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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000181-MR

K.N., MOTHER OF THE INFANT CHILDREN, AND L.D.N., FATHER OF THE INFANT CHILDREN — APPELLANTS

v.

APPEAL FROM MERCER FAMILY COURT
HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NO. 06-AD-00002

R.P. AND L.P., GREAT GRANDPARENTS OF THE INFANT CHILDREN

AND

K.A.N. AND C.R.N., INFANTS UNDER THE AGE OF 18 YEARS

AND

CABINET FOR FAMILIES AND CHILDREN SERVICES — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

MOORE, JUDGE: This matter involves an appeal from the Mercer Family Court's termination of parental rights and judgment of adoption to the maternal great grandmother and step great grandfather of the children at issue. Upon review, we vacate and remand for proceedings consistent with this opinion.

The historical facts of this matter are convoluted, tragic and difficult to ascertain in light of the overwhelming amount of hearsay in the record, submitted at the termination trial in this matter. Because we have determined that the judgment is to be vacated and remanded, we detail only the salient facts herein.

K.N. and L.D.N. are the natural parents of C.R.N., date of birth April 20, 2000, and K.A.N., date of birth December 10, 1997. L.P. is the maternal grandmother of K.N., and the great grandmother of the children. R.P. is the husband of L.P. and the step great grandfather of the children.

On January 12, 2006, L.P. and R.P. filed a petition for adoption, which was answered by K.N. and L.D.N. on January 30, 2006, by their privately retained counsel, Michael Hawkins. K.N. and L.D.N. objected to the adoption on a number of grounds, including that their parental rights had not been terminated, that required statutory allegations had not been made, that L.P. and R.P. lacked standing to seek a judgment of adoption, that the children were not abused or neglected and that adoption was not appropriate because less drastic measures were available for the best interest of the children. As will be examined in greater detail *infra*, it is pertinent to note that at the

commencement of the trial in this action, counsel for the P.'s stated that it was a proceeding for the termination of parental rights, and in his closing argument he requested that the family court terminate the rights of the parents. The adoption proceedings commenced *only* after the parents' rights were terminated, and the adoption judgment was based on the fact the parental rights had been terminated.

K.N. and L.D.N. do not dispute that they have not been model parents. L.D.N. admitted that he has a long history of serious drug abuse and that he is a drug addict but is in treatment. He also has a long criminal record including drug offenses, manufacturing of methamphetamine, disorderly conduct, aggravated assault, driving under the influence offenses, driving with a suspended license, etc., and several periods of incarceration. K.N. also admitted to a long history of drug abuse beginning when she was fourteen years of age and to being a drug addict in treatment. She also has at least seven criminal convictions since 2003, including one that took place while a permanency matter was pending involving her children.

Although both K.N. and L.D.N. admit to a history of drug abuse, the trouble that lead to losing custody of their children began in May of 2002. At that time, the couple went to visit friends in Indiana, and L.D.N. has admitted knowing that the purpose of the trip was to take part in manufacturing methamephtamine.[2] K.N. denies that she knew they were going there to manufacture methamphetamine or that she was involved in

[2] L.D.N. was convicted and incarcerated for fifteen months for his involvement in manufacturing methamephtamine.

the manufacturing of methamephtamine. She nonetheless had a "bad feeling" about the trip.[3]

On or about the night of arriving in Indiana, K.N. and L.D.N. were arrested for manufacturing methamphetamine and held for a period of time while trying to make bond pending the disposition of their criminal charges. K.N. was released on bond on June 24, 2002.

K.N. testified that when she and her husband left for Indiana, they left their children with L.D.N.'s mother in Owensboro, Kentucky. To the contrary, L.P. testified that the children were in her and R.P.'s care in Mercer County when K.N. and L.D.N. left for Indiana. Despite L.P.'s testimony, under oath at the trial in this matter that K.N. left the children in her care, the Comprehensive Assessment & Training Services (CATS) completed a report on November 17, 2003, citing to a Kentucky State Police Report dated December 12, 2002, documenting that K.N. left the children with L.D.N.'s mother,[4] not L.P. The report also details that L.P. drove to L.D.N.'s mother's house and told her that K.N. had given her permission to take the children for the weekend. The document further shows that L.P. stated that she would return the children after the weekend visit but did not do so. When K.N.'s mother-in-law tried to regain possession of

[3] K.N. was initially charged, but her charges were dismissed.

[4] It should be noted that as the Cabinet's involvement in this matter continued to the point of seeking relative placement for the children L.D.N.'s mother's home was approved for placement of the children. However, the children were never placed there. L.D.N.'s mother later died of cancer. A request was made to allow her to see the children prior to her death, but the P.'s denied the request.

the children, L.P. would not allow her to have them. The Cabinet's record submitted into evidence in the hearing in this matter[5] documents that K.N. did not give L.P. permission to take the children from L.D.N.'s mother. K.N.'s trial testimony was in accord.

