

RENDERED: SEPTEMBER 2, 2022; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-0722-ME

D.E.L.

APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 20-AD-00010

CABINET FOR HEALTH AND FAMILY
SERVICES; A.S.L.-W., A MINOR CHILD;
AND A.N.W.

APPELLEES

AND

NO. 2021-CA-0724-ME

D.E.L.

APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 20-AD-00011

CABINET FOR HEALTH AND FAMILY
SERVICES; D.E.L., JR., A MINOR CHILD;
AND A.N.W.

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: CALDWELL, CETRULO, AND COMBS, JUDGES.

CETRULO, JUDGE: The Fleming Circuit Court granted the petitions of the appellee, Cabinet for Health and Family Services (the “Cabinet”), for termination of parental rights of appellant D.E.L. (“Father”), the biological father of A.S.L.-W. (“daughter”) and D.E.L., Jr. (“son”). The Cabinet filed petitions individually for the daughter and son (the “children”), and orders terminating parental rights were consolidated in this appeal. After reviewing the record and the applicable law, we affirm.

I. FACTS AND BACKGROUND

In March 2021, via Skype videoconferencing software, the Fleming Circuit Court held a combined hearing (“termination hearing”) relating to the parental rights of Father, A.N.W. (“Mother”),¹ and Mother’s current husband, B.D.A. At the termination hearing, Father, Mother, and B.D.A. were present and represented by counsel. Father was incarcerated at the time and appeared by audio only. The children were represented by the same guardian *ad litem*. The

¹ Appellee Mother is the biological mother of four children. This appeal relates only to Father’s parental rights of Mother’s two oldest children.

termination hearing included testimony from various mental health professionals, case workers, and the parents.

In 2016, the Cabinet became involved with this family due to allegations of neglect of the children and allegations of physical abuse by Mother towards the son. Father was not living with the children at that time. Over the next few years, the Cabinet moved the children several times – mostly to/from a great grandmother’s home – but in May 2019, the children entered foster care. In June 2020, the Fleming Circuit Court changed the case plan goal to adoption.

At the March 2021 termination hearing, Lauren Tackett, the family’s ongoing social worker (“SW Tackett”), testified that Father did not have a custodial role with the children during the years that the Cabinet was involved with the family.² SW Tackett testified that Father had not been involved with the children since 2018; prior to 2018, Father had only “sporadic” visitations. SW Tackett attempted to meet with Father to establish a case plan, but Father admitted that he had open warrants in Kentucky and Ohio and was unable to make a case plan until those were resolved. Father never signed a case plan with the Cabinet nor had contact with the Cabinet beyond that initial communication. SW Tackett sent monthly letters to Father offering to create a reunification case plan, but she

² Mother testified that Father briefly had a custodial role of daughter, but the timeframe was not clarified, and it was inferred to be prior to the Cabinet’s involvement.

never received a response. Through SW Tackett, the Cabinet presented evidence of Father's criminal record including convictions for alcohol intoxication, resisting arrest, unlawful imprisonment, and assault fourth degree. After SW Tackett's testimony, Father's counsel stated that Father did not wish to testify nor present any witnesses on his own behalf. The court confirmed this with a short conversation directly with Father.

Court: Now you understand that if you would like to testify you have the right to do that, or say anything you want. You understand [that] you have that right?

Father: Yes.

Court: It's my understanding that after talking to your attorney that . . . you don't . . . want to testify in this case. Is that correct?

Father: Yes, I don't want to testify.

[Conversation continued among the parties, then court addressed Father again.]

Court: You understand that based upon what the court's heard so far with regard to your involvement, there's a substantial – fairly good chance – that the court might order your parental rights to be terminated, so that you wouldn't be able to insist on contact with [the children] and . . . any child support obligation you might have with regard to them would likely also be terminated. Do you understand that that's the likely result of today's hearing?

Father: Yes.

Court: Is that something you want to object to or do you want to say anything with response to that possibility?

