

Commonwealth of Kentucky
Court of Appeals

NO. 2022-CA-0895-ME

D.D.W.

APPELLANT

EXPEDITED APPEAL FROM MONTGOMERY CIRCUIT COURT
v. HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 21-AD-00027

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

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, DIXON, AND JONES, JUDGES.

JONES, JUDGE: D.D.W. (“Father”) appeals an order from the family court division of the Montgomery Circuit Court (“family court”) terminating his parental rights to his minor child, L.G.M. (“Child”). In accordance with *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), counsel for Father

filed an *Anders*¹ brief, which was accompanied by a motion to withdraw.

Thereafter, this Court advised Father of his right to continue this appeal *pro se*, and he was provided with additional time to file a brief of his own choosing. Father did not file a brief or take any other action in relation to this appeal. The Cabinet filed an appellee brief in support of the family court's order of termination.

Following careful review of the record, and all applicable law, we grant counsel's motion to withdraw by separate order and affirm the family court's order terminating Father's parental rights.²

I. BACKGROUND

Child was born in February 2015. The Cabinet originally became involved with the family sometime in 2018 when concerns arose about parental substance abuse and instability. Child was removed from Mother's home in October 2018; Father was not living in the home at that time because he was incarcerated. Child's maternal grandfather became his permanent custodian in April 2019. Unfortunately, not long afterwards, maternal grandfather became terminally ill rendering him unable to care for Child. Due to maternal

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

² Appellee, J.M.M. ("Mother"), is Child's biological mother. Mother's parental rights were also terminated as part of the order on appeal. However, Mother has not appealed and has not entered an appearance in this appeal despite being named as an appellee. This Opinion considers only the propriety of the circuit court's termination of Father's parental rights. Mother is mentioned only insofar as is necessary to place this matter in the proper factual and procedural context.

grandfather's illness, another relative, T.B., began caring for Child. Maternal grandfather passed away in the summer of 2020.

Neither Mother nor Father was able to reassume custody of Child at that time. As a result, the Cabinet filed a dependency, neglect, and abuse ("DNA") action and a motion seeking emergency custody of Child, which was granted. At that time, the Cabinet elected to formally place Child in foster care with T.B.

Following an adjudication hearing, the family court determined that Child was dependent, and the Cabinet was awarded temporary custody in October 2020. A disposition hearing was held in December 2020, and the Cabinet retained custody of Child. The permanency goal for Child at that time was a return to his parents. Father was ordered to work with the Cabinet to complete a case plan to facilitate a return of Child to his care.

Thereafter, Amanda Bolton, the Cabinet's designated social worker for this family, attempted to contact Father by mailing letters to his institutional addresses. Father, however, failed to respond to Ms. Bolton or otherwise contact the Cabinet. The Cabinet has requested that Father avail himself of any prison programs available; however, he has not done so.

Given Mother and Father's failure to work case plans, the Cabinet changed its permanency goal for Child to adoption and filed a termination of parental rights petition with the family court on March 21, 2022. A final hearing

was held on October 28, 2022. In addition to the facts set forth above, Ms. Bolton testified that Child is currently doing well in T.B.'s home, and that T.B. can provide Child with the type of care necessary to address Child's on-going needs. The evidence at the hearing also revealed that neither Mother nor Father had provided any financial or emotional support to Child since his original removal in 2018. While Father was in jail in 2018 when Child was originally removed from Mother's care, he was released for a brief period prior to 2020. However, in early 2020, he committed a series of crimes that landed him back in jail. He is currently serving a lengthy prison sentence following his conviction of one count of possession of a controlled substance in the first degree (methamphetamine); three counts of burglary in the second degree; receiving stolen property; one count of burglary in the third degree; and of being a persistent felony offender in the second degree. His full serve out date is May 2, 2035.

Following the final hearing, the family court entered detailed findings of fact and conclusions of law and an order terminating Father's parental rights.

This appeal followed.

II. ANALYSIS

In *A.C.*, this Court adopted the procedures identified in *Anders* for appeals from orders terminating parental rights when counsel has concluded that the appeal is frivolous. *A.C.*, 362 S.W.3d at 371. Counsel is required to "conduct

a thorough, good-faith review of the record[.]” *Id.* “Once counsel has reached the conclusion that the appeal is wholly frivolous, counsel “should so advise the court and request permission to withdraw.” *Id.* (quoting *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400). 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 Servs.*, 297 S.W.3d 914, 915 (Ky. App. 2009). Thereafter, this Court’s duty is to review the record independently for prejudicial error. *Id.* This 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.

