

RENDERED: JULY 9, 2021; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2020-CA-0087-ME

M.A.C.

APPELLANT

v. APPEAL FROM CLARK FAMILY COURT
HONORABLE KIMBERLY BLAIR WALSON, JUDGE
ACTION NO. 18-AD-00028

E.A.; S.A.; AND
C.A.A. (FORMERLY C.A.C.),
A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: MAZE, TAYLOR, AND K. THOMPSON, JUDGES.

MAZE, JUDGE: M.A.C. (Father) appeals from an order of the Clark Family Court terminating his parental rights to C.A.A. (formerly C.A.C.) (the Child) and a judgment allowing E.A. and S.A. to adopt the Child. Since the record clearly

shows substantial evidence to support the family court's findings, order, and judgment, we affirm.

The Child was born to K.R.H. (Mother) and Father in May 2015. The Cabinet for Health and Family Services (the Cabinet) removed the Child from Mother's custody at birth because the Child tested positive for cocaine and heroin. Father has been incarcerated since before the Child's birth. Following a hearing in the Fayette Family Court, the Cabinet consented to placing the Child in the custody of E.A. and S.A. E.A. and S.A. are not related to the Child, but they had an established relationship with the Child's birth family. The Child has remained in their custody since that time.

The Cabinet prepared case plans for both Father and Mother. Mother did not attempt to work on any elements of her case plan. Although he is incarcerated, Father attempted to work on various elements of his case plan.

On August 22, 2018, E.A. and S.A. filed a petition in the Clark Family Court pursuant to KRS¹ 199.470 to terminate Father's and Mother's parental rights and to adopt the Child. Although the family court appointed counsel for her, Mother did not participate in the proceedings. Following an evidentiary hearing, the family court entered findings of fact, conclusions of law,

¹ Kentucky Revised Statutes.

and a judgment terminating Father's and Mother's parental rights. The family court entered a separate order granting a judgment of adoption to E.A. and S.A. Father now appeals from these orders. Additional facts will be set forth below as necessary.

Father's appointed counsel filed a brief stating that he is 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 and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), counsel filed a motion seeking to withdraw and to allow Father to proceed *pro se*. We shall grant the motion by separate order.

Parental rights are a "fundamental liberty interest protected by the Fourteenth Amendment" of the United States Constitution, requiring courts to conduct themselves with the "utmost caution" when considering termination. *F.V. v. Commonwealth, Cabinet for Health and Family Servs.*, 567 S.W.3d 597, 606 (Ky. App. 2018) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599 (1982), and *M.E.C. v. Commonwealth, Cabinet for Health and Family Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008)). Trial courts are afforded a "great deal of discretion" in determining whether termination of parental rights is warranted. *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 116 (Ky. App. 1998). Consequently, we are "obligated to give a great deal of deference to

the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *Commonwealth, Cabinet for Health and Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010).

A family court's termination of parental rights will be reversed only if it was clearly erroneous and not based upon clear and convincing evidence. *Id.*; CR² 52.01. "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." *T.N.H.*, 302 S.W.3d at 663 (citations omitted).

Generally, involuntary termination proceedings are governed by KRS 625.090. However, E.A. and S.A. 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. 1986). *See also E.K. v. T.A.*, 572 S.W.3d 80, 83 (Ky. App. 2019). Thus, the family court in this case properly applied the termination procedures set out in KRS Chapter 199.

² Kentucky Rules of Civil Procedure.

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, 498 (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.* E.A. and S.A. 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 Clark 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 E.A. and S.A. 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). The Cabinet filed its written approval of the adoption.

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). In this case, the family court appointed counsel for Father and Mother, and separately appointed guardians *ad litem* for the Child and for Father and Mother, since both were incarcerated at the time of the petition. CR 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;
- (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[.]

In this case, the family court found that Father abandoned the Child for a period of not less than ninety days; that, for a period of not less than six months, he continuously and repeatedly failed to provide essential care and protection for the Child and there is no reasonable expectation for improvement; and that, for reasons other than poverty alone, he continuously failed to provide

essential food, clothing, shelter, and education necessary for the Child, and there is no reasonable expectation of significant improvement in the immediately foreseeable future. KRS 199.502(1)(a), 199.502(1)(e), and KRS 199.502(1)(g). In addition, the family court found that A.E. and S.E. are suitable to have custody of the Child. Finally, the Child's guardian *ad litem* also advised the family court that termination of parental rights and adoption would be in the Child's best interests, and the family court so found.

In his supplemental brief, Father notes that he completed a substantial portion of his case plan. He also complains that E.A. and S.A. unilaterally denied him visitation with the child after 2016. Based upon the denial of visitation, Father argues that the family court could not find he abandoned the Child.

“Generally, abandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child.” *J.H. v. Cabinet for Human Res.*, 704 S.W.2d 661, 663 (Ky. App. 1985), (quoting *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983)).

Incarceration alone may not constitute abandonment justifying termination of parental rights. *Cabinet for Human Res. v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). However, a parent's dedication to a criminal lifestyle, characterized by multiple convictions and lengthy sentences, is a relevant factor. *J.H.*, 704 S.W.2d at 663-64.

In this case, the family court did not find that Father's incarceration or his lack of visitation amounted to an abandonment of the Child. Although Father sought visitation, he has never had any other significant contact with the Child. The Child's guardian *ad litem* also noted that Father has an extensive criminal history, and that his most-recent conviction occurred while he was on probation for another felony conviction. Under the circumstances, we conclude that the evidence supported a finding of abandonment.

Moreover, the family court also made findings under KRS 199.502(1)(e) and (g). Father does not dispute the court's findings that he has never provided parental care, protection, or support for the Child. Finally, Father does not dispute the family court's finding that this lack of support is unlikely to change in the foreseeable future given his extended incarceration. These findings alone would have supported the trial court's decision to terminate Father's parental rights. We conclude that there was substantial evidence supporting the family court's findings under KRS 199.502. Therefore, we find no basis to set aside the family court's order terminating Father's parental rights or the judgment allowing E.A. and S.A. to adopt the Child.

Accordingly, we affirm the order and judgment of the Clark Family Court.

THOMPSON, K., JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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