RENDERED: JANUARY 3, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000933-ME

R.W. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 18-AD-00330

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

AND NO. 2019-CA-000934-ME

M.H. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 18-AD-00330

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

ACREE, JUDGE: Appellants, M.H. (Father) and R.W. (Mother), appeal the order and judgment terminating their parental rights to raise their minor child. We find the order of termination is supported by substantial evidence and, therefore, affirm.

BACKGROUND

Mother and Father lived together in Illinois. Both were affiliated with the United States Army. Mother grew up in a military family, and Father was a soldier. Unfortunately, Father was injured while on duty. He suffered from back and shoulder pain and was prescribed powerful pain killing medications to treat his symptoms. The Army medically discharged Father and designated him a disabled veteran. Eventually, he found the medicine affected his ability to remain focused. Because of this, he opted for medical marijuana to treat his pain.

Mother and Father moved to Tennessee, where Mother's parents lived. Their child was born there, after which the family moved to Lexington,

Kentucky. This move allowed the family to be equally distant from both the paternal and maternal grandparents.

On January 26, 2018, Lexington Police responded to a domestic dispute between Mother and Father. According to the police report, Mother struck Father in the face while he was holding their child. Mother was arrested and charged with fourth-degree assault. Child Protective Services (Cabinet) contacted Father and began an investigation. Father told the Cabinet Mother was intoxicated during the incident. He also disclosed previous domestic violence incidents, including one that led to criminal charges against Father when he strangled Mother. The child was present during that incident, too.

The Cabinet executed a prevention plan, requiring Mother to have supervised visitation. At that time, child was not removed from Father's care. It was not until a temporary removal hearing was held that Father informed the family court that the child was living with the maternal grandparents in Tennessee. The Cabinet stepped in and filed for emergency custody, which the family court granted.

The Cabinet asked the maternal grandparents to return the child to Lexington, Kentucky, so it could evaluate if there were any marks on the child indicative of injury. When the maternal grandparents arrived in Lexington, the Cabinet took physical custody of the child. Both parents negotiated a case plan

and stipulated to the child's neglect. According to the case plans, each parent was to: (1) drug screen; (2) complete a substance abuse assessment and follow recommendations; (3) complete a domestic violence assessment and follow recommendations; (4) obtain and maintain stable housing; (5) obtain and maintain stable employment; (6) complete a psychosocial assessment and follow recommendations; (7) attend AA/NA twice weekly; and (8) cooperate with the Cabinet and obey court orders. To aid the parents in successful completion of the case plans, the Cabinet offered free drug screens, home visits, bus passes, and referrals to community partners.

On April 23, 2018, the family court held a disposition hearing. By that time, Mother had completed mental health, domestic violence, and substance abuse assessments, which resulted in a recommendation of individualized therapy. Mother also tested positive for THC on February 12, 2018, and April 6, 2018, and she failed to appear for drug screens between those times. Father began working with the Cabinet's counseling but was dismissed for failure to appear. He was provided access to help with anger management. His assessment resulted in a recommendation that he complete programs for chemical dependency, relapse prevention, and batterer's intervention. Like Mother, Father failed his drug screen, testing positive for THC.

Following disposition, Mother and Father attempted to work their case plans. Still, both parents participated inconsistently in the drug screening process. When they did, they tested positive for marijuana. Due to this lack of progress, the family court changed the goal to adoption. After this goal change, the parents made some progress, but by December 2018 returned to a pattern of positive screens for THC and alcohol.

The family court held a hearing to terminate Mother's and Father's parental rights. The family court entered its findings of fact, conclusions of law, and order terminating parental rights on May 16, 2019. This appeal followed.

STANDARD OF REVIEW

When the sufficiency of the evidence is challenged on appeal, we are permitted to reverse only if the trial court's findings of fact are clearly erroneous. *Cabinet for Health & Family Servs. v. I.W., Jr.*, 338 S.W.3d 295, 299 (Ky. App. 2010). What is needed "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).

ANALYSIS

Mother and Father separately appeal the order terminating their parental rights. Each parent argues the termination of their parental rights was not in the best interest of their child. We are not persuaded.

Before terminating parental rights, the family court must find clear and convincing evidence to support each of three parts of the standard established by KRS[1] 625.090. 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). Neither Mother nor Father argues the child was not abused or neglected. However, they have other issues with the family court's ruling. We take each issue in turn.

Best Interest

Both Father and Mother believe the family court abused its discretion when it found termination of their parental rights to be in the child's best interest. We disagree.

KRS 625.090(3) lays out the factors courts shall consider in determining the best interest of a child. These factors are: (a) mental illness that renders the parent unable to care for the child; (b) acts of abuse or neglect toward

[1] Kentucky Revised Statutes.

any child in the family; (c) the Cabinet's reasonable efforts to reunite the child with the parent if the child has been placed with the Cabinet; (d) the parent's efforts and behavioral adjustments that tend to make return of the child to the parent in that child's best interest; (e) the physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare; and (f) the parent's payment or the failure to pay a reasonable portion of the cost of the child's physical care and maintenance. KRS 625.090(3)(a)-(f). All factors must be considered but not all need be proven to find termination is in the child's best interest. KRS 625.090(3).

The family court gave a detailed account of why it is in the best interest of the child to terminate parental rights. It found: (1) the parents were unsuccessful with reunification after reasonable efforts were made; (2) the Cabinet offered or provided all reasonable services to the family and, despite the availability of those efforts, the parents failed to utilize the programs to adjust their circumstances, conduct, or conditions to make it in the best interest of the child to return to their home; and (3) the child is now thriving in her new, adoptive home.

