RENDERED: JUNE 7, 2024; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1048-ME

C.M. APPELLANT

APPEAL FROM CLAY CIRCUIT COURT
v. HONORABLE STEPHEN MICHAEL JONES, SPECIAL JUDGE
ACTION NO. 22-AD-00028

D.D.G.; K.I.G., A MINOR CHILD;
AND S.B.G. APPELLEES

AND

NO. 2023-CA-1128-ME

G.W. APPELLANT

APPEAL FROM CLAY CIRCUIT COURT
v. HONORABLE STEPHEN MICHAEL JONES, SPECIAL JUDGE
ACTION NO. 22-AD-00028

D.D.G.; C.M.; K.I.G., A MINOR
CHILD; AND S.B.G. APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CETRULO, GOODWINE, AND A. JONES, JUDGES.

JONES, A., JUDGE: The Appellants, C.M. ("Mother") and G.W. ("Father") (collectively referred to herein as "Biological Parents"), seek review of an order of adoption entered by the Clay Circuit Court ("family court") wherein the Appellees, D.G. and S.G. ("Adoptive Parents"), were allowed to adopt K.G. ("Child"), notwithstanding Biological Parents' objections. For the reasons set forth below, we vacate and remand for a new hearing and issuance of a new decision using the clear and convincing evidence standard.

I. BACKGROUND

On March 16, 2022, Mother gave birth to Child. The Cabinet for Health and Family Services ("Cabinet") was notified after Child's meconium tested positive for drugs and he was observed to be suffering from withdrawal symptoms. On March 21, 2022, Cabinet Social Worker Amy Johnson filed a dependency, neglect, and abuse ("DNA") petition with the family court on Child's behalf. Mother and Father were named as respondents. Simultaneously, the Cabinet requested an order for emergency custody.

The DNA petition included Social Worker Johnson's affidavit indicating that Biological Parents have a long history of admitted substance abuse

problems; Mother failed to seek timely prenatal care; Mother tested positive for methamphetamines, marijuana, and MDMA in the later months of her pregnancy; Biological Parents refused to attend inpatient drug treatment; Biological Parents lacked housing; and Biological Parents had previously lost custody of three other children due to their drug use and related problems. Due to these issues, Social Worker Johnson believed Child was at risk of neglect and/or abuse. The family court granted the Cabinet emergency custody and scheduled a temporary removal hearing for March 24, 2022.

Following the temporary removal hearing, the family court entered an order granting Adoptive Parents temporary custody of Child, and appointed counsel to represent Mother, Father, and Child. An adjudication hearing was scheduled for April 28, 2022. No formal hearing was necessary, however, because Biological Parents stipulated that their substance abuse problems and lack of stable housing placed Child at a risk of harm. Based on their stipulations, the family court concluded that Biological Parents engaged in a pattern of or conduct that made them incapable of caring for the immediate and ongoing needs of Child including, but not limited to, parental incapacity due to substance use disorder as defined in KRS[1] 222.005. The family court ordered Child to remain in Adoptive

[1] Kentucky Revised Statutes.

Parents' temporary custody. A final disposition hearing was scheduled for May 26, 2022.

Prior to the hearing, the Cabinet filed its dispositional report. Therein, the Cabinet noted that Child was doing well in Adoptive Parents' care, and their home was clean and well-maintained. The Cabinet further indicated Biological Parents were largely noncompliant with their case plans. Mother missed several appointments despite having assured the Cabinet she would attend, and Father had yet to attend even an initial intake session with the Cabinet. Following the hearing, the family court entered an order directing Biological Parents to cooperate with the Cabinet. The order also directed that Child was to remain in Adoptive Parents' custody. A review hearing was scheduled for November 17, 2022.

Sometime in May 2022, Mother began actively working on her case plan with the Cabinet. On July 5, 2022, Mother filed a motion in the DNA action requesting an order for parenting time with Child. On July 11, 2022, Adoptive Parents filed a petition for adoption with the Clay Circuit Court. The adoption case was opened as a separate matter but was assigned to the same judge presiding over the DNA action. On July 14, 2022, the family court granted Mother's motion for timesharing in the DNA action allowing her to have some limited visitation with Child. On July 19, 2022, Adoptive Parents filed a motion in the DNA action seeking an order suspending Mother's visitation with Child on the ground that the

visitation was seriously endangering Child's physical health. It appears that Adoptive Parents withdrew the motion on or about July 28, 2022.

