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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002319-MR

G.S.B. APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 00-AD-00018

B.T.R.,
C.W.R., and
E.C.W., a minor APPELLEES

OPINION
REVERSING
AND
REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

BUCKINGHAM, JUDGE: G.S.B. appeals from a judgment of adoption of the Franklin Circuit Court that effectively terminated his parental rights and allowed his daughter's stepfather to adopt her. We reverse and remand.

G.S.B. and C.W.R. lived together off and on from December 1988 through February 1998. They were never married. On November 20, 1990, C.W.R. gave birth to their daughter, E.C.W. C.W.R. and B.T.R. married on September 12, 1998,

approximately seven months after C.W.R. and G.S.B. had separated for the final time. The child resided with C.W.R. and B.T.R.

On September 20, 2000, approximately two years after C.W.R. and B.T.R. were married, B.T.R. filed a petition in the Franklin Circuit Court to adopt E.C.W. G.S.B. filed an answer in response and also filed a cross-claim wherein he requested that he be adjudged E.C.W's natural father, that C.W.R. be granted custody while he be allowed visitation, and that the court set child support payments to be made by him. An agreed order was entered establishing paternity; however, no action was taken as to visitation or child support. The trial of the case was held in the Franklin Circuit Court during July 2002.

On October 14, 2002, the circuit court rendered Findings of Fact, Conclusions of Law and Order. Therein, the court made numerous fact findings and conclusions before ordering that a judgment of adoption in favor of B.T.R. be entered. The court found that G.S.B. and C.W.R. had a long and tumultuous relationship that "epitomized the proverbial cycle of domestic violence." The court found that G.S.B. committed numerous acts of physical abuse and domestic violence against C.W.R. and that much of the violence was committed in their daughter's presence. Further, the court noted that G.S.B. had an alcohol abuse problem and had difficulty with anger management. The court also determined that C.W.R. tried to

encourage a good relationship between G.S.B. and their daughter but that G.S.B. did not take the initiative in seeing her.

Next, the court found that G.S.B. had not paid any child support nor otherwise contributed to his daughter's physical, medical, or educational needs since the latter part of 1999. The court also stated that the child had not been abused or neglected by G.S.B. and that he had not allowed her to be sexually abused or exploited. The court further noted that the Cabinet for Human Resources had prepared a report and had recommended that the adoption petition be granted provided all legal requirements were met. Additionally, the court stated it had talked with the child and she had stated her desire that her stepfather be allowed to adopt her.

The court concluded that B.T.R. was a fit and proper person to adopt E.C.W., but it noted that B.T.R. was required to prove by clear and convincing evidence that the statutory requirements had been met. The court then concluded as a matter of law that B.T.R. had proven by clear and convincing evidence (1) that G.S.B. had abandoned E.C.W. for a period not less than ninety days; (2) that G.S.B. had continuously or repeatedly inflicted emotional harm upon the child by reason of his alcohol abuse and repeated acts of domestic violence against C.W.R. in the child's presence; (3) that G.S.B. had, for a period of not less than six months, continuously or repeatedly failed or

refused to provide essential parental care and protection for the child, and there was no reasonable expectation of improvement in that situation considering her age; and (4) that G.S.B. had continuously or repeatedly failed to provide essential food, clothing, shelter, medical care, or education reasonably necessary and available for E.C.W.'s well-being, and there was no reasonable expectation of significant improvement in the foreseeable future considering her age. The court concluded that the granting of the adoption petition was appropriate for those four reasons and ordered that a judgment of adoption be entered. This appeal by G.S.B. followed.

KRS[1] 199.502 addresses the conditions necessary for an adoption without the consent of the child's biological parent or parents. As that statute pertains to the findings and conclusions made by the trial court in this case, it reads as follows:

> (1) Notwithstanding the provisions of KRS 199.500(1), an 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:
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> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> . . . .

[1] Kentucky Revised Statutes.

> (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
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> . . . .
>
> (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;
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> . . . .
>
> (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), (c), (e), and (g).

G.S.B. argues on appeal that there was not substantial evidence to support the trial court's Findings of Fact,

Conclusions of Law and Order. CR[2] 52.01 states in part that "[f]indings of fact shall not be set aside unless clearly erroneous." Further, "[w]hile a court's findings will not be disturbed on appeal if they are supported by substantial evidence, they will not be sustained if they are supported by no evidence." Burke v. Hammonds, Ky. App., 586 S.W.2d 307, 309 (1979). We will examine each of the four findings of the trial court and determine whether they were supported by substantial evidence.

