RENDERED: APRIL 5, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000700-ME
AND
NO. 2018-CA-000701-ME

P. D. B.[1] APPELLANT

v.

APPEALS FROM HARRISON CIRCUIT COURT
HONORABLE HEATHER FRYMAN, JUDGE
ACTION NOS. 17-AD-00032 AND 17-AD-00033

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; A.K L.-B., A MINOR CHILD; AND L.D.L.-B., A MINOR CHILD APPELLEES

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND K. THOMPSON, JUDGES.

[1] To protect the identity of the children, all parties are referenced by initials. "When final disposition of an appeal is made by an "Opinion and Order," as in this case, the party adversely affected may move for reconsideration as provided by [Kentucky Rules of Civil Procedure (CR)] 76.38(2) within ten days of entry, but a petition for rehearing is unauthorized. CR 76.32(1)." *Fink v. Fink*, 519 S.W.3d 384, 384 n.1 (Ky. App. 2016), *as modified* (Jan. 30, 2017).

NICKELL, JUDGE: These consolidated appeals challenge orders entered by the Harrison Circuit Court, Family Division, on April 9, 2018, terminating P.D.B.'s ("Mother") parental rights ("TPR") to two biological daughters, A.K.L.B., born February 17, 2013, in Clark County, Kentucky, and L.D.L.B., born April 21, 2014, in Scott County, Kentucky. Characterizing the appeals as "wholly frivolous," and unable to find any meritorious claim to pursue, Mother's appointed counsel filed an *Anders*[2] brief in both cases and moved to withdraw from representation. Mother has filed a *pro se* supplemental brief. We address the motion to withdraw in the Order following this Opinion. Having independently reviewed the record and determining TPR as to Mother to be supported by clear and convincing evidence, we affirm.

FACTS

The Cabinet for Health and Family Services ("CHFS") became aware of this family via a report alleging domestic violence between the parents in the presence of the children. Originally, the girls were placed in a maternal aunt's temporary custody, but after twelve days, the aunt could no longer care for them. According to CHFS, Mother "violated a provision in her prevention plan mandating supervised contact with the minor [girls]" and the temporary placement

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

ended shortly thereafter, prompting CHFS to seek an emergency custody order. The girls entered out-of-home care on June 22, 2016, where they have remained.

While the reported domestic violence was being investigated, Mother was arrested on June 10, 2016, and charged with driving under the influence-second offense. Father, who was also intoxicated, was in the vehicle with Mother and the girls.

Mother knew she had to demonstrate housing stability to regain her children. Both parents knew the steps required by their negotiated prevention and case plans but failed to complete them.

Mother was to complete a mental health assessment, a substance abuse assessment, and parenting classes, and follow all associated recommendations for each task. She was to submit to random drug screens, attend NA/AA meetings twice weekly, and obtain and maintain stable housing and employment. Due to unstable housing, a CATS[3] assessment was never conducted.

Mother made some strides, but did not complete the case plan, admitting she relapsed with alcohol, marijuana and crack cocaine. She has had

[3] The Comprehensive Assessment and Training Services (CATS) project evaluates families and children identified by the Department for Community Based Services (DCBS) meeting specific eligibility criteria. It identifies strengths and vulnerabilities in five major areas—family/social; emotional/behavioral/psychological/physiological; attachment; life history/traumatic events; and developmental/cognitive/academic.

stints of incarceration with her earliest release date for a probation violation being December 2019. Three shock probation motions were filed and denied.

Mother was free from June 2016 through March 2017, when she served ten days for outstanding traffic tickets. She was then free until late June 2017 when she served fourteen days for drug usage. She was incarcerated again on August 19, 2017, where she remains.

On October 31, 2017, CHFS petitioned for involuntary TPR of both Mother and D.L.-L. ("Father").[4] KRS[5] 625.050 *et seq*. According to the dispositional report filed in Case Nos. 16-J-00066-001 and 16-J-00067-001 on December 7, 2016, both parents stipulated to neglect. Mother is described as having a "history with DCBS that revolves around substance abuse, domestic violence, instability and having a prior involuntary termination of parental rights." The report further states attempts to maintain the family unit by creating a prevention plan with Mother failed because the plan was not followed.

