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Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000279-ME

K.D.S.

APPELLANT

APPEAL FROM SCOTT FAMILY COURT
v. HONORABLE KIMBERLY BLAIR WALSON, SPECIAL JUDGE
ACTION NO. 18-AD-00016

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; B.M.; AND B.M.B.M., A
MINOR CHILD

APPELLEES

AND
NO. 2019-CA-000280-ME

K.D.S.

APPELLANT

APPEAL FROM SCOTT FAMILY COURT
v. HONORABLE KIMBERLY BLAIR WALSON, SPECIAL JUDGE
ACTION NO. 18-AD-00017

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; B.M.; AND D.D.M., A
MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, KRAMER, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: K.D.S. (mother) appeals the termination of her parental rights to B.M.B.M. (son) and D.D.M. (daughter) (collectively children).

Based upon the evidence and credibility findings against mother, we affirm.

Mother and B.M. (father) had two children. Son was born in October 2013 and daughter was born in March 2015. The children were removed from mother's care and committed to the Cabinet for Health and Family Services on December 16, 2015, after son was found alone outside, and mother was arrested on drug charges.

On May 25, 2016, children were adjudicated abused and neglected and committed to the Cabinet in a dependency, neglect, and abuse (DNA) case.

On May 7, 2018, the Cabinet filed for termination of mother's and father's parental rights.¹ As to mother, the Cabinet alleged that she was incapable of providing essential care or the essentials of life to children and that children had been out of the home for more than fifteen of the last twenty-two months.

The termination trial was held on January 9, 2019. Testifying for the Cabinet were Patrick Nevitt, Jennifer Smith, and Alison Hines.

Nevitt explained he was the family's previous ongoing worker for the Cabinet. He testified the Cabinet received a referral in December of 2015 when son was found wandering around outside either with no pants or with just a t-shirt and pants, mother and father were found asleep and incapacitated on drugs and possessed prescription pills that were not theirs, and daughter had significant diaper rash.

Nevitt testified about the case plans mother signed and the tasks she was required to complete. Nevitt stated mother was supposed to: complete a substance abuse assessment and follow all recommendations, complete a mental health assessment and follow all recommendations, attend narcotics anonymous or alcoholics anonymous (NA/AA) twice weekly and have signed attendance sheets submitted, not drink alcohol or use illegal drugs, complete parenting classes,

¹ While the Cabinet also sought and obtained termination of father's parental rights, we do not discuss facts regarding him except as is relevant to mother's appeal because father did not appeal.

maintain stability in housing and employment, and visit with children. He testified that in later case plans mother was required to complete an assessment with Dr. Feinberg, have a new substance abuse assessment, and was also required to call in to confirm visits with children.

The case plans were introduced into evidence. The requirements were consistent with Nevitt's testimony.

Nevitt acknowledged that mother had completed a substance abuse assessment and enrolled in a drug treatment program. Nevitt acknowledged that mother told him she had completed most of her parenting classes and that she was regularly attending NA/AA, but she did not provide proof and mother did not complete the required assessment with Dr. Feinberg.

Nevitt stated that while mother initially did well during supervised visits, after two to three months, mother began missing visits, speaking inappropriately to children, and her hygiene became poor. He explained mother missed about two visits a month or about half of the visits and even after the case plan was changed to require mother to confirm visits the day before, sometimes she would not attend.

Nevitt overheard mother telling children that the foster parents were evil, and children did not have to obey them, so he had to interrupt and redirect

mother. After mother reported to Nevitt that children had bruises, the Cabinet investigated.

Nevitt testified mother's body odor was so severe that other clients in the waiting room complained and left, and after she visited with the children he had to wipe off every surface of the room and spray Lysol due to the lingering odor. Nevitt acknowledged that poor hygiene would not be an appropriate reason to terminate mother's parental rights.

Nevitt testified that other than his initial visit to mother's home, in which he found her home was clean and appropriate, he was never able to complete any other home visits whether scheduled or unscheduled. He was concerned that mother did not have stable and appropriate housing.

