

RENDERED: DECEMBER 22, 2022; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0879-ME

D.C.L.

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 21-AD-500300

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; J.A.W., A
MINOR CHILD; AND J.W.W.

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND McNEILL, JUDGES.

MAZE, JUDGE: D.C.L. (Mother) appeals from an order terminating parental rights and order of judgment entered by the Jefferson Family Court. Following a thorough review of the record, briefs, and law, we affirm.

On April 3, 2020, Mother gave birth to J.A.W., who was found to have been substance exposed and subsequently admitted to the NICU to be treated for withdrawal symptoms. Mother admitted to having used Percocet within one week of the birth and thereafter, on April 23, 2020, tested positive for fentanyl and methamphetamine. Commonwealth of Kentucky, Cabinet for Health and Family Services (Cabinet) filed a dependency, neglect, or abuse (DNA) petition. At the subsequent temporary removal hearing, J.A.W. was placed in the Cabinet's temporary custody and Mother was ordered to have a substance abuse assessment with appropriate follow-up, to submit to random drug screens, to remain clean and sober, to have supervised visits if she remained compliant, to participate in establishing paternity, and to cooperate with the Cabinet and START. Mother later stipulated that her substance use placed her children¹ at risk. J.A.W. was then committed to the Cabinet.

On July 7, 2021, the Cabinet filed its petition for involuntary termination of parental rights (TPR) as to J.A.W., naming D.C.L. and putative father J.W.W. as respondents. In paragraph 6 of the petition, the Cabinet asserts that J.A.W. "is an abused and neglected child as defined in KRS^[2] 600.020." In

¹ DNA petitions were also brought as to J.A.W.'s half-siblings, K.K. (No. 18-J-501995), J.L. (No. 18-J-501996), and A.C. (No. 20-J-502871) and introduced before the trial court as relevant evidence pursuant to KRS 625.090(3)(b) and "reasonable expectation of improvement" as set forth in KRS 625.090(2)(e).

² Kentucky Revised Statutes.

paragraph 7, the Cabinet states that it is in her best interest that the rights of her parents be terminated. Paragraphs 8, 9, and 10 set forth grounds for termination as provided in KRS 625.090(2)(a),³ (e), and (g).

On June 2, 2022, the case came before the family court for trial. The Cabinet was represented by counsel and called social service clinician Devin Reul and foster mother Lorethia Byrd as its witnesses. D.C.L. and J.W.W.,⁴ appeared in person and were represented by court-appointed counsel. J.A.W. was represented by her guardian *ad litem*. Following the close of evidence, the court made written findings of fact and reached conclusions of law. It then entered its order terminating parental rights and order of judgment.

KRS 625.090(2)(e) and (g) provide that termination may be appropriate upon a finding:

(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;**

...

³ KRS 625.090(2)(a) is alleged only as to J.W.W.

⁴ Following the trial of this matter, J.W.W. waived his right to trial and consented to the voluntary termination of his parental rights. He has not participated in this appeal.

(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[.]**

The family court found that the “evidence supporting the first part of each statutory provision preceding the highlighted portion of each of these TPR grounds” was “overwhelming.” Based upon Reul’s testimony and the drug screen records tendered by the Cabinet as its exhibit, the court stated that Mother’s inability to remain compliant with her treatment plan was an impediment to reunification, forcing J.A.W. to remain in the custody of the Cabinet for some 25 months. For this reason, the court concluded that “for a period of not less than six (6) months” she “has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child[.]”

The court also found that even though Mother was capable of working she did not do so regularly and, on those occasions when she did work, she did not offer to provide financially for J.A.W. This the court attributed to “abandonment and/or drug abuse[.]” As such, the court concluded that the failure was “for reasons other than poverty alone[.]”

The court then turned to the portions of the statute set forth in bold above, explaining that, “[w]hile the first part of each of the statutory provisions set forth in KRS 625.090(2)(e) and 625.090(2)(g) involves objective manifestations of continuous and ongoing parental behavior, the highlighted portions require a trial court to make reasonable inferences regarding future parental conduct.” The court proceeded to apply the best interest factors set forth in KRS 625.090(3) “[a]s an aid in making that determination[.]”

The court determined that there was sufficient evidence to find that:

(1) J.A.W. is an abused or neglected child as a result of Mother’s substance abuse; and (2) the child could not be returned to Mother’s custody due to her failure to remain compliant. KRS 625.090(3)(b). Then, the court found that the Cabinet had made “reasonable efforts” to reunify the family, specifically including substance abuse treatment, drug screens, supervised visitation, family mentor, and the payment of rent. KRS 625.090(3)(c). In considering the fourth statutory factor, the parent’s efforts to conform his or her conduct such that it is in the best interest of the child to return home “considering the age of the child[.]” the court noted that while Mother has made some apparently successful efforts at treatment recently, it is simply “too late.” KRS 625.090(3)(d).

KRS 625.090(3)(e) is directed to the welfare of the child and the likelihood of improvement upon termination. The court found that J.A.W.’s needs

have been met while she has been in the Cabinet's custody and will continue to be met following termination. She remains in the home of foster mother Lorethia Byrd, who sees to her physical, psychological, and emotional needs and to whom she is very attached. Finally, the court found that Mother has failed to pay any form of substitute financial assistance as contemplated in KRS 625.090(3)(f).

