No.

In the Supreme Court of the United States

M.N.,
Petitioner,

v.

A.A., *et. al.*
*Respondent*s.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented for review are:

(1) whether KY. REV. STAT. ANN. § 199.502 violates the Fourteenth Amendment's Due Process Clause because it fails to articulate a clear and convincing evidentiary standard;

(2) whether KY. REV. STAT. ANN. § 199.502 violates the Fourteenth Amendment's Due Process Clause because it is vague in both failing to define the term "abandoned" or whether the 90-day abandonment period is consecutive or cumulative;

(3) whether the lower courts' application of a presumption that KY. REV. STAT. ANN. § 199.502 is constitutional conflicts with this Court's prior decisions; and

(4) whether this Court's precedents regarding the sanctity of parental rights are deeply rooted in American history and tradition such that they continue to exist after *Dobbs*.

This Court's precedent holds that the rights of biological parents to a relationship with their minor children are among associational rights which the Fourteenth Amendment's Due Process Clause fundamentally protects against unwarranted usurpation or disregard. *See e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972);

Santosky v. Kramer, 455 U.S. 745 (1982); *Troxel v. Granville*, 520 U.S. 57 (2000).

However, the Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 142 S. Ct. 2228 (2022) calls into question whether this implied right persists. In Kentucky, the statute which permits the type of parental rights termination here at issue operates on a precariously low evidentiary standard, preponderance of the evidence. Such standard disregards decades of this Court's pre-*Dobbs* jurisprudence which command the application of a heightened evidentiary standard.

In this case, Kentucky courts determined that the Petitioner had "abandoned" her child "for a period of no less than 90 days." The term "abandoned," however, is not defined anywhere in the applicable Kentucky statutes. Also undefined is whether the 90-day abandonment period is consecutive or cumulative. Thus, a Kentucky parent who experienced long-term isolated hospitalization due to Covid; who has fled to a shelter from domestic violence; or who has gone on a mission trip abroad, are all subject to having their parental rights terminated under the challenged Kentucky statute.

PARTIES TO THE PROCEEDING

Petitioner is M.N. The Petitioner was the Respondent-Appellant below.

Respondents are:

(1) A.A. The Respondent A.A. was the Petitioner-Appellee below;

(2) P.B. The Respondent P.B. was a Respondent-Appellee below; and

(3) S.B. The Respondent S.B. was a Respondent-Appellee below.

The parties are referred to by their respective initials to preserve their confidentiality as this matter pertains to a minor child. M.N. is filing a sealed letter with the Clerk which identifies the names of the parties.

CORPORATE DISCLOSURE STATEMENT

Petitioner M.N. is an individual and thus not a parent corporation or a publicly held company owning 10% or more of another corporation's stock.

RELATED PROCEEDINGS

A.A. v. M.N., et. al., 20-AD-500011, Jefferson Family Court (Kentucky) Findings of Fact, Conclusions of Law, and Judgment of Adoption entered on July 27, 2021.

M.N. v. A.A., et. al., 2021-CA-1007-ME, Kentucky Court of Appeals Opinion Affirming entered on January 28, 2022.

M.N. v. A.A., et. al., 2022-SC-0057, Kentucky Supreme Court Order Denying Discretionary Review entered on June 8, 2022.

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OPINIONS BELOW

This petition seeks review of the unreported opinion of the Kentucky Court of Appeals in *M.N. v. A.A., et. al.* (App. 2a – 16a, *infra*). The Judgment of the Circuit (Family) Court of Jefferson County, Kentucky (App. 17a – 19a, *infra*) and its separate Findings of Fact and Conclusions of Law (App. 20a – 34a, *infra*) are not reported. The order of the Kentucky Supreme Court which denied discretionary review of the Court of Appeals opinion (App. 1a, *infra*), is likewise not reported.

JURISDICTION

The opinion of the Kentucky Court of Appeals was entered on January 28, 2022. (App. 2a – 16a, *infra*). A petition for discretionary review in the Kentucky Supreme Court was denied on June 8, 2022 (App. 1a, *infra*). This Court has jurisdiction under 28 U.S.C. § 1257(a) to hear this case by writ of certiorari. This petition is timely filed, as it is filed within 90 days from the date of the Kentucky Supreme Court's order denying discretionary review. Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Due Process Clause, U.S. Const. Amend. XIV, § 1: … No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law ….

B. KY. REV. STAT. ANN. § 199.502(1): Conditions necessary for adoption without consent of child's biological living parents -- Court decision -- Representation of biological parent.

(1) Notwithstanding the provisions of KRS 199.500(1), an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding that any of the following conditions exist with respect to the child:

(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;

(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;

(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;

(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

3. The condition or factor which was the basis for the previous termination finding has not been corrected;

(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; or

(j) That the parent is a putative father, as defined in KRS 199.503, who fails to register as the minor's putative father with the putative father registry established under KRS 199.503 or the court finds, after proper service of notice and hearing, that:

1. The putative father is not the father of the minor;

2. The putative father has willfully abandoned or willfully failed to care for and support the minor; or

3. The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

* * *

INTRODUCTION

This case involves whether a Kentucky involuntary adoption statute, KY. REV. STAT. ANN. § 199.502, is unconstitutional on due process grounds as it fails to articulate the applicable heightened evidentiary standard required by this Court's long-standing precedent and is vague by failing to define a key term. The resulting constitutional infirmities impair M.N.'s

fundamental constitutional rights as a biological parent to a relationship with her child, S.B. Historically, this Court has upheld such right as fundamental and protected by the Due Process Clause of the Fourteenth Amendment. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Troxel v. Granville*, 530 U.S. 57 (2000). This Court's commitment to the continued protection of such right, however, seems in doubt in light of its recent ruling in *Dobbs v. Jackson Woman's Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022).

Kentucky law provides two (2) statutory methods to irrevocably terminate a parent's rights *vis-à-vis* a child – a formal termination proceeding and a voluntary or involuntary adoption. The first method entails a child being placed in foster care by the Kentucky Cabinet for Health and Family Services (CHFS), Kentucky's child welfare agency, due to a parent's actions or inactions which either harmed the child or placed such child at risk of harm.

