

RENDERED: DECEMBER 2, 2022; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2022-CA-0708-ME

C.N.M. (A/K/A J.T.III.J.)

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE BRIAN WIGGINS, JUDGE  
ACTION NO. 21-AD-00023

S.E.V.; A.D.V.; COMMONWEALTH  
OF KENTUCKY, CABINET FOR  
HEALTH AND FAMILY SERVICES;  
AND E.D.V., A MINOR CHILD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: CLAYTON, CHIEF JUDGE; CALDWELL AND MAZE, JUDGES.

MAZE, JUDGE: C.N.M., natural father of E.D.V., appeals from an order and judgment of adoption and supporting findings of fact and conclusions of law entered by the Muhlenberg Circuit Court, terminating his parental rights and allowing S.E.V. to adopt E.D.V.

## **Background**

C.N.M. and A.D.V., an unmarried couple, had one child in common, E.D.V., born September 15, 2015. C.N.M. was not present for the birth, having been arrested two days prior to the delivery. He and A.D.V. separated four months later. C.N.M. was incarcerated from February of 2016 until 2019 as the result of fleeing from a roadblock and shooting at police with A.D.V., a passenger, and the child in the vehicle. A.D.V. took E.D.V. to visit C.N.M. in prison once on April 12, 2016.

In August of 2016, A.D.V. was granted a domestic violence order (DVO) to protect her and her child from C.N.M. based upon A.D.V.'s testimony that he threatened to beat her up and take the child. That order provided for visitation by C.N.M. to be determined, but he never sought to have a visitation schedule established. Although child support was ordered, he has only made one payment. However, A.D.V. testified that a portion of C.N.M.'s stimulus payments was diverted to her for E.D.V.'s benefit.

E.D.V. is six years old and C.N.M. has been incarcerated for her entire life except for approximately nine months. When she was one month old, he elbowed her in the head while intoxicated. When she was three months old, he placed her mother in a choke hold while the child was in her arms and the child hit

her head. He has made no attempt to call her or her mother in the past two years. He is currently incarcerated and is not eligible for release until 2028.

A.D.V. and S.E.V. were married on November 7, 2016. They now have two other children together. S.E.V. is the only father figure that E.D.V. has ever known. The two of them enjoy playing video games, going to the park, and “play wrestling.” He considers her his child and works to support the entire family.

S.E.V. filed a verified petition for adoption of E.D.V. in Muhlenberg Circuit Court. A.D.V. was named as a respondent and has executed her written consent to the adoption. A final hearing was held on April 27, 2022, at which all persons were present. C.N.M. was represented by appointed counsel as required by KRS<sup>1</sup> 199.502(3). The trial court found as follows:

(A) Respondent/Father has abandoned the child for a period of not less than ninety (90) days.

(C) That the Respondent/Father has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm. The Court finds the Respondent/Father elbowed the minor child when the parties [] were together while he was under the influence and that he had placed Respondent/Mother in a headlock and restricted her air flow causing her to fall to her knees while the Respondent/Mother was holding the child and causing the child to hit her head and cry out.

---

<sup>1</sup> Kentucky Revised Statutes.

(E) That Respondent/Father for a period of not less than six (6) months, has continuously or repeatedly failed and/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. The Respondent/Father's parole eligibility is approximately six (6) years down the road.

(G) That Respondent/Father, 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.

On appeal, C.N.M. argues that the trial court erred in finding that there is "no reasonable expectation of significant improvement."

### **Standard of Review**

As the consequences of an adoption without consent to a parent's fundamental liberty interest are so severe, a judgment granting such a petition must be supported by clear and convincing evidence. *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 426-27 (Ky. App. 2015). Clear and convincing evidence is "proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014). Therefore, our review is pursuant to the clearly erroneous standard of

CR<sup>2</sup> 52.01 and we will only disturb the trial court's findings if they are unsupported by substantial evidence. *Id.*

### **Analysis**

KRS 199.502(1) provides that adoption without the consent of a biological parent may be granted where any one of the ten conditions set forth in subsections (a)-(j) have been pleaded and proven. The first such condition is that of abandonment of the child for ninety (90) days or more as provided in subsection (a). It has long been held that, “[i]ncarceration alone can never be construed as abandonment as a matter of law.” *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985). However, the *J.H.* Court recognized that “absence, voluntary or court-imposed, may be a factor to consider in determining whether the children have been neglected[.]” *Id.* at 664. “[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.” *S.B.B. v. J.W.B.*, 304 S.W.3d 712, 716 (Ky. App. 2010) (citing *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983)).

