

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

South Carolina Department of Social Services,
Respondent,

and

Sherry Powers, Edward Anthony Dalsing and Tammy
Gaye Causey Dalsing, Intervenors,

v.

Erica Smith and Andrew Jack Myers, Defendants,

Of whom Edward Anthony Dalsing, Tammy Gaye
Causey Dalsing, and Erica Smith are Respondents,

and

Andrew Jack Myers is the Appellant.

In the interest of a minor under the age of eighteen.

Appellate Case No. 2015-002045

Appeal From Union County
Rochelle Y. Conits, Family Court Judge

Unpublished Opinion No. 2016-UP-517
Heard October 19, 2016 – Filed December 15, 2016

**VACATED IN PART, REVERSED IN PART, AND
REMANDED**

Melinda Inman Butler, of The Butler Law Firm, of Union; and Nathan James Sheldon, of The Law Office of Nathan J. Sheldon, LLC, of Rock Hill, for Appellant.

James Fletcher Thompson, of James Fletcher Thompson, LLC, of Spartanburg; and Larry Dale Dove, of Dove Law Group, LLC, of Rock Hill, for Respondents Tammy G. Dalsing and Edward A. Dalsing.

David E. Simpson, of South Carolina Department of Social Services, of Rock Hill, for Respondent South Carolina Department of Social Services.

Debra A. Matthews, of Debra A. Matthews, Attorney at Law, LLC, of Winnsboro, for Respondent Erica Smith.

Lindsey Ann McCallister, of Foster Care Review Board, of Columbia, for Respondent Foster Care Review Board. Brenda L. Gorski, of South Carolina Guardian ad Litem Program, of Columbia, for the Guardian ad Litem.

Erick Matthew Barbare, of the Barbare Law Firm, of Greenville, for Intervenor Sherry Powers.

PER CURIAM: Andrew Jack Myers (Father) appeals a family court order granting the adoption of his minor daughter (Child) to Edward and Tammy Dalsing (Foster Parents). On appeal, Father argues the family court erred in (1) finding his consent was not required for Child's adoption, (2) terminating his parental rights, (3) granting adoption to Foster Parents while simultaneously finding they lacked standing to adopt Child, (4) allowing Foster Parents to be parties to this action, and (5) finding Child's permanent plan should be termination of parental rights (TPR)

and adoption.¹ We vacate in part, reverse in part, and remand for a new permanency planning hearing.

On appeal from the family court, this court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *see also Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651-52.

Initially, we find the issue of Foster Parents' intervention in the removal action brought by the Department of Social Services (DSS) is not properly before this court. The October 8, 2014 order allowing Foster Parents to intervene in the DSS action was by agreement; having consented to the intervention, Father cannot now challenge it on appeal. *See Hooper v. Rockwell*, 334 S.C. 281, 290, 513 S.E.2d 358, 363 (1999) (providing a party "may not appeal [a] consent order because such orders are not appealable").

We find the family court erred in considering adoption once it determined Foster Parents did not have standing to file an adoption action.² Once the family court

¹ The family court also terminated the parental rights of Erica Smith (Mother), but she has not appealed.

² Foster Parents have not appealed the family court's finding that they lacked standing to file an adoption petition; thus, this unappealed ruling is the law of the case. *See Ex parte Morris*, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (stating an "unappealed ruling is the law of the case and requires affirmation"). We further find that under the rationale of *Youngblood v. South Carolina Department of Social Services*, the family court properly found Foster Parents did not have standing to file an adoption petition. *See* 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) ("Standing, a fundamental prerequisite to instituting an action, may exist by statute, through the principles of constitutional standing, or through the public importance exception."); *id.* at 318, 741 S.E.2d at 518 ("[W]hile section 63-9-60(A) [of the South Carolina Code (2010)] broadly grants standing [to file an adoption petition] to 'any South Carolina resident,' section 63-9-60(B) makes that grant of standing inapplicable to a child placed for adoption by DSS." (quoting §