Father: No.

In May 2021, the Fleming Circuit Court entered an order terminating parental rights of Father (“termination order”)³ finding that – based upon clear and convincing evidence – the statutory requirements of KRS⁴ 625.090 had been met, termination of Father’s parental rights was in the best interest of the children, and the Cabinet was best qualified to receive custody of the children. Also in May 2021, the circuit court entered additional findings of fact and conclusions of law in support of the termination order.⁵ Father appealed.⁶

³ The circuit court entered separate termination orders for each child, but due to the consistency of the verbiage, we will refer to one termination order for this consolidated appeal.

⁴ Kentucky Revised Statute.

⁵ The circuit court entered separate findings of fact and conclusions of law for each child, but again, due to the consistency of the verbiage, we will refer to one findings of fact and conclusions of law for this consolidated appeal.

⁶ Father’s counsel filed an appellate brief, commonly referred to as an “*Anders* brief,” *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), essentially stating that the appeal lacks meritorious assignments of error to raise. Specifically, Father’s counsel stated that she “is unable to find any meritorious arguments on behalf of [Father] other than he does not desire to have his parental rights terminated.” However, in Kentucky, a parent’s right to counsel – in parental rights termination cases – is rooted in statute, KRS 625.080(3). Pursuant to *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), an “A.C. brief” need only say that, after a conscientious examination of the record, counsel concluded there are no non-frivolous grounds for reversal. Here, the motion to withdraw is addressed by separate order. Father did not file an additional *pro se* brief.

II. STANDARD OF REVIEW

We use the clearly erroneous standard when reviewing whether the termination of parental rights was lawful. *C.J.M. v. Cabinet for Health and Fam. Servs.*, 389 S.W.3d 155, 160 (Ky. App. 2012). “Pursuant to this standard, an appellate court is obligated to give a great deal of deference to the family court’s findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them.” *Cabinet for Health and Fam. Servs. v. K.H.*, 423 S.W.3d 204, 211 (Ky. 2014) (internal quotation marks omitted); *see also* CR⁷ 52.01. Substantial evidence is evidence that, when “taken alone or in the light of all the evidence . . . has sufficient probative value to induce conviction in the minds of reasonable men.” *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62, 64 (Ky. 1970) (internal quotation marks and citation omitted).

III. ANALYSIS

“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.” *M.E.C. v. Commonwealth, Cabinet for Health & Fam. Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008).

KRS 625.090 provides for a tripartite test which allows for parental rights to be involuntarily terminated only

⁷ Kentucky Rule of Civil Procedure.

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.

K.H., 423 S.W.3d at 209.

A. Adjudged Abused/Neglected

At the termination hearing, SW Tackett testified that the children had been abandoned by Father, and the circuit court agreed. KRS 600.020(1) defines an “[a]bused or neglected child” as including one whose “health or welfare is harmed or threatened with harm when . . . (a) [h]is or her parent . . . (7) [a]bandons or exploits the child[.]” Here, the findings of fact and conclusion of law stated that the children are “abused or neglected [children] as defined in KRS 600.020” and that “[Father] has abandoned the [children].” This first element is easily assessed and met.

B. Best Interest: KRS 625.090(3)

KRS 625.090(3)(a)-(f) outline the six factors a circuit court must consider when determining the child's best interest and a ground for termination. *K.H.*, 423 S.W.3d at 212. The circuit court does not need to specifically address each factor, as long as the court's findings reflect that each factor was properly considered. *Id.* Specifically, KRS 625.090(3)(a)-(f) state that

[i]n determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

(a) Mental illness as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

(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.

First, KRS 625.090(3)(a), relating to parental mental health, is not relevant to Father.

Second, applying KRS 625.090(3)(b), relating to acts of abuse or neglect, the court found Father's abandonment of the children satisfied this element. KRS.600.020(1)(a)7. Testimony revealed that Father had not been in contact with the children since 2018. Additionally, during the termination hearing, when the court informed Father that his parental rights were likely to be terminated, Father acquiesced; Father did not object or argue.

