RENDERED: AUGUST 30, 2024; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-0203-ME

C.M.D. APPELLANT

v. APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE SQUIRE WILLIAMS, III, JUDGE
ACTION NO. 23-AD-00036

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; G.H.; AND
K.M.H., A CHILD APPELLEES

AND

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COMMONWEALTH OF KENTUCKY,
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OPINION
AFFIRMING

** ** ** ** **

BEFORE: CETRULO, L. JONES, AND LAMBERT, JUDGES.

CETRULO, JUDGE: In these expedited, consolidated appeals, C.M.D. ("Mother") appeals from the Franklin Family Court's findings of fact, conclusions of law, and judgment terminating parental rights to her two minor children, K.D.H. ("Daughter") and K.M.H. ("Son" collectively "the Children"). 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.

Daughter was born in 2009, and Son was born in 2013. The Cabinet became involved with the family in 2017 due to concerns with Mother's substance abuse. The Children were removed from parental care but were reunited with Father in 2019. However, in 2022, Father was arrested for allegedly sexually abusing two juveniles, not Daughter or Son. At that time, Mother was incarcerated. Therefore, on April 1, 2022, the Cabinet for Health and Family

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

Services ("the Cabinet") filed a petition for emergency custody of the Children. That petition was granted soon thereafter, and the Children were placed in foster care, where they have remained continuously.

Even though Mother was incarcerated, the Cabinet established a case plan for her. The essential portions of the plan required Mother to complete a substance abuse assessment and a mental health assessment, complete parenting classes, and obtain and maintain stable housing and employment. Meanwhile, the Children were initially placed with a family member. Son continues to reside with that family member. However, Daughter has experienced mental health challenges which have resulted in her being moved into a therapeutic foster home.

In July 2023, the Cabinet filed a petition to involuntarily terminate Mother's parental rights to the Children.[2] A final hearing on that petition was held in October 2023, at which time the criminal charges against Father were still pending. Father did not testify, but Mother did.

Mother forthrightly admitted having struggled with addiction for roughly 20 years, which resulted in her being jailed approximately 14 times. Mother testified repeatedly that she knew she had not been a good mother to the Children, though she also expressed a strong desire to be reunited with them.

[2] The Cabinet also successfully sought to terminate the parental rights of the Children's father. We addressed Father's appeal from that decision in a separate opinion, also affirming the family court.

According to Mother, she had been sober since around November 2021 but had not lived with the Children in about five years. Mother admitted she had a child support arrearage of around $12,000, though she had begun making payments to reduce that arrearage shortly before the hearing. Also, Mother admitted she had previously undergone long-term drug treatment several years ago, which had resulted in her being sober for approximately three years, but she eventually relapsed.

When released from prison in April 2023, Mother entered an addiction and mental health treatment program in Madisonville, Kentucky. She successfully completed the first two phases of that program and was in the third phase at the time of the hearing. It is undisputed that Mother had about five months remaining before she would complete phase three. She expressed a need to remain in the sober living aftercare program due to her 20-year history of addiction.

Witnesses involved in Mother's treatment program testified that she had made admirable progress. She was working at a Subway restaurant. Upon completion of treatment, she intended to rent a dwelling near Lawrenceburg, Kentucky from a relative and to work at another Subway. Mother's supervisor at Subway testified that she was a good worker. However, Mother was currently living and working three hours away from the Children. She lacked any mode of

transportation and testified that she could not even seek a driver's license until she could complete classes required due to a criminal conviction for driving under the influence.

Julie Snawder ("Snawder"), a supervisor with the Child Protective Services Department of the Cabinet, also testified. Snawder testified that Mother had not completed some requirements of her case plan, such as having stable housing and income for six months. Of course, Mother could not complete all of her case plan tasks while incarcerated or in residential drug abuse treatment.

According to Snawder, Mother had not completed parenting classes (a statement with which Mother seemingly disagreed). However, Snawder admitted that it would be best for Mother to complete substance abuse treatment prior to taking parenting classes. Snawder testified that Mother had not had contact with the Children since approximately November 2019. Mother had inquired about seeing the Children upon being released from prison, but had not done so due to the distance between her treatment facility and where the Children were residing. Snawder also testified that the Cabinet did not allow Mother to see the Children until it verified the accuracy of a "no contact" order preventing Mother from seeing the Children.