Within a few days of gaining possession of the children after having apparently used deceptive means and while K.N. and L.D.N. were still being held pending resolution of their criminal charges in Indiana, L.P. filed an emergency custody petition in Mercer County in May of 2002, based upon her allegations that the parents had left the children with no one to care for them. At the time of the emergency hearing, it is undisputed that K.N. was released on bond and had attempted to regain her children from L.P. and R.P., but she was told by R.P. that the children had gone with L.P. to Gatlinburg, Tennessee. R.P. testified in accord at the termination trial.

Shortly after K.N. tried to get her children from L.P. and R.P., an emergency hearing was held on June 26, 2002, in Mercer District Court on L.P's allegations that the children were left by their parents with no one to care for them. It is undisputed that K.N. did not have notice of the emergency hearing, and that L.P. reported to the court that K.N. was incarcerated and that she did not know when she would return. It is not evident from the record whether R.P. made similar representations to the court at the emergency hearing; however, the record indicates he was present at the hearing. As mentioned *supra*, by this time K.N. had already gone to L.P.'s and R.P.'s house, while

[5] As will be examined *infra*, many of the Cabinet's records that were admitted into evidence included hearsay.

R.P. was at home, to regain her children; however, the district court was apparently not so informed, particularly in light of L.P's statement to the court that K.N. was still incarcerated.

Based upon L.P.'s petition for emergency custody and apparent misrepresentations that the parents had left the children with no one to care for them and that both parents were still incarcerated, the court temporarily placed the children in the custody of the Cabinet for Families and Children. The children were then placed with L.P. and R.P. based on the district court's finding that the children were dependent, despite the fact that K.N. was not in fact incarcerated at the time.

Later, a hearing on the temporary removal was held on December 10, 2002, and the district court made a finding that the children were neglected pursuant to KRS[6] 600.020(1)(c), keeping the placement with L.P. and R.P. The family court, at the termination trial presently under our review, relied on this finding.

After the neglect finding, the children remained in the temporary custody of L.P. and R.P. until March of 2003. At this time, the children were removed from their care and placed in foster care. The Cabinet's record submitted at the trial documents that the court placed the children in foster care due to concerns that the P.'s were "coaching" the children and that the parents and great grandparents did not get along well. The children remained in foster care until August of 2003 when they were returned to the temporary custody of L.P. and R.P.

[6] Kentucky Revised Statute

Also occurring at this time, K.N. alleged that R.P. had sexually abused her as a child. She candidly admitted at the termination trial in the matter at hand that she had fabricated this story in an attempt to regain her children. R.P. testified at the termination trial that K.N.'s allegations were the basis for the removal of the children. However, as mentioned above, entries in the record also include concerns for the children based on the parents and great grandparents' inability to get along and concerns of "coaching" by the great grandparents.

In 2003, L.P. and R.P. filed for permanent custody of the children in Mercer Family Court. During these proceedings, the counselor for the children recommended that they not have contact with K.N.; L.D.N. was still incarcerated at this time. There is not an order in the record denying visitation.

Thereafter, K.N. was arrested in March of 2004 for possession of illegal drugs and IV needles used to inject these drugs. L.P. and R.P. continued with custody of the children and allowed no contact whatsoever between the parents and children.

Regarding the termination and adoption proceedings, the family court, by order entered August 1, 2006, set the matter at hand for a case management conference for September 26, 2006, and for a two-day trial beginning November 2, 2006. All parties and only one witness each were permitted to testify at trial, and all other testimony was to be taken through deposition testimony or by report to the court.

In the interim, the depositions of K.N. and L.D.N. were noticed to be taken and were taken. However, no other depositions were taken in this matter.

On September 6, 2006, K.N. and L.D.N.'s counsel, Mr. Hawkins, filed a motion to withdraw as counsel, citing irreconcilable differences with his clients. He noticed the motion for the same day as the case management conference. Mr. Hawkins called the court's chambers and indicated that he did not intend to be present at the hearing.

At the case management hearing, K.N. and L.D.N. did not appear. The court held the hearing in a conference room. A discussion was thereafter held among the court, the great grandparents' attorney, and the children's GAL about whether K.N. and L.D.N. were entitled to the appointment of counsel. It was determined that the parents would have to first prove they are indigent pursuant to KRS 625.080(3). At that point, the great grandparents' attorney, William Erwin, referenced the parents' income as they testified to in their respective depositions. He stated that the record showed that the parents had approximately $4300 monthly in gross income, with L.D.N. earning $15 per hour with a 40 to 60 hour work week, and K.N. earning approximately $300 per week as a waitress.

With everyone still in the conference room, the court telephoned Mr. Hawkins regarding his motion to withdraw. Mr. Hawkins stated that he did not attend the hearing because he had contacted his clients and it was his understanding that they did not have any objections to his withdrawing. He had advised them in writing of the case management hearing and trial date. The court then inquired whether the motion to withdraw was based upon the parents' failure to pay Mr. Hawkins, to which Mr. Hawkins

stated that was not the case. Mr. Hawkins stated that his reasons for wanting to withdraw dealt with ethical reasons, and he believed it was no longer appropriate for him to represent the parents. He indicated that his reasons were based on actions of his clients during their depositions.

