RENDERED: MARCH 15, 2024; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0602-ME

E.J.F. APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON S. FLEMING, JUDGE
ACTION NO. 21-AD-00001

A.J.E., A CHILD; COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; AND G.D.E., FATHER APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MCNEILL, AND TAYLOR, JUDGES.

MCNEILL, JUDGE: E.J.F. ("Mother") appeals from the termination of her parental rights to A.J.E. ("Child").[1] After careful review, we affirm.

[1] Father's parental rights were terminated in the same proceeding, but he has not appealed, therefore, we limit our Opinion to evidence and rulings relevant to Mother's appeal.

BACKGROUND

The Cabinet became involved with Mother and Child after receiving a report of a residence with no heat and a child going door to door asking for food. Upon making contact, Mother lied about the whereabouts of Child. Child was eventually found inside the home asleep on a mattress on the floor. The home was full of black smoke due to an improperly ventilated kerosene heater. Child was hard to arouse and lethargic and had to be transported to the hospital due to smoke inhalation. Mother was charged with First-Degree Wanton Endangerment and taken to jail.

The Cabinet filed a dependency, neglect, or abuse petition in Christian Circuit Court and was granted emergency custody of the Child on January 27, 2020. A month later, the Court found Child to be abused and neglected. Mother was released from jail in March and given a case plan, with the goal of reunification. She was asked to cooperate with the Cabinet, complete parenting and psychological assessments, and follow all recommendations.

In June, Child was committed to the Cabinet's custody. At that time, the Cabinet's goal changed to reunification concurrent with termination of parental rights and adoption due to the length of time Child had already been in foster care. The Cabinet learned Child had spent a year and a half in foster care in Tennessee

immediately before this incident and had only been returned to Mother's custody in November 2019.

An interested party review board agreed with the goal change and noted Mother needed to be "more engaged with her case plan." In January 2021, the Cabinet filed a Petition to terminate the parental rights. The Cabinet's decision was supported by a subsequent Comprehensive Assessment and Training Services Project ("CATS") report which recommended the Cabinet "turn its focus toward securing permanency for [Child] outside of [Mother's] care" due to the "extensive length of time [Child] has been in and out of home care, as well as [Mother's] continued lack of insight and meaningful reduction of risk . . . ."

A final evidentiary hearing was held on March 20, 2023. Kayleigh Graves and Jennifer Hedrick, two social workers on the case, testified for the Cabinet. Ms. Graves testified she was the case worker from January 2020 to September 2021. Mother's initial case plan required her to cooperate with the Cabinet, participate in monthly home visits, complete a psychological assessment, individual therapy, and parenting classes, be honest in responses to providers, and demonstrate safe parenting, among other things.

Ms. Graves stated Mother did not initially work her case plan but began complying in 2021. Mother was in and out of therapy and parenting classes and did not take full advantage of her visitation. For instance, in-person visits

were initially restricted due to COVID-19. Mother was given a Zoom link for virtual visits with Child but missed several. She did participate in phone calls to Child. When in-person visits were reinstated in early 2021, Ms. Graves could not get ahold of Mother. Ms. Graves stated Mother was generally good at maintaining contact except for one three-month period when Mother returned home to Tennessee.

According to Ms. Graves, the biggest issue with Mother was her inability to follow through with treatment. Ms. Graves was also concerned with Mother's honesty with providers. When the Cabinet received Mother's mental health assessment, she had downplayed her prior involvement with social services in Tennessee. Ms. Graves noted that if Mother is not honest in the assessment, she cannot receive appropriate resources.

Ms. Graves was also questioned by the Child's guardian *ad litem* about the CATS assessment's finding that Mother lacked insight as to her environment's effect on Child. Ms. Graves stated that on the night of the removal, Mother seemed to not understand why the police and Cabinet needed to see Child. She also noted Child required significant supervision. Based upon her observations, she believed Mother would need significant help if Child were returned. Mother struggled to comprehend a lot of the things the Cabinet was

telling her, and they would have to repeat things several times. By her admission, Mother had a financial overseer for most of her life.

Ms. Hedrick testified that since she took over the case in April 2022, Mother has maintained contact with the Cabinet and participated in mental health treatment. However, she could not verify whether Mother had completed parenting classes. Mother had six to seven in-person visits with Child during her time on the case, but these were postponed indefinitely when Child began exhibiting aggressive behavior following in-person visits with Mother. During these visits, Mother had brought Child an Xbox, a television, arts and crafts, and in one instance, a home-cooked meal, but had not provided clothes or school supplies. In sum, Mother had complied with the minimums of her case plan, but they wanted to see her exhibit what she had learned.

