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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0861-ME

J.R.

APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIFFANY G. YAHR, JUDGE
ACTION NO. 22-AD-00181

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES AND K.J.R.,
A MINOR CHILD

APPELLEES

AND

NO. 2023-CA-0862-ME

J.R.

APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIFFANY G. YAHR, JUDGE
ACTION NO. 22-AD-00182

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND

FAMILY SERVICES AND J.G.S.R.,
A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EASTON, KAREM, AND TAYLOR, JUDGES.

KAREM, JUDGE: These consolidated appeals arise from the Fayette Family Court’s termination of the parental rights of J.R. in two children. Upon careful review, we affirm the family court’s rulings in both appeals.

FACTUAL AND PROCEDURAL BACKGROUND

J.R. (“Mother”) is the biological mother of J.G.S.R., a son born in 2016 (“Older Son”) and K.J.R., a son born in 2020 (“Younger Son”). O.M.S., the father of Older Son, was a named party in the termination proceedings but he is not a party to these appeals. The father of Younger Son is not known.

The Cabinet for Health and Family Services (“the Cabinet”) first became involved with Mother in 2017, when she witnessed her father murder her mother. Mother was a juvenile at the time and she and her sibling were placed in the permanent custody of relatives.

The Cabinet became involved with Mother again in 2020, when O.M.S. shot into her car while she and Older Son were in the vehicle. Mother was

pregnant with Younger Son at the time. O.M.S. was convicted of wanton endangerment and received a prison sentence. Mother was given sole custody of Older Son and O.M.S. was ordered to have no contact with them. Mother completed her case plan, and the case was closed on April 20, 2021.

In June 2021, the Cabinet received a report that Mother had stolen a vehicle at the Hope Center and left her children unsupervised. Older Son was found wandering in the street and Younger Son was found home alone in his crib. Mother was arrested and charged with grand theft and child abandonment. She spent eleven months incarcerated at the Fayette County Detention Center. O.M.S.'s family and a maternal aunt were evaluated by the Cabinet as possible placements for the children but were rejected. The children were placed together in a foster home. On October 25, 2021, the Fayette Family District Court entered a finding of neglect or abuse against Mother.

Mother did not have any visitation with her sons during her incarceration. The Cabinet social worker, Hannah Deas, prepared a case plan for Mother which required her to complete assessments for mental health, substance use, parenting, domestic violence, and to follow all recommendations. Mother was required to obtain a psychosocial assessment and to complete drug screens in accordance with a court order. She was asked to attend NA/AA meetings, parenting classes, and to engage in individual counseling. She was also asked to

maintain appropriate housing and employment, to maintain contact with the Cabinet, and to cooperate and allow home visits. Initially, she was not able to make progress on the case plan because she was incarcerated, and the jail did not offer any of these programs or services.

When Mother was released on bond in May 2022, Deas met with her to update the case plan and provide referrals for services. Mother began working her case plan and completed her initial mental health assessment on August 4, 2022. The assessor recommended that she undergo a full psychological evaluation. Deas provided Mother with contact information to obtain the evaluation, but Mother refused to complete the evaluation and told Deas that she had no ongoing mental health issues and that she was “better” than she was at the time she stole the car. According to Deas, the evaluation was necessary to move forward with the case plan because of Mother’s psychological state at the time of her arrest and the initial hearing in the case.

Deas testified that Mother was not given visitation immediately upon release because Older Son’s therapist recommended that she spend some time working on her case plan first.

Deas testified that both children were doing very well in their foster home and the foster parents wished to adopt them. Initially, Older Son had adjustment and behavioral issues and trauma symptoms from exposure to domestic

violence, but he was now doing well in school and participating in extracurricular activities like soccer. Younger Son was also thriving. Both children were attached to their foster parents and their medical and physical needs were being met. To Deas's knowledge, the biological parents had not provided any money, food, clothing, or other necessities for the children.

Deas testified that her contact with Mother was sporadic because Mother did not have a phone and had to receive calls through her sister's phone. On a couple of occasions, Deas did meet with Mother at her sister's apartment, where Mother was staying. Because Deas and the therapist did not see sufficient progress on Mother's part, the goal for the children was changed to adoption on September 26, 2022.

In Deas's opinion, the greatest risks to the children were Mother's unassessed and unresolved mental health issues, her inability to demonstrate long-term stability and sobriety, and her lack of insight into and accountability for placing the children at risk of harm. Deas expressed concern that if the children were returned to Mother, they would continue to be abused or neglected.

