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Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-0357-ME

J.W. APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 19-AD-00050

CABINET FOR HEALTH AND
FAMILY SERVICES; E.W., A MINOR
CHILD; AND S.E.B. APPELLEES

AND NO. 2020-CA-0358-ME

J.W. APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 19-AD-00051

CABINET FOR HEALTH AND
FAMILY SERVICES; A.E.W., A
MINOR CHILD; AND S.E.B. APPELLEES

AND NO. 2020-CA-0359-ME

J.W. APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 19-AD-00052

CABINET FOR HEALTH AND
FAMILY SERVICES; A.W., A MINOR
CHILD; AND S.E.B. APPELLEES

OPINION
VACATING AND
REMANDING

** ** ** ** **

BEFORE: COMBS, DIXON, AND MAZE, JUDGES.

COMBS, JUDGE: Appellant, J.W., appeals from orders of the Campbell Family Court terminating his parental rights. After our review, we vacate and remand to the Campbell Family Court for additional findings.

J.W. (Father) is the biological father of three minor children: E.J.S.W., a male, born in 2014; A.E.W., a female, born in 2015; and A.R.H.W., a female, born in 2017. After Father and the children's mother, S.B. (Mother), separated in 2018, the children remained with Mother.

On September 6, 2018, the Appellee, Cabinet for Health and Family Services (the Cabinet), filed a petition for emergency custody against Mother only after receiving multiple reports concerning the safety of the children, including: substance abuse by Mother, who was the primary caretaker; chronic homelessness; utilizing inappropriate caregivers; inadequate supervision by Mother; and domestic violence. Mother had a previous history with the Cabinet, and her two older children were in the permanent custody of their maternal grandmother. On October 10, 2018, the court found that the children were neglected or abused based upon Mother's stipulation.

On August 5, 2019, the Cabinet filed petitions for the involuntary termination of parental rights against Mother and Father as to each of the three children. On September 9, 2019, Mother filed an appearance, waiver, and consent to adoption as to each child.

The matter was tried on January 10, 2020. Maurice Lee, the Cabinet Social Services Specialist assigned to the case from mid-January 2019 through July 2019, and Ashley Valenzuela, who took over the case from Mr. Lee, both testified on behalf of the Cabinet. Father also testified. We have reviewed the recorded proceeding, and we shall discuss the witnesses' testimony as it pertains to the issues before us on appeal.

On February 7, 2020, the trial court entered findings of fact, conclusions of law, and judgments terminating parental rights. The court's findings of fact[1] provide in relevant part as follows:

> Based upon clear and convincing evidence presented at trial, the Court makes the following findings of fact:
>
> . . .
>
> 4. [J.W.] is the father of [the child] pursuant to KRS [Kentucky Revised Statutes] § 625.065(1)(a), as [J.W.] was voluntarily identified by [Mother] via affidavit. No other person meets the statutory requirements necessary to be named as the child's putative father with parental rights based on KRS § 625.065.
>
> . . .
>
> 6. The child . . . has resided in foster care since September 6, 2018. [The child] was committed to the Cabinet . . . by Order of the Campbell Family Court on November 28, 2018 . . . .
>
> . . .
>
> 8. The child entered care due to ongoing concerns of drug use and domestic violence in the home.
>
> 9. Father was given a case plan with the following tasks: substance abuse assessment, mental health assessment, drug screen on colors blue and purple,

[1] The trial court's findings of fact and conclusions of law are substantially identical as to each child. Those recited are from Case No. 19-AD-00050, in the interest of E.J.S.W. To the extent they differ as to the other two children, we note that distinction by footnote.

parenting classes, PCIT, and paternity test through child support office.

10. Father did complete a substance abuse assessment, but failed to provide truthful responses. Testimony shows the father only admitted use of marijuana, despite a history of abusing other substances. Consequently, he did not receive services appropriate to his substance abuse.

11. Father has not completed the mental health assessment. He did begin the process, but has not finished it. This task has been present on his case plan since the beginning and he only recently became engaged.

