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Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0967-ME

R.W.B. APPELLANT

v. APPEAL FROM GRAYSON FAMILY COURT
HONORABLE KENNETH H. GOFF, II, JUDGE
ACTION NO. 20-AD-00052

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

AND

NO. 2023-CA-0970-ME

R.W.B. APPELLANT

v. APPEAL FROM GRAYSON FAMILY COURT
HONORABLE KENNETH H. GOFF, II, JUDGE
ACTION NO. 20-AD-00053

A.D.H.; COMMONWEALTH OF
KENTUCKY, CABINET FOR
HEALTH AND FAMILY SERVICES;
AND K.R.B., A MINOR CHILD APPELLEES

AND

NO. 2023-CA-0972-ME

R.W.B. APPELLANT

v. APPEAL FROM GRAYSON FAMILY COURT
HONORABLE KENNETH H. GOFF, II, JUDGE
ACTION NO. 20-AD-00054

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; A.D.H.; AND
M.W.B., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, CETRULO, AND JONES, JUDGES.

CETRULO, JUDGE: Appellant R.W.B. ("Father") is the natural father of minor children D.R.B. ("Oldest Child"), K.R.B. ("Middle Child"), and M.W.B. ("Youngest Child") (together, the "Children").[1] The Grayson Family Court

[1] Father appealed his termination for each child separately; however, this Court consolidated the appeals pursuant to Kentucky Rule of Appellate Procedure ("RAP") 2(F)(2).

involuntarily terminated Father's[2] parental rights to the Children,[3] and Father filed a Kentucky Rule of Civil Procedure ("CR") 59.05 motion to alter, amend, or vacate the judgment. The family court denied Father's motion, and he appealed.[4]

FACTUAL AND PROCEDURAL HISTORY

The Cabinet for Health and Family Services ("Cabinet") had been involved with Father and A.D.H., the Children's natural mother ("Mother"), since 2012, when the first Dependency, Neglect, or Abuse ("DNA") petition regarding the Oldest Child was filed. The Cabinet filed its second DNA petition in 2015, which resulted in temporary removal of the Oldest Child and Middle Child[5] and an adjudication that they were abused and neglected. A year later, the Oldest Child and Middle Child were returned to Father and Mother's custody, but the case remained open. Following a domestic violence incident involving Mother in

[2] The family court also involuntarily terminated Mother's parental rights to the Children; however, Mother is not part of this appeal so we will focus on the court's findings regarding only Father.

[3] The family court entered separate judgments for each of the Children; however, because each judgment contained nearly identical analysis and relied upon the same witness testimony and case documents, we will refer to them jointly.

[4] "Our case law is clear, however, that there is no appeal from the *denial* of a CR 59.05 motion. The denial does not alter the judgment. Accordingly, the appeal is from the underlying judgment, not the denial of the CR 59.05 motion." *Ford v. Ford*, 578 S.W.3d 356, 366 (Ky. App. 2019).

[5] The Youngest Child was not yet born.

March 2017, Father pled guilty to disorderly conduct and enrolled in anger management.

Nevertheless, the next year, Father was arrested for another domestic violence incident with Mother and charged with fourth-degree assault. Due to this ongoing violence in the Children's presence, the Cabinet filed another DNA petition in November 2018. According to the DNA petition, Father had thrown a chair into a picture frame, shattering glass all over the floor of the home. Father then grabbed Mother by the throat while she was holding the Youngest Child. In Mother's attempts to remove Father's hand from her throat, Father hit the Youngest Child in the face. Father proceeded to yell and curse at the Children, and when police officers arrived at the scene, Father was intoxicated.

At the temporary removal hearing, the district court placed the Children in the Cabinet's custody and ordered no contact between Father and the Children. While the juvenile cases were pending, Father was arrested twice – on January 2 and 9, 2019 – for violating the emergency protection order Mother had filed against him. In April 2019, Father stipulated to a finding that the Children were abused and neglected. Later that month, Father again was arrested for violating the emergency protective order. The disposition hearing in May 2019 placed the Children in Mother's custody and kept the no contact order with Father in place.

However, in August 2019, the Cabinet was notified that Father was living with Mother and the Children, violating the no contact order. The Cabinet then filed a petition for emergency custody, stating that Father had violated the no contact order and neither parent had submitted to their court-ordered hair follicle tests; therefore, the Children were at immediate risk of harm if left in Mother's care. The Children were then placed in the Cabinet's custody, where they have remained since that time.

