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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001821-ME

B.A.H. APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE MIKE MCKOWN, JUDGE
ACTION NO. 17-AD-00006

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, GOODWINE, AND LAMBERT, JUDGES.

GOODWINE, JUDGE: B.A.H. ("Father") appeals from the Edmonson Family Court's October 5, 2017 order terminating his parental rights to F.M.D. ("Child"). Father asserts the family court erred in terminating his parental rights because it found the Cabinet for Health and Family Services ("the Cabinet") provided him

reasonable efforts at reunification prior to filing a petition for involuntary termination of his parental rights. Based on our review of the record, we affirm.

BACKGROUND

Child was born on July 3, 2010, to L.A.D. ("Mother"). One year later, the family court determined Father was Child's biological father. Mother and Father both have troubled lives, which have adversely affected Child for the past ten years.

For most of his life, Mother cared for Child, with Father sporadically entering the picture. But in January 2013, the Cabinet temporarily removed Child from Mother's custody. This removal lasted eight months. The Cabinet allowed Mother unsupervised visitation in August 2013, after she substantially complied with the Cabinet's case plan.

Unfortunately, over the next four years, circumstances did not change much for Child. In March 2014, the Cabinet took temporary custody of Child, and Mother stipulated to his neglect at the May 29 adjudication hearing. The following year, Child sustained burns on his eye and hand from playing with fireworks while on an unsupervised visit with Mother. Mother did not seek medical attention, and Child suffered from second-degree burns. Later that year, during an unsupervised visit on Thanksgiving, Child suffered a large bruise on his neck and elbows. After

this incident, the Cabinet suspended Mother's visits based on the recommendation from Child's therapist. Mother stipulated to dependency on July 23, 2015.

In February 2017, Mother began attending appointments with Child's therapist. But that did not last long. One month after her first appointment, Mother quit attending the visits. She continued missing appointments and ignored Child's numerous attempts to contact her. Later that month, Child's therapist finally reached her, and Mother informed him that she would not be attending any other appointments with him. That same month, Mother effectively quit working her case plan and did not attend any subsequent meetings with Child's therapist. Sadly, the family court entered an emergency custody order in March 2017, which removed Child from Mother's care. She had allowed her then-boyfriend to whip Child with a cane pole switch, which left marks on Child's body. On March 13, 2017, the Cabinet filed a petition for the termination of parental rights on Child's behalf.

As previously noted, during Child's life, Father had been mostly absent. Father has an extensive criminal record. He was incarcerated for much of Child's life, and when he was not incarcerated, he had been on the run from the authorities and out of contact. Starting with Child's 2014 removal, Father was not incarcerated at the time. But when contacted by the Cabinet, he informed a social worker that he did not want a case plan because he was going to be incarcerated for

a long time. In April 2015, Father was out on parole from prison. During his parole, Father visited Child—who was in the care of a paternal relative—but never contacted the Cabinet about the meeting nor requested a case plan for him to complete. While out on parole in 2015, Father was charged with and convicted of manufacturing methamphetamine and received a twelve-year sentence, with a minimum serve-out date of July 2024. His maximum serve-out date is July 2027.

In May 2017, while serving that twelve-year sentence, Father's attorney informed a Cabinet social worker, Jennifer Chandler, that Father wanted to complete a case plan. Chandler and Father spoke by phone and discussed objectives for the case plan. After the call, Chandler mailed Father a copy of the case plan for him to sign. Chandler mailed the plan by certified mail and received the green card, but never received Father's signed copy. Chandler then sent a follow-up letter to Father, and, once again, did not receive a signed copy of the case plan.

On September 14, 2017, the family court held a final hearing on the petition for termination of parental rights. The family court concluded that: (1) Child had been abused and neglected, as defined in KRS[1] 600.020(1); (2) Mother and Father had continuously and repeatedly failed to provide, or were incapable or providing, essential parental care of Child with no reasonable expectation of

[1] Kentucky Revised Statutes.

improvement; (3) Mother and Father, for reasons other than poverty alone, have continuously or repeatedly failed to provide essential food, clothing, shelter, medical care, or education reasonably necessary and available for Child's well-being; (4) Child had been in foster care for fifteen of the past 22 months preceding the filing of the Cabinet's termination petition; and (5) it considered all factors in KRS 625.090(3) in making its determination. Ultimately, the family court terminated Mother and Father's rights. Father appealed.

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 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, 726, 70 S.W.2d 5, 9 (1934). Because "termination decisions are so factually sensitive, appellate courts are generally loath to reverse them, regardless of the outcome."

D.G.R. v. Com., 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*.

Under Kentucky law, a family court must strictly comply with, and establish 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)(c). And third, the family court must find at least one ground of parental unfitness. KRS 625.090(2).

