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Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1441-ME

T.S., NATURAL FATHER — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE W. KENT VARNEY, JUDGE
ACTION NO. 23-AD-00008

CABINET FOR HEALTH AND FAMILY SERVICES; B.P.; R.M.; R.P.; AND T.R.R.S., A MINOR CHILD — APPELLEES

AND

NO. 2023-CA-1442-ME

T.S., NATURAL FATHER — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE W. KENT VARNEY, JUDGE
ACTION NO. 23-AD-00009

CABINET FOR HEALTH AND FAMILY SERVICES; B.P.; R.M.; R.P.; AND T.R.R.S., A MINOR CHILD — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CALDWELL, COMBS, AND EASTON, JUDGES.

CALDWELL, JUDGE: T.S. ("Father") appeals from orders of the Pike Circuit Court granting petitions for adoption without his consent, as the living, biological father of the minor children at issue. Because the family court failed to specifically state it utilized the clear and convincing standard of proof in making its findings, and otherwise failed to make written findings adequate to support involuntary termination of parental rights, we vacate and remand to the family court for a new hearing and new orders and judgments with required findings of fact and conclusions of law.

FACTS

Few underlying facts in the matter have any pertinence to our decision. To briefly summarize the procedural history, the record reflects verified petitions to adopt T.R.R.S., then ten years old, and T.R.R.S., then twelve years old ("Minor Children") were filed by the maternal grandparents, R.P. and B.P. ("Grandparents") with the Pike Family Court on February 6, 2023.[1] Both petitions contained a paragraph which included the following language:

[1] Pike Circuit Court, Family Division, actions No. 23-AD-00008 and No. 23-AD-00009.

> Said child sought to be adopted has lived in the home of [the Grandparents], off and on their entire lives. Social Services have been involved since 2014. [The Grandparents] currently have permanent custody, however, the parental rights of the natural mother and father have not been terminated at this time.

Father, the natural parent of the Minor Children, appeared at a status conference, in person, before the family court on June 7, 2023, after having been served by warning order. On the same date, the family court appointed counsel to represent Father; the record reflects Father did not consent to the adoptions.

Motion practice by Grandparents indicated pleading errors had occurred. Their second amended petitions, eventually entered in the actions, specifically requested involuntary termination of Father's parental rights. The second amended petitions for adoption contained the following paragraphs:

> 9. [Father and Mother] have collectively been unable to provide care for the minor child and have not done so for at least six (6) calendar months. [Father and Mother] have continuously and repeatedly failed or refused to provide or have been substantially incapable of providing essential parental care and protection for the minor child. [Father and Mother] have not done any of these things in the past six (6) months. Therefore, there is no reasonable expectation of improvement in parental care and protection in the future, considering the age of the child.
>
> 10. [Father and Mother] for reasons other than poverty alone have continuously or repeatedly failed to provide 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 parents conduct in the immediately foreseeable future.
>
> 11. [Grandparents] have no[t] received any child support or any other financial assistance from [Father and Mother]. The minor child is only vaguely aware of who [Father and Mother] are, they only know [Father and Mother] as his biological parents but there is no established relationship.
>
> 12. The parental rights of [Father and Mother] should be terminated and [Grandparents] have standing to adopt the minor child pursuant to KRS 199.470, KRS 199.500(4), and KRS 199.502(1).

On August 17, 2023, Father filed answers to both the second amended, as well as initial, petitions for adoption in both actions. In each, he asserted the failure to plead grounds for an adoption without parental consent, as required by KRS 199.502(1), as a defense. In his answers to the second amended petitions, he denied each of the second amended petitions' paragraphs 9-12. He explicitly objected to the termination of his parental rights.

