

RENDERED: OCTOBER 20, 2023; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0048-ME

M.R.C.

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 22-AD-00002

C.E.B.; A.J.B.; C.J.C., A MINOR
CHILD; AND CABINET FOR
HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CETRULO, DIXON, AND McNEILL, JUDGES.

McNEILL, JUDGE: M.R.C. (“Father”) appeals from three orders¹ of the Lawrence Circuit Court terminating his parental rights to C.J.C. (“Child”) and granting a petition for adoption filed by C.E.B., Child’s maternal grandfather (“Grandfather”). In accordance with *A.C. v. Cabinet for Health and Family*

¹ Those three orders are: (1) Findings of Fact, Conclusions of Law and Judgment of Adoption; (2) Judgment of Adoption; and (3) Order Terminating Parental Rights.

Services, 362 S.W.3d 361 (Ky. App. 2012), Father’s counsel filed an *Anders*² brief stating the appeal is frivolous, accompanied by a motion to withdraw as counsel. After careful review, we affirm. We grant counsel’s motion to withdraw by separate order.

BACKGROUND

Father and A.J.B. (“Mother”) are the biological parents of Child, born September 2, 2015. Both Father and Mother have a history of drug addiction and criminal convictions that have impeded their ability to be a part of Child’s life. As a result, Child has resided with Grandfather since he was nine months old and since January 22, 2017, Grandfather has had custody. On February 3, 2022, Grandfather filed a petition in Lawrence Circuit Court to adopt Child without the consent of the biological parents under KRS³ 199.502 and to terminate Father’s and Mother’s parental rights. The family court set the petition for a final hearing on November 21, 2022.

At the hearing, Mother consented to the voluntary termination of her parental rights and to the adoption of Child by Grandfather. Grandfather testified that Child has been in his care for six years and that Father has never financially supported Child or visited him during that time, despite living across the road.

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

³ Kentucky Revised Statutes.

Father did attempt to contact Child once, a year before the petition was filed, but Grandfather prohibited it.

Father conceded he had been absent from Child's life due to drug addiction. He testified he had been incarcerated from May 2016 to June 2020 and had six felony convictions. However, he now wanted to be a father and have visitation with his son. Father stated he was in rehab and had completed parenting and anger management classes. He admitted to having a pending felony drug charge.

Following the hearing, the family court granted the adoption petition and terminated Father's parental rights. He appealed. Father's attorney filed an *Anders* brief and a motion to withdraw, stating there were no meritorious grounds for appeal. *See Anders*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d. 493; *A.C.*, 362 S.W.3d 361. Pursuant to *A.C.*, 362 S.W.3d 361, we are obligated to independently review the record to determine if the appeal is, in fact, frivolous.

STANDARD OF REVIEW

This case involves an adoption without the consent of Father. "An adoption without the consent of a living biological parent is, in effect, a proceeding to terminate that parent's parental rights." *M.S.S. v. J.E.B.*, 638 S.W.3d 354, 359 (Ky. 2022) (citation omitted). As such, we apply the same standard of review as in termination of parental rights cases. "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.* at 359-60 (citation omitted). “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.” *Id.* at 360 (citation omitted). Additionally, “[s]ince adoption is a statutory right which severs forever the parental relationship, Kentucky courts have required strict compliance with the procedures provided in order to protect the rights of the natural parents.” *Day v. Day*, 937 S.W.2d 717, 719 (Ky. 1997).

ANALYSIS

An *Anders* “review is akin to palpable error review requiring us only to ascertain error which ‘affects the substantial rights of a party.’” *A.C.*, 362 S.W.3d at 370 (citing CR⁴ 61.02). Failure to strictly comply with KRS Chapter 199 adoption procedures constitutes palpable error. *See Burnett v. Commonwealth*, 538 S.W.3d 322, 324 (Ky. App. 2017) (holding that failure to comply with statutory requirements for voiding defendant’s pretrial diversion was palpable error). Therefore, we begin our analysis by determining whether the adoption proceeding satisfied all relevant statutory requirements.