Thereafter, the court requested that everyone except his staff leave the conference room. At that time, Mr. Hawkins read a letter to the court that he had sent K.N. and L.D.N. regarding his reasons for wanting to terminate representation. These reasons included that they had previously been forty-five minutes late for a court hearing, an hour late for their depositions and had knowingly lied at their depositions regarding who drove their vehicle to the deposition.[7]

Mr. Hawkins also stated to the court that the parents had repeatedly and consistently not followed his advice. Thereafter, the court stated that it was incumbent upon it to ask these questions of Mr. Hawkins and that Mr. Hawkins should consider that he had been ordered by the court to reveal this information to the court. The court informed Mr. Hawkins that it was going to grant his motion.

After the telephone conference with Mr. Hawkins ended, the great grandparents, their attorney and the GAL returned to the conference room. The court informed them that it was going to allow Mr. Hawkins to withdraw due to the "bad faith"

[7] L.D.N. does not have a driver's license. When asked about who drove to the deposition, L.D.N. testified that he did not drive to the deposition that morning. Mr. Hawkins's associate knew this was untrue and during a break informed K.N. that she needed to clarify this during her deposition. During K.N.'s deposition, she was asked at least twice who was driving the vehicle and despite having been advised by counsel to clarify this, she lied both times, stating that she had been the one who drove the vehicle to the deposition.

of the parents and that it was the parents' fault it was allowing the withdrawal. The court further stated that it would not allow them to "sabotage" their own representation and that it would hold firm to the trial date set.

During the conference, another discussion was held regarding whether the court had to appoint counsel for the parents in the termination proceeding. The court stated that "without prejudging it, it does not appear that they are indigent." No hearing was held on whether they were indigent, and no court order was entered regarding such. The court noted that the parents had notice of the pending trial to be held in two months, and it reiterated that it was going to hold firm to the trial date. In the order allowing the withdrawal of Mr. Hawkins filed on October 4, 2006, the court included that the "withdrawal of counsel shall not delay the trial of this case, which was previously scheduled by this Court." K.N. and L.D.N. were noticed as being served with this order.

Other than responding to requests for admissions, the parents did not correspond with the court or take any actions regarding the pending trial to terminate their parental rights and to allow adoption of their children. They did not file a motion for a continuance of the trial to secure new counsel.

On November 11, 2006, the trial commenced in this action. K.N. and L.D.N. appeared without counsel. Both parties announced "ready" when asked by the court if they were prepared to proceed. K.N. and L.D.N., acting *pro se*, obviously did not understand the implications of announcing "ready." L.D.N. then asked for a continuance, stating that their attorney had "just quit [them] out of the blue" and that it takes them a

while to get the money together to hire another attorney. He requested that the court grant a continuance of only a few months to hire an attorney.

The court denied L.D.N.'s request for a continuance stating that the parents had known for several months that the trial date was scheduled. The court also stated that there had been a sufficient basis to allow Mr. Hawkins to withdraw.

During opening arguments, counsel for the great grandparents stated that it was a proceeding for termination of parental rights. And, in his closing argument, the great grandparent's counsel requested that the family court terminate the rights of the parents.

The only person other than the parties to testify at the termination hearing was Laurie Eldridge, a social worker.[8] She testified that the parents in the past had only minimally complied with prior case plans and the compliance was insufficient for a recommendation that the children go back to the parents when this issue was reviewed at the permanency hearing. Ms. Eldridge further testified that the parents have never fully complied with any of the Cabinet's case plans. She testified that permanent custody was granted to R.P.and L.P. on June 4, 2004. Until this time, K.N. and L.D.N. had limited visits with the children. After permanent custody was granted to L.P. and R.P., all visitation and contact between K.N. and L.D.N. and their children were suspended. This, however, was apparently not done by court order.

[8] The family court limited witnesses to the parties and one witness each. Per the family court's order, all other witness testimony was to come in by deposition only.

During Ms. Eldridge's testimony , the court asked what the Cabinet's role was in such an unusual case as the one at hand. Specifically, the court wanted to know whether the Cabinet made recommendations where "two private individuals filed for an involuntary termination of parental rights, as well as an adoption."

During Ms. Eldridge's testimony, Mr. Patrick, the children's GAL, offered for admission, pursuant to the court's prior order, a "box of records" containing the Cabinet's file. Ms. Eldridge did not authenticate these records. The box contained hundreds of loose pages of documents that appear to be copies of the Cabinet's record involving the children. The parents, acting *pro se*, obviously did not know to object. The family court allowed the admission of these records as the GAL's Exhibit One.

The family court's record also contains a letter dated March 20, 2006, from Felicia R. Morgan, B.S., who was a counselor for L.D.N. In this letter, Ms. Morgan stated that L.D.N. entered a treatment center on February 23, 2005, and was prescribed Methadone Hydrochloride to help him with his drug addictions. She stated that he had made progress, passed drug screening, and attended regular counseling sessions. Ms. Morgan commented that she expected L.D.N. to continue to progress in the future. However, Ms. Morgan was not called as a witness at the termination trial.

A letter is in the family court's record from Meghann Jeffries, B.S., a counselor for K.N., on March 20, 2006. In the letter, Ms. Jeffries, noted that K.N. was admitted into a drug treatment center on February 23, 2005 and was prescribed Methadone Hydrochloride to help with her drug addiction. Ms. Jeffries reported that

K.N. attended counseling regularly, passed drug screening tests, was cooperative in her treatment and was expected to continue to progress in the future. Ms. Jeffries was not called as a witness at the termination hearing.

