

RENDERED: DECEMBER 11, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2020-CA-0275-ME

B.H.¹

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NO. 19-AD-500072T

CABINET FOR HEALTH AND
FAMILY SERVICES AND M.S.T.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

¹ Pursuant to Court policy, to protect the privacy of minors, we refer to parties in termination of parental rights cases by initials only.

DIXON, JUDGE: B.H. (Father) appeals from the Jefferson Circuit Court order terminating his parental rights to M.S.T. (Child),² entered on January 23, 2020. After careful review of the record, briefs, and law, we affirm.

BACKGROUND

In February 2019, the Cabinet for Health and Family Services (CHFS) petitioned the Jefferson Circuit Court to terminate the parental rights to Child. Child was born on September 27, 2017, testing positive for illegal substances. CHFS was granted emergency custody of Child, and three days after her birth, Child was placed in the foster home where she has remained. Father was not listed on the birth certificate, and CHFS was initially unable to locate him.

Father explained his early absence by claiming Mother “pulled a long con” by misleading him regarding Child’s due date. Father asserts he attempted to contact CHFS multiple times a day for four days upon learning of Child’s birth on November 13, 2017; however, CHFS disputed this assertion.

Father successfully contacted CHFS in December 2017, and his paternity was established in March 2018. Thereafter, Father was adjudicated of neglect of Child and was given a case plan requiring that he submit to a hair follicle test, have supervised visitation, complete a parenting assessment, and

² The parental rights of A.T. (Mother) were also terminated in the proceedings below; however, Mother has not filed an appeal. Accordingly, any reference to her in this appeal is intended solely for the purposes of clarity and completeness.

ultimately complete parenting classes. Father met Child for the first time on May 18, 2018, and a supervised visitation schedule of two-hour visits every other week began in June 2018.

Much of the trial pertained to Child's best interest. The foster parents and the social worker, Salm, testified that Child has developmental delays and severe anxiety issues, and is essentially non-verbal, using only a few words via speech and sign language. Through the First Steps program, Child was placed in occupational, physical, and speech therapy, and the foster parents actively participate in her treatment. CHFS testified that termination of parental rights (TPR) was in Child's best interest as she was receiving the care she needed and was well bonded with her foster family, who is prepared to adopt her. CHFS expressed concerns regarding Child's lack of attachment to Father, as well as his ability and willingness to meet Child's needs.

Testimony regarding Father's visitation with Child was heavily developed at trial. It is uncontested that Father was initially content to allow Child to dictate the course of visitation and whether she wished to engage with him. Salm concedes this was appropriate given the Child's high level of separation anxiety. After the first few visits, Father began bringing Child a snack and usually a book for their time together. Father opined that he was set up for failure by CHFS when Child was sent to visitation with only one diaper and some wipes,

instead of a full diaper bag with familiar items. However, Father believes the visits are now almost perfect and submitted photos of himself and Child to support this belief.

CHFS disagreed with Father's characterization of the visits. After a December 2018 visitation, the foster parents testified that Child's anxiety-related behavior—previously characterized as screaming hysterically when taken from the foster parents—became exacerbated. Upon returning home, Child became angry and began pulling out large sections of her hair, scratching and hitting herself, and waking up in outbursts up to four times a night. These behaviors eventually abated but returned after the next visit in March 2019. To help alleviate these behaviors, the foster parents practiced soothing techniques, such as joint massage and skin brushing, learned from Child's therapist at First Steps.

Beyond Child's severe anxiety, CHFS had additional concerns regarding visitation. Salm testified Father lacked engagement during visitation. As examples, Salm stated how Father generally chose to chat with her, instead of playing with Child, and that Father did not ask questions or express concerns regarding Child's wellbeing. Salm further opined that Child is not attached to Father, as demonstrated by her attempts to prematurely end visitations by pulling Salm to the door or signing that she is done. Additionally, Salm noted that Father

had not requested to learn the soothing techniques to help Child and had to be prompted at the end of every visit to change Child's diaper.

Regarding Father's efforts toward reunification and parental adjustments, while he ultimately completed his case plan, CHFS expressed concerns about his lack of accountability and follow-through. Examples of this include Father's failure to: complete the six-week parenting classes ordered in August 2018 until April 2019; provide proof of completion of classes until June 2019; engage in Child's treatment; request extended visitation; or provide financial support. With regard to the lack of increased visitation, Salm testified that Father had expressed his desire to keep the current schedule of every other week and had, in fact, requested less visitation after his back surgery.

Father asserts he has done everything requested of him. Father acknowledges he was supposed to complete parenting classes through Pennyroyal, his employer, and attributes the delays to his erroneous reliance on staff to schedule it correctly and a policy change regarding employees utilizing services. Father asserts he did not contact Child's First Steps providers because they were supposed to contact him. Father admits he has not learned Child's soothing techniques but asserts his local First Steps office will create a plan for him if he is granted custody. Father believes his visitation should have been increased without request. Father denied ever stating he did not want more frequent visitation and

denied that a reduction was necessary after his back surgery because he worked a full schedule the following week. Upon further questioning, however, Father conceded he asked to not schedule visits to allow him to recover from surgery. Despite a reported monthly income of \$1,000, after expenses, Father admitted he had not provided any financial support to Child. Finally, when asked if there was anything Father could have done differently, he indicated he could have researched on the dark web what was expected so that his failure to ask questions would not be used against him.

