RENDERED: JULY 22, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-001211-ME

C.V.Y. APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 13-AD-00003

M.D.M. AND M.E.M. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

ACREE, JUDGE: C.V.Y. (Mother) appeals the Lawrence Circuit Court's June 26, 2015 order 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

[1] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

this merits panel. After careful review, we grant counsel's motion to withdraw by separate order, and affirm the circuit court's order terminating Mother's parental rights.[2]

Mother is the biological parent of M.J.Y. (Child), a female child born on February 12, 2005. Child's natural father is deceased. Since 2007, Child has been in the continuous custody of Appellee M.D.M. (Aunt), Child's maternal aunt and Mother's twin sister, and Appellee M.E.M. (Uncle), Child's uncle. In 2009, the Cabinet for Health and Family services initiated a child protection case against Mother due to Mother's severe drug addiction. The record indicates Mother has been involved in numerous incidents with law enforcement and social services as a result of her drug use over the years. The circuit court found Child to be a neglected child and, in February 2010, ordered Child remain in the permanent relative custody of Aunt and Uncle.

Three years later, on May 20, 2013, Aunt and Uncle filed a petition to terminate Mother's parental rights and to adopt Child. A termination hearing was held on February 24, 2014.

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[2] Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

Aunt testified Child has been in her sole care and custody since she was two years old. Aunt described Child as bright, loving, outgoing, and intelligent. However, upon initially entering her care, Aunt testified Child was very small in stature, had developmental delays, was malnourished, was still using a bottle and sippy cup, and had had little experience eating table food. Aunt went on to describe the progress Child had made while in her care. Aunt also testified Mother had not visited Child since March 2013 and Mother had paid little child support over the years. To Aunt's knowledge, Mother did not have a job, reliable transportation, or stable housing. Aunt admitted she had not spoken with Mother since spring 2013.

Uncle is a retired military member, receives substantial social security disability income, and owns a 4,800 square foot home where Child resides with Aunt, Uncle, and her two cousins. Uncle testified Child is close to her cousins and calls them "brother and sister."

Mother testified in opposition to the petition. Mother stated she entered a residential drug rehabilitation program in November 2009, where she remained until June 7, 2010. Mother described the program as God-based and life changing. She reiterated she has been clean and sober since November 2009. Mother testified she volunteers with substance abuse support groups and attends church. She also stated she last visited with Child in May 2013, although she still had court-ordered visits through a separate custody action. Mother testified she paid child support when financially able and had not spoken to her sister (Aunt)

since May 2013. Mother admitted she was unemployed, had no income, was attempting to reinstate her disability benefits, had a vehicle, and had moved three times in the last two years. Mother testified she completed phlebotomy training in 2013 and was preparing for a licensing exam.

Mother also presented testimony from her adult son, an informal counselor, and her roommate. All three witnesses acknowledged Mother's serious drug-riddled past, but testified Mother had made remarkable changes following treatment in 2009 and has been drug free for several years. All confirmed Mother desired to regain custody of Child. Mother's informal counselor stated he had not seen Mother in a parenting role with Child, but had observed Mother appropriately parent her step-daughter. Mother's roommate testified Mother is capable of having a relationship with Child. The roommate also admitted Mother was unemployed and not contributing to the rent.

Mother's adult son testified he had not seen Mother under the influence of drugs or alcohol in a long time, and that his relationship with Mother had improved since she had become sober. He admitted that Mother's addiction had had a negative impact on his life and explained that he had previously been removed from Mother's care as a young adult due to her substance abuse. During that time, he stayed with Aunt and Uncle. He described his stay as difficult; according to adult son, Aunt and Uncle were strong disciplinarians and he got into at least one physical altercation with Uncle. However, adult son admitted that he believes Aunt and Uncle provide a good home.

The Cabinet submitted a confidential report recommending that Aunt and Uncle's petition to adopt Child be granted. Along those same lines, the circuit court took judicial notice of the neglect action including, specifically, a February 12, 2010 permanent custody order that released the Cabinet from working with Mother. The circuit court also took judicial notice of the fact that Mother had filed a separate custody civil action, but failed to appear for several custody-related hearings in that matter.

On March 28, 2014, the circuit court entered a perfunctory order terminating Mother's parental rights to Child. Mother appealed.

