RENDERED: SEPTEMBER 8, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000002-ME

J.L. APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 14-AD-000153

P.H. AND K.H., the adoptive parents
of H.K.D.; H.K.D., a minor; THE
KENTUCKY CABINET FOR
HEALTH AND FAMILY SERVICES APPELLEES

AND NO. 2016-CA-000019-ME

A.D. APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
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P.H. AND K.H., the adoptive parents
of H.K.D.; H.K.D., a minor; THE
KENTUCKY CABINET FOR
HEALTH AND FAMILY SERVICES APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

ACREE, JUDGE: This is an appeal from an order and judgment of the Kenton Family Court granting the petition for adoption of H.K.D. (Child) by P.H. and K.H., and an order terminating the parental rights of the minor child's biological mother, A.D. (Mother), and biological father, J.L. (Father). Neither Mother nor Father has raised any argument justifying reversal of the family court's termination decision. Therefore, we affirm.

FACTS AND PROCEDURE

Mother and Father are the biological parents of Child, born April 21, 2012. The Cabinet for Health and Family Services became involved, or rather re-involved, with this family shortly after Child's birth.[1] The Cabinet filed a dependency, neglect, and abuse action in Campbell Family Court involving Child. In an order entered on September 5, 2012, the Campbell Family Court required Mother: (1) to cooperate with the Cabinet; (2) to maintain employment and housing; (3) to refrain from illegal drug use and attend mental health appointments; and (4) ensure Father does not live in the home or have contact with Child. The court required Father: (1) to have no contact with Mother or Child unless he engages in substance abuse treatment facility and is sober; and (2) not live in the

[1] It appears from the record that the Cabinet has been involved with this family for several years, beginning in or about 2009.

home until he successfully completes a substance abuse treatment program and remains clean and sober.

In January 2013, the Cabinet received a new referral, claiming Mother smoked marijuana in her apartment with Child present and while in a caretaking role. Mother also admitted Father had contact with Child in violation of the Campbell Family Court order. The Cabinet filed a neglect petition in March 2013, and the family court awarded temporary custody of Child to P.H. and K.H., where he has remained ever since.[2] In April 2013, the family court ordered Father to cooperate with the Cabinet and undergo random drug screens. He did not obey that order.

Mother stipulated to neglect at the adjudication hearing in May 2013. Father's attorney was present at the hearing, but Father was not. No mention of Father was made at the adjudication. The family court's disposition order, entered May 29, 2013, adopted the Cabinet's recommendations. The family court ordered Father to cooperate with the Cabinet, and that he have no contact with Child until he attends a substance abuse treatment facility, remains clean and sober, and meets with the Cabinet. The Cabinet also indicated it would conduct an absent parent search to assure contact with Father. There is no evidence that Father contacted the Cabinet, or completed the required substance abuse program.

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[2] Child's maternal grandmother originally took physical custody of Child in January 2013. However, she was unable to keep him long-term. The maternal grandmother then approached P.H. and K.H. about caring for Child; they and Mother agreed and P.H. and K.H. took physical custody of Child in February 2013. As referenced, they were awarded temporary legal custody in March 2013.

With respect to Mother, the Cabinet recommended, and the family court agreed, that Mother needed to: maintain stable housing and employment; complete parenting classes; visit regularly with Child; refrain from drug use and submit to random drug screens; attend NA[3] meetings; and participate in therapy.

On November 25, 2013, the family court awarded P.H. and K.H. permanent custody of Child. Almost a year later, on December 1, 2014, P.H. and K.H. filed a petition for adoption and involuntary termination of Mother's and Father's parental rights. A warning order attorney was appointed to locate Father. That attorney submitted a report that he sent a letter concerning the nature and pendency of the matter to Father's last known address – his parents' house, located on Walton Nicholson Road in Walton, Kentucky – and the letter was not returned. The attorney also happened to encounter Mother, who was known to the attorney, and who informed him that she believed Father was living at the Walton address.

The family court appointed Mother and Father counsel, and subsequently conducted a termination hearing on November 25, 2015. Father, then incarcerated in the Simpson County jail, participated by way of telephone. Father testified first.

Father stated he did not receive the adoption documents until the day before the hearing, did not receive notice of the underlying neglect proceedings, and was not assigned a caseworker by the Cabinet or offered reasonable services to facilitate reunification. He admitted he attended one hearing in the neglect action.

[3] Narcotics Anonymous.

