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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001355-ME

J.D.K. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 16-AD-00014

CABINET FOR HEALTH AND FAMILY SERVICES, COMONWEALTH OF KENTUCKY; J.L.B., A MINOR CHILD; AND B.L.K., MOTHER APPELLEES

AND

NO. 2016-CA-001471-ME

B.L.K. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 16-AD-00014

CABINET FOR HEALTH AND FAMILY SERVICES,
COMONWEALTH OF KENTUCKY AND
J.L.B., A CHILD APPELLEES

AND

NO. 2016-CA-001472-ME

B.L.K. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 16-AD-00015

CABINET FOR HEALTH AND FAMILY SERVICES,
COMONWEALTH OF KENTUCKY AND
J.R.B., A CHILD APPELLEES

AND

NO. 2016-CA-001492-ME

R.K. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 16-AD-00015

CABINET FOR HEALTH AND FAMILY SERVICES,
COMONWEALTH OF KENTUCKY AND
J.R.B., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: B.L.K. (hereinafter referred to as Mother), J.D.K. (hereinafter referred to as Father 1), and R.K. (hereinafter referred to as Father 2) appeal from orders of the Fayette Circuit Court terminating their parental rights to their children. We find the statutory requirements for terminating their parental rights were present in this case and affirm.

Mother and Father 1 are the biological parents of J.L.B. (hereinafter referred to as Child 1), who was born in 2003 in Texas. Mother and Father 2 are the biological parents of J.R.B. (hereinafter referred to as Child 2), who was born in 2011 in Florida. Child 1 has lived most of his life in Texas with Mother and Father 1. Mother would sometimes leave Father 1 and Texas, not tell anyone where she was going, and travel to different states. During one such trip, she began a relationship with Father 2 in Florida while Father 2 was out on bond. Father 2 had been charged with assault on a police officer. Mother became pregnant with Child 2 and returned to Texas. She then returned to Florida to give

birth to Child 2. At the time of the birth, Father 2 was incarcerated in Florida with a sentence of 10 years. After the birth of Child 2, Mother returned to Texas.

In the summer of 2014, Mother left Texas with her two children and began traveling the country. She did not tell anyone where she was going and did not stay in contact with Father. Around September 24, 2014, the Cabinet filed a dependency, neglect, and abuse petition alleging Child 1 and Child 2 were being neglected. The Cabinet had received information that Mother and the children were living at the Salvation Army Shelter in Lexington, Kentucky, but were being asked to leave because Mother failed to properly supervise Child 1 and Child 1 was being aggressive and harmful to Child 2 and other children staying there.

During the Cabinet's investigation, Mother revealed that she and the children left Texas, had traveled to multiple states, and had been staying in hotels and shelters. When she arrived in Lexington, the van the family was traveling in was repossessed along with all the family's belongings. Mother disclosed that Child 1 was autistic and Child 2 had developmental delays. Also, neither child had seen a doctor since June 2014, and the Cabinet believed the children had not been consistently receiving their medications. Child 1 was also not enrolled in school. Due to the family being homeless, the history of transiency, and the failure to enroll Child 1 in school, the Cabinet sought emergency custody of the children. An emergency custody order was issued on September 24, 2014. The Cabinet contacted Father 1 and Father 2 by letter about the Cabinet's involvement with the

children. The Cabinet gave Mother a case plan to work through in October of 2014.

The children were eventually committed to the Cabinet in January of 2015. Mother returned to Texas in April of 2015, against the advice of the Cabinet, but stated that she would continue to work her case plan. Father 1 came to Kentucky in June of 2015. Other than the letter he received in September of 2014, this was the only contact he had with the Cabinet. The Cabinet did give him a case plan after his visit in June. Father 2 did not receive a case plan from the Cabinet because he was in prison; however, he availed himself of multiple classes in order to be a better citizen and father. In September of 2015, the Cabinet changed the case plan for the children from reunification to adoption. The Cabinet filed a petition to involuntarily terminate the parental rights of all three parents in January of 2016, and a hearing was held July 20, 2016.