12. Father does not screen as required. Testimony shows he has missed multiple screens on color blue and tested positive for cocaine in August 2019. He has never showed for a screen on color purple.

13. Father has not completed parenting classes.

14. Father has not been able to participate in PCIT, as he has not made progress on his case plan.

15. Father has not established paternity, despite having the information necessary to complete the task. As a result, he also has not established child support.

16. Father only became interested in working a case plan in July 2019. Prior to that, he refused to cooperate.

17. Due to his lack of progress, [F]ather does not have visits with the children.

18. Father has had no contact with the child in over a year.

19. Testimony indicates father has made no lifestyle changes. He continues to use substances and he is not able to provide appropriate housing for the child.

20. Testimony shows the Respondent mother has made allegations of domestic violence by the father.

21. Father has failed to provide any financial care for the child. He has not offered to provide any food or clothing for the daily needs of the child.

22. The child is excelling in the adoptive home. The siblings are placed together, and the foster parents are meeting all of the child's needs. It is expected the child will continue to progress.[2]

23. When [the child] entered care, the child had significant behavior issues. Through play therapy, [the child] progressed.[3][4]

24. Respondent father failed to protect and preserve the child's fundamental right to a safe and nurturing home and this is an abused or neglected child. [The child] has been adjudged to be a neglected child, as defined in KRS 650.020, by the Campbell Family Court.

25. Respondent father . . . abandoned the child for a period or periods of not less than ninety (90) days in duration.

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[2] With respect to A.E.W., Case No. 19-AD-00051, the trial court further found that "[s]he is enrolled in Headstart and improving quickly."

[3] With respect to A.R.H.W., Case No. 19-AD-00052, the trial court's Finding of Fact No. 23 states: "The social worker has observed a significant bond between the child and the foster family."

[4] With respect to A.E.W., Case No. 19-AD-00051, the trial court's Finding of Fact No. 23 is as follows: "After phone visits began, the child regressed in behaviors. She was potty training and began to have a significant number of accidents."

26. Respondent father . . . for a period of not less than six (6) months, continuously or repeatedly failed or refused to provide or proved to be substantially incapable of providing essential parental care and protection of the child . . . and there is no reasonable expectation of improvement in parental care and protection considering the age of the child.

27. Respondent father . . . for reasons other than poverty alone, continuously or repeatedly failed or refused to provide or proved to be 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 parents' conduct in the immediately foreseeable future, considering the age of the child.

28. Respondent father . . . committed acts of abuse or neglect established in KRS 600.020(1) toward any child in the family.

29. Respondent father . . . has a substance abuse history that poses a risk to any child in his care.

30. The Cabinet for Health and Family Services has attempted to render services either directly or by referral in an effort to keep the family together including working with the family while the child was placed in foster care. [Father] failed to make lasting parental changes.

31. The child has made improvements since coming into foster care and these improvements are expected to continue. There is a high likelihood that the child will be adopted and has formed an attachment to the prospective adoptive family.

> 32. Respondent father . . . failed to pay a reasonable portion of substitute physical care and maintenance.
>
> 33. Termination of parental rights is in the best interest of the child . . . and the Cabinet for Health and Family Services has facilities available to accept the care, custody, and control of the child and is the agency best qualified to receive custody.

Based upon the above findings of fact, the trial court made the following conclusions of law as to each child in relevant part, as follows:

> 2. The child is adjudged to be a neglected child by the Court in this action as defined in KRS 600.020(1)(a), 4, 7, 8 as it relates to father.
>
> 3. Respondent father abandoned the child for a period of not less than ninety days.
>
> 4. Respondent father, for a period of not less than six (6) months, continuously or repeatedly failed or refused to provide or proved to be substantially incapable of providing essential parental care and protection for the child . . . and there is no reasonable expectation of improvement in parental care and protection considering the age of the child.
>
> 5. Respondent father, for reasons other than poverty alone, continuously or repeatedly failed to provide or proved to be 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 improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child.
>
> 6. Respondent father has a substance abuse history that poses a risk to any child in his care.