Further, the record reflects Father was appointed counsel in the neglect action, and his attorney was present at every hearing. Father admitted Mother told him Child was with P.H. and K.H.

Father explained he stayed home with Child after his birth in April 2012 for approximately ten months until Father was incarcerated on or about January 2013. Father got out of jail in August 2014. He lived with his father at the Walton Nicholson Road address from August 2014 until he was incarcerated again in May 2015. Father testified he is eligible for parole in May 2019.

There were no allegations of neglect or abuse when Father cared for Child. Father agreed Mother was unable to care for Child at the time of Child's removal, and was unable to say whether he would have taken advantage of services, such as parenting classes or substance abuse assistance, if offered by the Cabinet. Father testified he is no longer abusing drugs or alcohol. He intends to avail himself of services available in jail, such as a substance abuse treatment and programs to assist him with anger management and parenting.

Father admitted he has not seen Child in one-in-a-half to two years. Despite being out of jail for over nine months between August 2014 and May 2015, he made no effort to visit Child. Father testified the no-contact order prevented him from doing so. Father further admitted he has not financially contributed to Child's growth, development, or essential needs.

Mother testified next. She stated she desired to be part of Child's life and attempted to visit with him regularly[4] and follow all court orders. Mother testified she attended all court-ordered visitation except one. She blamed P.H. and K.H. for stopping visitation in December 2014. When visits were occurring, Mother testified she frequently offered to bring Child diapers, clothing, and shoes, but P.H. and K.H. refused. Mother admitted P.H. and K.H. took good care of Child, and that he was well-groomed and nourished. Mother also admitted she has four biological children, but she has custody of none.

Mother testified she last used drugs or narcotics in September 2015 and has been clean and sober for sixty days. She attends NA regularly and recently left a substance abuse program at the WRAP[5] House. She admitted she had been addicted to drugs for at least half of 2015.

Mother is unemployed, but was to begin a new job a few days after the termination hearing. She has no money saved and is currently on welfare. She has not paid child support in at least six months, despite a court order requiring that she do so. When employed, Mother testified she regularly paid child support by means of a wage garnishment. She stated she would commence a new wage garnishment once her new employment began.

Mother admitted she voluntarily moved to Texas with her boyfriend for nine months in 2015; she returned to Kentucky in September or October 2015.

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[4] The family court allowed Mother one hour of visitation every Sunday.

[5] Women's Residential Addiction Program.

Mother testified she was unaware of her boyfriend's criminal history and his status as a convicted child molester until shortly before she ended their relationship.

P.H. and K.H. submitted evidence that Mother had 78 opportunities (weeks) to visit Child since his removal in March 2013; she only visited 17 times. Of the missed visits, four times P.H. and K.H. were not available; six times Mother was sick or not available; twenty-six times Mother failed to appear; and twenty-five times Mother failed to contact P.H. and K.H., as required by court order, to confirm the visit.

By orders entered November 25, 2015, the family court terminated Mother and Father's parental rights to Child and granted P.H.'s and K.H.'s adoption petition. It found clear and convincing evidence that Child had been previously adjudged neglected and was neglected consistent with KRS[6] 600.020(1)(a); that termination was in Child's best interest; and that Mother and Father were unfit to parent Child. Mother and Father both appealed.

STANDARD OF REVIEW

This Court will only disturb a family court's decision to terminate a person's parental rights if clear error occurred. If there is substantial, clear, and convincing evidence to support it, the decision stands. KRS 625.090(1); *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). The clear and convincing standard does not demand uncontradicted proof. All that is needed

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[6] Kentucky Revised Statute.

"is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citation omitted).

ANALYSIS

KRS 199.500(4) allows an adoption 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." KRS 199.500(4). Accordingly, such a proceeding operates to terminate the non-consenting parent's parental rights. *Id.*

KRS 625.090 requires satisfaction by clear and convincing evidence of a three-part test before parental rights may be terminated. First, the child must have been found to be an "abused or neglected" child, as defined by KRS 600.020. KRS 625.090(1)(a). Second, termination must be in the child's best interest. KRS 625.090(1)(b). Third, the family court must find at least one ground of parental unfitness. KRS 625.090(2). We shall address the arguments raised by Mother and Father separately.