Sometime in late July 2022, Father began actively working his case plan with the Cabinet. On October 28, 2022, Father filed a motion also seeking visitation with Child. Ultimately, the family court allowed Biological Parents to have visitation with Child each Wednesday from 9:00 a.m. until 6:00 p.m.

A bump in the road occurred in November 2022, after Adoptive Parents requested that the presiding judge recuse due to his relationship with D.G., Adoptive Father, who worked as a bailiff in the judge's courtroom. A new judge was assigned but he too recused for the same reason. Ultimately, the case was reassigned to Special Judge Hon. Stephen Jones. Sometime during the reassignment process, the DNA action stalled. Although the parties filed motions and reports with the family court, the motions were not immediately ruled upon, and no review hearings were conducted. In its April 5, 2023 report, the Cabinet noted: "There hasn't been a court hearing in regards to this family since October of 2022, as the original judge recused himself. . . . Due to this, [neither] the family nor the [Cabinet] has had the opportunity to discuss the exceptional progress that has been made by both the mother and the father." On June 28, 2023, the Cabinet filed a motion asking the family court to schedule a review conference as the one that had been scheduled in December 2022 did not occur due to the recusal. The

Cabinet renewed its motion on July 7, 2023. On August 15, 2023, the Cabinet filed a report detailing Biological Parents' extraordinary progress towards completion of their parenting plans. The report explained that Biological Parents were both clean and sober, enrolled in treatment programs, had steady employment, and were residing together in a three-bedroom rental home that was safe and clean. The Cabinet's report concluded with the recommendation that Child be returned to his parents. However, the DNA action remained largely inactive.

Meanwhile, the parallel adoption action continued to progress. Biological Parents were served with the adoption petition on July 11, 2022, the same day it was filed by Adoptive Parents. On September 13, 2022, the Cabinet filed a report with the family court indicating that it had investigated and determined that "the information provided in the adoption petition is accurate." On September 14, 2022, the family court entered an order setting the adoption action for a final hearing to be held on October 4, 2022. The hearing did not take place as scheduled. Next, on October 28, 2022, Biological Parents each filed affidavits of indigency seeking appointment of counsel. The family court denied both finding that parents were employed with income levels exceeding the threshold.

On November 17, 2022, Adoptive Parents filed an amended petition in the adoption action. The main difference between the original petition and the

amended petition appears to be that the amended petition alleges that Adoptive Parents also qualified as Child's *de facto* custodians and sought to be awarded permanent custody of Child, as well as adoption. After Special Judge Jones took over the DNA and adoption actions, Adoptive Parents filed a renewed motion for a final hearing date. Prior to setting the matter for a hearing, the family court entered orders appointing counsel for Child and Biological Parents.[2] Thereafter, acting with the assistance of their respective counsel, Biological Parents filed separate answers seeking dismissal of the adoption petitions and Child's return.

The final hearing on the amended adoption petition commenced on May 22, 2023, with Adoptive Parents presenting their proof first. Adoptive Father, D.G., was the first witness called to testify. D.G. testified that he and his wife received custody of Child shortly after his birth at which time Child was still suffering from withdrawal symptoms. According to D.G., he and his wife have provided for all of Child's financial and medical needs without any assistance from Biological Parents. He denied that Biological Parents called to check on Child during his first several months. After Biological Parents received visitation, Adoptive Parents became concerned about Child's care during his visits noting evidence of improper or no feeding during visitation, lack of attention to a high fever, burns from an improper fitting car seat, and evidence of Child having been

[2] Separate counsel was appointed for each.

exposed to second-hand cigarette smoke. D.G. further testified that Child is extremely bonded to Adoptive Parents and their daughter, and they can provide for all his needs and wish to adopt him into their family.