Multiple people testified during the termination hearing including Mother, Father 1, Father 2, Child 1's current therapist, two different social workers, Child 2's former foster mother, the maternal grandmother of the children, and Mother's sister. According to the testimony presented during the hearing, when the children came into foster care, they were behind on their immunizations, Child 1 was out of his medications, and both children had acne on their bodies due to poor hygiene. Child 2 also had severe dental problems due to untreated trauma to the mouth. This required multiple dental surgeries to correct. Child 2, who was

three years old at the time, was not toilet trained, still took a bottle, and was extremely limited with his speech. Further medical tests showed that Child 2 had a genetic abnormality that was causing developmental delays.

Initially, the children were placed in the same foster home; however, within a few weeks, Child 1 began to act out and became aggressive. Child 1 was sent to Our Lady of Peace in Louisville, Kentucky in October of 2014. Our Lady of Peace specializes in behavioral health services. Child 1 was diagnosed with a number of mental disorders. Child 1 currently resides in the Dessie Scott Children's Home, which is a residential facility for children with mental disorders. According to the social workers and Child 1's therapist, both children have greatly improved since being removed from Mother's custody. The social workers also testified that Mother and Father 1 had not completed their case plans.

Mother testified that she believes she can properly parent her children and disagreed with most of the testimony presented by the Cabinet. The maternal grandmother and Mother's sister also believe Mother is a good parent and can care for the children.

Father 1 testified that he wants both children to live with him and Mother. He testified that he was unable to come to Kentucky until June of 2015, because of his job. He also stated he could care for the children, but admitted he and Mother had neglected to get dental care for Child 2 after he fell and damaged his teeth. Father 1 also admitted that he did not know the children were behind on

their immunizations and did not know what kind of medications Child 1 regularly took.

Father 2 also wishes to parent his child. He testified that he has taken classes to better himself and become a good father. He also stated that he made multiple attempts to contact the Cabinet to get a case plan and updates about Child 2, but that the Cabinet never responded. He testified that he was imprisoned in 2011 and that his earliest possibility for parole will be in 2019. He also testified that, in addition to the crime for which he is currently incarcerated, he had been convicted of the following crimes: grand theft in 2004; battery of a law enforcement officer, resisting arrest with violence, and criminal mischief in 2006; possession of marijuana in 2008; and disorderly conduct in 2011.

On September 7, 2016, the trial court entered orders terminating the parental rights of all three parents. This appeal followed.

> The standard for review in termination of parental rights cases is set forth in *M.P.S. v. Cabinet for Human Resources,* 979 S.W.2d 114, 116-17 (Ky. App. 1998). Therein, it is established that this Court's standard of review in a termination of parental rights case is the clearly erroneous standard found in Kentucky Rules of Civil Procedure (CR) 52.01, which is based upon clear and convincing evidence. Hence, this Court's review is to determine whether the trial court's order was supported by substantial evidence on the record. And the Court will not disturb the trial court's findings unless no substantial evidence exists on the record. *V.S. v. Commonwealth, Cabinet for Human Resources,* 706 S.W.2d 420, 424 (Ky. App. 1986).

> Furthermore, although 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. While the state has a compelling interest to protect its youngest citizens, state intervention into the family with the result of permanently severing the relationship between parent and child must be done with utmost caution. It is a very serious matter. *V.S. v. Commonwealth, Cabinet for Family Services,* 194 S.W.3d 331, 335 (Ky. App. 2006).

M.E.C. v. Com., Cabinet for Health and Family Services, 254 S.W.3d 846, 850 (Ky. App. 2008).

> The standard of proof before the trial court necessary for the termination of parental rights is clear and convincing evidence. "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."

V.S., 706 S.W.2d at 423-24 (citations omitted).

