

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0552-ME

C.S.

APPELLANT

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 21-AD-00018

D.W.P.; S.D.G.P., A MINOR CHILD;
T.G.P., MOTHER; AND T.R.P.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CALDWELL, GOODWINE, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: C.S. (hereinafter referred to as Father)¹ appeals from judgments of the Anderson Family Court which terminated his parental rights to S.D.G.P. (hereinafter referred to as Child) and allowed D.W.P. (hereinafter referred to as Grandfather) and T.R.P. (hereinafter referred to as Grandmother) to

¹ This case concerns the termination of parental rights to a child; therefore, we will not use the names of the parties in order to protect the privacy of the child.

adopt Child without his consent. We believe that the trial court erred in terminating Father's parental rights and allowing Child's grandparents to adopt Child; therefore, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

T.G.P. (hereinafter referred to as Mother)² and Father³ are the biological parents of Child. Mother and Father have been in an on-again, off-again relationship for many years, but have never been married. The grandparents in this case are the maternal grandparents.

Child was born on December 18, 2018. Shortly after Child's birth, Mother and Child moved in with the grandparents. Mother stayed a few months, but then she and Child left to reside with Father. The following day, Father returned Child to the grandparents and Child has been living with them ever since.

Mother and Father have had a tumultuous relationship and Mother did not reside with Father for long. She went through bouts of homelessness and resided in rehab facilities for short amounts of time.⁴ In 2019, Mother wanted to take Child away from the grandparents. The grandparents were against this idea and filed a dependency, neglect, and abuse petition on May 17, 2019. The

² Mother's parental rights to Child were also terminated, but she did not bring an appeal.

³ At all relevant times, Father has lived in Ohio.

⁴ Mother is a drug addict.

grandparents alleged Mother was unfit to raise Child due to her drug usage, criminal history, lack of permanent residence, and being involved in an abusive relationship with Father.

Following the petition, the grandparents were officially given emergency custody of Child. On September 10, 2019, Mother stipulated to dependency because she was unable to provide for Child. No petition was filed regarding Father and there has been no finding that Father has abused or neglected Child. On September 25, 2019, the court in the juvenile case ordered that the grandparents retain custody of Child. The court also ordered Mother and Father to take drug screens and the record indicates that Father's drug tests came back negative.

On January 15, 2020, Father was ordered to begin supervised visitation with Child at the Sunshine Center, a place that provides multiple services regarding domestic relations. On August 11, 2020, Father made a motion requesting additional visitation; however, that motion was denied. On November 17, 2020, Father was ordered to pay child support to the grandparents in the amount of \$340.22 per month.

On December 8, 2020, the grandparents filed a motion seeking to stop Father from contacting them and to stop Father's visitation. The grandparents alleged that Grandmother heard Father threaten to harm her while she was talking

to Mother on the phone. Father was apparently mad about a missed visit with Child. On December 16, 2020, the court ordered that Father was to have no contact with the grandparents, but the court did not suspend or terminate his supervised visitation with Child.

On August 18, 2021, the grandparents again moved to terminate Father's visitation with Child. This motion alleged that Father had abused Mother and caused her to bleed.⁵ On August 27, 2021, the court suspended Father's visits with Child.

On October 15, 2021, the grandparents filed a petition seeking to terminate Mother and Father's parental rights to Child. They also sought to be able to adopt Child. Mother and Father contested the adoption and termination of their rights, and a hearing was held on April 1, 2022. Grandmother, Grandfather, Mother, and Father all testified. On April 20, 2022, the trial court entered orders terminating Mother and Father's parental rights and allowing the grandparents to adopt Child. This appeal followed.

⁵ Father bit Mother's hand while driving in the car causing her to bleed all over the car. Father then took Mother to the hospital. Father was interviewed by the police, but no criminal action was taken. Father claimed that Mother grabbed the steering wheel and tried to crash the car while he was driving and Father bit her hand in self-defense. At the hearing, Mother was not asked any questions regarding the details of this injury.

ANALYSIS

We will first begin our analysis of this appeal addressing the grandparents' allegation that no issues were preserved for appeal and the appeal should be dismissed. The grandparents claim that because Father did not file a Kentucky Rules of Civil Procedure (CR) 59.05 motion seeking to alter, amend, or vacate the orders, that the issues on appeal were not preserved. We disagree. There is no rule or case law stating that post-trial motions are required to perfect appeals. Father contested the petition to terminate his parental rights and filed proposed findings of fact and conclusions of law after the trial was concluded. This was sufficient to preserve the issues on appeal.

The grandparents also argue that the appeal should be dismissed because Father's brief does not comport with CR 76.12(4)(c)(v). The grandparents claim that Father's brief does not cite to where and how the issues were preserved. The grandparents are correct in that there are no preservation statements as required by this rule. When a brief fails to have a preservation statement, we may choose "(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (citation omitted); *see also Ford v. Commonwealth*, 628 S.W.3d 147,

153-55 (Ky. 2021). We choose to ignore the deficiency and proceed with a review on the merits.

