RENDERED: JULY 28, 2023; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0155-ME

T.D. APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 21-AD-00076

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; A.D., A MINOR CHILD; AND T.D. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CETRULO, ECKERLE, AND GOODWINE, JUDGES.

CETRULO, JUDGE: Appellant T.D. ("Mother") appeals the Kenton Circuit Court order terminating her parental rights to her minor child, A.D. ("Child").

I. FACTUAL AND PROCEDURAL HISTORY

Child was born prematurely in February 2019 and has significant health challenges, including cerebral palsy and bronchopulmonary dysplasia.[1] Upon birth, in caring for those conditions, Child required oxygen supplements, 24-hour monitoring, and a feeding tube.

In September 2019, the Appellee Cabinet for Health and Family Services ("Cabinet") opened an investigation regarding Mother's untreated mental health concerns and domestic violence between Mother and Child's father ("Father"). The next month, the Cabinet filed its first Dependency, Neglect, or Abuse ("DNA") petition, alleging that Child was admitted to Cincinnati Children's Hospital Medical Center ("Hospital") for a third time on a failure-to-thrive diagnosis. Child had failed to gain weight after each discharge from the Hospital, suggesting Mother was not appropriately feeding Child using his feeding tube, and the family court signed an emergency custody order. However, after a hearing on the issue, the family court vacated the emergency custody order[2] and Child was returned to Mother with further orders that Mother avoid alcohol; have no contact with Father; and take Child to Kidz Club[3] each day.

[1] This is a chronic lung disease.

[2] However, the DNA petition remained.

[3] Kidz Club provides skilled nursing care and therapeutic services to children with medical complexities.

In December 2019, the Cabinet filed its second DNA petition, alleging that Child had again been admitted to the Hospital and had lost weight; that there had been a domestic violence incident between Mother and Father, despite the no-contact order; that Mother had failed to take Child to Kidz Club each day; and that there was uncertainty regarding whether Mother underwent a mental health assessment and was receiving appropriate treatment. Again, the family court signed an emergency custody order.

In early December 2019, the family court held a hearing on the emergency custody order and found there were reasonable grounds to believe Mother had neglected Child. Child then entered the temporary custody of the Cabinet, where he has remained. The family court held the adjudication hearing on both DNA petitions the next week and found Mother had neglected Child under Kentucky Revised Statute ("KRS") 600.020(1). Specifically, the family court concluded that Mother had inflicted on Child a physical injury by way of underfeeding Child – based on Child's continual weight loss while in care of Mother and Mother routinely resetting the feeding tube so it was impossible to monitor whether Child was getting adequate nutrition.[4] The family court held that,

[4] Although the family court's December 2019 findings of fact and conclusions of law stated that Mother had only reset her other child's feeding tube, Mother testified at the 2022 trial, regarding Child, that she had reset the feeding tube after his feedings as well because that was how she was taught to do it. Resetting the feeding tube prevented the parties from monitoring Child's nutrition intake, which had been a substantial issue in helping him gain weight.

pursuant to KRS 600.020(1), Mother created a risk of physical or emotional injury to Child by allowing Father to be around Child while knowing that he was "actively a sufferer of substance use disorder by way of using meth." The family court ordered supervised visitation for Mother.

In March 2020, the family court held the disposition hearing and ordered Mother to cooperate with the Cabinet, cooperate with individual therapy and case management services, and obey all court orders. The dispositional report stated that Mother was working her case plan but needed to make more progress before she could be reunified with Child. Post-adjudication, the Cabinet's case plan for Mother included that she receive mental health services; follow all doctor recommendations for Mother and Child; obtain stable housing; participate in an anger management program; attend parenting classes; and become educated as to Child's medical conditions and how to care for them. That month, Mother began seeing a psychiatrist, Dr. Bruce Snider ("Dr. Snider"), for medication management and continued to see a licensed professional counselor, Ashley Swope ("Counselor Swope").

