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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-1304-ME

T.P.S. APPELLANT

v. APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 20-AD-00013

R.J.C.; H.M-L.S., A MINOR CHILD;
H.R.B-H.; AND K.L.C. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND CETRULO, JUDGES.

CETRULO, JUDGE: Appellant T.P.S. ("Biological Father"), the biological father of Appellee H.M-L.S. ("Child"), appeals the Bath Circuit Court Order terminating his parental rights and granting the petition to adopt Child of the Appellees, R.J.C. and K.L.C. ("Adoptive Parents").

FACTUAL AND PROCEDURAL HISTORY

In July 2018, the Cabinet for Health and Family Services (the "Cabinet") filed a Dependency, Neglect, or Abuse ("DNA") Petition against Biological Father and Appellee H.R.B-H., Child's biological mother, regarding "a Near Fatality"[1] on Child.[2] The temporary removal hearing was held that month, and emergency custody was granted to the Cabinet while Child remained in the hospital. At that hearing, the court ordered that the biological parents have no contact with Child.[3] Two months later, in October 2018, Biological Father stipulated to abuse at the adjudication hearing. Then, the next month, the district court granted custody to Adoptive Parents[4] at the disposition hearing. Child has remained exclusively with Adoptive Parents since that time.

In August 2019, Biological Father was indicted on criminal charges related to the child abuse allegations referenced in the DNA petition. Biological

[1] The Cabinet's report stated that when Child was two months old, "she suffered non-accidental head trauma while in the care of her birth parents[,]" which resulted in the need for brain surgery and the placement of a shunt in her head to relieve fluid and pressure from her brain. Testimony later established that Child was being seen for traumatic brain injury induced autism, attention-deficit/hyperactivity disorder ("ADHD"), and sensory disorder.

[2] Although biological mother was a party in the action below and the circuit court terminated her parental rights as well, she did not participate in the proceedings below and did not appeal the order terminating her parental rights.

[3] The record did not indicate when or if that no contact order was lifted. Although the disposition hearing order referenced a no contact order regarding biological mother, it did not mention the one for Biological Father.

[4] Adoptive Parents are distantly related maternal cousins of Child.

Father was incarcerated,[5] and in November 2019, the district court granted permanent custody to Adoptive Parents.

In March 2020, Adoptive Parents filed a petition with the circuit court to adopt Child without the consent of biological parents. The petition explained that Child had resided with Adoptive Parents for at least 90 days and that the district court had granted them permanent custody of Child. Additionally, the petition detailed that Adoptive Parents were fictive kin, pursuant to Kentucky Revised Statute ("KRS") 199.011(9); had an emotionally significant relationship with Child; and had exclusive care, custody, and control of Child. As such, under KRS 199.480(1)(d), the Cabinet was not a party to the proceeding. Following the petition, the circuit court appointed guardians *ad litem* ("GALs") for Child and for the biological parents.

In May 2020, Biological Father was released from incarceration on bond with the condition that he have no contact with Child. In July 2020, Child's GAL submitted a report to the circuit court noting that he had met with Adoptive Parents and Child, and that Child was "very loving and very attached to the [Adoptive Parents]. There is no reason to think she does not view them as anything other than Mom and Dad." Adoptive Parents explained to Child's GAL

[5] The record further indicated that Biological Father was incarcerated in December 2019 on a separate burglary charge. The timelines and requisite charges resulting in the incarcerations were not clear.

that Biological Father had not contacted Child at any point since Child had been in their care. Additionally, Biological Father had "provided no financial assistance nor reached out in any way to check on [Child's] well-being . . . ." The Child's GAL concluded that termination was likely, and if the circuit court terminated parental rights, adoption by Adoptive Parents would be in the best interest of Child.

The next month, in September 2020, Vickie Rouse, a social service worker with the Cabinet ("SSW Rouse"), submitted the court report for Community Based Services. The report stated that "the natural parents ha[d] abandoned [Child] for not less than ninety days." Further, it explained that Biological Father had a history of domestic violence and substance abuse. It noted that the Cabinet conducted a visit with Child in September 2020, and Adoptive Parents were properly caring for Child. The Cabinet recommended that Adoptive Parents be permitted to adopt Child.

