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Commonwealth of Kentucky
Court of Appeals

NO. 2022-CA-1350-ME

D.L.B.

APPELLANT

v. APPEAL FROM MADISON FAMILY COURT
HONORABLE KIMBERLY BLAIR WALSON, JUDGE
ACTION NO. 21-AD-00069

F.C.; COMMONWEALTH OF
KENTUCKY CABINET FOR
HEALTH AND FAMILY SERVICES;
AND B.R.L.B., A MINOR CHILD

APPELLEES

AND

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APPELLEES

OPINION
AFFIRMING

** **

BEFORE: CETRULO, ECKERLE, AND GOODWINE, JUDGES.

ECKERLE, JUDGE: F.C. (“Mother”) and D.L.B. (“Father”) appeal from orders of the Madison Family Court terminating their parental rights to their child. They argue that the Cabinet for Health and Family Services (“the Cabinet”) failed to establish the statutory elements for termination of parental rights by clear and convincing evidence. Although we have some concerns about the quality of the Cabinet’s proof and the premature filing of the petition, we conclude that the Family Court’s findings were supported by substantial, unrefuted evidence. Hence, we affirm.

Mother and Father are the parents of B.R.L.B. (“Child”), who was born in September 2020. Child showed signs of withdrawal at the time of his birth. Mother had tested positive for methamphetamine in 2020, and the parents previously had other children removed due to on-going substance abuse. Following an investigation, the Cabinet filed petitions for an Emergency Custody

Order and for Dependency/Neglect/Abuse (“D/N/A”) on behalf of Child. Child was placed in the Cabinet’s custody shortly thereafter, and Child has been in foster care since that time. The parents stipulated to neglect/abuse in March 2021.

The Cabinet negotiated case plans with both parents. Under the terms of their case plans, Mother and Father were to: complete substance abuse assessments and follow all recommendations; participate in substance abuse treatment; complete mental health assessments and follow all recommendations; develop relapse prevention plans; cooperate with the Cabinet; call in for and submit to random drug screens; sign releases of information for all providers; have no drugs or alcohol in the home; and take medication only as prescribed. Due to their non-compliance with the case plans, the parents’ visitation with Child ceased in December 2020 by court order. Both parents began their required assessments but provided no verification that the assessments were completed. They have not completed any of their required case plan tasks.

Following the birth and removal of another child, the Cabinet filed petitions to terminate Mother’s and Father’s parental rights on June 2, 2021. The matter proceeded to an evidentiary hearing on August 25, 2022. Mother and Father were represented by counsel but did not attend the hearing. Child was represented by an appointed guardian *ad litem*. The Family Court took notice of the prior D/N/A proceedings, and the Cabinet introduced its records as exhibits.

The Cabinet also presented the testimony of case worker Briana Brooks (Brooks) and supervisor Renee Taylor (Taylor). Brooks testified that she was the fourth case worker and had only been working with Mother and Father since May 2022. She testified primarily from her review of the case file and based on her experience over the past three months. Likewise, Taylor testified based upon her review of the case file and her supervision of prior case workers.

At the conclusion of the hearing, the Family Court entered findings of fact, conclusions of law, and separate orders terminating Mother's and Father's parental rights to Child. These appeals followed. Additional facts will be set forth below as necessary.

On review of an order terminating parental rights, we ask whether the Family Court's findings were clearly erroneous. *Cabinet for Families & Children v. G.C.W.*, 139 S.W.3d 172, 178 (Ky. App. 2004). The Family Court's factual findings will not be disturbed unless there exists no substantial evidence in the record to support them. *V.S. v. Commonwealth, Cabinet for Human Res.*, 706 S.W.2d 420, 424 (Ky. App. 1986). "[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR¹ 52.01.

¹ Kentucky Rules of Civil Procedure.

Because termination of parental rights involves a fundamental liberty interest, the statutory findings must be supported by clear and convincing evidence.

Cabinet for Health & Fam. Servs. v. K.H., 423 S.W.3d 204, 209 (Ky. 2014).

“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.” *Cabinet for Health & Fam. Servs. v. K.S.*, 585 S.W.3d 202, 209 (Ky. 2019) (quoting *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky. App. 1998)).