Father argues on appeal that the trial court erred in involuntarily terminating his parental rights and allowing the grandparents to adopt Child.

Kentucky Revised Statutes (KRS) 199.502 sets forth the requirements that must be met in cases such as this one.

(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;

(b) That the parent had inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;

(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;

(d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to a child named in the present adoption proceeding;

(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;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(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;

(h) That:

1. The parent's parental rights to another child have been involuntarily terminated;

2. The child named in the present adoption proceeding was born subsequent to or during the pendency of the previous termination; and

3. The condition or factor which was the basis for the previous termination finding has not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

(j) That the parent is a putative father, as defined in KRS 199.503, who fails to register as the minor's putative father with the putative father registry

established under KRS 199.503 or the court finds, after proper service of notice and hearing, that:

1. The putative father is not the father of the minor;
2. The putative father has willfully abandoned or willfully failed to care for and support the minor; or
3. The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

KRS 199.502.

An adoption without the consent of a living biological parent is, in effect, a proceeding to terminate that parent's parental rights. The standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence. The findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. 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. Additionally, since adoption is a statutory right which severs forever the parental relationship, Kentucky courts have required strict compliance with the procedures provided in order to protect the rights of the natural parents.

We are also reminded of the protected rights of parents to raise their own children. As the Supreme Court summarized in *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), the rights

to conceive and to raise one's children have been deemed "essential," basic civil rights of man, and rights far more precious than property rights. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Furthermore, [t]he 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.

B.L. v. J.S., 434 S.W.3d 61, 65 (Ky. App. 2014) (internal quotation marks and citations omitted).

In the case at hand, the trial court found that KRS 199.502(1)(a), (e), and (g) were applicable to Father. We will first address KRS 199.502(1)(a), abandonment. We believe there was not substantial evidence to show that Father had abandoned Child. "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). The evidence in this case indicated that Father did not abandon Child. Father was only permitted supervised visitation with Child at a third-party site. Father participated in those visitations. Father was also ordered to pay child support and was not in arrears at the time of the hearing. While Father had not seen Child in around eight months at the time of the hearing, that was due to orders of the court and not an intentional relinquishment of parental rights by Father.

Further, Father attempted to gain additional visitation rights with Child in 2020.

Finally, there was no evidence presented that Father was given a case plan by the Cabinet for Health and Family Services which would have helped with reunification. Had he been given a case plan and failed to follow through, then that could have been some proof of intentional abandonment; however, such was not the case here. The evidence shows that the trial court's finding as to abandonment was clearly erroneous.

As for KRS 199.502(1)(e) and (g), those two subsections are similar and will be addressed together. The court found that Father had not provided care and protection of Child and had not provided food, clothing, and other necessities to Child. The court also found that there was no reasonable expectation of Father improving in regard to these factors. Again, we believe the evidence was lacking as to these factors. The evidence showed that Father did all that was permitted by the trial court. Father was ordered to have supervised visitation with Child and to provide child support. He did both. He was also ordered to have no contact with the grandparents. While Father did not provide food, clothing, or other essentials directly to Child, he did provide child support which would help the grandparents pay for these things. In addition, it would be nearly impossible for Father to provide additional care to Child in this case because he was only permitted

supervised visitation and was ordered to have no contact with Child's primary caregivers, the grandparents.

Furthermore, the evidence at the hearing indicated that Father was living with his parents and had been working at an insurance agency for over three years. In other words, Father had stable housing and employment. Father also testified that he had a problem with illegal drugs in the past, but had been sober for five years at the time of the hearing. There was no evidence presented to the contrary. There were also seven negative drug tests in the record. In addition, while there were allegations of domestic violence between Mother and Father, there were no allegations that Father abused or neglected Child.⁶ There has also never been a dependency, neglect, and abuse case brought against Father. Also worth noting is that Father has a child from a previous relationship and has visitation with that child every other weekend. Finally, near the beginning of the juvenile case proceedings, Father requested that Child be placed in his custody; however, the Cabinet declined to do a home evaluation because Father lived in another state.

CONCLUSION

Based on the foregoing, we reverse and remand. There was not substantial evidence to show that Father had abandoned Child, refused to provide

⁶ Father has also never been arrested for domestic violence.

Child with care and protection, and refused to provide food, clothing, and other essentials to Child. There was also no evidence that he could not improve his conduct and relationship with Child within a reasonable time. While it is clear that it would be in Child's best interests to remain in the primary care and custody of the grandparents, there was insufficient evidence to terminate Father's parental rights and allow the grandparents to adopt Child without his consent. Further, the evidence suggests that Father likely has anger management issues when it comes to the grandparents and Mother; however, that is not a valid reason to terminate his parental rights pursuant to KRS 199.502.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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