Here, Father appeals the family court's order terminating his parental rights of Child. He makes the singular argument that the family court was clearly erroneous in concluding the Cabinet exhausted "reasonable efforts to reunite the

child with the parents[.]" KRS 625.090(3)(c). Based on this alleged incorrect conclusion, Father asks us to reverse the family court's order.

At the outset of our analysis, we note that rather than expounding on the entirety of KRS 625.090's three-factor test, and each factor's correlation to the case at hand, we narrowly review the third factor outlined in KRS 625.090(3)(c). We do this because Father's only procedural cause for relief is confined to this section. Father appeals only the family court's conclusion that the Cabinet made reasonable efforts to reunify him with Child—as outlined in KRS 625.090(3)(c); therefore, he has waived any other arguments regarding the family court's substantive analysis.

Father offers a skewed—and ultimately incorrect—view of KRS 625.090(3). Essentially, Father focuses exclusively on subsection (c), completely ignoring the plain understanding of KRS 625.090(3) and *all* of its factors. According to Father, the family court did not have enough evidence to conclude the Cabinet made reasonable efforts to reunify him with Child. And since this conclusion was not backed by substantial evidence, the family court was clearly erroneous and we should reverse. But the plain language of KRS 625.090(3)(c) paints a different picture, which guides our decision in this case.

Under 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:

> (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;
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> (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.

Clearly, the plain language of KRS 625.090(3) requires a family court to consider all six factors together, rather than isolate, and fulfill, each one separately. In fact, just this year, this Court noted in a termination case, "All [of KRS 625.090(3)(c)'s] factors must be considered but not all need be proven to find termination is in the children's best interest." *K.L.B. v. Cabinet for Health & Family Servs.*, Nos. 2019-CA-001487-ME and 2019-CA-001493-ME, 2020 WL 1898878, at *3 (Ky. App. Apr. 17, 2020). Given KRS 625.090(3)'s plain language, as well as our past jurisprudence, we hold there is no requirement that the court find each of the listed factors present to determine that it is in a child's best interests to terminate parental rights. *See D.G.R.*, 364 S.W.3d at 115 ("As the statute itself notes, the factors are to be 'considered' in deciding whether termination is in the child's best interest. They do not necessarily dictate a result and are always subordinate to the best-interest finding that the court is tasked with making.").

Based on our review of the record, the family court based its order on its factual findings in correlation with its conclusions evaluated under KRS 625.090. Specifically, the family court explicitly noted in its findings of facts and conclusions of law, "All the factors in KRS 625.090(3) were considered." Record ("R.") at 59. But, as previously noted, Father only challenges the family court's order as pertaining to the Cabinet's reunification efforts. From our review of the

record, the family court made detailed findings, which it used to guide its conclusions of law—including all six factors analyzed under KRS 625.090(3).

Even if we look only at subsection (c), Father's argument still fails. Reasonable efforts are defined as 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).[2] The Cabinet's efforts always begin with a signed case plan.

When the Cabinet and Father first discussed case planning in 2014, Father did not want to work a case plan due to his impending incarceration. When he was on parole in 2015, he visited with Child–who was placed with a paternal relative–but Father did not contact the Cabinet indicating a desire to complete a case plan.

After the Cabinet filed its petition to terminate parental rights, Father's attorney contacted the Cabinet to advise it that Father wished to complete a case plan. Father was serving his twelve-year sentence for manufacturing methamphetamine. As a result, Chandler and Father spoke by phone and she outlined the case plan. She completed the case plan and mailed it to Father via certified mail on May 27, 2017, for his signature. Chandler received the green

[2] We use the version of the statute in effect at the time of the judgment. The statute was amended effective June 27, 2019, and section 11 can now be found at section 13.

card, but Father never returned the signed case plan. Chandler then sent a follow-up letter to Father and, once again, did not receive a signed copy of the case plan. Thus, the family court found "CHFS has rendered or attempted to render all reasonable services to [Mother] and [Father] in an effort to bring about a reunion of the family but these services have not been utilized." R. at 55. Father's case plan was based on what he could do while he was incarcerated—substance abuse treatment, parenting classes, and classes to help him not reoffend. R. at 58.

Without a signed case plan, the Cabinet could not offer any services to Father. Thus, the family court did not err in finding that the Cabinet exercised or attempted to exercise reasonable efforts at reunification. Since Father confines his argument solely to KRS 625.090(3)(c), we need not engage in any further analysis of the family court's conclusions. Finding no error, we affirm.

CONCLUSION

For the foregoing reasons, we affirm the family court's October 5, 2017 order terminating Father's parental rights.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas Vallandingham
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BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

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