In September 2019, Father signed his case plan, which included tasks to complete a mental health assessment and a substance abuse assessment; attend parenting classes, couples' counseling, a batterer's intervention program, and supervised visitation with the Children; and submit to random drug screens. In December 2019, Father again stipulated to a finding of neglect and abuse due to the repeated domestic violence in the Children's presence and his substance abuse. In January 2020, the district court committed the Children to the Cabinet and ordered Father not to engage in domestic violence.

Father began individual counseling; however, he continued to commit acts of domestic violence against Mother and had positive drug screens. Father was again arrested in June 2020 for strangling Mother. The next month, the district court waived reasonable efforts to Father and changed the permanency goal to adoption. The Cabinet then filed a Petition for Involuntary Termination of

Parental Rights against Father in December 2020. Father was released from incarceration in May 2021, and the next month, he began court-ordered counseling.

Father's counselor, David Hicks, MSW, LCSW, a Licensed Clinical Social Worker for Twin Lakes Behavioral Health and Wellness ("Counselor Hicks") submitted reports stating that Father had completed a substance abuse assessment and parenting program. In September 2021, Counselor Hicks's report indicated that Father was progressing well and had maintained abstinence from substances. The report also indicated that Father was staying away from Mother; however, after the submission of the report, Father was arrested for violating the protection order with Mother. He remained incarcerated until May 2022.

Upon that release, Father restarted his mental health and substance abuse treatment with Counselor Hicks and completed an intensive outpatient program in July 2022. Counselor Hicks also referred Father to a batterer's intervention program; however, Father did not complete the program until a year later, shortly before the termination proceedings began.

At the termination trial in early-June 2023, Counselor Hicks; Doug Hazelwood, a Cabinet Supervisor ("Supervisor Hazelwood"); Dalton Poteet, a Grayson County Detention Center deputy jailer ("Jailer Poteet"); Father; and Leiha Bohannon, the social worker on the case ("SW Bohannon") testified. Largely in line with his previous reports, Counselor Hicks testified that Father was

progressing well and had maintained sobriety and independence from "chaotic relationships." Counselor Hicks emphasized that Father was focused on self-care and maintaining his relationship with the Children. He also confirmed that Father had undergone a mental health evaluation, had completed a substance abuse assessment and parenting course, and was entering an intensive outpatient program for anger management.

Supervisor Hazelwood then testified that Father had completed a batterer intervention program and had maintained steady employment and sobriety since his release from prison in May 2022. Nevertheless, he acknowledged that the Children had been in care for an extensive period of time and that too much had happened for the Children to be returned to Father. Additionally, Supervisor Hazelwood noted that the Children had bonded with their foster family and were doing well in the placements. Jailer Poteet testified that he met Father while he was incarcerated, but their relationship has continued through Father's release. They participated in Bible studies together, and Jailer Poteet described Father's home as "appropriate." Jailer Poteet believed Father had "changed" while incarcerated.

Father acknowledged that he had a toxic relationship with Mother and that he had committed numerous incidents of domestic violence against her. He admitted that he "did terrible things to [Mother] in front of [the Children]" and that

the Children had been traumatized. Father believed that his relationship with Mother "was the source of the majority of his violations of the law and the removal of the [C]hildren"; however, he testified he had not contacted Mother since September 2021. Despite that claim, SW Bohannon testified that Father had tried to contact Mother in January 2023. Father acknowledged that the Children had been in foster care for an extended period of time; nevertheless, he testified that he continued to work with Counselor Hicks to improve himself so he could maintain a relationship with the Children.

SW Bohannon testified that Father had a history of neglect and abuse, citing numerous substantiated and unsubstantiated allegations involving sex abuse, neglect, spouse abuse, physical abuse, and risk of harm spanning 2010 to 2020.[6] On top of that, SW Bohannon testified that Father had an extensive criminal record and was on probation at the time of trial. Most recently, Father had been sentenced to 20 years on charges of first-degree unlawful imprisonment, first-degree wanton

[6] These included a June 2010 unsubstantiated allegation of sex abuse, a December 2012 substantiated allegation of neglect, a July 2015 substantiated allegation of neglect/risk of harm, a July 2015 substantiated allegation of spouse/partner abuse, a November 2015 substantiated allegation of sex abuse and neglect/risk of harm, a November 2017 allegation of spouse/partner abuse with no finding, a March 2017 unsubstantiated allegation of physical abuse and risk of harm, an October 2018 substantiated allegation of neglect/risk of harm and neglect/environmental, an August 2019 substantiated allegation of neglect/risk of harm and neglect/medical, a September 2020 need for sexual abuse services, and a September 2021 unsubstantiated allegation of sexual abuse.

endangerment, and fourth-degree assault of Mother, and had been incarcerated from June 2020 to May 2021, then September 2021 to May 2022.

