

RENDERED: OCTOBER 11, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002158-ME

T.R.P.

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 12-AD-00010

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY; AND K.R.P., A CHILD

APPELLEES

AND

NO. 2012-CA-002159-ME

T.R.P.

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 12-AD-00011

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY; AND A.L.P., A CHILD

APPELLEES

OPINION AND ORDER
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CAPERTON, JUDGE: T.R.P. appeals from the termination of her parental rights to two of her children, A.L.P. and K.R.P. On appeal, counsel for T.R.P. has filed an *Anders* brief¹ 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 T.R.P. After our independent review of this matter, 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 T.R.P. is hereby granted.

The Cabinet filed petitions for termination of parental rights for both A.L.P. and K.R.P., children of T.R.P. and R.P., the father, on June 6, 2012. A hearing was conducted on November 16, 2012. Findings of fact, conclusions of law, and judgments terminating the parental rights of T.R.P. and R.P. to the children were entered on November 19, 2012. The father, R.P., has not appealed the termination of his parental rights to A.L.P. and K.R.P.

¹ *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.

T.R.P. and R.P. have three children together: B.P., K.R.P., and A.L.P. The oldest child, B.P., was removed from T.R.P. and R.P. and was placed in the custody of a relative due to neglect after being exposed to domestic violence. B.P. was not subject to this termination proceeding due to being permanently placed with a relative. At the time of the hearing, K.R.P. and A.L.P. had been in foster care for at least fifteen of the last twenty-two months.

The second child, K.R.P., was removed from T.R.P. on two occasions. At the time of the second removal, K.R.P. was on a “trial home visit” with T.R.P. following the birth of A.L.P. in June of 2009. At that home visit, T.R.P. left a weapon, a knife, accessible to K.R.P. and the home was not clean. Additionally, T.R.P. failed to have adequate food in the home for the children. These problematic conditions within the home had been addressed multiple times by the Cabinet for Health and Family Services, but T.R.P. had failed to improve these conditions. Both children were removed due to the conditions found at the home visit. The Carter Family Court adjudged both children to be neglected by T.R.P. At the November 16, 2012, hearing, the Carter Family Court took judicial notice of its record in the neglect case with no objection from either parent.

Following the removal of the children, the Cabinet prepared a case plan and worked to rehabilitate the family for the possibility of reunification. The Cabinet asked T.R.P. to maintain stable housing, to complete parenting classes, and to obtain mental health treatment. T.R.P. completed parenting classes but was unable to demonstrate an improvement in her parenting skills at visitations with the

children. T.R.P. was unable to provide the necessities of life for her children, unable to maintain stable housing for herself, and unable to meet her mental healthcare needs. The inability to maintain stable housing was not due to her poverty, as she had the opportunity to obtain an apartment based upon her income. T.R.P. only attended the initial appointment with a mental health care provider.

T.R.P. testified that she was on disability for “major depressive disorder.” She further testified on cross-examination that she was too depressed to care for small children. T.R.P. was not currently receiving any medication or treatment for her depression despite having a medical card that provided her access to care at no cost.

The Cabinet, through the testimony of Mary Sparks, concluded that T.R.P. was unable to make sufficient progress to allow the safe return of her children and that additional services were unlikely to bring about lasting parental adjustment enabling the safe return of the children.

Based upon the evidence, the family court determined by clear and convincing evidence that K.R.P. and A.L.P. were abused and neglected children and sufficient grounds existed for the termination of T.R.P.’s parental rights.

Counsel for T.R.P. timely filed a notice of appeal. Counsel also filed a motion to withdraw² and a brief that comports with *Anders v. California*.³

² We have granted counsel’s motion to withdraw as set forth *supra*.

³ Counsel in its *Anders* brief presents this Court with the possibility of the argument that the court misinterpreted the law, misapplied the facts to the law, abused its discretion and committed reversible error when it terminated T.R.P.’s parental rights without clear and convincing evidence to do so. Counsel then appropriately, per *A.C.* and *Anders*, informs this Court why such an argument is without merit. The Cabinet also undertook an examination of the record

This Court, in *A.C. v. Cabinet for Health and Family Services*, applied *Anders* to an appeal of termination of parental rights in which appointed counsel determines that the appeal is wholly frivolous. Upon a good faith review of the record,

[i]f counsel finds his [client's] case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished to the indigent and time allowed for him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all

the proceedings, to decide whether the case is wholly frivolous.

