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Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-1011-ME

D.W. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA JOHNSON, JUDGE
ACTION NO. 20-AD-500234

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
N.W.W., A CHILD; AND T.A.,
NATURAL MOTHER APPELLEES

OPINION
REVERSING AND
REMANDING

** ** ** ** **

BEFORE: COMBS, GOODWINE, AND MCNEILL, JUDGES.

COMBS, JUDGE: Appellant, D.W., appeals from the Jefferson Family Court's July 21, 2021, findings of fact, conclusions of law, and order which terminated his parental rights to N.W. After carefully reviewing the record, the briefs, and the

applicable law, we reverse and remand for entry of an appropriate order consistent with this Opinion.

As a preliminary issue, we shall address whether D.W.'s notice of appeal was timely filed. The filing of a timely notice of appeal is a prerequisite to this Court's exercise of our appellate jurisdiction. CR[1] 73.02. By order entered on February 22, 2022, this panel found sufficient cause to allow this case to remain on the Court's active docket following a problem entailed in the electronic filing procedure.

D.W. is the putative father of the minor child, N.W. N.W. was the subject of a dependency, neglect, or abuse ("DNA") petition filed in the Jefferson Family Court on February 14, 2018, docketed as Case No. 18-J-501741-001 (the "original DNA action"). Appellee, the Cabinet for Health and Family Services, subsequently filed two additional DNA cases initiating Case Nos. 18-J-501741-002 and 18-J-501741-003. On June 22, 2020, the Cabinet filed a separate petition for the involuntary termination of D.W.'s parental rights, docketed as Case No. 20-AD-500234 (the "TPR action"). Following a June 18, 2021, hearing, D.W.'s parental rights were terminated by order entered July 21, 2021.

On August 20, 2021, at 11:47 p.m., D.W.'s attorney attempted to electronically file ("eFile") a timely notice of appeal in the TPR action so that

[1] Kentucky Rules of Civil Procedure.

D.W. could appeal the TPR order. However, the eFiling system would not allow counsel to file the notice of appeal in the TPR action. With mere minutes left until the filing deadline had run and no reasonable way to conventionally file the notice of appeal, D.W.'s attorney did the only thing she could do under the circumstances: she filed the notice of appeal in the most current, related DNA action, No. 18-J-501741-003, with a notation stating "20-AD-500234 [the TPR action] CLOSED FOR ELECTRONIC FILING."

However, the circuit court clerk docketed the notice of appeal and accompanying motion to proceed *in forma pauperis* in the DNA action. As a result, on September 17, 2021, this Court issued an order directing D.W. to show cause why the appeal should not be dismissed for proceeding improperly. The Court specifically noted:

> It appears from the record that the Orders from which this appeal arises were entered in Case No. 20-AD-500234, which is an action filed under KRS[2] 625.050 to terminate Appellant's parental rights. Appellant, however, appears to have filed the notice of appeal in Case No. 18-J-501741-003, which is a dependency, neglect, or abuse action under KRS 620.070.

In response, D.W. argued that the notice of appeal was timely because it was filed within the jurisdictional deadline. Additionally, he suggested that the reason that the notice of appeal had not been filed in the TPR action was due to an error of the

[2] Kentucky Revised Statutes.

circuit court clerk in "closing the on-line case before the expiration of the appeal period[.]" D.W. also filed a motion with the Court requesting that it correct the underlying trial record to reflect the correct case, the TPR action.

On October 12, 2021, the Cabinet filed a motion to dismiss the appeal, arguing that the notice was untimely. In response, D.W. noted that the circuit court clerk had made a mistake and that "Undersigned Counsel had filed documents on-line for the termination matter previously and had no reason to suspect that it would be closed."

This Court found sufficient cause for the case to proceed on our active docket and directed the circuit court clerk to docket the notice of appeal in Case No. 20-AD-500234. Whether this notice of appeal is timely under the Civil Rules is a critical issue of first impression for the Court.

