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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-1214-ME

K.S.

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE CLINT J. HARRIS, JUDGE
ACTION NO. 23-AD-00007

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

APPELLEES

AND

NO. 2023-CA-1224-ME

K.S.

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE CLINT J. HARRIS, JUDGE
ACTION NO. 23-AD-00008

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

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: THOMPSON, CHIEF JUDGE; ACREE AND CALDWELL, JUDGES.

THOMPSON, CHIEF JUDGE: In this consolidated appeal, K.S.¹ (“Mother”) appeals from orders of the Jackson Circuit Court terminating her parental rights as to her biological children K.G.H. (“Child 1”), born in 2017, and C.D.K.H. (“Child 2”), born in 2019. Mother argues that she did not receive due process, and that the Cabinet for Health and Family Services (“the Cabinet”) did not prove by clear and convincing evidence that termination was in the children’s best interest. After careful review, we find no error and affirm the orders on appeal.

FACTS AND PROCEDURAL HISTORY

On February 5, 2021, Mother was arrested in Jackson County, Kentucky on the charge of operating a motor vehicle under the influence. The arrest arose after Mother was observed by law enforcement passed out in the driver’s seat of her vehicle in a convenience store parking lot. Child 2 was in the back seat of the vehicle at the time of her arrest.

Based on this information, the Cabinet filed a dependency, neglect, and abuse (“DNA”) action on March 10, 2021, against Mother alleging the neglect

¹ We will not use the parties’ names because minor children are involved.

of both children. After a temporary removal hearing was conducted, the Cabinet was awarded temporary custody and the matter was set for adjudication on April 20, 2021.

Neither Mother nor the children's putative Father, R.H., appeared at the adjudication hearing. When Judge Clint J. Harris asked where Mother was, a person who the Cabinet assumes was a social worker stated, "I have not been able to make contact with her." The court noted that both parties had been served and proceeded with the hearing.

Deputy J.R. Weaver testified as to Mother's arrest and the resultant criminal charges. Social worker Ashley Gilbert testified that she spoke with Mother at the jail on February 8, 2021, at which time Mother admitted using substances. Ms. Gilbert stated that she attempted to locate Mother to negotiate a case plan, but that Mother did not respond when Gilbert knocked on the door of her residence. The court then took judicial notice of the criminal proceeding, and found that Mother created risk of physical or emotional injury to the children; that she engaged in a pattern of conduct rendering her incapable of caring for the needs of the children because of substance use disorder; and that she failed to provide parental care and protection.

As the court was setting a disposition date, a court clerk told Judge Harris that Mother called the court and stated that she had pinkeye. Judge Harris

tried unsuccessfully to get mother on a Zoom call, then set the disposition hearing for May 18, 2021.

On October 25, 2021, a new case plan was implemented which included the condition that Mother enroll in a New Hope program for assessments. The record indicates that Mother did not follow the recommendations for intensive outpatient services, counseling, and parenting classes. Ms. Bailey testified that Mother was not in contact with the Cabinet from November, 2021 to March, 2022.

A social worker would later testify that Mother was arrested after a March 22, 2022 hearing; that Mother was at the time being treated at Chrysalis House in Lexington, Kentucky; and, that Mother was trying to maintain contact with the children through video visits.

On June 14, 2022, Judge Harris appointed counsel to represent Mother in the juvenile proceedings. More status hearings were conducted through May 16, 2023, at which time Mother was serving a jail sentence but appeared in court.

At the final hearing, Ms. Bailey testified as to the following: that in the preceding months, Mother made little or no progress; that Mother had been arrested multiple times; that Mother had not followed recommendations from assessments; that Mother had not called in for drug screens; and, that Mother had not been in any other treatment programs since termination from the Chrysalis House.

Mother testified that she got mad and left Chrysalis House, resulting in her being kicked out of the program. She stated that she had been living intermittently with her parents and someone named Chris because she had no other choice. She also testified that she quit her job, was having drug relapses, and had been homeless.

Thereafter, Judge Harris determined that termination of both Mother and putative Father's parental rights were in the children's best interest. It entered separate orders terminating Mother and putative Father's parental rights as to each child. This consolidated appeal followed.²

STANDARD OF REVIEW

Our standard of review in a termination of parental rights action is confined to the clearly erroneous standard based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support them. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986). "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." *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

² Putative Father has not appealed.

