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Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0636-ME

P.A.G. APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE LISA MORGAN, JUDGE
ACTION NO. 21-AD-00008

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; I.D.Z.; AND
N.D.G., A MINOR CHILD APPELLEES

AND

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COMMONWEALTH OF KENTUCKY,
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OPINION
AFFIRMING

** ** ** ** **

BEFORE: CETRULO, JONES, AND MCNEILL, JUDGES.

CETRULO, JUDGE: P.A.G. (Father) appeals from the findings of fact, conclusions of law, order terminating parental rights, and order of judgment entered in each case involving his minor children. We affirm.[1]

This case involves two minor children, N.D.G., born in 2018, and M.S.G.Z., born in 2020. The Cabinet for Health and Family Services (CHFS) became involved with the family in 2019 in response to domestic violence between Mother and Father that occurred in N.D.G.'s presence. Father was arrested and subsequently entered a guilty plea to fourth-degree assault. CHFS opened a dependency, neglect, or abuse (DNA) action in Jessamine County. On June 20, 2019, Father stipulated to neglect of N.D.G. in Jessamine Family Court. At the disposition hearing on August 1, 2019, it was revealed that Mother continued to have contact with Father and allowed Father to have continued contact with N.D.G., despite provisions of the domestic violence order (DVO) in place. On October 3, 2019, a second DNA petition was filed in Jessamine Family Court, and

[1] Mother's parental rights were also terminated. She did not appeal.

temporary custody of N.D.G. was awarded to CHFS, where she has since remained.

The DNA action was transferred to the Woodford Family Court in June 2020. On June 9, 2020, a DNA petition was filed regarding M.S.G.Z., who was born just three days prior. M.S.G.Z. was placed in the custody of CHFS on the same date, where she has since remained. In August 2020, the Woodford Family Court ordered a parental capacity evaluation of Father. On December 4, 2020, Father stipulated to neglect or abuse of M.S.G.Z. Clinical psychologist Dr. David Feinberg submitted his parental capacity report regarding Father on or about March 14, 2021. The 19-page report detailed, in relevant part, Father's ongoing mental health and substance abuse issues. It also indicated that Father has "severe abandonment and attachment issues" and his prognosis for change is "quite poor." As a result, Dr. Feinberg concluded that Father's reunification with the children was not appropriate. On June 21, 2021, CHFS filed the underlying petitions for termination of parental rights. After a bench trial on April 4, 2022, the family court entered findings of fact, conclusions of law, and orders terminating the parental rights of Mother and Father. Father appealed.

Father makes three arguments on appeal. He claims the family court erred by: (1) allowing and relying on expert opinion testimony of Dr. Feinberg who was not qualified as an expert witness or identified as an expert in CHFS's

exhibit list filed prior to trial; (2) finding the evidence was clear and convincing that the factors of "KRS[2] 625.090(b)" had been met; and, (3) continuing the case at the request of CHFS then not considering Father's progress during the continuances. Most of Father's arguments are refuted by the record before us.

KRS 625.090 sets forth the requirements which must be met before a court in Kentucky can involuntarily terminate a parent's rights to his children. First, as it concerns these appeals, the lower court must determine that the children are abused or neglected children, or that the children were previously determined to be abused or neglected children by a court of competent jurisdiction. KRS 625.090(1)(a)1.-2. Second, a petition seeking the termination of parental rights must have been filed by the Cabinet pursuant to KRS 620.180 or 625.050. KRS 625.090(1)(b)1. Third, the lower court must find that termination is in the best interests of the children. KRS 625.090(1)(c). Finally, the lower court must find by clear and convincing evidence the existence of one or more of the eleven grounds (a) through (k) listed in KRS 625.090(2). Even if all these requirements are met, the court may choose in its discretion not to terminate a parent's rights if the parent has established by a preponderance of the evidence that the children will not continue to be abused or neglected if returned to the parent. KRS 625.090(5).