Electronic filing is governed by Kentucky Supreme Court Amended Administrative Order 2018-11 (the "eFiling Rules"). Section 3(1) states, "[t]hese rules shall apply to supported case and filing types, in civil, criminal, domestic, juvenile, probate, and other matters in trial courts." Additionally, Section 3(2) allows users to eFile into "a supported action[.]" It appears the only cases that are ineligible for eFiling are sealed cases. Section 9(3) provides that any document in a sealed case must be conventionally filed. Further, Section 15(4) states:

> Access to confidential cases in CourtNet 2.0 is available to persons entitled by statute, except that non-

> government parties may be required to eFile into a confidential case in order to access the entire record. Sealed cases are not eligible for eFiling and are not viewable in CourtNet 2.0.

When read as a whole, these rules are not clear nor do they warn that a "supported action" can later become *unsupported and ineligible* for eFiling.

The pitfall of this rule is seen most keenly in involuntary TPR cases. TPR actions begin as confidential cases -- making them eligible for eFiling. Pursuant to eFiling Rules Section 15(4), it appears eFiling is **even necessary** in order for a party to access the entire record. However, upon entry of the final order, the TPR case becomes sealed. KRS 625.108(2). Thus, with no warning to the parties or practitioners, the TPR case becomes ineligible for eFiling at what is, arguably, the most critical stage of the case. We are deeply concerned that unsuspecting practitioners and parties are lured into a false sense of security that they may eFile a notice of appeal in their TPR actions up until the clock strikes midnight -- when in reality they cannot.

Such was the case in the matter presently before the Court. It is undisputed that D.W.'s attorney was able to eFile throughout the entirety of the underlying action. The eFiling Rules do not warn users of this potential trap. As a result, D.W.'s attorney believed she would be able to eFile the notice of appeal by means of the TPR action. Having no notice that she would not be able to eFile the notice of appeal and believing that the circuit court clerk had prematurely closed

eFiling, D.W.'s attorney did what she thought was the next best thing. The result was that the timeliness of her notice of appeal was jeopardized and nearly nullified.

After determining there is indeed an ambiguity in the eFiling Rules, we must address the issue of how to interpret these Rules. Because the eFiling Rules are contained in an administrative order of the Kentucky Supreme Court, we rely on *Crouch v. Crouch* for our standard of interpretation:

> "the legal significance of language in an administrative order is always subject to interpretation by a reviewing court, which must enforce such orders according to existing law." . . . [W]here the order is ambiguous and open to interpretation, we will endeavor to construe and effectuate the intent of the trial court.

201 S.W.3d 463, 465-66 (Ky. 2006) (quoting *W.T. Sistrunk & Co. v. Kells*, 706 S.W.2d 417, 418 (Ky. App. 1986)). In enacting the eFiling Rules, our Supreme Court endeavored to allow greater and more convenient access to Kentucky's trial courts. Additionally, the system was "designed to accept filings 24 hours a day[.]" eFiling Rules § 8(3)(d). Based on the foregoing reasoning and considering the ambiguity we have discovered in the eFiling Rules, we reiterate our finding of sufficient cause shown. We shall, therefore, proceed to decide the merits of this matter.

N.W. was born on January 23, 2009; he was 12 years of age at the time of the TPR trial.[3] The family first had contact with the Cabinet in early 2018. On February 20, 2018, N.W. and his siblings[4] were the subject of a temporary removal hearing and were placed with their maternal grandmother. According to ongoing social worker Phillip Cross, N.W. was placed in foster care in or about May 2020. Once in foster care, N.W. demonstrated behavioral and/or emotional issues, specifically issues with urinating and defecating on himself. Therefore, he was moved to different foster care placements five times.

D.W. was incarcerated at the Nelson County Jail beginning in January 2019. He currently remains in the custody of the Kentucky Department of Corrections. After entering guilty pleas, D.W. was convicted by final judgments of conviction entered on March 25, 2020, of the following: two counts of second-degree escape; three counts of first-degree criminal possession of a forged instrument; possession of a handgun by a convicted felon; receiving stolen property (firearm); and first-degree possession of a controlled substance, first offense (methamphetamine). He was sentenced to a total of 14-years'

[3] The family court also terminated the parental rights of N.W.'s natural mother, T.A. T.A. did not appeal, and this Opinion pertains only to the termination of D.W.'s parental rights to N.W.

[4] N.W.'s siblings have different putative fathers. The family court additionally terminated parental rights of those fathers. Those terminations are not before this Court and are not affected by this Opinion.

imprisonment. He had been continuously incarcerated for a total of approximately 28 months immediately preceding the TPR trial.[5] Thus, D.W. was incarcerated at the time the second and third DNA petitions, trailer Nos. - 002 and - 003, were filed with respect to N.W.

