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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001850-ME

F.T.M.

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 10-AD-00004

G.S.M. AND T.L.M., A CHILD

APPELLEES

AND

NO. 2010-CA-001851-ME

F.T.M.

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 10-AD-00005

G.S.M. AND S.E.M., A CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: NICKELL AND THOMPSON, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

THOMPSON, JUDGE: F.T.M. (father) appeals two judgments terminating his parental rights to his two children and granting the adoption petitions filed by the children's stepfather, G.S.M. For the following reasons, we affirm.

Father and W.K.M. (mother) were married in 1995. In 1997, their first child was born and the second was born in 2000. Sometime in 1998, father began having a substance abuse addiction and, before father and mother finally separated in March 2004, had two separate emergency protective orders issued against him for violent acts committed in the children's presence.

In June 2004, the marriage between father and mother was dissolved and father was ordered to pay \$331 per month in child support and to pay certain marital debts, including payments on a truck he was awarded. Mother was awarded custody of the children. Father was not awarded visitation with children but was required to petition the court for visitation. However, father did not file a motion to have contact with the children until May 14, 2010, after the petitions for adoption were filed.

Despite the absence of a visitation order, mother permitted some contact with the children and father after the decree through November 2004, when father moved to Michigan. Father admits that between 2004 and 2007, he suffered a drug addiction and during that time was periodically incarcerated. In 2005, he served a nine-month sentence and upon release, violated his parole and was

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<sup>1</sup> Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

sentenced to an additional six months' home incarceration. During that time, he did not comply with his obligations under the decree to pay his share of the marital debts and child support.

In 2007, father contacted an attorney to establish child support and visitation. However, an agreement was not reached before father's arrest for driving under the influence. His probation was revoked and he was sentenced to two years' imprisonment. During his incarceration, father occasionally telephoned his children and received periodic letters and cards for holidays such as Christmas and Father's Day, the last being a letter received in September 2009 from his oldest child. Although he alleges that he sent money through his sister, he had no proof of his payments and admitted it was not sufficient to meet his child support obligation.

When released in 2010, father called his oldest child to wish her Happy Easter and reestablish communication. Mother reported father to his parole officer but was informed that there was no order prohibiting contact with the children. After G.S.M. filed the petitions for termination and adoptions in April 2010, father filed a motion to establish phone visitation with the children.

A hearing was held at which the parents, the paternal grandmother, paternal aunts and stepfather testified. Additionally, the guardian ad litem's report was introduced.

Mother testified that father did not pay child support or the debts as ordered in the decree. The only money she received was from father's sister in the

first few months following the divorce and, pursuant to the decree, father owed her approximately \$54,000. Although father knew her address and she did not prevent him from seeing the children, he had not exercised any parenting time with the children since November 2004. She testified that she married stepfather in September 2005, and the couple has one child. Stepfather has provided support for the children and they refer to him as “Dad.” Father’s family, including his mother, sister, and brother have had contact with the children once a year and sent Christmas and birthday gifts. She testified that adoption of the children by stepfather is in the children’s best interests.

Father testified that prior to his drug addiction, he had a loving relationship with his children. However, since the divorce until the date of the hearing, he had seen his children only four or five times, which he stated was the result of his addiction and incarceration. He alleged that he stopped using drugs prior to the revocation of his probation in April 2008, but admitted that his probation was revoked because of a DUI charge in October 2007. While in prison, father participated in drug treatment programs which were completed and he took parenting courses. Additionally, he worked and obtained his GED. As a result of his performance on the GED, he received college scholarships and, at the time of the hearing, had completed a college course. He attributed his failure to provide support for his children as required by the decree to his drug addiction. However, since his release from prison in March 2010, father has been employed earning \$15 per hour but had not paid child support.

Father's mother and sisters testified that they continue to have a loving relationship with the children. They see the children approximately once per year, maintain telephone contact, and send holiday gifts. All testified that prior to his drug addiction, father was a loving parent.

Stepfather testified that he loves the children and is fully aware of his financial responsibilities to the children. Since late 2004, he has provided the children with food, clothing, and a home. He testified that he was not aware of any support received from father.

The guardian ad litem's report stated that he interviewed the parents, the stepfather, and the children. He observed that the children appeared well-nourished, well-groomed, active and content. The children reported that they understood the adoption process and believed adoption by their stepfather was in their best interest. Their only contact with father in the past five years was through cards and letters. The guardian ad litem concluded that termination of father's rights and adoptions by stepfather were in the children's best interests.

Following the close of the evidence, the circuit court judge orally stated his findings and conclusions. Specifically, the court found that father had failed to provide support or be involved with the children for more than seventy months, well in excess of the ninety days required by statute. Additionally, the circuit court found that father failed to or was incapable of providing paternal care and support for a period of more than six months and that there was no reasonable expectation of improvement in parental care and protection, considering the age of

the children. After orally stating his decision, the judge instructed stepfather's counsel to prepare the findings of fact, conclusions of law, and judgments and to forward them to father's counsel. Subsequently, the judgments prepared by stepfather's counsel were entered.

Father's initial contention is that the circuit court erred when it delegated the duty of drafting findings of fact, conclusions of law and judgments to opposing counsel. We are not persuaded that the circuit court erred.

