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Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-1055-ME

W.H.J. APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 21-AD-00152

J.N.W.; J.A.W.; AND N.H.J., A
MINOR CHILD APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CALDWELL, DIXON, AND ECKERLE, JUDGES.

CALDWELL, JUDGE: W.H.J. (Father) appeals from an order of the Warren Circuit Court, Family Court division, granting J.A.W.'s (Stepfather's) petition to adopt his stepson (Child). Because the family court did not utilize the constitutionally mandated clear and convincing evidence standard, we must vacate and remand for a new hearing.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

The core facts are uncontested. Father and J.N.W. (Mother) are the parents of Child, who was born in 2015. Father and Mother divorced in 2018. The decree of dissolution awarded, among other things, sole custody of Child to Mother. Father was not permitted to have contact with Child due to Father's "noncompliance with substance abuse and mental health treatment and his failure to attend the Parent Education Clinic . . . ." and Father was ordered to pay child support.

Mother married Stepfather in 2020. In late 2021, Stepfather filed a petition to adopt Child. Mother consented to the adoption; Father did not.

A couple months later, the family court held a brief hearing in response to Stepfather's request for a trial date, at which Father appeared *pro se*. The entire proceeding lasted approximately four minutes. At no point during those four minutes did the family court plainly tell Father that he had a statutory right to appointed counsel, if he could not afford one. *See* KRS[1] 199.502(3) ("A biological living parent has the right to legal representation in an adoption wherein he or she does not consent. The Circuit Court shall determine if a biological living parent is indigent and, therefore, entitled to counsel pursuant KRS Chapter 31. If the Circuit Court so finds, the Circuit Court shall inform the indigent parent; and, upon

[1] Kentucky Revised Statutes.

request, if it appears reasonably necessary in the interest of justice, the Circuit Court shall appoint an attorney to represent the biological living parent pursuant to KRS Chapter 31 . . . .").

At the hearing, when Father told the court that he intended to contest the adoption, the court asked him if he planned to get an attorney. Father replied in the affirmative and the court repeatedly told him that he needed to do so quickly. Then the court told Father: "We can give you an affidavit of indigence if you are seeking counsel. If, I don't know if, I, if you qualify for appointment of counsel or not." Obviously at least somewhat confused, Father responded, "I'll, uh, I'll pay for an attorney. Is that what you're saying?" The court simply responded, "yes." The court set the matter for trial in a few months.

Though he said he intended to retain counsel, Father appeared *pro se* at the trial. There were no meaningful discussions at trial about Father's statutory right to receive appointed counsel if he were found to be indigent.

At the trial, Stepfather testified about his deep and loving reciprocal bond with Child. Mother agreed with Stepfather's testimony and unequivocally expressed her consent to the adoption. Mother also testified that Father had a child support arrearage of roughly $25,000. According to Mother, Father had not seen Child in over four years, nor had he sought to do so. Mother testified that Father had recently begun paying child support but had otherwise provided no parental

care or protection for Child for well over six months prior to the filing of the petition. Father did not ask Stepfather or Mother any questions.

Father then testified that he had pending criminal charges at or near the time when he and Mother divorced and, upon the advice of his then-counsel, had not sought custody of Child while the charges were pending. According to Father, it had taken roughly three years to resolve the charges, which resulted in his being on probation for bail jumping at that time. Father did not materially dispute Mother's testimony about his recent lack of contact with, and failure to provide parental support and care for, Child.

Father admitted that he had been a heroin addict but asserted he was sober and attending therapy at a facility which provided him with both "talk" therapy and Suboxone. Father worked full-time as a pipe welder in Alabama. Father expressed his gratitude for Mother and Stepfather's efforts toward raising Child but stated that he also wanted to be part of Child's life. However, Father admitted he had not completed the parenting program or drug and alcohol assessment required by the divorce decree for him to have contact with Child.

