

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001537-ME

L.S.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NO. 14-AD-500469

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND M.J.D., A CHILD

APPELLEES

AND

2015-CA-001538-ME

L.S.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NO. 14-AD-500470

CABINET FOR HEALTH AND
FAMILY SERVICES,

COMMONWEALTH OF KENTUCKY;
AND J.R.S., A CHILD

APPELLEES

AND

2015-CA-001539-ME

L.S.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TARA HAGERTY, JUDGE
ACTION NO. 14-AD-500471

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
AND C.N.D., A CHILD

APPELLEES

OPINION AND ORDER
AFFIRMING
AND GRANTING MOTION TO WITHDRAW

** ** * * * * *

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

MAZE, JUDGE: L.S. (“Mother”) brings these appeals from orders of the Jefferson Family Court terminating her parental rights in her three minor children: M.J.D., a

son born in 2001, and two daughters, J.R.S. and C.N.D., born in 2005 and 2007 respectively.¹

On January 29, 2013, the Cabinet for Health and Family Services filed a petition alleging that the children were found home alone while in Mother's custody, that Mother smokes marijuana, and that Mother failed to provide necessary mental health treatment for the son.

The trial court permitted Mother to retain custody of the children. It ordered Mother to insure her son received his treatment, and also ordered her to participate in her own mental health treatment, to attend a protective parenting group at Seven Counties Services (SCS), to undergo random drug screens, and to establish paternity for her children. On March 13, 2013, Mother stipulated before the family court to having neglected all three children by leaving them without proper supervision, with the result that the police were called to the home.

A week later, the Cabinet sought and obtained an emergency custody order claiming that the children had been neglected again while in their mother's care.

The Cabinet alleged that Mother had been arrested for possession of marijuana,

¹ Pursuant to 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 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.

promoting contraband and tampering with physical evidence, and that three days later, the son had been found walking alone on the street. He claimed he and his sisters had been home alone since their mother's arrest. The son was placed in the Cabinet's temporary custody and the daughters in the temporary custody of a relative. About one month later, the mother again stipulated to having neglected the children and admitted that they also had excessive absences resulting in educational neglect. The children were all committed to the custody of the Cabinet on December 4, 2013.

The Cabinet was able to locate the father of the daughters, but he denied paternity and told the Cabinet he had no interest in pursuing custody of the girls. He has not had any contact with the children since 2006 when he separated from Mother, and he has never paid child support. Mother initially identified another individual as the son's father but genetic testing proved he was not, and he was dismissed from the action. Mother testified that she does not know who son's father may be.

Mother was ordered to submit to random drug screens, to obtain mental health treatment and substance abuse treatment, and to attend protective parenting group counseling. Mother was permitted to have supervised visits with the children.

Mother attended eight out of fourteen requested drug screens in the period between February 2013 and November 2014. She tested positive for marijuana on five occasions, and once each for opiates, benzodiazepines and oxycodone. She

did not attend any drug screens after September 8, 2014, when she tested positive for marijuana and oxycodone. She refused to attend drug screens in both March and April 2015, admitting that she would test positive for marijuana as she continued to use the drug.

The Cabinet repeatedly referred Mother to the Jefferson Alcohol and Drug Abuse Center (JADAC) for substance abuse assessment and treatment, but without success. She failed to complete evaluations there in April 2013 and May 2013. She did complete an evaluation on November 13, 2013, and was advised to attend intensive outpatient treatment, but failed to do so. The Cabinet offered her another referral to JADAC in September 2014 but she declined because, in her view, JADAC was only “for hard drugs” and she was just “smoking pot and using opium” occasionally. In March 2015, she informed the Cabinet that she was seeking substance abuse treatment through weekly classes at the Nia Center but provided no evidence of her attendance. She testified that she has only gone to two classes there and has continued to smoke marijuana.

The Cabinet also referred the mother to SCS for mental health treatment and participation in a protective parenting group. She was rejected from the group because she refused to accept at least some responsibility for her actions when she denied leaving her children unsupervised. She attended another session several months later, at which she admitted only that she left her children with an irresponsible teenage caregiver. She attended several individual and group sessions but ultimately retracted her admission of any wrongdoing. On July 23,

2014, SCS diagnosed her with mood disorder, and opiate and cannabis abuse. Her case has been closed by SCS on several occasions due to her refusal to acknowledge any wrongdoing.

Mother's visits with her children were suspended due to her non-compliance with court-ordered treatment. She has had no visits with the children since 2013 and even some inconsistent telephone contact ceased in November 2014. She has maintained stable housing and employment since the removal, but has never paid any child support or made any material provision for the children. She has not participated in their mental health treatment or inquired about their needs or well-being during her conversations with her Cabinet social worker. She testified that she has one other child, a daughter who has chosen to live with her father, and that she was incarcerated from July to August 30, 2014, for nonsupport of that child.

Ultimately, the Cabinet filed petitions for involuntary termination of parental rights² for each of the three children, and a trial was held on May 28, 2015.

At the time of the trial, Mother had failed to attend any drug screens in the prior eight months, had failed to complete any substance abuse treatment or protective parenting program, and failed to sustain any mental health or psychiatric treatment.