> 7. Respondent father has committed acts of abuse or neglect defined in KRS § 600.020(1) toward any child in the family.
>
> 8. Respondent father failed to pay a reasonable portion of substitute physical care and maintenance.
>
> 9. The Cabinet for Health and Family Services has rendered or attempted to render all reasonable services to the parents which reasonably might be expected to bring about a reunion of the family, no additional services are likely to bring about a reunion of the family, and no additional services are likely to bring about parental adjustments enabling a return of the child to the parents within a reasonable time, considering the age of the child.
>
> 10. Petitioner, Cabinet for Health and Family Services, is entitled to a judgment terminating the parental rights of [Mother] and [Father], to the child . . . , and it is in the best interest of the child that parental rights of Respondents be terminated and that custody be transferred to the Cabinet for Health and Family Services as a ward of the state with authority to place the child for adoption.

Father appeals. As this Court explained in *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 426-27 (Ky. App. 2015):

> [P]arental rights are a "fundamental liberty interest protected by the Fourteenth Amendment" of the United States Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982). When 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 Svcs. of Durham Co., N.C.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 2160, 68 L.Ed.2d 640 (1981).

> Accordingly, termination of parental rights is a grave action which the courts must conduct with "utmost caution." *M.E.C. v. Commonwealth, Cab. for Health and Family Svcs*., 254 S.W.3d 846, 850 (Ky. App. 2008). Termination can be analogized as capital punishment of the family unit because it is "so severe and irreversible." *Santosky v. Kramer*, 455 U.S. at 759, 102 S.Ct. at 1398. Therefore, to pass constitutional muster, the evidence supporting termination must be clear and convincing. 455 U.S. at 769-70, 102 S.Ct. at 1403. Clear and convincing proof is that "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).

In *Cabinet for Health and Family Services v. K.H*., 423 S.W.3d 204, 209 (Ky. 2014), our Supreme Court explained:

> The Commonwealth's TPR [termination of parental rights] statute, found in KRS 625.090, attempts to ensure that parents receive the appropriate amount of due process protections. KRS 625.090 provides for a tripartite test which allows for parental rights to be involuntarily terminated only upon a finding, based on clear and convincing evidence, that the following three prongs are satisfied: (1) the child is found or has been adjudged to be an abused or neglected child as defined in KRS 600.020(1); (2) termination of the parent's rights is in the child's best interests; and (3) at least one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) exists.

Indeed, "the bulk of the statute, reflects a default preference against termination, which is why it states that no termination of parental rights shall be ordered *unless* the court makes the statutory findings based on the higher standard of proof of clear and convincing evidence." *D.G.R. v. Commonwealth, Cabinet for*

Health and Family Services, 364 S.W.3d 106, 112 (Ky. 2012). On appeal, "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 and Family Services v. K.S.*, 585 S.W.3d 202, 209 (Ky. 2019) (citation omitted).

We first address Father's second argument that the court erred in terminating parental rights because the three-prong test has not been met by clear and convincing evidence.

The first prong of the test, KRS 625.090(1)(a), requires a finding based upon clear and convincing evidence that either:

> 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction; [or]
>
> 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding[.]

Father contends that the trial court erred in finding that he "committed acts of abuse or neglect established in KRS 600.020(1) toward any child in the family." The Cabinet worker, Maurice Lee, testified that the children were adjudged neglected on October 10, 2018, but only with respect to Mother. Father was not named in the petition because it did not appear that he was in a custodial role at that time. At the time the children were removed, Mother alone was caring for

them. According to Mr. Lee, there are two other children living with the grandmother, but they are not Father's children. Thus, there was no prior adjudication of abuse or neglect against Father. Any finding to the contrary is clearly erroneous because it is not supported by substantial evidence and must be set aside. CR[5] 52.01 ("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.").