Kentucky Revised Statute (KRS) 625.090 sets forth the requirements the Cabinet must prove in order to involuntarily terminate a person's parental rights. KRS 625.090 states:

> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
>
> (a) 1. 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;

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or

3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and

(b) Termination would be in the best interest of the child.

(2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

(a) That the parent has abandoned the child for a period of not less than ninety (90) days;

(b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;

(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;

(d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;

(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;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(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;

(h) That:

1. The parent's parental rights to another child have been involuntarily terminated;

2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and

3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

(a) Mental illness as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which 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 as defined in KRS 600.020(1) toward any child in the family;

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

KRS 600.020 defines an abused or neglected child as follows:

(1) “Abused or neglected child” means a child whose health or welfare is harmed or threatened with harm when:

(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;

2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;

3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;

4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;

7. Abandons or exploits the child;

8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-

> being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;
>
> 9. Fails 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) of the most recent twenty-two (22) months[.]

Mother argues on appeal that the Cabinet did not prove it would be in the best interests of the children to terminate her parental rights. We disagree. The trial court found that the Cabinet made reasonable efforts to reunite the children with Mother (KRS 625.090(3)(c)), Mother had not made reasonable adjustments in her life to allow the children to return home (KRS 625.090(3)(d)), that the children are doing well physically and emotionally since being placed in the Cabinet's custody and will continue to do well if parental rights are terminated (KRS 625.090(3)(e)), and that Mother had not paid a reasonable portion toward the care of the children (KRS 625.090(3)(f)).

We believe the trial court's findings on the best interests of the children issue were supported by substantial evidence, and therefore, not clearly erroneous. The social workers who testified at the termination hearing stated that Mother

made little progress toward the goals set forth in the case plan the Cabinet set for her and did not take advantage of the services the Cabinet offered. Testimony also showed that Child 1 was doing well at the Dessie Scott Children's Home and is getting the care required to meet his extensive needs. Child 2 has also improved while in foster care. Due to Child 2's genetic condition, he has received physical, speech, occupational, and education therapies while in foster care and is expected to thrive. Finally, Mother was ordered to pay child support; however, at the time of the termination hearing, she had $1,800 in support arrears.

The above facts were submitted to the court during the termination hearing. Mother's failure to work her case plan and the improvements made by the children support the court's finding that it would be in the children's best interest for her parental rights to be terminated. The trial court did not err as to Mother.

Father 1 raises three arguments on appeal: that termination of his rights was not in the best interest of Child 1, that the Cabinet failed to make reasonable efforts to reunite him with Child 1, and that Child 1 would not be abused or neglected if returned to his care.

Father's first argument is that it would not be in the best interest of Child 1 for his parental rights to be terminated. The trial court found that the Cabinet made reasonable efforts to reunite Child 1 with Father 1 (KRS 625.090(3)(c)), Father 1 had not made reasonable adjustments in his life to allow the child to return home (KRS 625.090(3)(d)), that Child 1 is doing well physically and emotionally since

being placed in the Cabinet's custody and will continue to do well if parental rights are terminated (KRS 625.090(3)(e)), and that Father 1 had not paid a reasonable portion toward the care of Child 1 (KRS 625.090(3)(f)).

As with Mother, these facts are not clearly erroneous. The social workers who testified at the termination hearing stated that Father 1 made little progress toward the goals listed in the case plan the Cabinet set for him and did not take advantage of the services the Cabinet offered. Testimony also showed that even though the children were taken into the Cabinet's care in September of 2014, Father 1 did not come to Kentucky or contact the Cabinet until June of 2015. Father 1 did present evidence that he completed two online courses, one on domestic violence and one on parent education; however, the primary social worker who testified in the case stated that this was greatly insufficient toward meeting the case plan goals. Testimony also showed that Child 1 was doing well at the Dessie Scott Children's Home and is getting the care required to meet his extensive needs. Finally, Father 1 did not financially assist Child 1 once he went into the custody of the Cabinet even though he was steadily employed during all relevant times.

