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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-0709-ME

E.K. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 19-AD-00002

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY,
AND R.Y.K., A CHILD APPELLEES

AND NO. 2019-CA-0710-ME

E.K. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 19-AD-00003

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY,
AND K.N.K., A CHILD APPELLEES

AND NO. 2019-CA-0711-ME

E.K. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 19-AD-00004

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY,
AND E.J.K., A CHILD APPELLEES

AND NO. 2019-CA-0712-ME

D.N.K. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 19-AD-00002

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND R.Y.K., A CHILD APPELLEES

AND NO. 2019-CA-0713-ME

D.N.K. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 19-AD-00003

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

AND NO. 2019-CA-0714-ME

D.N.K. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 19-AD-00004

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY,
AND E.J.K., A CHILD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CALDWELL, JONES, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: E.K. (Mother) and D.N.K. (Father) appeal from Findings of Fact, Conclusions of Law, and Judgments of the Boone Circuit Court, Family Court Division, entered April 9, 2019, terminating their parental rights as to their

three minor children: R.Y.K., K.N.W.K., and E.J.K.[1] Mother and Father both argue that the family court's termination of their parental rights is not supported by substantial evidence. We agree and thus, reverse and remand.

I. BACKGROUND

Appellants are the biological Mother and Father of the three minor children involved in these related appeals: R.Y.K. (Younger Son), born August 1, 2016; K.N.W.K. (Older Son), born February 13, 2014; and E.J.K. (Daughter), born June 18, 2012.[2] These related appeals[3] stem from petitions filed in January 2019

[1] Mother and Father failed to name the children as appellees in the body of their Notices of Appeal, a potentially fatal error. *See, e.g.*, *A.M.W. v. Cabinet for Health and Family Servs.*, 356 S.W.3d 134, 135 (Ky. App. 2011) ("If a parent appeals an order terminating parental rights, the child is a principal focus of the appeal. Therefore, the child must be made a party to the appeal to protect his interests. The child is a necessary and indispensable party to an appeal from the termination of parental rights and the failure to join the child to the appeal requires this Court to dismiss this appeal."). However, Mother and Father listed each child in the caption of the notice of appeal pertaining to him/her and—unlike *A.M.W.*—mailed a copy of the notices to the children's guardian *ad litem*. Therefore, dismissal of the appeals is unnecessary. *Morris v. Cabinet for Families and Children*, 69 S.W.3d 73, 74 (Ky. 2002) ("Appellants' notice of appeal named the minor child, CJM, in the caption, and, although he was not included in the certificate of service, copies of the pleadings were provided to the child's guardian *ad litem*. These factors together substantially comply with the requirements of [Kentucky Rules of Civil Procedure] CR 73.03 and provided sufficient notice to all parties concerned that the minor child was also an Appellee.").

[2] To protect the privacy of these minor children, we will not refer to the names of the children or their natural parents.

[3] Mother and Father were each represented by separate counsel in family court and filed separate appeals. Mother's motion to consolidate her appeals of the judgments terminating parental rights as to each child was granted; likewise, Father's motion to consolidate his appeals of the judgments terminating parental rights as to each child was granted. The Cabinet for Health and Family Services, Commonwealth of Kentucky, has filed a separate appellee brief in each of the two consolidated appeals. Although Mother's consolidated appeal has not been consolidated with Father's consolidated appeal, we review their appeals together in this combined opinion for the sake of judicial economy.

by the Cabinet for Health and Family Services (Cabinet) seeking termination of both Mother and Father's parental rights as to these three children, which were granted following a joint hearing in March 2019.[4]

The Cabinet first became involved with this family several years ago. Daughter and Older Son were removed from Mother and Father's care in late summer of 2014 and placed with a grandparent. At that time, Mother and Father's home, located in Walton, Kentucky, was described as cluttered and unsanitary. The electricity in the home had been turned off, there was a risk of eviction, and there were observations of staples mixed in with a child's food. At least one child had severe diaper rash. Daughter and Older Son were returned to the care of Mother and Father in the spring of 2016 with Cabinet workers continuing to monitor the home for several months thereafter. Younger Son was born August 2016, and the Cabinet closed its case in the early months of 2017 as conditions in the home had improved.