In such event, CHFS files a Petition for Involuntary Termination of Parental Rights (Involuntary Petition). Such proceeding seeks to involuntarily terminate the parent's rights due to a failure to show sufficient improvement in circumstances so that the child will no longer be at risk if returned to their care. Kentucky's statutory regime provides for a bench trial in which CHFS must prove certain elements by clear and

convincing evidence, and the trial court must utilize its vast discretion to determine a disposition in the child's best interests. KY. REV. STAT. CH. 625 codifies the law concerning involuntary termination proceedings.

The second method, the one at issue here, is commonly referred to as "private adoption." Kentucky law allows an individual who has assumed the care of a child to seek the involuntary termination of the rights of such child's biological parents by filing a Petition for Adoption (Adoption Petition). KY. REV. STAT. CH. 199 governs private adoptions and KY. REV. STAT. ANN. § 199.502 is the particular statute here at issue.

There are several critical differences between the two aforementioned statutory regimes. KY. REV. STAT. CH. 625 is robust and complex such that CHFS must prove, by clear and convincing evidence, a multitude of statutory elements as a predicate to a trial court involuntarily terminating a parent's rights. A private adoption, however, merely requires proof by a preponderance of the evidence of the existence of any single statutory condition from a list of 10 conditions. In this instance, KY. REV. STAT. ANN. § 199.502(1)(a) sets forth the chosen statutory condition: that the parent has abandoned the child for a period of not less than 90 days. The permanent severance of a parent-child relationship is the ultimate effect of both statutory regimes.

Complicating the implantation of an involuntary adoption are two things: (1) the operative statute, KY. REV. STAT. ANN. § 199.502, does not articulate the heightened evidentiary standard (clear and convincing evidence) required when considering a parental rights termination and (2) neither KY. REV. STAT. CHS. 199 nor 625 define the term "abandoned" or illuminate whether the 90-day time abandonment period is consecutive or cumulative. Further, such statute provides for the automatic termination of parental rights if any of the 10 statutory conditions a proven, including the abandonment requirement. Such statute affords the trial court no discretion with respect to such outcome.

Finally, there is a compelling need for the Court to clarify the boundaries of abridging parents' associational rights *vis-à-vis* their children following this Court's recent decision of *Dobbs*. Without clarification, some states may either adopt or (like Kentucky) continue to enforce laws and procedures which deprive parents, irrespective of their fitness, of the automatic entitlement to a relationship with their children, simply because such right is not explicitly articulated in the text of the Constitution.

STATEMENT OF THE CASE

In April 2017, M.N. was blessed with the birth of her first and only child – a daughter named S.B. Unfortunately, S.B. tested positive for heroin while in the hospital following delivery. This put

the wheels of Kentucky's child welfare regime into motion. CHFS accordingly removed S.B. from M.N.'s care and placed her in A.A.'s temporary custody. Under Kentucky law, such placement constituted a "relative placement" as opposed to a foster care placement because A.A. is a blood relation to M.N. *See* KY. REV. STAT. ANN. § 620.090(2). Notably, A.A. stated before the trial court that she was not looking to assume custody of S.B. forever as she already had four (4) children of her own.

M.N. is an unfortunate victim of the opioid crisis which has plagued Kentucky during the past decade. M.N. was initially prescribed Lortab at age 15 for chronic pain management. This exposure to such a strong narcotic led M.N. down the long and winding path to full blown addiction. M.N. transitioned to heroin after she developed a tolerance to the opioid pills. This, unfortunately, led to a less than wholesome lifestyle.

M.N. was incarcerated for a period of time and, for the most part, remained impoverished and homeless while she was in active addiction. M.N. unsuccessfully attempted to achieve sobriety for 3 years; enrolling in 10 different recovery programs. Relapse, however, is a normal part of recovery; but also serves as evidence of an individual's desire to improve their circumstances.

A.A. provided full-time care to S.B. as M.N. attempted to achieve sobriety, and finally succeeded. During this period, M.N. would speak

to S.B. either by telephone or Facetime. M.N. also had supervised in-person visitation with the child. A.A. claimed at trial an unawareness that M.N. was maintaining contact with S.B. That claim, however, is curious given that M.N.'s parents would often pick up S.B. from A.A.'s home to spend time with her. M.N. would also frequently text A.A. to inquire about S.B.'s wellbeing. At trial, M.N. produced pictures of herself with S.B at various stages of development to show the progression of her age.

CHFS did not file an Involuntary Petition pursuant to KY. REV. STAT. CH. 625 which sought to terminate M.N.'s parental rights because it had not placed S.B. in foster care. Instead, CHFS sought to have A.A. deemed as S.B.'s "permanent custodian" so that it could close its file. CHFS's ultimate goal in every case is to achieve "permanency" for dependent children. A.A. was awarded permanent custody in August 2017. *See* App. 25a. As such, the onus of whether to terminate M.N.'s parental rights was left squarely on A.A.'s shoulders.

A.A. opted to cut M.N. out of S.B.'s life and file an Adoption Petition in the Jefferson Circuit (Family) Court on January 6, 2020. A.A. alleged therein that M.N. had abandoned S.B. for a period of no less than 90 days. A.A.'s Petition further named the Respondent P.B. as S.B.'s purported biological father, although he was subsequently

deemed not the father. S.B.'s actual father is unknown.

The trial court held a bench trial on June 2, 2021. The court heard the testimony A.A., M.N., and M.N.'s father. M.N. also presented the court photographs, therapy notes, suboxone clinic records, and attendance logs from Alcoholics Anonymous meetings. M.N. had been clean and sober for 8-months at the time of trial. M.N. was also gainfully employed as a server at a restaurant; had stable housing; and was receiving on-going treatment for substance use disorder (SUD).[1]

M.N. asserted before the trial court that it could not enter an adoption judgment pursuant to KY. REV. STAT. ANN. § 199.502 as such statute was unconstitutional. To that end, the trial court ruled:

> "[M.N.] objects to [the child's] adoption and argues [KRS] 199.502 is unconstitutional noting that the statutory bar for termination of parental rights pursuant to an adoption under KRS Chapter 199 is precariously low in relation to the grounds which must be proven to terminate parental rights under [KRS] 625. As this Court is not charged with adjudicating the

[1] Under KY. REV. STAT. ANN. § 199.502, parents who have *never* suffered from SUD or abused their children can still have their rights terminated.