K.N. testified at the termination hearing that she tried to be a parent to her children but that L.P. interfered with this. L.P. would not allow her or her husband to speak with the children. She further testified that she had left her children with L.D.N's mother when she and her husband left for Indiana. After K.N. and L.D.N. were arrested and incarcerated in Indiana, as noted earlier, the CATS report indicated that L.P. lied to L.D.N's mother to gain possession of the children, although K.N. had told L.D.N.'s mother not to let L.P. have the children.

K.N. testified that she bonded out of jail in Indiana and then she went to R.P. and L.P.'s house to get her children. She knocked for a long time, but no one answered. Finally, she contacted the police, who came to the house. R.P. answered the door, acting as if he had not heard the earlier knocks. The police asked where the children were, and R.P. responded that L.P. had taken the children to Gatlinburg. Within a few days, an emergency custody hearing was held, which K.N. stated she knew nothing about. Emergency custody was granted to the Cabinet at this time and the children were placed with L.P. and R.P., although K.N. was no longer incarcerated. K.N. testified that it was not long after this that she made false claims that R.P. had sexually abused her as a child to try to get her children back.

During R.P.'s testimony, he was asked why he wanted to adopt the children. He responded that the children had initiated the conversation and that they wanted to be adopted.[9] He testified that the parents had no contact with the children in three years and that when he and L.P. wanted to file the petition for adoption, they had a difficult time locating the residence of K.N. and L.D.N. R.P. testified that he and L.P. had provided for all the financial needs of the children, except when they were in foster care, and that they did not receive any financial support from K.N. and L.D.N. R.P. acknowledged that on one or two occasions, K.N. and L.D.N. sent a box of items for the children. However, he stated the children did not want any of the items from their parents.

On cross examination by L.D.N., R.P. testified that the children told him they did not want to see their parents. And, on cross examination by the children's GAL, R.P. testified that the therapist, who was not present to testify nor was her deposition taken, made it clear that it would be detrimental to the children to have contact with their parents.

The court asked R.P. if he had knowledge about an investigation into whether the younger child had been sexually abused. R.P. testified that an investigation had been conducted that substantiated that the younger child had suffered sexual abuse, but it was unknown who the perpetrator was.[10]

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[9] The children were not present at the termination hearing. However, the parents, acting *pro se*, did not object to this statement; nor did they object to any other hearsay statements.

[10] The Cabinet's file indicates that this is accurate.

L.P. was then called as a witness. She testified in accord with her husband that the counselor recommended that the children should not have contact with their parents and that contact would be detrimental to them.

When cross examined by L.D.N., L.P. denied knowing that K.N. was released on bond prior to the emergency custody hearing in May of 2002. However, R.P. earlier testified that K.N. had come to their house to see her children after she was released on bond, but that L.P. had taken the children to Gatlinburg. Presumably, R.P. would have informed L.P. that K.N. had come to their home and was out of jail, but L.P. remained firm in her testimony that she did not know at the time of the emergency custody hearing that K.N. was not incarcerated.

K.N. next cross-examined L.P. and again, L.P. stated that she did not know that K.N. was out of jail when the emergency custody hearing took place. She also denied taking the children from L.D.N.'s mother when L.D.N. and K.N. left for Indiana. Instead, L.P. testified that the children were in her care at that time. L.P. testified that it took R.P. and her over a year to locate K.N. and L.D.N. to serve the adoption papers on them.

During closing arguments, counsel for the great grandparents set forth the factors that he believed supported termination of the parents' rights. In conclusion, he requested that the court terminate the parental rights of K.N. and L.D.N.

The court thereafter stated that its practice in a “termination proceeding” was to review the record and make a finding from the bench whenever possible.

Thereafter, the court took a recess to review the record, including specifically Exhibit One, the box of records submitted by the GAL containing the Cabinet's records.

Upon returning to the bench, the court orally announced findings of fact and conclusions of law, which were later memorialized in writing and entered in the record. The court specifically stated that it had reviewed the "box of records" to see how the testimony "lined up" with the record. The court made numerous references in its findings to the box of records comprising the GAL's Exhibit One in outlining the history of the case. Included in these references were notations made in the Cabinets' records to which no one had testified at the hearing. Regarding the termination of parental rights, the court found that the children had been adjudged by the Mercer District Court to be neglected children in December of 2002. The court ruled that the parents had abandoned the children for more than 90 days having disappeared from the children's lives for a period of over a year, had failed to provide support to them for not less than six months, and had failed to provide essential necessities for the children with no reasonable expectation of improvement. The court also found the great grandparents to be the children's *de facto* parents.

