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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-1295-ME

B.W.[1] APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JANE ADAMS VENTERS, JUDGE
ACTION NO. 20-AD-00052

A.M.; D.M.; AND
S.D.W., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND MCNEILL, JUDGES.

MCNEILL, JUDGE: B.W. ("Mother"), the biological mother of minor child S.D.W. ("Child"), appeals an August 12, 2021 order of the Pulaski Family Court terminating her parental rights to Child and granting Child's paternal great-uncle's

[1] Pursuant to Court policy, we protect the privacy of parties in termination of parental rights ("TPR") proceedings by referring to them by initials only.

("D.M.") and great-aunt's ("A.M.") petition to adopt Child. Upon review, we affirm the trial court's order. We also grant, by separate order, appellant counsel's motion to withdraw from representation of Mother.

FACTUAL AND PROCEDURAL BACKGROUND

The trial court largely based its August 12, 2021 judgment upon evidence gleaned from a two-day trial in which it considered testimony from A.M.; D.M.; Kayla York Mann, the ongoing DCBS[2] worker in the juvenile proceedings associated with this matter; T.M.W., the minor respondent's paternal grandmother; and Mother. In its judgment, the trial court accurately summarized the relevant factual and procedural background of this matter and provided its operative findings of fact and conclusions of law, stating in pertinent part:

FINDINGS OF FACT

> 1. Petitioner, [A.M.], was born [in] . . . 1976 in Pulaski County, Kentucky. Petitioner resides at [omitted]. Petitioner has been a resident of Kentucky at least one year prior to the filing of this Petition.
>
> 2. Petitioner, [D.M.], was born [in] . . . 1971 in Jefferson County, Kentucky. Petitioner resides at [omitted]. Petitioner has been a resident of Kentucky at least one year prior to the filing of this petition.
>
> 3. Petitioners, [A.M. and D.M.], were legally married on June 10, 2011 in Pulaski County, Kentucky with said marriage being registered in Pulaski County, Kentucky.

[2] Department for Community Based Services.

4. The child sought to be adopted, [Child], was born [in] . . . 2017 in Hardin County, Kentucky. The minor child has continuously resided with Petitioners at [omitted] since December 21, 2018.

5. Respondent, [D.K.M.], is the minor child's biological father. He was born [in] . . . 1986 in Pulaski County, Kentucky, and is currently incarcerated at the Harlan County Detention Center in Evarts, Kentucky. Said Respondent has consented to the adoption of the minor Respondent.

6. Respondent, [Mother], is the minor child's biological mother. She was born [in] . . . 1991 and resides at [omitted].

7. [Child] was removed from the biological parents on December 12, 2018 in a juvenile proceeding and the Hardin Family Court made a finding of neglect against both natural parents on January 9, 2019. Ms. Mann (formerly York), the ongoing social worker, cited ongoing domestic violence and drug use which led to the neglect finding. On February 20, 2019, the Petitioners were granted permanent custody of the child.

8. Respondent, [Mother], objects to the adoption and asserts completion of her case plan. She presented evidence that she completed parenting classes in April 2019, that she submitted to a mental health assessment in January 2019 and that she completed the recommended counseling sessions in May 2019. She asserts that she was not afforded sufficient time to work her case plan prior to the award of permanent custody. However, she filed nothing to object to that decision in the Hardin Family Court. Ms. Mann testified that [Mother] would not engage with her and all she could do was offer help and services. Further, as of the date of this hearing, 2 ½ years after the juvenile proceeding commenced, she still has not provided evidence of substantial compliance with her case plan. She has not maintained a job for more

