RENDERED: OCTOBER 9, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-1415-ME

B.H. AND L.H. APPELLANTS

APPEAL FROM BOYLE CIRCUIT COURT
v. HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NO. 18-AD-00035

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY, and S.J.-L.H.,
A MINOR CHILD APPELLEES

AND
NO. 2019-CA-1416-ME

B.H. AND L.H. APPELLANTS

APPEAL FROM BOYLE CIRCUIT COURT
v. HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NO. 18-AD-00036

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY, and C.D.J.H.,
A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

JONES, JUDGE: B.H. ("Mother") and L.H. ("Father") appeal from orders of the Boyle Circuit Court ("family court") terminating their parental rights to their two minor children, S.J.-L.H. and C.D.J.H. Having reviewed the record and being sufficiently advised, we affirm.

I. BACKGROUND

Mother and Father are the adoptive parents of S.J.-L.H. and C.D.J.H.[1] The Cabinet first began receiving referrals regarding this family in August 2017 when the children were eight and nine. The referrals were largely due to environmental concerns related to the living conditions in the family's home. At this time, Mother and Father lived in Gravel Switch in Boyle County, Kentucky. Initially, the Cabinet decided that the children could remain in the home so long as Mother and Father worked to improve the family's living environment. As a result, over the next several months, the Cabinet provided four separate prevention plans to the family.

[1] Mother and Father are the children's biological maternal grandmother and maternal step-grandfather. They adopted the children approximately three years prior to these termination proceedings after the rights of the children's biological parents were terminated. However, it appears that even prior to their adoptions the children had lived with Mother and Father for most of their lives.

Sadly, however, the family's living conditions continued to deteriorate. On February 9, 2018, Kyle Huffman, the social worker assigned to the family, completed a home visit with the family. Mr. Huffman testified that he found the family's home to be in deplorable condition. Beer cans and glass were strewn throughout the yard. The inside of the home was in far worse condition. Mice and other animals were entering the home through holes in the wall so big that one could see to the outside. Mice feces was present throughout the kitchen and dining areas. There were broken windows. The only source of heat was a small portable heater in the living room. There was only one working light in the home. The inside of the home was cluttered and littered with trash, beer cans, and other items. While Mr. Huffman was standing in the kitchen, a mouse ran up his leg.

Mr. Huffman concluded that the home was not safe for the children. Immediately after the home visit, he filed a petition on the Cabinet's behalf seeking emergency custody of the children. The children were removed that evening. The Cabinet attempted to place the children with a relative to no avail. Ultimately, the Cabinet placed the children in foster care where they have remained since their removal. A dependency, neglect, and abuse ("DNA") action was instituted against Mother and Father. On February 26, 2018, both parents stipulated to neglect.

The Cabinet's permanency goal was initially reunification. The Cabinet's identified areas of concern for Mother and Father included the environmental state of the home, truancy, Father's alcohol abuse, Mother's codependency, their instability, mental health concerns, and deep-seated neglect. The Cabinet set up individual case plans with Mother and Father. The requirements of the case plans were similar: participate in substance abuse and mental heath assessments and follow any recommendations related thereto, complete drug screens when scheduled, attend parenting classes and demonstrate the skills learned from the classes, abstain from all substances, cooperate with the Cabinet, and take responsibility for their actions. The Cabinet provided Mother and Father with referrals to obtain mental health and substance abuse assessments and treatment, parenting classes, and parenting evaluations. Additionally, the Cabinet provided no-cost drug screens.

The Cabinet also set up supervised visitation so Mother and Father could see the children and maintain their bond. These visits were scheduled every other week. Mother and Father were faithful in going to all their scheduled visitations. However, the visits were stopped in May 2019 after the children's therapist recommended that they cease all contact with their parents. This recommendation was based on the parents' inappropriate behaviors and problems with boundaries during the visits. Some of these behaviors included encouraging

and/or discussing inappropriate behaviors (farting, cigarette smoking, and sex); failing to intervene when the children misbehaved; favoring S.J.-L.H. over C.D.J.H.; and discussing the case with the children. On one instance, Father was observed throwing a ball at one of the children's genitals. Mr. Huffman testified that the expectation was for the parents to demonstrate the parenting skills they were learning and, instead, Mr. Huffman was the one redirecting the children and parents during the visits.

On October 1, 2018, the Cabinet changed its permanency goal to adoption. It filed petitions for involuntary termination of parental rights on November 2, 2018. The family court held a final hearing on July 12, 2019, at which Dr. Paul Ebben, the psychologist who completed the parental evaluations, Dr. Brian Ellis, and Mr. Huffman testified. Neither Mother nor Father testified. While their counsel remained, they left the courtroom before the conclusion of the hearing.