Nevitt was also concerned that mother was using synthetic marijuana because she was arrested in June or July of 2017 for having synthetic marijuana in her bra. He acknowledged that mother only had one positive drug test with the Cabinet, which was positive for marijuana metabolites, but otherwise only tested positive for suboxone for which she had a prescription.

Nevitt testified that mother did not provide children with any financial support, did not provide essential parenting or the essentials of life, and mother did not show improvement. He did not know of anything else the Cabinet could do to help her.

Smith was the current ongoing worker. She testified mother never provided her with any proof that she completed any part of her case plan. Smith testified that she tried to visit mother's home on multiple occasions at the two addresses she was provided and mother either would not open the door or someone else would say mother had just left; Smith was unsure where mother lived.

Smith testified that children were currently in a concurrent home, having been returned to the same home they were initially placed in as of March or May of 2018. She explained children were removed from the home after an allegation was made against the foster parents that was investigated and then determined to be unsubstantiated.

Smith testified that son is doing well but daughter is struggling; daughter has mental health diagnoses and can be violent with other children but is in therapy to address these issues. Smith explained the current foster parents have sought help for daughter, including taking her to a developmental psychologist. Smith opined that the children were bonded with their foster family.

Smith testified that mother missed visits about half of the time. Smith testified that mother interacts with children to a degree, reads to them, brings them snacks and drinks, and brought them Christmas presents. Smith explained children listen to mother, but they do not appear to be bonded to mother and call mother by her first name.

Smith testified she has ongoing concerns about mother's ability to parent children, the limited bonding they have with her, the stability of her housing, and uncertainty about mother's sobriety and mental health. She explained the Cabinet's concerns about mother were largely the same since December 2015, but there were no other services the Cabinet could offer mother. Smith testified that mother never produced proof that she completed her mental health assessment, her substance abuse assessment, her assessment with Dr. Feinberg, or was regularly attending NA/AA.

Hines, a Cabinet supervisor, testified she was present on the night children were removed and saw children. She recounted that children's bodies and their clothes were extremely dirty, both children had severe diaper rash, and they smelled of urine and cigarette smoke.

Hines testified she believed daughter's behavioral problems were caused by mother leaving her alone for long periods of time but acknowledged this was exacerbated by daughter frequently being moved between foster families. Hines explained that daughter has a reactive attachment disorder and is aggressive at daycare with other children.

Hines testified she met with mother and father to go over the initial case plan and discussed that they needed to provide proof of the completion of required items. She testified she reviewed the Cabinet's file for mother on the

previous day and there was no proof that mother had completed any of the case plan requirements.

Hines testified about the children's placements. She explained that they were first moved over an unsubstantiated allegation of abuse and then four other families had problems coping with daughter's behaviors.

Mother testified on her own behalf along with mother's mother (grandmother) and mother's brother. The family court permitted mother to introduce documentation that she brought with her to court that day, but indicated it was striking all hearsay opinions because the professionals who wrote the letters could not be called or cross-examined at this late date. The exhibits consisted of: a 2016 certificate of completion for parenting classes; a 2016 housing authority lease; a 2016 letter stating mother completed a substance abuse outpatient program; 2016 letters indicating mother had clear drug screenings; 2017 letters stating that mother had come into screen, but the court order had expired, and she could not be screened; and a 2019 letter from mother's methadone clinic showing that mother was diagnosed with an opioid use disorder and had been receiving medically assisted treatment and prescriptions, was visiting every other week, attending counseling, and had clear drug screens.

Mother testified that prior to when children were taken away, her previously clean apartment became dirty when her aunt, her aunt's daughter

(cousin), cousin's daughter, her brother, her brother's girlfriend, and girlfriend's child moved in with her against her wishes. Mother explained they had been staying with her for about three weeks and she was trying to get them to leave. Mother admitted knowing it violated her lease to have them there, but she wanted her landlord to kick them out and did not want the police involved because her brother had outstanding warrants. She testified that on that night she was threatened by her brother and aunt, that she would see her children taken away from her and be in handcuffs.