KRS³ 625.090 sets forth the requirements which must be met before a court in Kentucky may involuntarily terminate a parent’s rights to his child. First, as it concerns this appeal, the lower court must determine that the child is an abused or neglected child or that the child was previously determined to be an abused or neglected child by a court of competent jurisdiction. KRS 625.090(1)(a)1.-2. Second, a petition seeking the termination of parental rights must have been filed by the Cabinet pursuant to KRS 620.180 or 625.050. KRS 625.090(1)(b)1. Third, the lower court must find that termination is in the best interest of the child. KRS 625.090(1)(c). Finally, the lower court must find by

³ Kentucky Revised Statutes.

clear and convincing evidence the existence of one or more of the eleven grounds (a) through (k) listed in KRS 625.090(2). Even if all these requirements are met, the court may choose in its discretion not to terminate a parent’s rights if the parent has established by a preponderance of the evidence that the child will not continue to be an abused or neglected child if returned to the parent. KRS 625.090(5).

After the termination hearing, the lower court is required to make findings of fact and conclusions of law supporting its decision on the termination petition. *Id.* “Broad discretion is afforded to courts to determine whether parental rights should be terminated, and our review is limited to a clearly erroneous standard.” *Cabinet for Health and Family Services v. H.L.O.*, 621 S.W.3d 452, 462 (Ky. 2021). Factual findings which are supported by substantial evidence of record are not clearly erroneous. *R. M. v. Cabinet for Health and Family Services*, 620 S.W.3d 32, 37 (Ky. 2021). “Substantial evidence is that which is sufficient to induce conviction in the mind of a reasonable person.” *Id.* “When the findings are supported by substantial evidence, then appellate review is limited to whether the facts support the legal conclusions which we review *de novo*. If the [lower] court’s factual findings are not clearly erroneous and the legal conclusions are correct, we are limited to determining whether the [lower] court abused its discretion in applying the law to the facts.” *H.L.O.*, 621 S.W.3d at 462 (citing CR⁴ 61.02).

⁴ Kentucky Rules of Civil Procedure.

An abused or neglected child includes a child whose health or welfare is harmed or threatened with harm when his parent:

1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
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 a substance use disorder 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;
5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
7. Abandons or exploits 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 when financially able to do so or offered financial or other means to do so. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that

reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;

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) cumulative months out of forty-eight (48) months; or

10. Commits or allows female genital mutilation as defined in KRS 508.125 to be committed[.]

KRS 600.020(1)(a).

The family court concluded that Father's ongoing criminal lifestyle and substance abuse issues rendered him "incapable of caring for the immediate and ongoing needs of the child" causing Child to be neglected. We agree. Father was incarcerated when Child was originally removed from Mother's care in 2018. Even though Father was subsequently released, he did not change his ways. Instead, he continued to engage in substance abuse and criminal conduct that landed him back in prison where is currently serving a lengthy sentence. Father's pattern of conduct has left him unable to care for Child and meet his needs.

The next requirement is that the termination petition must have been filed by the Cabinet "with the court pursuant to KRS 620.180 or 625.050[.]" KRS 625.090(1)(b)1. Child was committed to the Cabinet's custody, and the Cabinet subsequently filed its petition seeking termination of parental rights on or about October 28, 2021, satisfying KRS 625.090(1)(b)1.

The family court next concluded that numerous grounds supported termination including that “for reasons other than poverty alone [Father] 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.”⁵ KRS 625.090(2)(g). Specifically, the family court determined that Father’s inability to provide for Child was not due to poverty alone; rather, it was “largely due to a lifestyle of instability, substance misuse and criminal conduct.” Substantial evidence supports this conclusion. Father’s own choice to continue his criminal lifestyle instead of working with the Cabinet led to his present, lengthy incarceration and prison sentences. And, as the family court found, given the length of Father’s prison sentences, there is little hope that Father will be able to care for and support Child anytime soon.

Lastly, the family court considered the best interest factors, and concluded that termination of Father’s parental rights was best for Child. To this end, it noted that Father had failed to care for and support Child for numerous years and would not be able to do so for many years to come. In contrast, Child is

⁵ We decline to review all the grounds of termination identified by the family court because termination requires that only one ground be present. *B.E.K. v. Cabinet for Health and Family Services*, 487 S.W.3d 457, 468 (Ky. App. 2016).

thriving in T.B.'s home, and she desires to adopt him. We wholeheartedly agree with the family court that Child deserves more support, care, and permanency than Father is able or willing to provide to him.

III. CONCLUSION

As counsel for Father attested in the *Anders* brief and the Cabinet agreed, no meritorious grounds exist upon which to grant relief. Accordingly, the order terminating Father's parental rights is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marsha Megan Hughes Richmond
Mt. Sterling, Kentucky

BRIEF FOR APPELLEE CABINET
FOR HEALTH AND FAMILY
SERVICES:

Kevin Martz
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