Dr. Ebben testified that he met with Mother and Father separately on June 7, 2018, for the purpose of completing parental competency and risk assessments as directed by the Cabinet. In addition to interviewing the parents and conducting a number of psychometric tests, Dr. Ebben reviewed the parents' service provider and Cabinet records. Dr. Ebben testified that Mother suffers from fairly significant mental health issues and has been on medication for some time.

Dr. Ebben believes Father's cognitive abilities may be limited by the effects of a traumatic brain injury he suffered sometime in the past. Despite these conditions, Dr. Ebben believes the parents are functional and able to meet their own needs.

Dr. Ebben testified both parents minimized the circumstances that led to removal of the children from their home. Instead of accepting responsibility, both attributed the removal to only a mouse problem that they could have better addressed by setting out poison. They also minimized Father's drinking and did not see it as a problem. Overall, Dr. Ebben noted significant discrepancies between the Cabinet records and the parents' reports. While he believed Mother and Father (to a lesser degree) had the capacity to improve their parenting, in his opinion, their failure to acknowledge their own roles in the children's initial removal posed a barrier to improvement. In his opinion, individuals have no chance of actually achieving significant improvement if they are not aware and do not acknowledge their roles in the problem. Dr. Ebben recommended reevaluations of both Mother and Father after they had successfully completed their case plans; however, these were never scheduled because the case plans were not completed to the Cabinet's satisfaction.

Next, Mother's and Father's treating physician, Dr. Brian Ellis, testified. He testified Mother has various physical and mental health diagnoses, including fibromyalgia, depression, and chronic pain. He testified Father suffered

a brain injury many years prior. Dr. Ellis was unaware of Father's alcohol usage and admitted he could not render an opinion regarding alcohol abuse when he did not have the proper background from his patient.

Mr. Huffman was the next to testify.[2] He testified about the Cabinet's identified issues and barriers toward reunification, including environmental neglect. He explained that Mother and Father initially worked to clean up their home in Gravel Switch. However, conditions quickly deteriorated again. Eventually, they moved to a new residence in June of 2018 after they were approved for public housing assistance. While the new home's condition was better at the onset, conditions once again began to deteriorate. After only four months in the new home, Mr. Huffman observed the couple falling back into their old habits. In October of 2018, Mr. Huffman observed that the new home was becoming cluttered and unsafe. The home also had a pervasive cigarette odor. Mr. Huffman testified that at times the cigarette smoke in the home was so thick that he could not see clearly. This is particularly problematic because C.D.J.H. was found to be suffering from asthma due to secondhand smoke inhalation at the time of his removal.

[2] At the time of the hearing, Mr. Huffman no longer worked for the Cabinet. He was the ongoing social worker from February 9, 2018, until March 22, 2019, at which time he left to work at Court Appointed Special Advocates ("CASA") as a program development coordinator. He was still involved with the family through his new position.

Mr. Huffman testified Father was released from his substance abuse program because he was unable to verbalize any treatment goals. Afterwards, Father completed a substance education class; however, Mr. Huffman felt this did not satisfy Father's case plan, as it was not technically a treatment program. Father returned multiple positive or diluted drug screens, most recently on April 24, 2019.

Ultimately, Mr. Huffman did not believe there were any additional services the Cabinet could provide Mother and Father. He explained that despite repeated efforts both before and after the children were removed, Mother and Father displayed an inability to keep the family's home in a safe and habitable condition conducive for child-rearing. He also testified that even after Mother and Father completed their parenting classes, they were unable to demonstrate appropriate parenting skills during their supervised visits, which eventually led to a cessation of all visitation with the children. He also noted that neither parent appeared willing to address Father's alcohol consumption. And, despite the fact that Mother and Father received counseling and had completed parenting classes, they continued to minimize the problems in their home that led to the children's removal or did not acknowledge any problems with their parenting skills.

Finally, Mr. Huffman testified about the children's progress since having been removed from Mother's and Father's care. Mr. Huffman explained that the children were placed together with a concurrent foster family. They had

had a variety of issues when they were removed. C.D.J.H. was suffering from asthma due to inhaling secondhand smoke while in Mother's and Father's care. Both struggled to conform their behavior to socially and age-appropriate standards. Each child demonstrated marked improvement since removal. Mr. Huffman testified that they were doing "fantastic," and he believed that they would continue to improve if left in their foster home.

Following the hearing, the family court entered a separate termination order and separate findings of fact and conclusions of law with respect to each child. These appeals followed.

II. STANDARD OF REVIEW

Family courts are afforded a great deal of deference in determining if termination of parental rights is warranted. *M.P.S. v. Cabinet for Human Res*., 979 S.W.2d 114, 116 (Ky. App. 1998). As such, this Court will not set aside the family court's findings of fact unless they are clearly erroneous. CR[3] 52.01. Factual findings are clearly erroneous if the record is devoid of substantial evidence to support them. *Yates v. Wilson*, 339 S.W.2d 458, 464 (Ky. 1960). "The standard of proof before the trial court necessary for the termination of parental rights is clear and convincing evidence." *V.S. v. Commonwealth of Kentucky, Cabinet for Human Res.*, 706 S.W.2d 420, 423 (Ky. App. 1986) (citations omitted). "Clear and

[3] Kentucky Rules of Civil Procedure.

