

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001763-ME

L.F.

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 18-AD-500247

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; U.K.;
AND S.G.K. (A MINOR CHILD)

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, KRAMER AND TAYLOR, JUDGES.

KRAMER, JUDGE: L.F. (Mother) appeals from the Jefferson Family Court order terminating her parental rights to S.G.K. (Child).¹ After careful consideration, we affirm.

¹ This order also terminated the parental rights of U.K., Child's father. However, he did not file an appeal.

Child was born in March 2017. Shortly after giving birth, Mother admitted to abusing substances while pregnant. Stemming from that admission, an emergency custody order was entered giving the Cabinet custody of Child. Since that time, Child has remained in the Cabinet's custody. In September 2017, Mother stipulated that Child was abused or neglected due to her substance abuse while pregnant.

In December 2017, Mother was given the following tasks on her case plan to regain custody of Child: (1) comply with the START² program; (2) complete a substance abuse assessment and follow all recommendations; (3) submit to random drug screens; (4) attend AA³ and/or NA⁴ meetings regularly and obtain a sponsor; (5) attend supervised visitation; and (6) complete a psychological assessment and follow all recommendations. Also, it was recommended Mother obtain stable housing and complete an intensive outpatient program (IOP) to address her substance abuse issue. To that end, START repeatedly offered Mother housing in structured living facilities. Freedom House and St. Jude were two of

² "START" stands for Sobriety Treatment And Recovery Team. This is a specialized unit that provides intensive services including quick access to substance abuse treatment. To qualify for START services, there must be a child under the age of five in the family who has been subjected to abuse or neglect resulting from parent substance abuse issues.

³ Alcoholics Anonymous.

⁴ Narcotics Anonymous.

the primary options. However, Mother was asked to leave Freedom House due to noncompliance and she never spent a substantial amount of time in any other structured living program, despite having several opportunities to do so.

While Mother did make some progress in certain areas of her case plan, she was never fully compliant with the Cabinet's directives. Primarily due to this overall lack of progress, the Cabinet changed the goal to adoption and petitioned to terminate Mother's parental rights as to Child in June 2018. A hearing took place over two days, and the family court heard from: (1) a psychologist who performed a psychological assessment of Mother; (2) two case workers from the Cabinet assigned to the subject family; (3) Mother's counselor through START; and (4) Mother. Following the hearing, the family court entered findings of fact and conclusions of law and an order terminating Mother's parental rights in October 2018. This appeal followed. Further facts will be developed as necessary to address Mother's arguments.

In reviewing a decision to terminate parental rights, we apply a clearly erroneous standard. *Commonwealth, Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010); CR⁵ 52.01. "Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family

⁵ Kentucky Rule of Civil Procedure.

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 (citation omitted).

Involuntary termination proceedings are governed by KRS⁶ 625.090, which provides that a family court may involuntarily terminate parental rights only if the court finds by clear and convincing evidence that a three-pronged test has been met. First, the children must be deemed abused or neglected as defined by KRS 600.020(1).⁷ KRS 625.090(1)(a). Second, termination must be in the child's best interest, and the court is provided with a series of factors it shall consider when making this determination. KRS 625.090(1)(c); KRS 625.090(3). Third, the court must also find at least one ground of parental unfitness listed in the statute. KRS 625.090(2).

On appeal, Mother does not take issue with the second prong of the test. Rather, she argues there was not clear and convincing evidence to deem Child abused or neglected; and, that there was not clear and convincing evidence of a KRS 625.090(2) parental unfitness ground. Mother makes two additional arguments asking this Court to: (1) find KRS 625.090(1)(a) unconstitutional; and

⁶ Kentucky Revised Statute.

⁷ Although Child was previously found to be an abused or neglected child in September 2017, this finding can also be made at the termination hearing pursuant to KRS 625.090(1)(a)(2), which occurred in this case.

(2) “revisit” the holding in *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), requiring appointed counsel to represent litigants on appeal. We will address each argument in turn.

Mother first argues that the family court erred in finding that Child was abused or neglected. In her view, the Cabinet did not meet its burden of proof.

KRS 625.090(1)(a)(2) allows a family court to make a finding that a child has been “abused or neglected” in the termination proceeding. Here, the family court found, by clear and convincing evidence, that the children were abused and neglected by Mother when measured by the standard set out in KRS 600.020(1)(a). Specifically, the family court found subsections three and four of that provision applied in this case. Those subsections state, an “abused or neglected child” is one whose health or welfare is harmed or threatened with harm when 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;⁸
4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child[.]

⁸ This is the updated version of this subsection as of June 27, 2019. The only change with the subsection was as to punctuation.