Also that month, Child's social worker, Susan Sandfoss ("SSW Sandfoss"), submitted a Cabinet report detailing Child's medical condition. It noted that, although Child had been hospitalized once for significant illness while in his medically fragile foster home, he was doing well in the placement, and his

medical needs were consistently being met. Child had numerous medical appointments each month to monitor his gastrointestinal system, his lungs, his heart, and his general development and genetics. Further, Child received outpatient speech therapy, physical therapy, and occupational therapy weekly. Child had progressed well – steadily gaining weight and properly maturing – since he entered care of the foster parents. Child utilized a feeding tube for much of his nutritional needs, and his feeding routines were constantly monitored and changed to ensure progress. The report also indicated that there was evidence Mother and Father were back in a relationship, despite the no-contact order.

In January 2021, SSW Sandfoss submitted another Cabinet report, stating that Mother had completed anger management classes and continued to attend individual therapy. Further, it noted that Counselor Swope had reported that Mother was consistent and engaged in the sessions and that Mother continued to take parenting classes. SSW Sandfoss stated that there were no concerns during visits between Mother and Child, aside from Mother needing consistent assistance when visiting with all of her children.[5] Further, the report stated that there was a bond between Mother and Child, that Mother displayed appropriate parenting skills, and that Mother was very informed and knowledgeable about Child's

[5] Mother has two other children; however, Mother did not have custody of them. Mother had supervised visits with them once a week but they were not involved in this proceeding.

medical needs. The Cabinet acknowledged that it had no concerns about how Mother behaved when she was not being monitored.

Despite that progress, the Cabinet found that Mother "continue[d] to show that her personal life t[ook] preceden[ce] over her children" and that she had "multiple relationships with inappropriate people in the last several months and has displayed erratic behaviors." According to the report, Mother had "acknowledged that she [was] not in a position to care for [Child] or his siblings at th[at] time." The report indicated that Mother and Father denied being in a relationship or having contact with one another. The Cabinet recommended that Child remain committed to the Cabinet.

The April 2021 report of SSW Sandfoss added that Mother was also taking appropriate steps to get her driver's license.[6] The report stated that Mother had completed her case plan, but the Cabinet had lingering concerns about her personal life and how it interfered with her ability to safely parent Child. Mother had recently been in another relationship that had ended with a domestic violence incident. The Cabinet recommended that Child remain committed to the Cabinet and that unsupervised contact between Mother and Child be at the discretion of the Cabinet.

[6] However, at trial, Mother testified that she still relied on family members for transportation.

In June 2021, the Cabinet filed the petition to involuntarily terminate Mother's parental rights.[7] In the next month's Cabinet report, SSW Sandfoss added that Mother had weekly in-person visitation with Child and one scheduled video/phone call per week, but in recent weeks, Mother had routinely missed the call. Additionally, Mother had been invited to some of Child's virtual medical appointments but had not attended them. Mother had claimed that was due to lack of communication regarding those appointments. Although the report stated that the Cabinet was "fully agreeable" with Mother's request to hold a meeting to devise a plan to provide more parenting time to Mother, SSW Sandfoss testified that such a meeting never happened.

The next month's report included that Mother had stable housing and financial stability and continued to attend individual therapy and case management services "even though she had technically completed the program." Mother's supervised visits with Child continued to show no concerns regarding bonding or appropriateness. SSW Sandfoss explained that she was concerned Mother was not being honest with Counselor Swope in fear that the therapist would give that information to SSW Sandfoss. The report documented Mother's hospitalization in July 2021. The associated police report indicated that Mother had been highly

[7] The petition also pertained to Father; however, Father voluntarily terminated his parental rights.

intoxicated with multiple cuts on her legs and had been expressing suicidal ideations.

One of the individuals Mother had been with, who had been at Mother's house during the incident, was arrested on an outstanding warrant. That same individual had been involved with Mother when Mother had substance abuse issues in the past. SSW Sandfoss noted her concerns regarding Mother's mental health and her association with certain "inappropriate" individuals in her home. The report noted that Mother blamed the incident on her anxiety regarding the July 2021 review hearing and her distrust of SSW Sandfoss. Communication between Mother and SSW Sandfoss had declined significantly since that time. The next report added that there continued to be inconsistencies with Mother attending Child's visits, therapy and doctors' appointments, and meetings with the nurse case manager ("Nurse Gilley").[8]

The family court held the termination trial on May 5, September 20, and November 4, 2022. In pertinent part, Nurse Gilley, SSW Sandfoss, and Mother testified.[9] Nurse Gilley testified regarding her role as an out-of-home medical case manager and her observations of Child, his conditions, and the

[8] The report indicated that a list of those missed appointments was attached to the report, but that list does not appear to be in the record.

