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DISCRETIONARY REVIEW GRANTED BY KENTUCKY SUPREME COURT:
OCTOBER 24, 2007

(2007-SC-0436-DE)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001008-ME

T.G., MOTHER — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 05-AD-500119

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; A.J.M., AN INFANT — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: T.G. has appealed from the Jefferson Family Court's March 16, 2006, order terminating her parental rights to her infant daughter, A.J.M., and transferring her custody to the Cabinet for Health and Family Services with the authority to place her

for adoption. Having determined that the family court abused its discretion in terminating T.G.'s parental rights, we reverse.

T.G. is the biological mother of A.J.M., born January 7, 2004.[1] Upon her birth, the Cabinet requested that A.J.M. be put on a 72-hour hold and filed an Emergency Custody Order (ECO) to obtain custody of her. The ECO was based upon T.G.'s diagnosis of obsessive compulsive disorder and the prior removal of her two older children due to her noncompliance with treatment and her stipulation of abuse and neglect. The ECO was later dismissed.

On August 26, 2004, the Cabinet filed for a second ECO, which was granted, and four days later filed a Juvenile Dependency, Neglect and Abuse Petition, alleging that A.J.M. was a neglected and abused child. The supporting affidavit from social worker Sky Tanghe read as follows:

> On or about July 29, 2004 CHFS received a rep[or]t of neglect by child's NM, [T.G.], indicating while NM was at a bat[t]ing cage in Louisville KY she laid child on the concrete ground. During further investigation of case DCBS was advised by NM that she had 3 rental properties, one of which she would not allow social workers to enter, another home (where NM and child resided) was found to be in unsafe and unsanitary conditions. There are items stacked to the ceiling, the kitchen sink was full with dirty dish[es] and stagnant water, [the] kitchen floor was cluttered with several boxes, paint can and old food. The NM signed a safety plan stating that she would reside at her 3rd [property.] This FSW observed this home and found home to be empty with a daybed (without a mattress) and a playpen. FSW has concerns that NM is not actually living in this home. NM

[1] T.G. has two other children, who are in the permanent custody of their maternal grandmother and are not involved in the present case.

> reports she is remodeling her other 2 properties in order to rent them to others. Child currently attends daycare at Kindercare learning center, staff has indicated concerns over NM's behavior, specifically stating there have been several times NM has brought the child into daycare with only a diaper on and has asked the teacher to dress the child. On morning of 8-18-04 NM brought child to daycare, dressed. The NM was asked to fill out a form, in middle of doing so she stopped, grabbed the child and stormed outside. NM then brought child back into daycare undressed, she asked teacher to dress child when she woke up (the child was already awake in NM's arms). Daycare indicates child appears never to be clean and her clothes are filthy. On first day NM came to pick child up from daycare she did not recognize her child. The NM looked at the teacher and then at her child and then asked where her child was, she then slowly turned around and panicking asking where her child was. NM has a significant history with CPS, her oldest two children are in the permanent custody of [t]heir MGM due to neglect by NM and NF. Mother has been diagnosed with obsessive compulsive disorder and elements of a paranoid personality. NM has received an assessment from Dr. Linda Bail[e]y who believes NM would benefit from ongoing supportive and evaluative therapy as well as medication for her anxiety disorder. Child's NF, [Andrew M.], is not paying child support and does not have ongoing supportive contact with child. Affiant believes this child is at significant risk of neglect if left in the home with her NM.

Following an adjudicative hearing on October 6, 2004, the family court entered an order finding that the allegations in the petition were true, that A.J.M. was neglected,[2] that reasonable efforts were made to prevent her removal from the home, and that A.J.M. was to remain in the custody of the Cabinet. Following a disposition hearing, the family court entered an order on December 8, 2004, finding that reasonable efforts were made to prevent A.J.M.'s removal from the home and that it was in her best interest

[2] We note that while the family court checked the box for "dependent," it is clear from the rest of the order that the family court found that A.J.M. was neglected.

for the court to take custody of her. The family court then committed A.J.M. to the Cabinet, ordered T.G. to cooperate with the Cabinet and participate in any treatment or social service program, and ordered her to pay $70 per month in child support. While the initial goal was to return A.J.M. to her mother, the Cabinet moved to change the permanency goal to adoption. To that end, the Cabinet filed a Petition for Involuntary Termination of Parental Rights on April 8, 2005, naming both T.G. and Andrew M., A.J.M.'s putative father,[3] as respondents. The family court appointed a *guardian ad litem* to represent A.J.M.'s interests. A bench trial was held on November 1, 2005.