than a couple of months at a time. She claims financial stability but she has child support arrearages totaling thousands of dollars for all three of her children. She financed the purchase of a vehicle for over $350.00 per month but she does not have a driver's license or permit. As to routine drug screening, the first screening was positive for methamphetamine and she never tested again. She has not provided proof of a substance abuse assessment or a TAP assessment, both of which were a part of her case plan. While the parenting classes and mental health services were a part of the plan and have been completed, compliance with the drug screen protocol, substance abuse assessment and TAP assessment are integral parts of the plan, especially given the job/financial instability and questionable choices regarding acquaintances she has experienced since the award of permanent custody. Completion of the TAP assessment, with substantive barriers being identified, and any recommendations being followed, was crucial. [T.M.W.], paternal grandmother and [D.M.'s] sister, provided details regarding the lack of parenting skills of [Mother] and her attempts to help her, not only with guidance but also with transportation and logistics. If these services were completed as claimed, information should have been presented to the Court. Moreover, her credibility was diminished by instances where her testimony was contradicted by text messages or audio recordings.

9. The Hardin Family Court's award of permanent custody to [A.M. and D.M.] after only a couple of months was because of the lack of cooperation by the parents and was preceded by the Cabinet's request that the Court either grant [A.M. and D.M.] permanent custody or waive reasonable efforts as to both natural parents. Affidavits in support of said request detail the natural father's refusal to cooperate and his aggressive and hostile harassment of the Cabinet workers that led to the Hardin Family Court ordering the Cabinet workers not to complete any more home visits, rendering it

impossible for the Cabinet to work with the family. The affidavits also detailed the natural mother's intention to continue residing with the natural father even though the case arose due to the natural father's physical aggression against her which led to an EPO being filed and ended with her dismissing the EPO so that both parents could spend the holidays with the child. Testimony indicated [Mother]'s lack of protective capacity for the child was a concern of Ms. Mann, the ongoing social worker. Records introduced indicate [D.K.M.] pled guilty to 4th degree assault, domestic violence, in September 2018 prior to the domestic violence petition being filed. Thereafter in November of 2018 [Mother] obtained the domestic violence order which she dismissed in December of 2018.

10. Respondent, [Mother], has continued an on and off relationship with the natural father despite recounting to the Court frequent instances of domestic violence and physical aggression by him. Although she testified she will not reconcile with the natural father upon his release from incarceration, she has a pattern of doing so. She was unable to present any evidence of attendance at counseling specific to victims of domestic violence. She continues to surround herself with high-risk individuals, which has resulted in law enforcement coming to her residence on multiple occasions. In her testimony, [Mother] recounted an incident when law enforcement came to her home looking for T.J., a previous boyfriend, who had absconded while on probation; an incident when law enforcement entered her residence while chasing her neighbor, Virgil, who had entered her residence in attempt to flee from them and was arrested in her residence. [Mother] also admitted that she had allowed [an] acquaintance named April to stay at her home and that April was on probation. She further admitted that her current boyfriend, Michael Osborne, is on probation or diversion but denied that he threatened her or put his hands on her. She stated that he calls her names but that

she can't control what he says and that he apologizes after he says hurtful things.

11. Respondent, [Mother], admits she lost custody of her other two children after a finding of neglect or abuse more than five (5) years ago. She did not participate in the court proceedings, but she learned from the children's stepmother that the children's father had been granted permanent custody. They do not permit her to see the children. She never followed up on the court proceedings to independently verify the court's ruling.

12. Although Respondent, [Mother], has texted to ask about the child very frequently since the filing of this action, prior to that, she randomly texted only once every two or three months. She had two visits with the child during the juvenile proceedings and missed other planned visits. She asked the Petitioners only a few times to see the child and they did not permit it because they had no evidence that she was maintaining sobriety or working her case plan. She admits to a long period of time when she did not ask to see the child. At this point, she hasn't seen child for 2 ½ years.

13. The [Guardian *ad litem*] argued that Petitioners have met the statutory requirements for the relief sought and she questioned [Mother's] ability to protect the child given the dismissal of the DVO when there was a lack of capacity to protect the child. Issues regarding her current relationship where she admitted to being yelled at, her possible drug use given her failure to undergo screens, questionable people in and out of the home and a lack of stable employment were troubling to the attorney for the child.