Ms. Hedrick stated the Cabinet still had concerns with Mother's parenting abilities as well as her mental health. The main barrier to reunification was her overall insight. Ms. Hedrick believed Mother still did not understand why Child was removed from her care. When discussing the reason, Mother would always justify, "at least she had this, at least she had that," without seeing the danger she put Child in and understanding she is responsible for her safety and welfare. She also questioned whether Mother could provide the necessary level of

care. Child is diagnosed with autism and ADHD and is currently in behavioral health therapy and speech therapy.

The guardian *ad litem* had similar concerns and questioned Ms. Hedrick if Mother had shown any insight or understanding as to how the environment Child was raised in had affected her. Ms. Hedrick said Mother had not, which was why the Cabinet had no reasonable expectation circumstances would improve. She believed the parties would be back in court if Child was returned to Mother's custody. Ms. Hedrick noted that completion of a case plan alone is not sufficient to ensure the safe return of a child. A parent must be able to demonstrate what they have learned, and Mother had not demonstrated she had gained sufficient knowledge from her treatment plan.

Mother had a different view of the circumstances. She questioned whether anything she did would be enough for the Cabinet. She noted that when she got out of jail following the initial removal, she was poor and homeless. She went to Tennessee to get her life in order. She claimed she had done all the Cabinet had asked of her. She had housing, was attending mental health therapy, and had completed parenting classes. She noted the difficulties poverty and COVID-19 had posed to reunification and questioned how she was supposed to improve her relationship with Child when she was prevented from visiting her,

referring first to COVID-19 protocols and then suspension of in-person visits for therapeutic reasons.

Following the hearing, the circuit court entered findings of fact and conclusions of law terminating Mother's parental rights. It found Child had been abused and neglected, and that termination was in Child's best interests. KRS[2] 625.090(1)(a), (c). It further found under KRS 625.090(2)(a), (e), and (g), that three separate grounds existed for terminating parental rights. This appeal followed.

STANDARD OF REVIEW

We begin by noting a "trial court has wide discretion in terminating parental rights." *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 211 (Ky. 2014). As such, "our 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." *Id.* (citing CR[3] 52.01). "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people." *M.S.S. v. J.E.B.*, 638 S.W.3d 354, 360 (Ky. 2022) (citation omitted). "Pursuant to this standard, an

[2] Kentucky Revised Statutes.

[3] Kentucky Rules of Civil Procedure.

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 and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). "Because 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 and Family Services*, 364 S.W.3d 106, 113 (Ky. 2012).

ANALYSIS

Pursuant to KRS 625.090, to involuntarily terminate parental rights, a court must find by clear and convincing evidence: (1) the child is or has been adjudged abused or neglected as defined in KRS 600.020; (2) termination is in the child's best interest; and (3) at least one of the conditions in KRS 625.090(2)(a)-(k) exists.

Mother's arguments on appeal only pertain to prongs two and three of the test. Specifically, concerning prong two, she contends the family court's finding that the Cabinet had made reasonable efforts at reunification was clearly erroneous. As to prong three, she argues the family court's findings under KRS 625.090(2)(a), (e), and (g) were similarly unsupported by substantial evidence. Mother also argues the family court erred in admitting the CATS report, and the expert opinions contained therein.

CATS Report

Before we address the family court's required statutory findings, we consider the admission of the CATS report and its opinions, because Mother devotes a significant portion of her appellate brief to that issue. Specifically, she argues the family court improperly admitted the CATS report as a business record under KRE[4] 803(6). At the very least, she argues, it was error for the family court to admit the expert opinions within the report.

Even assuming it was error, we find any error harmless. Generally, "[a]dmission of incompetent evidence in a bench trial can be viewed as harmless error . . . *if there was other competent evidence to prove the matter in issue*[.]" *Prater v. Cabinet for Human Res., Commonwealth*, 954 S.W.2d 954, 959 (Ky. 1997). *See also M.P.S. v. Cabinet for Human Res*., 979 S.W.2d 114, 117 (Ky. App. 1998) ("[I]f the quality and substantiality of competent evidence to support termination is abundantly sufficient, the admission of hearsay evidence is nonprejudicial error."). Disregarding any consideration given to the CATS report in the court's findings, there was sufficient competent evidence supporting the family court's termination of Mother's parental rights. Therefore, any error in admitting the report or opinions was nonprejudicial.

[4] Kentucky Rules of Evidence.