During the trial, the Cabinet introduced the live testimony of four witnesses. Deposition testimony from two more witnesses was filed subsequent to the trial. Dr. Sally Brenzel, a licensed clinical psychologist who was qualified as an expert witness, performed a psychological evaluation on T.G. in 2005. As a result of her evaluation, Dr. Brenzel diagnosed T.G. with Generalized Anxiety Disorder and Borderline Personality Disorder with obsessive compulsive traits. She testified that these diseases and the symptoms associated with them are treatable, but dramatically affect T.G.'s ability to parent A.J.M. Her ability to parent was affected in that she was unable to exercise good judgment and follow through with A.J.M.'s basic needs or to navigate various relationships, both personal and professional. In Dr. Brenzel's opinion, improvement would be possible if T.G. could form and maintain baseline

[3] Later paternity testing excluded Andrew M. from being A.J.M.'s father, and he was subsequently dismissed as a party to the proceeding. A.J.M.'s paternity has not been established.

communications with the critical people in her life. Dr. Brenzel admitted on cross-examination that there had not been any report of injury to A.J.M.

Dr. Peggy Kinnetz, a mental health counselor who worked with T.G. in a parenting group, testified that T.G. completed her classes. Dr. Kinnetz observed T.G. with A.J.M. and was initially concerned about a lack of bonding, although this improved. She also noted problems with T.G.'s ability to set boundaries and to put A.J.M.'s needs above her own. Other areas of concern included T.G.'s refusal to take responsibility for previous neglect or abuse and her mistrustful and suspicious nature. Regarding her anxiety diagnosis, Dr. Kinnetz stated that the disorder would affect her ability to make good decisions and to relate to others.

T.G.'s stepmother, Nancy G., testified about the problems she encountered when she and her husband (T.G.'s father and A.J.M.'s grandfather) supervised T.G.'s visitation with A.J.M. for approximately two months in early 2005. While the first few visits were very good, later ones were not. Nancy G. testified that T.G. excessively changed A.J.M.'s diaper, rearranged A.J.M.'s clothing, fed her inappropriate food, engaged in arguments in A.J.M.'s presence, kept A.J.M. up too late, and left her on the floor during a shower.

Social worker Sky Tanghe was the last witness who testified for the Cabinet live at trial. She testified that she had been working with the family since 1996, when the first abuse allegation arose. Her first contact with A.J.M. was right after her birth, when the ECO was filed. Tanghe reopened the case on July 30, 2004, when she

received a report of neglect. The report was that T.G. left A.J.M. on the concrete ground while she engaged in batting practice. An assessment team went to T.G.'s home and found the residence to be in deplorable condition. An ECO was entered and A.J.M. was removed. The record of the dependency action was admitted without objection. Tanghe also testified about the services the Cabinet provided to T.G., including putting a HELP team in place, providing parenting classes, scheduling evaluations, and providing therapy. She noted that while T.G. had attended her appointments, she had not completed all of the services recommended for her. Tanghe could not identify any improvement related to T.G.'s mental health issues, as she could not establish a relationship with a therapist. While Tanghe stated that T.G.'s support payments were not consistent, she would bring food, toys, and clothes during visitations. A.J.M.'s physical health was good at the time of the removal. At the time of the trial, A.J.M. was medically in great shape and was above average in intelligence and development. Tanghe indicated that her foster home wanted to adopt A.J.M., and that her foster mother has a strong relationship with A.J.M.'s maternal grandparents, so that contact would be kept up with the family after the adoption. Finally, Tanghe testified that there was nothing more the Cabinet could do to address T.G.'s mental health or to effect a successful reunification because T.G. would not take advantage of the services offered to her or stick with anything.

