's substance abuse,<sup>3</sup> and his own failure to establish that he can refrain from using alcohol while parenting by working the reunification plan established by the Cabinet. Based on the series of Father's failures to adequately work his reunification plan, the family court concluded there is no reasonable expectation of improvement in parental care and protection, considering the age of Daughter.

The family court also found under KRS 625.090(2)(g) that 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

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<sup>3</sup> Although Father asserts that Mother has left the residence, their relationship is ongoing as demonstrated by the birth to Father and Mother of another child in 2018.

education reasonably necessary and available for the child's well-being. Although Father could only provide the Cabinet with sporadic proof of steady employment, he resided with his parents and was not poverty-stricken. Nevertheless, he failed to provide for Daughter in any moderately substantial way. Because of his failure to comply with court orders and Cabinet recommendations, the family court concluded there is no reasonable expectation of significant improvement in Father's conduct in the immediately foreseeable future, considering the age of Daughter.

Because the evidence clearly showed Daughter to have been in foster care and the responsibility of the Cabinet for twenty-one (21) of the forty-eight (48) months preceding the hearing, the family court concluded the ground for terminating Father's parental rights under KRS 625.090(2)(j) was met.

After thoroughly reviewing the record, considering Father's arguments, and analyzing the family court's order, we can find no legal basis for reversing the court's parental rights termination.

### **CONCLUSION**

For the foregoing reasons, we affirm the October 28, 2018, order of the Fayette Family Court terminating Father's parental rights.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET  
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