⁴ Kentucky Rules of Civil Procedure.

KRS 199.470 “contains the basic requirements that must be satisfied to petition for adoption in this Commonwealth.” *C.J. v. M.S.*, 572 S.W.3d 492, 498 (Ky. App. 2019). The petitioner must be (1) eighteen; (2) a Kentucky resident, or have resided in Kentucky for twelve months immediately prior to filing; (3) and file in the county where the petitioner resides. KRS 199.470(1). Further, KRS 199.470(3) requires the child to have resided continuously with the petitioner “for at least ninety (90) days immediately prior to the filing of the adoption petition.”⁵ Lastly, KRS 199.470(4) requires the child to have been placed for adoption by the Cabinet or other agency, or with written approval by the secretary, prior to the filing of the petition unless certain exceptions are met, such as the petition is being filed by a blood relative. A review of the record shows that these requirements were met.

Next, we must determine whether the petition complied with KRS 199.480, which governs party defendants, service of process, and guardian *ad litem*. A valid adoption petition must name the following parties as defendants:

- (a) The child to be adopted;

⁵ This requirement does not apply if the child was “placed for adoption by the cabinet, by an agency licensed by the cabinet, or with written approval by the secretary of the cabinet[.]” KRS 199.470(3). Here, Child was placed with Grandfather by the Cabinet for purposes of temporary, and later, permanent, custody, but it was not until after the adoption petition was filed that the Cabinet issued a report recommending the adoption. Therefore, Child was not placed for purposes of adoption and the ninety-day requirement applies. *See B.L. v. J.S.*, 434 S.W.3d 61, 69 (Ky. App. 2014) (interpreting KRS 199.470(4)’s similar language as requiring the child be placed for purposes of adoption).

(b) The biological living parents of a child under eighteen (18), if the child is born in lawful wedlock. If the child is born out of wedlock, its mother; and its father, if one (1) of the following requirements is met:

1. He is known and voluntarily identified by the mother by affidavit;
2. He has registered with the cabinet pursuant to KRS 199.503 as a putative father prior to the birth of the child, or if he did not have notice prior to the birth of the child, within twenty-one (21) days after the birth of the child;
3. He has caused his name to be affixed to the birth certificate of the child;
4. He has commenced a judicial proceeding claiming parental right;
5. He has contributed financially to the support of the child, either by paying the medical or hospital bills associated with the birth of the child or financially contributed to the child's support; or
6. He has married the mother of the child or has lived openly or is living openly with the child or the person designated on the birth certificate as the biological mother of the child.

A putative father shall not be made a party defendant if none of the requirements set forth above have been met, and a biological parent shall not be made a party defendant if the parental rights of that parent have been terminated under KRS Chapter 625, or under a comparable statute of another jurisdiction;

(c) The child's guardian, if it has one.

(d) If the care, custody, and control of the child has been transferred to the cabinet, or any other individual or individuals, institution, or agency, then the cabinet, the other individual or individuals, institution, or agency shall be named a party defendant, unless the individual or individuals, or the institution or agency is also the petitioner.

KRS 199.480(1). Further, the petition must be served upon all parties, including the Cabinet if the child to be adopted is under fourteen years old. KRS 199.480(2). Here, the petition named and served the required party defendants in accordance with KRS 199.480.⁶

Concerning the petition's content, KRS 199.490(1) calls for the following:

- (a) The name, date, place of birth, place of residence, and mailing address of each petitioner, and, if married, the date and place of their marriage;
- (b) The name, date, place of birth, place of residence, and mailing address, if known, of the child sought to be adopted;
- (c) Relationship, if any, of the child to each petitioner;
- (d) Full name by which the child shall be known after adoption;
- (e) A full description of the property, if any, of the child so far as it is known to the petitioner;

⁶ KRS 199.480(3) provides that no guardian *ad litem* need be appointed to represent the child “[i]f the child’s biological living parents . . . are parties defendant[.]” Here, a guardian *ad litem* was appointed even though both biological parents were parties.