> constitutionality of the laws by which it is governed, the Court need not address this argument other than to state that [sic] the obvious; there is clearly a distinction in terminating parental rights pursuant to an adoption under KRS Chapter 199 and terminating parental rights under Chapter 625."

App. 32a – 33a.

On July 27, 2021, the trial court entered two dispositive rulings: its Findings of Fact and Conclusions of Law, App. 20a – 34a, and Judgment of Adoption, App. 17a – 19a. Therein, the trial court determined that "the evidence presented supports a finding that [M.N.] abandoned [the child] for a period well in excess of ninety days set forth as a minimum in KRS 199.502(1)(a)." App. 30a. As a result, M.N.'s parental rights were terminated, and A.A. was permitted to adopt S.B.

M.N. filed a Notice of Appeal on August 26, 2021. She challenged the entry of a Judgment of Adoption, again arguing that KY. REV. STAT. ANN. § 199.502 was unconstitutional. She noticed the Kentucky Attorney General, Daniel Cameron, on her appeal as required by KY. REV. STAT. ANN. § 418.075 and KY. R. CIV. P. 24.03.

On January 28, 2022, the Kentucky Court of Appeals rendered an Opinion which affirmed the trial court's judgment. App. 2a – 16a. Therein, the appellate court addressed the constitutionality of

KY. REV. STAT. ANN. § 199.502. After reviewing the records and arguments of the parties, the Court of Appeals held that:

> "[a]fter careful review of KRS 199.500, KRS 199.502, and KRS Chapter 625, we cannot conclude that Appellant has overcome the presumption that KRS 199 is constitutional, nor that Appellant has proven that KRS Chapter 199 clearly, unequivocally, and completely violates provisions of the constitution."

App. 14a. In the end, the Court of Appeals determined that M.N. did not meet her burden to prove that KY. REV. STAT. ANN. § 199.502 was unconstitutional pursuant to *Wilfong v. Commonwealth*, 175 S.W.3d 84 (Ky. App. 2004). App. 15a.

On February 17, 2022, M.N. filed a Motion for Discretionary Review with the Kentucky Supreme Court. On June 8, 2022, the court denied M.N.'s Motion. *See* App. 1a. Notably, 3 of the 7 justices (one short of the necessary number to hear M.N.'s appeal) voted to grant review. *Id.*

REASONS FOR GRANTING THE PETITION

This case concerns the preservation of a parent's fundamental constitutional right to due process when facing a termination of their parental rights. This Court has, for the past century, held in cases like *Meyer v. Nebraska*, 262

U.S. 390 (1923) and its progeny that the parental rights *vis-à-vis* their children are protected as fundamental under the Fourteenth Amendment. Kentucky's involuntary adoption statute, KY. REV. STAT. ANN. § 199.502 altogether ignores this bedrock constitutional principle. This case thus reveals several deep constitutional defects in the way Kentucky has granted private individuals (in this case, one of M.N.'s relatives) the power to undermine her parental rights by simply asserting that she is unfit to care for S.B. Kentucky has also done so through a mere preponderance of the evidence standard. Such rubric does not comport with the United States Constitution and this Court's long-standing precedents.

A. KY. REV. STAT. ANN. § 199.502 is unconstitutional because it fails to require a heightened evidentiary standard.

Basic intuition dictates that an individual has a fundamental right to a relationship with their own children free of government and private interference. The law, however, historically viewed children as their father's property. *See e.g., Commonwealth v. Briggs*, 33 Mass. 203 (Mass. 1834) (stating "…that there can be no adverse interest between husband and wife, but that in contemplation of law, the custody of both wife and child belongs to the husband and father, and is actually in him."); *State v. Smith*, 6 Me 462 (Me. 1830) (awarding custody of children to the mother based on a prior written agreement of the parties,

finding that said agreement was the contractual disposition of the father's property); *People ex rel. Brooks v. Brooks*, 35 Barb. 85 (N.Y. App. 1861).

The 20th Century, however, brought about a different mindset of the parent-child relationship, particularly in the area of parental rights. Starting with cases like *Meyer*, *supra*, at 399, this Court found that a person's freedom "to marry, establish a home and bring up children" were "essential". This Court followed in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) by holding that "[m]arriage and procreation are fundamental to the very existence and survival of the race" as they involve "one of the basic civil rights of man." The Court further elaborated in *May v. Anderson*, 345 U.S. 528, 533 (1953) that a state could not impair the parental rights of a non-resident or non-domiciliary because such rights are "far more precious … than property rights." Justice Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) observed that the Ninth Amendment protected fundamental personal rights, like the privacy in marriage and the traditional relation of the family. Finally, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) held that the "private interest" of a "man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." Ultimately, this Court has rooted these holdings in concepts of due process (*Meyer,*

May and *Stanley*), equal protection (*Skinner*) or penumbral rights (*Griswold*).

Integral to establishing the fundamental constitutional protection of parental rights, this Court has dictated that the law requires a heightened evidentiary standard when seeking to terminate a parent's rights. In *Santosky, supra,* this Court addressed the constitutionality of a preponderance of the evidence standard in parental termination cases. This Court weighed the various interests and held that "the private interest affected is commanding" in termination cases; "the risk of error from using a preponderance standard is substantial" and "the countervailing governmental interest favoring that standard is comparatively slight." *Id*. at 758. As such, a preponderance of the evidence standard was inconsistent with due process. *Id*. The Court concluded that a clear and convincing evidence standard "strikes a fair balance between the rights of the natural parents and the State's legitimate concerns." *Id*. at 769.

One of the constitutional dilemmas here is that KY. REV. STAT. ANN. § 199.502 fails to set forth a heightened evidentiary standard in involuntary adoption cases although they result in the termination of parental rights. This element alone places the subject statute at odds with this Court's decision in *Santosky, supra.* and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) and warrants review.

