

RENDERED: DECEMBER 3, 2021; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2020-CA-1590-ME

E.M.

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE JULIA HAWES GORDON, JUDGE
ACTION NO. 19-AD-00073

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; H.T.E.R.; JANE
DOE FOSTER PARENT; JOHN DOE
FOSTER PARENT; M.C.R., A CHILD;
AND HONORABLE SAMUEL LEE,
GUARDIAN AD LITEM

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CETRULO, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: E.M. (Father) appeals from a November 9, 2020, order terminating his parental rights to his daughter, M.C.R., entered by the Daviess Circuit Court, Family Court Division. Father's appointed counsel contends that:

(1) this appeal is frivolous, and (2) he should be granted leave to withdraw from his representation of Father. For the reasons addressed below, we grant counsel's motion to withdraw by separate order and affirm the judgment terminating Father's parental rights to M.C.R.¹

The relevant facts are not in dispute in this case. Father is the biological parent of M.C.R., the subject matter of the instant appeal. M.C.R. has been in the care and custody of the Commonwealth of Kentucky, Cabinet for Health and Family Services (Cabinet) since February 13, 2019, when she was approximately six weeks old. At the time of removal, Mother was staying at a women's shelter in Owensboro, Kentucky. Mother got into a physical altercation with a staff member while that staff member was holding M.C.R. Mother was subsequently forced to leave the shelter and was unable to secure housing. Due to the physical altercation involving M.C.R., the Cabinet intervened. After the family court entered an emergency custody order, M.C.R. was removed and placed into a foster home.

Father was not named in the initial dependency, neglect, or abuse (DNA) petition filed by the Cabinet. However, Father made contact with the ongoing social worker, Tina Carman, several months after M.C.R. was removed

¹ M.C.R.'s Mother voluntarily terminated her parental rights and therefore has not filed an appeal.

from Mother's care. Although Father refused to enter into a case plan at the time, he was provided with a list of parenting classes and mental health services available in Crittenden County, Kentucky, where he was living. During the pendency of the DNA proceedings involving Mother, a separate paternity action was filed. Father was then determined to be M.C.R.'s biological father by court order entered September 5, 2019. He was also ordered to pay child support.

Once paternity was established, a separate DNA petition was filed naming Father, and the Cabinet entered into a case plan with him. The case plan required Father to (1) undergo a mental health assessment and follow all recommendations; (2) undergo a parenting assessment and attend parenting classes; (3) visit regularly with M.C.R.; (4) follow all court orders; (5) maintain contact with the Cabinet; and (6) keep the Cabinet informed of changes in his contact information. The Cabinet provided or made available various reunification services in order to reunite M.C.R. with Father, including providing him with information on where to access mental health and parenting services in his home county and providing transportation of M.C.R. to in-person visitation.

Father did not complete his case plan. He failed to show for any of the scheduled in-person visits with M.C.R. and, when visitation changed to video and/or telephonic visits due to COVID-19 restrictions, Father utilized the available visitation just once. Although he started parenting classes, he did not complete

them. He also failed to have the mental health and parenting assessments contained in his case plan. Father did not maintain contact with the Cabinet as required by his case plan and, although he moved multiple times, did not keep his address and phone number current with the ongoing social workers. Father never paid court-ordered child support or provided for M.C.R.'s needs in any way.

Although the petition to terminate Father's parental rights was filed by the Cabinet in December 2019, the Cabinet continued to try to work with Father in meeting the goals of his case plan. Father motioned the family court for a continuance of the final hearing so he could have more time to complete his case plan, and the family court granted his motion. However, when Father appeared at the final hearing on October 21, 2020, the Cabinet submitted proof that he had not made any progress towards completing his case plan. Father did not testify on his own behalf and did not call any other witnesses. An order terminating parental rights and judgment was entered on November 9, 2020. This appeal followed.

Counsel for Father tendered to this Court an *Anders* brief and a motion to withdraw as Father's counsel. In support of the motion, counsel directed our attention to *Anders v. State of California*, 386 U.S. 738 (1967) and *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012) for the proposition that withdrawal from representation is justified where the record demonstrates that the appeal is wholly frivolous. *Anders*, 386 U.S. 738, as adopted

in the Commonwealth by *A.C.*, 362 S.W.3d 361, provides in relevant part that when counsel determines the appeal to be without merit, he or she may withdraw from representation and appellant is then given notice and 30 days leave to file a *pro se* brief or other pleading. Father did not file a *pro se* brief. Our review proceeds accordingly.

When a party files an *Anders* brief in a termination of parental rights case, this Court is not required to address every conceivable argument that an appellant could have raised on appeal. *A.C.*, 362 S.W.3d at 370. This Court's review is analogous to a palpable error review requiring only that we "ascertain error which 'affects the substantial rights of a party.'" *Id.* (quoting Kentucky Rules of Civil Procedure (CR) 61.02).

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, Kentucky Revised Statute (KRS) 625.090(1) requires that a child be adjudged neglected or abused as defined in KRS 600.020. 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 decision is clearly erroneous if not supported by substantial evidence. *Id.*

Pursuant to KRS 600.020:

(1) “Abused or neglected child” means a child whose health or welfare is harmed or threatened with harm when:

(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

.....

4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

.....

7. Abandons or exploits the child;

8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child’s well-being[.]

The Cabinet presented evidence to the family court consistent with these provisions at trial. Based on our review of the record and the evidence presented below, we agree with the family court’s findings. These findings were supported by clear and convincing evidence and thus are not clearly erroneous.

KRS 625.090 provides as follows:

(2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:

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

....

(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;

....

(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[.]

The family court found these provisions had been satisfied by the Cabinet. The family court then found termination of parental rights was in

M.C.R.'s best interest, pursuant to KRS 625.090(3). Based on our review of the record, we cannot conclude that the family court's findings of fact were clearly erroneous and must agree that it was in the best interest of M.C.R. to terminate Father's parental rights.

For the reasons stated, we affirm the Daviess Circuit Court, Family Court Division's order entered November 9, 2020, terminating E.M.'s parental rights to M.C.R.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET
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