At the conclusion of the hearing, the family court orally stated that it would grant the adoption because Father had failed to provide essential parental

care and protection for Child for at least six months, and there was no reasonable expectation of improvement, considering Child's age.[2]

However, the court failed to state that its conclusions were made pursuant to the clear and convincing evidence standard. That omission is momentous because precedent repeatedly stresses that courts must use that standard. *See, e.g.*, *M.S.S. v. J.E.B.*, 638 S.W.3d 354, 359 (Ky. 2022) ("An adoption without the consent of a living biological parent is, in effect, a proceeding to terminate that parent's parental rights. Parental rights are a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution. As such, termination of parental rights is a grave action which the courts must conduct with utmost caution. So, to pass constitutional muster, the evidence supporting termination must be clear and convincing.") (internal quotation marks,

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[2] KRS 199.502 provides in relevant part:

> (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 . . .
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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 . . . .

footnotes, and citations omitted); *A.F. v. L.B.*, 572 S.W.3d 64, 70 n.7 (Ky. App. 2019) ("Although KRS 199.502 does not require clear and convincing evidence, the Due Process Clause does."); *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 427 (Ky. App. 2015) (quoting *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S. Ct. 1388, 1398, 71 L. Ed. 2d 599 (1982)) ("Termination can be analogized as capital punishment of the family unit because it is 'so severe and irreversible.' Therefore, to pass constitutional muster, the evidence supporting termination must be clear and convincing.").

The court asked Stepfather's counsel to tender findings of fact and conclusions of law. A few days later, the court signed those tendered findings, apparently without making any changes to them. Inexplicably, the findings of fact and conclusions of law also fail to contain any references to the clear and convincing evidence standard. Father then filed this appeal *pro se*, though counsel eventually submitted briefs on his behalf.

ANALYSIS

Failure to Use the Clear and Convincing Evidence Standard

In a typical appeal from an involuntary adoption, we would stress that "trial courts are afforded a great deal of discretion in determining whether termination of parental rights is appropriate. A family court's termination of parental rights will be reversed only if it was clearly erroneous and not based upon

clear and convincing evidence." *M.S.S.*, 638 S.W.3d at 359-60 (internal quotation marks, footnotes, and citations omitted). But this is not a typical involuntary adoption appeal because the family court did not apply the mandatory proof standard.

The trial court's failure to apply the clear and convincing evidence standard is glaring and readily apparent from reviewing the findings of fact and conclusions of law and the video of the trial. Nonetheless, Father puzzlingly does not directly raise that omission in his brief.

We did not "go looking for" the family court's failure to utilize the clear and convincing evidence standard. *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011). "However, we bump into it squarely out of the gate" since it is necessary to scrutinize the court's findings to assess Father's arguments, and it is obvious from reviewing those findings that the court did not use the correct standard. *Id.*

Generally, we limit our review to the arguments raised by the parties. *See, e.g.*, *Rainey v. Mills*, 733 S.W.2d 756, 757 (Ky. App. 1987). However, "[w]hile this Court will not go looking for error not called to our attention, neither can we ignore one which is so glaring and flows naturally under our appellate review of the issue raised." *Barker*, 341 S.W.3d at 114.

"Parental rights are a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution." *M.S.S.*, 638 S.W.3d at 359 (internal quotation marks, footnotes, and citations omitted). Therefore, "termination of parental rights proceedings **must** utilize a clear and convincing evidence standard of proof." *Simms v. Estate of Blake*, 615 S.W.3d 14, 22 (Ky. 2021) (emphasis added). Therefore, since usage of the clear and convincing evidence standard is a baseline requirement for terminating parental rights (which is an inevitable byproduct of granting a contested adoption), we must address the family court's failure to use that standard even though Father did not explicitly raise that omission as a basis for relief in his brief.