ARGUMENTS AND ANALYSIS

Mother first argues that the orders on appeal must be reversed because the circuit court's failure to appoint counsel until June 14, 2022, constituted a deprivation of her right to due process. She notes that at the March 23, 2021 temporary custody hearing, Ms. Gilbert stated that the Cabinet's plan was to place the children with their maternal grandmother who was going to become a foster parent. Mother argues that this testimony placed the circuit court on notice that the proceedings might culminate in termination. As such, Mother asserts that she was entitled to counsel from the outset of the proceedings and the circuit court's failure to appoint counsel constituted an impermissible deprivation of her right to due process.

Mother has not complied with Rules of Appellate Procedure ("RAP") 32(A)(4),³ which requires,

[a]n **argument** conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

(Emphasis in original.)

³ Formerly Kentucky Rules of Civil Procedure 76.12(4)(c)(v).

Mother’s argument section of the brief does not contain a statement at the beginning with reference to the record showing whether each issue was properly preserved for review and, if so, in what manner.

“A brief may be stricken for failure to comply with any substantial requirement of these rules.” RAP 31(H)(1). The rule requiring an argument section including a statement of preservation is a substantial requirement of RAP 32 encompassed by RAP 31(H)(1).

When a party fails to abide by the Rules of Appellate Procedure, we may choose “(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions . . . ; or (3) to review the issues raised in the brief for manifest injustice only[.]” *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (citation omitted); *see also Ford v. Commonwealth*, 628 S.W.3d 147, 153-55 (Ky. 2021). We choose to ignore the deficiency and proceed with the review.

The United States Supreme Court has found no absolute right to counsel in termination cases under the umbrella of the United States Constitution but instead has held the appointment of counsel need only be made on a case-by-case basis. Kentucky’s General Assembly eliminated the need for a case-by-case determination by enacting [Kentucky Revised Statute (KRS)] 625.080(3), which provides, in pertinent part, that “parents have the right to legal representation in involuntary termination actions. The Circuit Court shall determine if the parent is indigent and, therefore, entitled to counsel[.]”

A.C. v. Cabinet for Health and Family Services, 362 S.W.3d 361, 366 (Ky. App. 2012) (citations omitted).

In *C.J.M. v. Cabinet for Health and Family Services*, 389 S.W.3d 155, 163 (Ky. App. 2012), a panel of this Court emphasized that while KRS 625.080(3) provides for the appointment of counsel in dependency proceedings, the appointment is contingent on a parental request for counsel. KRS 625.080(3) expressly states that, “*upon request*, if it appears reasonably necessary in the interest of justice, the Circuit Court shall appoint an attorney to represent the parent[.]” (Emphasis added.)

In the matter before us, Mother never requested counsel prior to June 14, 2022, and it is not clear from the record whether she requested counsel at that time. Further, Mother failed to appear at any hearings in 2021, despite having received service and notice, and the efforts of the Cabinet and the circuit court to bring about her personal appearance or her participation via Zoom calls. In addition, Mother, through appellate counsel, has cited no requests in the record after the appointment of trial counsel to vacate the court’s prior findings nor to seek the return of custody to Mother. We agree with the Cabinet that Mother cannot absent herself from an entire year of the proceedings, despite service and notice, and then reasonably argue that she was denied due process. We find no basis for reversing the orders on appeal on this issue.

Mother goes on to argue that the Cabinet failed to prove by clear and convincing evidence that termination of her parental rights was in the children's best interest. She asserts that the Cabinet's "child specific foster home" process requires termination of parental rights for cases that would otherwise be resolved in dependency and abuse court. She also argues that her involvement with the children throughout the pendency of the proceeding, the completion of many programs at Chrysalis House, and her work history demonstrate that termination was not in the children's best interest.

The focus of Mother's "child specific foster home" argument is that the Cabinet has improperly created a procedure where a relative can, with very minimal effort, become a foster parent and receive a per diem payment and other benefits available to foster homes without meeting the requirements of a traditional foster home. This arrangement, she contends, allows the Cabinet to provide payments to relatives through foster care funding rather than a separate program. Mother appears to assert that the "child specific foster home" procedure created by the Cabinet is the sole reason the current situation resulted in a termination of parental rights petition being filed. She also claims that the procedure is money-driven and, as it unfairly biases the proceedings toward termination, it is improper.

