

RENDERED: AUGUST 14, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001575-ME
AND
NO. 2014-CA-001576-ME
AND
NO. 2014-CA-001577-ME

L.D.-M.M.

APPELLANT

APPEAL FROM MERCER FAMILY COURT
v. HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NOS. 13-AD-00015, 13-AD-00016, AND 13-AD-00017

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE, CLAYTON AND KRAMER, JUDGES.

KRAMER, JUDGE: L.D.-M.M. (Mother), appeals from the August 20, 2014 order of the Mercer Family Court terminating her parental rights. In accordance with *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App.

2012), counsel for Mother filed an *Anders*¹ brief conceding that no meritorious assignment of error exists to present to this Court, accompanied by a motion to withdraw which was passed to this merits panel. After careful review, we find no error and affirm the judgment of the Mercer Family Court terminating Mother's parental rights. We grant counsel's motion to withdraw by separate order.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and J.R.E. (Father) are the natural parents of three children.² In April 2011, the Cabinet for Health and Family Services filed a petition relating only to the youngest child, alleging that Mother used drugs during her pregnancy and that drugs were found in the child's system at birth. As a result of the first petition, this child was placed in the custody of her maternal grandmother until Mother completed the case plan objectives developed by the Cabinet. Upon completion of the case plan objectives, this child was returned to Mother's custody and care.

Shortly thereafter, on December 21, 2012, the Cabinet received specific allegations relating to continued drug use by Mother, including the exact location of the drugs in her residence. At that time Mother and the children were living with Father, as well as the children's maternal grandfather. It was alleged that Mother was using drugs in the residence; drugs and drug paraphernalia were within reach of the children; the children had no beds; and, that the residence was

¹ *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967).

² The children were born October 1, 2008; February 15, 2010; and April 6, 2011.

in an unsanitary condition. A search of the residence by law enforcement yielded needles, pills, cooking spoons, marijuana, and other drug paraphernalia, as well as filth and exposed wiring throughout. On December 22, 2012, an Emergency Custody Order placed all three children in foster care. On December 29, 2012, a temporary removal hearing was held and Mother stipulated to reasonable grounds for removal.

On January 9, 2013, the Cabinet and Mother negotiated a second case plan. The case plan objectives included submitting to random drug screens; completing a substance abuse assessment and following all recommendations; completing a mental health assessment and following all recommendations; completing parenting classes and demonstrating all skills learned; and obtaining and maintaining stable housing and employment. Subsequently, on May 29, 2013, Mother stipulated to neglect pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and a disposition hearing was held on July 10, 2013. On September 11, 2013, the Cabinet's goal was changed to adoption. On October 22, 2013, a Petition to involuntarily terminate Mother's parental rights was filed by the Cabinet.

The Cabinet's Petition to terminate Mother's parental rights was heard on August 8, 2014. Jenny Carmen, an ongoing case worker with the Cabinet, was assigned to the case and testified at the hearing. Ms. Carmen testified that throughout the entirety of the case Mother submitted to only two drug screens. The first, a urine screen, came back diluted and the second, a hair screen, came

back positive for marijuana. Mother completed a substance abuse assessment, but failed to follow through with the resulting recommendations or complete the mental health assessment or parenting classes. Ms. Carmen was never able to verify Mother's housing and was only able to verify that Mother was employed at a fast food restaurant for a two-week period. Although Mother alleges she was employed for closer to two months, she was unable to provide pay stubs or other documentation to support her testimony.

Mother testified that the children's maternal grandfather had a criminal history involving drug and alcohol abuse and that he discouraged her from trying to complete the case plan. She testified that he has been an overbearing force throughout her life and that she has never been able to stand up to him, even when it involved the wellbeing of her children. Mother stated that she intended to "love him from a distance," although she also testified that when she was released she intended to return to the same town and rely on the same family and friends for support that she has throughout her life. Mother also testified that she planned to reunite with Father and move into his four-bedroom mobile home after she was released from incarceration, although she had a history of using marijuana and alcohol with Father. Mother had no other plan for housing. Mother acknowledged that due to her incarceration she would be unable to immediately take care of her children if her rights were not terminated, and that it would take at least another year of supervised contact to establish stability and demonstrate sobriety – approximately sixteen months from the date of the termination hearing.

Significantly, prior to the August 8, 2014 termination hearing, Mother acknowledged that she had not seen her children since September 27, 2013.