Despite Father's failure to meaningfully work his case plan for the first three years of the Children's removal, SW Bohannon noted that Father had been having video calls with the Children every other week for the five months preceding trial. However, once those calls began in 2023, the Youngest Child began having nightmares and the Children had issues at school. The Children also expressed worry that their needs would not be met if they were placed back with Father. The Oldest Child and Middle Child had been diagnosed with post-traumatic stress disorder, and the Oldest Child did not participate in visits with Father. Further, SW Bohannon testified that as of June 1, 2023, Father owed $10,834.32 in child support. Accordingly, SW Bohannon testified that she believed termination was in the best interest of the Children.

Following trial, the family court entered its judgment terminating Father's parental rights, based on clear and convincing evidence. The court found that the Children were first placed in the Cabinet's custody in August 2019, and they had remained in the Cabinet's continuous care since that time. As such, Father had failed to protect and preserve the Children's fundamental right to a safe and nurturing home, and the Children were found to be neglected and abused during the DNA actions. Additionally, during the termination proceeding, the

family court found the Children to be neglected or abused pursuant to Kentucky Revised Statute ("KRS") 600.020(1)(a)3., 4., 7., 8., and 9. Father had continuously and repeatedly failed or refused to provide essential parental care and protection for the Children.

Further, the family court found that Father had failed to engage in services upon the Children's removal, which resulted in the district court waiving reasonable efforts in July 2020. The court acknowledged that although Father had been having bi-weekly video calls with the Children for a few months preceding trial, he had failed to maintain contact with the Children for long periods of time previously.[7] Likewise, the family court found that the Children entered foster care in August 2019 and Father had abandoned the Children for a period of not less than 90 days. Father had failed to provide the Children with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for their wellbeing. Additionally, Father provided no support for the Children for the first few years they were in the Cabinet's custody, and the court noted Father still owed $10,834.32 in child support. As a result, the court determined Father had failed to make sufficient progress toward identified goals in the case plan to allow for the safe return of the Children.

[7] The court acknowledged that some of those lapses were the result of a no contact order and incarceration.

Likewise, the family court found that there was clear and convincing evidence that at least one ground for termination existed; specifically citing KRS 625.090(2)(a), (e), (g), and (j). The court determined that termination of Father's parental rights was in the best interest of the Children and the Cabinet was equipped to accept the care, custody, and control of the Children.

The next month, Father filed a CR 59.05 motion to alter, amend, or vacate the June 2023 Judgment, which the family court denied. Father appealed.

STANDARD OF REVIEW

> [O]ur review is limited to a clearly erroneous standard which focuses on whether the family court's order of termination was based on clear and convincing evidence. [CR] 52.01. "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 & Fam. Servs. v.*] *T.N.H.*, 302 S.W.3d [658,] 663 [(Ky. 2010)]. Due to the fact that "termination decisions are so factually sensitive, appellate courts are generally loathe to reverse them, regardless of the outcome." *D.G.R.* [*v. Commonwealth, Cabinet for Health & Fam. Servs.*], 364 S.W.3d [106,] 113 [(Ky. 2012)].

Cabinet for Health & Fam. Servs. v. K.H., 423 S.W.3d 204, 211 (Ky. 2014).

Substantial evidence is "that which is sufficient to induce conviction in the mind of a reasonable person." *Ball v. Tatum*, 373 S.W.3d 458, 464 (Ky. App. 2012) (internal quotation marks and citation omitted).

ANALYSIS

Father first argues that the Cabinet failed to establish that termination was in the Children's best interest.[8] 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 & Fam. 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 eleven enumerated factors. *Id.*

Father concedes that the Cabinet proved KRS 625.090(1)(a)1. – that the Children had been abused or neglected – and KRS 625.090(2)(j)[9] – that the Children had been in foster care for 15 of the 48 months preceding the Cabinet's filing to terminate his parental rights. As such, the only substantive issue Father

[8] As part of this argument, Father claims that SW Bohannon did not have the necessary authority to testify regarding what was in the Children's best interest because she was not an expert. However, the family court did not rely upon SW Bohannon's statement that termination was in the Children's best interest to make its finding. Instead, the family court considered the testimony of all witnesses and analyzed the requisite factors to come to its conclusion.

