

RENDERED: SEPTEMBER 1, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000607-ME

A.W.M., SR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE DEBERRY BROWN, JUDGE
ACTION NO. 15-AD-500245T¹

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND A.W.M., A CHILD

APPELLEES

AND

NO. 2016-CA-000608-ME

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v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE DEBERRY BROWN, JUDGE
ACTION NO. 15-AD-500246T

¹ This case involves two children. Separate cases were opened in the trial court but a single opinion was issued. Similarly, two separate case numbers were issued by this Court, but a single Opinion and Order resolves both cases. When final disposition of an appeal is made by an “Opinion and Order,” the party adversely affected may move for reconsideration as provided by CR 76.38(2) within ten days of entry, but a petition for rehearing is unauthorized. CR 76.32(1). *Fink v. Fink*, 519 S.W.3d 384, 385 (Ky. App. 2017).

OPINION AND ORDER

** ** * * * * *

BEFORE: J. LAMBERT, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: A.W.M., Sr.² (father) appeals from an order of the Jefferson Circuit Court, Family Division, entered on April 1, 2016, involuntarily terminating his parental rights (TPR) to two minor sons, A.W.M., Jr. born September 30, 2006, and L.R.M. born August 14, 2008. Having independently reviewed the record, the briefs and the law, we affirm TPR as to both children.

Father's appointed counsel filed a notice of appeal on his behalf.

Being unable to find any meritorious claim to pursue, counsel filed an *Anders*³ brief and moved to withdraw from the case. Father was given leave to supplement the *Anders* brief but filed nothing. We address counsel's motion to withdraw in the Order following this Opinion.

FACTS

² To protect the identity of the children, all parties will be referenced by initials only.

³ Upon finding an appeal to be wholly frivolous, appellate counsel may move to withdraw but preserve the client's constitutional right to counsel by filing a brief identifying any portion of the record that might support an appeal should the client choose to raise those points. *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). This holding applies to TPR cases. *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361, 367 (Ky. App. 2012).

A.W.M., Sr. is the biological father of A.W.M., Jr. and L.R.M. The biological mother of the boys is N.R. (mother). N.R.'s parental rights were terminated in the same action. She has not appealed.

The Cabinet for Health and Family Services (CHFS) became involved with this family on October 7, 2008, filing a verified DNA⁴ petition regarding M.W.,⁵ an autistic child, alleging he was abused or neglected and the two brothers at the heart of this TPR action were at risk for abuse. Following a temporary removal hearing, all three children were left in the custody of A.W.M., Sr. and mother. About two months later, N.R. stipulated M.W. was injured with a belt while being inappropriately punished. Thereafter, CHFS referred the family to various services including Batterers Intervention Program, psychological assessment services, parenting assessment services, victim's counseling, domestic violence counseling, Abusive Parenting classes, Protective Parenting classes, and visitation services among others.

About two years later, March 2010, CHFS filed another DNA petition again alleging M.W. was abused or neglected. Following the temporary removal hearing, M.W. was placed in the care of his father. A.W.M., Jr. and L.R.M. were placed in the temporary custody of CHFS. Two months later, N.R. stipulated she and A.W.M., Sr. had inappropriately disciplined M.W., and A.W.M., Jr. and

⁴ Dependency, Neglect and Abuse. Kentucky Revised Statutes (KRS) 620.100(3).

⁵ M.W. is a half-sibling to A.W.M., Jr. and L.R.M. All three children have the same mother.

L.R.M. were at risk. A.W.M., Jr. and L.R.M. were returned to the custody of father and mother.

On December 5, 2013, CHFS filed a verified DNA petition alleging A.W.M., Jr. and L.R.M. were abused or neglected. Following the temporary removal hearing, the brothers were placed in the temporary custody of CHFS where they have remained. On March 11, 2014, the Family Court determined the brothers were abused or neglected following a written stipulation by both parents that the boys had excessive school absences in 2011 and 2012, and the mother's paramour had used inappropriate corporal punishment on L.R.M.

In a TPR petition filed against father, CHFS cited KRS 625.090(2)(a) and offered evidence establishing father had abandoned both boys for not less than ninety days. The caseworker testified father had failed to visit or contact the children; had not maintained regular contact with the caseworker; and, had not inquired into the children's well-being—all for not less than ninety days. The court determined father had not had enough contact with his children.

While proof of a single ground, such as the abandonment described above, will justify TPR, CHFS cited three additional grounds. KRS 625.090(2)(e)—failure or refusal to provide essential parental care and protection for not less than six months with no reasonable expectation of improvement; (g)—for reasons other than poverty, continuous or repeated failure to provide essential food, clothing, shelter, medical care, or education with no reasonable expectation of

improvement; and (j)—children in foster care fifteen of most recent twenty-two months before filing of TPR petition.