14. The Respondent mother's demeanor indicates a lack of appreciation for her deficiencies in being able to provide a stable, appropriate home for the child. While she may have engaged in some services on the case plan, her inability during her testimony to adequately address

> her poor choices of friends and acquaintances, as well as financial and job stability, is troubling. She does not take any responsibility for her actions, or lack thereof. While a permanent custody order was entered in the juvenile case in a short amount of time, she did not provide evidence of compliance with the case plan in a meaningful way and her current circumstances two years later reflect that.

Considering what is set forth above, and based upon the statutory criteria discussed in greater depth below in the context of our analysis, the trial court terminated Mother's parental rights to Child and granted D.M.'s and A.M.'s adoption petition. After the trial court overruled Mother's subsequent CR[3] 59.05 motion, Mother, via court-appointed counsel, filed a timely notice of appeal. Her counsel then filed a motion to withdraw as counsel in the appeal, and also filed a brief that comported with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), citing an inability to identify any issue with sufficient merit to support a meaningful argument on appeal, and requesting that this Court conduct a full examination of the record for prejudicial error and to determine if any non-frivolous issues had been overlooked. A motion panel of this Court passed consideration of the merits of counsel's motion to this merits panel and provided Mother thirty days to file a *pro se* brief in the appeal. Mother ultimately filed no brief.

[3] Kentucky Rule of Civil Procedure.

ANALYSIS

a. *Anders* and *A.C.*

In *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), this Court adopted the principles and procedures laid out in *Anders* in the criminal setting to appeals from orders terminating parental rights, concluding that "an indigent parent defending a termination of parental rights action enjoys a statutory right to counsel during the appeal[.]" *Id*. at 367. Consequently, under Kentucky law, it is necessary to utilize *Anders*-type briefs and procedures in termination of parental rights cases wherein appointed counsel does not believe there are any non-frivolous claims to appeal. Therefore, upon a good faith review of the record:

> if counsel finds his [client's] case to be wholly frivolous, after a conscientious examination of it, he 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. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

Anders, 386 U.S. at 744, 87 S. Ct. at 1400.

As discussed, in this case Mother's counsel submitted a brief in compliance with *A.C.* and *Anders*. We are therefore obligated to independently

review the record and establish whether this appeal is, in fact, frivolous. *A.C.*, 362 S.W.3d at 371.

b. Standard of Review

Appellate review of findings of fact in adoption actions concerning the termination of parental rights is limited to the "clearly erroneous" standard discussed in CR 52.01. *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 715 (Ky. App. 2010). Such review reflects the notion that the trial court was in the best position to judge the witnesses' credibility. *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998).

However, as stated in *R.P., Jr. v. T.A.C.*, "to pass constitutional muster, the evidence supporting termination must be clear and convincing." 469 S.W.3d 425, 427 (Ky. App. 2015). Clear and convincing evidence does not equate to "uncontradicted" evidence. *W.A. v. Cabinet for Health and Family Servs.*, 275 S.W.3d 214, 220 (Ky. App. 2008). Rather, clear and convincing evidence is "of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 423-24 (Ky. App. 1986) (quoting *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934)).

c. Discussion

We begin with the substantive merits of the trial court's decision. As this Court has stated, "a petition seeking adoption of a child against the child's biological parent's wishes is a discrete subset of involuntary termination of parental rights cases[.]" *C.M.C. v. A.L.W.*, 180 S.W.3d 485, 490 (Ky. App. 2005). Such an action "is governed in its entirety by KRS[4] Chapter 199." *R.M. v. R.B.*, 281 S.W.3d 293, 297 (Ky. App. 2009). Particularly, KRS 199.502(1) sets forth 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 part of the adoption proceeding" that any one of the ten conditions specified in that subsection "exist with respect to the child[.]"

Here, the trial court relied on three such conditions. The first, set forth in KRS 199.502(1)(a), required that "the parent has abandoned the child for a period of not less than ninety (90) days[.]" The second, set forth in KRS 199.502(1)(e), required:

> 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[.]