[9] Mother called two other individuals who testified to Mother's bond with Child, her ability to handle cleaning and handling his feeding tube, and her participation in Child's care. However, the family court found that neither witness has been intensely involved in the case.

medical progress meetings she held bi-weekly with the Cabinet, Child's guardian *ad litem* ("GAL"), medical providers, foster parents, and Mother. She testified regarding Child's medical care and the importance of maintaining his various doctor and therapy appointments. Additionally, she explained that she had contact with Child at least once a week and then at each of the bi-weekly care meetings.

SSW Sandfoss testified that Mother had attended only two care meetings in 2022, despite such meetings being held virtually twice every month.[10] Further, SSW Sandfoss testified that Mother missed several video visits with Child, as well as physical, occupational, and speech therapy appointments in which mother had adequate notice. Additionally, SSW Sandfoss testified that Mother missed several appointments at the Hospital, despite the close proximity to Mother. Mother denied many of those accusations.

Mother testified that when the family court learned that she had completed her case plan in April 2021, it scheduled a meeting with the Cabinet and GAL to determine how to increase her parenting time with Child. However, after that meeting, Mother's parenting time was roughly cut in half. Mother acknowledged that the Cabinet had notified her that reunification could not occur until Mother was consistently attending Child's appointments and meetings.

[10] SSW Sandfoss and Mother agreed that Mother did not receive timely notice of *all* of those meetings – Mother received notice within an hour or two of some meetings – however, they testified that some meeting invites came at an appropriate time.

Mother took issue with the Cabinet sometimes scheduling Child's medical appointments on her visitation days – where Mother would meet Child at the appointment – because it cut into her one-on-one time with him. Although Mother acknowledged she did not have consistent transportation – often utilizing her grandmother to get her to appointments – she testified that, if Child was returned to her, she could get him to appointments using family members and insurance.[11] Mother displayed her intimate understanding for the monitoring and care of Child's feeding tube and testified that she had changed it many times during her visits with Child.

Additionally, on December 1, 2022, Mother submitted depositions of Dr. Snider and Counselor Swope, and the family court deemed the case submitted. The depositions indicated that Mother consistently attended her therapy appointments and was making progress with her mental health. Both expressed that in their professional opinions, Mother was stable and capable of safely parenting her children; however, the Cabinet emphasized, and the therapists acknowledged, that neither of them had actually seen Mother with Child or conducted any sort of parenting evaluation.

[11] Mother testified her insurance would pay for medical transportation if alerted 72 hours in advance.

In December 2022, the family court entered its order terminating Mother's parental rights to Child. The judgment stated that the court had found, by clear and convincing evidence, that Child was neglected pursuant to KRS 600.020(1); that termination was in Child's best interest; and that Mother met one of the enumerated grounds for termination. Mother appealed, arguing the family court's findings were not supported by clear and convincing evidence; the family court improperly allowed Nurse Gilley to testify; and the GAL improperly submitted a report. Additional facts will be discussed, as necessary.

II. STANDARDS OF REVIEW

This Court reviews a family court's termination of parental rights using the clearly erroneous standard, based upon clear and convincing evidence. *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116 (Ky. App. 1998) (citing Kentucky Rule of Civil Procedure ("CR") 52.01). The family court's findings "will not be disturbed unless there exists no substantial evidence in the record to support its findings." *Id.* (citation omitted). Substantial evidence is "that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Bowling v. Nat. Res. & Env't Prot. Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994) (citation omitted).

> Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by

> substantial evidence and if the correct law is applied, a family court's ultimate decision . . . will not be disturbed, absent an abuse of discretion.