determined Foster Parents did not have standing to file an adoption action, the issue of adoption was not before the family court, and the family court did not have the authority to consider it. *See Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518 (noting standing is "a fundamental prerequisite to instituting an action"); Rule 2(a), SCRFC (limiting the applicability of Rule 54(c), SCRCF, in family court actions "to the extent it permits the court to grant relief not requested in the pleadings"); *Bass v. Bass*, 272 S.C. 177, 179-80, 249 S.E.2d 905, 906 (1978) (finding the family court erred as a matter of law in awarding the wife business compensation when she did not assert a claim for compensation in her pleadings); *id.* at 180, 249 S.E.2d at 906 ("While it is true that pleadings in the family court must be liberally construed, this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings." (footnote omitted)). We acknowledge the family court may award relief not requested in pleadings in certain instances. For example, Rule 17(a), SCRFC, permits a defaulting defendant to "be heard at the merits hearing on issues of custody of children, visitation, alimony, support, equitable distribution, and counsel fees." However, we find this rule does not extend to permit the family court to consider adoption *sua sponte* when the party requesting it does not have standing to make such a request. Because adoption is contrary to common law, the statutes authorizing adoption must be strictly construed. *See Hucks v. Dolan*, 288 S.C. 468, 470, 343 S.E.2d 613, 614 (1986) ("The adoption of a child was a proceeding unknown to the common law. Adoption exists in this state only by virtue of statutory authority which expressly prescribes the conditions under which an adoption may legally be effected. Since the right of adoption in South Carolina is not a natural right but wholly statutory, it must be strictly construed." (citation omitted)). Thus, we find the family court erred in granting the adoption of Child to Foster Parents once it determined they did not have standing to file the adoption petition. Further, because the issue of Father's consent to the adoption was tied to the adoption, we find it was not properly before the family court. Thus, we vacate the family court's finding that Father's consent was not required for the adoption and the family court's order granting Foster Parents adoption of Child.

63-9-60(A))); *id.* at 322, 741 S.E.2d at 520 ("[T]he foster parent relationship, absent statutory law to the contrary, is insufficient to create a legally protected interest in a child and therefore, does not create standing to petition to adopt.").

Additionally, we find Foster Parents did not present clear and convincing evidence to prove a statutory ground for TPR.³ *See S.C. Code Ann. § 63-7-2570 (Supp. 2016)* (providing the family court may order TPR upon finding a statutory ground for TPR is met and TPR is in the child's best interest); *S.C. Dep't of Soc. Servs. v. Parker*, 336 S.C. 248, 254, 519 S.E.2d 351, 354 (Ct. App. 1999) (providing grounds for TPR must be proved by clear and convincing evidence). The family court determined clear and convincing evidence supported three statutory grounds for TPR: willful failure to visit, willful failure to support, and abandonment. In analyzing whether clear and convincing evidence supports one of these grounds, we are cognizant that "[b]ecause terminating the legal relationship between natural parents and a child is one of the most difficult issues an appellate court has to decide, great caution must be exercised in reviewing termination proceedings[,] and termination is proper only when the evidence clearly and convincingly mandates such a result." *S.C. Dep't of Soc. Servs. v. Roe*, 371 S.C. 450, 455, 639 S.E.2d 165, 168 (Ct. App. 2006).

We find the record does not contain clear and convincing evidence showing Father willfully failed to visit Child. *See S.C. Code Ann. § 63-7-2570(3) (Supp. 2016)* (providing a statutory ground for TPR is met when "[t]he child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to visit the child"). During the pendency of this action Child was placed in South Carolina and Father was incarcerated in Virginia. *See id.* ("The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit."). Father's incarceration, standing alone, is not a sufficient basis for TPR. *See S.C. Dep't of Soc. Servs. v. Wilson*, 344 S.C. 332, 337-38, 543 S.E.2d 580, 583 (Ct. App. 2001) (rejecting DSS's argument "that the father's voluntary pursuit of lawless conduct, resulting in his incarceration, [was] a sufficient basis for [TPR]"); *id.* at 339, 543 S.E.2d at 584 ("To determine whether a parent's failure to support or visit during the time of