[9] Much of Father's argument on this point pertains to the family court's additional findings under KRS 625.090(2)(a), (e), and (g); however, as Father conceded, the family court needed to establish the existence of only one factor under KRS 625.090(2). As such, the family court's finding under KRS 625.090(2)(j) was sufficient to meet the requirement.

raises is whether the family court appropriately found that termination was in the Children's best interest under KRS 625.090(1)(c).[10]

To determine the Children's best interest, the family court must consider the six factors outlined in KRS 625.090(3), as detailed in *K.H.*, 423 S.W.3d at 212. Specifically, KRS 625.090(3)(a)-(f) states 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;

[10] Additionally, Father attempts to argue that the family court improperly considered Mother and Father jointly in its June 2023 Judgment; however, Father did not raise that issue before the family court, and it is not properly before this Court. *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016) (internal footnotes and citations omitted) ("Indeed, an appellate court is 'without authority to review issues not raised in or decided by the trial 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.

The family court specifically identified KRS 625.090(3) as the applicable statute to determine the Children's best interest and appropriately analyzed the factors. Subsection (a) was not applicable, so the court started with subsection (b), finding that Father's "acts of neglect or abuse toward [the Children] resulted in this court's finding of neglect or abuse in the underlying juvenile actions[.]" The court detailed the string of DNA petitions and Father's accompanying stipulations to findings of abuse and neglect, as well as the court's own finding during the termination proceeding that Father had abused or neglected the Children pursuant to KRS 600.020(1)(a)3., 4., 7., 8., and 9. Under subsection (c), the family court determined that "the Cabinet made reasonable efforts to reunite [the Children] with [Father but he] refused to engage in services[.]" As such, the district court had waived reasonable efforts to Father in 2020.

The court then found, pursuant to subsection (d), that Father "made no adjustments in [his] circumstances, conduct, or conditions to make it in the

[Children's] best interest to return [them] to [his] care, nor will it be within a reasonable amount of time" and that it was "clearly not in [the Children's] best interest to wait for [Father] to work a case plan and hope that [he defies his] own history of case plan noncompliance[.]" While Father testified regarding his recent compliance with services, the evidence demonstrated that Father had not consistently worked his case plan for a majority of the time it had been in place.

Moreover, the evidence presented at trial established that Father's participation in services had not necessarily created an environment in which the Children would be safe if placed back in Father's care. Namely, following Counselor Hicks's report that Father was progressing well and avoiding Mother – evidence that Father had been complying with portions of his case plan – was offset by Father's almost immediate arrest for violating a protective order concerning Mother. Additionally, there was testimony that Father had attempted to contact Mother as recently as 2023, despite his acknowledgment that many of his legal issues resulted from contact with Mother.

The family court found that, under subsection (e), the Children were "thriving in foster care [and had] bonded to the foster parents." Additionally, the family court found that the Children had made improvements since entering foster care and that those improvements were expected to continue. As to subsection (f), the court noted that Father had failed to provide for the Children and owed

$10,834.32 in child support. The family court analyzed the appropriate statute and supported its finding that termination was in the Children's best interest with substantial evidence. As such, the court's finding was not clearly erroneous.

Next, Father argues that the family court erred when it terminated his parental rights because he presented evidence that the Children would not be abused or neglected in the future. As Father notes, KRS 625.090(5) provides that "[i]f the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child . . . if returned to the parent the court in its *discretion may* determine not to terminate parental rights." (Emphasis added.) Therefore, Father claims that the family court should not have terminated his parental rights. However, the statutory language is clear: KRS 625.090(5) is not a mandate. Indeed, it allows the family court to exercise its discretion regardless of the evidence presented concerning future abuse or neglect. Plainly, the use of the words "discretion" and "may" in the statute renders it permissive.

As detailed, Father has an extensive history of exposing the Children to domestic violence, and he waited almost three years after the Children's removal to make any progress with his services. Moreover, there was testimony that Father's recent participation in services had not caused any meaningful changes in his environment because Father denied responsibility for his criminal behavior

with Mother and for harming the Children by committing acts of violence in their presence.

Some witnesses testified that Father had changed and was making adequate progress; however, others emphasized that the progress was not sufficient to justify returning the Children to his care. The family court considered all the evidence presented and simply agreed with those supporting termination, whose testimony was sufficient to lead a reasonable person to find termination was in the Children's best interest. Such weighing of witness credibility is "within the *exclusive province of the trial court*." *D.G.R.*, 364 S.W.3d at 114 (citation omitted). As such, we cannot say that the family court was clearly erroneous when it prioritized the Cabinet's witnesses' testimony, "nor that their testimony was insufficient to support the [family] court's determination." *Cf. D.G.R.*, 364 S.W.3d at 114.

CONCLUSION

The Grayson Family Court's findings were supported by substantial evidence and therefore were not clearly erroneous. As such, we AFFIRM the Grayson Family Court.

ALL CONCUR.

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