B.C. v. B.T., 182 S.W.3d 213, 219 (Ky. App. 2005) (citations omitted).

As to the family court's ruling to permit Nurse Gilley to testify, we review for abuse of discretion. *See Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2004) (citing *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000)). "The test for abuse of discretion is whether the [family] judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (quoting *Goodyear*, 11 S.W.3d at 581).

Similarly, in regard to the family court allowing the GAL to submit a "position," this Court reviews such evidentiary rulings for abuse of discretion. *See Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (citation omitted).

III. ANALYSIS

Mother argues that the family court erred when it terminated her parental rights because (A) its determination under KRS 625.090 was not supported by clear and convincing evidence; (B) it had improperly allowed, and relied upon, a non-medical witness to provide expert testimony that was not disclosed; and (C) it permitted the GAL to submit a post-trial recommendation without the opportunity for cross-examination.

A. KRS 625.090 Findings Properly Supported

KRS 625.090 governs involuntary termination of parental rights and provides that a family court "may involuntarily terminate parental rights if it finds, by clear and convincing evidence, that the child is an abused or neglected child as defined in KRS 600.020(1) and that termination serves the best interest of the child." *C.J.M. v. Cabinet for Health & Family Servs.*, 389 S.W.3d 155, 160 (Ky. App. 2012) (citing KRS 625.090(1)(a)-(c)). Further, under KRS 625.090(2), the family court must show the existence of one or more of several factors listed. *Id.*

1. Finding of Neglect

Pursuant to KRS 600.020(1)(a), the family court concluded, by clear and convincing evidence, that Mother neglected Child under subsections 2., 3., 4., and 9. As only one ground is required for the family court to find neglect, we will focus on the court's findings under subsections 3. and 4.

KRS 600.020(1)(a) provides, in pertinent part, that a child is abused or neglected when their

> health or welfare is harmed or threatened with harm when: (a) His or her parent . . . 3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child . . . 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child[.]

Here, the family court found "that [M]other ha[d] failed to participate in child's care and follow-up [in] such [a way] that she c[ould] handle his medically complex condition, and missed multiple visit[s] with child, treatment team and doctors/therapies." Mother argues that the evidence at trial did not support those conclusions because "the Cabinet admitted there were multiple reasons, through no fault of Mother, that resulted in missed appointments, including not even being aware they were occurring due to Cabinet's failure to inform." While SSW Sandfoss did acknowledge, and the family court recognized, that Mother missed some of the appointments due to circumstances outside of her control – *e.g.*, last-minute scheduling, illness – there was evidence presented that every absence did not fall under such category. For example, Mother testified to at least one instance in which she had slept through an appointment.

Additionally, there was testimony that Mother regularly missed Child's appointments because she did not have transportation, yet she insisted that if Child was returned to her, she would have transportation to attend all of Child's appointments. The family court did not find Mother credible nor such "excuses" acceptable. Further, the family court noted inconsistencies and lack of honesty in some of Mother's testimony regarding her other children. When pressed on the issue, Mother justified the untruthfulness by stating that she did not trust the GAL.

As a result, the family court concluded that "most missed appointments as well as visits with [Child] [were] the result of [M]other's own conduct and no one else."

As "the family court is in the best position to evaluate the testimony and weigh the evidence[,]" this Court should not "substitute its own opinion for that of the family court" absent clear error. *See Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008). Moreover, the family court "has broad discretion to determine whether a child has been either abused or neglected[.]" *C.J.M.*, 389 S.W.3d at 160 (citing *R.C.R. v. Commonwealth Cabinet for Hum. Res.*, 988 S.W.2d 36, 38 (Ky. App. 1998)). The family court was clear that it exercised that discretion, finding Mother was not credible and determining that under subsections 3. and 4., she had neglected Child. The family court provided substantial evidence to support its finding by clear and convincing evidence, and we cannot say that it clearly erred.