It appears from the parties' briefs that Adoptive Parents also called four other witnesses: S.G., Adoptive Mother; Social Worker Sherry Shepherd who authored the Cabinet's September 13, 2022 report; Pediatrician Khercie Smith who provided medical care for Child following his birth; and S.G.'s mother. The video record this Court received from the Clay Circuit Court Clerk contains only the preliminary arguments of counsel and D.G.'s testimony. Out of an abundance of caution, this Court contacted the Clay Circuit Court Clerk to obtain the full video record from the May 22, 2023, hearing; in response, this Court was informed that the incomplete video record previously provided is the only record that the Clay Circuit Court Clerk currently has of the hearing.[3]

After Adoptive Parents rested their case, the family court directed Biological Parents to present their proof via depositions with transcripts to be filed as part of the written record. Biological Parents concede that they did not object to this procedure. On August 1, 2023, Biological Parents filed the deposition transcripts for their seven witnesses: 1) Biological Mother; 2) Biological Father;

[3] Where the parties' briefs agree, we have considered their representations of the omitted testimony. Where they are silent or disagree, we must assume that the omitted portions support the family court. *Harper v. Commonwealth*, 371 S.W.3d 763, 769 (Ky. App. 2011).

3) Chelsea Rawlings, Father's case manager at Second Mile; 4) Jason Looney, another employee of Second Mile; 5) Susan Smith, the Cabinet's designated social worker for this family; 6) Ashley Sizemore, one of Mother's coworkers and friends; and 7) Amanda Imhoff, Mother's case manager at Volunteers of America, a program run by the Family Recovery Court.

In sum, Biological Parents testified about their prior drug use and problems and the steps each had taken to become sober, obtain suitable housing, and maintain gainful employment. They each testified that they desire to parent Child and believe that they are now able to do so. The other witnesses provided supplementary testimony regarding Biological Parents' progress and ability to parent.

On August 23, 2023, the family court entered its findings of fact and conclusions of law and a separate judgment of adoption. Biological Parents each appealed. Their separate appeals have been consolidated for the purposes of our review.

II. ANALYSIS

Biological Parents present three arguments that they claim require us to vacate the family court's judgment of adoption. First, they argue that the family court acted prematurely by conducting the hearing prior to the guardian *ad litem* having filed her report with the Court. Second, they assert that the family court

violated their due process rights by ordering Biological Parents to present their proof via deposition transcripts. Lastly, they contend that the family court's findings of fact and conclusions of law are deficient because the family court did not make its findings under the clear and convincing evidence standard.

Biological Parents admit in their appellant brief that they did not preserve their arguments for appeal, and they ask us to review for palpable error.

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

CR[4] 61.02. A palpable error is "easily perceptible, plain, obvious and readily noticeable." *Rice v. Rice*, 372 S.W.3d 449, 452 (Ky. App. 2012) (citation omitted). It is an error that "seriously affect[s] the fairness to a party if left uncorrected." *Hibdon v. Hibdon*, 247 S.W.3d 915, 918 (Ky. App. 2007) (citation omitted).

Adoptions without consent, which in effect terminate the parental rights of biological parents, are some of the most grievous cases our court reviews. "The involuntary termination of parental rights is a scrupulous undertaking that is of the utmost constitutional concern. The United States Supreme Court has declared parental rights essential civil rights far more precious . . . than property

[4] Kentucky Rules of Civil Procedure.

rights. Termination of parental rights is so severe it has been characterized as the death penalty of family law." *W.R.G. v. K.C.*, 673 S.W.3d 81, 84 (Ky. App. 2023) (internal quotation marks and citations omitted).

"'[T]wo basic rules' govern all adoptions: 1) the right of adoption exists only by statute; and, 2) there must be strict compliance with the adoption statutes." *A.K.H. v. J.D.C.*, 619 S.W.3d 425, 429 (Ky. App. 2021) (quoting *S.B.P. v. R.L.*, 567 S.W.3d 142, 147 (Ky. App. 2018). Failure to comply with the adoption statutes results in an invalid judgment. *Wright v. Howard*, 711 S.W.2d 492, 494 (Ky. App. 1986).

