

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-0628-ME

E.B.

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE JOHN F. VINCENT, JUDGE
ACTION NO. 20-AD-00010

R.M.L., JR.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, McNEILL, AND L. THOMPSON, JUDGES.

McNEILL, JUDGE: E.B. (Father) appeals from the Boyd Circuit Court's decision to grant R.M.L., Jr.'s (Stepfather) petition to adopt A.N.G. (Child). We affirm.

The core underlying facts are straightforward. Father and B.L. (Mother) are the biological parents of Child, who was born in November 2012. Slightly less than two months after Child's birth, Father was incarcerated. Father has remained incarcerated ever since. Father was sentenced to twenty years'

imprisonment for his conviction for multiple counts of use of a minor under age 18 in a sexual performance and multiple counts of possession of matter portraying a sexual performance by a minor. Mother is a victim of Father's crimes.

It is uncontested that Father has not seen Child since being incarcerated and has provided no financial support for Child. Father likewise has not attempted to contact Child since being incarcerated, nor has Father sent Child any clothing, food, or presents.

In 2019, Mother and Stepfather were married. In February 2020, Stepfather filed a petition seeking to adopt Child. Mother filed her written consent to the adoption. Similarly, the Cabinet for Health and Family Services filed a report recommending that Stepfather be permitted to adopt Child.

The trial court appointed a guardian *ad litem* for Child and a separate one for Father. Child's guardian *ad litem* filed a report stating that it would be in Child's best interest for Stepfather's petition to be granted. Father's guardian *ad litem* filed a response arguing that Stepfather's petition should be denied because Father's lack of support for Child stems solely from his incarceration.

The Court held a final hearing via videoconference in April 2021. The witnesses included Mother, Stepfather, and Father. Stepfather and Mother testified about their relationship and how Stepfather had helped raise Child for

several years. According to Mother and Stepfather, Child believes Stepfather to be her father and is unaware of Father's existence.

Father admitted that he had not seen Child since soon after her birth, nor had he provided for Child. But Father insisted his incarceration was the sole reason for his lack of support. Father also admitted he had not attempted to contact Child but stated that he did not think he was permitted to attempt to do so because Child was in the care of Mother, who was a victim of his crimes. Father testified that he intended to appeal his convictions but admitted that, unless he received relief from the courts, he would be imprisoned until Child was near the age of majority.

Soon after the hearing the trial court issued two separate orders. First, the court issued an order terminating Father's parental rights. Citing Kentucky Revised Statute (KRS) 625.090, which governs involuntarily terminating parental rights, not KRS 199.502, which governs an adoption without the biological parent's consent, the court issued an order terminating Father's parental rights to Child based upon findings that Father had abandoned Child for more than ninety days and had failed to provide appropriate care for Child. Second, the court issued an order stating it found "by clear and convincing evidence that it is in the child's best interest" to grant the adoption. Record (R.) at 47.

Father then filed this appeal. In accordance with *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012) and *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), counsel for Father filed a motion to withdraw and a brief opining that no meritorious issues exist. Counsel's request to withdraw was passed to this merits panel. Father was given time to file a brief on his own behalf, but he did not do so.

Pursuant to *A.C.*, "we are obligated 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. We are thus not required to address "every conceivable argument" that an appellant could have raised. *Id.* at 370. Instead, our review is "akin to palpable error review requiring us only to ascertain error which affects the substantial rights of a party." *Id.* (internal quotation marks and citation omitted). We review the trial court's findings of fact under the clearly erroneous standard. *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 715-16 (Ky. App. 2010).

The trial court exclusively cited KRS 625.090, which governs the involuntary termination of parental rights. But "it is incumbent on us to clarify that this is not a termination case governed by KRS Chapter 625; it is an adoption case governed by KRS Chapter 199." *C.J. v. M.S.*, 572 S.W.3d 492, 497 (Ky. App. 2019). Thus, it was unnecessary for the trial court to issue separate orders terminating Father's parental rights and granting the adoption. *Id.* We shall "view

the judgment of adoption and order terminating parental rights as being one document that comprises the judgment. The effect of the judgment is the adoption of the child at issue. As such, we review the judgment for compliance with the adoption statutes.” *Id.* (internal quotation marks and citation omitted).