Snawder testified that Mother had not provided material care for the Children during her absence. Snawder was unaware of anything additional the

Cabinet could offer to reunify Mother with the Children in the foreseeable future. The gist of Snawder's testimony was that Mother had made progress but had not done everything the Cabinet requested, and waiting further would deprive the Children of much needed permanency. In addition, there was unrebutted testimony that Mother suffers from multiple, severe mental illnesses and was still in need of treatment for those conditions. Her therapist acknowledged that treatment for parenting concerns and skills was not part of the treatment she was receiving in the sober living facility. Her therapist declined to offer any opinion about Mother's current ability to parent the Children.

The family court granted the Cabinet's petition and terminated Mother's parental rights to both Children. Mother then filed these appeals, one for Son (No. 2024-CA-0203-ME) and one for Daughter (No. 2024-CA-0204-ME), which we have consolidated.

STANDARD OF REVIEW

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 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) . . . exists." *K.H.*, 423 S.W.3d at 209. *Clear and convincing evidence* "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." *Commonwealth, Cabinet for Health and Family Services v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010) (internal quotation marks and citations omitted).

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." *K.H.*, 423 S.W.3d 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). "When reviewing a family court's determination of the best interests of a child, we must apply the abuse of discretion standard." *D.J.D. v. Cabinet for Health and Family Services*, 350 S.W.3d 833, 837 (Ky. App. 2011).

ANALYSIS

Counsel for Mother filed an *Anders* brief stating that the instant appeal is frivolous, although the brief states that Mother "does not believe she was afforded an appropriate opportunity to regain custody of her minor children." Appellant's Brief, p. 6. We afforded Mother the opportunity to submit a *pro se* brief, but she did not do so. Regardless of counsel's assertion that the appeal is frivolous, "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.[3]

The family court made the findings required in KRS 625.090 by clear and convincing evidence, specifically including: 1) the Children were abused or neglected; 2) at least one ground of parental unfitness existed; and 3) termination was in the Children's best interest based on the factors listed in KRS 625.090.

[3] Even *Anders* briefs must comply with the mandatory briefing requirements found in the Kentucky Rules of Appellate Procedure ("RAP"). *See, e.g., A.C.*, 362 S.W.3d at 371 (discussing a failure to follow the briefing rules found in the former Kentucky Rule of Civil Procedure ("CR") 76.12, which are essentially identical to those found in RAP). RAP 32(A)(3) requires an appellant's opening brief to provide a statement of the case which contains "ample references to the specific location in the record supporting each of the statements contained in the summary." Mother's *Anders* brief contains zero citations to the trial court record and fails to comply with the requirement in RAP 32(E)(1)(d) that the appendix to a brief must be preceded by an index which "shall set forth where each document may be found in the record." We have elected to address the merits regardless.

From our independent review of the record, substantial evidence supports those findings.

First, the family court found that the Children were abused or neglected because, among other reasons, Mother had failed for many years to provide essential parental care for the Children. *See* KRS 600.020(1)(a)4. Snawder gave unrebutted testimony that Mother had not provided any material care for the Children since they were removed from Father's custody until she began paying child support shortly before the hearing. Mother also admitted she had not lived with the Children for about five years, had been in jail around 14 times, owed a substantial child support arrearage, and had not seen the Children since approximately November 2021. Previously, the Cabinet had become involved with the Children in 2017, and Mother was incarcerated for 17 months after their removal. After the Children were returned to Father in 2019, Mother was again incarcerated when Father was arrested on allegations of sexual abuse of two minors. The Children have been in foster care since early 2022 on this second removal. In sum, for reasons beyond Mother's incarceration alone, there was substantial evidence to support the family court's conclusion that the Children were abused or neglected by Mother. *See, e.g., A.R.D. v. Cabinet for Health and Family Services*, 606 S.W.3d 105, 110-11 (Ky. App. 2020) (noting that parental

rights cannot be terminated due solely to the parent's incarceration, but parental absences based on court orders may be considered in determining neglect).

