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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NOS. 2002-CA-001560-MR & 2002-CA-002065-MR

K.K.-C. APPELLANT

v.

APPEALS FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 99-AD-00012

N.S.; B.K.D.; M.A.D.;
M.S.; and R.N.G. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE. K.K.-C. appeals from orders entered by the Franklin Family Court authorizing the adoption of his daughter, R.N.G., by the appellees, B.K.D. and M.A.D., resulting in the termination of his parental rights. K.K.-C. claims that the decision of the trial court was not supported by clear and convincing evidence as required by KRS[1] 625.090. After reviewing

[1] Kentucky Revised Statutes.

the record, we find sufficient evidence to support the findings and conclusions of the trial court. Thus, we affirm.

In the summer of 1997, while serving in the United States Army and stationed at Fort Knox, Kentucky, the appellant became intimately involved with the appellee, M.S. Their brief relationship resulted in the birth of a daughter, R.N.G., on April 7, 1998. Prior to the baby's birth, K.K.-C. was transferred to Germany, where he remained until January 2000. Unable to care for R.N.G., M.S. entrusted the child to her own mother, N.S. When the child was six months of age, she was placed with the appellees, B.K.D. and M.A.D.

On October 1, 1999, B.K.D. and M.A.D. filed a petition to adopt the baby. Her mother consented to the adoption. Prior to filing their petition, the appellees asked K.K.-C. to give his consent to the adoption. He responded as follows:

> Be advised that I have no parental claims regarding [R.N.G.]. It has never been proven that I am her father. It is not my belief that I may be her father, so please accept this letter in lieu of the legal documents you sent to me. I am tired of being harassed by the mother, [M.S.], and I will not be maneuvered into signing documents which may be used later to implicate me. Since I am not named on the child's birth certificate and there is no valid paternity test, then my parental rights are actually unsubstantiated. I hope this will suffice for the adoption procedure. I wish the [adoptive parents] and [the child] the best for their future.

A Warning Order Attorney was appointed to advise K.K.-C. of the adoption. In his report filed on November 30, 1999, the attorney related that he had been successful in notifying K.K.-C. of the adoption and informed the court of the following sequence of events:

> On Friday, November 5, 1999, the undersigned spoke with Lieutenant John Crowley. Lieutenant Crowley informed the undersigned that he was an attorney for the United States Army and was stationed in Germany. He indicated that [K.K.-C.] had received notice of the action pending against him. Lieutenant Crowley also informed the undersigned that [K.K.-C.] would not be making an appearance in this action as he was an active member of the armed U.S. services. Lieutenant Crowley did advise the undersigned that [K.K.-C.] has denied paternity of [R.N.G.] [K.K.-C] had also advised Lieutenant Crowley that [K.K.-C.'s] name did not appear on the birth certificate of the child.

On June 6, 2000, several months after his return to the United States and his release from the military, K.K.-C. wrote a letter to the Franklin Family Court requesting that it stay the adoption proceeding until paternity tests were conducted. K.K.-C. then sought the assistance of the Franklin County Attorney's office, which filed a paternity action on September 20, 2000. After DNA tests positively identified K.K.-C. as R.N.G's father, he filed a petition seeking custody of his daughter. The two proceedings were then consolidated.

On September 17, 2001, the trial court conducted a hearing on K.K.-C.'s motion for temporary custody. Although the trial court denied the motion, it allowed the appellant to have supervised visitation with the child every week for one hour. Six months intervened between the entry of the order allowing visitation and the final hearing on the proposed adoption. During that period of approximately twenty-four weeks, K.K.-C. exercised the opportunity to visit with his daughter on only four occasions.

At the conclusion of the adoption/termination hearing on March 25, 2002, the parties agreed to submit proposed findings of fact and conclusions of law. On July 10, 2002, the trial court adopted verbatim the proposed findings of fact and judgment tendered by the adoptive parents. The court concluded that the adoptive parents had ably established statutory grounds for terminating K.K.-C.'s parental rights. Specifically, the trial court concluded that K.K.-C. had abandoned R.N.G. for a period of not less than 90 days. KRS 625.090(2)(a).