KRS 199.500(4) provides in relevant part that “an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as a part of the adoption proceedings that any of the provisions of KRS 625.090 exist with respect to the child.” Similarly, as it pertains to this case, KRS 199.502 provides in pertinent part:

(1) Notwithstanding the provisions of KRS 199.500(1), an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding 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;

....

(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[.]

Though KRS 199.502 requires only a finding that one listed condition has been proven, the trial court here found that two had been proven. First, the court found that Father had abandoned Child for a period of at least ninety days. Second, the court found that Father had continuously and repeatedly failed to provide essential food, clothing, shelter, medical care, or education for Child and that there was no reasonable expectation of significant improvement in the immediately foreseeable future. Both findings are amply supported by the evidence.

It is beyond dispute that Father has had no contact with Child since Child was approximately two months old. But “abandonment must be based on more than mere failure to exercise visitation.” *S.B.B.*, 304 S.W.3d at 717. Instead, “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.” *Id.* at 716 (internal quotation marks and citations omitted).

As he stresses, Father has been incarcerated for almost the entirety of Child’s life. And the circumstances here are unique since Child has resided with a victim of Father’s crimes. Nonetheless, the evidence supports the court’s conclusion that Father has abandoned Child. Father sent Child no letters. Father made no attempts to call Child on the telephone. Father sent Child no holiday or birthday cards or gifts. Father essentially has taken no steps to attempt to remain a

part of Child's life. Thus, the trial court's abandonment conclusion is adequately supported by the evidence. *Id.* ("Father did not communicate with his son's caregivers and did not demonstrate any interest in the boy's life during his critically important formative years. These facts do not paint the picture of a man interested in the nurturing and upbringing of his son.") (Citation omitted.)

The evidence also supports the trial court's finding that Father had, for reasons other than poverty alone, not provided essential food, clothing, shelter, medical care, or education for Child. Father has been absent for nearly all of Child's life and has provided none of the necessities of life for Child. Father has made no financial contributions whatsoever to Child's upbringing. And Father's inability to earn a significant income due to his incarceration stems directly and solely from his own voluntary choice to engage in criminal conduct. The trial court's conclusion that Father had not provided necessities for Child, for reasons other than poverty alone, is adequately supported by the evidence.

We agree with Father that a person's parental rights may not be terminated solely due to incarceration. *See, e.g., A.R.D. v. Cabinet for Health and Family Services*, 606 S.W.3d 105, 110-11 (Ky. App. 2020). Clearly, however, "incarceration is something to be considered among all other factual circumstances." *Id.* at 111. The offenses for which the Father was incarcerated

were felonies involving minor victim(s) – including Mother. Father thus voluntarily engaged in illegal conduct which led to his absence.

Incarceration may have prevented Father from being intimately involved in Child’s day-to-day life but it did not prevent Father from at least attempting to be involved in Child’s life. Yet Father has taken no tangible steps toward attempting to be part of Child’s life. The trial court’s findings were not based solely upon Father’s incarceration.

Moreover, though Father expressed confidence that he would receive a new trial, Father admitted he was required to remain incarcerated until Child was at, or nearly at, the age of majority. Thus, the trial court’s conclusion that there is no reasonable expectation of significant improvement in the immediately foreseeable future is adequately supported by the evidence. *See, e.g., A.R.D.*, 606 S.W.3d at 112 (holding that a parent who was not scheduled to be released from prison for at least several months after the termination hearing meant the parent would “be unable to actively take care of Child or provide for his needs for a substantial time in the future”).

Finally, “to pass constitutional muster, the evidence supporting termination must be clear and convincing.” *A.F. v. L.B.*, 572 S.W.3d 64, 70 (Ky. App. 2019) (internal quotation marks and citation omitted). Here, the evidence of Father’s abandonment of and/or failure to provide for Child is so overwhelming

that it is beyond rational dispute that the evidence satisfied the clear and convincing evidence standard. Indeed, the court explicitly recited the clear and convincing evidence standard in the order granting the adoption. Thus, viewing the two decisions holistically to be one judgment of adoption, we conclude the decision “pass[es] constitutional muster[.]” *Id.* (internal quotation marks and citation omitted).

In sum, we have carefully reviewed the record and have discerned no errors which impacted Father’s substantial rights. We thus affirm the adoption and grant Father’s counsel’s motion to withdraw via separate order.

For the foregoing reasons, the Boyd Circuit Court is affirmed.

ALL CONCUR.

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