The proof established mother is low functioning with an IQ of 66 and cannot put into practice the skills she learns. There was evidence mother suffers from mental illness or mental retardation making her unable to care for her children for lengthy periods of time. While mother took advantage of some offered services, she did not sufficiently progress with her treatment plan to allow A.W.M., Jr. and L.W.M. to return to her. Mother is currently homeless.

Father may interact with and have better control over the boys than mother, but his success may result from his sons fearing him. The boys told their foster mother they watched pornographic movies with father. A.W.M., Jr. told the foster mother father had knocked out his tooth with his fist and he had watched father try to set mother ablaze with gasoline.

According to the foster mother, at the time of initial placement, neither boy spoke in full sentences, neither was toilet-trained, and both were over-medicated and behind on vaccinations. A.W.M., Jr. hoarded food; at school, he would eat until he vomited. L.W.M. consistently wet the bed, feared being struck with a belt, was extremely violent—he attempted to stab a teacher—and, coinciding with parental visits, acted out sexually.

Father consistently paid child support—funds were deducted from his paycheck—but the money went to mother who never reported the financial gain and did not use the funds to provide for the boys. For reasons other than poverty

alone, mother and father did not even partially support their sons. The trial court found sufficient proof of all three grounds—in addition to abandonment.

ANALYSIS

TPR is governed by KRS 625.090. Unless a parent stands convicted of a criminal charge stemming from abuse or neglect of a child, TPR is prohibited absent a finding by the trial court, based on clear and convincing proof,⁶ that a court of competent jurisdiction has previously adjudged the child to be abused or neglected, or finds in a current proceeding the child is abused or neglected. KRS 625.090(1)(a). Additionally, the trial court must find termination is in the child's best interest. KRS 625.090(1)(b). Finally, the trial court must find existence of one or more of ten grounds enumerated in KRS 625.090(2) demonstrating parental malfeasance or nonfeasance.

In an order entered April 1, 2016, the Jefferson Circuit Court noted A.W.M., Jr. and L.W.M. were determined on March 11, 2014, to be abused or neglected children within the meaning of KRS 600.020(1) in a prior DNA action, thereby satisfying KRS 625.090(1)(a). The court also found KRS 625.090(2)(a) was satisfied when father abandoned the boys for not less than ninety days; KRS 625.090(2)(e) was satisfied when father failed to provide essential parental care or protection for the boys for at least six months; KRS 625.090(2)(g) was satisfied by father failing to provide, for reasons other than poverty alone, essential material

⁶ The clear and convincing standard of proof was approved in *Santosky v. Kramer*, 455 U.S. 745, 770, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (1982).

needs; and, KRS 625.090(2)(j) was satisfied by the boys being placed in foster care fifteen of the most recent twenty-two months. Finally, KRS 625.090(1)(b) was satisfied when the trial court found TPR was in the best interests of the children. Each of the foregoing findings was supported by substantial evidence of CHFS efforts to reunify the family by offering treatment services which father failed to complete in a two-year period. During that time, father failed to provide for the boys and did not progress toward completion of his own treatment goals and services.

As an appellate court, we accord the trial court much discretion in a TPR proceeding and apply the clearly erroneous standard of review set forth in CR⁷ 52.01. Sufficient proof is that which has “a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

No claims having been raised on appeal, as directed by *A.C.*, we have independently reviewed the record. Our review convinces us A.W.M., Jr. and L.W.M. are neglected or abused—as found by the trial court—and TPR as to father is in their best interests. There is no reason to set aside the findings of the trial court. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

⁷ Kentucky Rules of Civil Procedure.

As counsel for father argued in the *Anders* brief and CHFS agreed, no meritorious grounds exist upon which to grant relief. The order terminating father's parental rights to A.W.M., Jr. and L.W.M. is affirmed.

ORDER

WHEREFORE, father's counsel having moved to withdraw from the above-styled appeal under *Anders* after conscientiously reviewing the record and finding no meritorious issue to raise; a copy of said *Anders* brief and the motion to withdraw having been mailed to father at his last known address; father having been advised he could file a *pro se* brief if desired, but none being filed; said motion to withdraw having been passed to this merits panel for resolution; opposing counsel having agreed the appeal is without merit; and father having filed no response thereto, we hereby GRANT the motion to withdraw.

ALL CONCUR.

ENTERED: September 1, 2017

/s/ C. Shea Nickell
JUDGE, COURT OF APPEALS

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