We simply cannot ignore a fundamental error "which is so glaring and flows naturally under our appellate review of the issue raised." *Barker*, 341 S.W.3d at 114. Of course, we will confine our review to what appears in the record. *Priestley v. Priestley*, 949 S.W.2d 594, 596 (Ky. 1997) ("So long as an appellate court confines itself to the record, no rule of court or constitutional provision prevents it from deciding an issue not presented by the parties . . . .") (citations omitted).[3]

[3] Of course, a person may waive most, if not all, of his or her constitutional rights. *Commonwealth v. Simmons*, 394 S.W.3d 903, 907 (Ky. 2013). However, waiver "will not be presumed . . . from a silent record. In general, of course, courts do not presume acquiescence in the loss of fundamental rights . . . ." *Id.* at 914 (internal quotation marks and citations omitted). Here, the record does not plainly show that Father knowingly and voluntarily waived his right to have the adoption decision be made under the clear and convincing evidence standard. *See, e.g.*,

Although the evidence was uncontradicted and most errors may be deemed harmless if they did not impact a case's outcome, precedent constrains us to vacate this decision without assessing the evidence.

In *N.S. v. C and M.S.*, 642 S.W.2d 589, 590 (Ky. 1982), a trial court granted a contested adoption. Because the then-controlling statute "did not specify a standard or degree of proof necessary for the involuntary termination of parental rights[,]" the trial court "did not address that question in its findings of fact, conclusions of law, nor in its judgment. It simply indicated that movant had abandoned and deserted the children and had '. . . substantially and continuously repeatedly refused to give parental care and protection for the children. . . .'" *Id.*

Meanwhile, the General Assembly had enacted a statute which permitted termination of parental rights based on the preponderance of the evidence standard while the United States Supreme Court had, in *Santosky*, set the clear and convincing evidence standard as the evidentiary floor for termination decisions. *N.S.*, 642 S.W.2d at 590-91. Thus, our Supreme Court was faced with the quandary of how to assess an adoption decision which did not use any standard

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Simms v. Commonwealth, 354 S.W.3d 141, 143 (Ky. App. 2011) (internal quotation marks and citation omitted) ("The waiver of a constitutional right must be given voluntarily, knowingly, and intelligently with sufficient awareness of the relevant circumstances and likely consequences.").

of proof while the standard required by the General Assembly was inadequate under the precedent of the United States Supreme Court.

Here is how our Supreme Court tersely resolved the dilemma:

> While the movant contends that the trial court complied with the "clear and convincing" test set out in *Santosky*, *supra*, the respondent contends that it did not. Both urge us to review the evidence and apply the new test. Because the trial court did not identify any standard of proof and because it is not our role to be finders of fact, we decline to do so.
>
> Because of *Santosky*, *supra*, we declare that the provision of KRS 199.603(1) (1978) requiring only a "preponderance of the evidence" in involuntary termination cases is unconstitutional because it deprives the parent(s) of due process of law under the provision of the Fourteenth Amendment to the United States Constitution. **Moreover, we decide that because of the failure of the trial court to identify any burden of proof, the case must be remanded for a new trial, using the "clear and convincing" test as a standard of proof** in a proceeding under KRS 199.603(1).

Id. at 591 (emphasis added).

We reached a similar conclusion in *Wright v. Howard*, 711 S.W.2d 492 (Ky. App. 1986). We reversed the stepparent adoption decision for several reasons in *Wright*, including the trial court's failure to utilize the clear and convincing evidence standard:

> In order to justify finding the existence of [statutory grounds to grant the adoption], the trial court was required to find from clear and convincing proof that appellant had abandoned or substantially or

> continuously or repeatedly neglected or abused the twins. *Santosky v.* [*K*]*ramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *N.S. v. C. and M.S.*, Ky., 642 S.W.2d 589 (1983). In the latter case as here the trial court in finding that appellant Wright had so misbehaved did not identify the standard of proof it applied in its finding, much less identify it as being by the *Santosky* standard of clear and convincing proof. We, as did our Supreme Court in *N.S. v. C. and M.S.*, *supra*, find the omission by the trial court ***fatally defective*** as to this determination upon which its judgment is for a good part bottomed. The trial court's judgment entered in the light of all or each of the above violations of the adoption statutes' various provisions is invalid and should be vacated.