In order to satisfy the first prong of KRS 625.090, the trial court had to find that the children were abused or neglected as defined in KRS 600.020(1). In its conclusions of law, the trial court determined that: "The child is adjudged to be a neglected child by the Court in this action as defined in KRS 600.020(1)(a), 4, 7, 8 as it relates to father." Those subsections define an abused or neglected child as one whose parent:

> 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
>
> . . .
>
> 7. Abandons or exploits the child;
>
> 8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. . . .

[5] Kentucky Rules of Civil Procedure.

It is not clear to us what particular evidence the trial court relied upon in reaching its conclusions. The trial court did make a finding that "Father has failed to provide any financial care for the child. He has not offered to provide any food or clothing for the daily needs of the child." There is evidence that could support a finding that Father failed to provide care. However, there is also Father's uncontradicted testimony that he did offer assistance (that he asked the foster mother multiple times if the children needed anything), and it was declined. In addition, Father testified that he gave Mother cash for support of the children every time that he saw her after April 2018 -- when they split up and before removal. We cannot determine if the trial court did not consider Father's testimony at all or whether it considered his testimony and did not find it credible (as was its prerogative). *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (Judging credibility of witness is a task within the exclusive province of the trial court.).

The court also found that Father has not had contact with the children in more than a year. However, as Father notes in his brief, he did have telephone contact. According to Ms. Valenzuela, phone calls with the children began in October 2019 after Father became consistent with drug screens; the phone calls apparently were continuing. We cannot determine if the trial court believed that Father had no in-person contact with the children or if it erroneously believed that Father had no contact with the children whatsoever.

> To review the judge's decision on appeal, it is important to know what facts the judge relied on in order to determine whether he has made a mistake of fact, or to even determine if he is right at law, but for the wrong facts. If a judge must choose between facts, it is clearly relevant which facts supported his opinion.

Anderson v. Johnson, 350 S.W.3d 453, 455 (Ky. 2011). Appellate courts are not expected to "search a video record or trial transcript to determine what findings the trial court might have made with respect to the essential facts." *Keifer v. Keifer*, 354 S.W.3d 123, 126 (Ky. 2011).

The trial court also made findings of fact that:

> 25. Respondent father . . . abandoned the child for a period or periods of not less than ninety (90) days in duration.
>
> 26. Respondent father . . . for a period of not less than six (6) months, continuously or repeatedly failed or refused to provide or proved to be substantially incapable of providing essential parental care and protection of the child . . . and there is no reasonable expectation of improvement in parental care and protection considering the age of the child.

These findings of fact merely recite the statutory language contained in KRS 625.090(2). They do not cite to specific evidence that would support a determination that the child is "a neglected child . . . as defined in KRS 600.020(1)(a), 4, 7, 8 as it relates to father."

In *M.L.C. v. Cabinet for Health and Family Services*, 411 S.W.3d 761 (Ky. App. 2013), this Court held that the trial court's findings were insufficient

where they merely parroted "the legal language required in KRS 625.090 and did not explain or cite to any specific evidence which supported its decision regarding any of the factors. . . . Without clear and convincing evidence in support of its findings, the trial court's ruling amounts to an abuse of discretion." *Id.* at 765. In the case before us, we are compelled to conclude that the trial court's findings are insufficient to satisfy the first prong of the tripartite test in KRS 625.090(1)(a).

Next, Father argues that the requirements of KRS 625.090(2) have not been met. This prong of the tripartite test mandates that "[n]o termination of parental rights shall be ordered unless the Family Court also finds by clear and convincing evidence the existence" of one or more of the enumerated grounds in subsections (a)-(k).

The trial court made a finding of fact that "Respondent father . . . abandoned the child for a period or periods of not less than ninety (90) days in duration." As discussed above, that finding is insufficient because it merely repeats the statutory language of KRS 625.090(2)(a). Moreover, as Father notes, "abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983) (citation omitted).