The trial court entered findings of fact and conclusions of law, and ordered Mother's parental rights terminated by judgment dated August 20, 2014. Mother appealed.

STANDARD OF REVIEW

We review the termination of parental rights according to the clearly erroneous standard. This standard, found in Kentucky Rules of Civil Procedure (CR) 52.01, provides that “[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” “A finding supported by substantial evidence is not clearly erroneous. Substantial evidence is ‘that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.’ In assessing whether the findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the family court.” *Hunter v. Mena*, 302 S.W.3d 93, 97 (Ky. App. 2010) (citations omitted). Where the record contains substantial evidence to support the trial court's findings, we will not disturb them on appeal. *Id.*

ANALYSIS

After reviewing the trial court record, on appeal counsel for Mother filed an *Anders* brief in compliance with *A.C.*, 362 S.W.3d at 363-64 (*citing Anders*, 386 U.S. at 744, 87 S.Ct. at 1400). In *A.C.* this court adopted and applied

the procedures identified in *Anders* to appeals from orders terminating parental rights wherein counsel is unable to identify any non-frivolous grounds to appeal. *Id.* Those procedures require counsel to first engage in a thorough and good-faith review of the record. *Id.* “If counsel finds his [client’s] case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.” *Id.* (quoting *Anders*, 286 U.S. at 744, 87 S.Ct. at 1400). Here, Mother’s counsel fully complied with the mandates of *A.C.* and *Anders* by certifying that they furnished Mother with a copy of the *Anders* brief and informed Mother of her right to file a *pro se* brief raising any issues she deemed meritorious. *A.C.* at 371. Mother chose not to file a *pro se* brief.

As directed by *A.C.* we have also cautiously examined the record and agree with counsel that no grounds exist that would warrant disturbing the family court’s orders terminating Mother’s parental rights. Here the trial court has satisfied the tripartite test developed by our legislature to ensure the rights of both parents and children are protected, and the record contains sufficient evidence to support the family court’s decision to terminate Mother’s parental rights. *See Cabinet for Health and Family Services v. K.H. Sr.*, 423 S.W.3d 204, 209 (Ky. 2014).

The trial court concluded first that the children were abused or neglected under Kentucky Revised Statutes (KRS) 600.020(1);³ second, that

³ KRS 600.020(1)(a) defines an “Abused or neglected child” as a child whose health or welfare is harmed or threatened with harm ... when [h]is or her parent:

....

termination would be in the child's best interest pursuant to KRS 625.090(3);⁴ and third, that one or more of the grounds for termination set forth in KRS 625.090(2)⁵ existed herein. Evidence presented at the termination hearing clearly and convincingly supports the trial court's conclusions.

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;

....

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....

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;

⁴ KRS 625.090(3) states:

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

As noted, Mother previously stipulated to neglect of the youngest child after the child was exposed to illegal substances during the pregnancy. Mother's residence contained drugs and drug paraphernalia within the reach of the children, and well as unsanitary and otherwise dangerous conditions that posed a safety risk to the children. Mother failed to satisfy her case plan objectives of completing random drug screens, a mental health assessment, and parenting classes, or maintain stable housing and employment, despite being offered all reasonable services by the Cabinet. Mother admitted to having a substantial criminal history and to being frequently incarcerated as a result. Mother

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.

⁵ KRS 625.090(2) states:

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:

....

(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;

....

(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;

...

(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.

acknowledged that any reunification would take place, at the earliest, in 2016, almost three years after she last saw her children. Yet Mother was unable to articulate how she would make changes to her life that would result in reunification.

This evidence supports the trial court's conclusion that Mother continuously failed or refused to provide or was substantially incapable of providing essential parental care and protection for the children; and that for reasons other than poverty alone mother continually failed or refused to provide or was incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the child's well being; and that despite being offered all reasonable services, there was no reasonable expectation of improvement in Mother's conduct or care and protection of the children. After considering the totality of the circumstances we are convinced that Mother has neglected her children and that termination of her parental rights is in the children's best interests.

CONCLUSION

Having made an independent review of the record, we find no prejudicial error or violation of Mother's constitutional right to a fundamentally fair proceeding. Therefore, we affirm the judgment of the Mercer Circuit Court terminating Mother's parental rights to her three children.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery A. Herrington
Harrodsburg, Kentucky

BRIEF FOR APPELLEE:

Sheila F. Redmond
Lexington, Kentucky