Although the proceedings involved termination of the parental rights, the family court further determined that adoption was preferable over continuing permanent custody because it was (1) in the children's best interest; (2) more permanent; (3) a legal pronouncement of the factual situation that existed; (4) a result of the parents not having maintained themselves as parents while the great grandparents had; (5) a way to grant

finality to the children as the parents had been given more opportunities than most parents in these situations but had continually failed to follow through with the opportunities given; and (6) a way to deter the parents from having a favored status if the great grandparents died. The court also opined that the great grandparents had expended presumptively thousands of dollars in attorneys' fees to the benefit of the children, taken them to counseling appointments and court and maintained a steadfast commitment to these children. Consequently, the court ordered that the parents' rights be terminated.

Thereafter, the court had the parents escorted from the courtroom and then stated that it "wanted to do the adoption today too." The court stated that proof on the petition for adoption would be taken and then it moved to adoption proceedings, reminding the great grandparents that they were still under oath. Their counsel asked them the relevant questions under KRS 199.520, to which they responded accordingly. The court then congratulated them and asked counsel to draft the judgment of adoption.

On December 15, 2006, Clifton A. Boswell entered an appearance on behalf of K.N. and L.D.N. On the same day, Mr. Boswell filed a motion to proceed *in forma pauperis* on behalf of the parents to waive the filing fees for a notice of appeal. Attached to the motion were affidavits of indigency for both K.N. and L.D.N. As to their financial status, both only averred that they were unable to afford the filing fee that was required to file a notice of appeal. Having failed to demonstrate indigency, the court denied their motion. And, on January 22, 2007, K.N. and L.D.N.'s notice of appeal which was tendered with their motion for *in forma pauperis* status was filed.

STANDARD OF REVIEW

Because adoption is a statutory right, severing permanently the parental relationship, Kentucky courts require strict compliance with the procedures in order to protect the rights of the natural parents. *Day v. Day*, 937 S.W.2d 717, 719 (Ky. 1997). "Nothing can be assumed, presumed, or inferred and what is not found in the statute is a matter for the legislature to supply and not the courts." *Id.* (citing *Coonradt v. Sailors*, 209 S.W.2d 859 (Tenn. 1948)). The trial courts must find that termination of parental rights is supported by clear and convincing evidence. *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986). The findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. *Id*.

ANALYSIS

A circuit or family court may grant an adoption without the consent of the natural parents "if it is pleaded and proved as a part of the adoption proceedings that any of the provisions of KRS 625.090 exist with respect to the child."[11] KRS 199.500(4). Or,

[11] Kentucky Revised Statute 625.090(1)(a) requires that the circuit court must find that the child has been adjudged to be an abused or neglected child as defined by KRS 600.020(1), by a court of competent jurisdiction or that the child is found to be an abused or neglected child in the underlying proceedings. As to the remaining elements in KRS 625.090, KRS 199.502(1), which permits an adoption to be granted without the consent of the biological living parents, reflects the same relevant factors as set forth in KRS 625.090 as follows:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> (b) That the parent had inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;

a court may grant an adoption without the consent of the natural parents if their rights have been terminated. KRS 199.500(1)(b). Additionally, an adoption may proceed without parental consent pursuant to the conditions set forth in KRS 199.502.

> (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
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> (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to a child named in the present adoption proceeding;
>
> (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;
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> (f) That the parent has caused or allowed the child to be sexually abused or exploited;
>
> (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;
>
> (h) That:
>
> 1. The parent's parental rights to another child have been involuntarily terminated;
>
> 2. The child named in the present adoption proceeding was born subsequent to or during the pendency of the previous termination; and

Presently, the parties dispute under which statutory provision the adoption proceeded. The parents maintain that the requirements under KRS 625.050(3) were not complied with in the present case.

On the other hand, the great grandparents maintain that KRS 625.050(3) is irrelevant to the case at hand because the adoption proceedings were initiated under KRS 199.502, which allows for an adoption of a child without the consent of the biological living parents of a child if it is pleaded and proved as a part of the adoption proceedings that any of nine specific facts are present. The great grandparents contend that KRS 625.050(3) only applies to proceedings for involuntary termination of parental rights when there is not an adoption proceeding. They thereafter argue that KRS 199.502 sets forth the proceedings for involuntary termination of parental rights when an adoption has been filed. The great grandparents then opine that KRS 199.502 permitted them to proceed with an adoption and an involuntary termination of parental rights therein. We disagree with their analysis on a number of fronts.

> 3. The condition or factor which was the basis for the previous termination finding has not been corrected; or
>
> (i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect.

Prior to examining the correct statutory procedures, we must first turn to the constitutional nature of this matter. In *Santosky v. Kramer,* 455 U.S. 745, 769-70, 102 S.Ct. 1388, 71 L. Ed. 2d 599 (1982), the Court reasoned as follows:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Id. at 753-54, 102 S.Ct. 1388. The Court continued, noting that "a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Id.* at 758-59, 102 S.Ct. 1388 (internal quotation marks and citation omitted). "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id.* at 759, 102 S.Ct. 1388. Thus, "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." *Id*.

Following *Santosky*, our Court recognized the constitutional aspect to a parent's interest in a proceeding to terminate parental rights in *O.S. v. C.F.*, 655 S.W.2d 32 (Ky. App. 1983). The Court held that "[p]arental rights are so fundamentally esteemed

under our system that they are accorded due process protection under the 14th Amendment to the United States Constitution, when sought to be severed at the instance of the state." *Id*. at 33. Consequently, our review must include whether the process of terminating K.N. and L.D.N.'s parental rights was fundamentally fair.

