

RENDERED: NOVEMBER 10, 2022; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-1378-ME

S.M., MOTHER

APPELLANT

v. APPEAL FROM PIKE FAMILY COURT
HONORABLE W. KENT VARNEY, JUDGE
ACTION NO. 20-AD-00069

G.C.M.; M.J.M.; T.M.; CABINET FOR
HEALTH AND FAMILY SERVICES;
AND S.J.M., A MINOR CHILD

APPELLEES

AND

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HONORABLE W. KENT VARNEY, JUDGE
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G.C.M.; M.J.M.; T.M.; CABINET FOR
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AND S.A.M., A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: This is an appeal from the Pike Family Court’s findings of fact, conclusions of law, and order terminating parental rights and judgment of adoption entered as to each of the minor children on October 25, 2021. Counsel for Appellant has filed briefs pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 81 L. Ed. 2d 493 (1967), and *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), and has sought leave to withdraw.

Appellees S.A.M. (born November 11, 2011) and S.J.M. (born June 17, 2014), are the children of Appellant S.M. (Mother) and Appellee T.M. (Father). The children were committed to the “legal and physical custody” of Appellees

G.C.M. and M.J.M.¹ by order of the Wise County, Virginia Juvenile and Domestic Relations District Court² entered October 3, 2017.

In June of 2019, Mother was convicted in the United States District Court for the Western District of Virginia on drug-related charges and sentenced to thirty-six months to serve with three years of supervised probation, to be followed by an additional year of probation on a state criminal conviction. She was incarcerated from July of 2019 until September of 2021.

On November 4, 2020, G.C.M. and M.J.M. filed their petition for adoption in the Pike Circuit Court. A final hearing on the issue of the termination of Mother's parental rights was held on October 19, 2021.³ At the conclusion of that hearing, the court made oral findings on the record that the adoption could proceed without Mother's consent. Evidence regarding the factors required by KRS⁴ 199.520 was heard on October 21, 2021. The court's docket sheet contains the notation that, "All facts stated in the petition were established. All legal req. met. Adoption granted." On October 25, 2021, the trial court entered its findings

¹ G.C.M. and M.J.M. may or may not be the children's maternal grandparents. G.C.M. testified that S.M. is his "daughter." M.J.M. testified that S.M. is her "daughter" but also testified that her parents adopted S.M. and she is therefore her sister. Their status vis-à-vis the children is unclear.

² Action Nos. JJ017071-01-00 and JJ017070-01-00.

³ Father voluntarily terminated his parental rights and consented to the adoption at a telephonic hearing the following day.

⁴ Kentucky Revised Statutes.

of fact, conclusions of law, and order terminating parental rights and a separate judgment of adoption. Mother has appealed. Based upon our review of the record and the relevant law, we affirm.

MOTION TO WITHDRAW

In *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), this Court approved the procedure provided in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), for use in appeals from orders terminating parental rights. The Court found that, while indigent parents are entitled to counsel during the appellate process, they do not have the right to bring frivolous appeals. Thus, in order to fulfill counsel's duties to his client under such circumstances, "counsel should, at a minimum, review the circuit court's (1) neglect and/or abuse determination; (2) finding of unfitness under KRS 625.090(2); and (3) best-interests determination." *A.C.*, 362 S.W.3d at 371. Clearly, the brief filed by Mother's counsel herein meets those requirements. Based upon this finding, the Court will grant her motion for leave to withdraw by contemporaneous order.

STANDARD OF REVIEW

As the consequences of an adoption without consent to a parent's fundamental liberty interest are so severe, a judgment granting such a petition must be supported by clear and convincing evidence. *R.P., Jr. v. T.A.C.*, 469 S.W.3d

425, 426-27 (Ky. App. 2015). Clear and convincing evidence is “proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014). Therefore, our review is pursuant to the clearly erroneous standard of CR⁵ 52.01 and we will only disturb the trial court’s findings if they are unsupported by substantial evidence. *Id.*

ANALYSIS

KRS 199.502 states in pertinent part:

(1) Notwithstanding the provisions of KRS 199.500(1), an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding that any of the following conditions exist with respect to the child:

(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;

...

⁵ Kentucky Rules of Civil Procedure.