The Cabinet also relied upon the deposition testimony of clinical psychologist Dr. Patricia Aulbach and mental health counselor Dr. Daya Singh Sandhu. Dr. Aulbach started a therapeutic relationship with T.G. in mid-2005 regarding her

mental health issues on the recommendation of Dr. Kinnetz. T.G.'s initial diagnosis was Generalized Anxiety Disorder and Paranoid Personalty Disorder. Dr. Aulbach noted that T.G. was very anxious during the sessions, due to her concerns about the Cabinet, and they were unable to develop a therapeutic relationship. At the end of their relationship, Dr. Aulbach gave T.G. a poor prognosis, unless she was willing to develop a relationship with a therapist and work on her issues. Dr. Singh met with T.G. three or four times. He was unable to formulate an opinion regarding T.G.'s ability to parent as he did not have enough contact with her. Dr. Singh did testify that T.G. worried that if she received psychiatric treatment, it would negatively affect her case.

T.G. relied upon the testimony of licensed certified social worker and marriage counselor Alison Johnson. She and T.G. first met in late 2004, and resumed their sessions in late 2005. In these sessions, they addressed T.G.'s anxiety over her children. During the later visits, Johnson noted that T.G. was more balanced emotionally and was learning to be a better parent with a greater willingness to listen. She testified that a long-term therapeutic relationship depended on T.G., and that she felt connected so far. Johnson also stated that other groups, both in and out of the home, would be beneficial to T.G. She admitted on cross-examination that she had not reviewed other records, but was aware of T.G.'s diagnosis and that she was taking an antianxiety medication. Although she could not recommend that A.J.M. be returned home at that time, Johnson recommended a structured transition.

T.G. also relied upon the testimony of Betty Scharfenberger, who participated in group therapy sessions with her at Recovery, Inc. Betty testified that T.G. got better and calmer over time and had improved due to the program.

Finally, T.G. testified as to the issues raised in the proceeding. She testified that she has a degree in advertising and marketing, and currently rents properties. Regarding the state of her residence when A.J.M. was removed, T.G. explained that she was remodeling the unit, and that any problems were either accidental or unavoidable (i.e., the clogged sink). At the time of the trial, the unit was clean. Regarding the batting cage incident, T.G. testified that she did not intend to be neglectful, as she had placed A.J.M. on a blanket and kept her eye on her. She testified that she was under considerable pressure from the Cabinet to be perfect. She also was able to dispute or explain Nancy G.'s testimony regarding the incidents during their visitations. T.G. indicated that she wished to continue her sessions with Alison Johnson, as they had a good therapeutic relationship. She also pointed out that she engaged in regular visitation with A.J.M., had been paying child support, and had completed her parenting classes. She believed that she could care for A.J.M. and that she should be returned to her.

On March 16, 2006, the family court entered its Findings of Fact, Conclusions of Law as well as the Order Terminating Parental Rights and Order of Judgment. In the order, the family court made the following findings:

> 1. The child, [A.J.M.], is an abused and neglected child as defined in KRS 600.020.[4]

[4] In its separate Findings of Fact and Conclusions of Law, the family court found that A.J.M. had been adjudged to be abused or neglected in a prior proceeding and found her to be abused or

> 2. The Respondent 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 there is no reasonable expectation of improvement in parental care and protection, considering the age of the child.
>
> 3. The Respondent 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 child's well being and there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child.
>
> 4. Termination of parental rights is in the best interest of the child.
>
> 5. The Cabinet for Health and Family Services is best qualified to receive custody of the child.

The family court went on to vest the Cabinet with A.J.M.'s custody, along with the authority to place her for adoption, and made her a ward of the State. The family court later denied T.G.'s CR 59 motion to alter, amend or vacate, or for a new trial. This appeal followed.