Mother cites three references to the CATS report in the court's findings as evidence it improperly relied upon the report in reaching its decision. The first reference states that during her CATS assessment Mother "reported she had been diagnosed with depression and anxiety in the past and taken psychotropic medications in the past." The second notes that "[a]fter the CATS assessment, visitations between the mother and child were terminated due to the recommendations made in the CATS report." Finally, the court recounted, "[t]he CATS assessment did not believe that the mother could meet the needs of the child."

We would note that only the last reference to the CATS report contained an opinion. The first reference is merely a recitation of Mother's statements to healthcare providers which are not excluded under the Kentucky Rules of Evidence. *See* KRE 803(4). The second reference is simply a statement of fact and testified to by Ms. Hedrick. As to the CATS report opinion that Mother could not meet the needs of the child, both social workers testified similarly. Thus, any error by the family court in relying upon the CATS report opinion is harmless. We find no reversible error.

Best Interests of the Child

KRS 625.090(3) lists six factors a family court must consider when determining whether termination of parental rights is in the best interest of a child.

These factors are (a) mental illness that 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 toward any child in the family; (c) whether the Cabinet has made reasonable efforts to reunite the child with the parent; (d) the parent's efforts and adjustments to make it in the child's best interest to return to parent; (e) the child's physical, emotional, and mental health, and the prospects for improvement if termination is ordered; and (f) the parent's payment or failure to pay a reasonable portion of the child's substitute physical care and maintenance if financially able.

Mother argues the family court erred in finding the Cabinet made reasonable efforts at reunification under KRS 625.090(3)(c). "When the Commonwealth takes custody of a child, it must undertake efforts to reunify the family as are appropriate and reasonable under the circumstances." *R. M. v. Cabinet for Health and Family Services*, 620 S.W.3d 32, 41 (Ky. 2021) (citation omitted). Reasonable efforts are defined as "the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available . . . which are necessary to enable the child to safely live at home[.]" KRS 620.020(13).

In finding the Cabinet made reasonable efforts at reunification, the family court noted the Cabinet offered a case plan to Mother that addressed her

mental health issues, lack of stable housing, and employment issues, among other things. While recognizing that Mother completed some of her case plan, it found she never demonstrated she had gained any knowledge from the tasks required by the case plan. "Despite all the offered services, her insight has not improved over the last three years." It also referenced Ms. Graves' testimony that Mother's lack of honesty with providers had made treatment difficult.

Mother claims the Cabinet was never interested in reunification, as evidenced by the short time (less than six months) between the filing of the DNA petition and the goal change to reunification concurrent with termination. In her opinion, reasonable efforts would have required she be allowed to demonstrate she could safely parent Child through in-home observation or programs, such as CASA[5] or the Family First Program, which she was never offered.

We agree with the family court that the Cabinet's reunification efforts were reasonable under the circumstances of this case. "KRS 625.090(3)(c) focuses only on the Cabinet's efforts *prior* to the TPR[6] petition, irrespective of the permanency goals." *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 213 (Ky. 2014). Here, the Cabinet had given Mother a case plan that

[5] Court Appointed Special Advocates.

[6] Termination of parental rights.

requested she complete a full psychological evaluation and a parenting assessment and follow all recommendations.

Ms. Graves testified that Mother was in and out of mental health therapy and parenting classes before the filing of the TPR petition in January 2021. Mother was also dishonest in her mental health assessment, denying any prior history with child protective services or drug use, which affected her ability to receive appropriate services. Mother also failed to take full advantage of the visitation opportunities afforded her. During COVID-19, when in-person visits were restricted, Mother missed several Zoom video chats with Child. When in-person visits resumed, the Cabinet could not get ahold of Mother.

As we noted in *K.M.E. v. Commonwealth*, 565 S.W.3d 648 (Ky. App. 2018), "[t]he services that will be reasonable, and therefore required, depend on the facts and circumstances of each case. There may be a strong relationship between the definition of reasonable efforts and the court's findings with regard to parental attitude." *Id.* at 658 (citation omitted). Here, the Cabinet offered numerous services to Mother which she failed to take full advantage of before the filing of the TPR petition. Substantial evidence supports the family court's finding that the Cabinet's efforts at reunification were reasonable.

Other evidence considered by the family court supports the remaining relevant KRS 625.090(3) factors. While Mother completed some of her case plan,

she lacked insight into how her actions affected Child. Ms. Hedrick testified Mother still does not understand why Child was removed from her care, despite the obvious harm of exposing Child to an improperly ventilated kerosene heater. Mother justified "at least [Child] had this, at least [Child] had that." Child's needs are being met in foster care. She is receiving therapy and is doing well. In sum, substantial evidence supports the family court's finding that the termination of the Mother's parental rights is in the best interests of Child.