At the June 18, 2021, TPR hearing, the Cabinet's only witnesses were Cross and the foster mother. Cross testified that he has attempted to get N.W. "stable" in his foster placements and that services such as therapy, a psychological examination, and abdominal x-rays had been scheduled and/or provided. Cross further testified that N.W. "opened up" to the foster mother concerning sexual abuse by an uncle. Cross testified that he believed the foster mother and N.W. were "attached," but he acknowledged that his observation of the pair was limited to Zoom calls and that they had only one such call because N.W. had been in this placement only about five weeks.[6]

Concerning N.W.'s father, Cross testified that when he was out of custody, D.W. did not comply with his case plan, which included obtaining a substance abuse assessment and hair follicle testing and maintaining housing and

[5] Although he was charged with two counts of escape, D.W. testified that he did not get "free" during those escape attempts; he has been continuously in custody since January 2019.

[6] Cross did testify that this foster family had provided respite care before N.W. was placed with them. The foster family also has at least one of the siblings of N.W.

employment. Cross acknowledged that the Cabinet has not offered services to D.W. since he has been incarcerated.

D.W. testified on his own behalf, stating that he was enrolled in a substance abuse treatment program at the Harlan County Detention Center. He stated that the program randomly drug screens its participants but that he had not yet been selected for such testing. He also testified that he has contacted Cross once by letter and once by telephone, noting that any phone calls that he makes to Cross must be collect calls.

According to D.W.'s testimony, prior to 2019, he saw N.W. on a daily basis. He provided N.W. financial support and met his everyday needs. Although he has not had contact with N.W. since he has been incarcerated, he believes that he cannot do so because of his being in custody. D.W. objected to termination of his parental rights to N.W. and testified that he has plans for employment and housing upon his release. At the time of trial, he was next eligible for parole in December 2021. According to the Kentucky Offender Website, D.W.'s parole was deferred for 24 months. He will become eligible for consideration again in December 2023.

In Kentucky, termination of parental rights is proper upon satisfaction of a tripartite test by clear and convincing evidence. *Cabinet for Health and Family Servs. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). First, KRS 625.090(1)(a)

requires that a child be adjudged neglected or abused. Second, KRS 625.090(1)(c) requires that termination be in the child's best interest. Third, at least one of the conditions set forth in KRS 625.090(2) must be established. The family court's termination decision will be reversed only if it is clearly erroneous. *Cabinet for Health & Family Servs. v. T.N.H.*, 302 S.W.3d 658, 663 (Ky. 2010). Such a decision is clearly erroneous if there is no substantial, clear, and convincing evidence to support it. *Id.*; CR 52.01.

N.W. was adjudged a neglected child in Case No. 18-J-501741-001, by order entered September 18, 2018, on the ground of educational neglect, thus satisfying the first element of the three-part test. Further, Appellant does not dispute that at least one of the factors set forth in KRS 625.090(2) has been met.[7]

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[7] The TPR petition alleged two grounds for termination set forth in KRS 625.090(2)(e) and (g), respectively:

> (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; [and]
>
> . . .
>
> (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[.]

However, Appellant argues on appeal that the Cabinet did not show -- by clear and convincing evidence -- that termination of his parental rights is in N.W.'s best interest pursuant to KRS 625.090(1)(c). Having carefully reviewed the record, we agree.

The Cabinet asserts that D.W. has been incarcerated on various convictions throughout N.W.'s life and that he has, therefore, shown a dedication to a criminal lifestyle incompatible with parenting. *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661 (Ky. App. 1985). The family court found that D.W.'s "failure or inability to meet the material needs . . . of his . . . child is doubtless due more to . . . incarceration than any other single factor[.]" Findings of Fact and Conclusions of Law, at p. 16. The court correctly ruled that a parent's repeated incarceration (*i.e.*, "court-imposed" absences from the child's life) "may be a factor" for the trial court's consideration in termination cases. *J.H.*, 704 S.W.2d at 664. However, "whether abandonment occurs through incarceration sufficiently to support terminating parental rights must be strictly scrutinized." *Id.* at 663.