(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;

G.C.M. testified that at the time Mother brought the children to his home in 2017, she was an active drug user. He told her that she could see the children if she got help. He even took her to a facility to get treatment, but she left. He also indicated that not only was she a drug abuser, but she was a drug dealer. He referenced her Facebook posts featuring photos of her wearing a gold plug,⁶ as well as photos of large quantities of drugs such as meth and marijuana. However, even during this period when she was earning money from the sale of drugs, she paid no child support.

M.J.M. testified that, prior to her incarceration, they told Mother that she could see the children and speak with them on the phone if she could pass a drug test. She confirmed her husband's testimony that they did try to get help for Mother.

⁶ G.C.M. testified that his internet research showed that wearing such a device indicates the status of drug dealer among those active in the trade.

Mother testified that she voluntarily took the children to G.C.M. and M.J.M. She stated that she had been abusing drugs since she was in her teens. She indicated that S.J.M. was born addicted but S.A.M. was not. She said that she had used drugs from the time they were born. Although she did not use drugs in front of them, she admitted that she did use drugs when she was supposed to be taking care of them. She confirmed the testimony of G.C.M. and M.J.M. that they had tried to get help for her, but she left.

She testified that between June of 2017 and June of 2019 she saw the children one day in the park and had a New Year's video chat in 2018. She agreed that she paid no child support. She understood what was required for her to see the children, but she didn't do what was necessary. She stated that she stayed in contact and asked to see them but did not file for custody or visitation. She admitted that she was not impoverished and did have money from drug dealing.

The trial court found as to each child by clear and convincing evidence pursuant to KRS 199.502(1)(a) that Mother had no visitation with the children in more than ninety days specifically referencing the period from "June 2017 to her incarceration in June 2019" and excluding the period of her incarceration. The court also noted that G.C.M. and M.J.M. did not place "an unreasonable stipulation" on Mother by requiring her to produce a negative drug screen prior to exercising visitation with the children.

The court also found pursuant to KRS 199.502(1)(e) that Mother has failed to provide “essential parental care and protection” for the statutory period and that there was “no reasonable expectation of improvement” G.C.M. testified that Mother has not provided any parental support to the children since they have been in his care. She has not been there to get them ready for school or help them with homework or taken them to any medical or dental appointments. When asked if she had sent any cards or gifts, he indicated that she had sent a couple of cards.

M.J.M. also testified that Mother had sent some cards and letters. However, it is M.J.M. who takes care of the children’s day-to-day needs. She stated that S.J.M. has a heart murmur and they are awaiting an appointment for a specialist. As to the issue of foreseeable improvement the court concluded that, while Mother testified that she was living in a halfway house and intended to transition to a sober living facility, she had expressed no concrete plans regarding the care of her children.

Finally, pursuant to KRS 199.502(1)(g), the court found that “for reasons other than poverty alone” Mother has failed to provide “essential food, clothing, shelter, medical care or education reasonabl[y] necessary and available for the child’s well-being” and that there was “no reasonable expectation of significant improvement in the parent’s conduct in the immediately foreseeable

future, considering the age of the child.” Mother testified that she sent some clothes for the children by way of their other grandmother “a few times.” She said that she sent some money by mail prior to her arrest. However, the court explained that while Mother had income from the sale of drugs, she had not used it to provide for her children. As to potential improvement, the court once again referenced Mother’s failure to have a plan to supply her children with the necessities of life.

The Court notes that although styled “Findings of Fact, Conclusions of Law and Order Terminating Parental Rights” and “Judgment of Adoption” these documents do not reflect the “mistaken procedural approach” most recently addressed in *J.L.R. v. A.L.A.*, 645 S.W.3d 63, 65 (Ky. App. 2022) (citing *Wright v. Howard*, 711 S.W.2d 492, 496 (Ky. App. 1986)). The trial court clearly recognized that “KRS 199 encompasses KRS 625.” *E.K. v. T.A.*, 572 S.W.3d 80, 83 (Ky. App. 2019). The petitions filed by G.C.M. and M.J.M. were titled “Petition for Adoption” and were properly adjudicated by the trial court pursuant to KRS 199.502 and KRS 199.520. Having clarified this issue, we are satisfied from our independent review of the record that the trial court’s findings of fact based upon KRS 199.502(1)(a), (e), and (g) are supported by clear and convincing evidence.

Accordingly, we affirm the Pike Family Court's findings of fact, conclusions of law and order terminating parental rights and judgment of adoption entered as to each of the minor children.

ALL CONCUR.

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