

Commonwealth of Kentucky
Court of Appeals

NO. 2020-CA-0533-ME

H.W.

APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 19-AD-00008

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; B.Y.;
AND W.Y.

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

COMBS, JUDGE: The Appellant, H.W. (Mother), appeals from an order of the Spencer Family Court terminating her parental rights. Finding no error after our review, we affirm.

Mother and W.Y. are the biological parents of B.Y., a female child born on October 5, 2017. The Cabinet intervened after receiving a report of an

altercation (with a knife involved) between Mother and her sister that took place in the child's presence. On January 26, 2018, the Cabinet filed a dependency, neglect, or abuse (DNA) petition in case No. 18-J-00007-002. According to the DNA Petition, Mother admitted to hitting and biting her sister and reported using a hammer and a knife to access her sister's room.

The Cabinet worker had been at the home a couple of weeks earlier when law enforcement had been called about another incident. At that time, the Cabinet worker noted that the home did not meet cleanliness standards, observing that there was trash in the doorway, clutter and dishes piled up, and mousetraps under the child's baby swing. There were also concerns about the child's father due to pending criminal charges. At that time, Mother was still a minor. She and the child were removed, placed in the Cabinet's custody, and placed together at All God's Children.

On February 26, 2018, the child was adjudicated to be a neglected or abused child as defined in KRS¹ 600.020(1); Mother stipulated that she had placed the child at risk of harm due to the physical altercation between Mother and the child's maternal aunt in the child's presence. Mother and the child were committed to the Cabinet at the March 12, 2018, disposition hearing.

¹ Kentucky Revised Statutes.

Mother had continued difficulty at All God's Children. She was cited for a variety of infractions, including sneaking males into her room at night in the child's presence, failing to properly care for the child, and exhibiting violent outbursts in the child's presence. In May 2018, the child was placed at a respite foster home for her own safety. The foster placement was later changed to long-term due to escalation in Mother's troubled behaviors and her lack of commitment to the program at All God's Children.

In August 2018, Mother became 18 years of age, and she decided not to recommit to the Cabinet. She left the All God's Children program without completing it. Thereafter, Mother continued to struggle with her plan. In May 2019, the Spencer Family Court waived reasonable reunification efforts.

On May 24, 2019, the Cabinet filed a petition for the involuntary termination of parental rights (TPR). On February 27, 2020, the trial court conducted a TPR hearing. Mother and her counsel were present -- although Mother arrived late. Father had previously signed a waiver and consented to the voluntary termination of his parental rights. The Cabinet called four witnesses: Tiffany Patterson and Kate Ray, both Cabinet workers; Erin Lowe, formerly a case manager at All God's Children; and Sara Joyner, a foster care case manager at All God's Children. Mother also testified. We have reviewed the testimony presented at the hearing.

On March 16, 2020, the trial court entered an order terminating Mother's parental rights and an order of judgment terminating the parental rights of both parents.

Mother appeals. Her counsel requests that we make an independent review of the record to determine whether the proceedings are free from prejudicial error, citing *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012). Although it appears that Mother's counsel intended to file an *Anders* brief, she failed to file a motion to withdraw.² Instead,

² In *A.C. v Cabinet*, this Court explained that:

In accordance with *Anders*, once 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." *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400.

...

Further, appointed counsel must certify in the *Anders* brief that counsel provided the indigent parent with a copy of the brief and informed the parent that he or she has a right to file a *pro se* brief raising any issues the parent deems meritorious. *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400.

Upon receiving counsel's motion to withdraw and accompanying *Anders* brief, this Court shall enter an order granting the indigent parent thirty days to file a *pro se* brief and deferring counsel's motion to withdraw to the merits panel. The order shall also grant the Cabinet thirty days from the due date of the parent's *pro se* brief to file its response. After all briefs are filed, this Court will fully examine the record and decide whether

Appellant's brief was filed without the accompanying motion to withdraw as required. Consequently, Mother is still represented by her counsel.

We have carefully conducted an independent review of the record in this case, and we conclude that there is no ground for reversal. Nor is there any issue of merit that would warrant supplemental argument or briefs.

In *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204 (Ky. 2014), our Supreme Court explained as follows:

KRS 625.090 provides for a tripartite test which allows for parental rights to be involuntarily terminated only upon a finding, based on clear and convincing evidence, that the following three prongs are satisfied: (1) the child is found or has been adjudged to be an abused or neglected child as defined in KRS 600.020(1); (2) termination of the parent's rights is in the child's best interests; and (3) at least one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) exists.

Id. at 209. The standard governing our review is whether the trial court's findings are clearly erroneous. CR³ 52.01.

The trial court has a great deal of discretion in an involuntary termination of parental rights action. . . . [F]indings of fact of the trial court will not be disturbed unless no substantial evidence exists in the record to

the appeal is wholly frivolous pursuant to *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400. During the course of this review, this Court may, in its discretion, order either or both parties to file a supplemental brief addressing any issues this Court finds *may* have merit.

A.C., 362 S.W.3d at 371 (emphasis original).

³ Kentucky Rules of Civil Procedure.

support its findings. Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people.