On appeal, T.G. raises several arguments. First, she attacks the constitutionality of KRS 625.090(1)(a)1., in that a court is permitted to adopt the findings from a dependency adjudication, which is afforded a lower standard of proof than required in a termination proceeding. Second, T.G. argues that the family court's finding of abuse or neglect was not supported by substantial evidence. Third, she asserts that the

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neglected in the present proceeding.

family court's findings under KRS 625.090(2) that several grounds existed were not supported by substantial evidence. In conjunction with her last argument, T.G. asserts that the family court erred in finding that the Cabinet made a reasonable effort for reunification and in considering testimony concerning her mental health, as no witness was qualified as a mental health expert.

STANDARD OF REVIEW

Our standard of 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):

> The trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, Ky.App., 552 S.W.2d 672, 675 (1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 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 its findings. *V.S. v. Commonwealth, Cabinet for Human Resources,* Ky.App., 706 S.W.2d 420, 424 (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, 726, 70 S.W.2d 5, 9 (1934).

With this standard in mind, we shall address the issues T.G. has raised in her appeal.

ANALYSIS

The General Assembly provided the mechanism for the involuntary termination of parental rights in KRS 625.090. The statute creates a three-pronged test, whereby the Cabinet must prove, and the circuit court must determine, that 1) the child is abused or neglected, as previously adjudged by a court of competent jurisdiction or found to be abused or neglected in the present proceeding; 2) termination would be in the child's best interest;[5] and 3) one of several listed grounds exists. In deciding the second and third prongs, the circuit court is required to consider several enumerated factors, as listed in KRS 625.090(3).

I. CONSTITUTIONALITY OF KRS 625.090(1)(a)1.

The first determination a circuit court must make is whether the child is, or has been adjudged to be, abused or neglected as defined in KRS 600.020(1). Specifically, the statute reads:

> (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 and that physical or

[5] T.G. did not specifically dispute the family court's finding that termination would be in A.J.M.'s best interests, so we shall not address this prong.

> 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[.]

T.G. contends that the first option violates due process, in that it allows a circuit court to accept information and a finding of neglect or abuse that was based upon the lower preponderance of the evidence standard, as opposed to the higher clear and convincing standard mandated in involuntary termination proceedings. The Cabinet argues that there are no constitutional implications, as the prior adjudication effectuates a rebuttable presumption that a child holds the status of abused or neglected, and this presumption is merely a threshold requirement in a review that as a sum must be based upon clear and convincing evidence. Furthermore, the Cabinet argues that the legislature is presumed to be aware of the different standards applicable to dependency and termination proceedings and must have deemed the dependency adjudications reliable by including that particular option in the first prong.

The United States Supreme Court elevated the standard of proof for termination proceedings in *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (1982): "A majority of the States have concluded that a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. . . . We hold that such a standard adequately conveys to the fact finder the level of subjective certainty about his factual conclusions necessary to satisfy due process." Kentucky's courts and the legislature have adopted this standard of proof for involuntary termination proceedings. KRS 625.090;

N.S. v. C. and M.S., 642 S.W.2d 589 (Ky. 1982); *J.E.H. v. Dept. for Human Resources*, 642 S.W.2d 600 (Ky.App. 1982). However, the dependency, neglect, and abuse statute still requires that a determination, in part, be based only upon the lower preponderance of the evidence standard. KRS 620.100(3).

We begin our analysis with the strong presumption that a statute, in this case KRS 625.090(1)(a)1., is constitutional, and we must draw all fair and reasonable inferences in favor of its validity. *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006); *Bess v. Bracken County Fiscal Court*, 210 S.W.3d 177 (Ky.App. 2006). Furthermore, we must presume that the legislature "is aware of the constitution, previously enacted statutes and the common law." *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 93 (Ky. 2005). "It is clear that we should not construe [a statute] as intending an unconstitutional result if such a construction may be avoided." *Kentucky Utilities Co. v. Jackson County Rural Elec. Co-op. Corp.,* 438 S.W.2d 788, 790 (Ky. 1968). Furthermore, we must presume that the legislature did not intend an unconstitutional result in the application of KRS 625.090(1)(a)1. *See City of Louisville v. Churchill Downs*, 267 Ky. 339, 102 S.W.2d 10 (1936). "The issue of whether a statute is unconstitutional is a question of law subject to de novo review." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 91 (Ky.App. 2004).