A. Mother

Counsel for Mother, instead of filing a normal appellant's brief, filed an *Anders*[7] brief in accordance with *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), conceding that no meritorious assignment of error exists to present to this Court, accompanied by a motion to

[7] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

withdraw which was passed to this merits panel.[8] We cautioned in *A.C.* "that an *Anders* brief should not be used as an escape provision for a court-appointed counsel whose payments have exhausted, but should only be filed when appointed counsel has conducted a thorough, good-faith review of the record and can ascertain absolutely no meritorious issue to raise on appeal." *Id.* at 371.

We severely question Mother's counsel's decision to utilize an *Anders* brief in this case.[9] We can easily envision several non-frivolous grounds to raise on Mother's behalf. Fortunately, counsel's brief includes enough substance to allow this Court to fully examine the issue raised without the need for additional briefing. *Id.* (this Court, upon reviewing the matter, may order one or both parties to file supplemental briefs addressing possible meritorious arguments).

P.H. and K.H. submitted evidence of Mother's substance abuse history, her decision to move out of state to Texas for at least nine months with no contact or support for Child, her failure to regularly and consistently visit Child, her failure to pay child support, and her failure to complete a case plan and follow court orders. Mother contested some, but not all, of this evidence. From the evidence presented it was reasonable for the family court to conclude that Mother

[8] We grant Mother's counsel's withdrawal motion by separate order, contemporaneous with this Opinion.

[9] We urge counsel now before us, and all attorneys who might invoke *A.C.* and *Anders* in the future, to exercise restraint in filing *Anders* briefs. We state again, quoting from *A.C.*, that "'[t]he *Anders* brief is not a substitute for an advocate's brief on the merits.' Likewise, it is not an escape provision to end undercompensated, and sometimes uncompensated, legal services the lawyer agreed to provide." *A.C.*, 362 S.W.3d at 372 (internal citation omitted). An *Anders* brief is *only* appropriate when counsel is unable to discern *any* non-frivolous grounds for appealing a termination of parental rights, yet is compelled by his or her duty to his or her client to file an appeal. *Id.* at 368.

failed to provide essential parental care and protection for Child; failed to provide for Child's essential needs; and abandoned Child for a period of not less than ninety days. KRS 625.090(2)(a), (e), (g). Further, the family court found it would be in Child's best interest for Mother's rights to be terminated. KRS 625.090(1)(b). Mother admitted Child has been with P.H. and K.H. for almost three years, he was well-cared for and adjusted, and he was thriving in his current environment. KRS 625.090(3)(e). Mother also admitted she was not currently able to care for Child, KRS 625.090(3)(d), and she had not paid child support for the past several months. KRS 625.090(3)(f). She ultimately failed to make the necessary adjustments to her circumstances to create even the possibility of returning Child to her home within a reasonable time or that doing so would be in Child's best interests. KRS 625.090(3)(d). Mother does not dispute that the family court declared Child neglected in 2012. KRS 625.090(1)(a). There is sufficient evidence in the record to support the family court's decision to terminate Mother's parental rights, and we decline to interfere.

B. Father

Father, by way of a conventional appellant's brief, presents more substantial and detailed arguments to this Court. He contends there is no clear and convincing substantial evidence to support any of the statutory grounds for termination. As referenced, termination of a party's parental rights is proper upon satisfaction, by clear and convincing evidence, of a "tripartite test." *Cabinet for*

Health and Family Services v. K.H., 423 S.W.3d 204, 209 (Ky. 2014). We shall discuss each part separately.

i). Abused or Neglected Child

First, the child must have been found to be an "abused or neglected" child, as defined by KRS 600.020. KRS 625.090(1)(a). Father argues there was insufficient evidence of neglect and that the family court abused its discretion when it determined that Father neglected Child. We disagree.

Relevant to this case, KRS 600.020(1) clarifies that an "'[a]bused or neglected child' means a child whose health or welfare is harmed or threatened with harm when" his or her parent:

> 3. Engages 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 alcohol and other drug abuse as defined in KRS 222.005; [or]
>
> 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child; . . . [or]
>
> 7. Abandons or exploits the child; [or]
>
> 8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being[.]

KRS 600.020(1)(a)3-4, 7-8. There was sufficient evidence presented during the termination hearing, and applicable under these standards, from which the family court could, and did, conclude that Father neglected Child. KRS 625.090(1)(a)2.

Father's criminal history is not inconsequential and it has resulted in at least two incarcerations since Child's birth. This fact is not in dispute. Father's pattern of adopting a criminal lifestyle has rendered him incapable of caring for Child's immediate and ongoing needs. He candidly admitted he cannot contribute now to Child's emotional or developmental wellbeing. KRS 600.020(1)(a)3.