KY. REV. STAT. ANN. § 199.502 applies in the case of a proposed adoption without the consent of a child's biological living parents. KY. REV. STAT. ANN. § 199.502(1) lists 10 conditions which warrant a court granting an involuntary adoption and termination of parental rights. The satisfaction of any listed condition mandates the court to grant the adoption and thus terminate the parent's rights. *See* KY. REV. STAT. ANN. § 199.502(2)(a).

Most of the conditions found in KY. REV. STAT. ANN. § 199.502(1) are typical of the parental rights termination statutes found in other states. Kentucky's regime includes conditions which intuitively warrant a parental rights termination. For example, KY. REV. STAT. ANN. § 199.502(1)(d) mandates a termination when a parent has been convicted for inflicting serious injury to the child and subsection (f) mandates a termination if a parent has allowed the child to be sexually abused. Again, the statute does not set a heightened standard of proof with respect to a court finding the existence of any necessary condition. The statute also does not require a finding that adoption (and thus a termination of parental rights) is in the child's best interests.

Kentucky's involuntary adoption regime stands in stark contrast to its regular involuntary termination regime. The latter, set forth in KY. REV. STAT. ANN. § 625.090, generally requires proof by clear and convincing evidence that the

child is "an abused or neglected child" as defined by KY. REV. STAT. ANN. § 600.020(1). Such regime requires courts to consider factors like whether the parent suffers from a mental illness. *See e.g.* KY. REV. STAT. ANN. § 625.090(3). Such statutory regime also requires that courts find that CHFS had made reasonable efforts to reunify the child with their parents. *See* KY. REV. STAT. ANN. § 625.090(3)(c). An involuntary termination can only occur upon a finding of the necessary statutory elements by clear and convincing evidence. *See* KY. REV. STAT. ANN. § 625.090(1). The regular involuntary termination regime also requires a finding that a parental rights termination is in the best interests of the child. *See* KY. REV. STAT. ANN. § 625.090(1)(c).[2]

In this instance, A.A.'s Petition pled the existence of the condition set forth in KY. REV. STAT. ANN. § 199.502(1)(a) — that M.N. had "abandoned the child for a period of not less than ninety (90) days." M.N. argued at trial that KY. REV. STAT. ANN. § 199.502 was unconstitutional for a myriad of reasons, including the absence of a heightened evidentiary standard. Both the trial and appellate courts addressed M.N.'s

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[2] Another distinguishing element is that KY. REV. STAT. ANN. § 625.090(5) allows a parent to overcome the circumstance which would warrant an involuntary termination through a showing by a preponderance of the evidence that the child will not continue to be abused or neglected if returned to the parent. KY. REV. STAT. CH. 199 does not have an analogous provision.

constitutional arguments but neither analyzed the applicable evidentiary standard required in an involuntary adoption case.

The Kentucky Legislature is tasked with the job of crafting the Commonwealth's statutory law. The Legislature initially adopted KY. REV. STAT. ANN. § 199.502 in 1994[3] and amended the statute in 1998 and 2018.[4] The statute's initial adoption and subsequent amendments all occurred after *Santosky, supra,* and such amendments also occurred after *M.L.B., supra*. It is plain, however, from the face of KY. REV. STAT. ANN. § 199.502 that the Legislature did not include a clear and convincing evidence standard when adopting or amending the statute.

A.A. may note that Kentucky's courts seemingly recognized the existence of a clear and convincing evidence standard in involuntary adoption cases. *See P.C.C. v. C.M.C., Jr.*, 297 S.W.3d 590 (Ky. App. 2009) and *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425 (Ky. App. 2015).[5] Such recognition begs the question as KY. REV. STAT. ANN. §

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[3] *See* 1994 KY. ACTS CH. 242, SEC. 10.

[4] *See* 1998 KY. ACTS CH. 57, SEC. 18 and 2018 KY. ACTS CH. 159, SEC. 35.

[5] *P.C.C.* found the existence of a clear and convincing standard in KY. REV. STAT. ANN. § 199.502 by virtue of its relationship to KY. REV. STAT. ANN. § 625.090. *R.P., Jr.*, however articulated that *Santosky, supra,* was the source of such requirement.

199.502 does not, on its face, state a heightened evidentiary requirement. Even if Kentucky case law implies a clear and convincing evidence standard, neither the trial court's Judgment, App. 17a – 19a, nor its Findings and Conclusions, App. 20a – 34a, articulate the existence of a heightened evidentiary standard, let alone that A.A. satisfied it. The Court of Appeals' Opinion is also bereft of any discussion about the applicable heightened standard of proof or that A.A. introduced sufficient proof to satisfy such standard. *See* App. 2a – 16a.

The Court should accordingly accept review and determine both that KY. REV. STAT. ANN. § 199.502 is facially unconstitutional in violation of M.N.'s due process rights because it fails to articulate the clear and convincing evidence requirement set forth in *Santosky, supra*, and that such statute was unconstitutional as applied in this case.

B. The lower courts' application of a presumption of constitutionality conflicts with this Court's prior rulings relative to parental rights.

The Court should also accept review to address the incongruity between the lower courts' application of a presumption that KY. REV. STAT. ANN. § 199.502 was constitutional given this Court's prior rulings relative to parental rights.

Kentucky law generally presumes that its statutes are constitutional. *Pinto v. Robison*, 607

S.W.3d 669 (Ky. 2020). The Court of Appeals erred because a presumption of constitutionality ignores how this Court's precedents weigh fundamental rights. The termination of parental rights involves an impairment of a fundamental constitutional right. *See Santosky, supra.* and *M.L.B., supra.* This Court traditionally applies a strict scrutiny test when a statute impairs a fundamental right. *See Clark v. Jeter*, 486 U.S. 456 (1988). This highest standard of constitutional review means that a challenged statute can survive only if it furthers "interests of the highest order" by means "narrowly tailored in pursuit of those interests." *Tandon v. Newsom*, 593 U.S. ___, 141 S. Ct. 1294, 1298 (2021), citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 546 (1993). Kentucky law applies the same standard in analyzing cases arising under the Kentucky Constitution. *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003).