Although the State did not initiate the proceedings at issue, the nature of the parents' and children's fundamental rights remain unaltered. "[T]he same procedural safeguards mandated [in *Santosky*] apply regardless of whether one is threatened with the loss of his or or her parental rights pursuant to . . . the involuntary termination statute, or by adoption of his or her child without [the parent's] consent. The result to the natural parent is the same in either proceeding, that is, total deprivation of any legal or personal connection with the child." *D.S. v. F.A.H.*, 684 S.W.2d 320, 323 (Ky. App. 1985). Moreover, because judicial action was required for the termination of parental rights, it is evident that the State did have involvement in severing these rights.

Kentucky Revised Statute 199.502 does not require that a *proceeding* to terminate parental rights take place before a petition of adoption is granted. Rather, and as the language of the statute specifically states, "an adoption may be granted without the consent of the biological parents of a child if it is pleaded and proved as part of the *adoption* proceedings that any [of a number of conditions exists]." (Emphasis added). Termination of parental rights to the child or children sought to be adopted is not one of the enumerated conditions. Certainly, an adoption without the consent of living biological parents effectively terminates the biological parents' rights; therefore,

constitutional safeguards must be implemented. *See Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003).

In *Wright v. Howard*, 711 S.W.2d 492 (Ky. App. 1986), Judge Dunn explained the genesis of confusion when a non-consensual adoption includes a request to terminate parental rights.[12] In *Wright*, as in the case at hand, both an adoption and the termination of parental rights were sought by a nonparent.[13] On this, Judge Dunn explained that

> the prayer to terminate is unnecessary-the adoption itself terminates the non-consenting parent's parental rights. Allegation and proof of the grounds for involuntary termination suffices as a substitute for KRS 199.500 sworn consent and, assuming all other legal requirements have been met, without resort to an order terminating the parental rights of the [non-consenting parent], the trial court then can enter a valid judgment of adoption containing only the mandatory findings of KRS 199.520, which is titled Judgment-Prerequisites-Order-Name and legal status of child. . . .

Id. at 496.

Before us, however, the great grandparents maintain that they did not seek to terminate the parents' rights, but rather proceeded under KRS 199.502. Regardless of how the great grandparents attempt to now frame what took place below, the record evinces that they sought a termination of the parents' rights *before* adopting the children.

[12] Although KRS 199.500 has been amended since *Wright*, the provision on which it is based remains intact. Thus, the analysis of *Wright* provides detailed guidance on the question at hand.

[13] In *Wright*, the nonparent's petition was styled as a "Petition for Adoption and Termination of Parental Rights." In the case at hand, the great grandparents styled their petition as only a "Petition for Adoption." Nonetheless, in the petition they sought to terminate parental rights and also requested such at the termination trial held in this matter.

A trial was held specifically on the *termination* of parental rights, at which the great grandparents' counsel's requested *termination* in his opening and closing arguments. Additionally, during the trial, the court stated that the proceeding involved "two private individuals [who] filed for an involuntary termination of parental rights, as well as an adoption." Thereafter, in making its decision, the court stated that it was reviewing a *termination* matter and in its findings did in fact terminate the parents' rights. While the great grandparents state they were proceeding under KRS 199.502, in actuality, the proceedings were to terminate the parents' rights so the children were available for adoption. This is even more evident because only after the parents' rights had been terminated and they had been removed from the courtroom, did the court announce it was moving to the adoption proceedings. Moreover, the findings of fact with regard to the petition for adoption included as a foundation for the adoption that

> [t]he infant children sought to be adopted were born in Kentucky, and the parental rights of the Respondents [L.D.N. and K.N.] have been *terminated* pursuant to Mercer County Family Court Order, Case Number 06-AD-00002.

(Emphasis added).

Contrary to the proceedings which the General Assembly allows under KRS 199.502 for adoption without parental consent, this case was not practiced under nor did it procedurally follow KRS 199.502. Rather, the trial in the matter proceeded as a termination of parental rights.

Once the parents' rights were terminated, the court thereafter allowed the adoption proceedings to begin in their absence. Thus, rather than proceeding under KRS 199.502, the adoption proceeding was substantially (regardless of the form the great grandparents place on it now) under KRS 199.500 (1)(b) (allowing for an adoption without parental consent if the parents' rights have been terminated under KRS Chapter 625). Having chosen this route for the proceedings, the great grandparents cannot now be heard to complain. Accordingly, the procedural protections under KRS Chapter 625 should have been followed pursuant to KRS 199.500(1)(b).

The procedures for involuntary termination of parental rights outlined in KRS 625.050 include that such proceedings may only be initiated by the Cabinet, any child-placing agency licensed by the Cabinet, any county, or Commonwealth's attorney or parent. KRS 625.050(3). Consequently, we agree with the parents that the great grandparents lacked standing to initiate termination proceedings.

Further, as to the termination and adoption proceedings as practiced under this case, *Wright*, 711 S.W.2d at 494, provides instruction. In *Wright*, as in the case at hand, the trial court entered its "Findings of Fact and Conclusions of Law" and pursuant to this, entered a "Judgment of Adoption" and an "Order Terminating Parental Rights."

