

RENDERED: NOVEMBER 9, 2023; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0570-ME

S.D.D.

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE TERRI SCHOBORG, JUDGE
ACTION NO. 22-AD-00051

S.M.D., A MINOR CHILD; T.J.; AND
Z.J.

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, JONES, AND McNEILL, JUDGES.

JONES, JUDGE: S.D.D. (“Father”) appeals the March 15, 2023 Judgment of Adoption and corresponding findings of fact and conclusions of law entered by the Kenton Circuit Court (“family court”) wherein the Appellees, T.J. and Z.P. (“Adoptive Parents”), were allowed to adopt S.M.D. (“Child”) without Father’s consent. On appeal, Father asserts that he was deprived of due process because he was not included in a 2016 Boone County Dependency, Neglect, and Abuse

(“DNA”) Action, Case No. 2016-J-00399, which resulted in Child being placed with Adoptive Parents. Father further asserts that the family court’s findings of fact are wholly conclusory such that it is impossible for this Court to meaningfully review them. Having reviewed the record, we AFFIRM.

I. BACKGROUND

Child was born in March 2015 to Father and N.L.J. (“Mother”). In the late summer of 2016, a DNA action was filed in Boone District Court alleging that Mother was unable to care for Child because she was being evicted from her home and did not have a job. Child was determined to be a dependent child and was placed with his maternal grandparents in August 2016. A few weeks later, Mother overdosed on drugs and died. Subsequently, in October 2016, Adoptive Parents, Child’s maternal uncle and his wife, received temporary custody of Child and, on August 1, 2017, they were awarded permanent legal custody. Child has resided continuously with Adoptive Parents and their biological children since that time.

On April 8, 2022, Adoptive Parents filed an adoption petition in the family court division of Kenton Circuit Court. According to the petition, Father was believed to be incarcerated as a federal inmate, and a warning order attorney,

Trisha Brunk, was appointed to accept service on his behalf.¹ Attorney Kristin Turner was appointed as Child's guardian *ad litem* ("GAL").

The Cabinet for Health and Family Services was served with a copy of the petition, and pursuant to KRS² 199.510, it provided the family court with a report detailing its investigational findings. After interviewing Child and Adoptive Parents and conducting a video walkthrough of the Adoptive Parent's home, the Cabinet recommended that the family court grant the adoption provided all legal requirements for adoption without consent had been met.

The family court conducted a final evidentiary hearing on March 10, 2023. Adoptive Parents and their counsel attended the hearing in person as did Child's GAL and Father's appointed counsel. Father, who was incarcerated in a federal prison in West Virginia, attended by telephone. Adoptive Parents, Father, and Child's Maternal Aunt testified at the hearing. For the most part, the witnesses agreed on the basic facts leading up to Adoptive Parents' petition.

Father and Mother began dating around 2005, and while never married, they have three children together. A maternal aunt has custody of the two

¹ Father advised Attorney Brunk that he would not consent to the adoption. Thereafter, Attorney Jennifer Landry was appointed as Father's counsel for the purpose of objecting to the adoption.

² Kentucky Revised Statutes.

older children, and Adoptive Parents have had custody of Child since he was approximately one.

Father has a lengthy criminal history dating back to 1998. He has spent most of the last two decades incarcerated. Child has never had a relationship with Father, but Adoptive Parents do make sure that Child and his natural siblings have a relationship. Father admitted that he has never provided any financial support for Child. Father asserted that he wanted to stay in contact with Child, but he was never provided with contact information. Father believes he will be released to a halfway house in December 2023 or sometime around then. He does not object to Child remaining in the custody of Adoptive Parents, but he would like to have visitation. He acknowledged that his past criminal lifestyle prevented him from being able to provide for Child but asserted that he has worked to better himself during his time in federal prison. He admitted that he has made similar promises in the past and failed to live up to them.

Child is bonded to Adoptive Parents and their natural children. He is doing well in school and considers Adoptive Parents to be his parents. He does not remember ever not living with them. For many years, Child was unaware that Adoptive Parents were not his natural parents. As part of the adoption process, Adoptive Parents told Child more about his situation. He was not upset, and he expressed excitement about being adopted because it would mean his last name

would be changed so that it was the same as the rest of his family. Adoptive Parents make sure Child sees his natural siblings on a regular basis, and they have a relationship with the aunt who has custody of them.