The circuit court held a status hearing in October 2020; however, Biological Father did not attend. The circuit court then appointed a warning order attorney for Biological Father and set another status hearing for December 2020. Again, Biological Father failed to appear. At a March 2021 status hearing, the attorney raised questions regarding proper service, and the circuit court found that because Biological Father's attorney had then made an appearance, service was

thereby effected as of March 2021. The next month, the attorney for Biological Father filed an answer to the petition for adoption, denying most of the allegations and noting that Biological Father was no longer incarcerated.

At the June 2022 status hearing, Biological Father was initially present via Zoom; however, he was disconnected prior to the start of the hearing. Counsel for Biological Father objected to proceeding with the hearing without his client present and objected to continuing with the termination proceeding while Biological Father's criminal charges were pending. The circuit court took testimony of Adoptive Parents but kept evidence open for proof, until Biological Father could be heard.

The adoptive mother testified that Biological Father had not contacted Adoptive Parents or Child in any capacity since Child had been in their care – which at that time, had been three and a half years. She further testified that Biological Father had not provided any support, financial or otherwise, or any items for Child since Child had been in their care. Although she acknowledged that there had been court orders in place restricting Biological Father's contact with Child, she noted that there were no orders in place restricting Biological Father from providing support for Child. Adoptive mother testified that Child was doing well and was happy despite some residual issues from the abuse. Adoptive father seconded adoptive mother's testimony.

At the August 2022 status hearing, Biological Father's attorney restated his objections to the case proceeding. He further explained that Biological Father had completed everything on his case plan,[6] except for the portions that involved contact with Child, because there were "no contact" orders in place prohibiting his contact with Child. Child's GAL noted that the issues were larger than the pending criminal case, claiming there had been large swaths of time where Biological Father had not done "anything at all." He argued that even before charges were pending, "he just wasn't doing anything." He reminded the court that the adoption had been pending for a couple of years by that point and it was time to move on. The attorney for Adoptive Parents agreed, seeking permanency for Child. The circuit court noted that Biological Father had a more recent indictment that was similar to the indictment entered in November 2019, just involving different people; however, the parties did not move to certify the indictment in the adoption case or submit it to evidence.[7]

[6] The record indicated that Biological Father completed Alcohol, Drugs, and other Addictions Program, Life Without a Crutch Program, Life Skills Program, and Anger Management Program. He had completed 13 weeks of two-hour sessions, including classroom participation, and had "progressed well and completed all the ten lesson assignments required." Further, the instructor for the programs wrote in a letter that Biological Father had "acquired the knowledge and skills to become a good parent for his children."

[7] Although the parties mentioned that there had been a more recent indictment, there was no additional information provided. Biological Father did not testify.

At the September 2022 final hearing, Biological Father was present with his counsel, along with Adoptive Parents and their attorney, and Child's GAL. Biological Father's counsel, once more, argued that Biological Father had done everything asked of him, aside from the tasks that the court ordered him not to do, *i.e.*, contact Child. Adoptive Parents' counsel responded, noting that the proceedings were to determine what was in the best interest of the child, not the parents. He further noted that Child, by that point, had been in Adoptive Parents' care for four years, which was essentially her entire life, and for the last several years, the adoption proceedings had been ongoing. At no point during those years had Biological Father filed for supervised visits or to alter any no contact orders; nor had he provided any support to Child. The court took the evidence under advisement.

The next month, the circuit court entered its findings of fact and conclusions of law, terminating Biological Father's parental rights and granting Adoptive Parent's petition to adopt Child. The order noted that the biological parents' consent was not necessary pursuant to KRS 199.502(1)(a), (e), and (g). Further, it found that Child had resided with Adoptive Parents for at least 90 days and that the district court had granted them permanent custody of Child in November 2019, after Child had been placed with them a year earlier.

The order concluded that Biological Father: (a) had abandoned Child for a period of not less than 90 days; that he, (e) for a period of not less than six months, had continuously or repeatedly failed or refused to provide or had been substantially incapable of providing essential parental care and protection for the child, and that there was no reasonable expectation of improvement in parental care and protection considering Child's age; and that he, (g) for reasons other than poverty alone, had continuously or repeatedly failed to provide or was incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for Child's well-being and that there was no reasonable expectation of significant improvement in the parent's condition in the immediately foreseeable future, considering the age of the child.