Father argues the Cabinet did not make reasonable efforts to reunite him with his child and ignored his efforts and accomplishments. We disagree. Reasonable efforts are defined as the "exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available . . .

which are necessary to enable the child to safely live at home." KRS 620.020(11).[2] The Cabinet offered numerous services to both parents. This Court is unaware of any additional services that could have been provided and neither parent identified any. The family court summarized these offered services demonstrating it considered this factor and concluded reasonable efforts were made. That suffices under the statute for this factor.

The family court also considered the efforts and adjustments made by each parent. KRS 625.090(3)(d). Father contends the Cabinet ignored its "moral and ethical obligation to do all it can to reunify that family, not destroy it." (Appellant's Brief p. 5.) He believes the Cabinet ignored his efforts and accomplishments. He argues that his brief periods of sobriety and his decision to work some of his case plan is evidence he was adjusting to his circumstances. He argues he made significant progress with his adjustments, but believes no matter what he did, the Cabinet would continue to change his goals. Again, we disagree.

Neither parent fully accomplished any of the tasks assigned by the family court or the Cabinet. Neither parent demonstrated any significant effort or adjustment. Both parents fell short of their case plan. Father, for example, was ordered to drug screen and only did so periodically, and when he did screen, tested

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

positive for THC, marijuana, or alcohol. Father also failed to comply with the Cabinet by not releasing documentation showing he completed the required classes. Additionally, when Father was in a car accident and no longer had access to transportation to his drug screens, the Cabinet gave him bus passes. However, Father said public transportation was "too difficult and inconvenient." He was given every opportunity to comply, but he failed to do so.

Both parents demonstrated an inability or unwillingness to change their circumstances by continuing to fail drug screens. That supports the family court's finding that the parents' efforts and adjustments were inadequate under KRS 625.090(3)(d) to make it in the child's best interest to return her to the parents' home. We find no error regarding the family court's analysis under this factor.

The family court also considered whether the child has prospects for improvement if termination is ordered. KRS 625.090(3)(e). The family court found affirmatively under this factor, and we conclude the finding was supported by the evidence. As a starting point, the family court found the child's needs were "met while in her adoptive home and [the child] is expected to continue improving." More than this, the family court addressed the improvement in the child's well-being after removal from the parents' home.

While in the parents' custody, the child suffered from developmental delays, medical problems, and behavioral issues. She had a speech delay, severe eczema, double ear infections, and no vaccinations. She was also very aggressive and would often hit, kick, scratch, bite, and be rough with the family pet. Now, the child is treated by doctors for her medical issues and began speech therapy; she is meeting her goals. The evidence showed the child's general behavior also dramatically improved.

The evidence supports the court's finding that "the child is now thriving in care and has improved greatly." We can find no evidence to contradict these findings. Nor is there evidence that the child would be supported physically, emotionally, or mentally if returned to her parents.

Involuntary Termination Grounds

Father makes a brief argument regarding the Cabinet's very filing of the petition for involuntary termination. He believes the petition lacked a good-faith basis that it was in the child's best interest to break up the family. However, this is merely another way of arguing what Mother expressed as her argument – that the evidence for termination was not clear and convincing. Therefore, we address Father's argument together with Mother's.

Mother argues that substantial evidence does not support the family court's findings under KRS 625.090(2)(a), (e), (g), and (j). Mother may take issue

with four factors from KRS 625.090(2), but the family court only needs to find clear and convincing evidence of one factor. KRS 625.090(2). Regardless, we address each of Mother's arguments.

Mother argues the family court did not have evidence warranting a finding that the child was abandoned for 90 days or more under KRS 625.090(2)(a), or that the child was not in foster care for fifteen cumulative months out of forty-eight months preceding the filing of the petition under KRS 625.090(2)(j). However, the family court appears not to have relied on these factors, as nothing of them is mentioned in the family court's findings of fact or conclusions of law. Therefore, we dismiss these arguments and turn to the remaining two.

> The family court found, pursuant to KRS 625.090(2)(e) and (g), that
>
> > for a period of not less than six (6) months, [each parent] 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;
> >
> > . . .
> >
> > [and], for reasons other than poverty alone, [each parent] 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[.]

KRS 625.090(2)(e), (g).

The family court concluded both parents are incapable of providing parental protection of the child. Both parents waited several months to engage any of the provided services. Both parents completed substance abuse classes and attended AA/NA meetings but continued to test positive for drugs. Mother admitted using marijuana as a coping mechanism for past trauma and Father admitted using marijuana for medical purposes, even though he no longer lived in a state where it is legal. Both parents also failed to care for their child's medical needs and well-being. The child did not have any vaccinations and had multiple medical issues.

Because of the substance abuse, lack of compliance with the case plans, and lack of lasting changes, the family court found both parents incapable of providing essential care and protection for their child. Mark Twain's truism applies here, that "actions speak louder than words." Mother and Father both say they are willing to do whatever it takes to regain custody of their child, yet they fall short of completing their case plans, continuing to abuse drugs instead. Due to the likelihood of the repetition of drug abuse and domestic violence, the family court terminated parental rights. We affirm this finding.

The family court's conclusion that both parents are incapable of providing essential parental care and protection to their child, and that there is no reasonable expectation of improvement, is supported by substantial evidence. The parents' history makes it unreasonable to expect improvement in the foreseeable future. Their inability to work through the entirety of the case plans and failure to change their lifestyle demonstrates that, for reasons other than poverty, they failed to provide for their child.

CONCLUSION

For the foregoing reasons, we affirm the Fayette Family Court's May 16, 2019 order terminating the parental rights of R.W. and M.H.

ALL CONCUR.

BRIEF FOR APPELLANT R.W.:

Christopher D. Wilkie
Lexington, Kentucky

BRIEF FOR APPELLANT M.H.:

Michael R. Slaughter
Westport, Kentucky

BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

Tiffany Yahr
Lexington, Kentucky