The trial court first determined that G.S.B. had abandoned his daughter for a period of not less than ninety days. See KRS 199.502(1)(a). This was based on the fact that G.S.B. apparently had no contact with the child after having lunch with her at Applebee's in November 1999. B.T.R. notes that the period of time from November 1999 until his petition for adoption was filed in September 2000 was clearly in excess of the statutory requirement of abandonment for at least ninety days.

"[A]bandonment 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., Ky. App., 655 S.W.2d 32, 34 (1983). Also, "[s]eparation to constitute abandonment and neglect must

[2] Kentucky Rules of Civil Procedure.

be wilful and harsh." Kantorowicz v. Reams, Ky., 332 S.W.2d 269, 271-72 (1960). See also D.S. v. F.A.H., 684 S.W.2d 320, 322 (1985).

It is apparently undisputed that G.S.B. had no contact with his daughter after November 1999. The trial court found that G.S.B. visited approximately four times in 1998 and two or three times in 1999. The evidence was undisputed that in 1998 G.S.B. had a two-day visit in April, two separate days in August, and a five-day visit in November when B.T.R. and C.W.R. were out of town. In 1999 G.S.B. had a two-day visit in January and then met E.C.W. at Applebee's in November.

Although the court found that C.W.R. had tried to encourage a good relationship between E.C.W. and G.S.B., C.W.R. admitted that she had informed G.S.B. in January 1999 that she did not want any further contact between G.S.B. and their daughter and did not want any further support from him. In addition, C.W.R. admitted that while she allowed G.S.B.'s mother to visit with E.C.W. from January 1999 on, she refused to allow G.S.B.'s mother to visit with E.C.W. at her house in Georgetown because G.S.B. lived on the same property.

C.W.R. attempts to counter this evidence by referencing a letter she sent to G.S.B. in October 1999 and the November 1999 meal that she allowed to take place at Applebee's. Nevertheless, her actions, particularly her statement to G.S.B.

that he was not to have contact with their daughter, underscore the fact that his lack of contact was not all of his own doing but was at C.W.R.'s directive that he stay away. Under these circumstances and under the aforementioned legal principles applicable to the issue of abandonment, we conclude that the evidence was not clear and convincing in this regard. The evidence was not such as to exhibit a wilful and harsh attempt by G.S.B. to abandon or separate himself from his daughter.

The second determination made by the trial court was that B.T.R. had proven by clear and convincing evidence that G.S.B. inflicted emotional harm on the child by reason of his alcohol abuse and repeated acts of domestic violence committed against C.W.R. in the child's presence. See KRS 199.502(1)(c). G.S.B. concedes that he and C.W.R. had a tumultuous relationship, that a domestic violence order was entered against him in 1994, and that he committed several acts of domestic violence against C.W.R., some of which occurred in the child's presence. However, he notes that the court did not find that any incident of domestic violence had occurred after the parties finally separated in early 1998, and he also notes that the court specifically found that "[E.C.W.] has not been abused or neglected by [G.S.B.]."

The definition of an "abused or neglected child" is set forth in KRS 600.020(1), and it includes a child whose

health or welfare has been harmed or threatened when his parent inflicts or allows to be inflicted physical or emotional injury, creates or allows to be created a risk of physical or emotional injury, or engages in a pattern of conduct that renders the parent incapable of caring for the child's needs due to alcohol abuse. While there was evidence that G.S.B. abused alcohol and committed acts of domestic violence in the presence of the child, the court entered a specific fact finding that she was not abused or neglected by G.S.B. Furthermore, there was no evidence that G.S.B.'s acts of domestic violence against C.W.R. caused the child emotional harm. In light of these circumstances, we conclude there was not sufficient evidence to support the conclusion that G.S.B. inflicted emotional harm upon her by reason of the alcohol abuse and acts of domestic violence. In short, the finding and the conclusion are inconsistent.

More importantly, the statute, KRS 199.502(1)(c), requires that it be proven that the parent "continuously or repeatedly" inflicted physical or emotional harm on the child. As we have noted, G.S.B. and C.W.R. separated for the final time in February 1998. B.T.R. filed the adoption petition in September 2000, over two and one-half years later. There was no evidence of any emotional harm being inflicted on the child by

G.S.B. due to alcohol abuse or domestic violence committed in the child’s presence during this period of time.