The trial court further found that:

> Respondent father . . . for a period of not less than six (6) months, continuously or repeatedly failed or

> refused to provide or proved to be substantially incapable of providing essential parental care and protection of the child . . . and there is no reasonable expectation of improvement in parental care and protection considering the age of the child.
>
> Respondent father . . . for reasons other than poverty alone, continuously or repeatedly failed or refused to provide or proved to be 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 parents' conduct in the immediately foreseeable future, considering the age of the child.

Those findings follow the language of KRS 625.090(2)(e) and (g), respectively, which, unlike the other subsections of the statute, require a finding based upon clear and convincing evidence that there is no reasonable expectation of improvement. "Under either section (e) or (g), which are quite similar, the Cabinet must establish by clear and convincing evidence that the [parent] is incapable of rendering such care in the future." *M.E.C.*, 254 S.W.3d at 855. The bare recitation of statutory language is unaccompanied by any citation to specific evidence whatsoever -- much less to evidence of a clear and convincing nature.

The trial court also made the substantially conclusory finding that "[t]estimony indicates that father has made no lifestyle changes. He continues to use substances and is not able to provide appropriate housing for the child." Again, we are unable to provide proper appellate review:

> Conclusory statements—or statements which merely state a conclusion without justification—are not proper findings of fact or conclusions of law because, in addition to appearing arbitrary, they deprive the parties from obtaining meaningful appellate review.

Fry v. Caudill, 554 S.W.3d 866, 868 (Ky. App. 2018) (citation omitted). Not only are these findings merely conclusory, but they appear to be erroneous as well.

The trial court did not adequately explain the basis for its findings that grounds exist under either KRS 625.090(2)(e) or (g). It is true that Father was slow to start working on his plan, but "the statute has no requirement that the parent completely eradicate all problems immediately." *M.E.C.*, 254 S.W.3d at 855. Father testified that he did complete the mental health assessment at Transitions, that he completed parenting classes, and that he had become consistent with drug screening. Further, from August 23 to December 31, 2019, Father completed approximately 22 drug screens which were negative. Father testified that he is completely clean. He submitted slips for his attendance at AA/NA classes. In addition, Father works full time for a tree service as a tree climber and earns $250.00 a day. He testified that he was in the process of securing a larger residence suitable for the children. There is no mention of any of this positive testimony in the trial court's findings of fact and conclusions of law. Therefore, we conclude that remand is required for additional findings.

The remaining prong under the statute, KRS 625.090(3), requires that termination be in the best interest of the child. Father argues that termination is **not** in their best interest.

> When reviewing a family court's determination of the best interests of a child, we must apply the abuse of discretion standard. Absent a showing that a decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles, a family court's determination on the issue will not be an abuse of discretion and will be sustained.

D.J.D. v. Cabinet for Health and Family Services, 350 S.W.3d 833, 837 (Ky. App. 2011) (citations omitted).

In determining the best interest of the child, the statute mandates that the trial court consider six statutory factors. The first factor, KRS 625.090(3)(a), requires the court to consider mental illness or intellectual disability of the parent as certified by a mental health professional. That factor does not appear to be relevant in this case.

The second factor, KRS 625.090(3)(b), requires the trial court to consider "[a]cts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family[.]" Father submits that the court erred in finding that he "committed acts of abuse or neglect established in KRS 600.020(1) toward any child in the family." As discussed above, there was no prior adjudication of neglect or abuse **against Father** -- only against Mother. To the extent that the trial court made any

finding to the contrary, it is clearly erroneous and must be set aside. In addition, the finding that Father committed acts of abuse is clearly erroneous and is hereby set aside. No finding of abuse was made **as to Father** in this proceeding. The trial court only determined that the child is a neglected child as defined in KRS 600.020(1)(a) 4, 7, and 8 -- a finding which we have already determined is insufficient and requires remand.

> The remaining factors that the trial court must consider are:
>
> (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;
>
> (d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;
>
> (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and
>
> (f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

KRS 625.090(3).

