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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0571-ME

K.N. APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS, III, JUDGE
ACTION NO. 20-AD-00006

S.D.; CABINET FOR HEALTH AND FAMILY SERVICES; L.W., A MINOR CHILD; M.D.; AND R.W. APPELLEES

OPINION
VACATING AND
REMANDING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; CALDWELL AND EASTON, JUDGES.

CALDWELL, JUDGE: K.N. ("Father") appeals from the findings of fact, conclusions of law, and judgment of the Boyd Circuit Court granting the petition

for adoption of L.W., a minor child.[1] Because the trial court failed to specifically state it utilized the clear and convincing standard of proof in making its findings required by law to involuntarily terminate Father's parental rights, we vacate and remand to the trial court for a new hearing.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

R.W. ("Mother") and Father are the parents of L.W. ("Child"). Child was born in April 2018, in West Virginia. Mother and Father were not married at the time Child was born. Mother and Father have both been incarcerated on drug-related charges for most of Child's life. Father currently resides in Ohio and Mother is incarcerated in West Virginia. As a result, Child was placed into the physical custody of S.D. and M.D. ("Adoptive Parents") in June 2018, just months after his birth, upon petition filed by the Cabinet for Health and Family Services ("Cabinet"). In January 2019, the district court granted permanent relative placement of Child to S.D.

At issue in this case is the petition filed by Adoptive Parents seeking to adopt Child which, if granted, would require the trial court to terminate parental rights of Mother and Father. Adoptive Parents joined the Cabinet as a party to the action in order for the Cabinet to fulfill its duties under Kentucky Revised Statute

[1] Pursuant to court policy and to protect the privacy of the minor child, we do not identify Parents or Child by name.

("KRS") 199.510.[2] The Cabinet filed an answer to Adoptive Parents' petition, stating that it had no objection to the adoption or termination of parental rights.

A Warning Order Attorney was appointed by the trial court on January 30, 2020, to notify Father of Adoptive Parents' action to terminate his parental rights and adopt Child. The Warning Order Attorney mailed a certified letter to Father's Ohio address, which was returned as unclaimed on March 16, 2020.

On June 26, 2020, Father filed an entry of appearance, through counsel. Father then moved to file a late answer, response, counterclaim, and crossclaim. Adoptive Parents responded to the motion, arguing that Father had not shown "excusable neglect" under Rule of Civil Procedure ("CR") 6.02(b), which is the standard a litigant must meet to file a late pleading. The trial court denied Father's motion to file a late answer on November 6, 2020. Father subsequently filed a second motion to file a late answer, arguing he was never personally served and thus his answer was not late. The trial court denied Father's second motion to file a late answer on January 8, 2021.

On March 30, 2023, the trial court conducted a final hearing in this

[2] KRS 199.510(1) states that the Cabinet must investigate and report in writing to the court whether the contents of the adoption petition are true, whether the adoptive parents are of good moral character, whether the adoptive parents are financially able to take care of the child, whether the adoption is in the best interest of the child, and whether the child is suitable for adoption.

matter. Testimony was heard from Adoptive Parents and Father.[3] The Adoptive Parents testified that Child had been in their care for almost his whole life; that Father made two attempts to contact Adoptive Parents; and that Adoptive Parents never attempted to take Social Security benefits from Father for Child. Adoptive Parents further testified that they treat Child as their own, and that Child gets along with their biological children.

Father, through counsel, cross-examined Adoptive Parents at the hearing. Father testified that he had been incarcerated for most of Child's life but has since been released on probation. Father testified that he has a daughter he takes care of full time. Father also testified that he suffers from anxiety, depression, and PTSD from being incarcerated. Based on the testimony of Adoptive Parents and Father, the trial court granted Adoptive Parents' adoption petition, effectively terminating the parental rights of Father and Mother.[4] This appeal followed.

ANALYSIS

"[T]rial 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

[3] Father was represented by counsel, and he was physically present at the hearing.

[4] Mother did not appeal this decision.

upon clear and convincing evidence." *M.S.S. v. J.E.B.*, 638 S.W.3d 354, 359-60 (Ky. 2022) (internal quotation marks, footnotes, and citations omitted).

In the case before us, the trial court failed to state in its findings of fact and conclusions of law or judgment that its decision was made pursuant to the clear and convincing evidence standard. Precedent is clear that the standard of evidence to be used in adoption proceedings is clear and convincing, making the trial court's omission a fatal one. *See M.S.S.*, 638 S.W.3d 354, 359 ("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, footnotes, and citations omitted).

While Father fails to raise the issue of there being no indication from the trial court's findings of fact and conclusions of law, or its adoption judgment, that it applied the clear and convincing evidence standard, we are not free to simply ignore it. Our review of a case on appeal necessitates scrutiny of the trial court's findings in determining strength and validity of arguments before us. *See, e.g.*, *W.H.J. v. J.N.W.*, 669 S.W.3d 52, 55 (Ky. App. 2023) (addressing trial court's

failure to make findings by clear and convincing evidence despite appellant's failure to raise that issue in his brief "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.").

Our appellate review is normally limited to the arguments raised by the parties. *See, e.g.*, *Rainey v. Mills*, 733 S.W.2d 756, 757 (Ky. App. 1987). But, when there is an error "so glaring" it naturally flows under our appellate review, we will not ignore it. *W.H.J.*, 669 S.W.3d at 55; *see also Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011). Our review, however, will stay confined to 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).

Parental rights are protected by the Fourteenth Amendment of the United States Constitution as a "fundamental liberty interest." *M.S.S.*, 638 S.W.3d at 359. Thus, "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). Therefore, we must review the trial court's error when it did not identify any standard of proof in its findings of fact and conclusions of law or judgment.

In *N.S. v. C. and M.S.*, 642 S.W.2d 589, 591 (Ky. 1982), the Kentucky Supreme Court determined 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.* It was also for that reason we reversed the adoption judgment in *Wright v. Howard*, 711 S.W.2d 492, 497 (Ky. App. 1986):

> 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.*, 642 S.W.2d 589 (Ky. 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. "[A]n adoption decision which does not explicitly rely upon the clear and convincing evidence standard cannot stand. And we may not initially apply that standard." *W.H.J.*, 669 S.W.3d at 57; *see N.S.*, 642 S.W.2d at 591.

We recognize the error of the trial court could be corrected quickly by allowing the trial court to issue a new decision which applies the clear and

convincing evidence standard of proof to the existing evidence. However, precedent binds our decision. *See N.S.*, 642 S.W.2d at 591. "[W]e cannot let indistinguishable cases yield distinguishable results in the interests of expediency. And we must follow the indistinguishable decision in *N.S.*" *W.H.J.*, 669 S.W.3d at 57. Therefore, we must vacate the trial court's decision and remand for a new trial with the issuance of a new decision using the clear and convincing evidence standard. We have confidence the trial court will act with urgency.

CONCLUSION

For the foregoing reasons, the Boyd Circuit Court's decision granting the 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.

ALL CONCUR.

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