Third, as it relates to KRS 625.090(3)(c) and the Cabinet's steps towards reunification, the court determined that the Cabinet made reasonable efforts to reunite the family. The Cabinet attempted to meet with Father to create a case plan, but he did not agree to meet. SW Tackett sent monthly letters to Father, but he did not respond nor contact SW Tackett in the years the children were involved with the Cabinet.

Fourth, relating to KRS 625.090(3)(d) and Father's efforts and adjustments, the court heard testimony that Father did not take any known measures to reunite with his children. At the termination hearing, SW Tackett testified that he did not communicate with her, nor meet to create a case plan. When given the opportunity, Father did not testify as to any efforts or adjustments he made toward reunification.

Fifth, KRS 625.090(3)(e) relates to the physical, emotional, and mental health of the children. The circuit court heard testimony that the daughter had been emotionally injured by Mother and that the son was at risk of emotional injury if he remained in Mother's home; no evidence was presented that Father took any protective measures on behalf of his children. Moreover, the court heard testimony that Father had abused Mother in the past and had an additional history of violence. The Cabinet presented evidence of Father's criminal record, and he did not refute nor dispute those statements during the termination hearing. The court found that prospects were greater for the children's health and recovery if termination was ordered.

Finally, pertaining to KRS 625.090(3)(f) and Father's ability to provide physical care and maintenance, Father provided no evidence that he supported his children in any way. SW Tackett stated that Father had not had any contact with the children since 2018.

Clearly, the circuit court considered the factors of KRS 625.090(3) when analyzing the best interests of the children. The court's findings of fact and conclusions of law contained substantial evidence that the children deserve "permanency, stability and safety" and that Father is unable to provide that for the children. Therefore, the court did not err in finding parental termination was in the best interests of the children.

C. Ground for Termination: KRS 625.090(2)

Kentucky law requires the existence of at least one factor enumerated in KRS 625.090(2). Here, the circuit court found that more than one of the factors in this statute were present. Relevantly, KRS 625.090(2) provides:

No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence . . .

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

. . .

(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[.]

As previously mentioned, KRS 600.020(1) defines, in part, abused or neglected children as including those whose health or welfare is harmed when their parent abandons them. KRS 600.020(1)(a)7. Father did not put forth any evidence that he had supported or maintained any contact with his children since 2018. At the termination hearing, he did not object to nor argue against the termination of his parental rights. Moreover, SW Tackett testified that Father did not contact her, send support, nor visit the children while they were in foster care. The court stated

[Father] for a period of not less than six (6) months, continuously or repeatedly failed or refused to provide or ha[s] been substantially incapable of providing essential parental care and protection for [the children] and there is no reasonable expectation of improvement in parental care and protection, considering the age of [the children]. The Cabinet has been providing services to this family since 2016. . . . [F]ather has abandoned the [children.]

The undisputed evidence constitutes clear and convincing evidence of abuse or neglect as defined in KRS 600.020(1); supports the circuit court's findings that Father abandoned and neglected the children for at least 90 days; and, that he continuously and repeatedly failed or refused to provide essential care for the children for not less than six months. KRS 625.090(2)(a), (e), and (g). *See also B.T.R. v. J.W.*, 148 S.W.3d 294, 297-98 (Ky. App. 2004). Therefore, the circuit court did not err in finding the existence of at least one of the enumerated factors in KRS 625.090(2) as grounds for termination.

IV. CONCLUSION

For reasons contained herein, we AFFIRM the order of the Fleming Circuit Court to terminate Father's parental rights.

ALL CONCUR.

BRIEF FOR APPELLANT:

Louise M. Brown
Foster, Kentucky

BRIEF FOR APPELLEE CABINET
FOR HEALTH AND FAMILY
SERVICES:

Dilissa G. Milburn
Mayfield, Kentucky