Additionally, the circuit court found that terminating Biological Father's parental rights and granting adoption to Adoptive Parents was in Child's best interest. The circuit court noted that Child's GAL had recommended the adoption and had submitted a report stating the same. Further, it acknowledged that the Cabinet, through its report, had approved and recommended the adoption. The circuit court found that Adoptive Parents were of sufficient ability, financially and otherwise, to nurture, protect, and educate Child.

Biological Father appealed. His attorney, however, found the appeal to be meritless under the Kentucky Rules of Appellate Procedure ("RAP") 11;[8] filed a brief pursuant to *A.C. v. Cabinet for Health & Family Services*, 362 S.W.3d 361 (Ky. App. 2012)[9] ("*Anders* brief"); and moved to withdraw as Biological Father's counsel.[10] Counsel informed Biological Father of his right to submit an additional brief, *pro se*; however, he declined to do so.

STANDARD OF REVIEW

When counsel files an *Anders* brief, pursuant to *A.C.*, this Court independently reviews the record to ensure "the appeal is, in fact, void of nonfrivolous grounds for reversal." *C.J. v. M.S.*, 572 S.W.3d 492, 494 (Ky. App. 2019) (citing *A.C.*, 362 S.W.3d at 372).

Additionally, for involuntary termination of parental rights cases, the standard of review "is confined to the clearly erroneous standard in [Kentucky Rule of Civil Procedure] CR 52.01 based upon clear and convincing evidence. The

[8] In pertinent part, RAP 11 states that an attorney shall file a document only if "to the best of the signatory's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If an attorney violates RAP 11, he or she could be sanctioned.

[9] *Anders v. State of California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) "established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel." *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539 (1987). This Court extended *Anders* to involuntary parental rights termination proceedings in *A.C.*, 362 S.W.3d at 370.

[10] By separate Order, we have granted that motion.

findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings." *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014) (citation omitted).

ARGUMENT

Following the blueprint outlined in *A.C.*, counsel for Biological Father addressed "all issues he could conceive that could be raised on appeal and explain[ed] why any argument in support lack[ed] merit." Counsel explained that he had objected to the termination action while the related criminal matter was still pending. Additionally, counsel objected to the assertion that Biological Father failed to complete the case plan because Father had been prohibited from doing so by court order. Despite those objections, counsel argues that the circuit court's ruling on termination was not clearly erroneous – *i.e.*, was supported by clear and convincing evidence. We agree.

KRS 199.502 governs petitions for adoption without consent of the biological parents. It states, in pertinent part, that

> [A]n 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 of the following conditions exist with respect to the child:
>
> > (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; [or]
>
> . . .
>
> (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(1)(a), (e), (g).

Further, KRS 199.502(2) provides:

> Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision either:
>
> > (a) Granting the adoption without the biological parent's consent; or
> >
> > (b) Dismissing the adoption petition, and stating whether the child shall be returned to the biological parent or the child's custody granted to the state, another agency, or the petitioner.

Here, we must review the circuit court's judgment, findings of fact, and conclusions of law to determine whether its decision to terminate Biological

Father's parental rights under KRS 199.502 was based on clear and convincing evidence. While the circuit court's written "factual findings" regarding Biological Father were limited, its judgment *was* supported by the record.

> [T]rial courts are afforded a great deal of discretion in determining whether termination of parental rights is appropriate. 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. 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. Under this standard, we are obligated to give a great deal of deference to the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them.

M.S.S., 638 S.W.3d at 359-60 (internal quotation marks and citations omitted).

With that guidance in mind, and after review of the record in its entirety, we find the determinations of the circuit court were based on clear and convincing evidence.[11] In 2018, Biological Father stipulated to abuse at the adjudication hearing. Although the court limited his contact, Biological Father made no attempts to have the no contact order lifted, nor did he provide any support, financial or otherwise, or any items for Child since placement with Adoptive Parents in 2018. Further, Biological Father's history of criminal activity,

[11] We recommend that a circuit court incorporate **full and complete** findings *in writing* including the application of the "clear and convincing" standard of review. However, here, under these circumstances, the record in full supports the circuit court's determination.

domestic violence, and substance abuse further supports the conclusion that placement with Adoptive Parents is in the best interest of Child; again, here Child's best interest outweighs Biological Father's best interest. Additionally, Adoptive Parents have an emotionally significant relationship with Child, and Child has lived with them for more than four years, almost her entire life.