Id. at 497 (emphasis added).[4]

The relevant statutes have been amended since *N.S.* and *Wright* were issued. But the core legal principle remains: an adoption decision which does not explicitly rely upon the clear and convincing evidence standard cannot stand. And we may not initially apply that standard. *N.S.*, 642 S.W.2d at 591.

Arguably, this error could be corrected much more expeditiously by simply allowing the family court to issue a new decision which applies the clear and convincing evidence standard to the already-existing evidence. But that was also true in *N.S.*, yet our Supreme Court chose instead to remand the matter for a

[4] Due to other errors, we ordered the petition to be dismissed instead of remanding for a new hearing. *Id.* at 496-98.

new trial. SCR[5] 1.030(8)(a) constrains us to do the same here. Any modification of the procedure required by *N.S.* in these rare, unfortunate situations must come from our Supreme Court.

We recognize that everyone involved in this case needs stability and finality and so we regret the uncertainty, angst, and delay inherent in remanding the matter back to the family court for a new hearing. But we cannot let indistinguishable cases yield distinguishable results in the interests of expediency. And we must follow the indistinguishable decision in *N.S.* *See* SCR 1.030(8)(a) ("The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court."). Therefore, we must vacate the family court's decision and remand for a new trial, followed by issuance of a new decision using the clear and convincing evidence standard. We trust the family court will act with urgent rapidity.

Appointment of Counsel

Father also argues, essentially, that the family court erred in refusing to appoint counsel for him. We will briefly discuss that argument to provide guidance on remand.

We acknowledge at the outset the curious dissonance between Father arguing that he was entitled to appointed counsel while he is currently being

[5] Rules of the Kentucky Supreme Court.

represented by non-appointed counsel. However, we do not know whether Father's counsel is representing him *pro bono* or whether Father's financial status has recently improved. Given those uncertainties, we cannot conclude that his arguments about being entitled to appointed counsel are moot.[6]

KRS 199.502 expressly provides that an indigent parent who contests an adoption is entitled to appointed counsel. *See also, e.g.*, *Cabinet for Health & Family Services v. K.S.*, 610 S.W.3d 205, 209 (Ky. 2020) ("Kentucky law provides indigent parents with a statutory right to counsel in proceedings which threaten their fundamental right to care and custody of their children."). But Father has not cited, nor did we independently locate, binding precedent requiring a trial court to use any specific language to enforce that precious right.

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[6] Father's opening brief asserts that the family court never discussed appointing counsel with him. That assertion is inaccurate. It is improper for an attorney to knowingly make a false statement of fact to a court. *See* SCR 3.130(3.3)(a). Father's reply brief states that counsel was unaware of the discussion of appointed counsel at the pretrial hearing at the time counsel submitted Father's opening brief. Of course, Father's counsel did not withdraw the record from the clerk's office and the best way for counsel to know what is in the record is to withdraw and review it before submitting a brief. *See* Kentucky Rules of Appellate Procedure (RAP) 26(D)(2). We have leniently elected to not impose sanctions on counsel for the blatant misstatement since it appears to stem from counsel's unfamiliarity with the record instead of an intent to deceive us. However, we ***strongly*** caution counsel to not make a similar mistake again.

In his reply brief, Father asks us to ignore the discussion between himself and the family court about counsel which occurred at the pretrial hearing, arguing "[i]t is improper to reference recordings that are not part of the certified record." Reply brief, p. 1. But, regardless of whether that hearing was designated for inclusion in the record by the parties, video footage of it is in the record certified to us by the circuit court clerk – to which no party timely objected. We emphatically refuse to ignore pertinent materials found in the record.

Here, the trial court used the correct legal terminology, such as "affidavit of indigence."[7] But we agree with Father to the extent that he argues that the terminology used by the family court carried a significant risk of not being understood by a layperson. Moreover, the family court did not ever plainly tell Father that he had a statutory right to have counsel appointed for him if he could not afford to retain one. We encourage trial courts to state plainly to a parent contesting an adoption that he or she has a right to have counsel appointed if the parent cannot afford to retain one. "Legalese" should be avoided to the greatest extent possible, and any terms familiar to attorneys but likely unfamiliar to laypersons should be explained in the simplest possible language.

