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OPINION OF DECEMBER 3, 2021, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-0807-ME

D.H. APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 20-AD-00115

CABINET FOR HEALTH AND
FAMILY SERVICES; AND
J.H., A CHILD APPELLEES

AND NO. 2021-CA-0809-ME

D.H. APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 20-AD-00116

CABINET FOR HEALTH AND
FAMILY SERVICES; AND
J.H., A CHILD APPELLEES

AND NO. 2021-CA-0810-ME

D.H. APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 20-AD-00117

CABINET FOR HEALTH AND
FAMILY SERVICES; AND
M.H., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND MAZE, JUDGES.

MAZE, JUDGE: D.H. appeals from judgments of the Kenton Family Court which terminated his parental rights to his three children. We find substantial evidence to support the family court's findings of fact and conclusions of law on all of the required statutory factors. We further conclude that the trial court did not lose

authority to enter its judgments more than thirty days after the evidentiary hearing. Hence, we affirm.

D.H. (Father) and G.P. (Mother) are the parents of three children: Jo.H. (born September 2011); M.H. (born April 2015); and Ja.H. (born November 2018).[1] The Cabinet has a history of involvement with both Father and Mother dating back to 2008 due to concerns of substance abuse and domestic violence. The Cabinet became involved with the family again in March 2017 after another incident of domestic violence between Father and Mother. Father was charged with fourth-degree assault. In the criminal matter, Father was ordered to participate in an anger management treatment program and was subject to a no-contact order with Mother. Mother obtained a domestic violence order (DVO) against Father, which required him to have no contact with her for three years.

Around the same time, the Cabinet filed a non-removal petition based on concerns of domestic violence and substance abuse in Mother's home. The family court allowed the children to remain in Mother's home. Both parents admitted to substance abuse and Father acknowledged the domestic violence incident and that two children were present at the time of the incident. Following his arrest, Father left the home at the time and was living with his aunt in Ohio.

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[1] Because two of the children have the same initials, we will differentiate between them by including the second letter of their first names.

The court granted supervised visitation to Father and directed the Cabinet to provide substance abuse referrals. Both parents stipulated to neglect at that time.

The Cabinet became involved again in November 2018, after Mother tested positive for drug use following the birth of Ja.H. Father was still living in Ohio and the DVO remained in effect, but he admitted to paternity of the child. The Cabinet offered Sobriety Treatment and Recovery Team (START) services to both parents.

In February 2019, the Cabinet filed another non-removal petition due to Mother's lack of compliance with her substance abuse treatment services. The petition also stated the Mother and Father were actively violating the DVO. Mother stipulated to neglect of Ja.H. due to the positive drug test at the child's birth. The court placed the children in the temporary joint custody of Mother and a third party.

At a hearing in April 2019, the joint custodian stated that she was no longer willing or able to have custody of the children. The children were removed from Mother's home at that time. Father's case plan required that he undergo a substance abuse assessment, refrain from the use of illegal substances and non-prescribed medications, drug screen at the START team's discretion, complete sober parenting classes and participate in individual therapy, build a sober support network and provide verification, attend AA/NA meetings and provide

verification, complete anger management classes, and maintain stable housing and employment.

Following their removal, the Cabinet placed the children with various relatives. However, the Cabinet removed the children from those placements because the relatives were unable to care for the children. The children have remained in foster placement since July 2019.

Father completed a drug screen in April 2019, which tested positive for marijuana, fentanyl, oxycodone, and buprenorphine. In May 2019, the Cabinet reported that Father was refusing additional services. Father began anger management classes in August 2019, but he dropped out after several months to take employment outside of the country. Father restarted the program again at the beginning of 2020. By the time of trial in March 2021, Father still had five classes to complete. Father began drug treatment in July 2020, but he failed to complete either the treatment or assessment programs. Father repeatedly tested positive on drug screens, recording 18 positive tests, 0 negative tests, and 81 no-shows.

In August 2020, the Cabinet filed petitions against Father and Mother to involuntarily terminate their parental rights to each of the children. The matter proceeded to a bench trial on March 18, 2021. At the hearing, the Cabinet presented records from the dependency/neglect/abuse petitions involving the children. Social worker Christina Burgess testified about the Cabinet's history

with the family, as well as the services offered to both parents. The children's therapist testified about the therapy the children receive and the level of parental involvement required to maintain their stability. Both Father and Mother testified as well.

On June 11, 2021, the family court issued separate findings of fact, conclusions of law, and judgments terminating Father's and Mother's parental rights to each of the children. Father now appeals from these judgments. 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." CR[2] 52.01.

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).

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[2] Kentucky Rules of Civil Procedure.

"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)).

KRS[3] 625.090 sets out the findings necessary to support an involuntary termination of parental rights. First, the circuit court must find that the child is "an abused or neglected child[.]" KRS 625.090(1)(a)2. "The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination." *K.S.*, 585 S.W.3d 202, 209 (Ky. 2019) (citation omitted).

Father argues that the trial court's conclusions of law merely repeat the language of the statute and do not identify any particular evidence supporting its conclusions. However, the court's factual findings are sufficient if they identify evidence of record to show that it complied with the statutory requirements and to allow for meaningful appellate review. *See Keifer v. Keifer*, 354 S.W.3d 123, 125-26 (Ky. 2011). In this case, the family court entered extensive findings of fact, followed by conclusions of law on each of the statutory elements. While it is

[3] Kentucky Revised Statutes.

better practice to state the factual bases for each conclusion, we conclude that the family court's factual findings are sufficient.

Here, Father previously stipulated to neglect of the two older children. Furthermore, the definition of "abused or neglected child" includes a child whose health or welfare is harmed or threatened when his or her parent

> [f]ails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) cumulative months out of forty-eight (48) months[.]