Parental Unfitness

"A family court may not terminate parental rights unless the court 'also finds by clear and convincing evidence the existence of one (1) or more' of the grounds listed in KRS 625.090(2) indicating parental unfitness." *J.R.E. v. Cabinet for Health and Family Services*, 667 S.W.3d 589, 593 (Ky. App. 2023). Mother next argues the family court's findings under KRS 625.090(2)(a), (e), and (g) were clearly erroneous. KRS 625.090(2)(a), (e), and (g) provide:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> . . . .
>
> (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

. . . .

> (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child[.]

As to KRS 625.090(2)(a), the family court found that Mother abandoned Child for a period of not less than 90 days when she lost contact with the Cabinet for three months while residing in Nashville. "Generally, abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." *K.M.E. v. Commonwealth*, 565 S.W.3d 648, 656 (Ky. App. 2018) (citation omitted).

Mother argues there was no clear and convincing evidence that Mother was in Nashville for longer than 90 days, citing Ms. Graves' testimony that the period was "maybe three months." She contends the statute requires the period of abandonment to be "no less than ninety days," and there was no evidence of that here. While the evidence was unclear exactly how long Mother was in Nashville, we believe substantial evidence supports the family court's finding that Mother abandoned Child for a period of not less than ninety days.

Ms. Graves testified that the period was about three months and Mother testified similarly. Even if the length of time Mother was in Nashville (and out of contact with the Cabinet) cannot be definitively established as greater than ninety days, abandonment can be shown in other ways. In addition to moving to Nashville for three months, Ms. Graves testified that Mother did not comply with her case plan for the first year. During that same time, Mother also missed several of her Zoom visitations as well as in-person visitations. Further, there was no evidence Mother provided essential items such as food, clothing, or school supplies during the first year following removal. These factors, when viewed with the estimated three-month period Mother ceased contact with the Cabinet, are sufficient evidence that Mother abandoned Child for "a period of not less than ninety (90) days[.]" KRS 625.090(2)(a).

Even if the family court erred in finding Mother abandoned Child, substantial evidence supported its finding under KRS 625.090(2)(e) that Mother "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 . . . considering the age of the child[.]" Again, the family court need only find "one of the termination grounds enumerated

in KRS 625.090(2)(a)-[(k)] exists." *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014).

The family court found Mother "completely lacks the insight necessary to see how her bad decisions negatively impact the child. She has had several years and been offered many services but appears incapable to [sic] learning how to safely care for her child." Elsewhere in its findings, the family court noted that "Mother seemed to believe that the prevention plan was just a series of boxes to 'check off' without learning from the tasks."

Substantial evidence supported these findings. Mother testified she had done everything asked of her and blamed the Cabinet for not having her child back. She admitted she made a mistake by choosing the wrong individual (referring to her paramour), reflecting a lack of understanding as to the risk of harm the unventilated kerosene heater posed and the actual reason Child was removed. In Mother's view, the only reason the CATS assessment recommended termination was because Child had been in foster care for so long, which was due to the Cabinet's failure to conduct a home visit at her new residence. Mother failed to acknowledge the 1.5 years Child had been in foster care in Tennessee immediately before this incident or her part in either removal.

Ms. Hedrick testified Mother still does not understand why Child was removed from her care, despite the obvious harm of exposing Child to an

improperly ventilated kerosene heater. Mother justified "at least [Child] had this, at least [Child] had that." Both the Cabinet and Child's guardian *ad litem* believed that due to lack of insight, there was no reasonable expectation of improvement in parental care. We find no error.

Lastly, the family court's finding under KRS 625.090(2)(g) was similarly supported by substantial evidence. Mother argues the family court failed to provide any explicit examples of how she failed to provide essential food, clothing, shelter, medical care, or education, and that it failed to acknowledge her contributions. However, Ms. Hedrick testified Mother never provided clothes or school supplies, although she did once provide a home-cooked meal. Mother did give Child an X-Box, a television, and arts and crafts supplies. But the evidence was that these were isolated incidents.

Further, Ms. Hedrick testified that Child was currently undergoing significant therapy, including behavioral and speech therapy, and had been diagnosed with ADHD and autism, and questioned whether Mother could provide the level of ongoing mental health and speech therapy Child required. We cannot say the family court's finding that ground for termination exists under KRS 625.090(2)(g) was clearly erroneous.

Based upon the foregoing, the order of the Christian Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brandi L. Jones
Oak Grove, Kentucky

BRIEF FOR APPELLEE:

Dilissa G. Milburn
Mayfield, Kentucky