This Court, upon review, found the circuit court's 2014 termination order deficient as it failed to include sufficient factual findings. *C.V.Y. v. M.D.M.*, 2014-CA-000687-ME, 2015 WL 509632, at *3 (Ky. App. Feb. 6, 2015). "Although the court alluded to statutory requirements as having been fulfilled," we explained, "it did not provide specific facts from the evidence." *Id.* Notably, it failed to consider any of the evidence Mother presented at the termination hearing, including evidence regarding Mother's current situation and recent progress, and, instead, predicted the likelihood of Mother's future performance based wholly on her past. *Id.* Accordingly, we remanded the matter back to the circuit court for additional findings of fact. *Id.*

On remand, the circuit court permitted the parties to submit supplemental proof along with proposed orders. Mother submitted an affidavit stating: (1) since the 2014 hearing, she had obtained employment at Crispy Dairy

Treat; (2) this was her third job since May 2014; (3) she had remained drug and alcohol free and was attending numerous drug and alcohol support groups; and (4) she was making child support payments.

By order entered June 26, 2015, the circuit court again terminated Mother's parental rights to Child. The circuit court found Child neglected. KRS[3] 625.090(1)(a). It also found that termination was in Child's best interest, KRS 625.090(1)(b), and found that Mother was unfit to parent Child because: (a) she continuously inflicted upon Child emotional harm; (b) she failed to provide basic necessities for Child; and (c) she failed to offer essential parental care and protection for Child. KRS 625.090(2)(c), (e), and (g). Mother appealed.

On appeal, counsel for Mother filed an *Anders* brief in compliance with *A.C.*, *supra*.[4] In *A.C.*, this Court adopted and applied the procedures identified in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967) to appeals from orders terminating parental rights wherein counsel is unable to identify any non-frivolous grounds to appeal. *A.C.*, 362 S.W.3d at 364. Those procedures

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[3] Kentucky Revised Statutes.

[4] Aunt and Uncle failed to file an appellee brief in this matter. Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) permits us to impose the following sanctions in such a circumstance:

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

The exercise of these options is within our discretion. Given the undeniable significance of a termination action, we have elected not to impose any sanctions pursuant to this rule, but shall instead consider the merits of Mother's appeal.

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*, 386 U.S. at 744, 87 S.Ct. at 1400).

We cautioned in *A.C.* "that an *Anders* brief should not be used as an escape provision for a court-appointed counsel whose payments have exhausted, but should only be filed when appointed counsel has conducted a thorough, good-faith review of the record and can ascertain absolutely no meritorious issue to raise on appeal." *Id.* at 371. We question counsel's decision to utilize an *Anders* brief in this case. This is the second *Anders* brief filed by counsel in this matter; he did so in the first appeal. That appeal, as previously explained, was resolved in his client's favor. It is clear to this Court, at least in hindsight, that Mother had a viable, non-frivolous argument in the first appeal and, therefore, the use of an *Anders* brief was unwarranted. Arguably, the same could be said about the current appeal.

In this appeal, counsel argues on Mother's behalf that the trial court's termination decision was not supported by substantial evidence. He contends the testimony at the termination hearing suggests a reasonable expectation of improvement on Mother's behalf, thereby making termination statutorily unjustified. Under the facts of this case, this argument is not wholly frivolous and should have been presented in a normal appellant brief. We urge counsel now before us, and all attorneys who might invoke *A.C.* and *Anders* in the future, to

exercise restraint in filing *Anders* briefs. We state again, quoting from *A.C.*, that "'[t]he *Anders* brief is not a substitute for an advocate's brief on the merits.' Likewise, it is not an escape provision to end undercompensated, and sometimes uncompensated, legal services the lawyer agreed to provide." *A.C.*, 362 S.W.3d at 372 (internal citation omitted). An *Anders* brief is *only* appropriate when counsel is unable to discern *any* non-frivolous grounds for appealing a termination of parental rights, yet is constrained by his or her duty to his or her client to file an appeal. *Id.* at 368.

Fortunately, counsel's brief and argument in this matter include enough substance to allow this Court to fully examine the issue raised without the need for additional briefing.[5] *Id.* at 371 (this Court, upon reviewing the matter, may order one or both parties to file supplemental briefs addressing possible meritorious arguments). Counsel contends, as previously referenced, that the improvements made by Mother relate to the circuit court's best interests and parental unfitness determinations. KRS 625.090(2)(e)[6] and (g),[7] the parental

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[5] We remind counsel that an *Anders* brief must refer to anything in the record that might arguably support the appeal *and* objectively demonstrate the issues identified are wholly frivolous. *A.C.*, 362 S.W.3d at 371. The *Anders* brief in this case complies with the former, but not the latter.