Following the hearing, the family court entered its findings of facts and conclusions of law and a separate judgment of adoption. This appeal by Father followed.

II. STANDARD OF REVIEW

“An adoption without the consent of a living biological parent is, in effect, a proceeding to terminate that parent’s parental rights.” *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014) (citing *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003)). Accordingly, in adoption without consent cases we apply the same standard of review that governs parental termination cases. Our review is confined to the clearly erroneous standard in CR³ 52.01 based upon clear and convincing evidence. The family court’s findings will not be disturbed unless there exists no substantial evidence in the record to support them. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998) (citing *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986)).

Clear and convincing proof does not necessarily mean uncontradicted proof; but rather, requires there is proof of a probative and substantial nature that is

³ Kentucky Rules of Civil Procedure.

sufficient to convince ordinarily prudent minded people. *Id.* at 117. Under this standard, “we are required to give considerable deference to the [family] court’s findings, and we will not disturb those findings” unless the record provides no substantial support for them. *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006). “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.” *B.L.*, 434 S.W.3d at 65.

III. ANALYSIS

Father first argues that he was denied due process in the “underlying” 2016 DNA case making all subsequent actions related to his parental rights, including the adoption, invalid. However, a prior finding of neglect or abuse is not a predicate for granting an adoption without consent. *A.K.H. v. J.D.C.*, 619 S.W.3d 425, 427 (Ky. App. 2021) (“[O]ne of the fundamental differences between termination of parental rights cases and adoption without consent cases is the absence of an abuse or neglect requirement in the adoption without consent statute.”).

Moreover, even though it is true that Adoptive Parents obtained custody of Child as part of the prior DNA proceedings, we fail to see how Father’s participation in the DNA action would have affected its outcome. Due to his

criminal activities, Father was not able to take custody of Child either at the time Mother lost her home or later after she passed away. This situation is analogous to the facts we considered in *B.L.* wherein we held that the non-consenting parent's lack of participation in the DNA case did not prevent the family court from granting an adoption without consent.

Biological Father argues that the Petition of Adoption should have been dismissed due to the trial court's failure to appoint counsel to represent him at all critical stages of the underlying neglect case against Biological Mother. Biological Father specifically states that during the neglect proceedings, the trial court failed to conform to the rules set forth in KRS 620.100(1)(b), which state: "[t]he court shall appoint separate counsel for the parent who exercises custodial control or supervision if the parent is unable to afford counsel pursuant to KRS Chapter 31." As discussed above, Biological Father was not represented by counsel at any of the proceedings in regards to the neglect case. Biological Father did request counsel during the hearing on permanent relative placement, but the trial court denied that request upon learning that Biological Father did not object to the Adoptive Parents being granted full custody of Minor Child.

This court previously held in *R.V. v. Com., Dept. for Health and Family Services*, 242 S.W.3d 669, 673 (Ky. App. 2007), that "the parental rights of a child may not be terminated unless that parent has been represented by counsel at every critical stage of the proceedings. This includes all critical stages of an underlying dependency proceeding in district court, unless it can be shown that such proceeding had no effect on the subsequent circuit court termination case." Biological Father asserts that his due process rights were violated during the adoption proceedings because he was not appointed counsel during

the neglect proceedings. Biological Father further argues that the neglect proceedings had a substantial effect on the adoption proceedings.

Keeping in mind that these standards apply to a parent whose custodial rights are terminated through an adoption, it is our view that Biological Father was not entitled to representation during the neglect proceedings. Biological Father was not accused of neglecting Minor Child and was not otherwise the subject of the neglect proceedings. Biological Father was also not involved with the Cabinet and did not have to take any steps for reunification, unlike Biological Mother. Most importantly, Biological Father was not the parent exercising custodial control or supervision of Minor Child during the time of the alleged neglect or at any time during the neglect proceedings. There is also no evidence in the record that Biological Father was involved in any capacity with Minor Child's care during the relevant times.

