

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002063-ME
AND
NO. 2012-CA-002064-ME

K.M.F.Y.

APPELLANT

v. APPEALS FROM JOHNSON CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NOS. 11-AD-00012 AND 11-AD-00013

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY FOR ITSELF AND AS
NEXT FRIEND OF B.J.Y.; AND B.D.H.

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CAPERTON, JUDGE: The Appellant, K.M.F.Y., appeals the order and judgment of involuntary termination and findings of fact and conclusions of law terminating her parental rights to the minor children, B.J.Y. and B.D.H., issued by the Johnson

Family Court on October 30, 2012.¹ On appeal, counsel for K.M.F.Y. has filed an *Anders* brief² per *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361, 362 (Ky. App. 2012), asserting that this appeal is wholly frivolous but setting forth any possible appealable issue; counsel requests to be allowed to withdraw from representation of K.M.F.Y. After our independent review of this matter, and in light of *A.C.*, we are in agreement with counsel that there is no basis warranting relief on appeal and, therefore, affirm the trial court. Counsel's motion to withdraw from representation of K.M.F.Y. is hereby granted.

K.M.F.Y. is the natural mother of the minor children, B.D.H. and B.J.Y., who are the subject of this action herein, and who were committed to the Cabinet for Health and Family Services by the Johnson Family Court on July 6, 2010.³ At the time that the court committed the children, K.M.F.Y. was incarcerated at Western Kentucky Correctional Complex as a result of a December 20, 2010, conviction for criminal abuse in the second degree and complicity to commit assault in the fourth degree (child abuse) for which she was sentenced to

¹ We note that the court below issued separate orders terminating the parental rights of K.M.F.Y. with respect to B.D.H. and B.J.Y., and that those orders were appealed separately as case numbers 2012-CA-002063, and 2012-CA-002064, which appeals have been properly consolidated before this Court, and are now addressed herein.

² *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In *Anders*, the United States Supreme Court addressed “the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal.” 386 U.S. at 739, 87 S.Ct. at 1397.

³ This Court notes that following the commitment of the children to the Cabinet, neither K.M.F.Y., J.D.R. (father of B.D.H.), nor C.M. (father of B.J.Y.) made any attempt to visit the children. It was noted that C.M. came to a few visits with his son, but then ceased visiting, and even failed to approach his son and the foster father when he encountered them in a local store. K.M.F.Y., who was released on bond prior to again being incarcerated, conceded that she left the jurisdiction and went to Tennessee, during which time she had no contact with either her children or the Cabinet.

five years' incarceration, as well as an additional one year for first-degree bail jumping to be served consecutively for a total of six years. K.M.F.Y. remained incarcerated until the date of the hearing for involuntary termination of her parental rights which was held on October 25, 2012. As of March 2013, the time that her brief was submitted to this Court, K.M.F.Y. had sixteen months of incarceration remaining before she would be eligible for parole.

Below, the court found by clear and convincing evidence that the minor children, B.J.Y. and B.D.H., had been abused,⁴ neglected, or abandoned, and had not received the essential parental care and necessities of life, and that based upon the mother's incarceration there was no reasonable prospect of improvement. Further, since July of 2010, the minor children have remained in foster care under the supervision of the Cabinet in the same home in which they were initially placed. On appeal, K.M.F.Y. presumably argues that the court erred in terminating her parental rights to the two minor children, though she has submitted no brief in support of that position.⁵ The Cabinet argues that the court below correctly terminated the parental rights of K.M.F.Y. with respect to both minor children, and urges this Court to affirm.

⁴ It appears that J.D.R., who is the father of B.D.H., was found guilty of first-degree assault after dropping B.D.H. and breaking his ribs and legs when B.D.H. was five months old. J.D.R. received a sentence of ten years for that conviction.

⁵ Indeed, this Court notes that the only brief submitted on behalf of K.M.F.Y. was the aforementioned *Anders* brief filed by her appointed counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed 2d 493 (1967), wherein counsel asserted that he found no error in the proceedings below which would justify reversal of the court's judgment terminating parental rights, but nevertheless requested this Court to review the record to ensure K.M.F.Y.'s right to fundamental fairness and one level of appellate review as a matter of right.

In reviewing this matter, we note that the trial court has a great deal of discretion in determining whether the child fits within the abused or neglected category and whether the abuse or neglect warrants termination. *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977). This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986).

We further note that, "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Rowland v. Holt*, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934). The record contains substantial evidence to support the findings of the trial court. We review this matter with this standard in mind.

Upon review of the record and applicable law, we find that the determination of the court below was supported by substantial evidence. There is no question that the father of B.D.H. was convicted for assaulting B.D.H. when he was five months old, and that K.M.F.Y. pled guilty to complicity in that assault. We are in agreement with the court that the violence perpetrated on B.D.H. indicated a risk of harm to B.J.Y., particularly in light of the fact that K.M.F.Y.

testified that the father of B.D.H. also struck B.J.Y., causing his mouth to bleed. Further, the record clearly indicates that none of the parents involved have made an effort to care for or maintain a relationship with the children, nor to support them in any way. The children have remained in foster care since the time they were committed in 2010, where they have been living continually without incident. Accordingly, we are in agreement with the court below that both the minor children B.D.H. and B.J.Y. were abused or neglected as defined by Kentucky Revised Statutes (KRS) 600.020, and that pursuant to KRS 625.090(3), it was in the best interest of the children that the parental rights of K.M.F.Y. be terminated.

Wherefore, for the foregoing reason, this Court hereby affirms the October 30, 2012, orders and judgments of involuntary termination of parental rights, as well as the findings of fact and conclusions of law made by the Johnson Circuit Court, the Honorable Janie McKenzie-Wells presiding.

ALL CONCUR.

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