Here, the compelling state interest is the protection and welfare of minor children, and the fundamental right is that of parents to have a relationship with their children. The lower courts did not apply a strict scrutiny standard when reviewing the constitutionality of KY. REV. STAT. ANN. § 199.502. Rather, citing *Wilfong*, *supra*, the Court of Appeals shifted the burden to M.N. to establish why such statute was unconstitutional. The Court of Appeals did so by imposing the burden of proving that they 'clearly, unequivocally

and completely' violate provisions of the constitution." App. 13a.

This stance is wholly inconsistent with decades of this Court's strict scrutiny jurisprudence. When a statute impedes the exercise of a fundamental right, such as parents' right to a relationship with their children, a court must apply strict scrutiny and "[i]n the face of an interest this powerful a State may not rest on the threshold rationality or a presumption of constitutionality." *Washington v. Glucksberg*, 521 U.S. 702 (1997). The burden rests with the party challenging the constitutionality of a statute under either a rational basis or intermediate scrutiny analysis. Strict scrutiny analysis, however, flips that burden to the party defending a statute. This is especially true in cases involving a fundamental right. This Court sets a high bar in such instance:

> "to survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest."

Burson v. Freeman, 504 U.S. 191 (1992).

The Kentucky Attorney General did not file a brief on the Commonwealth's behalf. Thus, the Commonwealth declined to defend KY. REV. STAT. ANN. § 199.502 and, thus, did not meet their burden. A.A. also failed to chin the strict scrutiny bar. This Court should not indulge Kentucky's

presumption that KY. REV. STAT. ANN. § 199.502 is constitutional given the importance of the fundamental liberties at stake.

C. KY. REV. STAT. ANN. § 199.502 is also unconstitutionally vague in that fails to define the term "abandoned the child" or illuminate matters related to the 90-day abandonment period.

The Court should also accept review to address another constitutional defect inherent in KY. REV. STAT. ANN. § 199.502 — its failure to define the term "abandoned the child". Such failure must render the statute unconstitutionally vague.

The trial court terminated M.N.'s parental rights, and the Court of Appeals affirmed such termination, upon KY. REV. STAT. ANN. § 199.502(1)(a). Such part of the statute articulates one of the conditions warranting a termination of parental rights and involuntary adoption: a parent having "abandoned the child for a period of not less than ninety (90) days." The Kentucky Legislature, however, did not define the term "abandoned" anywhere in KY. REV. STAT. CH. 199. This failure creates a slippery slope which requires courts to impermissibly speculate as to what a parent must do for a child to be considered "abandoned".

This Court held in *Edwards v. California*, 314 U.S. 160 (1941) that a statute was void for uncertainty because it failed to inform persons subject to its penalties of what conduct will render them liable. This Court's opinion in *Grayned v.*

City of Rockford, 408 U.S. 104, 108-09 (1972) illuminates the rationale for such policy in holding that:

> "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Like the statute challenged in *Edwards*, the statute challenged here involves the application of an undefined term.

The problem with a vague statute is that it inevitably leads to arbitrary, and often discriminatory, application. For instance, a Kentucky court could predicate a termination upon a belief that a domestic violence victim "abandoned" their child when fleeing to a shelter. By the same token, a Kentucky court could find that a parent's entrustment of a child to the care of a relative, friend, or neighbor while searching for employment and suitable housing was an abandonment under KY. REV. STAT. ANN. § 199.502. Or consider the situation in which a parent with limited financial means works in another state and simply cannot afford to frequently travel back to Kentucky to visit the child. A Kentucky court could construe that situation to constitute abandonment. Finally, consider the situation in which a parent grants temporary custody to another person by way of a

written agreement to enter an in-patient rehabilitation facility. A Kentucky court could too consider such situation an abandonment under the statute.

The incongruity of KY. REV. STAT. ANN. § 199.502(1)(a) is evident from the way other courts have approached the similar issue. For instance, the Tennessee Supreme Court in *In re Swanson,* 2 S.W.3d 180 (Tenn. 1999) reversed the termination of parental rights by abandonment under the 1996 version of TENN. CODE ANN. § 36-1-102(1)(A), (D) (1996).[6] In such case, the biological father separated from the biological mother but attempted to maintain contact with his daughter. *Id.* at 182. The mother, however, refused to allow visitation. *Id.* A court terminated the father's parental rights and the Tennessee Supreme Court reversed such determination on the grounds that

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[6] TENN. CODE ANN. § 36-1-102(1)(A) (1996) defined the term "abandonment" as:

> "For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child."

termination by abandonment under TENN. CODE ANN. § 36-1-102(1)(A), (D) was unconstitutional.

Consistent with this Court's precedent, the Tennessee court held that the state's Constitution provides for a parental right to privacy to care for children without unwarranted state intervention unless there is a substantial danger of harm to the children. *In re Swanson, supra*, at 182. There must be a showing that either the biological parent is unfit or substantial harm to the child will result if parental rights are not terminated. *Id.* at 188. The challenged statute, however, allowed for termination of parental rights by a parent who has abandoned their child, either by "willfully failing to visit" or by "willfully failing to support." *Id.* This portion of the statute was deemed unconstitutional because it may be read to permit termination of parental rights even in the case of an unintentional failure to visit or pay support.

Indiana courts take a similar approach. IND. CODE § 31-19-9-8 provided that consent to adopt is not required from:

> "a parent or parents if the child is adjudged to have been abandoned or deserted for at least (6) months immediately preceding the date of the filing of the petition for adoption."

Section (b) of such statute provides that a court may declare that a parent abandoned a child "if a parent has made only token efforts to support or to

communicate with the child." IND. CODE § 31-19-9-8(b). The Indiana statutes did not define the term "token efforts".