In October 2022, another social worker, Ladeana Daniel, took over Mother's case from Deas. At that time, Mother had found employment, assisting a friend in cleaning houses. It was difficult for her to find a job because of her criminal charges. She had not yet completed parenting classes or received a

visitation schedule. Mother initiated contact with Daniel on October 23, 2022, via email. They had phone contact, in person meetings, and family team meetings. Mother had still not completed her psychological evaluation. When Mother filed a motion for visitation in February 2023, it was denied because she had not completed her psychological evaluation. Daniel testified that she had discussed the evaluation with Mother in April 2023, and Mother told her that she had scheduled it.

The Cabinet filed petitions for termination of parental rights for both children on December 6, 2022, and a trial was conducted on May 2, 2023.

At the time of the trial, Mother was still residing with her sister. She had obtained new employment, working full-time at Speedway, earning \$12.50 per hour. She submitted paystubs from Speedway from October 2022 to March 2023. Mother's drug screens from August 16, August 22, September 1, and September 9, 2022, were negative for all substances. Mother testified that she had recently applied for Section 8 housing and was looking for an apartment. She explained that with her pending criminal case, she did not want to find an apartment and then get evicted. She testified that she had recently begun therapy and her therapist told her what they were doing was the same as a psychological evaluation. She did not know the therapist's name. Mother testified that she had mental problems in the past due to her parents. She acknowledged that she was not currently in a good

position to take back her children and asked the court for more time. She testified that she has the financial ability to provide for them and to provide childcare while she is working.

The family court made oral findings following the hearing and entered written findings of fact and conclusions of law and orders terminating Mother's parental rights to Older and Younger Son. These appeals by Mother acting *pro se* followed. Because of their factual and legal similarities, the appeals have been consolidated.

STATUTORY FRAMEWORK AND STANDARD OF REVIEW

A family court may involuntarily terminate parental rights if the court finds by clear and convincing evidence that a three-pronged test has been met. Kentucky Revised Statutes ("KRS") 625.090. First, the trial court must find that the child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction or by the family court itself in the termination proceeding. KRS 625.090(1)(a)1. and 2. Second, the court must find the presence of at least one of the eleven grounds listed in section (2) of the statute. KRS 625.090(2)(a)-(k). Third, termination of parental rights must be in the child's best interest, and the court is provided with a series of factors that it shall consider when making this determination. KRS 625.090(1)(c); KRS 625.090(3).

“[A]lthough termination of parental rights is not a criminal matter, it encroaches on the parent’s constitutional right to parent his or her child, and therefore, is a procedure that should only be employed when the statutory mandates are clearly met.” *M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 850 (Ky. App. 2008). “[T]o pass constitutional muster, the evidence supporting termination must be clear and convincing. Clear and convincing proof is that of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people.” *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 427 (Ky. App. 2015) (internal quotation marks and citations omitted). “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 and Family Services v. K.H.*, 423 S.W.3d 204, 211 (Ky. 2014) (citation omitted).

ANALYSIS

Under the first prong of the statutory framework, the family court found that the children were abused or neglected, based on the October 2021 determination by the district court.

Under the second prong, the family court found the presence of grounds (e), (g), and (j). Subsection (e) requires a finding “[t]hat 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[.]” Subsection (g) provides “[t]hat 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[.]” Subsection (j) requires proof “[t]hat the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights[.]”

In its oral findings from the bench, the family court found that Mother had failed to provide essential care for the children. The court observed that the children had entered care in June 2021 and that the termination petition was filed on December 6, 2022. The court acknowledged that Mother had been incarcerated for a good portion of that time but found that it would have been necessary for her to “hit the ground running” upon her release but that she did not do so, noting the

approximately six-week delay between Mother's release from detention in May 2022 and her first assessment in August 2022.

The family court recognized that Mother had completed a good part of her case plan and emphasized that this accomplishment was not taken lightly by the court. It pointed out, however, that Mother still had not completed the psychological evaluation, an essential part of the case plan. The family court found no reasonable expectation of improvement in the immediately foreseeable future, especially in relation to Mother's refusal to take action on the psychological evaluation, rooted in her inability to recognize the importance of her mental health issues.

The family court concluded that termination was in the children's best interests pursuant to the factors in KRS 625.090(3), specifically that the Cabinet had rendered or attempted to render all reasonable services to Mother to bring about a reunion of the family and that there were no additional services likely to bring about such a reunion in a reasonable amount of time. The family court also found that the children were currently thriving and were expected to continue to do so.