CHFS expressed additional concerns that Father underappreciated the seriousness of Child's developmental delays and severe anxiety. Salm testified Father minimized Child's inability to speak by repeatedly noting that his older child did not begin speaking until age three and turned out fine. Additionally, Father undermined CHFS's compliance with the speech therapist's directive to require Child to voice her requests when he retrieved an item just to stop Child from crying. Regarding Child's anxiety-related behaviors, Father made sarcastic comments about how Child would probably need a week to recover from a visit.

Father denied making sarcastic comments and asserted he is aware of Child's developmental issues and would take her to treatment were he to be granted custody. Father acknowledged it is a concern if Child does not meet developmental norms, but stated Child is unique. He further acknowledged Child

has anxiety and engages in harmful behaviors, such as the hair pulling, but characterized this as being a passionate child.

The trial court granted termination, and this appeal followed. Additional facts will be introduced as they become relevant.

STANDARD OF REVIEW

The trial court's findings of fact are subject to the clearly erroneous standard of review. CR³ 52.01. Accordingly, we give great deference to the trial court's findings of fact and will only set them aside if the record is devoid of substantial evidence to support them. *D.G.R. v. Commonwealth, Cabinet for Health and Family Servs.*, 364 S.W.3d 106, 113 (Ky. 2012). Application of the law to the facts, we review *de novo*. *Id.*

ANALYSIS

Involuntary TPR actions are governed by KRS⁴ 625.090. TPR may be granted only if the trial court finds a three-pronged test has been met by clear and convincing evidence. *Id.* First, the child must be deemed abused or neglected as defined by KRS 600.020(1). KRS 625.090(1)(a). Second, the trial court must find the existence of at least one statutory ground for termination listed in KRS 625.090(2). Third, termination must be found to be in the best interest of the child

³ Kentucky Rules of Civil Procedure.

⁴ Kentucky Revised Statutes.

after consideration of the factors listed in KRS 625.090(3). Father does not challenge the trial court's conclusions that CHFS satisfied the first two prongs.

Father's first claim is the trial court erred by failing to utilize its discretion, pursuant to KRS 625.090(5), to deny TPR where he had demonstrated by a preponderance of the evidence that Child would not continue to be neglected if returned to his care. In support, Father asserts that the uncontested testimony was that he: completed every task asked of him; drug screened negatively; established paternity; attended and completed parenting classes; regularly attended court and supervised visitations; has family support; has stable income, employment, and housing; and demonstrated his good parenting by declining to engage in a custody or visitation battle regarding his eldest daughter at her request. Father acknowledges Child's special needs and asserts he can transport Child to appointments, learn the soothing techniques, and be otherwise engaged in her treatment.

In granting TPR, the trial court found that Father's testimony regarding his ability to meet Child's future needs lacked credibility, and consequently, he failed to demonstrate that Child would not continue to be abused or neglected. In reaching this conclusion, the trial court found that Father: lacked credibility in explaining his initial absence as the result of a "long con"; was not compliant with his case plan when the TPR petition was filed; provided an

unrealistic explanation for failing to complete parenting classes in a more timely fashion; had not engaged in Child's treatment program; did not learn Child's soothing techniques, despite being aware of them; minimized Child's significant developmental and health issues; and failed to provide financial support. The trial court further stated that even if Father had met his burden of proof, it would not exercise its discretion to deny TPR because termination was in Child's best interest.

Father's credibility was within the exclusive province of the trial court, and the court's findings are amply supported by the record. CR 52.01. Accordingly, we conclude the trial court did not err.

Father's second claim is that, pursuant to KRS 625.090(4), he proved by clear and convincing evidence that he had already made lasting parental adjustment as required to care for Child. Father's support for this claim is identical to that presented previously, *i.e.*, he believes the evidence is uncontroverted that Child should be placed in his custody.

KRS 625.090(4) provides that when a child is placed with CHFS, "the parent may present testimony concerning the reunification services offered by [CHFS] and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent." Father's argument under this claim appears misguided. KRS 625.090(4) merely defines

admissible evidence that can be introduced; it does not create an additional burden of proof on either party beyond that contained in KRS 625.090(1)-(3). To the extent Father seeks to supplement his argument that the trial court erred in refusing to use its discretion to deny TPR, our analysis above is sufficient, and this claim fails.

Father's third and final claim is that the court erred in finding that CHFS had made reasonable efforts to reunify the family. Father's argument is based solely on the fact that he was never permitted to have unsupervised visitation, despite being completely compliant with his case plan. Father attributes CHFS's actions to their unsubstantiated presumption that Child's anxiety-related behaviors stem from contact with him.

As part of its best interest determination, the trial court was required to consider whether CHFS made reasonable efforts to reunite the family prior to filing of the petition. KRS 625.090(3)(c). Reasonable efforts are defined as "the exercise of ordinary diligence and care by [CHFS] to utilize all preventive and reunification services available to the community . . . which are necessary to enable the child to safely live at home[.]" KRS 620.020(13).

Herein, the trial court found that reasonable efforts were made because CHFS testified it was unaware of additional services that would be beneficial, and Father was given a case plan, parenting assessment, parenting

classes, and visitation services. These findings are not clearly erroneous. Furthermore, Father's own testimony refutes his claim, as he admitted that he did not complete his parenting classes until April 8, 2019, approximately two months after filing of the TPR petition. Accordingly, sufficient evidence supports the trial court's order.

CONCLUSION

Therefore, and for the foregoing reasons, the order of the Jefferson Circuit Court terminating parental rights is **AFFIRMED**.

ALL CONCUR.

BRIEF FOR APPELLANT:

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**BRIEF FOR APPELLEE CABINET
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