This strict scrutiny is based on the fundamental, constitutional right of parents to parent their children. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); U.S. CONST. amend. XIV. "This fundamental

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D.W. has not challenged on appeal the family court's findings as to these elements of the three-part test, and so we shall not address them.

interest does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State . . . . " *K.H.*, 423 S.W.3d at 209 (internal quotation marks omitted) (citing *Santosky*, 455 U.S. at 753, 102 S. Ct. at 1394-95). Thus, this Court has explicitly held that "[i]ncarceration alone can never be construed as abandonment as a matter of law." *J.H.*, 704 S.W.2d at 663.

In the case before us, the family court specifically rejected "abandonment [as] a ground for termination of [D.W.'s] parental rights" under KRS 625.090, noting that "[w]hile [D.W.] was out of custody for longer than ninety (90) days even after removal of his child, there was no evidence presented regarding whether he had contact with the child during that time period." Findings of Fact and Conclusions of Law, at p. 12. Furthermore, we find inapposite the case law cited by the family court in support of its conclusion that D.W.'s incarceration compels termination of his parental rights.

In *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114 (Ky. App. 1998), the Court cited the natural mother's incarceration as a factor weighing in favor of termination where a court-appointed psychologist testified as to mother's "significant limitations in her overall cognitive abilities[,]" and "[a] psychological associate testified that [her] history at the prison included two suicide attempts as well as self-mutilating behavior." *Id.* at 117. In that case, the natural mother had pled guilty to first-degree criminal abuse and was incarcerated

"as a result of incidents relating to her oldest child." *Id.* at 115. There are no similar facts here. With respect to D.W., the sole basis for the original DNA action was educational neglect.

In *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660 (Ky. 1995), the Court held that termination of Rogeski's parental rights was appropriate under *J.H., supra*, where Rogeski had "been in prison in Ohio . . . for the rape of the half-sister of the two children presently involved" and was "serving a sentence of five to 25 years[.]" *Id.* at 660. In holding that incarceration "is a factor to be considered" in termination proceedings, our Supreme Court emphasized that this was "particularly so in a case such as this because KRS 625.090(2)(b) specifies that 'acts of abuse or neglect toward any child in the family' is a factor that circuit courts shall consider in determining the best interest of the child who is the subject of the termination action."[8] *Id.* at 661.

The case now before us is distinguishable from *M.P.S.* and *Rogeski* because the family court did not find that D.W.'s convictions are directly related to the 2018 adjudication of educational neglect; and furthermore, the court specifically found that it could not conclude that D.W. had abandoned the child. *J.H.*, 704 S.W.2d at 664; Findings of Fact and Conclusions of Law, at p. 12.

[8] Presently, KRS 625.090(3)(b) directs the circuit court to consider "[i]n determining the best interest of the child and the existence of a ground for termination . . . [a]cts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family[.]"

D.W. has certainly not been an exemplary or commendable parent. But we are concerned that there is insufficient evidence in the record that N.W.'s best interest would be furthered by terminating this remaining parental tie. We note the following facts:

> 1) N.W. had been in five different foster placements while in the custody of the Cabinet, and thus, at the time of trial, it is unlikely that he was substantially bonded to any caregiver.
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> 2) Although the child had been in a therapeutic foster placement and was to receive therapy twice a week, the family court found that "since relocation to [the current foster placement,] [N.W.] had only been to therapy two times."
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> 3) While the foster mother testified that she and N.W. have "a good relationship" and that they "talk and laugh together," at the time of trial, the placement was very new, and the foster mother testified that she had not yet decided whether she would seek to adopt N.W.
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> 4) The personal observations of the social worker (Cross) of the child with the new foster mother were limited.
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> 5) The family court did not conduct an *in camera* interview of N.W., who was 12 years of age at the time of trial, in order to ascertain his wishes or to determine whether he is bonded to D.W. -- and if so, to what extent.
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> 6) N.W.'s guardian *ad litem* did not testify at trial, nor could we locate a written report of the guardian *ad litem* in the record on appeal.

> 7) D.W. testified that he provided care and financial support[9] to N.W. prior to his incarceration in 2019, that he was obtaining substance abuse treatment while in custody, and that he had plans for a job and housing upon his release from custody.