In this case, the way T.G. suggests the family court applied this particular subsection (and the way it appears that it was actually applied) clearly does not pass constitutional muster, as it permits the court in a termination proceeding mandating a

higher standard of proof to adopt a finding from a dependency action that is based upon a lower standard of proof. We disagree with each of the Cabinet's assertions that the subsection was constitutional in the way it was applied in this case. Specifically, we disagree with the assertion that the legislature created a rebuttable presumption. Our review of the statute does not reveal any indication that the legislature intended a finding under KRS 625.090(1)(a)1. to be a rebuttable presumption. In other statutes, the legislature has clearly set forth rebuttable presumptions, unlike in this particular statute. *See* KRS 189A.010(3) (presumptions in prosecution for operating a motor vehicle under the influence); KRS 189.520(3) (presumptions in prosecution for operating a non-motor vehicle under the influence); KRS 403.213(2) (15% change in amount of child support due is rebuttably presumed to be material change in circumstance); KRS 406.021(4) (voluntary acknowledgment of paternity creates rebuttable presumption of paternity); and KRS 406.011 (child born during marriage is presumed to be child of husband and wife).

It is the holding of this Court that the mere filing and adoption of a prior finding of neglect or abuse, especially one that is not made under a clear and convincing standard, constitutes error and would raise constitutional implications. However, in following our mandate that we must presume that a statute is constitutional and draw all fair and reasonable inferences in favor of its constitutionality, we hold that KRS 625.090(1)(a)1. may be applied in a manner that passes constitutional muster. At oral argument, T.G. argued that she should be permitted to retry the prior dependency adjudication or be entitled to a complete reversal of the termination judgment. We

disagree with this part of T.G.'s argument, and hold that a circuit court may perform an independent review of the evidence submitted in the dependency action and make its own determination of abuse or neglect based upon the elevated standard of proof. Furthermore, either party would be permitted to offer proof to establish facts that led to the lower court's finding of abuse, neglect or dependency. Therefore, we hold that KRS 625.090(1)(a)1. is constitutional, so long as it is correctly applied.

In the present case, there is absolutely no indication that the family court made any type of independent review of the evidence submitted in the dependency proceeding. It merely adopted the result of the prior adjudication when it determined that A.J.M. had been adjudged to be abused or neglected. For this reason, we hold that there is no substantial evidence to support the family court's finding under KRS 625.090(1)(a)1. that A.J.M. had been adjudged to be abused or neglected. While this would normally require us to vacate the judgment to allow the family court to perform an independent review of the dependency record, in this case it is not necessary due to our ultimate holding.

II. FINDING OF ABUSE OR NEGLECT IN THE PRESENT ACTION

In addition to finding that a child has been adjudged to be abused or neglected, a circuit court may determine, based upon clear and convincing evidence, that "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[.]" KRS 625.090(1)(a)2. An "abused or neglected child" is defined as follows:

(1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:

> (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
>
> (b) 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;
>
> (c) 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;
>
> (d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
>
> (e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
>
> (f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
>
> (g) Abandons or exploits the child;
>
> (h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. . . . ; or
>
> (i) 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[.]

In the present case, the family court's finding that A.J.M. is at risk to be abused or neglected appears to be based on T.G.'s mental health problems and her history of resultant neglect or abuse to her two older children. We note that there is only cursory, unsupported information in the record detailing the reason T.G.'s two older children were removed from her custody. The family court devoted a considerable portion of its findings of fact to T.G.'s mental health diagnoses as well as her treatment and therapy, ultimately concluding that her treatment had not remedied her symptoms or improved her condition to the extent that she could safely care for A.J.M. A theme running through the reports and testimony of her treatment providers is T.G.'s inability to engage in relationships, therapeutic or otherwise. Another theme is T.G.'s inability to exercise good judgment in relation to parenting A.J.M. All providers testified that T.G.'s diagnoses and symptoms were treatable.

