

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000144-ME

J.L.T.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DONNA DELAHANTY, JUDGE  
ACTION NO. 12-AD-500150

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND FAMILY  
SERVICES; AND K.B.D.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: J.L.T. (Father) appeals the Jefferson Family Court's December 17, 2012 order terminating his parental rights. 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* brief conceding that no meritorious issue exists

to present to this Court, accompanied by a motion to withdraw which was passed to this merits panel. After careful review, we agree with counsel's assessment, grant his motion to withdraw by separate order, and affirm the family court's order terminating Father's parental rights.

A male child, K.B.D., was born on April 25, 1999, to K.R.D.T (Mother) and Father, an unmarried couple. The extent of Mother's and Father's involvement in the early years of Child's life is unclear. However, the record in this case indicates that the Cabinet for Health and Family Services became involved with Child in February 2011 due to allegations of abuse and neglect. At that time, Child was living with a non-relative permanent custodian. The family court placed Child in the care and custody of the Cabinet. In the meantime, the Cabinet undertook efforts to locate Mother and Father.

The Cabinet discovered Father was incarcerated in the Daviess County Detention Center. On August 22, 2011, the Cabinet sent Father a letter notifying him that Child was in foster care and requesting that Father: (i) notify the Cabinet of his release date; and (ii) identify relatives who might be willing to care for Child. Father responded to the Cabinet's letter, admitting therein that he had not seen Child since Child was two years old, but expressing his desire to remain in Child's life. Father did not identify any possible relative placements.

Between 2011 and 2012, Father oscillated between the Fayette County Detention Center and the Daviess County Detention Center. Father managed to shed the shackles of incarceration for a five-month period between December 2011

and May 2012. During that period, Father made no efforts to contact the Cabinet or inquire into Child's well-being.

The Cabinet filed its petition for involuntary termination of Father's parental rights on May 8, 2012. The action was tried before the family court on November 30, 2012. Because Father was incarcerated at the time of trial, he testified telephonically, as permitted by KRS<sup>1</sup> 197.022(3).

Father admitted he has been consistently incarcerated for at least part of every year since 2001. He explained that most of his criminal history stems from alcohol and drug addictions which began when he was nineteen years old. Father testified he is just now beginning, at the age of thirty-six, to address his substance-abuse problems. Father further admitted he has failed to provide for Child's material needs and support since Child was two years of age; Child was twelve years old at the time of trial. Finally, Father acknowledged he made no efforts to contact the Cabinet since his August 2011 letter, despite being released from custody for a period of time.

Tim Padgett, a social worker with the Cabinet, also testified. Padgett described the difficulties he sustained attempting to locate Father due to Father being in-and-out of incarceration in various counties. Padgett reiterated that Father failed to advise him of his whereabouts when he was out of jail, made no attempt to see Child, and at no time offered the name of a relative who might be willing to care for Child. Padgett testified that, at the time of the hearing, Father was

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<sup>1</sup> Kentucky Revised Statute.

incarcerated in the Fayette County Detention Center, and Padgett visited him approximately two weeks before trial. Father informed Padgett that he expected to be released to a halfway house in January 2013 to undergo three months of substance abuse treatment. Padgett testified Father has paid no child support or made any other arrangements for Child's care. Padgett explained Father's continual incarceration had been a substantial barrier to reunification efforts, and that Father, when released, would need multiple services before he could conceivably care for Child.

On December 17, 2012, the family court entered findings of fact, conclusions of law, and an order terminating Father's parental rights to Child.<sup>2</sup> The family court found Child to be neglected as defined in KRS 600.020(1)(a). The family court further concluded: it was in Child's best interest to terminate Father's parental rights (KRS 625.090(1)(b)); Father abandoned Child for a period of not less than ninety (90) days (KRS 625.090(2)(a)); Father, for a period of not less than six (6) months, continuously or repeatedly failed, refused to provide, or was incapable of providing essential parental care for Child, and there was no reasonable expectation of improvement in parental care and protection (KRS 625.090(2)(e)); and Father, for reasons other than poverty alone, had continuously and repeatedly failed to provide or was incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for Child's well-being, and there was no reasonable expectation of significant

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<sup>2</sup> Mother voluntarily consented to the termination of her parental rights. She is not a party to this appeal.

improvement in the parental conduct in the immediately foreseeable future, considering Child's age (KRS 625.090(2)(g)). From this order, Father appealed.