The actions proceeded to a final hearing, which took place before the family court on August 31, 2023. Prior to the hearing, Grandparents and Father had both filed witness and exhibit lists with the family court. At the hearing's onset, Father, by counsel, requested a continuance, which was denied. The record

reflects testimony from the parties, as well as other witnesses, was presented.[2] A session report for an audio/video recording of the hearing indicates the family court, after hearing witness testimony, noted the parental rights of the Mother and Father were terminated. The session report ostensibly indicates the Grandparents briefly testified again, followed by the Minor Children, and the family court then announced the adoptions were granted.

The trial court entered a pair of substantially identical orders, one styled "findings of fact and conclusions of law," the other styled "judgment," in each action on November 16 & 20, 2023. In both actions, the orders containing the family court's "findings of fact" contained the following paragraph:

> 4. That the minor child was placed with [Grandparents], since 2014. The minor child was placed with [Grandparents] via relative placement in case number 14-J-76-001; 14-J-76-002. The parental rights of [Father and Mother] have been terminated and the minor child is currently in the custody of [Grandparents].[3]

The family court entered orders in both cases styled "judgment." Both contained the paragraph, "[t]hat due to a failure to provide care of the minor child, the parental rights of [Father and Mother] are hereby terminated." These

[2] Video of the proceedings was not included in the record before us and does not appear to have been designated by any party. As we are vacating and remanding, we have not sought out video of the hearing.

[3] While this paragraph references the parental rights of the biological parents being terminated in the past tense, it appears undisputed the only adjudication of parental rights took place in these adoption cases.

orders, in each case, also indicated "[t]he facts set forth in the Petition are true and established." However, no more specific finding, regarding Father or his parental rights, appeared in the orders. While unmentioned by the parties, neither did the family court, in any of its orders, give any indication of the standard of proof utilized to reach its decisions.

This appeal follows.

ANALYSIS

At the onset, we note our standard of review: "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. v. J.E.B.*, 638 S.W.3d 354, 359-60 (Ky. 2022) (internal quotation marks, footnotes, and citations omitted).

This unfortunate case, however, prompts us to emphasize that, despite the discretion undoubtably retained by our family court, adoptions, particularly those to which a biological parent does not consent, demand their *utmost* care. For these adoptions to survive scrutiny, our family courts must demonstrate, "*strict compliance* with the procedures provided in order to protect the rights of the natural parents." *E.K. v. T.A.*, 572 S.W.3d 80, 84 (Ky. App. 2019) (quoting *Day v. Day*, 937 S.W.2d 717, 719 (Ky. 1997) (emphasis added)). Where we are totally

lacking any demonstration of a family court's procedural compliance within its written orders, we are thwarted from reviewing whether a family court properly exercised its discretion.

It would be difficult to overstate the gravity of our family courts' duty and responsibility in exercising its inherent powers to grant adoptions which simultaneously terminate parental rights:

> 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.

M.S.S., 638 S.W.3d at 359 (citation omitted).

Four statutory requirements must be found to grant an adoption without the consent of the biological, living parents.

> When broken down, an adoption without consent involves four distinct considerations: (1) did the petitioner comply with the jurisdictional requirements for adoption; (2) have any of the conditions outlined in KRS 199.502(1) been established; (3) is the petitioner of good moral character, of reputable standing in the community and of ability to properly maintain and educate the child as required by the first portion of KRS 199.520(1); and (4) finally, will the best interest of the child be promoted by the adoption, and is the child suitable for adoption as required by the final portion of KRS 199.520(1).

A.K.H. v. J.D.C., 619 S.W.3d 425, 431 (Ky. App. 2021) (footnote omitted).

Of these requirements, Father's primary argument concerns the required finding of pleading and proof that "any of the [KRS[4] 199.502(1)(a)-(j)] conditions exist with respect to the child[.]" KRS 199.502(1).

These conditions concern the actions, omissions, or statuses of the purported biological, living parents. Father's focus is upon two of these, KRS 199.502(1)(e) and (g), which he concedes were pled by grandparents in their second amended petitions. Grandparents agree these conditions were pled in their second amended petitions but also argue adequate language for KRS 199.502(1)(a) was contained. The statutory language for these conditions, cited by the parties, is as follows:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> . . .
>
> (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;
>
> . . .
>
> (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,

[4] Kentucky Revised Statutes.