In August 2017, conditions in the home had deteriorated again. The three children were removed at that time from Mother and Father's care and placed with an aunt due to substantiations of neglect, including: the home being cluttered and unsanitary; the children were observed to have walked in animal waste in the

[4] Mother gave birth to a fourth child in February 2019, who is not a party to the underlying proceedings and the appeals which are under review in this Opinion.

home; the children were covered with insect bites; one child was bloody from open sores; and there was very little food in the home. In early September 2017, Mother and Father admitted to neglect at a hearing before the family court. Shortly thereafter, the family court entered orders placing the children in the temporary custody of the aunt and incorporating the recommendations of the Cabinet in its dispositional reports. These recommendations included that Mother and Father cooperate with the Cabinet, follow all court orders, participate in supervised parenting time, set up specified services once they regain custody, complete a CATS[5] assessment and follow its recommendations, and cooperate with and follow recommendations of service providers.

In January 2018, the aunt was unable to continue caring for the children. The children were placed together in a foster home in Berea, Kentucky. Following a delay (in no way attributed to Mother or Father), the Cabinet did not schedule the CATS assessments until May 2018. The reports from the assessments were not completed until several weeks thereafter. Meanwhile, in July 2018, the family court granted the parents unsupervised parenting time every other week for eight hours in the Berea area. The family court also ordered a Court Appointed

[5] In this context, CATS refers to the "Comprehensive Assessment and Training Services" Project. A separate CATS assessment report was prepared for each child.

Special Advocate (CASA) investigation of the home and for Mother and Father to continue counseling.

The CATS assessment reports suggested that both parents should receive mental health treatment.[6] The reports also suggested future case plans should be "short term" but stated that either parent's ability to make necessary changes did not appear feasible. In September 2018, the Cabinet moved for a change in the permanency goal for each child to adoption. Following a hearing in October 2018, the Cabinet's motion was granted.

After placement of the children in foster care in January 2018, there is no dispute that Mother and Father regularly exercised supervised visitation with the children every other weekend. In July 2018, the court allowed unsupervised visitation with the children. The parents thereafter missed only one scheduled visitation due to car trouble. Visitation took place in Berea, Kentucky, an approximate two-hour drive from the parents' residence. The parents also complied with court orders to pay child support (a total of $200 each per month); improved the condition of their home through cleaning, repairs, and removing pets from the house; and attended counseling.[7] However, social workers for the

[6] The evidence at the final hearing in March 2019 indicated that both parents had been receiving mental health counseling since October 2018.

[7] Mother did not obtain a psychiatric evaluation recommended by her counselor according to social worker testimony, and the CATS report relayed concerns that neither parent made enough

Cabinet had ongoing concerns about both parents' mental health despite their getting mental health counseling at Catholic Charities. Notwithstanding the parents' successful completion of the Cabinet's case plan, the social workers concluded that Mother and Father could not provide adequate care, protection, and necessities for the children in the future.

The Cabinet then filed petitions for involuntary termination of Mother's and Father's parental rights as to each of these three children in January 2019. A joint hearing was held in March 2019, where several Cabinet social workers and a CASA volunteer testified. Also, the CATS assessment reports were introduced into evidence, along with other documents in court files regarding the family's history with the Cabinet.

At the hearing, in response to defense questioning, Cabinet social worker Misty Ginandt admitted in her testimony that both Mother and Father had done everything the Cabinet asked them to do "this time around." However, the social worker expressed concern that Mother and Father would not be able to effectively parent the children or provide for their basic needs given their prior case history. Ginandt opined that even though they may have "gone through the motions" of complying with case plan requirements, they did not seem to be

progress to be entrusted with their children's care despite receiving counseling due to such factors as avoidance and failure to take responsibility for past actions.

making the meaningful changes necessary to care for the children without long-term Cabinet supervision. She also testified that despite significant improvements in the condition of much of the home, she was still concerned for the children's safety in the master bedroom due to clutter she observed during a February 2019 visit. The CASA volunteer testified about visiting the home in February 2019, where she observed that the master bedroom was still cluttered. Cabinet supervisor Holly Profitt also testified about prior case history, including the circumstances of the 2014 removal and other problems observed in the home in 2016. While she did not believe the parents had made significant improvement, she admitted her opinion was based on reports from Ginandt and not personal observations. Profitt also admitted she had not visited the parents' home since December 2016, more than two years before the filing of the petitions.