The Indiana Supreme Court analyzed such statute in *J.W. v. D.F.,* 93 N.E.3d 759 (Ind. 2018) in holding that a mother's failure to communicate with her children is justified if she struggled with addiction, was willing to give up temporary custody, and made a good-faith effort to attain sobriety. The court held that the biological mother had a justifiable cause for failing to communicate with her child for more than one year under such circumstances and, therefore, consent was still required for adoption by the stepmother. *Id.* at 760. The court recognized that, although the mother did not communicate with her child, her willingness to shield the child from the adverse effects of her addiction, coupled with her good-faith attempt at recovery and noticeable progress, provided justifiable cause which mitigated any failure to communicate. *Id.* at 763. Ironically, the result of this case would be different if M.N. lived in Indiana.

Further, the court in *Alsager v. District Court of Polk County (Juvenile Div.)*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd* 545 F.2d 1137 (8th Cir. 1976), analyzed the constitutionality of IOWA CODE § 232.41(2)(b), (d) (1973). Such statute provided that:

> "[t]he court may upon petition terminate the relationship between parent and child:

* * *

> 2. If the court finds that one or more of the following conditions exist:
>
> * * *
>
> b. That the parents have substantially and continuously or repeatedly refused to give the child necessary parental care and protection.
>
> * * *
>
> d. That the parents are unfit by reason of debauchery, intoxication, habitual use of narcotic drugs, repeated lewd and lascivious behavior, or other conduct found by the court likely to be detrimental to the physical or mental health or morals of the child."

IOWA CODE § 232.41(2)(b), (d).

The Iowa court held that both provisions of the challenged statute were unconstitutionally vague on their face and as applied. In particular, the court held the standards of "necessary parental care and protection," § 232.41(2)(b), and of "[parental] conduct . . . detrimental to the physical or mental health or morals of the child," § 232.41(2)(d), was susceptible to multiple interpretations "which prevent the ordinary person from knowing what is and is not

prohibited." 406 F. Supp. at 18. The court noted that "[a]n examination of these phrases will not inform an ordinary person as to what conduct is required or must be avoided in order to prevent parental termination." *Id*. The court cited an example where a parent might follow a rigid scheme of corporal punishment to instill discipline, believing himself in full compliance with the law, only to learn of his folly at a termination proceeding. (citations omitted).

Finally, the 90-day threshold set forth in KY. REV. STAT. ANN. § 199.502(1)(a) is likewise problematically vague. The statute requires that an abandonment must persist for at least 90 days. Such statute, however, does not articulate when the 90-day period begins to run or whether the 90-day period is consecutive or cumulative. Thus, it is not clear whether frequent phone calls or sporadic in-person visits toll the 90-day time period, or whether such period is temporally narrow versus a broad accumulation of time during the remainder of a child's minority.

The state's power to authorize or initiate the severance of the fundamental legal relationship and the accompanying bond between natural parent and child ought to be – and has long been— scrutinized "with the utmost *precision*" and care. *Santoksy*, 455 U.S. at 651 (emphasis added). The word "abandoned" is not precise. The definition of "abandonment" according to *Black's Law Dictionary* mostly refers to property rights.

Buried within the definition is the following statement: "The act of leaving a spouse or child willfully and without an intention to return." Black's Law Dictionary 2 (7th Ed. 1999).

These clear conflicts call for a resolution by this Court. Here, the courts decided an important federal question in a way that directly conflicts with this Court's relevant decisions. The lower courts' findings of fact were not entirely erroneous, but such courts did apply a rule of law which is violative of the U.S. Constitution and this Court's long-standing precedent. As such, the decision merits review.

D. This Court's recent ruling in *Dobbs* implies the Fourteenth Amendment no longer shelters parents' rights.

Finally, this Court's recent ruling in *Dobbs, supra,* rightfully concerns those interested in the sanctity of parent-child relationships. This is so because the majority's holding centered on whether the right to an abortion was deeply rooted in the nation's history and tradition. To that end, this Court stated:

> "[w]e begin by considering the critical question whether the Constitution, properly understood, confers a right to abortion. […] First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to 'liberty' protects a particular right. Second, we

> examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as 'ordered liberty.'"

142 S.Ct. at 2244.

The *Dobbs* majority opinion also signaled that *stare decisis* should not always merit the weighty consideration it has previously enjoyed. This signal is implicit in the Court's statement that:

> "[w]e have long recognized, however, that *stare decisis* is 'not an inexorable command.' *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (internal quotation marks omitted), and it 'is at its weakest when we interpret the Constitution.' *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). It has been said that it is sometimes more important that an issue 'be settled than that it be settled right.'"

142 S.Ct. at 2262.

Yet, this case turns on the question of adhering to *stare decisis*. This Court's opinion in *Meyer, supra*, is the seminal case on parents' rights. The Court's subsequent rulings in have advanced parents' rights. *Santosky, supra.* and *M.L.B., supra,* plainly require that parental termination

statutes articulate a clear and convincing evidence standard. *Edwards*, *supra*, and *Grayned, supra,* also plainly set forth a policy that vague statutes are unconstitutional. *Dobbs* can be read as moving these important precedents a step, or perhaps several steps, toward oblivion.

M.N. is also rightly concerned because two of the concurring opinions in *Dobbs* are inherently conflicting *vis-à-vis* the continued viability of substantive due process rights. One concurring opinion by Justice Thomas called into question whether *any* substantive due process rights still exist, 142 S.Ct at 2301 (Thomas, J., concurring). Yet, another concurrence by Justice Kavanaugh emphatically stated that the *Dobbs* majority opinion did not put such rights at risk. *Id*. at 2309 (Kavanaugh, J., concurring). Both propositions cannot be true.

Ironically, the procedural complexities of *Troxel, supra,* yielded an important concurrence from Justice Thomas which recognized "a fundamental right of parents to direct the upbringing of their children." 530 U.S. at 80 (Thomas, J., concurring). Nevertheless, Justice Thomas expressed "no view" on whether the original understanding of due process "precludes judicial enforcement of unenumerated rights." *Id*. Such was, according to Justice Thomas, a resolution left "for another day". *Id*. That day has now dawned.

