

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-1915-ME

B. S. D.

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 19-AD-00025

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
M. V.; AND Z. N. S. D.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CALDWELL, KRAMER, AND MAZE, JUDGES.

KRAMER, JUDGE: B.S.D. (Father) appeals from the Warren Family Court's findings of fact, conclusions of law, and judgment terminating parental rights to his minor child.¹ In accordance with *A.C. v. Cabinet for Health and Family Services*,

¹ The court also terminated the parental rights of Child's mother. Mother did not appeal.

362 S.W.3d 361 (Ky. App. 2012), counsel for Father filed an *Anders*² brief stating that the appeal is frivolous, which was accompanied by a motion to withdraw as counsel. After a careful review of the record, we affirm. We grant counsel's motion to withdraw by separate order.

The minor child (Child) was born on April 10, 2018. Two days later, he was removed from his mother's care and placed in the custody of the Cabinet for Health and Family Services (CHFS). At birth, Child tested positive for amphetamines, methamphetamine, and marijuana and showed medical symptoms of withdrawal. Father was present at Child's birth but was not immediately listed as Child's father.³ This was the only contact Father has had with Child.

Shortly after Child's birth, CHFS filed a dependency, neglect, and abuse (DNA) petition in the family court. An adjudication hearing was conducted in June 2018, and Mother stipulated that Child was abused or neglected. Because paternity had not been established, Father was not named in the underlying DNA action; however, social worker Heather Shepherd testified that she met with Father in May 2018, while he was incarcerated, to develop a case plan.

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

³ A paternity test was conducted in May 2018, and the family court entered a judgment of paternity on August 10, 2018.

On February 20, 2019, CHFS filed a petition for termination of Father's parental rights. He was still incarcerated at that time and remained incarcerated throughout the entirety of the proceedings. The family court conducted the final hearing on November 7, 2019. Father was present and represented by counsel. He testified on his own behalf. The family court entered findings of fact, conclusions of law, and an order terminating Father's parental rights. The family court found that Child was neglected or abused; that termination would be in his best interest; that Father, 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 Child and there is no reasonable expectation of improvement in parental care and protection, considering the age of Child;⁴ and that Father, 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 Child's well-being, and there is no reasonable expectation of significant improvement in Father's conduct in the immediately foreseeable future, considering the age of Child.⁵ This appeal followed.

⁴ See Kentucky Revised Statute (KRS) 625.090(2)(e).

⁵ See KRS 625.090(2)(g).

On appeal, counsel for Father filed an *Anders* brief stating that the instant appeal is frivolous. However, pursuant to *Anders*, counsel identifies portions of the record that might arguably support Father’s appeal.⁶ The potential areas are: (1) that the petition for termination of parental rights was not properly filed because CHFS filed reports with the family court in March and July 2019, rather than every three months as required by KRS 620.180(2); (2) termination is not in Child’s best interest; and (3) the factors of KRS 625.090 were not met. When appointed counsel files an *Anders* brief, the Court of Appeals is bound to “independently review the record and ascertain whether the appeal is, in fact, void of nonfrivolous grounds for reversal.” *A.C.*, 362 S.W.3d at 372.

In Kentucky, termination of parental rights is proper upon satisfaction, by clear and convincing evidence, of a tripartite test. *Cabinet for Health and Family Servs. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). First, KRS 625.090(1) requires that a child be adjudged neglected or abused. Second, KRS 625.090(1)(c) requires that termination must be in the child’s best interest. Third, at least one of the conditions set out in KRS 625.090(2) must be established. The family court’s termination decision will be reversed only if it is clearly erroneous. *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). Such a

⁶ *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400.

decision is clearly erroneous if there is no substantial, clear, and convincing evidence to support the decision. *Id.*

The record shows that Father was incarcerated throughout the entirety of the proceedings. Although incarceration alone can never be grounds for termination of parental rights, CHFS provided evidence of Father's criminal record which shows an extensive, long-term criminal lifestyle involving domestic violence and substance abuse that is incompatible with parenting. *See J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661 (Ky. App. 1985). Father has never supported Child financially or in any other regard. He has never visited with Child, and the only contact Father has had with Child was at his birth. At the time of the hearing, Father could not say when he would be released from incarceration, only that, if he was not released on parole in April 2020, he anticipated his serve-out date to be in early 2022. Father testified that he completed substance abuse treatment during his incarceration; however, CHFS was never made aware of this. Father had not completed any other aspects of his case plan.

We conducted a thorough and independent review of the record and conclude that more than sufficient evidence supports the family court's findings of fact, conclusions of law, and orders terminating Father's parental rights to Child. The family court complied with all relevant statutory mandates for involuntarily terminating Father's parental rights, and the family court conducted an evidentiary

hearing where Father was present and testified on his own behalf. There is no legal basis or reason to set aside the family court's judgment terminating Father's parental rights. We agree with counsel that no valid basis exists to warrant relief from the judgment. *A.C.*, 362 S.W.3d at 371.

Accordingly, the family court did not err by terminating Father's parental rights as to Child, and we AFFIRM the Warren Family Court.

ALL CONCUR.

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