³ Although the family court properly determined Foster Parents did not have standing to file an adoption petition, the law allows foster parents to file TPR petitions. *See S.C. Code Ann. § 63-7-2530(A) (Supp. 2016)* (providing "any interested party" may file a TPR petition); *S.C. Code Ann. § 63-7-20(17) (Supp. 2016)* (providing "[p]arty in interest" includes the foster parent); *Dep't of Soc. Servs. v. Pritchett*, 296 S.C. 517, 520-21, 374 S.E.2d 500, 501-02 (Ct. App. 1988) (finding the Children's Code indicates foster parents have standing as interested parties to file TPR petitions).

incarceration evinces a settled purpose to forego parental responsibilities requires a comprehensive analysis of all of the facts and circumstances."). Based on our review of all the facts presented, we find the evidence did not show Father willfully failed to visit Child. At the TPR hearing, a DSS treatment worker acknowledged it was unlikely DSS—the agency that had custody of Child—would have transported Child to Virginia to visit Father. *See* § 63-7-2570(3) ("[I]t must be shown that the parent was not prevented from visiting by the party having custody or by court order."). Notwithstanding his inability to visit Child, Father showed a commitment to Child by writing her, writing DSS to inquire about Child, and communicating with Child's guardian ad litem. Based on the foregoing, we find Father did not willfully fail to visit Child. *See S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 53, 413 S.E.2d 835, 839 (1992) ("Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent."). Thus, we find clear and convincing evidence does not support this statutory ground.

Additionally, we find the record does not contain clear and convincing evidence showing Father willfully failed to support Child. *See* S.C. Code Ann. § 63-7-2570(4) (Supp. 2016) (providing a statutory ground for TPR is met when "[t]he child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child"). Although Father did not pay child support during the pendency of this action, the testimony established Father's mother (Grandmother) provided material support for Child during her monthly visitation. *See id.* ("A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means."). More importantly, Grandmother stated Father asked her to stop sending money to his prison account and use that money to provide support for Child. Based on Father's request, which Grandmother honored, we find Father did not evince a settled purpose to forego his parental duty to support Child. *See Broome*, 307 S.C. at 53, 413 S.E.2d at 839 ("Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent."). Rather, we find Father provided material support to Child despite having limited funds. *See* § 63-7-2570(4) ("The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the

custodian and the ability of the parent to provide support."). Thus, we find clear and convincing evidence does not support this statutory ground.

Finally, we find the record does not contain clear and convincing evidence showing Father abandoned Child. *See* S.C. Code Ann. § 63-7-2570(7) (Supp. 2016) (providing a statutory ground for TPR is met when a parent abandons a child); S.C. Code Ann. § 63-7-20(1) (Supp. 2016) ("Abandonment of a child" means a parent or guardian wilfully deserts a child or wilfully surrenders physical possession of a child without making adequate arrangements for the child's needs or the continuing care of the child."). The testimony at the TPR hearing established that Father—who had criminal charges pending prior to Mother's pregnancy—turned himself in when Mother became pregnant so he could serve his prison sentence before Child was born. Father communicated with Child, DSS, and Child's guardian ad litem through letters and provided material support to Child. Father also attempted to arrange for Child to be placed with Grandmother during his incarceration; however, that plan was hindered by the lengthy Interstate Compact on the Placement of Children process and Foster Parents' adoption action. Based on the foregoing, we find clear and convincing evidence does not show Father abandoned Child. Because clear and convincing evidence does not support a statutory ground for TPR, we reverse TPR.

Based on the foregoing, we vacate in part, reverse in part, and remand for a new permanency planning hearing pursuant to section 63-7-1700 of the South Carolina Code (Supp. 2016). A permanency planning hearing will allow all parties and Child's guardian ad litem an opportunity to update the family court on what has occurred since the TPR hearing. We urge the family court to conduct a hearing as expeditiously as possible, including presentation of a new guardian ad litem report and an updated home evaluation. If necessary, the family court may, *inter alia*, change custody, modify visitation, and approve a treatment plan offering services to Father.

VACATED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.