As referenced, counsel for Father, after engaging in a good faith review of the record, filed an *Anders* brief in compliance with *A.C.*, *supra*. In *A.C.*, this Court adopted and applied the procedures identified in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967) to appeals from orders terminating parental rights wherein counsel is unable to identify any non-frivolous grounds to appeal. *A.C.*, 362 S.W.3d at 364. Those procedures require counsel to first engage in a thorough and good faith review of the record. *Id.* "If 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." *Id.* (quoting *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400).

In this case, counsel for Father fully complied with the mandates of *A.C.* and *Anders*.<sup>3</sup> We recognize and lament the additional burden our opinion in *A.C.* places upon attorneys representing the indigent and, therefore, think it entirely appropriate to commend counsel for his efforts and his well-written brief. Following *A.C.*, we are to "fully examine the record and decide whether the appeal is wholly frivolous[.]" 362 S.W.3d at 371. We have done so. We agree with counsel that no grounds exist which may afford Father the relief he seeks.

A family court may terminate a person's parental rights upon satisfaction, by clear and convincing evidence, of a three-part test. First, the child

<sup>3</sup> As required by *A.C.*, counsel certified that he furnished Father with a copy of the brief and informed Father of his right to file a *pro se* brief raising any issues Father deemed meritorious. 362 S.W.3d at 371. Father chose not to avail himself of the opportunity to file a *pro se* brief.

must have been found to be an “abused or neglected” child, as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination must be in the child’s best interest. KRS 625.090(1)(b). Third, the family court must find at least one ground of parental unfitness exists. KRS 625.090(2). The family court’s termination decision will only be reversed if it is clearly erroneous. *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). Such a decision is clearly erroneous only if there is no substantial, clear, and convincing evidence to support the decision. *Id.*

We have conducted a thorough and independent review of the record, and find sufficient evidence to support the family court’s decision to terminate Father’s parental rights. By his own admission, Father has played no role in Child’s life for that past ten (or more) years. He has incessantly and wholly failed to provide any parental care or protection for the vast majority of Child’s life. Instead, Father elected to engage in a criminal lifestyle that has resulted in unremitting incarcerations. Father has engaged in a pattern of conduct that renders him incapable of caring for Child’s needs, and we see no reasonable expectation of improvement in the foreseeable future, especially considering Child’s age. Even after being notified by the Cabinet in 2011 that Child was in foster care and, shortly thereafter, being released from custody, Father chose not to re-assert himself, to even the slightest degree, in Child’s life. Like the family court, we are fully convinced Father has neglected and abandoned Child, is unfit to parent Child, and it is in Child’s best interest to terminate Father’s parental rights.

As required by *A.C.*, Father’s counsel identifies one ground “in the record that might arguably support the appeal[.]” 362 S.W.3d at 371 (citation omitted). Counsel states that the only arguable issue on appeal – which in his mind does not amount to a non-frivolous argument – is whether the appearance of Father by telephone at trial was a violation of due process.

The Fourteenth Amendment to the United States Constitution ensures that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1; *accord* amend. V. This Clause prevents “the government from depriving a person of his life, liberty, or property rights without first providing him with notice and an opportunity to be heard.” *Moffitt v. Commonwealth*, 360 S.W.3d 247, 252 (Ky. App. 2012).

Counsel notes that this issue was not preserved for appellate review, no court nationwide has ruled that it is a violation of due process, and the family court made a specific finding that it was “satisfied” that Father received a fair trial.<sup>4</sup> Counsel further points out that KRS 197.022(3) is directly on point and specifically

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<sup>4</sup> In its termination order, the family court stated:

[M]oments of difficulty in communication during the trial of this action were handled as they occurred and this Court is satisfied that [Father] received a fair trial. This Court advised [Father] to speak up and alert the Court if ever he could not adequately hear testimony, and he availed himself of that opportunity on various occasions. When he did so, the involved witness or counsel was admonished by this Court to move closer to the microphone or come to the phone at the bench, and that particular testimony or question or statement by counsel was repeated so that [Father] could hear and follow the proceedings. Also, [Father’s] counsel . . . was given opportunities to speak with his client . . . both immediately before and during the trial upon his request.”

(R. at 112).

authorizes the use of telephonic communications, at the trial court's discretion, in any civil matter involving a prisoner. *Id.* The statute provides that, "[t]o the extent practicable, any action concerning a prisoner in which the court has determined that the prisoner's participation is required or permitted may be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined." *Id.* We agree with counsel that the family court's decision to have Father testify by telephone did not impede or otherwise infringe upon his due process rights. Father had a meaningful opportunity to participate in the proceedings, confer with counsel, and confront the evidence against him.

For the foregoing reasons, the December 17, 2012 order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Henry F. Weber  
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BRIEF FOR APPELLEE:

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