

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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-0727-ME

B.D.A.

APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 20-AD-00012

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

APPELLEES

AND

NO. 2021-CA-0729-ME

B.D.A.

APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 20-AD-00013

CABINET FOR HEALTH AND FAMILY
SERVICES; N.J.A., 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 B.D.A. (“Father”), the custodial father of A.D.A. and N.J.A. (the “children”).¹ The Cabinet filed petitions individually for each of 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

Father and A.N.W. (“Mother”) are married and live together. Mother is the biological mother to four children: A.S.L.-W.; D.E.L., Jr.; A.D.A., born in October 2013; and N.J.A., born in July 2016. Although the record suggests that N.J.A. was Father’s only *biological* child, Father testified at the termination hearing that all four children lived with him: “I’ve been with these kids throughout their whole lives, pretty much. To me, they’re all my kids.” However, this appeal regards only A.D.A. (“older son”) and N.J.A. (“younger son”).

¹ Father is listed as the father on the birth certificates of both children named in this appeal. However, A.N.W. – the mother – testified that a DNA test revealed her first husband, D.E.L., is the biological father of A.D.A.

In March 2021, via Skype videoconferencing software, the Fleming Circuit Court held a combined hearing (“termination hearing”) relating to the parental rights of Father, Mother, and D.E.L., Mother’s first husband.² At the termination hearing, Father, Mother, and D.E.L. were present and represented by counsel. The children were represented by the same guardian *ad litem*. The 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 four children and allegations of physical abuse by Mother toward D.E.L., Jr. At the termination hearing, Lauren Tackett, the family’s ongoing social worker (“SW Tackett”), testified that in 2018 the children were removed from Mother’s and Father’s care and placed with the children’s great-grandmother. After approximately eight months, the great-grandmother became terminally ill and was no longer able to care for the children. The children were then returned to Mother and Father. Shortly thereafter, in August 2019, the children were committed to the Cabinet’s custody. In June 2020, the Fleming Circuit Court approved a goal change in the children’s case plan to adoption.

At the termination hearing, SW Tackett stated that despite her attempts to work with Father and Mother toward reunification, “things with the

² The Fleming Circuit Court subsequently terminated parental rights of all three parents.

family were not getting any better.” Father and Mother “ha[d] not fully taken responsibility yet for the maltreatment” of the children. SW Tackett testified that Father had begun “individual treatment,” including a relapse prevention plan with his therapist. The Cabinet recommended that he complete a substance abuse evaluation and, if recommended, a treatment plan. Father completed an assessment; a treatment plan was recommended, but he did not follow through with the recommendation. Later, he attended a second assessment, but according to SW Tackett, Father denied having “any substance abuse issues.” The Cabinet also recommended that Father participate in a batterer’s intervention program, but he did not complete such a program. SW Tackett testified that the children had been diagnosed with post-traumatic stress disorder (“PTSD”) and required various mental, emotional, and physical (speech) therapies due to the maltreatment and trauma they received from Father and Mother. She stated that the children have made “great improvements” since entering foster care, especially with improved self-esteem.

At the termination hearing, the court also heard testimony from Corey Birch, an employee at the University of Kentucky Center on Trauma and Children (“CTAC Birch”). CTAC Birch met with the family on January 15 and 22, 2020,

and served as team leader in the family's assessment.³ CTAC Birch testified that Mother had been diagnosed with schizophrenia and a major depressive disorder. Due to Mother's mental health concerns, she was required to have supervision while with the children; Father, while knowing of that court mandate, repeatedly left Mother home alone with the children.

Additionally, at the termination hearing, an employee of the Fleming County Child Support Office testified that Father had a wage withholding in place to pay his current child support obligations and to pay down an arrearage of approximately \$311 regarding the younger son. At the time of the termination hearing, Father was the only member of the household with a job outside the home.

At the termination hearing, Father testified that he had been working with a therapist to improve his parenting skills and to prevent further alcohol abuse. He admitted that he used corporal punishment on the children but was learning new/other discipline techniques. He admitted instances of domestic violence against his ex-wife, but he denied there had been any domestic violence against Mother. He stated that he was willing to attend a batterer's intervention program but did not explain why he had not yet attended. He said he had not

³ CTAC Birch stated that the Cabinet refers families to CTAC for parenting evaluations "usually when the Cabinet is having a difficult time deciding what's in the children's best interests." He described the evaluation as a multi-layered process that included interviewing the parents; interviewing the children; interviewing the family's social worker and/or therapists; reviewing mental health records; and performing various tests to diagnose, in part, depression, trauma, substance abuse risks, and physical child abuse.

attended family therapy because third parties failed to properly schedule the appointments.

In May 2021, the Fleming Circuit Court entered an order terminating parental rights of Father (“termination order”)⁴ finding that – based upon clear and convincing evidence – the statutory requirements of KRS⁵ 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.⁶ Father appealed.⁷ Additional facts and termination hearing testimony will be added as necessary.

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.*

⁴ 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.

⁵ Kentucky Revised Statute.

⁶ 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.

⁷ Father’s legal 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 the appeal lacks meritorious assignments of error to raise. Father’s counsel also aptly cites to *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), for authority to file such a brief. Here, the motion to withdraw is addressed by separate order. Father did not file an additional *pro se* brief.

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* CR⁸ 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 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

⁸ Kentucky Rule of Civil Procedure.