When the parties orally argued this case to this court, B.T.R.’s counsel cited R.C.R. v. Commonwealth, Cabinet for Human Resources, Ky. App., 988 S.W.2d 36 (1998), for the proposition that domestic violence and alcohol abuse by a father is grounds for terminating his parental rights. The facts in that case are distinguishable from the facts herein. In R.C.R. the children were removed from the home, and the Cabinet for Human Resources (now the Cabinet for Families and Children) instituted an action to terminate the parental rights against both parents due to domestic violence, alcohol abuse, and neglect. In the case *sub judice*, the domestic violence and the potential harm to the child had ended well over two years prior to the filing of B.T.R.’s adoption petition. We conclude that terminating G.S.B.’s parental rights on this ground was improper.

The third determination by the trial court was that B.T.R. had proven by clear and convincing evidence that G.S.B., for a period of not less than six months, continuously or repeatedly failed to provide essential care and protection to the child and that there was no reasonable expectation of improvement in the future considering the child’s age. Thus, the court concluded that such determination was a separate

ground for granting the adoption pursuant to KRS 199.502(1)(e). G.S.B. argues that any deficiency he may have had in not paying a sufficient amount of child support was due to no child support order directing him to pay being in place and due to C.W.R.'s direction to him that he have no contact and pay no support. Furthermore, G.S.B. again notes the finding by the trial court that he did not neglect his daughter.

The parties have argued this third conclusion by the trial court with the court's fourth conclusion that B.T.R. had proven by clear and convincing evidence that G.S.B. continuously or repeatedly failed to provide essential food, clothing, shelter, medical care, or education reasonably necessary for E.C.W.'s well-being and that there was no reasonable expectation of significant improvement in the foreseeable future considering her age. G.S.B. raises the same arguments regarding this determination. In response, B.T.R. notes that G.S.B. paid only $1,427.45 in child support from February 15, 1998, through November 29, 1999.

While the parties have argued the third and fourth conclusions of the court as if they were the same, they were not. The third conclusion relates to KRS 199.502(1)(e) and states that G.S.B. continuously failed or refused to provide essential parental care and protection to the child. The fourth conclusion relates to KRS 199.502(1)(g) and states that G.S.B.

continuously failed to provide essential food, clothing, shelter, medical care or education for the child's well-being. KRS 199.502(1)(e) involves providing essential care and protection, and KRS 199.502(1)(g) involves providing support. Because E.C.W. was in the custody of C.W.R. and B.T.R., she was receiving essential parental care and protection. Further, there is no evidence to indicate that during the periods E.C.W. was with G.S.B. in 1998 and 1999 she did not receive essential care and protection. Thus, the court's conclusion that G.S.B.'s parental rights could be terminated based on KRS 199.502(1)(e) was not supported by the evidence and was improper.

As for the fourth determination by the trial court, we again agree with G.S.B. that there was not clear and convincing evidence to support it. While G.S.B. was certainly not an ideal parent and while he abused alcohol and had previously committed acts of domestic violence against the child's mother, the fact is that C.W.R. told G.S.B. in January 1999 that he was to have no contact with the child and was to pay no support. Not only was G.S.B. not under any court order to pay child support, but he could not have been convicted of misdemeanor nonsupport as paternity was never established until G.S.B. filed a motion to do so in this action. See KRS 530.050 and Lane v. Commonwealth, Ky., 371 S.W.2d 16, 17 (1963). The evidence does not demonstrate that G.S.B. had a settled purpose to forego all

parental duties and relinquish all parental claims to E.C.W. Therefore, we conclude that there was not clear and convincing evidence to support the court's last determination.

The U.S. Supreme Court has spoken as to the seriousness of terminating the parental rights of a parent. In Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923), the Court referred to the right to raise one's children as being "essential." In Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942), the Court referred to these rights as being "basic civil rights of man." In May v. Anderson, 345 U.S. 528, 533, 73 S. Ct. 840, 843, 97 L. Ed. 1221 (1953), the Court stated that these are "[r]ights far more precious . . . than property rights." In Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972), the Court stated that the right of an unwed father "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."

In Santosky v. Kramer, 455 U.S. 745, 759, 102 S. Ct. 1388, 1895, 71 L. Ed 2d 599 (1982), the Court noted that "[w]hen the State initiates a parental rights determination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." The Court went on to note that "if the State prevails, it will have worked a unique kind of

deprivation . . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." Id., quoting Lassiter v. Department of Social Services, 452 U.S. 18, 27, 101 S. Ct. 2153, 2160, 68 L. Ed. 2d 640 (1981).