We are mindful that "[i]ncarceration alone can never be construed as abandonment as a matter of law." *J.H. v. Cabinet for Human Res.*, 704 S.W.2d 661, 663 (Ky. App. 1985). "However, absence, voluntary or court-imposed, may be a factor to consider in determining whether the children have been neglected[.]" *Id.* at 664. Father has been absent for most of Child's life. Even when Father was not incarcerated for parts of 2014 and 2015, he made no effort to visit or build a relationship with Child. KRS 600.020(1)(a)4, 7.

Father admitted he has not seen or spoken to Child in at least a year and a half, if not more. He claims he was prevented from doing so by a no-contact order first issued by the Campbell Family Court in 2012. A parent who is denied access to a child by order of the court has not necessarily abandoned the child. *Wright v. Howard,* 711 S.W.2d 492, 497 (Ky. App. 1986). But that no-contact order was provisional: it required Father to first complete a substance abuse program and *then* contact with Child could be re-established. The ball was in Father's court. We are mindful that Father claims he was not aware of the underlying neglect proceedings. But he did attend at least one hearing, and was represented by counsel throughout the entire neglect adjudication. Father had

sufficient information that, had he wanted to reconnect with Child, he could have taken steps to do so. Father's failure to ask for contact or to take even a single step to see Child demonstrates an abandonment of all parental duties, and it seems disingenuous to this Court that Father now complains about lack of contact with Child. KRS 600.020(1)(a)4, 7.

Father has provided little care for Child since his birth outside the first few months of Child's life. He admitted, except for diapers on occasion, he had not financially or otherwise contributed to Child's growth, development, or essential needs. He has not paid any child support. KRS 600.020(1)(a)8.

Examining the record as a whole, there is substantial evidence to support the family court's finding that Father neglected Child. He has identified no grounds upon which to disturb that finding.

ii). Best Interests of the Child

Second, termination must be in the child's best interest. KRS 625.090(1)(b). In evaluating the child's best interest, the family court is statutorily required to consider numerous factors, including "[t]he efforts and adjustments the parent has made in [her] circumstances, conduct, or conditions to make it in the child's best interest to return [her] to [her] home within a reasonable period of time, considering the age of the child." KRS 625.090(3)(d). Of course, that is not the only statutory factor that must be taken into account. Others include: mental illness or intellectual disability; acts of abuse or neglect towards any child in the family; reasonable efforts made by the Cabinet to reunite the child with the

parents; the child's physical, emotional, and mental health, and the possible improvement of the child's welfare should termination occur; and the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to so do. KRS 625.090(3).

Father faults the Cabinet for failing to provide him with reasonable services to facilitate reunification. KRS 625.090(3)(c). We question the applicability of subsection (3)(c) in this case. It reads, in pertinent part: "***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[.]" KRS 625.090(3)(c) (emphasis added).

Child was never placed with the Cabinet. His placement outside the home has always been with other appropriate persons – P.H. and K.H. Further, the Cabinet did not file the termination petition; P.H. and K.H. did. Under these circumstances, we need not consider whether the Cabinet provided Father with reasonable renunciation services as it pertains to the best-interest factor.

In any event, the family court ordered Father, as part of the underlying juvenile proceedings, to meet and cooperate with the Cabinet. As referenced, Father was represented by counsel during the neglect adjudication, and Father attended at least one neglect hearing, at which he could have discussed the status of his case – including his desire to reunify with Child and to receive services from the Cabinet – with his counsel. Even if unaware of the family court's order, Father was certainly aware of the Cabinet and its prior involvement with his family.

Father was no less obligated to seek reunification services than the Cabinet, in this case, was obligated to offer. At no point did Father make any effort to contact the Cabinet or otherwise take steps to see or reunify with Child.