Mother disputes several of the family court's factual findings and legal conclusions. First, in regard to the incident in June 2021 that led to criminal charges, she claims that the children were found unattended precisely because she

had been arrested for the car theft and that she had been with them until the moment of the arrest. She contends that she had been playing outside with Older Son and Youngest Son was inside sleeping in his crib, supervised by an unspecified adult. There is no evidence to support this version of the events except Mother's own statement in her appellate brief. Mother was given numerous opportunities to raise this matter before the family court but did not do so. Consequently, the family court was not able to consider this argument. "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011) (citation omitted), *abrogated on other grounds by Nami Resources Company, LLC v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323 (Ky. 2018). "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). In any event, even if Mother's version of the events is accurate, the family court's decision was based on her actions following her release and her ongoing failure to undergo a psychological evaluation than on the events leading to her incarceration.

Mother also contends that the Cabinet failed to make reasonable efforts toward reunification. She claims that the social workers failed to provide timely referrals to services, failed to allow her visitation, changed the goal to

adoption only four months and 24 days after her release from incarceration, and failed to account for the fact that she did attend counseling and therapy. As the family court noted, however, Mother did not explain the delay in seeking services upon her release from incarceration nor, as we have already noted, her persistent refusal to undergo a psychological evaluation, even though it was made clear that such an evaluation was a key part of the case plan. One of the greatest stumbling blocks to reunification with her children was Mother's steadfast refusal to undergo a psychological evaluation and her continuing denial of any psychological problems.

Mother also alleges that the Cabinet was so intent on placing the boys with a foster family who wished to adopt them that it failed to make adequate efforts to place them with members of Mother's family. She claims the Cabinet failed to get in touch with unspecified family members that she had provided as possible placements. Again, this evidence was never presented to the family court, nor does she explain how placement with family members would have altered the outcome of the case.

As to subsection (e), relating to Child's physical and emotional health, Mother argues that Older Son wished strongly to be returned to her care. She contends that the only reason she was unable to provide for her sons was her lengthy incarceration. Since her release, she claims she provided clothes, shoes,

gifts, stuffed animals, and gift cards through the CASA¹ worker and social worker. Mother did not, however, present this evidence at the hearing.

She contends that the Cabinet escalated its demands over time to prevent her from gaining visitation. When she showed progress after her release from jail, she was told she had to get a job. When she got a job, she was told she had to get a place of her own. She disputes the Cabinet's report that she made no effort to see her children upon her release from jail, pointing out that she did request visitation but was denied by the court. But she filed the motion for visitation eight months after her release from incarceration.

Mother contends that her attorney was ineffective and repeatedly told her that there was nothing she could do to prevent the termination of her parental rights. The law in this Commonwealth is that the due process clause, and KRS 625.080(3) and 620.100(1) require that the parental rights of a child not be terminated unless the parent has been represented by counsel at every critical stage of the proceedings. *R.V. v. Commonwealth, Dept. for Health and Family Services*, 242 S.W.3d 669, 673 (Ky. App. 2007). “[I]f counsel’s errors were so serious that it is apparent from the record that the parent was denied a fair and meaningful opportunity to be heard so that due process was denied, this Court will consider a claim that counsel was ineffective.” *Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky. App.

¹ Court Appointed Special Advocate.

2008). Our review of the termination hearing indicates that Mother's attorney effectively represented Mother. She diligently cross-examined the Cabinet's witnesses, gave Mother ample opportunity to explain her position upon direct examination, and made an appropriate closing argument based on the evidence presented.

Mother also claims her attorney failed to respond when Mother tried to contact her to file an appeal of the termination and that her attorney simply filed an *Anders*² brief. This argument is refuted by the record. This Court on its own motion ordered Mother's appeals to be held in abeyance to permit the circuit court to conduct a hearing to determine whether Mother desired and/or qualified for appointed counsel. The family court held such a hearing on August 28, 2023, at which Mother informed the court she did not want an attorney to represent her on appeal and that she would be handling the appeal herself. The family court entered an order finding that Mother did not want counsel appointed for her appeal and releasing the attorney who represented her in the termination proceedings. Mother was provided sufficient opportunity to retain appointed counsel for her appeal but chose not to do so. She cannot raise her lack of representation on appeal as grounds for reversal.

² *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

CONCLUSION

For the foregoing reasons, the findings of fact and conclusions of law and the orders and judgments of the Fayette Family Court terminating the parental rights of Mother to Older Son and Younger Son are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET
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