Mother explained that son got out of her apartment when she was in the bathroom despite the presence of child locks on the doors. Mother recounted that she asked her aunt to watch the children; she was gone two or three minutes and when she got out she did not see her aunt or son. She went outside to look for him and found her aunt with a neighbor who had son and the neighbor refused to give mother her son.

Mother admitted the home was dirty when her children were taken away but blamed it on her house guests not doing any cleaning and making her apartment a mess. Mother testified she took good care of her children and denied that children were dirty when they were removed. She admitted daughter had diaper rash, explaining that daughter was treated for diaper rash at the hospital, but the steroids prescribed made the rash worse.

Mother admitted that photos she was shown were taken of her home and they were introduced into evidence. They showed mother's unkept home, cigarette butts, rolling papers and syringes, and a mostly empty refrigerator.

Mother claimed the photograph showing syringes was of an emptied trashcan which her brother had used when cleaning out his car and they belonged to her brother. She thought the amount of food in her home was adequate.

Mother testified she did everything required under her case plan, but the Cabinet kept adding things onto it. She stated she completed her parenting classes, she obtained housing, and she completed her substance abuse assessment and drug treatment. She explained she had been treated by Dr. Ali for three years and regularly attended counseling with Joseph Armstrong and Robert Good.

Mother testified grandmother took her to NA/AA meetings on Tuesday and Thursday, every week, but mother forgot to bring to court her signed slips. She stated she went to Dr. Smith for suboxone every two weeks, had been on it for three years, and was on the highest tier at the clinic for good conduct since May.

Mother acknowledged being arrested for promoting contraband but denied having or using any illegal substances or alcohol since children were removed. She admitted she pled guilty and explained she was on probation for a

year ending in July 2019, and if she successfully completed probation she would be diverted.

Mother denied being asked to do a second assessment. Mother explained she refused to complete Dr. Feinberg's testing on the computer because she feared her test answers would be changed.

Mother stated that she had good visits with her children and denied saying anything inappropriate to the children. Mother stated she was entirely dependent on grandmother for rides, had to pay for grandmother's gas, and sometimes missed visits because of transportation problems. Mother admitted children were not bonded to her because they had been in several homes and were confused.

Mother testified she reported bruises and fingernail gouges on children to the social workers but was told children had to go back to that foster family anyway, and they stayed with an abusive foster family for months.

Mother testified as to her current address on Ely Avenue in Georgetown, Kentucky, and stated she provided this address to the Cabinet. She testified she was renting a house there since September 2018, Sam Ward was her landlord, it was just her in the home, and her home was clean. Mother testified she was diagnosed with bipolar disorder, was on Social Security disability which

provided enough money for rent and food, and she would be entitled to more benefits if the children were living with her.

Grandmother testified that before children were removed from mother, mother did a good job of taking care of them. Grandmother drove mother to get groceries and food for children, to buy children clothing, and took them to the doctor's office. She recounted that mother took daughter to the doctor when her diaper rash would not clear up, but the medicine made it worse, so she advised mother to take daughter back to the emergency room.

As to the people living with mother, grandmother told mother she needed to make them leave because they had caused problems for other family members. Grandmother noted that aunt had a criminal history, and this was not the first time that brother had lived with mother against mother's wishes.

Grandmother recounted that earlier on the day the children were removed, she called brother's phone to see how mother was doing. Grandmother reported hearing brother argue with mother: mother told brother to leave and brother said he would call child protective services on mother and have children taken away; mother denied he would do that and aunt said, "Yes we will. When they have got you in handcuffs you will see what they will do."

Grandmother testified she took mother to parenting classes, to substance abuse assessment and treatment, and everywhere mother needed

transportation. Grandmother testified that she took mother to her NA meetings on Thursdays but had not taken mother in the past three months and maybe not in the past six months. Grandmother had no concerns about the children being returned to mother because when mother was taking care of them they were clean and nicely dressed and grandmother only lived a mile away from mother.