In response, Mother and Father argued they had complied with their case plan requirements presented by the Cabinet. And, the nine-month delay in obtaining CATS assessments was not the parents' fault, which was admitted by the Cabinet. Mother and Father further argued that it was improper for the Cabinet to presume they could not provide for their children when they were given no opportunity to do so for the year and a half preceding the hearing, while they otherwise were complying with the Cabinet's case plan for reunification. Despite these arguments, the family court entered its Findings of Fact, Conclusions of Law,

and Judgments terminating Mother's and Father's parental rights as to their three children on April 9, 2019. These appeals follow.

II. STANDARD OF REVIEW

In Kentucky, the standard of review for a family court's decision to terminate parental rights is the clearly erroneous standard which requires the court's decision to be based upon clear and convincing evidence. Kentucky Rules of Civil Procedure (CR) 52.01;[8] *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116-17 (Ky. App. 1998). The family court's decision will not be disturbed on appeal if the decision was supported by substantial evidence. *M.E.C. v. Commonwealth, Cabinet for Health and Family Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008).

This standard of review reflects the law's protection of the parent-child relationship. While termination proceedings are not criminal matters, they encroach "on the parent's constitutional right to parent his or her child, and therefore, is a procedure that should only be employed when the statutory mandates are clearly met." *Id*. In this regard, we note that parental rights are a "fundamental liberty interest protected by the Fourteenth Amendment" of the United States Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). When

[8] CR 52.01 governs "all actions tried upon the facts without a jury" and provides in pertinent part: "Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

the government acts to terminate a parent's rights, it is not merely infringing on those rights; it is ending them. *Lassiter v. Dept. of Social Servs. of Durham Co.*, 452 U.S. 18, 27 (1981). Accordingly, termination of parental rights is a grave action which the courts must conduct with "utmost caution." *M.E.C.*, 254 S.W.3d at 850. Termination can be analogized as capital punishment of the family unit because it is "so severe and so irreversible." *Santosky*, 455 U.S. at 759; *F.V. v. Commonwealth, Cab. for Health and Family Servs.*, 567 S.W.3d 597, 606 (Ky. App. 2018). Therefore, in order to pass Constitutional muster, the evidence supporting termination must be clear and convincing. *Santosky*, 455 U.S. at 769-70; *F.V.*, 567 S.W.3d at 606.

III. ANALYSIS

The involuntary termination of parental rights is governed by KRS 625.090.[9] To involuntarily terminate parental rights under KRS 625.090, the family court must find by clear and convincing evidence that the following three-prong test is satisfied: (1) the child was found or adjudged to be abused or neglected as defined in KRS 600.020(1); (2) termination of parental rights is in the child's best interest; and (3) the existence of at least one of the grounds enumerated

[9] Termination of parental rights may also occur in adoption proceedings as provided for in Kentucky Revised Statutes (KRS) 199.500(4) and KRS 199.502.

in KRS 625.090(2). *Cabinet for Health and Family Servs. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014).

The focus of this appeal looks to the family court's findings and conclusions in both parents' cases under KRS 625.090(2). More specifically, the conclusions of the family court, though not specifically enumerating the statute, look to the grounds set forth in KRS 625.090(2)(e) and (g). Those provisions read as follows:

> (e) That the parent, for a period of not less than six (6) months, 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;
>
> . . . .
>
> (g) That the parent, 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 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[.]

The factual findings rendered by the family court in each child's case for both parents are virtually identical. Relevant to this appeal are findings set out

in paragraphs 7, 10, 11, and 14 in the court's findings of fact and conclusions of law. Those findings are almost exclusively limited to events that occurred in 2014 through August 2017, prior to the implementation of case plans for both parents after disposition in September 2017. *See* KRS 620.230. Surprisingly, the family court makes no reference whatsoever to either parent's case plan with the Cabinet and their satisfactory compliance with and completion thereof from September 2017 through the date of the final hearing in March 2019. Given that the statutory purpose of these plans is for reunification of the parents with the children, we find most troubling that no recognition is given to the parents' substantial efforts to satisfactorily complete the plans, which was acknowledged by the Cabinet's witnesses at the hearing.