[6] KRE 620.090(2)(e) provides: "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[.]"

[7] KRS 625.090(2)(g) provides: "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[.]"

unfitness provisions relied upon by the circuit court, both require that where the lack of ability to provide necessities for the child and to provide parental care and protection are the basis for termination, the circuit court shall take into consideration the reasonable expectation of improvement in Mother's parental care and conduct. Contrary to Mother's position, the circuit court did take this evidence into consideration when making its termination decision. That decision is supported by sufficient evidence and the ruling did not display an abuse of the court's discretion. Therefore, while not a frivolous argument, it is not a strong enough argument to persuade this Court to reverse.

It is undisputed that Mother has made significant strides in improving her life. She successfully completed a drug rehabilitation program and has been drug free since November 2009. We commend Mother for her progress. All of Mother's witnesses confirm Mother has mastered her addiction and is endeavoring to live a Christian lifestyle. The circuit court's termination order clearly articulates this evidence. But the circuit court found, and we agree, that Mother's drug-related issues are only part of the puzzle. Quoting from the circuit court's order:

> By all indications, [Mother] is now clean and sober, but it is also clear that for a period of much longer than the requisite six months, she failed to provide parental care and protection for [Child]. [Child] is ten years old and has no relationship whatsoever with [Mother]. Furthermore, although [Mother] has reported that she is now employed, she has a history of transiency as evidenced in the record. Additionally, the Cabinet attempted to work with [Mother] for years before ultimately being released from reunification efforts in August of 2013. [Mother] asserted that she has been

> clean and sober since November 2009. Thus, [Mother] had four years of sobriety to make some type of progress on her case and improve her ability to parent, but failed to do so. Again, the Court commends [Mother] for attempting to get her own life together, but the Court is unable to find that there is any reasonable expectation of improvement in her parental care and protection based on the record, history, and current circumstances.
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> In this case, [Mother] has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education for the minor child's well being. [Mother] was previously ordered to pay a minimal amount in child support for [Child], that being $30 per month. In 2013, [Mother] made a total of five child support payments. In 2014, [Mother] made a total of two child support payments before her obligation was terminated pursuant to this Court's order terminating her parental rights. . . . [I]t remains clear that [Mother] remains incapable of providing for [Child's] well-being on a consistent and regular basis.

(R. 138-39).

We echo the circuit court's sentiments. Mother had many years after obtaining sobriety – from November 2009 until the termination hearing in February 2014 – to demonstrate she is capable of parenting Child. Yet during all that time, she failed to visit Child regularly, failed to support Child financially or otherwise, and failed to obtain stable housing and employment. The circuit court clearly grappled with the question of how long is long enough? Four years is substantially more than sufficient time for Mother to demonstrate a reasonable expectation of improvement in her parental care and conduct. While Mother

overcame her addiction issues, she failed to overcome other factors in her life preventing her from being able to successfully parent Child.

Further, the record fully supports the circuit court's findings. At the time of the hearing, Mother was unemployed, had no income, and had moved three times in two years, indicating unstable housing. She had paid a total of $210 toward Child's care in two years (2013 and 2014). There was no evidence that Mother bought or offered to buy food, clothing, or other essentials for Child. Subsequent to the termination hearing, Mother had changed jobs three times between May 2014 and April 2015, again indicating Mother is unable to maintain stable employment.

Related to the best-interest determination, the circuit court found, in part, and we agree, that "[t]here exists no real relationship between the minor child and [Mother] . . . and although it is admirable that [Mother] has recently attempted to clean up her life, she has not been a valuable part of this [C]hild's life for the past eight years. [Aunt and Uncle] have cared for [Child's] needs and have the ability to provide her with a safe and stable home environment." (R. 137).

The circuit court found there was no reasonable expectation of improvement in Mother's parental care and conduct. Ultimately, we cannot hold that such a finding lacks clear and convincing supporting evidence. Mother cannot successfully challenge the circuit court's order on any other ground.

We affirm the Lawrence Circuit Court's June 26, 2015 order terminating Mother's parental rights to Child.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Adam S. O’Bryan<br>Paintsville, Kentucky | NO BRIEF FILED |