In *Bingham v. Bingham*, 628 S.W.2d 628, 629-630 (Ky. 1982), the Court was confronted with a similar argument and concluded:

There has been no showing that the decision-making process was not under the control of the trial judge, nor that these findings and conclusions were not the product of the deliberations of the trial judge's mind. The evidence adduced at trial clearly supports the findings of fact and conclusions of law announced by the court and in the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility under CR 52.01, they are not to be easily rejected.

We set forth the entirety of the circuit court's oral findings of fact and conclusions of law stated after the hearing to emphasize that the circuit court explicitly stated its findings and conclusions. There was no objection to the tendered findings of fact, conclusions of law, and judgments; thus, the parties and the court accepted the tendered findings, conclusions, and judgments as an accurate reflection of the circuit court's oral findings and conclusions. Therefore, we cannot say that the circuit court's use of stepfather's proposed written findings of

fact, conclusions of law, and judgments was erroneous. *M.E.C. v. Com., Cabinet for Health and Family Services*, 254 S.W.3d 846, 851 (Ky.App. 2008).

We next address the circuit court's conclusion that the adoptions should be granted.

This case was initiated as an adoption proceeding. Nevertheless, "an adoption without consent of the biological parents is, by its nature, a proceeding seeking the termination of parental rights." *C.M.C. v. A.L.W.*, 180 S.W.3d 485, 489 (Ky.App. 2005). Thus, the statute governing adoption, KRS 199.502, requires the same conditions set forth in KRS 625.090(2), which require clear and convincing evidence to prove whether one of the conditions therein supports the termination of parental rights.

As applicable to the present case, KRS 199.502 provides:

(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:

(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 wellbeing 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;
- (2) 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.

Because adoption is a statutory right, severing permanently the parental relationship, Kentucky courts require strict compliance with the procedures to protect the rights of the natural parents. *Day v. Day*, 937 S.W.2d 717, 719 (Ky. 1997). “Nothing can be assumed, presumed, or inferred and what is not found in the statute is a matter for the legislature to supply and not the courts.” *Id.* (citing *Coonradt v. Sailors*, 186 Tenn. 294, 209 S.W.2d 859 (1948)). A trial court must find that termination of parental rights is supported by clear and convincing evidence. *V.S. v. Com., Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky.App. 1986). The findings of the trial court will not be disturbed unless there is no substantial evidence in the record to support its findings. *Id.*



The focus of the circuit court was on the father's failure to exercise visitation with the children, his past drug addiction, his periodic incarceration, and his failure to provide any meaningful support to the children for a period exceeding five years. Thus, we examine whether there was substantial clear and convincing evidence to support termination of father's parental rights pursuant to KRS 199.502(1)(a) or (1)(e).

We emphasize that no single factor can serve as the basis for termination of parental rights and incarceration alone cannot be the basis for finding that a parent has abandoned a child. *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661 (Ky.App. 1985). "Generally, 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). Thus, we first examine the entirety of the circumstances to determine whether there was substantial clear and convincing evidence that father had abandoned his children for a period of more than ninety days. KRS 199.502(1)(a).

The evidence is undisputed that even prior to his incarceration in 2008, father had little contact with his children and offered minimal support. He had not visited with his children since November 2005 and had not sought a visitation order as directed by the decree. Prior to his incarceration in 2008, father was employed full-time earning \$18 per hour but he nevertheless failed to provide support for his children. Moreover, following his release from prison in March

2010 and until the date of the hearing, he had not attempted to support the children. He admits that his lack of contact with the children was attributable to his drug addiction and that mother's unwillingness to allow him to visit the children while plagued by his drug addiction was reasonable.

Father argues that the letters and cards sent by his children to him while he was incarcerated and his most recent attempt to have telephone contact are sufficient to demonstrate his desire to rekindle his relationship with his children. Father's attempts to reestablish a relationship appears to be a reaction to the pending adoption petition and does not negate his failure to assume his parental duties for the preceding five years. Regardless of his current motives, it remains that father has had no contact with these children, has provided little financial support, and has been voluntarily absent for more than five years of his children's lives. Under the circumstances, the trial court's finding that father had abandoned his children for a period in excess of ninety days was not clearly erroneous.

Father contends that the evidence does not support a finding that there was no reasonable expectation of improvement in parental care and protection. He points to his recent employment, attempts to enroll in college, and his drug rehabilitation.

We point out that KRS 199.502(1)(a) does not require that the court find that there is no reasonable expectation of parental improvement and reiterate that there was substantial clear and convincing evidence to support the circuit court's finding that the children had been abandoned. However, although not

required, the circuit court also premised its conclusion that father's rights be terminated based on subsection (e) and found that there is no reasonable expectation of parental improvement. Thus, we discuss the evidence to support the circuit court's finding.

Father's self-described history demonstrates that although he has periods when he is free from the use of illegal drugs and alcohol, he has repeatedly returned to drug and alcohol abuse resulting in his repeated incarcerations and inability to care for and support his children. Father's recidivist behavior convinced the circuit court and convinces this Court that the prospect for his continued freedom from addiction is uncertain. It is this Court's hope that father will continue to be drug-free and a productive citizen. However, it remains that he abandoned his children to live a drug-addicted and criminal lifestyle. The circuit court did not clearly err when it granted the adoptions by the stepfather who, for six years, had assumed the role of father and provided the children with a loving and nurturing home.

For the reasons stated, the judgments of the Bell Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Martha Farmer Copeland  
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BRIEF FOR APPELLEES:

Gerald L. Greene  
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