[4] Kentucky Revised Statute.

The third condition the trial court relied on, as set forth in KRS 199.502(1)(g), required:

> 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[.]

That said, we will not restate the family court's findings set forth above. It is enough to say they are consistent with the evidence of record and the family court's authority to assess the credibility of the witnesses; not indicative of clear error or an abuse of discretion; and amply support that the conditions of KRS 199.502(1)(a), (e), and (g) were met in this matter. Further, the trial court properly determined, consistently with KRS 199.520(1), that A.M. and D.M. were of good moral character and reputable standing in the community, and of sufficient means to properly maintain and educate the minor respondent; that it was in the best interest of Child to be adopted; and that all legal requirements were met relating to the adoption.

Before concluding, we pause to address four ancillary concerns suggested by Mother's counsel. First, counsel notes that Father's executed AOC-292 "appearance waiver and consent to adoption" form of record is a *copy*, not an *original*. Second, A.M.'s and D.M.'s initiating document was styled as a "petition

for leave to adopt," rather than a "petition for adoption." Third, counsel suggests Mother may have had "some indication of cognitive delay" that the family court failed to consider. Fourth, counsel suggests the Hardin Family Court – the *other* trial court in the *prior* DNA proceeding – may have erred by granting permanent custody to A.M. and D.M. because, in his view, the roughly two-month period between when that proceeding was initiated and when A.M. and D.M. were eventually granted permanent custody in that matter may have been too brief a time for the Cabinet to adequately provide Mother and Father services.

None of counsel's suggestions qualify as reversible error. When a party files an *Anders* brief in a termination of parental rights case, this Court is not obligated 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 similar to a palpable error review, which requires us "only to ascertain error which 'affects the substantial rights of a party.'" *Id*. (quoting CR 61.02). Bearing that in mind, counsel's first suggestion is not an argument Mother raised below, or otherwise has standing to raise in this appeal: At best, it relates to the validity of the trial court's termination of *Father*'s parental rights, not Mother's; and *Father* declined to appeal the termination of his parental rights or Child's adoption.

Counsel's second suggestion, which is likewise raised for the first time on appeal, fares no better. The styling of A.M.'s and D.M.'s initiating

document as a "petition for leave to adopt," rather than a "petition for adoption," had no impact on Mother's substantial rights. CR 61.02. Moreover, KRS 199.470(2) provides in relevant part that "[i]f the petitioner is married, the husband or wife shall join in *a petition for leave to adopt* a child . . . ." (Emphasis added.) Also, as counsel concedes in the *Anders* brief, A.M.'s and D.M.'s initiating document included all the information required by KRS 199.490.

Counsel's third suggestion is unsupported by the evidence. No medical or other expert testimony was adduced below demonstrating Mother suffered from diminished intellectual capacity.

As for his fourth suggestion, if mother wished to contest the *Hardin* Family Court's determination that she neglected Child, and its consequent award of permanent custody to A.M. and D.M., Mother was obligated to appeal those determinations. She did not do so. This direct appeal from *Pulaski* Family Court provides her no means of collaterally attacking those determinations. Moreover, as the Pulaski Family Court correctly explained in its October 5, 2021 order denying Mother's CR 59.05 motion,

> While the Court understands and appreciates counsel's arguments relating to the Cabinet's actions during the juvenile proceedings in Hardin County, at this point, those actions are far removed in both time and causation from [Mother's] current choices and circumstances and cannot be deemed a reason for the Court to reconsider its August 12 Judgment of Adoption.

CONCLUSION

We find no indication that the trial court erred in terminating Mother's parental rights to Child and granting A.M.'s and D.M.'s adoption petition. Therefore, we AFFIRM the order of the Pulaski Circuit Court. We also grant, by separate order, the motion of Christopher Lee Coffman to withdraw as counsel for Mother.

ALL CONCUR.

BRIEF FOR APPELLANT:

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