Brother testified he had lived at his house on Ely Avenue in Georgetown (at the same house number mother named) for one year with his wife and he had no written lease with his landlord Sam Ward. He stated that mother sometimes spent the night at his house, but she mostly lives with grandmother.

Brother testified that before the children were taken, mother lived in the same apartment for two years, and he regularly saw her at grandmother's house. The children were well fed, happy, and were clean. He saw mother at her apartment about once a week and it was always clean and she always had food. About a month or maybe longer prior to the night the children were removed, he, his girlfriend, and his girlfriend's child were living with mother on and off and mother had been telling him to find his own place.

Brother testified the other people, aunt and cousin, were not living there but just over and trying to use mother's house as a drug flop house. He explained that a week or two prior to the night the children were removed, aunt

was in mother's bathroom smoking crack and mother asked brother to get aunt out of there; he got aunt to leave, but aunt came back other times.

Brother testified that on the night the children were removed, he was lying down in his room and heard mother ask aunt to watch the children while she was in the bathroom and, about two or three minutes later when mother got out, she asked where son was. He stated son was found being held by a woman on the steps outside and she refused to give son to mother. Within five minutes the police arrived, and brother hid in the bathroom closet because he was a fugitive for a probation violation on a felony offense. It was brother's belief that aunt and the neighbor planned it out.

Brother denied arguing with his sister when he was on the phone with grandmother that evening. He admitted the drug paraphernalia shown in the picture of mother's apartment belonged to him.

On January 23, 2019, an order terminating parental rights and order of judgment, along with the findings of fact and conclusions of law, were entered in each termination case. The family court found that children came into care with the Cabinet in December 2015 after son was found wandering outside partially clothed, an investigation found drug paraphernalia and prescription drugs not belonging to the occupants, and the Cabinet found extremely filthy conditions. Parents were arrested, and no one was available to care for the children. The

family court acknowledged that mother repeatedly case planned with the Cabinet, on December 18, 2015; July 12, 2016; November 29, 2016; May 16, 2017; and December 12, 2017. The family court found mother was required to call in regularly for drug screens, refrain from illegal activity, maintain stability in housing and employment, attend NA/AA meetings, complete parenting classes, complete a substance abuse assessment and follow all recommendations, complete a mental health assessment and follow all recommendations, and provide the Cabinet with proof that these items were completed. Later, mother was also ordered to complete an assessment with Dr. Feinberg.

The family court found that mother initially made some progress on her case plan by completing parenting classes and a substance abuse assessment in 2016 but failed to provide any proof of completion to the Cabinet until the termination trial. The family court found that mother “soon began to demonstrate signs of instability—particularly in the disintegration of her personal hygiene[.]” The family court also noted issues with mother’s visitation with children, including her history of missing visits, and that mother admitted she refused to complete the assessment by Dr. Feinberg.

The family court found that mother was arrested in July 2017 and charged with promoting contraband and entered a diversion plea. The family court

found that because of this charge, mother was court ordered to complete a second substance abuse assessment which she had not yet done.

The family court also found mother's housing status was an ongoing concern as the Cabinet was rarely able to complete a home visit and there was contradictory evidence as to whether she now had appropriate housing. The family court explained that prior to children's removal, for three weeks or longer, mother had several other relatives living with her even though it was against the terms of the lease.

Even more telling, Respondent mother was aware that her brother was a fugitive for which a warrant for probation violation was outstanding and that her aunt (and perhaps others) were smoking crack in her bathroom. Despite knowing this, Respondent mother did not call the police to seek removal of these individuals who Respondent mother maintains were staying there against her wishes.