> 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;

KRS 199.502(1)(a), (e), and (g).

Father argues no finding of any KRS 199.502(1) ground by the family court, regarding any of these conditions, can be discerned from its orders. Upon review of the orders at hand, it is certainly true that no explicit reference, whatsoever, is made to KRS 199.502(1) or to any of the conditions listed therein.

Regarding this absence, Grandparents concede as much. Still, they argue, the family court's compliance with its obligation under KRS 199.502(1) may be implied. For support, they point to general language in the family court orders, including the statement: "[a]ll legal requirements relating to the adoption by the Petitioners of the minor child have been complied with[.]" In particular, they emphasize the statement in paragraph 2 in the orders styled as "judgment": "[t]he facts set forth in the Petition are true and established." Pointing to their *second amended* petitions, they note the inclusion of language quoting directly from KRS 199.502(1)(e) and (g) among their allegations. This language should be considered as incorporated into the family court's findings by reference, Grandparents argue. Consequently, they maintain, the family court's obligation to strict statutory compliance was met.

While we are sympathetic to Grandparents' position, we are not persuaded. The issuance of specific findings in its orders serves to demonstrate a family court has met its obligations under KRS Chapter 199. A total absence of specific findings in the family court orders on the issue of termination of parental rights eviscerates our ability to conduct any meaningful appellate review.

The chief difficulty with Grandparents' argument stems from application of CR[5] 52.01. Long ago, we have found this rule applies to adoptions where the biological, living parents do not consent. *See Jouett v. Rhorer*, 339 S.W.2d 865, 868-69 (Ky. 1960). Under CR 52.01, the family court was obligated, in its orders, to "*find the facts specifically* and state separately its conclusions of law thereon and render an appropriate judgment[.]" (Emphasis added.) The obligations imposed by the rule are not those of the lower courts alone. It includes an obligation incumbent upon a reviewing court, that: "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. But the appellate court cannot extend such due regard nor otherwise review the family court's assessment of the evidence if no specific written findings are made.

Aside from summary conclusions and sparse general statements, the family court's "findings of fact" lack even a cursory recitation of the evidence

[5] Kentucky Rules of Civil Procedure.

introduced at the hearing regarding Father. While video of the final hearing is not before us, the record indicates several hours of testimony and interviews occurred. The family court surely had "several factual reasons to support" its decision. *See generally Anderson v. Johnson*, 350 S.W.3d 453, 457 (Ky. 2011) (finding "clear violation" of CR 52.01 where a family court judge "could have stated several factual reasons to support his conclusion" that child's best interests were served by moving but "he did not"). Even imputing any and all relevant language from the second amended petitions to the family court's orders would not correct the lack of required findings. We would still be without any statement of the family court's reasoning. How the family court connected any specific facts to any specific conclusion would be a matter of speculation.

In adoption actions where the biological, living parent does not consent, KRS 199.502(2) mandates the family court to enter findings of fact, conclusions of law, and a decision either granting or denying the petition after hearing the evidence and arguments of counsel. Identifying *which* of the KRS 199.502(1) conditions the family court finds to have been pled and proven is, itself, an essential part of the findings of fact and conclusions of law which must be identifiable in the judgment. *See, e.g.*, *M.S.S.*, 638 S.W.3d 354 (noting the petition relied on conditions (a), (e), and (g), but the family court concluded the facts only

supported (a)); and *B.L. v. J.S.*, 434 S.W.3d 61, 68 (Ky. App. 2014) ("[T]he trial court properly found that subsections (a), (e), and (g) were satisfied . . . .").

