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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-1205-ME

B.R. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 21-AD-00061

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; AND H.R.A.B.,
A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MCNEILL, AND TAYLOR, JUDGES.

MCNEILL, JUDGE: B.R. (Mother) appeals from the Fayette Circuit Court's findings of fact, conclusions of law, and judgment terminating parental rights to her minor child, H.R.A.B. (Child). In accordance with *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), counsel for Mother filed

an *Anders*[1] brief asserting that there are no proper grounds for relief, along with a motion to withdraw as counsel. After careful review, we affirm and grant counsel's motion to withdraw via separate order.

The essential facts appear to be uncontested. Child was born in May 2020. Very soon thereafter, the Cabinet for Health and Family Services (CHFS) received a referral which stated that Mother had tested positive for methamphetamine and methadone upon delivering Child. Mother admitted to a CHFS employee that she (Mother) had a lengthy history of drug abuse, including having used heroin while pregnant with Child.

CHFS filed a dependency, neglect, or abuse (DNA) petition in the Fayette Circuit Court, Family Court Division, in June 2020. In the DNA proceedings, Mother stipulated to Child's having been neglected. Mother's compliance with CHFS' case plan requirements was poor, so CHFS eventually asked the court to change the goal to permit Child to be adopted. In March 2021, the court agreed to that goal change and CHFS then filed this termination action.[2]

In August 2021, the court held a final termination hearing via videoconference, at which Mother appeared. The only witness at the hearing was a CHFS social worker, who testified for about fifteen minutes. The social worker

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

[2] Child's father agreed to have his parental rights to Child terminated.

recounted how CHFS became involved with Mother and her failure to cooperate consistently with case plan requirements such as, for example, undergoing drug testing. The social worker also testified that Mother had been arrested for possession of methamphetamine roughly two months before the hearing.

Particularly significant to this appeal, counsel for CHFS asked the social worker if, in her professional opinion, Mother had continuously failed to provide, or had been substantially incapable of providing, essential parental care for Child for at least six months. The social worker answered in the affirmative, opining that for at least six months Mother had "not been able to provide any care" for Child. Video, 8/18/21 at 9:19:20 *et seq*. The social worker also stated it was her professional opinion that there was not a reasonable prospect of improvement in the foreseeable future, nor were there any additional services CHFS could provide which would permit Child to be safely reunited with Mother in the near future. *Id.* at 9:19:40 *et seq.* The social worker also testified that Child was healthy and well-bonded with her maternal grandmother, with whom Child had lived since leaving the hospital following her birth.

Since Mother had apparently indicated some recent willingness to consider getting long-term substance abuse treatment, the court asked the social worker how long it would take before Mother and Child could be considered for reunification if Mother soon entered, and complied with the terms of, long-term

residential treatment. The social worker explained that it would be at least six months to a year before reunification could properly be considered, even if Mother entered treatment immediately.

No one asked the social worker about what monetary support Mother had contributed toward Child's care. Similarly, no one asked the social worker what other contributions – such as providing food, diapers, or clothing – Mother had made to help with Child's upbringing. Also, no one asked about Mother's education, job history, or future employment prospects.

At the conclusion of the hearing, the court orally stated that it would terminate Mother's rights and it later issued a judgment and order doing so.[3] Mother then filed this appeal.

Terminating parental rights "is a scrupulous undertaking that is of the utmost constitutional concern." *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). Before parental rights may be involuntarily terminated, there must be clear and convincing evidence sufficient to satisfy the three-part test set forth in Kentucky Revised Statute (KRS) 625.090: "(1) the child

[3] The family court's findings of fact and conclusions of law state that at the termination hearing Mother's counsel "moved to withdraw as counsel for [Mother] based on the lack of contact with her. The court approved the motion to withdraw." Record (R.) at 39. But the video of the termination hearing reveals no motion to withdraw by Mother's counsel, nor does it depict the family court permitting Mother's counsel to withdraw. In fact, in an order permitting Mother to appeal *in forma pauperis*, the family court appointed the same person who represented Mother at the termination hearing as Mother's counsel for this appeal.