In short, the record supports the decision of the circuit court, and we decline to interfere. We are unable to conclude this circuit court was clearly erroneous when it found the existence of the conditions enumerated in KRS 199.502(1)(a), (e), and (g) as to Biological Father.

CONCLUSION

Accordingly, the judgment of the Bath Circuit Court is AFFIRMED.

ACREE, JUDGE CONCURS.

CALDWELL, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CALDWELL, JUDGE, DISSENTING: Reluctantly, I must dissent. As stated in this Opinion, and I do not disagree, the trial court has a great deal of discretion in an involuntary termination of parental rights action. The standard of review in a termination case is confined to the clearly erroneous standard in CR 52.01. But in certain adoption cases where, by the nature of the action, parental rights are also being terminated, it is also based upon the evidence being found by the trial court to be clear and convincing evidence.

As the right to parenthood is a fundamental constitutional right, precedent dictates that courts must use the clear and convincing standard. *See, e.g.*, *M.S.S. v. J.E.B.*, 638 S.W.3d 354, 359 (Ky. 2022) (internal quotation marks, footnotes, and citations omitted) ("An adoption without the consent of a living biological parent is, in effect, a proceeding to terminate that parent's parental rights. Parental rights are a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution. As such, termination of parental rights is a grave action which the courts must conduct with utmost caution. So, to pass constitutional muster, the evidence supporting termination must be clear and convincing."); *A.F. v. L.B.*, 572 S.W.3d 64, 70 n.7 (Ky. App. 2019) ("Although KRS 199.502 does not require clear and convincing evidence, the Due Process Clause does."); *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 427 (Ky. App. 2015) ("Termination can be analogized as capital punishment of the family unit because it is 'so severe and irreversible.' Therefore, to pass constitutional muster, the evidence supporting termination must be clear and convincing.") (quoting *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S. Ct. 1388, 1398, 71 L. Ed. 2d 599 (1982)).

While this is not an error raised on appeal, it is nonetheless one that cannot be ignored. "Parental rights are a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution." *M.S.S.*, 638 S.W.3d

at 359 (internal quotation marks, footnotes, and citations omitted). Therefore, "termination of parental rights proceedings **must** utilize a clear and convincing evidence standard of proof." *Simms v. Estate of Blake*, 615 S.W.3d 14, 22 (Ky. 2021) (emphasis added). And while a person may waive a constitutional right, waiver cannot be presumed from a silent record. *Commonwealth v. Simmons*, 394 S.W.3d 903, 914 (Ky. 2013).

Further, it is not the role of an appellate court to act as a fact finder. We use the deferential, clearly erroneous standard because it is the duty of the trial judge to consider the credibility of the witness. "The findings of the trial judge may not be set aside unless clearly erroneous with due regard being given to the opportunity of the trial judge to consider the credibility of the witnesses." *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995) (citing CR 52.01; *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982); *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986)). And so, it is also the duty of the trial judge to determine to what degree those facts have been proven.

As our Supreme Court has previously determined, the failure of the trial court to identify the standard of proof applied is fatal.

> In order to justify finding the existence of [statutory grounds to grant the adoption], the trial court was required to find from clear and convincing proof that appellant had abandoned or substantially or continuously or repeatedly neglected or abused the twins. *Santosky v.* [*K*]*ramer*, 455 U.S. 745, 102 S. Ct.

> 1388, 71 L. Ed. 2d 599 (1982); *N.S. v. C. and M.S.*, Ky., 642 S.W.2d 589 (1983). In the latter case as here the trial court in finding that appellant Wright had so misbehaved did not identify the standard of proof it applied in its finding, much less identify it as being by the *Santosky* standard of clear and convincing proof. We, as did our Supreme Court in *N.S. v. C. and M.S.*, *supra*, find the omission by the trial court fatally defective as to this determination upon which its judgment is for a good part bottomed. The trial court's judgment entered in the light of all or each of the above violations of the adoption statutes' various provisions is invalid and should be vacated.

Wright v. Howard, 711 S.W.2d 492, 497. (Ky. App. 1986). We are constrained to follow the Supreme Court's precedent.

Therefore, I would vacate this decision. I would remand the action to the trial court for a new trial utilizing the clear and convincing standard.

BRIEF FOR APPELLANT:

Howard Stone
Owingsville, Kentucky

NO BRIEF FOR APPELLEES.