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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000813-ME

C.W. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH BARTHOLOMEW, JUDGE
ACTION NO. 15-AD-500525

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY AND
C.D.W., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: C.W. (hereinafter referred to as "Father")[1] appeals from an Order of the Jefferson Circuit Court terminating his parental rights to a minor child. He argues that the Jefferson Circuit Court erred in failing to grant his post-

[1] Pursuant to the policy of this Court, we will not use the names of the parties involved because this case involves a minor child.

trial motion to present additional evidence because he had transportation issues which caused him to arrive at the courthouse after the trial concluded. For the reasons stated below, we find no error and AFFIRM the Order on appeal.

The facts are not in controversy. On October 15, 2013, the Cabinet for Health and Family Services ("the Cabinet") filed the first of several petitions in Jefferson Circuit Court regarding the care and custody of newborn child C.D.W. (hereinafter referred to as "Child"). Appellant is the natural father of Child and A.L. (hereinafter referred to as "Mother") is the child's mother. The various petitions arose after the Cabinet was informed that Child's meconium tested positive at birth for cocaine. Child was taken into the custody of the Cabinet at that time and remained with the Cabinet for about 23 of the next 25 months. The record reveals that another child, A.A.L., was born to Mother in 2015 by a different father, and that child also tested positive for cocaine. That child is not a subject of this appeal.

On December 4, 2016, the Cabinet filed a Petition to Involuntarily Terminate the Parental Rights of both parents of Child. From the outset, the whereabouts of Father and Mother were unknown and both had to be served by Warning Order Attorney. Trial on the Petition was conducted on March 24, 2016, and neither Father nor Mother appeared. Testimony was adduced from a social worker and an Order granting the Petition was rendered on April 14, 2016.

Father made a post-trial Motion requesting leave of court to present additional evidence. In support of the Motion, Father alleged that he had transportation issues that prevented him from attending the trial. He further claimed that Mother did not appear for the trial due to a medical issue. The Motion also sought to alter, amend or vacate the Order because it allegedly referenced pleadings which were not made part of the record. On May 4, 2016, the circuit court rendered an Order denying the Motion. In support of the Order, the court stated that,

> this is just one more attempt to delay the proceedings without good cause. The testimony during the trial demonstrates that neither parent has taken steps to comply with court orders, cooperate with the CHFS, or to provide food, clothing, shelter, medical care, or education reasonably necessary and available for the children's well-being. The Findings of Fact set out in the Order more than adequately provides [sic] the facts necessary to meet the statutory requirements.

This appeal followed.[2]

Father, through counsel, now argues that the Jefferson Circuit Court committed reversible error in terminating his parental rights to Child. After directing our attention to Kentucky Revised Statute (KRS) Chapter 625 and the elements of a termination action, Father contends that he was unable to attend the trial due to an undisclosed "transportation issue." The focus of his argument, however, is that KRS 625.090 - upon which the circuit court relied - is

[2] Mother is not a party to the appeal.

unconstitutional and cannot form a proper basis for terminating parental rights. Father contends that the United States Supreme Court established the standard to be used in termination proceedings, requiring the state to support its allegations with clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). He argues that KRS 625.090(1)(a)(1) lowers this requirement to a lesser standard employed in dependency cases. Specifically, Father contends that the "preponderance of the evidence" standard is often applied in dependency proceedings, after which the circuit court may adopt those findings in a subsequent proceeding requiring clear and convincing evidence to conclude that the child was abused or neglected. As such, Father argues that the current scheme allows the Commonwealth to improperly bypass the higher standard. It is on this basis that he seeks an Opinion and Order reversing the termination Order on appeal.

Having closely studied the record and the law, we find no basis for providing the relief sought by Father. We must first note that:

> In any appeal to the Kentucky Court of Appeals or Supreme Court . . . which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

KRS 418.075(2).

In arguing that "the family court relied on an unconstitutional statute in crafting its order," Father challenges the constitutionality of KRS 625.090(1)(a)(1). Father, however, has not demonstrated compliance with the mandatory reporting requirement of KRS 418.075(2). On this basis alone we may sustain the Order on appeal. *Skaggs v. Commonwealth*, 488 S.W.3d 10, 16 (Ky. App. 2016).

Father goes on to argue that the Cabinet did not meet its burden of demonstrating that termination was in the best interests of the children. He offers little in support of this claim, however, merely asserting that he "believes that the termination was not in the child's best interests as the child should have remained with the family." Conversely, the record amply demonstrates that Child was abused or neglected as defined by KRS 600.020(1), and that the elements for involuntary termination of parental rights found in of KRS 625.090(2) and (3) were met. Father had no contact with the child for more than a year before trial, refused to work with the Cabinet toward the rehabilitation of the relationship, paid no child support and did not appear at trial. Simply put, and in accordance with KRS 625.090(2), the circuit court properly concluded that there is no reasonable expectation of improvement in parental care and protection, nor reasonable expectation of significant improvement in parental conduct in the immediately foreseeable future. In sum, we find as supported by the evidence the circuit court's determination that Father has been unwilling or unable to provide essential parental care and protection since 2014, did not complete the Batterers Intervention

Program at the time of trial, and had no seen the child for fourteen months prior to trial. As such, we find no error on this issue.

Lastly, both counsel for Father and the Cabinet urge this Court to review *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), for the burden it imposes on court-appointed attorneys to handle mandatory appellate work. We decline the opportunity for such review. "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad, By & Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citation omitted). "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) (internal quotation marks and citation omitted).

For the foregoing reasons, we AFFIRM the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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