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." *K.H.*, 423 S.W.3d at 209.

Because "the trial court has wide discretion in terminating parental rights . . . our review is limited to a clearly erroneous standard which focuses on whether the family court's order of termination was based on clear and convincing evidence." *Id.* at 211. Under that tightly circumscribed standard, we afford "a great deal of deference to the family court's findings" and may not "interfere with those findings unless the record is devoid of substantial evidence to support them." *Id.* (internal quotation marks and citation omitted).

Counsel for Mother filed an *Anders* brief stating that the instant appeal is frivolous.[4] When that occurs, "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. Pursuant to the statement in *Anders* that counsel should "refer[] to anything in the record that might arguably support the appeal[,]"[5] Mother's counsel tersely identified potential grounds for relief – such as whether CHFS made reasonable efforts to reunify Mother and

[4] We afforded Mother the opportunity to submit a *pro se* brief, but she did not do so.

[5] *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400.

Child and whether the family court ignored Mother's efforts to complete her case plan. We construe those statements to be general assertions that termination was not in Child's best interests. *See R.M. v. Cabinet for Health and Family Services*, 620 S.W.3d 32, 38 (Ky. 2021); KRS 625.090(3).

First, based on Mother's stipulations, the family court found that Child was neglected in the underlying DNA proceedings. And the court again found in the termination proceeding that Child was neglected due to, among other things, Mother's drug abuse.[6] The court's conclusion that Child was neglected is not clearly erroneous.

Second, the court's factual findings supporting its conclusion that termination was in Child's best interests are also not clearly erroneous. The social worker testified that she was unaware of any additional services CHFS could offer to help Mother be reunited with Child. And there was ample evidence showing

[6] KRS 625.090(1)(a)2. states that termination of parental rights may occur if, among other things, the court finds by clear and convincing evidence that "[t]he child is found to be an abused or neglected child, as defined in KRS 600.020(1) . . . ." KRS 600.020(1)(a)3. defines an *abused or neglected child* in relevant part as:

> a child whose health or welfare is harmed or threatened with harm when . . . her parent . . . [e]ngages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child, including but not limited to parental incapacity due to a substance use disorder as defined in KRS 222.005[.]"

And, in turn, KRS 222.005(12) defines *substance use disorder* in relevant part as "a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems."

that Mother had not consistently taken advantage of the services offered to her by CHFS, such as referrals to a long-term substance abuse treatment center. Moreover, the social worker testified that Child had bonded with her grandmother and was doing well. Thus, we reject the fleeting assertion in Mother's brief that CHFS did not make reasonable efforts to reunite Mother with Child.

Mother did take at least some minimal steps toward completing her case plan, such as undergoing some substance abuse treatment, but failed to consistently stay in contact with CHFS and failed to complete many of the requirements of her case plan, such as undergoing long-term residential substance abuse treatment. And the family court did not wholly ignore Mother's positive actions. For example, it noted in its oral remarks following the social worker's testimony that Mother had received at least some substance abuse treatment. But the family court had the exclusive ability to evaluate all the testimony and weigh all the evidence, *P.S. v. Cabinet for Health and Family Services*, 596 S.W.3d 110, 115 (Ky. App. 2020), and we cannot conclude that the court erred by, essentially, affording more weight to Mother's many instances of disregarding the requirements of her case plan than to her limited, sporadic compliance therewith. *C.J.M. v. Cabinet for Health and Family Services*, 389 S.W.3d 155, 162 (Ky. App. 2012) ("The family court was provided substantial evidence that [CHFS] offered

services to the mother and that she did not avail herself of them. There was no error in the family court's judgment regarding reasonable efforts for the mother.").