Due process under the Fourteenth Amendment falls into two categories: (1) procedural due process; and (2) substantive due process. *See* e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Substantive due process "is based on the idea that some rights are so fundamental that the government must have an exceedingly important reason to regulate them, if at all, such as the right to free speech or to vote." *Hunter v. Commonwealth*, 587 S.W.3d 298, 303 (Ky. 2019). Here, KY. REV. STAT. ANN. § 199.502 substantively impairs the due process rights of Kentucky parents in involuntary adoption cases, to the extent that *Dobbs* does not impair such rights, because it sets an unconstitutionally low evidentiary bar (preponderance of the evidence) and fails to define key elements needed to determine the existence of an abandonment.

Even prior to *Dobbs*, however, Kentucky had an inconsistent approach to preserving the sanctity of the parent-child relationship. Notably, Kentucky is one of only a few states, despite *Troxel, supra*, in which a grandparent is statutorily permitted to sue an intact family for visitation with their grandchildren. *See* KY. REV. STAT. ANN. § 405.021. Thus, while non-parents are permitted to seek visitation over a fit parent's objection, a parent may also be divested of their rights if the lower preponderance of the evidence threshold suggests that a child has been abandoned. The price of such approach is the diminishment of biological parents' rights; thus

eroding the vital constitutional protections previously recognized by this Court.

Dobbs pertained to the constitutional right to an abortion, but its language can be interpreted as touching far more areas of the law. M.N. is thus rightfully concerned about whether the scope of *Dobbs* will reach into the realm of impairing parental decision making and the fundamental right of parents to a relationship with their children. M.N. respectfully asks this Court to clarify whether the right to raise one's own children remains sheltered by the Fourteenth Amendment.

CONCLUSION

M.N.'s petition for a writ of certiorari should be granted for the reasons both set forth above.

September 2022

Respectfully submitted,

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APPENDIX A
Order of Kentucky Supreme Court Denying Review
[Filed June 8, 2022]

Supreme Court of Kentucky

2022-SC-0057-DE
(2021-CA-1007)

M.N. MOVANT

JEFFERSON CIRCUIT COURT
20-AD-500011

A.A., ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Conley, Lambert, and VanMeter, JJ., would grant discretionary review.

ENTERED: June 8, 2022.

John D. Minton, Jr.
Chief Justice

APPENDIX B
Opinion of the Kentucky Court of Appeals
[Filed January 28, 2022]

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-1007-ME

M.N. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE A. CHRISTINE WARD,
JUDGE ACTION NO. 20-AD-500011

A.A.; P.B.; AND S.B. APPELLEES

OPINION AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: M.N.[1] ("Appellant") appeals from findings of fact, conclusions of law, and judgment of adoption rendered by the

[1] We will not use the names of the parties because minor children are involved.

Jefferson Circuit Court in favor of A.A. Appellant argues that the adoption statutes, Kentucky Revised Statutes ("KRS") 199.500 and KRS 199.502, are unconstitutional because they are not narrowly tailored and improperly infringe upon parents' fundamental rights as to the care, custody, and control of their children. For the reasons addressed below, we conclude that Appellant has not overcome the strong presumption that KRS 199.500 and KRS 199.502 are constitutional. As such, we affirm the judgment on appeal.

FACTS AND PROCEDURAL HISTORY

On April 25, 2017, a dependency, neglect, and abuse action was initiated in Shelby Family Court[2] as to Appellant's biological child ("Child"). A finding of abuse and neglect was entered on August 16, 2017, and Appellant's cousin, A.A., was granted permanent custody of Child. A.A. has four biological children including one who is emancipated. The finding of abuse and neglect, and the order granting custody in favor of A.A., were based on Appellant's conduct which made her incapable of providing for Child's immediate and ongoing needs. Appellant had a history of drug addiction, prostitution, homelessness, and incarceration.

In mid-2019, A.A. filed a petition in Shelby Family Court seeking to adopt Child. The Cabinet for Health and Family Services supported the

[2] Case No. 17-J-00112-001.

petition. Due to jurisdictional issues, the Shelby Family Court dismissed the action and directed A.A. to refile the action in Jefferson Family Court.

A.A. refiled the petition in Jefferson Family Court, and Appellant was served via a warning order attorney on January 28, 2020. A.A. filed an amended petition in late 2020 to include as a party defendant the man shown as the father on the birth certificate,[3] and Appellant answered in March 2021. Trial on the matter was conducted on June 2, 2021, after which the court memorialized the parties' stipulations that, 1) Appellant engaged in conduct making her incapable of caring for Child's immediate and ongoing needs; 2) the facts supported the finding of abuse and neglect; 3) Appellant's incarceration rendered her incapable of caring for Child's needs; and 4) Appellant did not know the identity of Child's biological father.

The court rendered findings of fact detailing Appellant's usage of a litany of illegal drugs including opiates, cocaine, methamphetamine, and heroin. The court noted Appellant's recurrent homelessness and incarceration for prostitution and theft. The court found that Appellant failed to avail herself of several interventions offered by Child Protective Services.

The court went on to find that though Appellant visited Child after Child's placement with A.A., Appellant abruptly ended her visits and

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[3] The Jefferson Family Court determined that this individual was not the biological father of Child.

had no contact with A.A. nor Child for a period of two years. Since 2018, Appellant acknowledged seeing Child on only three occasions though there were no orders restricting her contact. During this time, Appellant continued to struggle with drug addiction, homelessness, and poverty. Appellant entered at least seven addiction programs, and relapsed after each of them. Appellant offered evidence of part- time employment, though acknowledged that she could not handle working full time and failed to return to work after an altercation with her boss.

As A.A. was seeking to adopt Child without Appellant's consent, the Jefferson Family Court applied its findings to KRS 199.502. That statute provides that the court may order adoption without the consent of the biological parent if one of several listed conditions were present. The court found that at least three conditions were present: 1) that Appellant abandoned Child for at least 90 days (KRS 199.502(1)(a)); 2) that she is substantially unable to provide essential care and protection to Child (KRS 199.502(1)(e)); and 3) that Appellant continuously and repeatedly failed to provide or has been incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for Child's wellbeing (KRS 199.502(1)(g)). Pursuant to KRS 199.502, the court made inferences from the record that there was no reasonable expectation of improvement.