As previously mentioned, Mother did make some progress on her case plan. However, she did not engage meaningfully until approximately a year after Child was born. Even after she started working her case plan, she continually missed appointments and drug screens. In fact, there was an instance wherein Mother admitted to altering her drug screen. However, Mother's response at the hearing when confronted about her drug use while pregnant with Child was even more disconcerting. Despite stipulating to abusing drugs while pregnant with Child in an underlying dependency, neglect, and abuse action, Mother expressed reluctance about admitting that and stated, "that should have been kept between me and my sponsor." This reluctance is particularly troubling for someone who has a long history of dealing with substance abuse.

Furthermore, Mother was repeatedly told that stable housing was required to regain custody of Child. The structured living programs were suggested to help Mother address her substance abuse issues and would have provided the stable housing she needed to regain custody. Mother entered Freedom House in May 2017, but was dismissed for noncompliance. Thereafter, she was referred to St. Jude in September 2017 and again in March 2018; however, she did not follow through either time. Lastly, Mother entered Freedom House again in June 2018, but left after only four days. Simply put, this continuous refusal to fully commit to her case plan rendered Mother unable to care for Child's

needs. In light of these facts, the family court's ruling that Child was neglected was supported by substantial evidence, and therefore, was not in error.

Mother asserts the same argument regarding the family court's determination that at least one of the KRS 625.090(2) grounds of parental unfitness applied to this case. The family court found that KRS 625.090(2)(e)(g) and (h) all applied to the instant case.

KRS 625.090(2)(e) states that a court may terminate a parent's rights if it finds that a parent, for a period of not less than six months, has failed to provide essential parenting care and protection for the children, and there is no reasonable expectation of improvement considering the age of the children. Evidence at the hearing established that Child was removed from Mother's care due to ongoing concerns of substance abuse and remained in foster care for approximately eighteen months prior to the final hearing. Child has remained in foster care primarily due to Mother's lack of progress on her case plan. In addition to the concerns mentioned addressing Mother's last argument, Mother also has failed to complete protective parenting classes and failed to meet with a psychiatrist to address a significant mental health concern. This specific concern was brought to light when Mother reported to her Cabinet case worker, and again in her group therapy session, that she was missing drug screens and therapy sessions because a demon was living in her mattress and holding her hostage.

Mother's therapist scheduled a psychiatry appointment three separate times to address this issue; however, Mother missed all three appointments. In sum, Mother has failed to adequately address her substance abuse, mental health, and housing concerns, which renders her incapable of providing essential parental care and protection for Child.

In response, Mother argues that the family court erred in finding that there was no reasonable expectation of improvement in Mother's circumstances. Mother cites the progress she has made during the months preceding the final hearing. While we commend Mother for the positive steps she has taken, the fact remains that for at least eighteen months Mother has failed to make sufficient progress to allow Child to be returned to her care. In fact, Mother does not have custody of any of her six other children for similar reasons. Furthermore, Mother's reluctance regarding her admission of using drugs while pregnant, as well as her failure to address her mental health concerns, casts doubt that she will be able to make the requisite progress to regain custody of Child in the foreseeable future. Therefore, the family court's KRS 625.090(2)(e) finding was supported by substantial evidence; thus, it was not clearly erroneous. And because the plain language of the statute requires only one KRS 625.090(2) ground to apply, we need not address the other subsections.

Mother's next argument urges this Court to hold that KRS 625.090(1)(a)(1) is "unconstitutional as a matter of law."⁹ However, Mother did not argue this in front of the family court nor did she notify the Attorney General. Both are prerequisites to appellate review of this issue. *See Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 831 (Ky. App. 2014) (citing *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011)); KRS 418.075 (stating that no judgment shall be entered which decides the constitutionality of a statute until the Attorney General is given notice and an opportunity to be heard). Therefore, we decline to address this argument.

One final matter is brought up in Mother's brief. She asks us to "revisit the holding of *A.C. v. Cabinet for Health and Family Servs.*, 632 S.W.3d 361 (Ky. App. 2012) with respect to the appointment of counsel without compensation during the appeal of a termination of parental rights." *A.C.* is binding precedent on this Court, and a three-judge panel of this Court has no

⁹ That statutory subsection allows for involuntary termination of parental rights if "[t]he child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction[.]" KRS 620.100(3) states that "a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence." Thus, Mother argues the prior determination of abuse or neglect rested on a lower burden of proof by the Cabinet. In her view, its use here as a basis for termination would violate her right to hold the Cabinet to the higher burden of clear and convincing evidence.

authority to overturn it. *See Armstrong v. Armstrong*, 34 S.W.3d 83, 86-87 (Ky. App. 2000); *see also* SCR¹⁰ 1.030(7)(d).

For the reasons stated herein, the order of the Jefferson Family Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, CABINET
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¹⁰ Supreme Court Rule.