

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001186-ME

W.O.B.

APPELLANT

v.

APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 14-AD-00041

C.M.H.; J.D.H.;
AND L.G.H.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; NICKELL AND THOMPSON, JUDGES.

KRAMER, CHIEF JUDGE: W.O.B. (Father) appeals from the July 17, 2015 order of the McCracken Family Court denying his motion to alter, amend, or vacate, and the June 1, 2015 order of the McCracken Family Court 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*¹ brief conceding

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

that no meritorious assignment of error exists to present to this Court, accompanied by a motion to withdraw which was passed to this merits panel. After careful review, we find no error and affirm the judgment of the McCracken Family Court terminating Father's parental rights and denying his motion to alter, amend, or vacate. We grant counsel's motion to withdraw by separate order.

FACTUAL AND PROCEDURAL BACKGROUND

Father and C.M.H. (Mother) are the natural parents of L.G.H. (Child).² J.D.H. (Stepfather) is Child's stepfather. On October 2, 2014, Stepfather filed a petition for adoption and involuntary termination of parental rights, seeking to legally adopt Child and terminate Father's parental rights. The petition alleged that: (1) Father had abandoned Child for a period not less than ninety days; (2) for a period of not less than six months Father continuously or repeatedly failed to provide essential parenting care and protection for Child; and (3) for reasons other than poverty alone, Father continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available to Child, and there is no reasonable expectation of improvement in Father's conduct.

On June 1, 2015, the trial court found by clear and convincing evidence that Father had abandoned Child for periods exceeding ninety days. Father admitted that he went without contacting, or attempting to contact, Child for multiple periods of time exceeding ninety days. Specifically, from August 6, 2014,

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Child was born May 1, 2007.

to November 10, 2014, Father admitted that he made no attempts to contact Child. During this time, according to his Facebook posts, Father was “partying at the lake and a local bar.” Mother’s testimony also revealed that there were multiple ninety-day periods that Father made no attempt to contact child, including a five-month period in 2011. Father’s last contact with Child was October 2013. As of the May 20, 2015 termination hearing, it had been over a year and a half since Father had last seen Child. Between October 2013 and May 2015 Father made a few attempts, by Facebook messaging Mother, to contact Child. However, these sporadic messages were the only way he attempted to make contact during this period.³ Stepfather testified that Father, for a period of not less than six months, had continuously and repeatedly failed or refused to provide or had been substantially incapable of providing essential parental care and protection for Child.

At the termination hearing, evidence was introduced of Father’s extensive criminal history and periods of incarceration. These crimes include four driving under the influence (DUI) charges.⁴ Father, by his own admission, is an alcoholic and continues to consume alcohol. Instead of serving jail time for a July 2012 theft charge in Princeton, Kentucky, the Caldwell County Circuit Court granted Father’s request to attend Paducah Lifeline Ministries, a spiritual-based alcohol and drug recovery program. Father started his treatment at the recovery

³ A total of nine Facebook messages throughout the nineteen-month period.

⁴ One DUI conviction was in 2003, and three were in 2010.

program on April 9, 2013, but Father was ultimately dismissed from the program on September 18, 2013, for failure to comply with its rules and regulations. Father admitted he consumed alcohol while in the program and has not sought treatment since that time. His most recent incarceration was from February 2014 to August 2014. Father admits that he resumed a lifestyle of alcohol abuse and partying upon his release. The trial court found that Father had not made a good faith effort to be a parent to Child or address his alcoholism.

The trial court further found that Father had continuously failed to provide essential food, clothing, shelter, medical care, or education reasonably necessary for the child's well-being and there is no reasonable expectation of improvement. According to the testimony of a Division of Child support representative, as of April 30, 2015, Father owes a child support arrears balance of \$9,528.51. Since the child support was established on October 14, 2008, in a monthly obligation of \$180, Father provided no financial support or essential care for Child for the following periods: (1) November 15, 2007, through November 16, 2008; (2) July 10, 2010, through April 20, 2012; and (3) July 2013 through October 2014. Mother testified that Father has never paid or inquired about Child's medical expenses.

On June 1, 2015, the trial court entered findings of fact and conclusions of law and ordered Father's parental rights terminated. Father filed a motion under CR⁵ 59.05 to alter, amend, or vacate the termination of his parental

⁵ Kentucky Rules of Civil Procedure.

rights on June 10, 2015. In support of the motion, Father argued that Mother blocked his attempts to visit Child, that Stepfather lacked standing to terminate Father's parental rights pursuant to KRS⁶ 625.050(3), and that he has made substantial improvements regarding his alcoholism and fitness as a parent.