In sum, the family court's conclusion that terminating Mother's parental rights was in Child's best interests is supported by ample evidence. *See* KRS 625.090(3).[7]

Finally, we turn to whether the family court properly concluded that at least one ground in KRS 625.090(2) had been satisfied by clear and convincing evidence. Specifically, the family court here found that the evidence satisfied KRS 625.090(2)(e) and (g), which provide:

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[7] KRS 625.090(3) provides in relevant part that:

> In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider . . .
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> . . .
>
> (b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;
>
> (c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents . . .
>
> . . .
>
> (e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered[.]

KRS 620.020(13) defines *reasonable efforts* in relevant part as "the exercise of ordinary diligence and care by [CHFS] to utilize all preventive and reunification services available to the community . . . which are necessary to enable the child to safely live at home[.]"

> (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[.]

Specifically, the court found that "[t]estimony and exhibits provided that [Mother] has not provided any item of care for [Child] and has not demonstrated the ability to protect [Child]. [Mother] has not provided for [Child] since [Child] was born." R. at 45-46. Similarly, the court found that "[t]estimony and exhibits established that [Mother] has not provided any item or type of support for [Child] since [Child] was born. [Mother] has not demonstrated her ability to gain stable housing and employment." R. at 46.

Notably, the family court did not specify precisely what testimony or documentary evidence supported those findings. In the independent review of the record required of us by *A.C.*, we discovered no testimony by the social worker about whether Mother had provided any financial assistance toward rearing Child,

or whether Mother had provided any of the necessities of life to Child, such as food or clothing. The social worker also did not discuss Mother's housing or employment history, other than making a fleeting statement that she (the social worker) had been told Mother was residing with family members. The written record of the DNA proceedings also sheds little light on these areas.[8]

Thus, we cannot discern substantial evidence to support the family court's conclusion Mother "has not provided any item or type of support" for Child. That finding is perhaps factually accurate, but it is not soundly, directly based upon evidence of record.

However, the social worker discussed Mother's admission that she has an extensive history of drug usage, including using heroin whilst pregnant with Child. Mother's failure to drug screen consistently led the social worker to assume that Mother had continued to use drugs. That assumption is logical, especially since Mother tested positive for methamphetamine in a January 2021 drug screen and was arrested in June 2021 for possession of methamphetamine.

Moreover, the social worker's unrebutted testimony was that Child has resided with its maternal grandmother her whole life, other than the period of post-birth hospitalization. The social worker further testified that Mother had had

[8] There are boxes checked in orders from the DNA proceedings indicating that Mother was required to pay child support. But there is no indication of how much support Mother was required to pay, nor how much support she actually paid.

minimal contact with Child. In addition, the social worker crucially testified that for at least six months Mother had "not been able to provide any care" for Child. Finally, the social worker testified that there was no reasonable prospect of significant improvement in the foreseeable future, even if Mother immediately entered long-term residential substance abuse treatment.

Considering Child's extremely young age, the unrebutted testimony that it would be at least six months to a year before it was feasible to discuss reunification sufficiently supports the finding that there was no reasonable expectation of improvement. And the social worker testified bluntly that for at least six months Mother was unable to provide "any care" for Child. That unrebutted testimony sufficiently supports the family court's conclusion that, for at least six months, Mother was substantially incapable of providing essential parental care and protection for Child.

Consequently, the social worker's unrebutted testimony was sufficient to satisfy, by clear and convincing evidence, the requirements of KRS 625.090(2)(e). Accordingly, we need not address further the family court's conclusion that the evidence also satisfied KRS 625.090(2)(g). *See, e.g.*, *Commonwealth, Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010) ("Under the language of KRS 625.090(2), the existence of

only one of the grounds in that section needs to be proven by clear and convincing evidence.").

In conclusion, some of the family court's stray, individual findings are not supported by substantial evidence. However, the family court's core conclusion that there was clear and convincing evidence sufficient to satisfy the three-part test set forth in KRS 625.090 is not clearly erroneous. Thus, we must affirm.

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

ALL CONCUR.

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