2. Best Interest of Child Finding

Next, the family court found that termination of Mother's parental rights was in the best interest of Child. To make such determination under KRS 625.090(3), the family court first mentioned that it had initially returned Child to Mother, following the first DNA petition; however, Mother had then violated the court's no-contact order with Father, failed to take Child to Kidz Club, and manipulated the feeding tube data. All of this had endangered Child and led to

the second removal. Since that time, the family court noted, Mother had demonstrated an indifference to Child's well-being by missing multiple appointments with the treatment team, the doctor, the therapists, and her own visits with Child. Additionally, the family court noted that Mother failed to present a conceivable plan in which she could get Child the extensive treatment he needs because she had failed for the previous 36 months to consistently get to Child's treatment appointments. The court concluded that Child was safe, doing as well as could be expected with his issues, and his needs were being met with the foster family. The family court did not believe the same would be true if Child returned to Mother.

Mother argues that the family court erred in its conclusion because the Cabinet did not offer or provide Mother with additional parenting time with Child to prove she could manage his care. While Mother acknowledges that the family court did attempt to return Child to Mother following the first DNA petition, she argues that the Cabinet failed to make reasonable efforts once Mother finished her case plan. Mother claims an interested party review board's ("Review Board")[12] June 2021 report supports such conclusion.

[12] Review Boards may be comprised of volunteers, parents, care providers, service providers, Cabinet personnel, and attorneys. The board conducts interactive reviews that focus on case plans for the parents and their child, and the progress being made to secure permanency.

In the June 2021 report, the Review Board marked an "x" in a box indicating that reasonable efforts had not been made by the Cabinet to provide services to make it possible for Child to safely return home. However, that report also indicated that the Cabinet had made progress to alleviate the need for placement, that the current plan was the most appropriate for and in the best interest of the child, that out of home placement was still necessary, that "neither parent [was] capable [of taking] care of [C]hild[,]" and recommended that the termination of parental rights process "should be expedited."

Although Mother does not reference the December 2021 Review Board report, we find it important in this discussion as it indicated that reasonable efforts had been made to place Child in a timely manner and the steps necessary to finalize the permanency plan had been completed. That report also noted that Mother was not in compliance with the case plan and court orders because she was not showing up consistently for in-person scheduled visits or virtual visits. The board recommended that the family court end visits with Mother because she was "making no effort to see [Child], and he d[id] not need this instability in his life." Additionally, SSW Sandfoss testified at trial that the Cabinet had no other services to offer to Mother, and SSW Sandfoss did not believe Mother would make further improvement.

KRS 620.020(13) defines "reasonable efforts" as "the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community in accordance with the state plan for Public Law 96-272 which are necessary to enable the child to safely live at home[.]" In *J.R.E. v. Cabinet for Health and Family Services*, 667 S.W.3d 589, 593 (Ky. App. 2023), this Court found that the Cabinet had engaged in reasonable efforts toward reunification when it created a case plan, provided it to the parent, and had contact with the parent. *See also Cabinet for Health & Family Servs. v. K.H.*, 423 S.W.3d 204 (Ky. 2014). As such, this Court concluded that the family court had not abused its discretion when it found reasonable efforts had been made. *J.R.E*, 667 S.W.3d at 593.

Here, the record indicated that Mother received more services than simply the creation and distribution of a case plan. Importantly, "[c]lear 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.*, 979 S.W.2d at 117 (citing *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)). Despite the Review Board marking a box to indicate that the Cabinet had not made reasonable efforts in one of its reports, the same document contained statements recommending that the court expedite the termination process. Additionally, a

subsequent report from the board indicated that reasonable efforts had been made. Those reports, along with testimony of SSW Sandfoss support the family court's finding and suggest it relied upon substantial evidence to make its determinations. As such, it did not abuse its discretion.

3. Existence of An Enumerated Ground for Termination

Similar to findings under KRS 600.020(1)(a), referenced above, the family court need find only one of the possible 11 grounds of parental unfitness under KRS 625.090(2). Therefore, we will focus on the court's conclusion under subsection (e) that, by clear and convincing evidence, Mother failed "for a period of more than six months to demonstrate that she can handle Child and all his medical complexities in a safe manner." *See* KRS 625.090(2)(e).