In the Santosky case the Court noted that the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." 445 U.S. at 754. In Kentucky this court held that the principles set forth in the Santosky case apply in this state "regardless of whether one is threatened with the loss of his or her parental rights pursuant to KRS 199.603, the involuntary termination statute, or by adoption of his or her child without his consent." D.S., 684 S.W.2d at 323.

This brings us to another of G.S.B.'s arguments. G.S.B. argues that the trial court erred as a matter of law by failing to consider any measure less drastic than adoption in determining E.C.W.'s best interest. In the D.S. case, this court held that "we believe it incumbent upon the court when considering a petition to adopt . . . to not only require clear

and convincing evidence of abandonment or neglect, but to also consider any less drastic measures to accomplish the child's best interest." Id. This principle was reiterated in L.B.A. v. H.A., Ky. App., 731 S.W.2d 834, 836 (1987), wherein this court stated that "less drastic measures *must* be considered by the court prior to granting termination and involuntary adoption."

In the case *sub judice* it is obvious that less drastic measures were not considered prior to terminating the parental rights of G.S.B. Such measures should have been considered in light of the fact that he was not under a court order to pay support and had been told by C.W.R. that he was to pay no support and was to stay away from their daughter. While it appears that G.S.B. has been a poor parent in many respects, he is still the natural and legal father of E.C.W. Until the requirements of the statute are met by clear and convincing evidence, he must remain so.

Finally, we note that the facts in this case are somewhat similar to those in G.R.M. v. W.M.S., Ky. App., 618 S.W.2d 181 (1981). Therein, the trial court terminated the parental rights of a father to his children based on his failure to support them for three years and failure to even see them for over four years. The court therein concluded that "this was due in great part to the actions and attitude of the appellee." Further, the court stated, "[t]o terminate a father's parental

rights on this basis under this provision flies in face of the true spirit and intent of this statute, which is to sever relations between innocent children and a deadbeat, disinterested parent." Id. at 184. In light of the actions of C.W.R., we conclude that B.T.R. did not prove by clear and convincing evidence that the parental rights of G.S.B. should be terminated.

Therefore, the order of the Franklin Circuit Court is reversed and remanded for further proceedings in connection with G.S.B.'s cross-claim.

DYCHE, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: As I cannot agree with the assessment of the majority opinion that the evidence in this case failed the tough standard of "clear and convincing," I respectfully dissent. The thorough findings of the trial court were amply substantiated by evidence that was obviously weighed and evaluated by the court with great care. That evidence fully satisfies each and all of the statutory criteria that must be met before a court may order termination of parental rights.

The majority opinion essentially penalizes the mother in this case for endeavoring to insulate her daughter from a continual pattern of the most severe emotional abuse. The record is replete with instance after instance of violent

behavior by the alcoholic father -- including numerous outbursts of domestic violence (*e.g.*, strangling the mother and brandishing a gun in her face) routinely committed in the presence of the child. After an exasperating attempt to encourage and to nurture a relationship between father and daughter, the mother finally "ordered" him to stay away. He did stay away. He meekly obeyed a woman whom he had never hesitated to brutalize repeatedly. It is noteworthy that he made absolutely no attempt to invoke the courts to assert his parental rights at this point.

The majority opinion observes that the domestic violence and its attendant emotional harm to the child had ended more than two years before the filing of the adoption petition. From this fact, it reasons that the potential for emotional harm had ended and that, therefore, there was no legitimate basis to determine that he had "continuously or repeatedly" (KRS 199.502(1)(c)) inflicted ongoing harm. This reasoning essentially would require that harm be occurring contemporaneously with or up to the filing, a requirement clearly not contained in the statute. The record illustrates the continuity and repetition of the abuse -- as well as the virtual certainty that there would be no improvement in the behavior of the perpetrator.

In upholding the parental rights of this father, the majority opinion quotes Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed. 2d 551 (1972). It relies on that case for the proposition that parental rights are entitled to deference and protection – "absent a powerful countervailing interest." I would submit that such a "countervailing interest" has been clearly and convincingly established by the facts of this case.

This is a very difficult case, one that is emotionally wrenching for all concerned -- including the members of this appellate panel. However, I would not disturb the well-reasoned opinion of the trial court in its findings of facts (entered after sound and meticulous analysis) or in its application of the law (satisfying all the statutory criteria) to those facts. I would affirm the judgment of adoption and the termination of parental rights.

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