

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000102-ME

D.W.P.

APPELLANT

v. APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 18-AD-00032

D.W.; A.W.; AND
K.W.P., A MINOR CHILD

APPELLEES

AND
NO. 2019-CA-000111-ME

D.P.

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v. APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 18-AD-00032

D.W.; A.W.; AND
K.W.P., A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MAZE, AND SPALDING, JUDGES.

MAZE, JUDGE: D.W.P. (“Father”) and D.P. (“Mother”) each appeal from orders of the McCracken Family Court terminating their parental rights to K.W.P. (“the Child”) and allowing A.W. and D.W. to adopt the Child. Since the record clearly shows substantial evidence to support the family court’s findings and order, we affirm.

The Child was born in September 2015 to Father and Mother. In June 2016, the Cabinet for Health and Family Services filed the first of two dependency/neglect/abuse petitions concerning the child. After the first petition was closed, the parents moved to Colorado with the Child. While there, Father was arrested and charged with crimes of domestic violence against Mother, for which he is currently incarcerated.

Mother returned to Kentucky, but the Child was removed following the second petition filed by the maternal grandmother. Subsequently, the Cabinet removed the Child from grandmother’s custody based on reports of drug use. In June 2017, the Child was removed from the custody of the Cabinet and placed with A.W., a maternal aunt, and her husband, D.W. The Child has remained with them since that time.

On June 29, 2018, A.W. and D.W. filed a petition to involuntarily terminate the parental rights of Father and Mother and to adopt the Child. The family court appointed guardians *ad litem* (GAL) for the Child and Father and appointed counsel for Mother and Father. The Cabinet appeared and recommended granting A.W.'s and D.W.'s petition to terminate Father's and Mother's parental rights and to adopt the Child. The family court also considered the Cabinet's records and the report of the Child's GAL, who also concluded that adoption was in Child's best interests.

On December 17, 2018, the family court entered findings of fact and conclusions of law concluding that the termination and adoption would be in the Child's best interests. The family court noted the parents' history of neglect, domestic violence, and drug abuse. The court also noted that Father engaged in acts of "extreme" domestic violence against Mother, for which he will be incarcerated until at least 2020. While Father objected to the adoption, he has made no efforts to develop a case plan with the Cabinet. Mother has failed to make significant progress on her case plan. In addition, Mother was incarcerated at the time of the hearing and she was facing felony charges. The family court further found that termination and adoption would be in Child's best interests.

Based on these findings, the family court found that Child had been abused or neglected, the parents were incapable of providing for the Child now or

in the reasonably foreseeable future, and that the best interests of the Child would be served by terminating the parents' rights. Accordingly, the family court entered separate orders granting the petitions to terminate Father's and Mother's parental rights and allowing A.W. and D.W. to adopt K.W.P. Father and Mother now appeal.

Father's and Mother's appointed counsel each filed briefs stating that they are unable to find any reasonable basis for appeal. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493 (1967). In accordance with the procedures set forth in *A.C. v. Cabinet for Health & Family Services*, 362 S.W.3d 361 (Ky. App. 2012), both counsel have filed motions seeking to withdraw and for the respective appellants to proceed *pro se*. We shall grant the motions by separate order.

Involuntary termination proceedings are governed by KRS¹ 625.090. However, A.W. and D.W. filed this action as a dual petition seeking both termination of Father's and Mother's parental rights and adoption of the Child. In such cases, the adoption supersedes the termination because KRS Chapter 199 encompasses Chapter 625. *Wright v. Howard*, 711 S.W.2d 492, 495 (Ky. App.

¹ Kentucky Revised Statutes.

1986). *See also E.K. v. T.A.*, 572 S.W.3d 80, 83 (Ky. App. 2019). Therefore, the family court incorrectly applied KRS Chapter 625 to the petition in this case.

There are certain jurisdictional prerequisites to file an adoption petition, all of which were satisfied in this case. *C.J. v. M.S.*, 572 S.W.3d 492 (Ky. App. 2019). First, to petition for adoption, a person must be eighteen and “a resident of this state or who has resided in this state for twelve (12) months next before filing[.]” KRS 199.470(1). The petition should be filed in the county where the petitioner resides. *Id.* A.W. and D.W. pleaded that they are over eighteen years of age, and that they are residents of Kentucky and have been for more than twelve months before filing the petition. In addition, they filed their petition in McCracken County where they reside. They are married and joined together in the petition, which satisfies KRS 199.470(2).

KRS 199.470(3) requires the child must have resided continuously with the petitioners “for at least ninety (90) days immediately prior to the filing of the adoption petition.” As noted, the Child had resided with A.W. and D.W. for over a year when this petition was filed. Next, a petition for adoption cannot be filed “unless prior to the filing of the petition the child sought to be adopted has been placed for adoption by a child-placing institution or agency, or by the cabinet, or the child has been placed with written approval of the secretary[.]” KRS 199.470(4). However, Cabinet approval is not required if the petition is filed by a

blood relative. KRS 199.470(4)(a). The Cabinet filed its written approval of the adoption and, in any case, A.W. qualifies as a blood relative.

The adoptive parents must also comply with KRS 199.480, which governs party defendants, service of process, and appointment of a guardian *ad litem*. The biological living parents of the Child were named and properly served, and the Cabinet was provided with a copy of the petition. KRS 199.510(1). Furthermore, the family court appointed counsel for Father and Mother, and separately appointed guardians *ad litem* for the Child and for Father, as he was incarcerated at the time of the petition. CR² 17.04.

KRS 199.502(1) governs adoption without the consent of the child's biological living parents. Under this section, the family court must find, in relevant part, that any of the following conditions exist with respect to the child:

- (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
- (b) That the parent had 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;

² Kentucky Rules of Civil Procedure.

- (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to a child named in the present adoption proceeding;
- (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 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 adoption proceeding was born subsequent to or during the pendency of the previous termination; and
 - 3. The condition or factor which was the basis for the previous termination finding has not been corrected;

[or]

- (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[.]

The findings required for a termination under KRS 199.502(1) are substantially the same as those required under KRS 625.090, although the three-part test is not formally adopted. The family court made all the findings required by KRS 625.090. Indeed, the family court specifically found that the parents have continuously or repeatedly failed to provide essential food, clothing, or medical care for the Child and there is no reasonable expectation of improvement.

Furthermore, the parents have an extensive history of domestic violence and drug use and they were both incarcerated at the time of the hearing. Although the parents' incarceration alone is not a basis for terminating parental rights, it may be a factor in determining whether the child has been neglected and whether there are reasonable expectations of improvement. *Cabinet for Human Res. v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). Here, the family court found that the parents made no efforts or adjustments in their circumstances to make it in the Child's best interests to return to either of their homes within a reasonable period of time. Finally, the family court found that the Child is doing well with A.W. and D.W. and adoption would be in the Child's best interests.

These findings were more than sufficient to meet the requirements of KRS 199.502(1). Furthermore, the family court's factual findings will not be

disturbed unless there exists no substantial evidence in the record to support them. *V.S. v. Commonwealth, Cabinet for Human Res.*, 706 S.W.2d 420, 424 (Ky. App. 1986). Since there clearly was substantial evidence of record to support these findings, we find no basis to disturb the orders terminating Mother's and Father's parental rights and allowing A.W. and D.W. to adopt the Child.

Accordingly, we affirm the orders of the McCracken Family Court terminating the parental rights of D.W.P. and D.P. and allowing A.W. and D.W. to adopt the Child.

ALL CONCUR.

BRIEF FOR APPELLANT
D.W.P.:

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BRIEF FOR APPELLANT
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NO BRIEF FILED FOR APPELLEES