The family court also made a credibility finding against mother based on the testimony of mother's own witnesses:

The Court did not find Respondent mother to be a credible witness in the trial in the case at bar. Respondent mother's testimony was replete with inaccuracies and/or contradictions during the final hearing. As an example, Respondent mother testified that she resided alone in a 2 bedroom house in Georgetown, Kentucky. Respondent mother's brother, however, when called as a witness by Respondent, testified that he and his wife lived in that home and that Respondent mother stayed there for a night or so from time to time but did not reside in the house. Respondent

mother had testified that, on the night of the removal, she was being threatened by her brother and aunt that they would seek her arrest and removal of her children if she forced them to leave the apartment. The brother subsequently testified that Respondent mother had asked him to leave as soon as he could make arrangements but that there had been no arguments. Respondent mother also testified that she had attended NA/AA meetings for three years, two times a week, and that her mother drove her to these meetings and to other appointments—was in fact her only source of transportation. When called by Respondent as a witness, however, Respondent’s mother testified that she had not taken her daughter to these meetings for at least three months and possibly as long as six months.

The family court found three grounds for termination under Kentucky Revised Statutes (KRS) 625.090(2)(e), (g), and (j) established by clear and convincing evidence: (1) mother and father for a period of at least six months failed or refused to provide or were substantially incapable of providing essential parental care and protection for children, and there was no reasonable expectation of improvement in parental care within a reasonable time given the ages of children; (2) mother and father have, for reasons other than poverty alone, failed to provide the essentials of life, such as food, housing, medical care, education, and clothing, and there is no reasonable expectation of improvement in parental conduct within a reasonable time given the age of children; and (3) children have been in out-of-home care, under the custody of the Cabinet, for fifteen of twenty-

two months preceding the filing of the petition. It further found that the Cabinet provided all reasonable services and termination was in children's best interest.

The family court determined in accordance with KRS 625.090(1)(a)1 that children were previously adjudged abused or neglected children as defined in KRS 600.020(1), and it also found and adjudicated them abused or neglected children as part of the termination case in accordance with KRS 625.090(1)(a)2. The family court found it was in children's best interest that parental rights be terminated based on the findings of failure to provide essential care, the essentials of life, and the lapse of time pursuant to KRS 625.090(2)(e), (g), and (j) and noted it had considered the factors in KRS 625.090(3). It ordered mother's and father's parental rights terminated as to both children.

Mother appealed² and her counsel filed an *Anders*³ brief, explaining that given the family court's credibility finding against mother, which was entitled to deference, there was no meritorious assignment of error to raise on behalf of mother. Counsel filed a motion to withdraw which was passed to the merits panel.⁴

² There was a delay in this case being ready to be heard on appeal because the case was abated and remanded to the family court for determination over whether mother's counsel should be allowed to withdraw because mother had requested alternative appellate counsel below. The family court denied this motion. Mother's counsel also requested additional time to file her brief and additional time was also required to allow mother to file a *pro se* brief.

³ *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

⁴ We grant counsel's motion to withdraw in a separate order.

Mother filed a *pro se* brief in which she raises several arguments, all of which are without merit.

Whether termination is appropriate depends upon whether the statutory requirements contained in KRS 625.090 are met.

Termination of a party's parental rights is proper upon satisfaction, by clear and convincing evidence, of a three-part test. First, the child must have been found 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)]. Third, the family court must find at least one ground of parental unfitness. KRS 625.090(2).

B.E.K. v. Cabinet for Health & Family Servs., 487 S.W.3d 457, 464 (Ky.App. 2016).

Because the family court has wide discretion in deciding to terminate parental rights, "our review is limited to a clearly erroneous standard which focuses on whether the family court's order of termination was based on clear and convincing evidence." *Cabinet for Health & Family Servs. v. K.H.*, 423 S.W.3d 204, 211 (Ky. 2014). "Pursuant to this standard, an appellate court is 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." *Cabinet for Health and Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010).

