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# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-0001548-ME
&
NO. 2015-CA-0001549-ME

B.R.L., MOTHER APPELLANT

v.

APPEALS FROM BOYLE CIRCUIT COURT, FAMILY DIVISION
HONORABLE BRUCE PETRIE, JUDGE
CIVIL ACTION NOS. 15-AD-00007 & 15-AD-00008

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; B.S.S. and D.R.K. (infant children) APPELLEES

AND NO. 2015-CA-001550-ME

B.S., FATHER APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT, FAMILY DIVISION
HONORABLE BRUCE PETRIE, JUDGE
CIVIL ACTION NO. 15-AD-00007

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND D.R.K. (an infant) APPELLEES

AND NO. 2015-CA-001551-ME

B.S., FATHER APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT, FAMILY DIVISION
HONORABLE BRUCE PETRIE, JUDGE
CIVIL ACTION NO. 15-AD-00008

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; AND B.S.S. (an infant) APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: B.R.L., mother, and B.S., father, appeal the Boyle Family Court's order terminating their parental rights. In accordance with *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012) and *Anders v. California*, 386 U.S. 738 (1967), both parties' counsel filed a brief stating that no meritorious issue exists on appeal. The *Anders* briefs were accompanied by motions to withdraw, which were passed to this merits panel. After careful review, we agree with counsels' assessments, grant their motions to withdraw by separate order, and affirm the circuit court's orders terminating parental rights.

**Relevant Facts**

B.R.L. and B.S. are the biological mother and father, respectively, of D.R.K. and B.S.S. The Cabinet for Health and Family Services (the Cabinet) became involved with the family in January 2013 when B.R.L. was arrested for shoplifting with D.R.K. in her care. After being caught, B.R.L. apparently tried to escape with the child. B.R.L. testified that she had stolen the items to purchase drugs. She later pled guilty to the resulting theft and escape charges, and stipulated to neglect pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). At that time, B.R.L. admitted that B.S. smoked marijuana and took unprescribed pills, and that she also smoked marijuana. She also admitted that there was some history of domestic violence between them. The Cabinet placed the children with B.S.'s mother, S.S.

B.S. failed to work his case plan early in this case, so the Cabinet terminated his visitation. After receiving several calls stating that B.S. might be violating the prevention plan by contacting the children, Jeanne McQuerry, the original case worker for this case with the Cabinet, made an unannounced visit and discovered that B.S. was the only person present with the children. B.S. stipulated to neglect pursuant to *Alford*, *supra*, for violating the prevention plan.

The children were then removed and placed with B.R.L., who appeared to be substantially complying with her case plan at that time. She also had a steady job and housing, had complied with random screens and had completed various classes. However, in September 2014, B.R.L. was charged with a DUI and possession of an open alcoholic beverage container in a motor vehicle.

She pled guilty to the DUI and was required to complete additional classes; the open container charge was dismissed as a result of the plea. B.R.L. testified that she does not believe that she had a problem with alcohol, does not have a relapse prevention plan and still drinks beer.

Prior to the DUI charge, B.R.L. had executed a Durable Power of Attorney to her mother, M.K., on behalf of the children. B.R.L. was aware that she and her younger sister had previously been removed from M.K.'s custody because their stepfather had sexually abused B.R.L., and M.K. had not been appropriately protective. In addition, B.R.L. was evicted from her house.

Kristin Turpin Hazlett, an ongoing caseworker with the Cabinet, testified that a relative had contacted her and said B.R.L. had taken the children to Wisconsin. Hazlett testified that she understood that the children were taken there to stay, because the children were getting the required immunizations and were preparing to enroll in school. Hazlett testified that she and another worker flew to Wisconsin in order to retrieve the children, and the children were placed in foster care.

Although a new case plan was negotiated with B.R.L., she failed to work on it. B.R.L. apparently avoided appearing in court because she did not want to be arrested again since she had outstanding arrest warrants. Subsequently, she was arrested at her workplace. After B.R.L. failed to come to court three times, the court waived further reasonable efforts as to her.

B.S.'s case plan required him to have a psychosocial assessment, substance abuse assessment, domestic violence classes, parenting classes, contact DCBS daily for drug screens, maintain a stable home, maintain stable employment and visit the children regularly. Although B.S. made progress on his case plan, most of his work took place between March 2015 and the time of the hearing in July 2015. At the time of trial, B.S. lived with his mother and her two other adult children. B.S. testified that he mowed the grass and performed various other household chores, but he did not pay rent or utilities. B.S. also stated he had a job building pole barns for a man named "Bobby," but he could not provide Bobby's last name. Furthermore, B.S. was not paying child support.

On August 28, 2015, the family court entered findings of fact, conclusions of law and separate orders terminating B.R.L.'s and B.S.'s parental rights. This appeal follows. Counsel filed notices of appeal on behalf of B.R.L. and B.S. and submitted *Anders* briefs. In their *Anders* briefs, counsel asserted that no meritorious issues exist on which to base this appeal. B.R.L. also filed a *pro se* brief raising several issues. B.S. did not file a pro se brief.

**Analysis**

When a party files an *Anders* brief in a termination of parental rights case, it does not "require appellate courts to flesh out every conceivable argument appellant could have raised on appeal; instead, our review is akin to palpable error review requiring us only to ascertain error which 'affects the substantial rights of a party.'" *A.C.*, 362 S.W.3d at 370. As an appellate court, we will only reverse the

trial court's factual findings if they are clearly erroneous. *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). We review the trial court's application of law to those facts *de novo*. *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 716 (Ky. App. 2010).