This is a difficult case for this Court as well as the family court and Cabinet. From September 2017 until March 2019, the parents made substantial efforts to satisfactorily comply with their case plans for the children. This fact was acknowledged by the Cabinet. KRS 620.230 clearly contemplates that case plans are an integral component for the reunification of children who have been removed from their homes by the Cabinet. And, the legislative intent of KRS 620.230 looks to family courts being involved with case plans as part of adjudicating oversight of the reunification process. *See also* KRS 620.240. Based on the evidence presented at the hearing, the findings of fact are in conflict with the parents' successful

completion of their case plans, especially since the family court made no attempt to evaluate the parenting capacity of Mother or Father since September 2017. Without consideration of the parents' present ability or capacity to parent their children in March 2019, and given the parents' substantial improvement after September 2017, the court's conclusions of law also conflict with the requirements of KRS 625.090(2)(e) and (g). The parents were not given the opportunity to parent these children for eighteen months prior to the hearing, notwithstanding the successful completion of their case plans. Thus, the Cabinet failed to present substantial evidence based on the parents conduct since September 2017, to satisfy either of the grounds set forth in KRS 625.090(2)(e) and (g). In other words, there was not clear and convincing evidence that the parents could not properly care for their children in the future.

This Court has previously held that a termination of parental rights cannot focus solely on past behavior without evaluating the future parenting capacity of the parents, especially whereas in this case, there has been improvement shown. *See M.E.C.*, 254 S.W.3d at 855. The family court's findings of fact to support termination are based primarily on past conduct of Mother and Father rather than upon their recent actions and conduct under a case plan supervised by the Cabinet since September of 2017.

There is no dispute that Mother and Father have neglected their children in the past. Perhaps in August 2017, there was sufficient evidence to terminate their parental rights had a petition been filed. However, the petitions in these cases now before this Court were filed in January 2019. Since September of 2017, the evidence presented below indisputably shows that the parents have followed the Cabinet's case plans and have cooperated with the Cabinet throughout, have paid child support, have engaged in mental health counseling, have improved the overall condition of the family residence, and have regularly visited the children, including unsupervised parenting time from July 2018 up to the date of the termination hearing in March of 2019. Even the Cabinet acknowledged that parental rights are seldom terminated upon successful completion of case plans.

Perhaps even more compelling in this case is the lack of any allegations whatsoever regarding abandonment, substance abuse, alcoholism, or drug dependency. Nor are there any allegations or evidence of intentional physical abuse of the children. And, the record reflects that both parents are employed, self-sufficient, and paid all child support after the children were removed in August 2017. The Cabinet's primary basis for termination looks to Mother and Father's alleged inability to care for the children based on past actions and alleged mental illness or deficiency. Yet, there are no expert medical opinions in the record to

substantiate the parents' lack of mental capacity to raise their children, and both parents attended mental health counseling beginning in October 2018 at the direction of the Cabinet.

Thus, we believe the family court's findings and conclusions are not consistent with the evidence, especially as to whether one or more grounds existed under KRS 625.090(2) to support the termination. At minimum, the evidence is not clear and convincing evidence sufficient to support termination at this time.

As this Court concluded in *F.V.*, 567 S.W.3d at 609, KRS 625.090 does not require that a parent completely eradicate all problems immediately. However, the statute does require clear and convincing evidence that there is no reasonable expectation of improvement in the parents' conduct toward the children. *F.V.*, 567 S.W.3d at 609. Given the evidence of improvement presented below, under a case plan developed by the Cabinet, the family court's finding that there is no reasonable expectation of improvement is simply without clear and convincing evidentiary support in the record. To the contrary, Mother and Father have made improvements in many areas under the direction of the Cabinet, albeit apparently not to the Cabinet's liking.

Accordingly, we do not believe the proof in this record warrants the drastic remedy to terminate parental rights at this time, given Mother and Father's efforts since September of 2017 to reunite with their children. Therefore, we

reverse the family court's termination orders and direct the Cabinet to continue working with the parents toward reunification with their children or otherwise obtain expert medical opinions that conclusively establish that the parents lack the mental capacity or ability to properly raise and care for their children.

For the foregoing reasons, the Findings of Fact, Conclusions of Law, and Judgments of the Boone Circuit Court, Family Court Division, are reversed and these cases are remanded for proceedings consistent with this Opinion.

JONES, JUDGE, CONCURS.