While the statute does not give an exact definition of "custodial control or supervision," it is our view that Biological Father, who was not only incarcerated, but also uninvolved with Minor Child for most of his life and at all times relevant for the neglect proceedings, does not qualify as such. A plain reading of KRS 620.100 supports our view that the statute was intended to protect the rights of the parent involved in a dependency, neglect, or abuse case. Furthermore, the clear concern in *R.V. v. Commonwealth, Dept. for Health and Family Services* is the protection of a parent involved in such a case when those proceedings may later impact that parent's involuntary termination of parental rights. This court has previously upheld terminations of parental rights when a parent did not have counsel for an underlying abuse, dependency, or neglect case when the complaining parent was not the parent exercising custodial control or supervision or otherwise involved in the underlying case. See *R.R. v. Cabinet for Health and*

Family Services, No. 2013-CA-000175-ME, 2013 WL 4781523 (Ky. App. September 6, 2013); *B.H. v. Cabinet for Health and Family Services*, No. 2010-CA-000664-ME, 2010 WL 4905641 (Ky. App. December 3, 2010). Therefore, we conclude that the trial court was not required to appoint counsel for Biological Father during the neglect proceedings and there was no error mandating reversal of the adoption based on this issue.

Additionally, the record does not support Biological Father's contention that his lack of counsel during the neglect case had a substantial impact on the adoption proceedings. Biological Father testified at length during the adoption hearing regarding his ability to parent and support Minor Child and his history of drug use. The trial court relied only on evidence from the adoption proceeding as related to Biological Father. Moreover, while Biological Father alleges that he did not fully understand the neglect proceedings because he was not represented by counsel during them, Biological Father's understanding of the neglect proceedings is not relevant with respect to Biological Father's termination proceeding. Indeed, an adoption under KRS 199.502, the statute used to grant the Adoptive Parents' adoption of Minor Child, does not require a prior finding by a court that the child had been neglected or abused.

B.L., 434 S.W.3d at 66-67.

For these same reasons, we conclude that Father's lack of participation in the 2016 DNA action is not a basis for setting aside the family court's order of adoption.

Father's final argument is that the family court's judgment of adoption cannot withstand appeal because the underlying findings of fact are conclusory and not supported by the evidence of record. To grant an adoption over the objection

of the biological parent, it must be pleaded and proved as part of the adoption proceeding that one of the conditions set forth in KRS 199.502(1)(a)-(j) exists. Assuming this is the case, “[u]pon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision” granting the adoption. KRS 199.502(2).

Here, the family determined that two of the conditions were present: (1) that Father had abandoned Child for a period of not less than ninety (90) days, KRS 199.502(1)(a); (2) that Father for a period of not less than six (6) months, had 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, KRS 199.502(1)(e).⁴

This is not a case where the family court merely parroted the language of the statute without any reference to the testimony. Based on the evidence presented and in support of its conclusions, the family court specifically found that: (1) Father engaged in a pattern of criminal conduct that rendered him unable to care for Child’s ongoing needs; (2) Father had not seen Child since 2016 when he

⁴ Father also complains about the sufficiency of the family court’s conclusion that Father’s conduct rendered Child “a neglected Child.” As already discussed, a finding of abuse and/or neglect is not required in adoption without consent cases. *B.L.*, 434 S.W.3d at 66-67. Since a finding of neglect is not required in adoption without consent cases, any error with respect to the family court’s finding of neglect would be harmless.

was incarcerated; (3) even before to his latest incarceration Father had not provided a home for Child; and (4) Father had never paid child support or provided any of the necessary care to raise Child since his birth. Moreover, these facts were largely uncontested. Father admitted that he had never supported or cared for Child, and that even after his release from incarceration he would not be in a position to assume care because he would be living in a halfway house. While incarceration alone is insufficient to support a finding of abandonment, the family court rightfully considered that Father had failed to care for and support Child even during the brief period before his incarceration and that he indicated that he only wanted visitation with Child after his release. *M.S.S. v. J.E.B.*, 638 S.W.3d 354, 366 (Ky. 2022).

IV. CONCLUSION

For the reasons set forth above, we affirm the family court's March 15, 2023 Judgment of Adoption.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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