C.A.W. v. Cabinet For Health & Family Services, Commonwealth, 391 S.W.3d 400, 403 (Ky. App. 2013) (citations and internal quotation marks omitted).

In the case before us, the trial court provided a thorough discussion of the applicable law in its findings of fact and conclusions of law. The court determined that the child has been adjudged to be an abused or neglected child as defined in KRS 600.020(1). That finding is supported by the record, namely the February 26, 2019, order entered at the adjudication hearing in the underlying DNA proceeding. The first prong of the tri-partite test was satisfied.

The trial court concluded that termination of parental rights is in the best interest of the child. In making that determination, KRS 625.090(3) requires the court to consider six statutory factors. At pages 9-11 of its findings of fact and conclusions of law, the trial court explained as follows:

The first factor involves whether the parent has been properly diagnosed with mental illness or mental retardation. KRS 625.090(3)(a). Regarding this factor, there was evidence presented that Respondent mother has been diagnosed with conduct disorder, with limited prosocial emotions, lack of remorse or guilt, callous-lack of empathy. *All God's Children Records, Cabinet's Exhibit 4*.

Regarding the second factor, for “[a]cts of abuse or neglect . . . toward any child in the family,” KRS 625.090(3)(b), the totality of the evidence presented at trial is sufficient to convince this Court that the Petitioner child has been abused or neglected within the meaning of KRS 600.020(1) while in parental custody. This resulted from the Petitioner child being subjected to scenes of domestic violence in the home, to inappropriate outbursts of anger and violence, to neglect of her material, emotional and healthcare needs, and to having been abandoned for a period of not less than ninety (90) days during which time Respondent mother may have been incarcerated. The Petitioner child has been further abused or neglected by the Respondent mother’s failure or inability to comply with this Court’s remedial orders and the Cabinet’s court-approved treatment plan so that the Petitioner child could be safely returned to parental custody, and by the failure or inability of the Respondent mother to do what is necessary to materially support the child.

Regarding the third factor, for the Cabinet’s “reasonable efforts . . . to reunite the child[ren] with the parent[,]” KRS 625.090(3)(c), it is clear to this Court that the Cabinet made appropriate referrals to parenting classes, anger management , individual counseling, family therapy, random drug screens, supervised visitation sessions and various other services. The Cabinet social worker testified that, under the circumstances of this case, she was unaware of any other services which the Cabinet could provide or refer the Respondent mother to that would allow for the safe reunification of the Respondent mother with the Petitioner child within a reasonable period of time considering the age of the child. With due consideration given to the next factor, set forth in KRS 625.090(3)(d), this Court finds itself in agreement with that assessment.

The next, fourth, factor concerns “[t]he 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[.]” KRS 625.090(3)(d). Regarding this factor, the Cabinet's caseworker testified that as of the date of the filing of the petition in this TPR action and at the date of the trial, the Respondent mother has not been fully compliant with the Court's remedial orders out of the aforesaid DNA actions or her cabinet case plan. In fact, the only item on her plan that she has completed was her mental health assessment, and she has failed to follow through with the recommendations out of that assessment. She has failed to obtain and maintain stable housing or employment, she has failed to regularly attend visits with the child, she has failed to participate in and complete a protective parenting class and failed to cooperate with the Cabinet. As a result of all of the foregoing and more, the Petitioner child has been unable to return safely to parental custody and care and instead has remained in the Cabinet's care and custody for not less than fifteen months.

Regarding the fifth factor, set out in KRS 625.090(3), it is clear to this Court that the Petitioner child's physical, mental and emotional needs have been met while in the Cabinet's care and custody and the child is expected to make continuing improvements in these areas upon termination of parental rights. The Cabinet social worker testified that she has visited with the Petitioner child regularly in the foster home and the child is doing much better since removal from parental custody and is attached to the foster parents, who will adopt the child in the event parental rights are terminated.

The final factor this court is required to consider is the parent's “payment or . . . failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.” KRS 625.090(3)(f). While Respondent mother is now current on her child support

obligation, her history has been of non-payment, to the point that she was incarcerated for contempt.

(Italics original).

We apply an abuse-of-discretion standard in reviewing the court's best-interest determination. "Absent a showing that a decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles, a family court's determination on the issue will not be an abuse of discretion and will be sustained." *D.J.D. v. Cabinet for Health and Family Services*, 350 S.W.3d 833, 837 (Ky. App. 2011) (citations omitted). The trial court properly considered the statutory factors, and its findings are ably supported by substantial evidence. The second prong of the tri-partite test has been satisfied.

KRS 625.090(2) requires that the court also find by clear and convincing evidence the existence of one or more grounds enumerated in the statute. The court found three grounds, among them KRS 625.090(2)(j), which provides "[t]hat the child has been in foster care under the responsibility of the cabinet for fifteen (15) cumulative months out of forty-eight (48) months preceding the filing of the petition to terminate parental rights[.]" In the case before us, the TPR petition was filed on May 24, 2019. By that time, the child had been in foster care under the care of the Cabinet continuously since January 2018. The third prong of the tri-partite test was satisfied.

Accordingly, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET
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