The court further determined that it was in R.N.G.'s best interest that B.K.D. and M.A.D. be allowed to adopt her. In reaching its conclusions, the lower court made the following findings:

> 5. The respondent, [K.K.-C.], currently resides in the state of Virginia.

[K.K.-C.] is the biological father of [R.N.G.].

6. [M.S.], the mother of [R.N.G.], informed [K.K.-C.] that he was the father of the child herein on several occasions both before and after the child was born. After [the child] was born, [the mother] sent [K.K.-C.] a picture of her.

7. [K.K.-C.] acknowledged to [the mother] that he was probably the father of [her] unborn child and suggested that [M.S.] obtain an abortion.

8. From May 1998 to October 1998, [K.K.-C.] wrote several letters to [M.S.] admitting that he knew he was the father of the child.

9. . . .

10. On September 17, 2001, the Court granted [K.K.-C.] supervised visitation with the child for one-hour each week at the Sunshine Center. [K.K.-C.] has exercised 4 of these visitations. The last visitation he exercised with [R.N.G.] was on December 15, 2001.

11. [K.K.-C.] gave [M.S.] a total of $150.00 to help her support the child from May 1998 to September 1998. Since that time[,] [K.K.-C.] has not provided any financial support of any kind for the child.

12. [K.K.-C] has never called [the child] or sent her a gift.

The court found that the adoptive parents were "of good moral character" and "financially able" to care for R.N.G. The court carefully reviewed all of the requirements of KRS 199.502, the statute pertaining to adoption without the consent of the biological parent. Finding that all criteria had been met, the court entered the judgment of adoption on July 10, 2002. K.K.-C.'s appeal followed.

On August 6, 2002, while the appeal was pending, the appellees filed a motion in the lower court pursuant to CR[2] 60.01 requesting that the court correct its judgment to reflect that it had applied the "clear and convincing" standard of proof in terminating K.K.-C.'s parental rights. The motion was granted, and a corrected judgment was entered on September 16, 2002. K.K.-C.'s appeal from the corrected judgment was consolidated with his original appeal in this Court.

K.K.-C. argues on appeal that the trial court erred in failing to apply the stringent standard of "clear and convincing" evidence in terminating his parental rights. He further contends that the trial court lacked jurisdiction to amend its judgment to correct this error. He claims that the evidence pertaining to the relevant statutory factors for terminating parental rights did not support the conclusion of the trial court that he had abandoned his child. Finally, he

[2] Kentucky Rules of Civil Procedure.

argues that termination of his rights is not in R.N.G.'s best interest.

K.K.-C. is correct in stating that the trial court failed in its original judgment to recite the standard of proof that it utilized in assessing the evidence. There is no reference anywhere in that judgment as to any evidentiary standard -- including the "clear and convincing" standard. However, the appellees contend that any omission in this regard does not rise to the level of reversible error because the proper standard of proof was discussed "at the multiple pre-trial conferences." However, those conferences were not recorded; thus, they have not been included in the record on appeal.

In order to satisfy the constitutional guarantees of due process and to allow for meaningful review, it is necessary that the fact finder articulate the proper standard of proof. In Wright v. Howard, Ky.App., 711 S.W.2d 492, 497 (1986), this Court, citing Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) and N.S. v. C. and M.S., Ky., 642 S.W.2d 589 (1982), characterized the trial court's failure to identify any burden of proof as "fatally defective." However, in the case before us, any question as to the standard of proof employed by the trial court was properly resolved in the court's amended judgment. In that amended judgment, the court carefully

recited that the statutory factors it applied in terminating K.K.-C.'s parental rights had been established by clear and convincing evidence.

K.K.-C. counters by arguing that the trial court was without jurisdiction to amend its judgment and that the correction was more than a mere clerical error permitted by CR 60.01. We disagree. There is no indication that the court used an inappropriate standard in making its initial judgment. On the contrary, it simply failed to recite any standard. An obvious error in drafting, that omission is the very type of oversight envisioned for correction by CR 60.01. See, Cardwell v. Commonwealth, Ky., 12 S.W.3d 672, 673 (2000).