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 were previously adjudged to be abused and/or neglected by the Fleming District Court, in part, because (1) Father left the children unsupervised with Mother despite court orders to the contrary; and (2) Father and Mother violated a court order not to use physical discipline on the children. The circuit court referred to this adjudication in its findings of fact and conclusion of law – stating that the children were “previously adjudicated neglected by the Fleming District Court.” 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 recognized that at least one of the children⁹ was “abused or neglected” as defined by KRS 600.020(1). The statute states, in part, “[a]bused or neglected child” means a child whose health or welfare is harmed or threatened with harm when . . . (a) [h]is or her parent . . . (1) [i]nflicts or allows to be inflicted upon the child physical or emotional injury . . . [or] (2) [c]reates or allows to be created a risk of physical or emotional injury[.]” KRS 600.020(1). The circuit court was provided with hours of testimony satisfying this element. Father used corporal punishment for discipline, despite being instructed by the court to refrain from such actions. Also, numerous mental health professionals testified that the children had been harmed emotionally and physically by Father’s maltreatment.

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, but Father failed to complete substance abuse treatment and a batterer’s intervention program. Additionally, the Cabinet offered – and Father accepted – parenting classes; the Cabinet determined that a second round of parenting classes was necessary; however, SW Tackett testified that

⁹ The statute requires the abuse or neglect to be inflicted upon “*any* child in the family[.]” KRS 625.090(3)(b) (emphasis added).

Father declined additional classes, stating that the parenting courses did not help the first time.

Fourth, relating to KRS 625.090(3)(d) and Father's efforts and adjustments, the court's findings of facts and conclusions of law stated that Father "failed to take advantage of the services offered by the Cabinet" and his limited progress on the case plan was "unacceptably minimal." The court stated that although Father had completed some parenting classes, he still failed "to take even a modicum of responsibility for [the children] remaining in foster care, placing blame on either the Cabinet, Mother's grandparents, or other third parties." The court pointed to CTAC Birch's testimony that noted a number of risk factors associated with Father, including "conspiratorial thinking, unwillingness to acknowledge his own issues, externalizing blame, a past history of domestic violence, [] faking [a] good result on one of the administered tests, and inability to take responsibility for his [children] being in foster care."

Fifth, KRS 625.090(3)(e) relates to the physical, emotional, and mental health of the children. The court heard testimony that the children struggle emotionally and physically due to the maltreatment from Father. Testimony revealed that the children required additional, specialized services for physical and emotional wellbeing. Testimony raised concerns about Father's ability to perform executive functions, specifically taking the children to the necessary medical

appointments. Moreover, the court stated that the children's conditions have "improved since placement in foster care and continued progress is expected if termination is granted."

Finally, pertaining to KRS 625.090(3)(f) and Father's ability to provide physical care and maintenance, the court noted that Father "has a wage garnishment in place to meet his two hundred seven dollars (\$207) per month child support obligation, he has an outstanding arrearage of three hundred eleven dollars (\$311) regarding this child, and owes approximately twenty-thousand dollars (\$20,000) in arrearages for other children." The court heard testimony that while the children were in foster care, finances were a struggle, and it is not reasonable to believe that Father could provide physical care and maintenance moving forward.

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

C. Ground for Termination: KRS 625.090(2)

Kentucky law also requires the existence of at least one factor enumerated in KRS 625.090(2). Here, the circuit court found multiple factors in

this statute were present, but we need only discuss subsections (e) and (g).

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 . . .

(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[.]

While Father showed progress, progress alone is not enough; this Court must look at the preponderance of testimony and the trial court's recitation of its findings from that testimony. *Cabinet for Health and Family Services v. H.L.O.*, 621 S.W.3d 452, 464 (Ky. 2021).

In accordance with KRS 625.090(2)(e), the circuit court found Father had "continuously or repeatedly failed or refused to provide essential parental care

and protection for the [children], considering the age of the [children.]” The court pointed out that Father struggled to care for the children without the assistance of Mother’s grandparents. The court also questioned his judgment, leaving the children home alone with Mother contrary to court orders and sending one child to live with a person with a known history of domestic violence. Father failed to complete a batterer’s intervention program and did not complete his case plan with the Cabinet. The court noted that while Father made progress on his case plan, that plan was merely to achieve safe visitation, not reunification. Additionally, the court determined that there was not “a reasonable expectation of improvement” in Father’s ability to care for the children.

In accordance with KRS 625.090(2)(g), the circuit court found that for reasons other than poverty alone, Father “failed to provide the [children] with adequate care, supervision, food, clothing, shelter and education or medical care necessary for the [children’s] well-being.” Again, while Father showed progress, progress alone is not enough. *H.L.O.*, 621 S.W.3d at 464. Father was subject to wage garnishment, owed approximately \$20,000 in child support arrearages, and finances in the home were a struggle. Father was the only member of the household working outside the home, and Mother testified that finances were “rough,” in part, because Father owed a large sum in child support. Additionally, the court determined that although Father had completed some parenting classes,

he still failed to demonstrate that he could provide and care adequately for the children. The court noted that Father failed to accept responsibility for his children being in foster care and that there was no “expectation of significant improvement in [Father’s] conduct in the immediately foreseeable future considering the age of the [children].”

Therefore, the circuit court did not err in finding the existence of at least one of the termination grounds enumerated in KRS 625.090(2).

IV. CONCLUSION

For reasons contained herein, we AFFIRM the order of the Fleming Circuit Court terminating Father’s parental rights.

ALL CONCUR.

BRIEF FOR APPELLANT:

Glennis R. Harris, Jr.
Flemingsburg, Kentucky

BRIEF FOR APPELLEE CABINET
FOR HEALTH AND FAMILY
SERVICES:

Dilissa G. Milburn
Mayfield, Kentucky