CALDWELL, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CALDWELL, JUDGE, DISSENTING: I respectfully dissent. As stated in the majority opinion citing *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114 (Ky. App. 1998), the trial court has a great deal of discretion in an involuntary termination of parental rights action. The standard of review in a termination case is confined to the clearly erroneous standard in Kentucky Rules of Civil Procedure (CR) 52.01, based upon clear and convincing evidence, and the trial court's order will not be disturbed on appeal if the decision was supported by substantial evidence. *M.E.C. v. Commonwealth, Cabinet for Health and Family Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008).

"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." *M.P.S.*, 979 S.W.2d at 117 (citing *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934)). Furthermore, "[t]he findings of the trial judge may not be set aside unless clearly erroneous with due regard being given to the opportunity of the trial judge to consider the credibility of the witnesses." *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995) (citing CR 52.01; *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982); *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986)).

This recitation of the law and findings of fact by the trial court supports termination of the parental rights in this case. Specifically, and uncontroverted, the children of this action have been adjudicated to be neglected or abused children pursuant to Kentucky Revised Statutes (KRS) 600.020. Further, the trial court findings of fact show that the state met the clear and convincing burden of proof standard to support the trial court's findings under KRS 625.090(2)(e) and (g) and KRS 625.090(3). Yet, the majority would hold that there was simply not enough evidence to support termination.

Both Mother and Father, and the majority, cite to *M.E.C.*, *supra*, to argue that the trial court improperly focused on past behavior alone without a meaningful assessment of their future parenting capacity in concluding there was

no reasonable prospect of improvement. They contend that the trial court's conclusion of no reasonable prospect of improvement is improper based solely on their prior case history. I disagree.

Finding of KRS 625.090(2)(e) Grounds Not Clearly Erroneous

Despite more detailed findings concerning past failures to provide essential care and protection, the record was not devoid of evidence of more recent indications that Mother and Father were unable to render essential care and protection to their children. In addition to including details of the older two children's first removal from their parents' care from August 2014 until May of 2016, a period of twenty-two months, the trial court made detailed findings of why the children were removed a second time in August of 2017. At the time of this second removal, R.Y.K. was one year old, K.N.W.K. was three years old and E.J.K. was five years old. It is this second petition and removal for neglect that led to the termination of parental rights petitions herein being filed.

The court's finding notes that the parents had previously engaged in mental health assessments and services, after initially being uncooperative, and that several in-home services continued to be provided after the children had been returned to the home in May of 2016. However, at the time of the second removal the house was once again in a deplorable state. The trial court noted the deplorable state of the house and the children were covered in insect bites; the children were

walking in dog feces and urine; the youngest child's bottom was bleeding from open sores; there was little food in the home; the toilet was not working; and the children were using a bucket as a make-shift toilet, which was filled with feces and urine. While the trial court does not explicitly state that the children were out of the home for twenty-two months before the parents made enough progress for the children to be returned from the first removal, and that they were only back in the home for sixteen months before the level of neglect was again so severe as to require removal and in even worse condition than at the initial removal, the dates given provide that to be the case.

The trial court order then goes on to cite ongoing and recent facts of why the children have not been reunited with their parents – specifically, the CATS assessment of July 2018, which was admitted into evidence without objection, and the social workers' and CASA volunteer's testimony at the March 2019 trial – concerning their February 2019 visits to the parents' home. The court included from the CATS assessment in its findings the following: "[Parents] have had the opportunity for extensive service provisions but have been unable to achieve sustained improvement over time, even in the absence of caring for their three children. Any case plan provided would need to be short term given these children's length of time in out of home care, but their caregiver risks are longstanding and chronic in nature; given the long intervention that would be

needed to address their difficulties, [Parents'] ability to make necessary changes in a timely manner that would support a suitable caregiver environment for their children does not appear feasible." (Emphasis in original). Perhaps the trial court's findings should have included more direct and specific findings from the CATS assessments; however, each report was more than 50+ pages, and they were each a part of the evidence considered by the trial court, having been introduced without objection.

Additionally, the trial court included testimony of the CASA volunteer. She testified that in her February 2019 visit, the master bedroom was extremely cluttered and contained hazards to the children if they were to be returned home. This was the state of the home still, even after not having day-to-day care and responsibility of the children for the previous nineteen months. And although not specifically discussed by the trial court in this finding, we also note that a social worker similarly testified to being concerned by safety hazards in the master bedroom (*i.e.*, two-feet-high piles of clutter on the desk and a power saw atop a pile of clutter) during her February 2019 visit. We further note that this social worker had been working with the family recently and essentially expressed in her testimony her concerns that Mother and Father would not be able to adequately care for and protect the children without continued Cabinet intervention.