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, 70 S.W.2d 5, 9 (Ky. 1934).

III. ANALYSIS

Termination of parental rights is governed by KRS[4] 625.090. Under this statute, termination is proper if a three-part test is satisfied. First, the court must find that the child is abused or neglected, as defined by KRS 600.020(1). KRS 625.090(1). Second, one of the factors enumerated in KRS 625.090(2) must be present. Finally, termination must be in the child's best interest. KRS 625.090(3). KRS 625.090 requires the court to make a finding of abuse or neglect as to each parent.

Mother and Father concede that they stipulated to neglect during the DNA proceedings, meeting the first part of the test, and they have not presented any argument regarding the best interest prong.[5] Their arguments center entirely on whether substantial evidence exists to support the family court's finding that grounds for termination under both KRS 625.090(2)(e) and (g) were present in this

[4] Kentucky Revised Statutes.

[5] "Any part of a judgment appealed from that is not briefed is affirmed as being confessed." *Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000). Therefore, we will not address the first and third prongs of the parental termination test.

case. KRS 625.090(2)(e) provides one ground for termination exists when the parents "for a period of not less than six (6) months, [have] continuously or repeatedly failed or refused to provide or [have] been substantially incapable of providing essential parental care and protection for the child[ren] and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child[ren.]" KRS 625.090(2)(g) provides that another ground for termination exists when the parents "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[ren]'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[ren.]"

Parents contend that while they may have failed to provide the children with parental care, parental protection, and a suitable living environment in the past, the Cabinet failed to adequately demonstrate that there was not a reasonable expectation of significant improvement on their parts. To this end, they cite Dr. Ebben's finding that they had the capacity to change and properly parent. They point out that this conclusion is bolstered by the fact that they moved to new housing and made progress toward completion of their case plans.

In support of their argument they cite *M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 848 (Ky. App. 2008), wherein we held that termination was not supported even though the mother had failed to complete her case plan. We believe *M.E.C.* is largely inapposite. The mother in *M.E.C.* was prevented from completing her case plan due to short periods of incarceration and two lengthy hospitalizations following a near-fatal car accident. Despite these challenges and with little help from the Cabinet, the mother found and completed parenting classes and enrolled in a drug rehabilitation program. Throughout, the mother continued to visit the children, obtained appropriate housing, and secured employment. She also worked to remedy the problems in her life that caused her children's removal. We further noted that the children were well cared for by mother when they were in her custody.

In contrast, these two children were found to be living in deplorable conditions indicative of substantial neglect at the time of their removals. Despite significant assistance from the Cabinet, Mother and Father were unable to complete their case plans and maintain a suitable living environment. While Mother and Father eventually secured suitable housing, they reverted to their old habits after only a few months resulting in a cluttered, smoke-filled home. Perhaps most problematic, neither Mother nor Father fully acknowledged their parental shortcomings. Despite having completed parenting classes and participating in

counseling, they continued to minimize their past neglect and they discounted Father's alcohol abuse. Dr. Ebben testified that even though they might be capable of changing their behavior, their inability to take responsibility for their past actions would be a barrier to any future improvement. Mr. Huffman testified that Mother and Father continued to display poor parenting during their supervised visits. Eventually, this led to a recommendation from the children's therapist to cease further visitation.

Despite parents' protestations otherwise, the family court did not base its termination decision solely on their past conduct. Its conclusion that there was no reasonable expectation of significant improvement was based on Dr. Ebben's testimony in combination with Mr. Huffman's personal observations of parents' failure to remedy their living situation and parenting style despite having worked with the Cabinet extensively for some period of time. In that time, parents were provided with a significant amount of assistance but were still unable to achieve the sustained changes needed to regain custody. In short, there was substantial evidence that there was no reasonable expectation for parents to improve their behaviors in the immediate future.

Finally, parents argue that the Cabinet should not have been able to rely on their mental health and past legal problems because it was made aware of these problems before they adopted the children a few years prior to these

termination proceedings. We disagree. It would have been impossible for the Cabinet to know with complete certainty how these issues would affect Mother's and Father's ability to parent the children, if at all. The fact that the Cabinet previously believed Mother and Father would be able to properly parent the children despite these problems is not determinative or conclusive evidence of their actual ability to do so. The Cabinet appropriately stepped in to protect these children when it became clear that they were being neglected by parents. In seeking to determine whether parents were capable of improvement it was necessary for the Cabinet to examine their backgrounds and reassess whether it believed parents could change their conduct in light of their situations.

IV. CONCLUSION

For the foregoing reasons, we affirm the orders terminating Mother's and Father's parental rights.

ALL CONCUR.

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