Father raises no issue with respect to factors (d) and (e). He contends that the trial court "erroneously concluded and adjudged" factor (f). He also contends that factor (c) was not met and that the court's conclusion that it had been met is clearly erroneous. KRS 625.090(3) does not require the court to make a finding based upon clear and convincing evidence. It only requires that the court consider the statutory factors. We cannot say that the trial court abused its discretion in this regard. *See V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424-25 (Ky. App. 1986) (discussing the former termination of parental rights statute, KRS 199.603: "Relating specifically to the [best interest] factors in KRS 199.603(3), the clear and convincing evidence standard is not required. The factors listed are for consideration by the trier of fact. If reasonably considered by the trial court, the best interests of the child will naturally be determined.").

What is troublesome in the cases before us is the inadequacy of the findings under KRS 625.090(1) and (2) and the inaccuracy of some of the findings upon which the court's decision is based.

> While the state has a compelling interest to protect its youngest citizens, state intervention into the family with the result of permanently severing the relationship between parent and child must be done with utmost caution. It is a very serious matter.

M.E.C., 254 S.W.3d at 850. After addressing the deficiencies on remand, the trial court should again conduct a best-interest analysis.

Father argues that the trial court made factually inaccurate findings which must be set aside as clearly erroneous. We have already addressed some of this argument above. Some of the findings which Father challenges are credibility determinations that lie within the trial court's exclusive jurisdiction. Others involve choices made among facts presented -- also within the proper purview of the court's exercise of its discretion. "Clear and convincing evidence is not necessarily uncontradicted evidence[.]" *J.L.C. v. Cabinet for Health and Family Services*, 539 S.W.3d 692, 694 (Ky. App. 2018) (citation omitted).

We agree with Father that the finding that he has not completed parenting classes and the finding that he has not established paternity are clearly erroneous and they are hereby set aside. Testimony at the hearing established that Father had indeed completed parenting classes and that he did go for DNA testing.

Father argues that the finding that Mother had made allegations of domestic violence is clearly erroneous. We cannot wholly agree because Mr. Lee did testify that Mother reported domestic violence. However, her report was unsubstantiated. Mr. Lee testified they were not able to confirm or deny if domestic violence was occurring -- a fact not mentioned in the findings.

We need not address Father's third and final argument, which merely incorporates his previous arguments.

To summarize, we vacate the portions of the judgments of the Campbell Family Court terminating Father's parental rights to each of the three children and remand these cases for entry of additional findings of fact and conclusions of law consistent with this Opinion.

DIXON, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS WITH SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: Respectfully, I dissent from the majority's thorough and well-written opinion because I believe that the family court's factual findings are sufficient and supported by substantial evidence of record. The majority takes issue with the sufficiency of the family court's findings under each element of KRS 625.090. The statute requires proof of three elements by clear and convincing evidence to justify an involuntary termination of parental rights. First, the Cabinet must establish one of the following:

> 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
>
> 2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding;
>
> 3. The child is found to have been diagnosed with neonatal abstinence syndrome at the time of birth[.]

KRS 625.090(1)(a).

I fully agree with the majority that the family court was required to make a finding of abuse or neglect as to each parent. "Both parents have individual rights to their children; they are not a package deal, per se." *D.G.R. v. Commonwealth, Cabinet for Health & Family Servs.*, 364 S.W.3d 106, 115 (Ky. 2012). In this case, a finding of neglect was made in the DNA case against Mother, but there was no previous finding of neglect against Father.

However, the family court Finding No. 24 states:

> Respondent father failed to protect and preserve the child's fundamental right to a safe and nurturing home and this is an abused and neglected child. [The child] has been adjudged to be a neglected child, as defined by KRS 600.020, by the Campbell Circuit Court.

Elsewhere in its findings, the family court identified KRS 600.020(1)(a)4, 7, and 8 as its bases for finding that Father neglected the child. Those sections define an abused or neglected child to mean a child whose health or welfare is threated with harm when his parent or guardian:

> 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
>
> . . .
>
> 7. Abandons or exploits the child; [or]

> 8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being.