Even though the trial court's finding of no reasonable prospect of improvement to provide essential care and protection may cite more to prior case history, this was appropriate given important distinctions between this case and *M.E.C.* One important distinction is that this Court concluded in *M.E.C.*, 254 S.W.3d at 854, there was no substantial evidence of abuse or neglect. Whereas, Mother and Father in this case have admitted to neglect. Other important distinctions are that the Cabinet in *M.E.C.*, 254 S.W.3d at 852, began seeking termination just eight months after taking custody of the child for the first time and rendered little or no services during that time. Contrast that to the two removals of Mother's and Father's children and the provision of multiple services over multiple years here, and clearly these are distinctions with significant differences. And despite the provision of services and great lengths of time, both Cabinet personnel and the CATS assessor concluded that Mother and Father were not learning from the past and incorporating positive changes enabling them to parent effectively.

Finding of KRS 625.090(2)(g) Grounds Not Clearly Erroneous

The trial court found clear and convincing evidence showed that Mother and Father:

> for reasons other than poverty alone, have continuously or repeatedly failed to provide or are incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the child's well-being and there is no reasonable expectation of significant improvement in the parents' conduct in the

> immediately foreseeable future, considering the age of the child.

The trial court's discussion of this ground of parental unfitness (KRS 625.090(2)(g)) is admittedly not as long and detailed as its discussion of KRS 625.090(2)(e) grounds. The trial court referred to social worker testimony that although Mother and Father provided the children with food during unsupervised parenting time twice a month at the time of the trial, they failed to provide the children with food and other necessities for long periods of time due to the fact that the children had to be removed from their care due to unsafe home conditions and "unaddressed mental health concerns" of Mother. The trial court also cited a social worker's testimony that she did not have an expectation of improvement for either parent due to their prior case history.

Pointing to their payment of court-ordered child support, their consistent visitation, and their lack of opportunity to provide other items to the children while outside their care, Mother and Father argue that the trial court ignored the progress they made and that the trial court's finding is improperly based on past behavior alone in contravention of *M.E.C.* In response, the Cabinet argues that the trial court's finding is further supported by testimony that Mother and Father failed to have ready necessary supplies when R.Y.K. was born in August 2016 and when another child was born in February 2019, and by a social

worker's testimony that Mother and Father returned some items bought for the children, such as shoes.

The majority here finds that the trial court makes no reference to the parents' case plan and their satisfactory compliance and completion thereof, therefore, finding that the parents were not given an opportunity to parent these children for eighteen months prior to the trial, notwithstanding the successful completion of their case. From this the majority concludes that the Cabinet failed to present substantial evidence based on the parents' conduct since September 2017, to satisfy either of the grounds of KRS 625.090(2)(e) or (g). Again, I disagree.

While the majority uses phrases such as "satisfactory" and "successful" to describe the parents' completion of their case plan, I believe the trial court's findings include substantial, clear, and convincing evidence that this was not the case. While the Cabinet social worker acknowledges that the parents did complete their case plan, and that it is unusual to terminate parental rights when case plans have been completed, her description of their completion was that they were "just going through the motions." Significantly, even at the birth of their most recent child in February of 2019, they were not in a position to safely retain care and custody of that child. In February of 2019, just one month before this trial

and after the children had been out of their home for nearly eighteen months, there was still obvious and noticeable hazards in the home, making it unsafe for children.

It is no small thing when parents in dependency, neglect, and abuse actions complete case plans and work to improve their lives and successfully make changes to rectify unhealthy or unsafe situations. That success should not be minimized by affording the same opportunity to parents who simply show up for appointments and visitation but do not actually take the lessons being offered to heart and home and make the necessary changes to parent without being neglectful.

Lastly, despite Mother and Father's apparent compliance with all or most of their case plan requirements, they cite to no authority indicating that this compliance entitles them to retain their parental rights where neglect is not disputed and where legitimate concerns as to the children's safety in their care remain.

Overall, I cannot find that the trial court's determination of parental unfitness under KRS 625.090(2)(g) was not supported by substantial evidence. Again, the finding of a lack of reasonable prospects of improvement being based largely, though not entirely, on prior case history seems appropriate given the factual distinctions between this case and *M.E.C.* I would uphold the ruling of the trial court.

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