In support, the family court found Mother had "been in charge of [Child] for no longer than 3 hours at a time; never overnight" and "ha[d] missed multiple visits." Additionally, the family court noted that Mother was unreliable to schedule or keep doctor or therapists' appointments and care team meetings. The family court reiterated its finding that Mother's excuses regarding absences and irregularities were not credible because Mother had testified that she always got herself to her own appointments. As such, the family court found Mother demonstrated a "marked indifference about [Child]." The family court found that there was not likely to be any improvement on that matter because the situation

had been ongoing for 36 months, with no change in Mother's behavior, and most recently, Mother had missed a visit because she had slept through it.

Mother argues that the family court "created an impossible burden of proof for Mother." She noted that Nurse Gilley and SSW Sandfoss had testified that Mother did provide appropriate care to Child during visits. Yet, as the family court noted, Mother had only three hours with Child at a time, which the Cabinet had discretion to increase but never found it to be in Child's best interest. Further, Mother had missed many of Child's medical appointments, further suggesting that she was incapable of maintaining Child's care. The family court supported its findings with substantial evidence, as discussed, and did not abuse its discretion.

B. Court Did Not Abuse Discretion in Permitting Witness to Testify

The family court entered orders on July 15, 2021; October 14, 2021; November 2, 2021; January 20, 2022; and May 17, 2022 requiring the parties to deliver the "name, address, and telephone number of each witness to be called and provide a short summary of their testimony[,]" and "[a]s to any expert witnesses, their opinions, the basis for their opinions and facts revealed to them shall be released to the other side no later than fourteen (14) days before the trial."

On January 7, 2022, the Cabinet submitted its pretrial compliance, noting that Nurse Gilley was expected to testify "as to her personal observations as a case manager and observations of the care the child requires." The record does

not indicate that the Cabinet presented Nurse Gilley as an expert witness. As discussed, Nurse Gilley served as Child's medical case manager – a service provided for children in out-of-home care who have medical complexities. Nurse Gilley testified to her role in Child's medical process; the bi-weekly care meetings she held; and shared her observations regarding Child's improvement since she started working on his case in March 2021. Mother objected to multiple questions asked of Nurse Gilley by the Cabinet and GAL.

First, the Cabinet asked Nurse Gilley to state Child's medical conditions and Mother objected to any opinion testimony because the Cabinet had not disclosed her as an expert; therefore, Nurse Gilley was not qualified to give medical expert opinions regarding Child's medical conditions. The family court agreed, stating that Nurse Gilley could not provide medical diagnoses, so she would need to provide the source she was referencing if she spoke to the diagnoses that medical doctors – like those at the Hospital – had given Child. Ultimately, the family court permitted Nurse Gilley to list those diagnoses given by doctors, conditioned on the Cabinet submitting the Hospital records as Exhibit 8.[13]

Nurse Gilley then testified regarding the types of treatment Child received for those medical diagnoses. The Cabinet asked Nurse Gilley how the

[13] Initially, the Cabinet had not submitted the certified medical records; however, after discussion, the Cabinet stated it would submit the certified Hospital medical records as Exhibit 8, which Nurse Gilley would use during her testimony.

failure to consistently receive therapy at appointments would affect Child, but Nurse Gilley acknowledged that the Child's medical providers would have to provide that information. The Cabinet then asked, generally, whether the failure to obtain the therapies Child currently received could affect Child. Mother objected, claiming that such question called for speculation; however, the family court overruled the objection. Nurse Gilley stated that regular follow-ups and close monitoring were necessary to ensure optimal health and safety, and that Child – with consistent therapy – had made "leaps and bounds." The GAL later asked similar questions, again Mother objected, and again the family court overruled the objections. Nurse Gilley testified that, based on her observations, failure to attend medical appointments would affect Child's growth.