Accordingly, we simply cannot say that substantial evidence existed to support the family court's finding that termination of D.W.'s parental rights was in N.W.'s best interest. *C.f. K.H.*, 423 S.W.3d at 213 (affirming termination of parental rights where natural father failed to "show any steps he had taken" toward reunification and lacked basic knowledge concerning the child's considerable physical, emotional, and mental health needs; the Court also noted that "[s]ince his placement with his current foster family, [the child] has made vast improvements, both academically and psychologically"); *M.A.B. v. Cabinet for Health and Family Services*, 456 S.W.3d 407, 414-15 (Ky. App. 2015) (holding the Cabinet had established, by clear and convincing evidence, that termination was in the children's best interest considering that the record "exhaustively document[ed] six years of services provided by the Cabinet" to the natural mother, and the ongoing case worker "testified that all four children made marked improvement since removal from [the natural mother's] home and were thriving in their foster homes.").

[9] The Cabinet introduced evidence that D.W. had not paid child support to T.A. since 2016, but it did not specifically counter his testimony that he provided support to N.W. by other means.

Therefore, we reverse the July 21, 2021, findings of fact, conclusions of law, and order of the Jefferson Family Court terminating the parental rights of D.W, and we remand for entry of an appropriate order consistent with this Opinion.

This Opinion in no way affects the family court's termination of T.A.'s parental rights. Finally, nothing herein shall preclude the Cabinet from filing a renewed petition for termination of D.W.'s parental rights to N.W. should future circumstances so warrant.

MCNEILL, JUDGE, CONCURS.

GOODWINE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GOODWINE, JUDGE, DISSENTING: I respectfully dissent. As a preliminary matter, the majority addresses whether D.W.'s notice of appeal was timely filed. I agree with the majority that the filing of a timely notice of appeal is a prerequisite to this Court's exercise of our appellate jurisdiction under CR 73.02. By order entered on February 22, 2022, the majority found sufficient cause to allow this case to remain on the Court's active docket. I dissented then and must respectfully dissent now.

This appeal should have been dismissed because D.W., via his attorney, proceeded improperly by electronically filing ("eFiling") the notice of appeal for the termination of parental rights ("TPR") case in the related

dependency, neglect, and abuse ("DNA") action because the eFiling system would not allow D.W.'s attorney to file the notice of appeal in the TPR case.

Kentucky Supreme Court Amended Administrative Order 2018-11, the "eFiling Rules," govern eFiling in Kentucky. EFiling Rules section 15(4) provides:

> Access to confidential cases in CourtNet 2.0 is available to persons entitled by statute, except that non-government parties may be required to eFile into a confidential case in order to access the entire record. **Sealed cases are not eligible for eFiling and are not viewable in CourtNet 2.0**.

(Emphasis added.) KRS 625.108(2), in relevant part, states:

> Upon the entry of the final order in [an involuntary TPR case], the clerk shall place all papers and records in the case in a suitable envelope which shall be sealed and shall not be open for inspection by any person other than representatives of the cabinet without a written order of the court or as authorized by the provisions of KRS Chapter 199.

Pursuant to these rules a TPR action would be closed for eFiling upon entry of a final judgment. There is no exception to eFiling section 15(4) for notices of appeal in TPR actions. This means any subsequent notice of appeal would need to be filed conventionally. There is no ambiguity in this provision, and, unlike the majority, I am not willing to create one.

D.W.'s attorney asserts the failure to file the notice of appeal in the appropriate action was due to an error of the circuit court clerk in "closing the on-

line case before the expiration of the appeal period[.]" However, counsel's argument is unsupported by the above cited rule and statute. Instead, the error appears to be a result of ignorance of the governing rules, which is no excuse. *See Lawson v. Commonwealth*, 425 S.W.3d 912, 917 (Ky. App. 2014) (citing *Jellico Coal Mining Co. v. Commonwealth*, 96 Ky. 373, 29 S.W. 26 (1895) ("With respect to ignorance or mistake of law, pre-existing law starts with the age-old maxim that ignorance of [the] law excuses no one.")).

With only ten minutes left to meet the jurisdictional deadline for filing the notice of appeal in the TPR action, D.W.'s attorney, on her own volition, without any precedent to support her decision, circumvented eFiling Rules section 15(4) by filing the notice of appeal for the TPR action in the companion DNA case. First, counsel's waiting until ten minutes before a deadline to file necessary paperwork to invoke this Court's jurisdiction is inexcusable. No explanation was provided for the delay. Second, the majority's willingness to accept this behavior will only invite other attorneys to cite this case as precedent, or persuasive authority, to excuse similar behavior when they find themselves up against a deadline they cannot meet. Rules are rules.