Here, as in *M.S.S. v. J.E.B.*, 638 S.W.3d 354 (Ky. 2022), there was ample evidence that even while C.N.M. was not incarcerated, he had manifested an intention to cede his parental duties with respect to E.D.V. In 2019, he was

---

<sup>2</sup> Kentucky Rules of Civil Procedure.

released from prison for a period of some four months during which he had no contact with the child and attempted no contact with her, despite A.D.V. having had the same phone number for ten years. Despite the language contained in the August 2016 DVO regarding the establishment of parenting time, he never took steps to initiate visitation. Finally, although he drove past her house with girlfriend Sarah Phillips, he never stopped. The trial court clearly had clear and convincing evidence of abandonment based upon C.N.M.'s conduct during the time he was not incarcerated, and he does not appear to challenge this finding.

The trial court also had clear and convincing evidence before it as to the issue of “physical injury or emotional harm” as set forth in KRS 199.502(1)(c). A.D.V. testified that when E.D.V. was one month old, C.N.M. elbowed the child in the head while intoxicated, causing the child to cry out. She also testified that, when E.D.V. was three months old, C.N.M. placed A.D.V. in a chokehold while the child was in her arms. As a result, she fell to the floor and the child struck her head. C.N.M. has not addressed any perceived error in this finding.

Next, the trial court found that C.N.M. had not provided E.D.V. with “essential parental care and protection” for at least six months and that there was “no reasonable expectation of improvement,” “considering the age of the child” as provided in KRS 199.502(1)(e). Although C.N.M. argues that the trial court made

no finding as to the reason there is no such expectation, the court did, in fact, state that his “parole eligibility is approximately six (6) years down the road.”

“When determining whether a parent has a reasonable expectation for improvement, the court will also examine the parent’s current parenting ability, rather than just past behavior.” *A.F. v. L.B.*, 572 S.W.3d 64, 76 (Ky. App. 2019) (citation omitted). That case involved parents who had been absent from their child’s life from birth until the age of three due to incarceration and drug use. Unlike the parents in *A.F.*, C.N.M. has made no effort to demonstrate that, even if released tomorrow, he would have anything to offer this child, now age six.

In *A.R.D. v. Cabinet for Health and Family Services*, 606 S.W.3d 105 (Ky. App. 2020), the child involved was born in 2016 and A.R.D. had been incarcerated since before the child’s birth. He had a serve out date of 2038, with his earliest possible parole date being 2019. On appeal the Court found no error in terminating his parental rights since, “he was likely to remain incarcerated and be unable to actively take care of Child or provide for his needs for a substantial time in the future.” *Id.* at 112. The Court also noted that A.R.D. had failed to present any documentation as to programs completed during his incarceration on “relevant topics such as parenting or anger management[.]” *Id.* at 111. Similarly, C.N.M. introduced no evidence which would indicate that he has made any effort to prepare himself to provide “essential parental care and protection,” upon release.

Not only was there clear and convincing evidence to support the trial court's finding that C.N.M. failed to provide the requisite care and protection to E.D.V., but there was equally convincing evidence that he would not be available to do so until sometime after she turns twelve years old.

Finally, there is clear and convincing evidence to support the trial court's finding pursuant to KRS 199.502(1)(g) that C.N.M. has failed to provide "essential food, clothing, shelter, medical care, or education[.]" and that there is "no reasonable expectation of significant improvement" in the "immediately foreseeable future" "considering the age of the child[.]" As noted in *M.S.S.*, both subsections (e) and (g) "require the court to consider a parent's future conduct and ability to parent, even despite any failure to provide parental care in the past." 638 S.W.3d at 365. However, C.N.M. produced no evidence probative of his conduct in the foreseeable future. The length of his sentence, E.D.V.'s age upon his release, and this lack of any evidence of effort on his part, form a sufficient basis for the trial court's finding that there is "no reasonable expectation of significant improvement."

Accordingly, the findings of fact, conclusions of law, and judgment of adoption of the Muhlenberg Circuit Court are affirmed.



ALL CONCUR.

BRIEF FOR APPELLANT:

Ryan Bennett Driskill  
Greenville, Kentucky

BRIEF FOR APPELLEE S.E.V.:

Natasha Camenisch Little  
Madisonville, Kentucky