Because it is ultimately dispositive, we begin with Biological Parents' third argument that the family court's findings of fact and conclusions of law cannot stand where the family court failed to explicitly make its findings under the clear and convincing evidence standard. In *W.H.J. v. J.N.W.*, 669 S.W.3d 52, 57 (Ky. App. 2023), we held that "an adoption decision which does not explicitly rely upon the clear and convincing evidence standard cannot stand." Importantly, in *W.H.J.* we vacated the adoption even though the appellant did not "directly raise that omission in his brief" explaining that the failure was such a fundamental one that we could not ignore it. *Id.* at 55.

We have reviewed each line of the family court's eight-page findings of fact and conclusions of law and nowhere therein does the family court state that

its findings are based on clear and convincing evidence. While Biological Parents may not have preserved their argument at the family court level, they have done more than the appellant in *W.H.J.* insomuch as they have raised the issue as part of their appeal. For the same reasons that we could not ignore the deficiency in *W.H.J.*, we cannot ignore it here. Such an error plainly constitutes manifest injustice. *Id.*

As we explained in *W.H.J.*, Supreme Court precedent indicates that the proper remedy is for us to vacate the judgment and remand the matter for a new hearing followed by issuance of a new decision using the clear and convincing evidence standard.[5]

> 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.* [*v. C. and M.S.*, 642 S.W.2d 589, 590 (Ky. 1982)], yet our Supreme Court chose instead to remand the matter for a new trial. SCR[6] 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

[5] Even if precedent did not indicate the necessity of a new hearing, we would direct one in this case because the video record appears to have been partially destroyed or gone missing.

[6] Kentucky Rules of the Supreme Court.

> 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.

Id. at 57.

Our conclusion on Biological Parents' third argument essentially moots their other arguments making review of those arguments unnecessary. However, we do deem it necessary to briefly address one procedural irregularity, which we find deeply troubling. After Adoptive Parents filed their adoption petition, the DNA action effectively ceased even though the Cabinet continued to file case reports with the family court, the last of which recommended that Child be returned to Biological Parents. It appears to us that the family court placed the adoption action above the DNA action even though the DNA action was senior. The DNA action should not have lain dormant. Case reviews should have proceeded, and the parties' motions for increased visitation and a return of custody should have been timely addressed by the family court. Importantly, the Cabinet should have been permitted to make its recommendations to the family court irrespective of the effect, if any, returning Child's custody to Biological Parents

might have had on the pending adoption. We cannot ignore that this procedural irregularity had a profound impact on Biological Parents' ability to demonstrate a change in their circumstances. On remand, the family court should reopen the DNA action, have the Cabinet submit an updated case report, and conduct a review prior to even addressing the adoption case. The senior action must take precedence.[7]

Likewise, we cannot countenance the unusual procedure employed by the family court of having Biological Parents present all their proof by deposition transcript when Adoptive Parents were given the opportunity to present their testimony live. Of course, this would not in and of itself require us to vacate and remand for a new hearing, especially where Biological Parents did not contemporaneously object. Since we are remanding for a new hearing, however, fundamental fairness dictates that Biological Parents should be permitted to put on live proof should they so desire.

[7] We are cognizant that this case was procedurally irregular in several ways, including twice being reassigned in a relatively short amount of time. We are confident that the newly assigned judge worked diligently to keep himself abreast of the cases, and no doubt the DNA action was inadvertently dwarfed by the larger, more complicated adoption proceeding. Even so, we cannot ignore that the DNA action was senior and should have taken precedence or the effect that the failure to schedule regular case reviews in the DNA action had on this family, particularly on Biological Parents who were actively seeking to regain custody of their Child.

III. CONCLUSION

It is regrettable that this action did not result in permanency for this young child. The errors committed were avoidable. But we cannot sacrifice a biological parent's fundamental liberty rights just for the sake of achieving permanency quickly. To do so would render those rights hollow and meaningless, which would be far worse for society at large. Accordingly, for the reasons set forth above, we vacate the family court's findings of fact and conclusions of law and judgment of adoption and remand this matter for a new hearing followed by issuance of a new decision using the clear and convincing evidence standard. We trust the family court will act rapidly in both the DNA action and the adoption matter.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Hailey Scoville Bonham
London, Kentucky

Carl A. Short, II
Manchester, Kentucky

BRIEF FOR APPELLEE:

Kelly Kirby Ridings
London, Kentucky