> DCBS worked with the maternal aunt, [K.B.], who kept the children initially; however, she was unable to keep the children any longer and DCBS sought emergency

[4] D.L.-L.is the biological father of both girls. A warning order attorney was appointed for him and diligently attempted to advise him of the pending petition consistent with CR 4.07. Father did not appear at trial but was represented by counsel. Mother states Father has been deported. The record states he was being held on an immigration holder in Boone County, Kentucky, and had been living in both Arizona and Lexington, Kentucky. The trial court found he abandoned his daughters and terminated his parental rights. Father is not a party to this appeal.

[5] Kentucky Revised Statutes.

> custody of the children. The children have remained in foster care since that time.
>
> . . . .
>
> The only concerns that DCBS has in regards [sic] to [Mother] is in regards [sic] to her stability. [Mother] has moved at least 4 times since this case has been opened. She is currently residing with her grandmother in Lexington, KY and is on house arrest due to pleading guilty to her DUI when she had the children in the car with her. Given [her] history with DCBS and having a prior involuntary termination of parental rights, DCBS will be requesting a CATS assessment to assess [her] ability to provide care to her children and to ensure she is able to protect herself and not engage in high risk relationships. DCBS has also attempted to get drug screening from [Mother] on a random basis. [Mother and Father] were unable to find the lab on one occasion and the other occasion she reported the lab would not test her due to not having the order for the Cabinet to pay. DCBS will be requesting a hair follicle drug screen for [Mother]. If [she] were to have a positive hair follicle, then DCBS would put [her] on the random drug screening log.

CHFS alleged the parents failed to provide a safe and nurturing home; failed or refused to provide—or were substantially incapable of providing—essential parental care and protection without reasonable expectation of improvement; for reasons other than poverty alone, parents continuously failed to provide or were incapable of providing essentials without reasonable expectation of improvement in the immediately foreseeable future; and, both parents abandoned the children for a period of more than ninety days.

Additionally, CHFS alleged both girls had been in CHFS custody for fifteen of twenty-two months before the petition was filed, and in prior juvenile cases, the Harrison Family Court had found the girls to be neglected or abused and waived reasonable efforts as to Father. It further alleged, despite CHFS offering or providing all reasonable services to the family, parents failed or refused to institute changes allowing safe return of girls to their care; both girls are abused and neglected as defined in KRS 600.020; and, TPR is in both girls' best interest.

Since November 2017, the girls have been with a foster family with whom they have bonded. According to the social worker, who regularly visits with the girls, they are happy, healthy and thriving with the foster family, which desires to adopt them.

Trial occurred without a jury on March 23, 2018. At the time of trial, Mother was incarcerated in the Fayette County jail; she participated telephonically. The girls were represented by the same guardian *ad litem* ("GAL"). He recommended TPR of both parents as being in the girls' best interest.

The trial court granted TPR as to both parents and both children, finding both girls to currently meet the definition of being abused or neglected under KRS 600.020(1)—echoing the finding previously made by the Harrison Family Court; both parents for at least six months had "continuously or repeatedly failed or refused to provide or have been substantially incapable of providing

essential parental care and protection for the minor child" without reasonable expectation of improved parental care as addressed in KRS 625.090(2)(e); for reasons other than poverty alone, parents "continuously or repeatedly failed to provide or are incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary" without reasonable expectation of parental improvement pursuant to KRS 625.090(2)(g); Mother "has had her rights to a previous child involuntarily terminated and that this termination occurred prior to the birth of the minor [children] at issue in this case and the prior involuntary termination was based, in part, on conditions that continue in the instant case as described in KRS 625.090(2)(h)"; both girls were "in out-of-home care, under [CHFS custody]" for fifteen of twenty-two months before filing of the petitions; TPR is in best interest of both girls in light of KRS 625.090(3)(c), (d) and (g); CHFS provided all reasonable services to permit family reunification; and, CHFS is best qualified to receive custody of the girls. As a result, custody of both children was awarded to CHFS with authority to place them for adoption. It is from these TPR orders, supported by separate findings of fact and conclusions of law entered the same day, that notices of appeal were filed on Mother's behalf.