KRS² 625.090 sets out the findings necessary to support an involuntary termination of parental rights. First, the Family Court must find that the child is “an abused or neglected child[.]” KRS 625.090(1)(a)2. In this case, the parents stipulated to abuse and neglect, and they do not challenge the sufficiency of that finding.

Second, “the circuit court must find the existence of one or more of [the] 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 found that Child had been “in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months

² Kentucky Revised Statutes.

preceding the filing of the petition to terminate parental rights[.]” KRS 625.090(2)(j). Mother and Father note that the Cabinet filed its petition to terminate their parental rights on June 2, 2021 – after Child had been in the Cabinet’s custody for only about eight months. Consequently, they argue that the Family Court clearly erred in finding that this element had been satisfied.

In response, the Cabinet points to the provisions of KRS 620.180, which authorize it to promulgate regulations to implement the provisions of KRS Chapter 620. Specifically, KRS 620.180(2)(c) requires that such regulations ensure that children committed to the Cabinet “are timely reunified with their biological family or identified for and placed in a new permanent home.” In pertinent part, these processes, procedures, and requirements shall include:

3. A petition to the court of appropriate jurisdiction seeking the termination of parental rights and authority to place the child for adoption in accordance with this chapter and KRS Chapter 625 *no later than* after a child has been committed to the cabinet for a total of fifteen (15) cumulative months out of forty-eight (48) months[.]

(Emphasis added.)

The Cabinet takes the position that this language requires it to file a termination petition before a child has been committed for 15 cumulative months. The legislature added this language to the statute in the 2018 amendment. 2018 Ky. Laws ch. 159, § 22 (eff. Jul. 14, 2018 to Jun. 27, 2019). However, the General Assembly did not amend KRS 625.090(2)(j), which allows a court to terminate

parental rights on a finding 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*[.]” (Emphasis added.)

KRS 620.180 addresses the content of the Cabinet’s administrative regulations. KRS 625.090 addresses the findings required for a court to terminate parental rights. Since we are reviewing the Family Court’s order terminating Mother’s and Father’s parental rights, the requirements of KRS 625.090 are more specific and directly applicable to this appeal.

We agree with Mother and Father that the Family Court’s finding on this element is clearly erroneous. Although the evidentiary hearing was held and the termination orders were entered nearly two years after Child went into the Cabinet’s custody, the petition was clearly filed less than 15 months after Child was placed in Cabinet’s custody. Nevertheless, KRS 625.090(2) merely requires findings on “one or more” of the listed grounds. The Family Court also made findings under KRS 625.090(2)(a), (e), and (g), concluding that each parent has:

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

. . .

(e) . . . 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; [and]

...

(g) . . . 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[.]

Mother and Father first contest the sufficiency of the evidence supporting the finding that they abandoned Child. Generally, abandonment is demonstrated by facts or circumstances “evinc[ing] a settled purpose to forego all parental duties and relinquish all parental claims to the child[,]” which are pre-requisites to establishing abandonment, desertion, or neglect by clear and convincing proof. *K.D.H. v. Cabinet for Health & Fam. Servs.*, 630 S.W.3d 729, 739 (Ky. App. 2021) (quoting *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985)). They argue that there was no evidence to support a finding that they demonstrated a settled purpose to forgo all parental duties.

But as previously noted, the Cabinet presented evidence that Mother and Father had no contact with Child from December 2020 until August 2022. Mother and Father complain that their lack of contact was due to a court order.

But the Family Court suspended their contact due to their lack of compliance with their case plans. The parents also made no efforts to comply with their case plans until shortly before the hearing. Such compliance would have enabled them to resume contact. In addition, the parents made no efforts to pay court-ordered child support during this period. Under the circumstances, there was substantial evidence to support the Family Court's findings that Mother's and Father's actions amounted to abandonment.

Even if the proof was not sufficient to show abandonment, these same factors support the Family Court's findings under KRS 625.090(2)(e) and (g). Mother and Father note that each of these sections requires a finding that there is "no reasonable expectation of improvement." They assert that their recent efforts to comply with their case plans refutes the Family Court's finding that there was no reasonable expectation of improvement.