Lastly, Nurse Gilley testified that Mother had attended one of the bi-weekly case manager meetings in December 2021, and since then, Mother had attended "some of them" but she was not sure how many. Nurse Gilley stated that she had records of the number of meetings Mother had attended, but did not have the list in front of her, although, it was "something she could pull up." The parties acknowledged that Nurse Gilley's records of who attended which meetings were not submitted to Mother; however, Nurse Gilley noted that the information was available on a software program designed for Cabinet partners.[14] Mother objected

[14] Mother's brief indicated that she did not have access to the Cabinet's program.

to Nurse Gilley reviewing information that had not been provided to Mother, and the family court overruled the objection. Nurse Gilley then looked up the records indicating when Mother had attended the meetings and stated that Mother had attended two meetings, one in February 2022 and one in March 2022, in addition to the December 2021 meeting.

Mother argues that allowing Nurse Gilley to testify regarding her observations of Child, while referencing documents not submitted to Mother, was prejudicial. Further, she argues that if she had known Nurse Gilley was to testify regarding the effects of missed appointments, Mother would have obtained an expert to testify regarding the same. Alternatively, the Cabinet argues that it had sufficiently advised Mother of Nurse Gilley's testimony through its pretrial compliance. Specifically, the Cabinet disclosing Nurse Gilley would testify to her "observations of the care the child requires" sufficiently encompassed all of her testimony.

Mother relies on *Clephas*, 168 S.W.3d at 394, in which this Court emphasized that "[t]he discovery of the substance of an expert witness's expected testimony is essential to trial preparation." There, unlike here, the witness had been an expert; the defendant disclosed the expert's anticipated testimony past the deadline; and the defendant failed to follow court orders to provide additional information via deposition. *Id.* at 390-92. On appeal, this Court found that the

trial court had abused its discretion because the expert's "previously unrevealed opinions did indeed result in an unfair proceeding[.]" *Id.* at 393. Specifically, this Court found that the defendant's disclosure had not complied with CR 26.02(4), relating to expert witnesses. *Id.* As a result, this Court found the defendant's non-compliance with discovery orders – in failing to produce the expert for deposition and not allowing the expert to form an opinion until the evening before trial – "undoubtedly resulted in prejudice to [the plaintiff]." *Id.* at 394.

First, aside from Mother's references to Nurse Gilley as a "non-medical expert witness," the Cabinet never presented Nurse Gilley as an expert witness nor indicated that procedures under CR 26.02(4) would be applicable. Additionally, the family court had agreed with Mother's objection that Nurse Gilley could not testify regarding medical diagnoses because she was not a medical expert.[15] Nevertheless, if Nurse Gilley had been an expert, the findings in *Clephas* would not have been persuasive. Here, the Cabinet's witness disclosures were timely; Mother never objected to the sufficiency of the disclosure nor requested

[15] Importantly, if Nurse Gilley had been an expert, Mother would have been tasked with obtaining "further discovery of the expert witness by deposition upon oral examination or written questions pursuant to Rules 30 and 31." CR 26.02(4)(a)(ii). Then, if the Cabinet's response had been deficient, Mother's remedy would have been "to file a motion for an order compelling discovery." *See M.P.S.*, 979 S.W.2d at 118 (citing CR 37.01 and *Poe v. Rice*, 706 S.W.2d 5 (Ky. App. 1986)).

additional information.[16] Further, the early disclosure provided an opportunity for Mother to request additional information regarding Nurse Gilley's testimony if the disclosure of anticipated testimony did not sate Mother's curiosity.

Finally, Mother argues that the family court "based a significant amount of its findings on the testimony of Nurse Gilley" – including that Child must attend all therapy appointments and that without proper care several things can go wrong for Child – however, the record indicated that SSW Sandfoss further corroborated and expounded upon Nurse Gilley's testimony regarding Mother's missed appointments and its potential consequences. Even Mother testified that she understood the importance of attending Child's medical appointments and that she would continue his appointments if Child was returned to her care. The family court's findings were supported by the collection of testimony presented at trial – never singling out Nurse Gilley's testimony in that regard – and discussion of the diagnoses and therapies alone supported the family court's finding that it was important for therapies to continue. As such, we cannot find that the family court abused its discretion in allowing Nurse Gilley to testify at trial.

[16] Trial started on May 5, 2022, and the Cabinet disclosed Nurse Gilley as a witness in January 2022, well before 14 days prior.