At the time of the hearing, T.G. had returned to a previous counselor, Alison Johnson, whom she described as "enlightening." When T.G. resumed therapy in November 2005, Johnson indicated that her emotions were more balanced, that she was handling her diagnoses much better, and that she was learning to be a better parent. Johnson also testified that although she could not recommend a return of A.J.M. to T.G. at that time, an eventual, supervised return should take place. To T.G's credit, there is no evidence that A.J.M. had ever been injured, either physically or emotionally, while in her care, and she was in fact in good health at the time of her removal. Based upon this

evidence of record, we must conclude that there is no substantial evidence to support the family court's finding of abuse or neglect under KRS 625.090(1)(a)2.

Because there is no substantial evidence to support a finding under either subsection 1. or 2. of KRS 625.090(1)(a), and there is no allegation of criminal charges under subsection 3., the family court erred in finding that A.J.M. was abused or neglected. Thus, the first prong of the three-part test has not been met.

III. EXISTENCE OF GROUNDS IN KRS 625.090(2)

Next we will address the final prong of the three-part test, namely, whether there is clear and convincing evidence of one or more of several listed grounds. KRS 625.090(2). The grounds listed in the statute are:

> (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.

To determine whether one or more of the grounds exist, a trial court is required to consider the following factors, which are set forth in KRS 625.090(3):[6]

[6] A trial court must also consider these factors when determining whether termination is in the child's best interest pursuant to KRS 625.090(1)(b), which was not raised in this case.

> (a) Mental illness as defined by KRS 202A.011(9), or mental retardation 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[7] 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.

In the present case, the family court determined that grounds existed under KRS 625.090(2)(e) and (g). In its review of the six factors, the family court found that the Cabinet rendered reasonable efforts to reunify the family. KRS 625.090(3)(c). Furthermore, the family court found that the Cabinet had met A.J.M.'s needs since

[7] "Reasonable efforts" is defined as "the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community in accordance with the state plan for Public Law 96-272 which are necessary to enable the child to safely live at home[.]" KRS 620.020(10).

removal from T.G.'s custody and the prospects for improvement of A.J.M.'s welfare was greater if parental rights were terminated as her foster family wanted to adopt her. KRS 625.090(3)(e). Finally, the family court found that the Cabinet examined T.G.'s mental health. KRS 625.090(3)(a).

We shall first address the factors from the list of six the family court considered in determining whether any grounds existed. While there was testimony concerning T.G.'s mental illness, we note that such mental illness must "render[] the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time[.]" KRS 625.090(3)(a). In her brief, T.G. focuses on the requirement that the mental illness must be certified by a qualified mental health professional, but we need not address that argument, primarily because the family court did not conclude or find that T.G.'s mental illness rendered her unable to consistently care for A.J.M. In addition, we note that psychologist Dr. Brenzel testified that T.G.'s diagnoses dramatically affect her ability to parent, but are manageable, and improvement is possible if she can form and maintain baseline relationships with the critical people in her life. Mental health counselor Dr. Kinnetz noted the progress T.G. made during their 2004 sessions, but her mistrust and suspicions would not allow A.J.M. to be returned to her at that time. Neither of these witnesses testified that T.G.'s mental illness brought her within the scope of the statute.

As to the reunification issue, the Cabinet did make efforts by providing parenting classes and therapy for T.G. However, T.G. completed what the Cabinet

recommended, and much of what Cabinet social worker Tanghe testified to took place prior to A.J.M.'s birth. Furthermore, the Cabinet did not offer in-home services to T.G. when social worker and counselor Alison Johnson recommended these services for a successful reunification.

Our review of the evidence fails to reveal any substantial evidence that T.G. failed or was incapable of providing essential food, clothing, shelter or medical care. This was evident through the results of A.J.M.'s medical examination and testimony that she is above-average in both her intelligence and developmental levels. For this reason, the family court erred in finding otherwise.

Because we have determined that no substantial evidence exists to support the family court's finding that A.J.M. was abused or neglected, or that a ground supporting termination exists, we hold that the family court clearly abused its discretion in terminating T.G.'s parental rights to A.J.M. at this time.

CONCLUSION

For the foregoing reasons, the judgment of the Jefferson Family Court terminating T.G.'s parental rights is reversed.

ALL CONCUR.

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