Second, the family court's conclusion that termination of Mother's parental rights was in the Children's best interest was supported by substantial evidence and is not an abuse of discretion. KRS 625.090(3) provides that:

> In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:
>
> (a) Mental illness as defined by KRS 202A.011(9), or an intellectual disability as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;
>
> (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[4] to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;
>
> (d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the

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

> child's best interest to return him to his home within a reasonable period of time, considering the age of the child;
>
> (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; and
>
> (f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

There was unrebutted testimony that Mother had been diagnosed with depression and substance addiction. We have already determined that there was substantial evidence the Children were abused or neglected.

Despite Mother's belief to the contrary, the family court did not err in concluding the Cabinet had made reasonable reunification efforts. Indeed, Snawder testified that she was unaware of any other services the Cabinet could have offered which would have allowed for reunification within a reasonable period, nor has Mother pointed to any such specific services. Mother's regrettable absence from the Children's lives was due to her drug abuse and resulting multiple periods of incarceration.

At the time of the hearing, Mother's treatment was scheduled to last for at least five more months. The family court was not required to wait five more months to ensure Mother successfully completed her treatment. If Mother had successfully completed treatment, the family court would have to wait several more months to ensure Mother had achieved stable housing and income when she

does not even have a license to drive a vehicle and would have more steps to accomplish in order to seek a license.

Children have a fundamental "right to a secure, stable family." KRS 620.010. The Children had already been in the care of the Cabinet for at least 18 months, without contact from Mother, at the time of the final hearing. In sum, Mother's progress in treatment is highly commendable, but the family court did not err by terminating Mother's parental rights instead of keeping the Children indefinitely in a state of parental limbo.

KRS 625.090(5) provides that "[i]f the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights." Mother asserted that she "felt that KRS 650.090(5) [sic] would apply in her case, as she believed she had proven that the children would not continue to be abused or neglected children . . . if returned to her care." Appellant's Brief, p. 6.

However, the family court specifically disagreed. The family court's opinion went through each of the six factors contained within KRS 625.090(3). The court concluded from the totality of the evidence that the factors were met and specifically held that it was "not persuaded" that the Children would not be abused or neglected if returned to parental custody. Based on the family court's ability to

weigh the evidence and judge the credibility of witnesses, we discern no error or abuse of discretion in the court's conclusion. Despite Mother's recent and commendable progress, there was ample evidence of her lengthy history of addiction, absence, and parental neglect. *See, e.g.*, *A.F. v. L.B.*, 572 S.W.3d 64, 75 (Ky. App. 2019) ("The family court considered Mother's recent efforts. That is apparent from the record. However, the judgment implicitly reflects that the family court considered Mother's efforts too little and too late to reclaim a relationship with Child which, for Child's tenderest years, Mother voluntarily subordinated to pursue an illicit life of drugs . . . .").

Finally, we turn to KRS 625.090(2) which requires that at least one ground of parental unfitness has been satisfied by clear and convincing evidence. Though the evidence would support a finding of unfitness on additional grounds, it is uncontested that the Children were in foster care for 15 of the 48 months preceding the filing of the termination petition (from early April 2022 to early July 2023). KRS 625.090(2)(j). Accordingly, we do not need to address any other grounds listed in KRS 625.090(2). *T.N.H.*, 302 S.W.3d at 663 ("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.").

For the foregoing reasons, the Franklin Family Court is affirmed.

L. JONES, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, JUDGE, DISSENTING: I respectfully dissent. Here, there is uncontradicted evidence that Mother has completed most of her case plan and was in the process of completing the remainder. Mother "provided evidence and testimony that she was doing everything she could to meet the goals of her plan." *M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 853 (Ky. App. 2008). The family court no doubt acted in a good faith belief that termination was in the Children's best interest but, under these facts, its myopic focus on Mother's admittedly dark past failed to properly account for her remarkable progress and bright future. *Id.* at 854-55. Thus, I would reverse the termination as to each of the Children.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

Leslie M. Laupp
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