It might be argued Paragraph 4 of the family court's orders styled "Judgment" indicates, to some degree, the court's reasoning: "[t]hat due to a failure to provide care of the minor child, the parental rights of [Father and Mother] are hereby terminated." However, it in no way identifies specific KRS 199.502(1) condition(s) the family court had found were met. Neither does it cite specific evidence, such as testimony the family court found credible, as support. The orders here violate CR 52.01 because they have no specific conclusion regarding any of the KRS 199.502(1) conditions and no specific factual findings regarding these conditions.

As specifically set forth in CR 52.01, facts from the final hearing the family court relied upon, and the weight it gave certain evidence are imperative to appellate review. The record reflects testimony from both Father and Grandparents, as well as witnesses called on behalf of each, was presented at the final hearing. Presumably, some testimony the family court heard conflicted with other evidence. However, there is a total absence of discussion in the orders before us of which witnesses the court found credible or not. Neither do we see a demonstration of the family court resolving conflicts in the evidence by identifying which evidence it gave more weight to or found more credible.

For reasons set forth below, a new hearing is required for these cases. Should the family court be presented with conflicting evidence in a new hearing, it must weigh the evidence, assess credibility, and resolve the issues presented by the conflicting evidence. *M.S.S.*, 638 S.W.3d at 359-60. Where an appellate court is able to identify the family court's essential findings in its orders, the family court's determination of whether to terminate parental rights is "afforded a 'great deal of discretion'" on appeal. *Id*. at 359 (citation omitted). Its determination will be reversed only if it is clearly erroneous and not based upon clear and convincing evidence. *Id*. at 359-60.

This requirement, that the family court's determination be based upon clear and convincing evidence, dictates that our analysis does not end here. Typically, our review is limited to arguments raised by the parties. *See*, *e.g.*, *Rainey v. Mills*, 733 S.W.2d 756, 757 (Ky. App. 1987). However, where an error is "so glaring" it naturally flows under our appellate review, we will not ignore it. *W.H.J. v. J.N.W.*, 669 S.W.3d 52, 55 (Ky. App. 2023); *see also Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011). When an obvious error encountered in our review *does* prompt us to address an issue not raised by the parties, we remain 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).

"[T]ermination 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). The requirement that a court use the clear and convincing standard of evidence in adoption proceedings is not explicitly set forth in KRS 199.502; rather, it is a requirement by virtue of the United States Constitution. *See M.S.S.*, 638 S.W.3d at 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).

The remedy available for this deficiency is not within the discretion of this Court. The Supreme Court of our Commonwealth long ago determined, when confronted with an involuntary adoption order with "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)." *N.S. v. C. and M.S.*, 642 S.W.2d 589, 591 (Ky. 1982). This Court

vacated the adoption judgment in *Wright v. Howard* for the same reason. 711 S.W.2d 492, 497 (Ky. App. 1986). More recently, we affirmed: "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." *W.H.J.*, 669 S.W.3d at 57; *see N.S.*, 642 S.W.2d at 591.

We have carefully scrutinized the family court's orders, including each three-page findings of fact and conclusions of law and two-page judgments. Aside from the issues detailed above, there is a total absence of any indication as to what standard of proof the family court based its findings upon. As we have previously held, even absent a party drawing to our attention this error, it is one we cannot ignore. *W.H.J.*, 669 S.W.3d at 54. Furthermore, precedent is clear as to the proper remedy; we must vacate the judgment and remand the matter for a new hearing, followed by issuance of a new decision explicitly utilizing the clear and convincing evidence standard. *Id*. at 57.

As our decision and its required remedy renders Father's argument regarding his motion for a continuance moot, we decline to address it.

Therefore, we 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 and setting forth required findings of fact and conclusions of law. We have confidence the trial court will act with urgency.

CONCLUSION

For the foregoing reasons, the Pike Circuit Court's decision granting the adoption petition is VACATED and the case is REMANDED with instructions to conduct a new trial, followed by a new decision utilizing the clear and convincing evidence standard. Should the family court again decide to grant the adoption, it must enter orders which make specific findings of the KRS 199.502(1) conditions which were pled and proven.

ALL CONCUR.

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