It is difficult to discern exactly what Mother is arguing on this issue. While she takes issue with the administrative scheme the Cabinet employs for

placing a child with a relative, she does not argue that the Cabinet violated any of the Kentucky Administrative Regulations (“KAR”) pertaining to the children’s placement with their maternal grandmother. Rather, subsumed in her argument is the claim that the procedure unfairly biases the proceedings toward termination, and resulted in a termination that was not in the children’s best interest.

Every presumption is in favor of the correctness of the decision of the trial court, and in order to warrant a reversal, error must affirmatively appear from the record. This presumption is one with which this court begins its examinations of every case brought before it, and one which every appellant must overcome in order to secure a reversal of a judgment. In other words the burden is on the appellant to show error affecting the judgment rendered below.

Oakes v. Oakes, 204 Ky. 298, 264 S.W. 752, 753 (1924).

Per *Oakes*, the burden rests with Mother to show error affecting the orders terminating her parental rights. As she has not cited any specific error committed by the circuit court on this issue, she has failed to overcome the presumption of correctness of the circuit court’s decision. We find no error.

Lastly, we will address Mother’s argument that her involvement with the children throughout the pendency of the proceeding, the completion of many programs at Chrysalis House and her work history demonstrate that termination was not in the children’s best interest.

A circuit court may involuntarily terminate a party's parental rights if it finds by clear and convincing evidence that, 1) the child is abused or neglected as defined by statute; 2) that the termination of parental rights is in the child's best interest; and, 3) that at least one of the statutorily enumerated factors exists which demonstrates parental unfitness. KRS 625.090. A trial court has broad latitude in determining whether children fit within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977).

The record contains substantial evidence to support the findings of the circuit court. The first prong of the termination statute was satisfied when the children were adjudged neglected in the juvenile proceeding on April 20, 2021. A finding of neglect in an underlying juvenile case is sufficient to satisfy this requirement. *M.A.B. v. Commonwealth, Cabinet for Health and Family Services*, 456 S.W.3d 407, 412-13 (Ky. App. 2015).

The second prong requires the court to find that termination of parental rights is in the children's best interest. KRS 625.090(1)(c). The factors to be considered in determining the children's best interest are set out in KRS 625.090(3). These factors include the following: the mental health or disability of the parent, if any (KRS 625.090(3)(a)); acts of abuse or neglect (KRS 625.090(3)(b)); whether the child has been placed with the Cabinet (KRS

625.090(3)(c)); efforts made by the parent making it in the child's best interest to return home (KRS 625.090(3)(d)); the physical, emotional, and mental health of the child, and the prospects of improvement upon termination (KRS 625.090(3)(e)); and, the payment or failure to pay for the physical care of the child (KRS 625.090(3)(f)).

The Jackson Circuit Court expressly held that the termination of Mother's parental rights was in the children's best interest. This conclusion is supported by the record. The children were found to be neglected (KRS 625.090(3)(b)) and were placed with the Cabinet (KRS 625.090(3)(c)). The children had little prospect of returning home (KRS 625.090(3)(d)), as Mother acknowledged either being homeless or staying with her parents or someone named Chris. Further, the record reasonably supports a finding of the children's improvement of physical, emotional, and mental health upon termination (KRS 625.090(3)(e)), and Mother did not have stable employment allowing her to pay for the children's physical care (KRS 625.090(3)(f)).

The third and final prong of the statutory scheme is satisfied when the court finds at least one ground of parental unfitness set out in KRS 625.090(2). The record supports a finding that Mother, 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 children's well-being, and that there is no reasonable expectation of significant improvement in Mother's conduct in the immediately foreseeable future. KRS 625.090(2)(g). In addition, the children have been in foster care under the responsibility of the Cabinet for 15 cumulative months out of 48 months preceding the filing of the petition to terminate Mother's parental rights. KRS 625.090(2)(j). Either of these findings is sufficient to satisfy the third prong of the statutory scheme.

CONCLUSION

The ultimate question on appeal is whether the trial court's conclusions are supported by clear and convincing evidence of record. *V.S., supra*. Based on the totality of the record, we conclude that the circuit court's decision is supported by such evidence. Accordingly, we find no error. For these reasons, we affirm the orders of the Jackson Circuit Court terminating Mother's parental rights.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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NO BRIEF FOR APPELLEE R.H.