C. Court Did Not Abuse Discretion in Requesting GAL's Position

At the final hearing on November 4, 2022, the family court stated that at the close of its cases, it normally asks the GAL for "their position." The family court requested that the GAL submit a "written position" by December 1, 2022, the date it would deem the case submitted. Neither party objected to the submission of a "position" at the hearing. On November 30, 2022, the GAL filed its position, a one-sentence recommendation to terminate the parental rights of Mother: "Comes now [GAL] for [Child], and recommends that this Court terminate the parental rights of Mother . . . thereby making this minor child eligible for adoption." Despite failing to object to the court's notice that the GAL would submit a "position," Mother filed a written objection to the recommendation after submission, citing *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), and *S.E.A. v. R.J.G.*, 470 S.W.3d 739 (Ky. App. 2015).[17]

In *Morgan*, a custody modification action, the family court appointed a GAL to "investigate the situation, to file a report summarizing his findings, and to make a recommendation as to the custody issues raised by the parties." *Morgan*, 441 S.W.3d at 96. There, the report indicated the GAL conducted interviews with

[17] Further, Mother claimed that the GAL was not qualified to provide such recommendation under Kentucky Rules of Evidence 701 and 702 because the GAL was not a doctor, psychologist, or psychiatrist; however, as the recommendation did not make any medical or psychological assertions – simply stating that she recommended termination – we find this argument without merit, and it is unnecessary to address further.

the parties and the child and concluded which statements from the interviews held more weight. *Id.* at 97. The family court did not, however, "allow the party who disagreed with the GAL's recommendation [report] . . . to cross-examine the GAL as a witness at the [hearing]." *Id.* at 96. Then, in its order, the family court found in favor of the GAL report and noted "expressly the GAL's recommendation of that result." *Id.* at 98. The party opposing the GAL's recommendation appealed, claiming that "by allowing the GAL to testify, in effect, as to both facts and opinions through his recommendation to the court, but then disallowing [that party's] cross-examination of that testimony, the trial court violated [that party's] right to due process of law." *Id.* at 96.

Our Supreme Court agreed, explaining that

> the guardian *ad litem* is a lawyer for the child, counseling the child and representing him or her in the course of proceedings by, among other things, engaging in discovery, in motion practice, and in presentation of the case at the final hearing. The guardian *ad litem* neither testifies (by filing a report or otherwise) nor is subject to cross-examination.

Id. at 119.

"[T]he Court [in *Morgan*] concluded [] that if a trial court relies on a GAL report, due process demands that the other parties must be afforded an opportunity to question/cross-examine the GAL." *S.E.A.*, 470 S.W.3d at 743 (citing *Morgan*, 441 S.W.3d at 119).

The Cabinet agrees that a family court may not rely on a GAL report and prevent the opposing party from cross-examination of the GAL; however, the Cabinet contends that the family court did not rely on a GAL report. Therefore, it claims there was no requirement to provide an opportunity for cross examination. Specifically, unlike *Morgan*, the GAL here did not indicate that she had performed a detailed investigation of the parties and weighed their respective interviews. The GAL simply provided a one-sentence recommendation. Further, the GAL here provided no facts or recitations of evidence on which the family court could have relied.

Additionally, unlike *Morgan*, the family court did not reference the GAL's recommendation in its findings of fact or conclusions of law. As the Cabinet notes, "Mother asserts that the trial court 'adopted' the report of the GAL but points to no evidence in the record indicating in what manner the trial court adopted the report or in what way, if any, the purported adoption of the GAL report affected" its decision to terminate Mother's parental rights. We agree. As such, we do not find *Morgan* and *S.E.A.* to be sufficiently analogous as to necessitate a like result. Therefore, we do not find that the family court abused its discretion under those authorities.

IV. CONCLUSION

The decision of the Kenton Circuit Court to terminate Mother's parental rights was supported by clear and convincing evidence. Further, the Kenton Circuit Court did not abuse its discretion when it allowed Nurse Gilley to testify and allowed the GAL to submit a position. As such, we AFFIRM the order of the Kenton Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Delana S. Sanders
Crescent Springs, Kentucky

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES:

Kevin Martz
Covington, Kentucky