The trial court was not persuaded by these arguments and denied Father's motion to alter, amend, or vacate on July 17, 2015. Father appealed the order denying his motion, along with the order terminating his parental rights.

STANDARD OF REVIEW

We review the termination of parental rights according to the clearly erroneous standard. This standard, found in CR 52.01, provides that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” “A finding supported by substantial evidence is not clearly erroneous. Substantial evidence is ‘that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.’ In assessing whether the findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the family court.” *Hunter v. Mena*, 302 S.W.3d 93, 97 (Ky. App. 2010) (citations omitted). Where the record contains

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Kentucky Revised Statutes.

substantial evidence to support the trial court's findings, we will not disturb them on appeal. *Id.*

ANALYSIS

After reviewing the trial court record, appellate counsel for Father filed an *Anders* brief in compliance with *A.C.*, 362 S.W.3d at 363-64 (citing *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400). In *A.C.*, this Court adopted and applied the procedures identified in *Anders* to appeals from orders terminating parental rights wherein counsel is unable to identify any non-frivolous grounds to appeal. *Id.* Those procedures require counsel to first engage in a thorough and good-faith review of the record. *Id.* at 371. “[O]nce counsel has reached the conclusion that the appeal is wholly frivolous, counsel ‘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.’” *Id.* (quoting *Anders*, 286 U.S. at 744, 87 S.Ct. at 1400). Here, Father’s counsel fully complied with the mandates of *A.C.* and *Anders* by certifying that she furnished Father with a copy of the *Anders* brief and informed Father of his right to file a *pro se* brief raising any issues he deemed meritorious. *Id.* Father chose not to file a *pro se* brief.

As directed by *A.C.*, we have fully examined the record and agree with counsel that no grounds exist that would warrant disturbing the family court’s order terminating Father’s parental rights and the order denying to alter, amend, or vacate the termination. Here, the trial court has satisfied the test developed by our

legislature to ensure that the rights of a biological parent and the best interest of a child are both protected, and the record contains sufficient evidence to support the family court's decision to terminate Father's parental rights. *See Cabinet for Health and Family Services v. K.H. Sr.*, 423 S.W.3d 204, 209 (Ky. 2014).

The family court concluded first that evidence existed to involuntarily terminate all of Father's parental rights under KRS 199.502;⁷ and second, that termination would be in the child's best interest under KRS 625.090(3).⁸ Evidence

⁷ KRS 199.502(1) sets forth that "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 [nine] following conditions exist with respect to the child[.]" (Emphasis added.) In this case, the trial court relied on the requirements provided in subsections (a), (e), and (g):

- (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;
- (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,

⁸ KRS 625.090(3) states:

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 an intellectual disability 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;

presented at the termination hearing clearly and convincingly supports the family court's conclusions.

Our review convinces us that this evidence supports the family court's conclusion that Father had abandoned Child for a period not less than ninety days; that Father continuously failed or refused to provide or was substantially incapable of providing essential parental care and protection for Child; and that for reasons other than poverty alone Father continually failed or refused 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 that despite being offered all reasonable services, there was no reasonable expectation of improvement in Father's conduct or care and protection of Child.

We further agree with the family court's denial of Father's motion to alter, amend, or vacate the termination of his parental rights. The court was not persuaded by Father's argument that Mother blocked his attempts at visitation, nor his assertion that he made substantial improvements regarding his alcoholism and fitness as a parent. Lastly, as the family court noted, Father's attempt to challenge

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- (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;
 - (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.

Stepfather's standing to initiate this action under KRS 625.050(3)⁹ fails. This matter was initiated by a petition for adoption, "thus is governed in its entirety by KRS Chapter 199. Provisions of KRS Chapter 625 are applicable only as permitted by KRS 199.500(4), and as specifically enumerated in KRS 199.502." *R.M. v. R.B.*, 281 S.W.3d 293, 297 (Ky. App. 2009); *see also R.P., Jr., v. T.A.C.*, 469 S.W.3d 425 (Ky. App. 2015) (applying KRS chapter 199 to a stepfather's petition to adopt child).

CONCLUSION

As counsel for Father argued in the *Anders* brief, no meritorious grounds exist upon which to grant relief. We find no prejudicial error or violation of Father's constitutional right to a fundamentally fair proceeding. Therefore, we affirm the judgment of the McCracken Family Court terminating Father's parental rights to Child.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marianne Halicks
Paducah, Kentucky

BRIEF FOR APPELLEE:

Tiffany Gabehart Poindexter
Paducah, Kentucky

⁹ KRS 625.050(3) states:

Proceedings for involuntary termination of parental rights may be initiated upon petition by the cabinet, any child-placing agency licensed by the cabinet, any county or Commonwealth's attorney or parent.