[2] Kentucky Revised Statute.

The applicable standard of appellate review of findings by the family court in a termination of parental rights case is the clearly erroneous standard; thus, the findings of fact will not be set aside unless unsupported by substantial evidence. *M.L.C. v. Cabinet for Health and Family Servs.*, 411 S.W.3d 761, 765 (Ky. App. 2013); *see also* Kentucky Rule of Civil Procedure (CR) 52.01. A family court has broad discretion in determining whether the best interests of the child warrant termination of parental rights. *C.J.M. v. Cabinet for Health and Family Servs.*, 389 S.W.3d 155, 160 (Ky. App. 2012) (citation omitted).

Turning to Father's first argument, he contends that Dr. Feinberg's testimony was improperly admitted as he was not qualified as an expert witness. Father did not object to Dr. Feinberg's testimony until counsel gave closing arguments. In ruling on his objection, the family court took judicial notice that Dr. Feinberg was admitted as an expert witness in the underlying DNA action, even if not technically admitted as an expert in the termination proceedings. The family court also found that there was no prejudice to Father, pointing out that Dr. Feinberg was a known witness; was regularly a court-appointed expert; there were no possible substantive challenges to his qualifications as an expert; and his report had been received and reviewed by all parties in the underlying DNA action. We agree. We additionally note that Father was able to cross-examine Dr. Feinberg and could have called into question his credentials at the time and did not. We also

agree with the family court that FCRPP[3] 3(4) is applicable. The rule provides, in relevant part,

> (a) If otherwise admissible under the Kentucky Rules of Evidence, a court-appointed expert's report shall be admitted into evidence and may be considered by the court without further evidentiary foundation or testimony of the expert, unless a party subpoenas the expert to testify or the court orders otherwise. The party who subpoenas a court-appointed expert to trial or for deposition shall pay the expert's fee for appearance, unless otherwise ordered by the court.

It was therefore proper for the family court to rely on the report of Dr. Feinberg in the underlying DNA action and again in the termination proceedings by taking judicial notice of the report. *See, e.g.*, *Lambert v. Lambert*, 475 S.W.3d 646, 652-53 (Ky. App. 2015).

We note that Father did not object to Dr. Feinberg's report becoming a part of the record. Therefore, *even if* his testimony was stricken, the report remains properly in the record. Testimony of Dr. Feinberg was primarily directed toward Father's mental health issues. We agree with the assertion of CHFS that he was primarily a fact witness as his report had already been accepted in the DNA action. Further, Father also testified regarding his life-long struggle with mental health and substance abuse issues. He testified that, although he was currently seeing a

[3] Family Court Rule of Procedure and Practice.

therapist, he had prolonged gaps when he was not in therapy, including a period of six to seven months during the pendency of this action.[4]

Father additionally maintains he did not call his therapist as a witness *because* Dr. Feinberg was not qualified as an expert. Not only is this argument refuted by the record, but it is misleading to this Court. Father's therapist was not present at the trial. After Dr. Feinberg testified, Father's counsel moved to enter a letter from the therapist into evidence, and CHFS did not object. During Father's testimony, he stated his therapist was unable to attend the trial that day. Father is essentially arguing he knew prior to trial that Dr. Feinberg would not be qualified as an expert witness and therefore decided not to call his own therapist as a witness well in advance of trial. This argument is without merit and must fail.

Turning to Father's second argument, we must first note that he miscites the various subsections of KRS 625.090 in contending that CHFS failed to prove by clear and convincing evidence "that there was no reasonable expectation of significant improvement in parental conduct with regard to [Father] in the immediately foreseeable future."[5] He goes on to assert that the remaining factors of "KRS 625.090(b)" and "KRS 625.090(a)" were not met. We interpret Father's

[4] Father was also in inpatient treatment for his mental health issues in 2019.