The non-consenting parent in *Wright* argued that the judgment was void because (1) it was not supported by the evidence and (2) "since a judgment of adoption in and of itself terminates any meaningful legal relationship between the adopted child and its non-consenting party defendant natural parent, the treatment of the [party seeking

adoption] and the trial court of the alleged grounds for involuntary termination of his parental rights as a separate and distinct cause of action was contrary to the provisions of KRS Chapter 199." *Id.* Agreeing, the Court of Appeals vacated the judgment, "considering the combination of the so called 'judgment of adoption' and 'order terminating parental rights' as being one document that comprises the judgment." *Id*.

Because adoption is a statutory right, severing permanently the parental relationship, Kentucky courts require strict compliance with the procedures in order to protect the rights of the natural parents. *Day*, 937 S.W.2d at 719. The parents' rights having been terminated in absence of the protections outlined in KRS Chapter 625 and the adoption having been based on the proceedings to terminate the parents' rights, the family court's judgment must be vacated.

Even had the proper procedures been followed, we would vacate for other reasons. Under the constitutional mandate of *Santosky*, we are greatly troubled by a number of findings, even in light of our limited review of a family court's findings of fact. *See e.g.*, *G.E.Y. v. Cabinet for Human Resources*, 701 S.W.2d 713, 714 (Ky. 1985). Our greatest struggle is the admission of and the family court's reliance on Exhibit One, the "box of records" the GAL submitted, containing the Cabinet's file. This box, which contained hundreds of loose pages of documents that appear to be copies, was submitted without any authentication, and it contained numerous entries that were hearsay. The parents, acting *pro se*, obviously did not know to object to the introduction of these records. In the *G.E.Y.* opinion, the Court precluded the introduction of a compilation of

such records, determining that the common law "shopbook" exception to the hearsay rule did not apply.

G.E.Y., however, has been narrowed by the Kentucky Supreme Court to clarify that exceptions to the hearsay rule apply in proceedings to terminate parental rights. *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338 (Ky. 2006); *Cabinet for Human Resources v. E.S.*, 730 S.W.2d 929 (Ky. 1987); *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954 (Ky. 1997). In *G.E.Y.*, the Court found the "shopbook" exception to the hearsay rule objectionable because:

> The worker's narrative record in the instant case contains, in part, bits and pieces of gossip gathered from all over creation, the sources of which are frequently unidentified. The record contains the subjective and unverifiable impressions of the workers and their contacts of G.E.Y. and letters from third parties who did not testify containing highly inflammatory and prejudicial accusations against the appellant.

A.G.G., 190 S.W.3d at 347 (quoting *G.E.Y.*, 701 S.W.2d at 715).

In *E.S.*, however, the Court permitted portions of the Cabinet's file to be admitted, reasoning that

> it is the opinions and conclusions expressed in the social worker's records, rather than the factual observations, which cause difficulty. We hold that those entries in the case record made by the social worker which constitute statements of factual observations are admissible under the business entries exception to the hearsay rule, and those statements which express opinions and conclusions are not.

A.G.G., 190 S.W.3d at 347 (quoting *E.S.*, 730 S.W.2d at 932).

Then, in *Prater* the Court explained:

> [E]ven if a public agency's investigative report satisfies the foundation requirements of KRS 803(6), that does not authorize a carte blanche admission of each individual entry contained in the report. KRE 803(6) and KRS 803(8) only satisfy the hearsay aspects of the business or public record, itself. If a particular entry in the record would be inadmissible for another reason, it does not become admissible just because it is included in a business or public record.

A.G.G., 190 S.W.3d at 347-78 (quoting *Prater*, 954 S.W.2d at 958).

In the matter at hand, the entire file of the Cabinet was collectively admitted as the GAL's Exhibit One, without authentication, and it contained hundreds of pages of entries and documents. While some of the entries would have been admissible under the analysis of *A.G.G., E.S.,* and *Prater,* from any vantage point the entire box should not have been admitted as it contained numerous entries that were clearly hearsay. Given the fact that the family court stated several times that it relied on the Cabinet's file, and considering the fundamental right to a parental relationship with one's children, we conclude the family court committed palpable error in allowing admission of these records carte blanche. CR 61.02 ("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.").

And, beyond the box of records, the great grandparents made numerous hearsay statements at the trial regarding what the children (whose testimony was not taken) had told them. Moreover, the great grandparents testified to statements made by therapists and others who were not present to testify.

We mean no disrespect to the family court and are aware that when the court acts as a fact finder "it is presumed that [it] will be able to disregard any hearsay statements." *See G.E.Y.*, 701 S.W.2d at 715. Nonetheless, where is it apparent that the court relied, even in part, on a "box of records" containing numerous hearsay entries in making its decision, "the error in the admission of the unreliable evidence cannot be deemed harmless or nonprejudicial." *Id*.