A.C. at 364-365 (quoting *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400).

Sub judice, T.R.P.'s counsel submitted an *Anders* brief in compliance with *A.C.* Thus, we are obligated to independently review the record and ascertain whether the appeal is, in fact, frivolous. *A.C.*, 362 S.W.3d 361. Having done so, we agree with counsel's belief that T.R.P. does not have grounds warranting relief.

This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in Kentucky Rules of Civil Procedure (CR) 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

and, likewise, found no preserved errors or any issues apparent on the face of the record to indicate any arguable merit to the appeal.

to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986).

As set forth in Kentucky's termination statute, KRS 625.090,⁴ a court may involuntarily terminate parental rights if the court finds by clear and convincing evidence that a three-prong test has been met. First, the child must have been

⁴ KRS 625.090 sets forth:

(1) The 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:

- (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and

(b) Termination would be in the best interest of the child.

(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;
- (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
- (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
- (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
- (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;
- (f) That the parent has caused or allowed the child to be sexually abused or exploited;
- (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

found to have been an abused or neglected child as defined by KRS 600.020,⁵ or the circuit court must find that the child's parent has been criminally convicted of abusing any child and that the abuse or neglect is likely to occur to the child that is the subject of the instant termination action if the parental rights are not terminated. KRS 625.090(1)(a). Secondly, the court must find that at least one of

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;

(h) That:

1. The parent's parental rights to another child have been involuntarily terminated;
2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

(a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

(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;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

a number of specified grounds of parental unfitness exists. KRS 625.090(2).

Finally, termination of parental rights must be in the child's best interest. KRS 625.090(1)(b).

In making such findings, the trial court has a great deal of discretion in an involuntary termination of parental rights action. *M.P.S. v. Cab't for Human*

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

(4) If the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.

(5) If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights.

(6) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either:

(a) Terminating the right of the parent; or

(b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

⁵ KRS 600.020(1) sets forth the definition of an abused or neglected child:

(1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:

(a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;

(b) 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;

(c) 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;

(d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

(e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

Resources, 979 S.W.2d 114, 116 (Ky. App. 1998). Thus, the findings of the court below will not be disturbed unless no substantial evidence in the record exists to support its findings. *Id.* Moreover, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *See Murphy v. Murphy*, 272 S.W.3d 864 (Ky. App. 2008).

Sub judice, the family court found that the requirements of KRS 625.090 were met and that termination of T.R.P.'s parental rights was in the best interest of the children. As our courts have repeatedly held, clear and convincing proof does not necessarily mean uncontradicted proof. *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (Ky. App. 1934). 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. *Id.* It is not the province of this court to review the factual evidence in a termination action *de novo*, and we decline to do so in this instance.

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- (f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
 - (g) Abandons or exploits the child;
 - (h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. 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; or
 - (i) 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) of the most recent twenty-two (22) months[.]

Below, the court had the discretion to consider various factors, including T.R.P.'s inability to make sufficient progress to allow the safe return of her children, the ongoing mental health challenges facing T.R.P., as well as the possibility of repetition of past neglect. *See G.G .L. v. Cab't for Human Resources*, 686 S.W.2d 826, 828 (Ky. App. 1985). Ultimately, the evidence submitted below was of a nature sufficient to support the decision of the court, i.e., there was substantial evidence to support the family court's decision in this case.

Consequently, we affirm.

In light of the aforementioned we affirm the termination of T.R.P.'s parental rights.

JONES, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS AND WILL FILE SEPARATE
OPINION.

ENTERED: October 11, 2013

/s/ Michael O. Caperton
JUDGE, COURT OF APPEALS

CLAYTON, JUDGE, CONCURRING: While I agree with the reasoning and the result reached by the majority, I write separately because I believe that the trial court did not make findings as required under CR 52.01. The court is obligated in actions tried without a jury to find the facts specifically and state separately its conclusions of law. Here, the court's order recites the factors in KRS 600.020 but

not the facts which support these conclusions. Thus, the trial court's order only recites conclusions of law. In termination of parental rights cases, there is a mandatory duty to make findings if there is a dispute regarding essential facts. Therefore, findings as well as legal conclusions need to be made in this matter.

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BRIEF FOR APPELLEE:

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