Father's second argument on appeal is that the Cabinet failed to make reasonable efforts to reunite the family. The crux of this argument is that the Cabinet's only contact with Father 1 was when it informed him of Child 1 being put into the Cabinet's care in September of 2014, and when he came to Kentucky

and was given a case plan in June of 2015. Father believes the Cabinet should have made more of an effort to contact him and monitor his progress on his case plan. We believe the Cabinet made sufficient efforts at reuniting Father 1 and Child 1. Prior to the termination hearing in July of 2016, Father only came to Kentucky one time, in June of 2015. Around seven months passed between the time Father 1 was given a case plan and the Cabinet petitioned the court to terminate his parental rights; however, Father 1 made little progress.

Father 1's final argument on appeal is that Child 1 would not be abused or neglected if returned to his care. KRS 625.090(5) states that "[i]f the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights." We believe the trial court properly terminated Father 1's parental rights. While Father 1 expressed a desire to raise and care for Child 1, he made little progress on the case plan given to him by the Cabinet. Father 1 also made little effort in contacting the Cabinet while Child 1 was in its care. Additionally, Father 1 was still residing with Mother, who had a history of taking the children from him without notice and leaving the state of Texas for long periods of time. Finally, the Cabinet had facilitated Child 1's receipt of proper care and treatment considering his mental disorders. The trial court did not err as to Father 1.

Father 2 raises three arguments on appeal: that the termination of his parental rights was not in the best interest of Child 2, that the Cabinet did not make reasonable efforts to reunite him with Child 2, and that Child 2 would not be abused or neglected if returned to his care.

As to the issue of the best interest of Child 2, the trial court found that it would be in Child 2's best interest to terminate Father 2's parental rights because the Cabinet made reasonable efforts to reunite Child 2 with Father 2 (KRS 625.090(3)(c)), Father 2 was unable to make sufficient adjustments to his circumstances to allow the child to return to his custody within a reasonable amount of time (KRS 625.090(3)(d)), and that Child 2 is doing well physically and emotionally since being placed in the Cabinet's custody and will continue to do well if parental rights are terminated (KRS 625.090(3)(e)).

Here, Father 2's incarceration has hindered his ability to parent his child. When Child 2 went into the custody of the Cabinet, Father 2 still had at least 5 years left on his sentence. This long-term sentence prevented the Cabinet from giving him a case plan, but the Cabinet suggested he take any parenting classes offered by the prison. To Father 2's credit, he has taken a number of classes offered by the prison designed to help with parenting and general reintegration into society once he is released; however, the trial court believed that due to his incarceration, the time remaining on his sentence, and his "adopted criminal lifestyle", that Father 2 was unlikely going to be able to improve his circumstances

within a reasonable amount of time. Finally, the court considered the improvements Child 2 has made since being in the custody of the Cabinet. Child 2's foster parents provided him with speech, physical, occupational, and educational therapies. The court believed Child 2 would continue to thrive and benefit from a permanent adoptive placement. The trial court's findings of fact as to the best interest of Child 2 are supported by substantial evidence and are not clearly erroneous.

Father 2's second argument on appeal is that the Cabinet failed to make reasonable efforts to reunite him with Child 2. As stated before, Father 2 has been in prison since Child 2's birth. Because of his current incarceration and the years left on his sentence, the Cabinet was unable to give him a case plan or offer him services. Testimony at the termination hearing indicated that the Cabinet informed Father 2 of Child 2 coming into their custody in 2014 and that Father's correspondence sent to Child 2, in care of the Cabinet, were being passed on by the social workers. Due to Father 2's current situation, we believe the Cabinet did as much as it could for Father 2.