Even if the Court were to accept D.W.'s suggestion that this was akin to a technical error, which for reasons stated above it was not, D.W.'s counsel did not follow the procedure set out in eFiling Rules section 18. The majority finds

counsel did not have time to file the notice of appeal conventionally. Again, this is an excuse for waiting until the last minute to file the notice of appeal. The majority further finds the eFiling Rules are ambiguous. I disagree. EFiling will extend statewide in January of 2023. The Court cannot allow appellants or their attorneys to circumvent jurisdictional deadlines and the eFiling Rules by filing a notice of appeal from a TPR action in any related family court action. Because the notice of appeal was improperly eFiled, it is not timely. Thus, the appeal should have been dismissed on February 22, 2022.

Instead of dismissing the appeal at that time, the majority found sufficient cause to allow this case to remain on the Court's active docket and now reverses and remands the matter back to the family court finding a lack of substantial evidence to support the family court's findings of fact and conclusions of law that termination of D.W.'s parental rights was in N.W.'s best interest. Again, I must respectfully disagree.

The family court painstakingly went through the evidence presented at trial and the statutory requirements of KRS Chapter 625 and methodically detailed her findings and conclusions. Specifically, the family court found that D.W. was not compliant with the family court's remedial orders and the Cabinet's court-approved case treatment plan arising out of the three separate DNA actions. The family court further found that D.W. admitted during his testimony that he was out

of custody at the beginning of 2018 and was not incarcerated again until December of 2018.

D.W. attended the temporary removal hearing on February 20, 2018, where he was given his initial orders, but then failed to attend the other ***four*** court hearings on the case in 2018, including the September 18, 2018, trial. He was not in custody at that time. During the period he was not incarcerated, he did not avail himself to the services provided by the Cabinet and otherwise failed to make sufficient progress in the court-approved case treatment plan to allow for the safe return of N.W. to his parental custody and care.

When D.W. was out of custody he failed to comply with his case plan, which included completing a substance abuse assessment and hair follicle testing, as well as maintaining suitable, stable housing and employment. D.W. testified that prior to 2019, he saw N.W. daily and that he provided N.W. financial support and met his everyday needs. Yet, he committed several offenses prior to his January 2019 incarceration, including possession of a handgun by a convicted felon, which means he had at least one prior criminal conviction prior to committing that offense; escape, and at least two probation violations.

D.W. was incarcerated at the time of the second and third DNA petitions filed on January 17, 2019, and May 9, 2019, respectively. N.W. was ten years old when the petitions were filed. D.W. was still incarcerated at the time of

the trial in June of 2021 and had been incarcerated for twenty-eight months immediately preceding the TPR trial. N.W. was twelve years old at that time.

D.W. is facing a fourteen-year prison sentence and in December of 2021, his parole was deferred for twenty-four months, at which time N.W. will be one month shy of his fourteenth birthday. For one-third of N.W.'s young life, D.W. has been incarcerated. Given D.W.'s criminal history and failure to abide by prior probation conditions, it is likely his parole will be deferred again, or he could be denied parole and ordered to serve out his sentence. If D.W. is ordered to serve out his sentence, N.W. will reach the age of majority prior to D.W.'s release.

N.W. has been in foster care since February of 2018. Though he had five foster placements prior to trial, at the time of the TPR trial, he had been placed with B.W. for approximately one and a half months. He began to feel comfortable enough to talk to her. He has now been in B.W.'s care for eighteen months. Though B.W. testified she was uncertain about adopting N.W., she was certain that he could remain in her care permanently.

I agree with the majority that in Kentucky, termination of parental rights is proper upon satisfaction of a tripartite test by clear and convincing evidence. *Cabinet for Health and Family Serv. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). The family court met this standard, and her findings of fact and conclusions of law were supported by substantial evidence. Because this appeal was not

dismissed, and it was allowed to proceed on the merits, I would affirm the family court, terminate the parental rights of D.W., and allow N.W. some permanency.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY:

Adam Sanders
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