K.K.-C. next argues that the weight of the evidence bearing on the issue of his abandonment of R.N.G. did not satisfy the clear and convincing standard. He does not challenge any of the trial court's factual findings as clearly erroneous. However, he contends that the court failed to give any consideration to his status as a member of the military, a reality which engendered in him considerable fear of being prosecuted for adultery by the military upon the revelation of his liaison with R.N.G.'s mother.

> Due to [K.K.-C.'s] military status and physical location in Europe, it would have been impossible for him to have determined his paternity of [R.N.G.] without the involvement of the military. [K.K.-C.'s]

> belief that a married Army soldier found to have committed adultery would be swiftly and severely punished through the military system, ultimately resulting in his incarceration, was a reasonable belief under the foregoing circumstances. Accordingly, it appears reasonable that until his departure from the military, [K.K.-C.] was fearful to pursue [R.N.G.'s] paternity through normal channels.

(Appellant's brief, pp. 9-10.)

K.K.-C.'s persistent, intentional failure to acknowledge R.N.G. as his own child (or to seek a determination of her paternity until well after her second birthday) comprised only a minimal portion of the overwhelming evidence of his abandonment of her. Regardless of whether his fears of reprisal from the military were real or imagined, it remains undisputed that he failed to assume any responsibility for R.N.G. -- financial or otherwise. He consistently refused to have any involvement in her life until June 2000. Although K.K.-C. professed to have a close and supportive family, he neglected to inform any of his family members of the existence of his daughter until she was nearly two years old. He attributed this failure solely to his desire to avoid embarrassment.

The trial court carefully considered K.K.-C.'s failure to visit R.N.G. after receiving the opportunity to rehabilitate himself and to establish a relationship with his baby girl. The evidence revealed that his visits did not merit a priority

status. K.K.-C. recited a number of excuses to justify his failure to visit his child: the time it took to travel to Kentucky was "daunting"; other distractions arose that conflicted with his visits; the visits did not go well. In light of such obviously unmeritorious excuses, we believe that it was reasonable for the court to have viewed K.K.C.'s token efforts to establish a relationship with R.N.G. as "too little, too late."

Based on our review of the record, we are satisfied that the court did not err in concluding that the appellees met their burden of proving that K.K.-C. abandoned his child as contemplated by KRS 625.090. Evidence of his abandonment includes: the significant delay in asserting any interest in R.N.G.; his failure to take any responsibility for his child; and his repeated failures to visit with her after having been granted ample opportunities to do so. The evidence clearly and convincingly demonstrated that K.K.-C. consistently ignored the well being of his infant daughter for purposes of his own convenience, establishing a pattern that continued after his release from the military. Thus, the court did not err in rejecting K.K.-C.'s argument that fear of being disciplined by the military should have negated or mitigated a finding of abandonment.

Finally, K.K.-C. argues that he is more highly educated than the adoptive parents and that he is supported "by numerous highly educated and professionally employed relatives." He contends that he can provide R.N.G. with far more advantages than B.K.D. and M.A.D. can offer. In the same vein, K.K.-C. characterizes the adoptive parents as insensitive to his daughter's mixed racial heritage; he challenges whether their values and attitudes render them suitable to raise his daughter.

> It is apparent that [R.N.G.'s] opportunities to know her father, sister, extended family and racial heritage, as well as the social, educational, and economic opportunities which would be created by her relationship to her biological paternal family have been tragically severed by the trial court's termination decision.

(Appellant's brief, p. 14.)

After abdicating his parental responsibilities for more than two years (admittedly out of concern for his own well-being), K.K.-C. fails to persuade us with this argument. Even if these factors were relevant, K.K.-C. has not considered the emotional sustenance to R.N.G., which is equally crucial in assessing her best interests. The alleged social or cultural benefits that he claims capable of offering her are not counter-balanced -- much less outweighed -- by the love, emotional support, and stability that her adoptive parents have provided and promise to continue.

For the foregoing reasons, the judgment of the Franklin Family Court is affirmed.

ALL CONCUR.

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