(f) The names of the parents of the child and the address of each living parent, if known. The name of the biological father of a child born out of wedlock shall not be given unless paternity is established in a legal action, or unless an affidavit is filed stating that the affiant is the father of the child. If certified copies of orders terminating parental rights are filed as provided in subsection (2) of this section, the name of any parent whose rights have been terminated shall not be given;

(g) The name and address of the child's guardian, if any, or of the cabinet, institution, or agency having legal custody of the child;

(h) Any further facts necessary for the location of the person or persons whose consent to the adoption is required, or whom KRS 199.480 requires to be made a party to or notified of the proceeding; and

(i) If any fact required by this subsection to be alleged is unknown to the petitioners, the lack of knowledge shall be alleged.

Grandfather's petition fulfilled these requirements.

Once an adoption petition is filed, KRS 199.510(1) requires the Cabinet to investigate and file a written report with the court as to whether: (1) "the contents of the petition required by KRS 199.490 are true"; (2) "the proposed adoptive parents are financially able and morally fit to have the care, custody and training of the child"; and (3) "the adoption is to the best interest of the child and the child is suitable for adoption." A KRS 199.510 report was filed in this case and a review of that report demonstrates the required contents of the petition are

true, Grandfather is financially able to care for Child, and adoption is in the Child's best interest.

In sum, we find the statutory prerequisites for adoption were satisfied in this case and now turn to the family court's judgment. KRS 199.520 governs judgments in adoption cases and provides in relevant part:

(1) After hearing the case, the court shall enter a judgment of adoption, if it finds that the facts stated in the petition were established; that all legal requirements, including jurisdiction, relating to the adoption have been complied with; that the petitioners are of good moral character, of reputable standing in the community and of ability to properly maintain and educate the child; and that the best interest of the child will be promoted by the adoption and that the child is suitable for adoption. . . .

Here, the trial court found that it had jurisdiction over the parties, that Grandfather was of "good moral character, reputable standing in the community, and of the ability to properly maintain and educate" Child and that adoption would be in Child's best interest. Grandfather testified he has cared for Child for the last six years and was able to provide for Child financially. Grandfather has a stable job and owns his own house. Additionally, Child is doing well in school and has a good relationship with his cousins that also reside with Grandfather. The family court's judgment of adoption complies with KRS 199.520(1) and its findings were supported by substantial evidence.

Finally, we review the family court's decision to grant the adoption petition without Father's consent. Under KRS 199.502(1), an adoption may be granted without the consent of the living biological parents of a child if it is pleaded and proven as part of the adoption proceeding that *any* of nine statutory conditions are met. The family court found the conditions in subsections (a), (e), and (g) exist with respect to Child as to Father. Those subsections state:

(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[.]

KRS 199.502(a), (e), (g).

These findings were supported by substantial evidence. Father testified he had no relationship with Child and had not visited Child in six years. He has also failed to provide any support for Child in six years, financial or otherwise. While Father attributed his absence and lack of support to his incarceration, according to his own testimony, he was only incarcerated for three and a half of the last six years. There was no evidence he made any attempt to provide care, protection, or support for Child in those two and a half years he was not incarcerated. Father's single attempt to contact Child was a year prior to the hearing, despite living across the street.

As to reasonable expectations of improvement, Father has a history of drug abuse and admitted to a pending felony drug charge at the time of the hearing. While Father's efforts to achieve sobriety and be involved in Child's life are commendable, we cannot say the family court was clearly erroneous when it found, by clear and convincing evidence, the existence of the conditions enumerated in KRS 199.502(1)(a), (e), and (g). Having reviewed the record, we can discern no error in the family court's decision to grant the adoption petition.

CONCLUSION

Accordingly, the orders of the Lawrence Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Phillip D. Blair
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BRIEF FOR APPELLEE:

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