Further, our having reviewed the box of records in great detail, there is a divergent view of the parties depending on whether the social workers are from Rockcastle County or Mercer County.[14] While this Court is not in the position to evaluate credibility and because this matter is already remanded, we pause to note we are troubled in light of the vast divergent points of view of social workers regarding the parties depending on whether the case was in Rockcastle or Mercer County. We are not blind to the selfishness and lack of judgment made by the parents in the case at hand, and their

[14] Prior to the May 2000 incident, the Cabinet had been involved with the family in Rockcastle County.

contempt for consistent parenting cannot be tolerated, encouraged, condoned or rewarded. However, neither can the trail of apparent interference by the great grandparents be ignored. We have no reservations in agreeing that the parents are far, far from model parents, but even they are entitled to a fundamentally fair process and cannot have all ties to their children severed where the very foundation for terminating all ties may be based on manipulations by the great grandparents.

We are also concerned that the court made a finding that the parents had abandoned their children for not less than 90 days. Regarding abandonment and a failure to provide support, the *Wright* Court instructs that natural parents cannot be placed in a "Catch 22" situation and then have their parental rights severed. 711 S.W.2d at 497. In the *Wright* case, similar to the case at bar, the father was denied the right to visit with his child and the court required no support of him. *Id*. The Court determined that "[t]hese 'Catch 22' circumstances negate any finding that [a parent's] so called abandonment, desertion or neglect was by clear and convincing proof that evidenced a settled purpose to forego all his parental duties and all parental claims to the children." *Id.*

"'[A]bandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child." *O.S.*, 655 S.W.2d at 34. There can be no abandonment where parents are under a court order not to exercise visitation. *Wright*, 711 S.W.2d at 497. And, incarceration is not tantamount to abandonment. *L.S.J. v. E.B.*, 672 S.W.2d 938, 940 (Ky. App. 1984). Further, where parents are excluded from their children's lives by those having possession

of them, the parents cannot be considered to have abandoned their children. Given these situations in light of the case at hand, especially where the great grandparents blocked *all contact* between the children and parents,[15] the family court's finding of abandonment is erroneous as a matter of law.

This Court most certainly agrees with the family court that parenting cannot be on a "whim." Neither, however, can individuals, seeking adoption and having control and custody of the children, meet their standard of clear and convincing evidence that the parents have evinced a "settled purpose to forego all parental duties and relinquish all parental claims to [children]," *O.S.* 655 S.W.2d at 34, when they have built roadblocks to all contact, visitation and attempts the parents have made toward maintaining a relationship with their children.

As to providing support, as in *Wright*, failure to provide any support where none has been ordered and where any attempts to provide even clothing are rejected, raises a concern that this statutory element has been met. Under the adoption statutes, when all bonds between child and parent are to be forever severed, parents must have shown a "settled purpose to forego all parental duties and relinquish all parental claims to the child" *O.S.*, 655 S.W.2d at 34. This situation cannot be artificially created by those seeking adoption by blocking parental attempts. Even considering the grave trouble the parents created for themselves, the great grandparents cannot exclude the parents from

[15] We note that the great grandparents alleged that it took a year to track down the parents to serve them with the adoption papers at hand. Nonetheless, for at least a period extending longer than this, the great grandparents thwarted all attempts at contact.

their children's lives, and then claim they have relinquished all parental duties. "The mere fact that a child would have a better home elsewhere or that the natural parent may provide less parental care than the adopting parent is not grounds to terminate the parental rights in an adoption proceeding." *Id.*

As mentioned earlier, before all ties are severed between parent and child, both are entitled to fundamentally fair procedures. *Santosky,* 455 U.S.769-70, 102 S.Ct. 1388. And, while it cannot be disputed that K.N. and L.D.N. are far from model parents and at least historically (as their present status is unknown) selfishly put their drug addictions ahead of their children, the boundaries of due process protect even them.

The trial testimony of the great grandparents illustrates a long history of a strained relationship with the parents. And, because of the parents' irresponsible behavior and selfishness, their children have suffered. However, not even this should allow a non-parent to capitalize on the situation and forever sever all ties unless the parents have been afforded fundamentally fair procedures.

The parents also appeal the family court's denial of their request for a continuance to obtain counsel after announcing "ready" at the commencement of the termination trial. Because we are remanding this matter for other reasons, we decline to review this matter other than to note that generally whether to grant a continuance is within the sound discretion of the trial court. *Farris v. Evans*, 284 Ky. 418, 158 S.W. 2D 941, 943 (Ky. 1942).

For the reasons as stated, we vacate and remand this matter for proceedings consistent with this opinion. The parents' failures are not lost on this Court, but they are nonetheless entitled to a fundamentally fair process before their children may be adopted without their consent. And, certainly the children have fundamental rights to a safe and secure home. But, prior to all contact being severed, factual observations of the supervised visits between the parents and children by social workers in Rockcastle County included a number of favorable interactions. However, by the time of this opinion, the children have been in the sole care of their great grandparents for a number of years. Nonetheless, even considering the hardships the parents have brought on themselves and their children, this Court has previously held that "it would be rare when a child's best interest would be served, in a battle between family members, by sustaining a petition for its adoption rather than awarding custody to the non-parent, if appropriate, and allowing for visitation between the parent and child." *D.S. v. F.A.H.*, 684 S.W.2d 320, 323 (Ky. App. 1985).

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