The majority faults the family court for failing to identify the specific facts and the credibility determinations supporting its conclusion that Father neglected the child. I agree with the majority that this would be the better practice. But as quoted extensively in the majority opinion, the family court set out its findings of fact followed by its legal conclusions. The court's factual findings are sufficient if they identify evidence of record to show that it complied with the statutory requirements and to allow for meaningful appellate review. *See Keifer v. Keifer*, 354 S.W.3d 123, 125-26 (Ky. 2011). I believe that the family court's findings meet that standard.

Once that threshold is reached, the family court's findings will not be set aside unless there exists no substantial evidence in the record to support the findings. Clear and convincing evidence does not necessarily mean uncontradicted evidence. *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014). Instead, "[i]t is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Id.* (citing *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116-17 (Ky. App. 1998)).

The majority concedes that there was evidence to support a finding that Father failed to provide care. Likewise, the majority notes that Father did not have in-person contact with the child, although Father did maintain phone contact. The Cabinet did not allow Father in-person contact due to his failure to make sufficient progress on other aspects of his case plan. We may presume from the family court's findings that it found the evidence supporting those conclusions to be more credible than the contrary evidence.

I agree with the majority that there was no evidence to support the family court's finding that Father abandoned the child. "Generally, abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." *O.S. v. C.F*, 655 S.W.2d 32, 34 (Ky. App. 1983). The trial court's recitation of the statutory language does not match up to any of its factual findings.

Nevertheless, the definition of "[a]bused or neglected child" in KRS 600.020(1)(a) merely requires a finding supported by any one of the defined circumstances. In addition, subsection 9 would support a finding of abuse or neglect when the parent:

> Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) cumulative months out of forty-eight (48) months[.]

This Court can affirm a trial court's ruling for any reason appearing in the record. *See Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 495-97 (Ky. 2014). I believe that the facts as found by the family court would support a finding under this section as well. Therefore, I do not believe that it is necessary to remand this matter for additional factual findings on this question.

For similar reasons, I do not believe that it is necessary to remand this matter for additional findings on the other statutory factors. Second, "the circuit court must find the existence of one or more of ten specific grounds set forth in KRS 625.090(2)." *M.E.C. v. Commonwealth, Cabinet for Health & Family Servs.*, 254 S.W.3d 846, 851 (Ky. App. 2008). The family court made findings under KRS 625.090(2)(e) and (g), and its numbered findings 10-21 set out facts supporting its conclusions under these sections. The majority identifies facts of record which contradict these conclusions but does not address whether the Cabinet's evidence supported them.

"[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." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (internal quotation marks, brackets, and citations omitted). "Because termination decisions are so factually sensitive, appellate courts are generally

loathe to reverse them, regardless of the outcome." *D.G.R.*, 364 S.W.3d at 113. While I might have reached a different conclusion than the family court, I believe the family court set forth sufficient facts supporting its conclusions that the Father abused or neglected the child and that those findings are not clearly erroneous.

Lastly, the family court must make findings that termination of parental rights would be in the best interests of the child after considering the factors set out in KRS 625.090(3)(a)-(f). However, these factors are not a checklist, as the statute merely states that they are to be "consider[ed]" in deciding whether termination is in the child's best interest. While reasonable people could disagree about the evidence, the family court made sufficient findings supported by evidence of record to support these conclusions. Under the circumstances, I believe we are obligated to affirm.

In sum, I agree with the majority that the family court's findings should have been more specific in identifying the facts on which it was relying in support of each statutory factor. Furthermore, any court should be cautious in adopting tendered findings to ensure that they accurately reflect the evidence of record and apply the proper statutory analysis. But while the family court's findings of fact and conclusions of law are not a model of clarity, I would find them sufficient to afford meaningful appellate review. Similarly, I would conclude that there was substantial evidence to support most of the family court's findings of

fact and conclusions of law. Therefore, I would affirm the judgment terminating Father's parental rights.

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