There is other evidence to support the family court's best-interest determination. There exists no real relationship between Father and Child. Father has not been part of Child's life for the past several years. In his absence, P.H. and K.H. have cared for Child's needs and provided him with a safe and stable home environment. Child is happy and healthy. Father, instead of striving to be a better parent, adopted a criminal lifestyle resulting in at least two incarcerations since Child's birth. He is not even *eligible* for parole until 2019. Father essentially asks this Court to allow Child to linger in instability for another two, possibly three, years on top of the four years Child has been out of Father's care and custody. There is no possibility that Child can return to Father's care within a reasonable period of time. Further, Father admitted he has not financially contributed to Child's growth, development, or essential needs. This evidence as a whole is sufficient to support the family court's best-interest decision, and we decline to disturb it. *D.G.R. v. Com., Cabinet for Health & Family Servs.*, 364 S.W.3d 106, 112 (Ky. 2012) ("[T]he trial court has substantial discretion in determining the best interests of the child under KRS 625.090(1)(b) and (3).").

iii). Parental Unfitness

Third, the family court must find at least one ground of parental unfitness. KRS 625.090(2). The statutory grounds relevant to this case include:

(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 625.090(2)(a), (e), (g). Only one ground is needed to satisfy this prong of the tripartite termination test. *See* KRS 625.090(2) (termination shall only be ordered if the family court finds the existence of at least one of the statutory grounds enumerated in KRS 625.090(2)); *K.H.*, 423 S.W.3d at 209 (the family court need only find "one of the termination grounds enumerated in KRS 625.090(2)(a)-(j) exists").

For the purposes of Chapter 199 and 625.090, "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." *O.S. v. C.F.,* 655 S.W.2d 32, 34 (Ky. App. 1983). And again, "[i]ncarceration alone can never be construed as abandonment as a matter of law." *J.H.*, 704 S.W.2d at 663. But it is certainly a relevant factor. *Id.* at 664. In this case, it is clear to this Court that

"unlike the parent … who had committed only one crime and received a two-year sentence, [Father] has indeed pursued a lifestyle incompatible with parenting." *Id.; see also Cabinet for Human Res. v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995) ("Although incarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights, incarceration is a factor to be considered[.]").

We analyzed abandonment in detail as part of our neglect discussions. We need not fully re-hash it here. Suffice to say that, even when not incarcerated, Father made no effort to contact or build a relationship with Child. The no-contact order entered in 2012 prevented contact only and until Father completed substance abuse treatment. He never took any steps to do so. We find it suspect that Father would be aware of the no-contact order, but unaware of the requirement, contained in that same order, conditioning contact upon him attending substance abuse treatment and remaining clean and sober. Father was aware of the neglect proceedings to some degree, as he attended a court hearing in 2013 or 2014 in between periods of incarceration. At the very least Father could have requested that his attorney, who was also present at the hearing Father attended, seek visitation or some contact with Child at that time. But he did not.

Coupled with Father's non-existent relationship with Child is his failure to provide for Child's essential needs. Again, Father has not contributed, financially or otherwise, to Child's emotional, physical, or material needs for the majority of Child's tender life. He has not cared for Child in a parental role since

early 2013. That burden fell upon P.H. and K.H. in Father's absence. Father was aware Child was with P.H. and K.H. Though the no-contact order provisionally prevented him from visiting Child, it did not prevent him from reaching out to P.H. and K.H. to inquire as to Child's wellbeing. Father never took such a simple step.

Father also offered nothing upon which the family court could find there was a reasonable expectation of significant improvement in his parental care and protection or general conduct in the immediately foreseeable future, considering Child's age. KRS 625.090(2)(e), (g). Father claims he intended to utilize available services while incarcerated, but had not taken the initiative to begin a single program or service despite being in jail, this time, since May 2015. Tellingly, Father continues to place blame on others. He blames the Campbell Family Court for issuing the no-contact order. He blames the Kenton Family Court for allegedly failing to provide him notice of the neglect proceedings or the adoption/termination proceedings.[10] He blames the Cabinet for not providing reunification services and substance abuse treatment options. Father fails to take any responsibility for his own actions. He fails to acknowledge that he could have taken steps to provide for Child, financially and otherwise, and/or to establish visitation with Child. He refuses to admit his own shortcomings as a parent and father. It was reasonable, then, for the family court to conclude that there was no reasonable expectation of improvement in the foreseeable future.

[10] Father testified he did not receive notice of the adoption/termination paperwork until the day before trial. However, the record reflects a warning order attorney sent a letter concerning the nature and pendency of the adoption/termination action to the Walton address in December 2014, and the letter was not returned. Father testified he was living at that address in December 2014.

We find evidence in the record to support not just one but three of the statutory grounds of parental unfitness. This factor has been satisfied.

CONCLUSION

We affirm the Kenton Family Court's November 25, 2015 orders and judgments terminating Mother and Father's parental rights and granting the petition for adoption of Child by P.H. and K.H.

ALL CONCUR.

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