That one side presents more testimony than the other, or that one side's evidence seems superior to the other's, at least from the appellate perspective, has no bearing. In reviewing a trial court's findings, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." [Kentucky Rules of Civil Procedure (CR)] 52.01. As the court sitting in the presence of witnesses, a trial court is in the best position to evaluate the testimony and other evidence. Indeed, "judging the credibility of witnesses and weighing evidence are tasks within the *exclusive province of the trial court.*" *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (emphasis added). "[M]ere doubt as to the correctness of a finding will not justify its reversal, and appellate courts should not disturb trial court findings that are supported by substantial evidence." *Id.* (footnotes, quotation marks, and brackets omitted).

D.G.R. v. Commonwealth, Cabinet for Health and Family Servs., 364 S.W.3d 106, 114 (Ky. 2012).

There was sufficient evidence to support the termination, and the family court was justified in determining that mother was not credible and was entitled to choose to believe the testimony of other witnesses over her testimony. Given the lack of belief in mother's testimony and belief in testimony that was substantial and established each needed ground for termination, the family court did not err.

Mother argues that because the district court dismissed the charges against her for endangering the welfare of a minor and public intoxication, there was no evidence she abused or neglected children. This argument is not well

taken. The Commonwealth exercises broad prosecutorial discretion as to which crimes will be prosecuted and which will not. *Commonwealth v. Perry*, 507 S.W.3d 588, 591-92 (Ky.App. 2016). A prosecutorial decision about whether to attempt to prove crimes beyond a reasonable doubt has no bearing on whether there were sufficient grounds to remove children from mother’s care and find abuse and neglect.⁵

Mother argues the evidence that was introduced in the adjudication in the DNA case was not credible. Mother’s argument is not well taken at this juncture.

“[A] disposition order. . . is the final and appealable order with regard to a decision of whether a child is dependent, neglected, or abused.” *J.E. v. Cabinet for Health and Family Servs.*, 553 S.W.3d 850, 852 (Ky.App. 2018). Any arguments mother had regarding the competency of the testimony received that led to the adjudication in the DNA case could only be addressed in an appeal from the disposition order and is precluded from being challenged in this appeal.

⁵ Even if mother was acquitted of such charges, an acquittal is irrelevant to the question of whether mother abused or neglected children because there are different standards of proof in a criminal case compared with a DNA case. *See Drummond v. Todd County Bd. of Educ.*, 349 S.W.3d 316, 323 (Ky.App. 2011) (explaining acquittal on criminal charges was irrelevant to an administrative disciplinary hearing). *See also Gregory v. Commonwealth*, 610 S.W.2d 598, 600 (Ky. 1980) (explaining that a finding that no sodomy occurred in a DNA case where the court removed the children did not preclude a later criminal conviction because that finding was not necessary to the court’s action and “[t]he criminality of [the defendant’s] actions was not before the court which was charged generally with the well-being of the children”).

Additionally, it appears that the family court made credibility decisions which were within its discretion to make. Furthermore, the family court did not rely on the testimony from the DNA case but on the testimony and other evidence presented in the termination case and made a finding that the children were abused or neglected during the termination case.

Mother also argues, citing the Kentucky Family Court Rules of Procedure and Practice, that she was deprived of a final hearing in the termination case and did not get a list of the names and addresses of possible witnesses or a list of exhibits entered. Mother's arguments are conclusively refuted by the record. The termination trial was the final hearing and mother testified and presented witnesses and evidence at that time. The record shows that mother was provided with discovery and a list of witnesses the Cabinet planned to call, with Nevitt, Smith, and Hines specifically listed.

Finally, mother argues that the Cabinet injured children, especially daughter, by moving her through various foster homes and it would be in children's best interest for them to be returned home. While children may have suffered from various disruptions in foster care, this does not mean that they would be better off with mother given that she has not made the efforts necessary to make it safe for children to return to a stable home. There was ample evidence that children were now in a good placement and doing well and not bonded with

mother. The family court had a sufficient basis to terminate mother's parental rights.

Accordingly, we affirm the Scott Family Court's decision to terminate mother's parental rights to children.

COMBS, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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