In an analogous situation, the familiar *Miranda* rights recited by law enforcement officers after taking someone into custody in a criminal law context contain no terms which an average layperson would struggle to understand.[8] And

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[7] KRS 199.502(3), which guarantees appointed counsel to an indigent parent contesting an adoption, states that the court "shall determine if a biological living parent is indigent and, therefore, entitled to counsel pursuant [to] KRS Chapter 31." In turn, KRS 31.120(2) requires each person seeking appointed counsel to "certify by affidavit of indigency . . . the material factors relating to his or her ability to pay . . . ." Therefore, the trial court's usage of the term "affidavit of indigency" was correct. So, the issue is not using an improper term, it is explaining what a stilted proper term actually means.

[8] *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694 (1966) (holding that a person taken into custody by the authorities "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires").

that warning explicitly informs the person taken into custody that he or she has a right to court-appointed counsel if he or she cannot afford one.

We encourage trial courts to tweak the *Miranda* warnings to fit this context. Although no rote script is required, the brief colloquy could be along these lines: "You have a right to an attorney. If I find that you cannot afford an attorney, I [the court] will appoint one for you at no cost to you. Do you wish to see if you qualify for appointed counsel? If so, you will have to complete and sign under oath a document, which the law calls an affidavit of indigency, which gives me detailed information about your financial condition."

However, Father also bears responsibility for any lack of understanding. Although he now claims he was confused, Father did not express any confusion to the family court. Father did not ask the court to explain an affidavit of indigence. Father did not ask the judge what she meant when she said she was unsure if Father would be entitled to appointed counsel. And Father mentioned being unable to afford counsel at the final hearing but did not ask the court if it would appoint counsel for him. Although we understand that court proceedings can be stressful and intimidating and people also generally are reluctant to admit confusion or ignorance, everyone involved in a court proceeding has an obligation to let the court know if he or she is confused.

We need not explore this issue further. The case is being remanded for a new trial and KRS 31.120(1)(b) states that "[t]he court of competent jurisdiction in which the case is pending shall then determine, **with respect to each step in the proceedings**, whether he or she is a needy person." (Emphasis added.) Since another "step" of the adoption proceedings must occur on remand, the family court shall explore afresh whether Father wishes, and, if he does, qualifies for, appointed counsel.

Constitutionality of Adoption Statutes

Father also raises some unfocused, vague arguments that KRS 199.502 is unconstitutional. However, it is uncontested that Father failed to preserve that issue by raising it in the family court and timely serving notice of the constitutional challenge to the Attorney General of Kentucky. Therefore, we decline to address Father's constitutionality arguments, both facially and as applied to Father. *See Benet v. Commonwealth*, 253 S.W.3d 528, 532-33 (Ky. 2008).

Less Drastic Measures

Finally, Father argues the trial court should have imposed measures less drastic than severing permanently his ties to Child. However, though not cited by the parties, our research showed that Father's argument is directly contrary to precedent. *B.L. v. J.S.*, 434 S.W.3d 61, 67 (Ky. App. 2014) ("Father's second assignment of error is that the Franklin Circuit Court erred as a matter of law by

failing to consider any measure less drastic than adoption in determining Minor Child's best interests. We disagree . . . . There is simply no requirement under our current statute that the court must consider less drastic means than adoption prior to granting an adoption . . . ."). Because the argument is conclusively resolved by published Kentucky precedent, we decline to address the unpublished or extraterritorial cases cited by Father.

CONCLUSION

For the foregoing reasons, the Warren Circuit Court's decision to grant J.A.W.'s adoption petition is VACATED. The matter is remanded with instructions to conduct a new trial forthwith, followed posthaste by a new decision utilizing the clear and convincing evidence standard. Also, prior to trial, the court shall ascertain whether Father seeks appointed counsel and, if so, whether he qualifies for appointed counsel.

ALL CONCUR.

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