[5] *See* pages 5-6 of Appellant's brief.

argument to mean there was generally insufficient evidence to support termination of his parental rights under KRS 625.090. We disagree.

Father stipulated to abuse or neglect of both children in the underlying DNA actions, and, accordingly, both children were adjudged abused or neglected, thus satisfying the requirements of KRS 625.090(1). Second, the family court went through a detailed analysis of each of the enumerated factors in KRS 625.090(3)(a)-(f) in concluding that termination was in the best interest of both children. The family court's analysis is well-supported by the evidence contained in the record before us. Finally, although the family court needed to find only one applicable factor under KRS 625.090(2), it found three in relation to both children and an additional factor pertaining to only N.D.G. Specifically, in relation to Father only, the Court found:

> (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
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> . . . .
>
> (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;
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> . . . .

> (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;
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> . . . .
>
> (j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights[.][6]

The record before us shows that N.D.G. was repeatedly exposed to domestic violence between the parents as well as to substance abuse. Father's mental health and substance abuse are ongoing issues for which he continues to evade lasting treatment. Although Father did complete many of the tasks asked of him in his case plan, he failed to consistently participate in mental health counseling and failed to maintain stable housing or employment. Importantly, he did not complete a sex offender assessment. Prior to the underlying DNA action involving N.D.G., Father's oldest child had been removed from his custody in Tennessee, and Tennessee Children's Services substantiated sex abuse allegations against Father. Father also had inconsistent compliance with the drug screening requirements of his case plan.

[6] This provision applied to N.D.G. only.

Julie Snawder, the ongoing supervisor at CHFS, and Kelly Stephens, the children's foster mother, testified that the children's physical, mental, and emotional needs have been met while in foster care. Both witnesses also testified that visitation with Father was traumatic for the children, and they displayed little to no attachment to Father. The children are attached to the foster parents, who plan to adopt them. Finally, with regard to N.D.G., it is undisputed she was in the custody of CHFS for at least 15 months prior to the filing of the petition for termination of parental rights. We discern no error.

Father's final argument is also refuted by the record. He accuses CHFS of repeatedly asking for continuances "thus dragging out the final result."[7] The record before us shows that CHFS asked for one continuance via motion filed on October 6, 2021, indicating that Dr. Feinberg was unavailable to testify on the original trial date of November 5, 2021. The family court granted the motion and continued the trial to January 21, 2022. On January 7, 2022, CHFS filed a motion to have the trial remotely, citing a dramatic increase in local COVID-19 cases. Father filed a response in which he urged the family court *not* to conduct a virtual trial, but to continue it until all parties could be physically present. The family court entered an order that the trial would go as scheduled, but CHFS could appear

[7] *See* page 9 of Appellant's brief.

remotely. On the date of the trial, Father appeared before the family court and asked for a continuance. The hearing does not appear in the record before us; however, the family court entered a handwritten order stating, in relevant part, "Upon review of the record and relevant law, court granted continuance (full find. [sic] and conclusions made by oral ruling incorporated herein as if written in full)."[8] A new trial date was scheduled for April 4, 2022. Accordingly, the record before us refutes Father's assertion that all delays were caused by CHFS because Father also asked for a continuance. He also asserts that the family court did not take into account his continued progress toward sobriety and dealing with his mental health issues during that time. Father did testify that he was regularly seeing a therapist and that he was clean and sober. However, Father could not state his sobriety date on cross-examination. While the progress made by Father is commendable, the family court is in the best position to judge the credibility of witnesses. *R. C. R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998).

Accordingly, and for the foregoing reasons, the judgment of the Woodford Family Court is AFFIRMED.

[8] Father asserts that he requested a continuance because he did not receive the witness and exhibit list of CHFS. While we cannot fully ascertain from the record before us the exact reasons the family court granted Father's request for a continuance, we do note that the witness and exhibit list of CHFS was filed in the family court on January 14, 2022, one week prior to trial.

ALL CONCUR.

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