We note that B.R.L. failed to cite legal authority of any kind in her *pro se* brief. "Our courts have established that an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues and arguments advanced on appeal." *Drummond v. Todd Cty. Bd. of Educ.*, 349 S.W.3d 316, 325 (Ky. App. 2011) (quoting *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005)). Even if B.R.L. had not waived appellate review of her arguments, however, we would affirm.

B.R.L. first alleges that Hazlett had a conflict of interest concerning her case. B.R.L. alleges that she knew the father of Hazlett's first child, and that Hazlett did not like B.R.L. for that reason. B.R.L. also claims that Hazlett had not adequately performed her job duties as a case worker. Consequently, B.R.L. contends that she should have been appointed different case workers. We do not believe that B.R.L. had raised an appealable issue in regards to these matters. Even if Hazlett's or McQuerry's performance was deficient in some way, B.R.L. has not stated how their actions could have altered the outcome in this case.

B.R.L. has also argued that she should have had two additional witnesses, Jordan Guest and Kurt Folger, testify at trial. Any error in this regard would fall upon her counsel. This Court has previously recognized the right to

effective assistance of counsel in termination of parental rights proceedings. In *Z.T. v. M.T.*, 258 S.W.3d 31 (Ky. App. 2008) this Court stated that

> [i]t is logical that the parent's right to counsel includes effective representation. However, it does not derive from the Sixth Amendment nor can RCr 11.42 be invoked. We hold that if counsel's errors were so serious that it is apparent from the record that the parent was denied a fair and meaningful opportunity to be heard so that due process was denied, this Court will consider a claim that counsel was ineffective.

*Id.* at 36. The *Z.T.* Court then continued to "caution future litigants and their counsel that the burden is onerous." *Id.* at 37. *See also T.W. v. Cabinet for Health & Family Services*, 484 S.W.3d 302, 306 (Ky. App. 2016) (reversing for ineffective assistance of counsel in a termination proceeding involving a conflict of interest).

"Decisions relating to witness selection are normally left to counsel's judgment and this decision will not be second-guessed by hindsight." *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000) (citation omitted), overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). B.R.L. does not identify any favorable testimony that these potential witnesses would have provided at trial. B.R.L. claims that she "only met [Guest] once in court, and did not even talk to him nor did he talk to me. I talked to him on the phone one time and he told me to keep doing what I was doing because I … had the kids at that time." The only other information in B.R.L.'s brief concerning Guest is that he knew that B.R.L.'s children were located in Wisconsin and she "guesses" that he

resigned before he could pass along that information. The only information she stated as to Kurt Folger was that he accompanied Hazlett to retrieve the children when they were located in Wisconsin. Based on B.R.L.'s brief, it appears that these witnesses would not have provided any additional information.

Our Supreme Court has previously held that the "[f]ailure to identify additional witnesses to present cumulative testimony cannot be regarded as prejudicial." *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 5 (Ky. 2007). Having reviewed the record, we believe that any error in failing to subpoena these witnesses would not be "so serious that it is apparent from the record that the parent was denied a fair and meaningful opportunity to be heard so that due process was denied[.]" *Z.T.*, 258 S.W.3d at 36.

Finally, B.R.L. seems to allege that the trial court abused its discretion in terminating her parental rights under the facts of this case. We have reviewed the records for both B.R.L. and B.S. and disagree.

Under KRS 625.090(1)(a)(1)-(2), a 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 "[t]he child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1)…" or "[t]he child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding[.]" B.R.L. stipulated to neglect in regard to the shoplifting incident, and B.S. had previously stipulated to neglect pursuant to *Alford*, *supra*, in relation to his violation of his

prevention plan. The circuit court additionally determined that the children were abused and neglected in this proceeding.

Pursuant to KRS 600.020:

> (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:
> . . . .
> 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 . . .

The record supports each of these findings by the trial court. Under subsection (3), B.R.L. had admitted that she and B.S. smoked marijuana, that B.S. abused prescription pills and that B.R.L. had shoplifted in order to buy additional controlled substances. She was also arrested for driving under the influence. B.S. did not complete random drug screens, as per his plan. Under subsection (4), B.R.L.'s and B.S.'s failure to complete their case plans means that they have not had contact with their children. Although B.R.L. has paid some child support, B.S.

has not. Having reviewed the record, we cannot say that the family court's finding of abuse and neglect was clearly erroneous.

KRS 625.090 provides as follows:

> (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;
> . . . .
> (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;
> . . . .

The family court found that subsection (a) was satisfied because B.S. and B.R.L. "engaged in a pattern of substance abuse for no less than ninety (90) days, which has rendered [them] incapable of caring for the immediate and on-going needs of the child." Given B.S. and B.R.L.'s pattern of substance abuse as outlined above, we cannot disagree. Concerning subsections (e) and (g), the record is replete with instances of substance abuse and criminal acts that have rendered

both B.S. and B.R.L. unable to complete their case plans. Given our review of the record, we cannot hold that the family court's findings were clearly erroneous.

Finally, KRS 625.090(1)(b) requires the court to find that termination would be in the best interests of the children. The trial court specifically addressed the factor set out in KRS 625.090(3)(c), which provides:

> (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;
> …

Concerning this factor, the trial court found that "[t]he Cabinet for Health and Family Services has provided or offered to provide all reasonable services to [B.R.L.] and [B.S.] in an effort to keep the family together." The record reflects that the Cabinet repeatedly gave B.R.L. and B.S. chances to complete their case plans, and that they did not. Again, we cannot say that the trial court clearly erred in finding that the Cabinet made reasonable efforts or that termination would be in the best interests of the children.

**Conclusion**

Because no meritorious issues existed on appeal, we affirm the Boyle Family Court's order terminating B.R.L.'s and B.S.'s parental rights is affirmed.

ALL CONCUR.

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