Counsel filed an *Anders* brief in each case. On December 10, 2018, Mother filed a *pro se* supplemental brief in this Court arguing progress she had made working her case plan prior to being incarcerated should be accorded greater

weight. She acknowledged relapsing—more than once. She claimed she was robbed of just over $2,000 in Lexington in March 2017 where she filed a police report. In April 2017 she developed a pulmonary embolism followed by depression and another relapse "on a few substances." She requested referral to a mental health or substance abuse program from her social worker but did not receive a helpful answer. She was then arrested for a probation violation, receiving five years. She claims to have two jobs in place on her release which is unlikely until December 2019. She requested visits with her girls while incarcerated, but her social worker said, "No." After being arrested on August 19, 2017, she sent her girls school supplies. She claims she wants to send them money but does not know how to do so. She has completed multiple programs while incarcerated. Like others she has met in the detention center, she believes she has changed her life and should be allowed to remain part of her daughters' lives. Against this backdrop we review termination of Mother's parental rights to both girls.

ANALYSIS

Involuntary TPR is governed by KRS 625.090(1). Except for a parent whose rights CHFS seeks to terminate who stands convicted of a criminal charge stemming from abuse or neglect of a child, involuntary TPR is prohibited unless the circuit court finds, based on clear and convincing proof, a court of competent jurisdiction has previously adjudged the child to be abused or neglected as defined

in KRS 600.020(1), or finds in a current proceeding the child is abused or neglected. *Santosky v. Kramer*, 455 U.S. 745, 770, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). At least one of ten grounds enumerated in KRS 625.090(2) must be found to exist. As an appellate court, we accord the trial court much discretion in a TPR proceeding and apply the clearly erroneous standard of review set forth in CR 52.01. In addition to the threshold finding of abuse or neglect, the trial court must determine termination would be in the child's best interest. KRS 625.090(1)(c); *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 342 (Ky. 2006).

The evidence established the girls had been out of Mother's care fifteen of twenty-two months prior to CHFS filing the petition, satisfying KRS 625.090(2)(j). Additionally, for not less than six months, Mother failed to provide essential parental care and protection for the girls and there was no reasonable expectation of parental improvement, satisfying KRS 625.090(2)(e). Mother's rights to another child had been involuntarily terminated, satisfying KRS 625.090(2)(h). Finally, TPR was in the girls' best interest. KRS 625.090(1)(c). As required by KRS 625.090(3)(c), CHFS made reasonable efforts[6] to reunite

[6] "'Reasonable efforts' means the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community in accordance with the state plan for Public Law 96-272 which are necessary to enable the child to safely live at home." KRS 620.020 (11).

Mother with her children, but Mother did not complete the case plan to which she agreed. As noted by CHFS, Mother made strides, but was unable to sustain meaningful improvement in her high-risk lifestyle. KRS 625.090(3)(d).

A trial court must also consider the "physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered[.]" KRS 625.090(3)(e). The social worker testified the girls are happy and thriving in their foster family, which plans to adopt them.

No claims of error having been raised by counsel on appeal, as directed by *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), we have independently reviewed the record in both cases. We have considered Mother's supplemental *pro se* brief, but it shows no trial court error. The tenor of the supplemental brief is a request for greater consideration of short-term strides Mother made—but could not sustain. Mother's inability to demonstrate sustained change supports the trial court's decision.

Our review has convinced us the two minor children are abused or neglected—as found by the trial court—and termination of Mother's parental rights is in their best interest. Thus, there is no reason to set aside the trial court's findings. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). As counsel for Mother argued, no meritorious grounds exist upon which to

grant relief. Therefore, the order terminating Mother's parental rights to both children is AFFIRMED.

ORDER

WHEREFORE, citing *Anders*, counsel for Mother having moved to withdraw from the above-styled appeals after conscientiously reviewing the record and finding no meritorious issue to raise; the motion to withdraw along with a copy of the *Anders* brief having been mailed to Mother; Mother having filed a supplemental *pro se* brief after being apprised of the option; the motion to withdraw being passed to this merit panel for resolution; and neither Mother nor opposing counsel having responded to the motion to withdraw, the motion is hereby GRANTED.

ALL CONCUR.

DATE: April 5, 2019 /s/ C. Shea Nickell
JUDGE, KENTUCKY COURT OF APPEALS

BRIEF FOR APPELLANT:

Joshua A. K. McWilliams
Versailles, Kentucky

BRIEF FOR APPELLEE:

Constance G. Grayson
Lexington, Kentucky