Again, Mother and Father fail to show that the Family Court's findings were clearly erroneous. Although the Cabinet did not present the best evidence concerning the parents' efforts to comply with their case plans, the Cabinet documented its efforts to provide services, as well as the parents' failures to comply with the terms of their case plans. The Cabinet presented evidence that the parents had a lengthy history with substance abuse. Both parents had a history of missing drug screens. The Cabinet presented evidence that all of their other

children had been removed, and their parental rights were terminated to at least one other child. The Cabinet had no proof that either Mother or Father completed their required assessments, and the parents offered no evidence to show they had completed the assessments. Neither parent consistently called in to the Cabinet while Child was in foster care. In addition, Brooks testified that she had concerns about the safety of the parents' home due to its poor condition.

Mother and Father, through counsel, generally assert that they had begun working on their case plans shortly before the evidentiary hearing and that they made some recent improvements and attempts to comply with their case plans. However, they chose not to appear at the hearing themselves so there was no direct evidence of their efforts. But as discussed further below, we agree with the Family Court that their limited efforts were not sufficient to show a reasonable expectation of improvement that would warrant reunification in the foreseeable future. Consequently, we cannot disturb the Family Court's findings under these factors.

And third, the Family Court must find termination of parental rights would be in the child's best interests after considering the factors set forth in KRS 625.090(3)(a)-(f), as follows:

(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.

In its findings, the Family Court noted that all of Mother's and Father's children have been removed and placed in foster care, and their parental rights to at least one other child have been terminated. And as previously discussed, the Family Court found that the parents failed to make sufficient changes in their behavior to make it safe for Child to return to their home. Mother and Father generally contest the sufficiency of the evidence supporting the Family

Court's finding that the Cabinet has provided sufficient services to them. They also contend that there was no competent evidence showing that Child is doing well in foster care and will continue to do so if he is allowed to remain there and become available for adoption.

We have already noted the limited evidence presented by the Cabinet at the evidentiary hearing. Brooks had only served as the family case worker for four months, and she had limited direct contact with Mother and Father. Brooks made no home visits during the four months she was assigned to the case. Brooks was one of four workers who handled the case between September 2020 and August 2022. The previous case worker, Emily Mattingly, carried the case from March 2021 until May 2022. However, she was unavailable to testify.

Taylor testified entirely from the Cabinet's records. The Cabinet did not present records of all of the parents' drug screens and the most recent, positive screens did not show any illegal substances. The foster parents were present in the courtroom but were not called to testify. Mother's and Father's counsel raised objections to the lack of direct testimony about their actions during the Cabinet's supervision of the case and Child's progress in foster care. The Family Court even expressed its concerns about the Cabinet's handling of this case.

Despite these concerns, we conclude that this limited evidence had sufficient substance to induce conviction in the mind of a reasonable person. For

the most part, the Cabinet's proof was unrefuted. Mother and Father were not even present at the hearing. Mother's counsel stated that she had no contact with Mother since May 2020. Father's counsel stated that Father was aware of the scheduled hearing but did not know why he was not present. Their respective counsel engaged in thorough cross-examination of both witnesses but did not seriously refute the Cabinet's proof.

Brooks testified that Child is currently in a foster home with three of his other siblings, several of whom have already been adopted. Brooks further testified that Child is thriving in foster care, and that he will be adopted once Mother's and Father's parental rights have been terminated. From her review of the records, Taylor confirmed that assessment. Child's guardian *ad litem* agreed that termination was in his best interests. In addition, the Family Court took judicial notice that Father had a child support arrearage of \$2,580, and there was an order for his arrest.

The Family Court also noted that parents made "some level" of progress recently but found that they had never been consistent with their case plans. "The termination of parental rights is a particularly fact-sensitive inquiry, so appellate courts are disinclined to disturb trial-court findings, perhaps especially in a case like this where the facts are not seriously disputed." *R.M. v. Cabinet for Health and Family Services*, 620 S.W.3d 32, 38 (Ky. 2021) (footnote omitted).

While we would expect better evidence on a matter as serious as termination of parental rights, there was sufficient evidence of substance to support the Family Court's findings that termination of Mother's and Father's parental rights would be in the best interest of Child. Therefore, we find no basis to disturb the Family Court's orders terminating Mother's and Father's parental rights to Child.

Accordingly, we affirm the orders of the Madison Family Court.

ALL CONCUR.

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