Following the trial, the family court entered findings of fact, conclusions of law and orders terminating mother's parental rights in each of the three children.

Mother filed separate appeals from these orders, and this Court granted the

² The petition also named A.S., the father of the daughters, but he did not file an answer to the petition or otherwise appear in the proceedings. He is not a party to this appeal.

Cabinet's motion to consolidate the appeals. Counsel for mother filed an *Anders* brief conceding that substantial evidence supported the termination, along with a motion to withdraw. *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); *A.C. v. Cabinet for Health and Family Servs.*, 362 S.W.3d 361 (Ky. App. 2012). "An *Anders* brief supplements a motion to withdraw filed after counsel has conscientiously reviewed the record and found the appeal to be frivolous." *C.R.G. v. Cabinet for Health & Family Serv.*, 297 S.W.3d 914, 915 (Ky. App. 2009). Thereafter, this court's duty is to review the record independently for prejudicial error. *Id.*

Involuntary termination proceedings are governed by Kentucky Revised Statutes (KRS) 625.090, which provides that a circuit court may involuntarily terminate parental rights only if the court finds by clear and convincing evidence that a three-pronged test has been met. First, the child must be deemed abused or neglected, as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination of parental rights must be in the child's best interest, and the court is provided with a series of factors that it shall consider when making this determination. KRS 625.090(1)(b); KRS 625.090(3). Third, the court must also find at least one of the ten grounds listed in the statute. KRS 625.090(2).

The first prong of the test was met in this case, as Mother had stipulated on two occasions that the children were neglected and the trial court also made separate findings that the three children had been neglected. KRS 625.090(1)(a)(1.).

As to the second prong, the trial court determined that termination of mother's parental rights was in the children's best interest under each of the factors listed in KRS 625.090(3). Under subsection (a), the trial court found that the evidence, including certified medical records from SCS, shows that Mother suffers from a mood disorder and opiate and cannabis abuse but is not engaged in any of the counseling or psychiatric treatment recommended by the Cabinet. Under subsection (b), the trial court found that the children were abused or neglected while in Mother's custody because she abused drugs, neglected their material, emotional and healthcare needs, and had abandoned them for a period of not less than ninety days. She also failed or was unable to comply with the trial court's remedial orders and treatment plan to return the children safely to her custody. Under subsection (c) the trial court found that the Cabinet had made appropriate referrals to substance abuse counseling, parenting classes, individual and group counseling, drug screens, supervised visitation and other services and the Cabinet, as indicated by the testimony of a social worker, was unaware of any other services that could be provided to allow for the safe reunification of Mother with the children. Under subsection (d) the trial court considered the efforts and adjustments made by Mother to enable the children to be returned, and found that she had failed to complete any substance abuse treatment, counseling or protective parenting program. Under subsection (e), the trial court found, based on the testimony of the social worker who had visited the children at their foster placements, that their physical, emotional and mental health needs were being met,

that they were receiving various therapeutic services and making progress in addressing their significant behavioral and emotional problems, and would continue to improve after Mother's parental rights were terminated. Under subsection (f), the trial court found that Mother had not paid any financial assistance while the children were in the care of the state.

Third and finally, the court found pursuant to KRS 625.090(2)(a), (e) and (g) that Mother had abandoned the children for a period of not less than ninety days; that for a period of not less than six months had continuously or repeatedly failed to provide essential parental care and protection for the children and there was no reasonable expectation of improvement; and for reasons other than poverty alone, had continuously or repeatedly failed to provide essential food, clothing, shelter, medical care or education.

Our normal standard of review in a termination of parental rights action is confined to the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01, based on clear and convincing evidence. "It requires that there be proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *C.R.G.*, 297 S.W.3d at 916 (internal citation omitted). The trial court's findings were supported by clear and convincing evidence in the record and consequently will not be disturbed on appeal.

Mother's counsel, in an abundance of caution, has raised three issues which she believes could support an appeal but are nonetheless insufficient to warrant

reversal of the termination: that the goal change to adoption for the two girls occurred within less than four months of their placement with the Cabinet; that there was no follow-up regarding a possible relative placement of the children; and finally, that there had been no adoptive placement identified for the son, and the daughters had not completed their transition to potential placement for adoption. At the time of the goal change to adoption, the daughters had been out of Mother's care for almost one year and Mother had made no progress on her case plan; Mother testified that she was not interested in relative placement and wanted the children to be in the care of the Cabinet; and finally, there was testimony that a potential placement was interested in adopting both of the girls and that the girls were in the process of transitioning to their adoptive home. We agree with Mother's counsel that these issues do not warrant reversal of the termination.

Based on the *Anders* brief filed by counsel for Mother and our independent review of the record, we find no prejudicial error. The orders terminating the parental rights of L.S. in her three children, M.J.D., J.R.S. and C.N.D. are affirmed. It is further ordered that L.S.'s counsel's motion to withdraw is granted.

ALL CONCUR.

ENTERED: JULY 22, 2016

/s/ IRV MAZE
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Bethanni E. Forbush-Moss
Louisville, Kentucky

BRIEF FOR APPELLEE:

Erika L. Saylor
Louisville, Kentucky