KRS 600.020(1)(a)9.

The family court expressly found that Father failed to make sufficient progress on his case plan during the entire period the children were out of his custody. The record clearly supports this conclusion. Father did not participate in the START services offered by the Cabinet until April 2019, and then only sporadically. He failed to complete anger management classes. Although Father resumed the class in early 2020, he had not completed it by the time of trial. Father failed to provide verification of completion of AA/NA meetings. He repeatedly tested positive on or failed to attend drug screens. He was discharged from his drug treatment program for being noncompliant. While Father maintained housing and employment since the children's removal, he failed to consistently pay child support during the six months preceding trial. We find

ample evidence to support the family court's conclusion that Father abused or neglected each of the children.

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 made findings under KRS 625.090(2)(e) and (g), concluding that each 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;

and

> 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[.]

Father takes issue with these findings, arguing that the family court erred in finding no reasonable expectation of improvement. Father contends that he was not given the opportunity to care and provide for the children. He also

asserts that the pandemic restrictions imposed after March 2020 limited the availability of reunification services.

But as discussed above, Father left the family home in March 2017, when the DVO was entered. The Cabinet offered significant reunification services, but Father did not attempt to work on his case plan for over two years. Even when he began to pursue elements of his case plan, his compliance was sporadic. While Father provided some gifts for the children during visits, he was not current on his child support at the time of trial. Social worker Burgess expressed the opinion that Father's failure to complete these programs demonstrated his inability to meet his own needs or to safely parent the children. Although the pandemic may have restricted the availability of some services, Father failed to complete even the programs which were available. Given his limited progress, we find substantial evidence to support the family court's conclusion that there was no reasonable expectation of improvement given the ages of the children.

And thirdly, 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). The Cabinet presented evidence of its efforts to contact and work with both parents starting in 2017. As noted, Father's efforts to comply with his case plan were limited until 2019, and not consistent thereafter. The Cabinet also presented evidence that the two older children have required extensive therapy

to deal with what they witnessed in their parents' home. However, they are making progress in that therapy. The family court found that neither parent was able to provide a safe and therapeutic process needed to continue this progress. Under the circumstances, we find substantial evidence to support the family court's conclusion that termination of Father's parental rights would be in the best interests of the children.

Finally, Father argues that the family court failed to comply with KRS 625.090(6), which provides:

> Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:
>
> (a) Terminating the right of the parent; or
>
> (b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

Father notes that the trial court held the hearing on March 18, 2020 but did not enter its findings and judgment until June 11 – more than two months later. He argues that the violation of the statute is grounds for dismissal of the petitions. As an initial matter, we note that Father did not raise this issue to the trial court. Unless the matter affects the trial court's subject matter jurisdiction, this Court will not consider grounds which were not presented to trial court. *See*

G. P. v. Cabinet for Health & Fam. Servs., 572 S.W.3d 484, 489 (Ky. App. 2019). *See also Gullett v. Gullett*, 992 S.W.2d 866, 869 (Ky. App. 1999).

Father cites *K.M.J. v. Cabinet for Health and Family Services*, 503 S.W.3d 193 (Ky. App. 2016), as holding that the family court has no authority to terminate parental rights more than thirty days following the hearing. In *K.M.J.*, the trial court deferred ruling on a petition for termination of parental rights for nearly fourteen months, during which time the court even conducted additional hearings based on the original petition. *Id.* at 195-96. This Court held that KRS 625.090(6) only allows a trial court either to grant or dismiss the termination petition, not to hold the case in limbo indefinitely. *Id.* at 197.

In the current case, the only issue is that the family court failed to enter its findings and judgments in a timely manner. As noted in *K.M.J.*, the purpose of the 30-day requirement of KRS 625.090(6) is to limit the trial court's options once the termination petition is submitted to the court. The statute serves merely as means to expedite permanency for children. *Id.* We cannot find that the time limit imposes a jurisdictional barrier to granting termination beyond the time limit.[4]

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[4] This Court has reached the same conclusion in several unpublished cases: notably, *J.T.B., Sr. v. Cabinet for Health and Family Services*, No. 2013-CA-001395-ME, 2014 WL 4177422 (Ky. App. Aug. 22, 2014); *J.A. v. Cabinet for Health and Family Services*, No. 2017-CA-000586-ME, 2018 WL 3954289 (Ky. App. Aug. 17, 2018); and *R.M. v. Cabinet for Health and Family Services*, No. 2019-CA-000449-ME, 2020 WL 1332954 (Ky. App. Mar. 20, 2020), *aff'd on other grounds in* 620 S.W.3d 32 (Ky. 2021).

Under the circumstances, we conclude that the 30-day requirement of KRS 625.090(6) implicates, at most, the family court's particular case jurisdiction, as it involves compliance with a statutory time limit. *Kelly v. Commonwealth*, 554 S.W.3d 854, 861-62 (Ky. 2018). As a result, the defect is subject to waiver unless timely presented to the trial court. *Commonwealth v. Steadman*, 411 S.W.3d 717, 724 (Ky. 2013). Thus, our review is limited to palpable error. *See* CR 61.01.

Although we do not approve of the delay, Father has failed to show either that the family court acted outside of its authority or that he was prejudiced by the delay. As discussed above, the family court's findings of fact were supported by substantial evidence, its conclusions of law complied with the statutory requirements of KRS 625.090, and Father has not identified any violations of his due process rights. Therefore, we conclude that any error arising from the timeliness of entry of the orders terminating Father's parental rights was harmless and otherwise did not violate or affect his substantial rights in these appeals.

Accordingly, we affirm the judgments of Kenton Family Court terminating Father's parental rights to each of the children.

ALL CONCUR.

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