Having made such findings, the court concluded that J.A.W. "has been adjudged to be abused or neglected as defined in KRS 600.020(1) by a court of competent jurisdiction[,]" as well as by the family court in the termination proceeding. KRS 625.090(1)(a)1. and 2. The court then concluded that grounds for termination as set forth in KRS 625.090(2)(e) and (g) had been proven by clear and convincing evidence. The court found that the Cabinet had made reasonable efforts to reunite the family as provided in KRS 625.090(3)(c). The court further found that the child's physical, emotional, and mental health have been met since her removal and that "prospects are for greater improvement in the child's welfare if termination is ordered." KRS 625.090(3)(e). The court concluded that the Cabinet is entitled to a judgment of termination, and it is in the best interest of the child to do so. Mother now appeals.

The decision of a trial court terminating parental rights may only be disturbed where it is found to be "clearly erroneous." *J.M.R. v. Commonwealth, Cabinet for Health and Family Services*, 239 S.W.3d 116, 120 (Ky. App. 2007),

overruled on other grounds by Colvard v. Commonwealth, 309 S.W.3d 239 (Ky. 2010). Further, we are required to give “a great deal of deference” to the findings of the trial court. *Commonwealth, Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010).

Mother contends that because Reul’s testimony was inconsistent, and in some instances inaccurate, as it pertained to her drug screens, the Cabinet failed to prove that there is no “reasonable expectation of improvement” as required in KRS 625.090(2)(e) and (g). She has set forth five errors and omissions with regard to discrepancies between Reul’s testimony and the drug screen results tendered to the family court as an exhibit by the Cabinet. She notes that while Reul testified that Mother tested positive on July 14, 2020, the Cabinet’s exhibit reflects that she tested negative on July 13, 2020, July 20, 2020, and August 14, 2020, and further that the September 28, 2020, screen was not positive as indicated by Reul, but was instead negative. Next, she asserts that Reul’s testimony was erroneous in that he stated that she had a positive drug screen on September 29, 2021, when the tendered records do not contain a screen. Similarly, Mother contends that while Reul testified that she tested positive on February 24, 2021, there was no record of such a screen, nor of the three negative screens which followed on March 18, 2021, March 22, 2021, and May 25, 2021. She also asserts that Reul erred when he testified that the drug screen dated July 6, 2021, was positive, when it was actually

negative. Finally, she notes that Reul's testimony regarding positive drug screens dated July 12, 2021, July 15, 2021, and August 2, 2021, was unsupported by the record as none were included in the Cabinet's exhibit.

The trial court's findings of fact reflect that it relied upon Reul's testimony and the Cabinet's exhibit. The court found that Mother was absent from the Cabinet's supervision from "mid-October 2020 through January or February 2021." Only Mother's allegation that Reul's testimony was incorrect as to the February 24, 2021, drug screen has bearing on this period of time. This Court's review of the record indicates that, while there was no positive drug screen on that date, there was a positive screen on the following day, February 25, 2021.

The trial court also found that, after her discharge from treatment with Seven Counties in July of 2021, Mother failed to "engage in services in any substantial way[,]" this period being characterized by periods of documented drug use, or no-show testing. Mother is correct in her assertion that the Cabinet's exhibit did not contain any screening results, positive or negative, for July 12, 2021, July 15, 2021, or August 2, 2021. However, the test result which she contends was negative, collected on and tested on July 8, 2021, was actually positive.

"Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial

nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citing *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934)). However, issues of weight and credibility are matters for the trial court. *P.S. v. Cabinet for Health and Family Services*, 596 S.W.3d 110, 115 (Ky. App. 2020) (citing *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)). In this case, the family court clearly afforded substantial weight and credibility to Reul’s testimony and the Cabinet’s supporting documentation in reaching its conclusion that there was no reasonable expectation that Mother’s conduct would significantly improve, considering the age of the child.

Mother argued that the Cabinet failed to prove by clear and convincing evidence that she failed to provide essential care and protection for her child and that there was no reasonable expectation that her conduct would significantly improve “considering the age of the child.” KRS 625.090(2)(e).

Similarly, Mother asserted that the Cabinet failed to meet its burden of showing that she had failed to provide other essentials to her child and there was no reasonable expectation that her conduct would significantly improve “considering the age of the child.” KRS 625.090(2)(g). Further, she also argued that the Cabinet failed in meeting its burden because it did not submit a current child support order. However, the child support obligation is a matter of common

law as set forth in *Barnes v. Turner*, 280 S.W.2d 185, 187 (Ky. 1955) and has been codified in KRS 530.050(3).

Finally, Mother challenged the family court's finding that termination is in the best interest of the child on the ground that it failed to consider the efforts she has made as provided in KRS 625.090(3)(d) which also requires a consideration of "the age of the child." As set forth above, the court, relying upon Devin Reul's testimony and the Cabinet's exhibit, recognized Mother's history of non-compliance with the treatment services with which she was provided. The court noted that "she tested positive for fentanyl as late as April 2022[,]” resulting in J.A.W. having been placed in foster care for some twenty-five months.

Reul specifically testified that it would require a minimum of six months to accomplish reunification. He further noted that, this additional delay would result in further bonding between J.A.W. and her foster mother. Therefore, given the nature of the bond, the court properly concluded that particularly considering "the age of the child," reunification is no longer in her best interest.

CONCLUSION

In spite of her assertions regarding the accuracy of Reul's testimony, there remains, as the trial court found, "overwhelming" evidence of Mother's pattern of treatment and relapse, characterized as "cyclical," from which the trial

court could conclude that there was no reasonable expectation of improvement, given the age of the child.

Accordingly, we affirm the Jefferson Family Court's order terminating parental rights and order of judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Macauley Campbell
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BRIEF FOR APPELLEE CABINET
FOR HEALTH AND FAMILY
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Adam Sanders
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