Father 2's final argument on appeal is that Child 2 would not be abused or neglected if returned to his care. Father 2, like Father 1, cites to KRS 625.090(5). As stated previously, this section of KRS 625.090 is discretionary. The trial court terminated Father 2's parental rights due to his current term of incarceration and his "adopted criminal lifestyle". An adopted criminal lifestyle and incarceration

have been considered by this court as relevant issues when determining whether or not a child may be abused or neglected. *See J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985). The trial court did not abuse its discretion in this matter and did not err in terminating Father 2's parental rights.

Based on the foregoing, we believe that the trial court's findings as to these three parents were not clearly erroneous and affirm the court's judgment.

TAYLOR, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

JONES, JUDGE, DISSENTING IN PART: Respectfully, I dissent, as to termination of Father 2's parental rights. On the whole, it appears to me that the sole basis for terminating Father 2's rights is his present incarceration. I do not believe one can say that Father 2 voluntarily elected to pursue a criminal lifestyle incompatible with parenthood when all the crimes at issue were committed prior to Child 2's conception.[1] Certainly, many individuals engage in behavior inconsistent with parenthood before becoming an actual parent.

This is not to say that an incarcerated parent's rights can never be terminated in a situation such as this where a child was conceived while the parent was in the midst of criminal proceedings. To justify such a termination, however, I believe

[1] The trial court found that Child 2 was conceived while Father 2 was out on bond and facing criminal charges. This indicates the crimes at issue were committed prior to Child 2's conception. By the time Child 2 was born, Father 2 was incarcerated, presumably because he had been convicted of the charges he was facing when Child 2 was conceived.

the Cabinet must put forth some evidence showing that the parent has continued in that lifestyle while in prison (such as engaging in conduct that prolongs his sentence), failed to respond while incarcerated, or failed to take actions necessary for self-improvement while incarcerated. *See D.W. v. Commonwealth*, No. 2015-CA-001523-ME, 2017 WL 242701, at *5 (Ky. App. Jan. 20, 2017) ("While most of Father's criminal history took place prior to Son's birth, Father continued to accumulate new felony charges since that time. It was reasonable for the family court to conclude that Father had continued to engage in a criminal lifestyle following Son's birth, which rendered Father incapable of caring for Son's immediate and ongoing needs."); *J.C. v. Cabinet for Health & Family Servs*., No. 2011-CA-001128-ME, 2011-CA-001138-ME, 2012 WL 1556496 (Ky. App. May 4, 2012) (considering father's conduct while incarcerated and the fact that he was not eligible for release until 2021 where the father had been incarcerated since the child's birth and all the crimes at issue occurred before that time).

The Cabinet fails to offer any argument that Father 2's conduct after Child 2's birth supports termination. The sole argument it puts forth is that his "habitual criminal lifestyle put the child at risk of harm." As noted above, however, I find it problematic that the entire criminal history at issue occurred before Child 2's birth. Father 2's conduct since Child 2's birth and the Cabinet's involvement appears to suggest that he wants to be involved in Child 2's life. In response to learning about these proceedings, Father 2 acted promptly and contacted the Cabinet and solicited

its advice as to steps he could take to not lose his parental rights to his child. Father 2 complied with the Cabinet's suggestions and completed the following classes: anger management; 7 habits of highly effective people; family relationship; commitment to change; developing business concepts; and life of Christ. It appears that Father 2 will be eligible for release sometime in 2019. He testified that he had a home and job that he could return to once he was released, and therefore, would be able to provide for Child 2 in the future.[2]

In conclusion, I believe the trial court erred as a matter of law in solely relying on the adoption of a criminal lifestyle where all the crimes at issue occurred prior to Child 2's conception. In such a case, I believe it is necessary to consider other factors, including the parent's conduct while incarcerated. In this case, I cannot conclude that that conduct supports the trial court's termination decision. Accordingly, I would reverse as to Father 2.

[2] While the Cabinet explored a possible placement with the children's maternal grandmother, it does not appear that it has taken any steps to determine whether anyone in Father 2's family might be able to assume custody of Child 2.

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