The court noted that Appellant objected to the adoption, and that she argued that KRS 199.502 was unconstitutional because the standard for involuntary adoption was precariously low relative to the termination of parental rights provisions set out in KRS Chapter 625. The court declined to enter into an analysis of the public policy underlying KRS Chapters 199 and 625, noting that it was bound by the statutory law promulgated by the General Assembly. Based on the findings of fact and conclusions of law, the court granted A.A.'s petition for the adoption. This appeal followed.[4]

ARGUMENTS AND ANALYSIS

Appellant, through counsel, argues that the Jefferson Family Court committed reversible error in granting A.A.'s petition for adoption of Child.

Rather than asserting that the facts do not support the application of KRS 199.502 and the judgment of adoption, Appellant contends that KRS 199.500 and KRS 199.502 are unconstitutional and therefore void *ab initio*.[5]

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[4] Appellant's counsel attested that she notified the Kentucky Attorney General of a constitutional challenge in conformity with KRS 418.075(2).

[5] Appellant's ARGUMENT section of the brief does not contain a statement at the beginning with reference to the record showing whether each issue was properly preserved for review and, if so, in what manner. *See* Kentucky Rules of Civil Procedure ("CR") 76.12(4)(c)(v). Rather than striking the brief and

She argues that these statutes 1) are not narrowly tailored to protect a compelling state interest and are therefore unconstitutional; and 2) that the standard for involuntary adoption under KRS 199.500 and KRS 199.502 is precariously low when compared to the termination of parental rights provisions set out in KRS Chapter 625, thus rendering the statutes unconstitutional. Appellant argues that the right to the care, custody, and control of children is a fundamental parental right subject to strict scrutiny, and that when seeking to protect children, the Commonwealth should engage in less drastic measures to preserve the familial relationship. In sum, Appellant seeks an opinion reversing the findings of fact, conclusions of law, and judgment of adoption.

KRS 199.500 states that,

> (1) An adoption shall not be granted without the voluntary and informed consent, as defined in KRS 199.011, of the living parent or parents of a child born in lawful wedlock or the mother of the child born out of wedlock, or the father of the child born out of wedlock if paternity is established in a legal action or if an affidavit is filed stating that the affiant is the father of the child, except that the consent of the living parent or parents shall not be required if:

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dismissing the appeal, CR 73.02(2)(a) and (b), we will consider the issues presented as it is clear that the claim of unconstitutionality was raised before and addressed by the Jefferson Family Court.

(a) The parent or parents have been adjudged mentally disabled and the judgment shall have been in effect for not less than one (1) year prior to the filing of the petition for adoption;

(b) The parental rights of the parents have been terminated under KRS Chapter 625;

(c) The living parents are divorced and the parental rights of one (1) parent have been terminated under KRS Chapter 625 and consent has been given by the parent having custody and control of the child; or

(d) The biological parent has not established parental rights as required by KRS 625.065.

(2) A minor parent who is a party defendant may consent to an adoption but a guardian ad litem for the parent shall be appointed.

(3) In the case of a child twelve (12) years of age or older, the consent of the child shall be given in court. The court in its discretion may waive this requirement.

(4) Notwithstanding the provisions of subsection (1) of this section, an adoption may be granted 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 the provisions of KRS 625.090 exist with respect to the child.

> (5) An adoption shall not be granted or a consent for adoption be held valid if the consent for adoption is given prior to seventy-two (72) hours after the birth of the child. A voluntary and informed consent may be taken at seventy-two (72) hours after the birth of the child and shall become final and irrevocable seventy- two (72) hours after it is signed.

Further, KRS 199.502 states that,

> (1) Notwithstanding the provisions of KRS 199.500(1), an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding that any of the following conditions exist with respect to the child:
>
> (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;
>
> (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;
>
> (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;

(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

3. The condition or factor which was the basis for the previous termination finding has not been corrected;

(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; or

(j) That the parent is a putative father, as defined in KRS 199.503, who fails to register as the minor's putative father with the putative father registry established under KRS 199.503 or the court finds, after proper service of notice and hearing, that:

1. The putative father is not the father of the minor;

2. The putative father has willfully abandoned or willfully failed to care for and support the minor; or

3. The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of

the petitioner, whichever occurs first.

(2) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision either:

(a) Granting the adoption without the biological parent's consent; or

(b) Dismissing the adoption petition, and stating whether the child shall be returned to the biological parent or the child's custody granted to the state, another agency, or the petitioner.

(3) A biological living parent has the right to legal representation in an adoption wherein he or she does not consent. The Circuit Court shall determine if a biological living parent is indigent and, therefore, entitled to counsel pursuant KRS Chapter 31. If the Circuit Court so finds, the Circuit Court shall inform the indigent parent; and, upon request, if it appears reasonably necessary in the interest of justice, the Circuit Court shall appoint an attorney to represent the biological living parent pursuant to KRS Chapter 31 to be provided or paid for by:

(a) The petitioner, a fee to be set by the court and not to exceed five hundred dollars ($500); or

(b) The Finance and Administration Cabinet if the petitioner is a blood relative or fictive kin as

established in KRS 199.470(4)(a), a fee to be set by the court and not to exceed five hundred dollars ($500).

As to Appellant's claim that KRS 199.500 and KRS 199.502 are unconstitutional,

> [A]cts of the General Assembly carry a presumption of constitutionality. A statute will not be invalidated as unconstitutional unless it clearly, unequivocally, and completely violates provisions of the constitution. Moreover, the Commonwealth does not bear the burden of establishing the constitutionality of a statute, rather . . . the one who questions the validity of an act bears the burden to sustain such a contention. The issue of whether a statute is unconstitutional is a question of law subject to de novo review.

Wilfong v. Commonwealth, 175 S.W.3d 84, 91 (Ky. App. 2004) (internal quotation marks, footnotes, and citations omitted).

Thus, in examining *de novo* the question of whether KRS 199.500 and KRS 199.502 are constitutional, we 1) begin with the presumption that they are constitutional; and, 2) recognize that Appellant has the burden of proving that they "clearly, unequivocally and completely" violate provisions of the constitution. *Wilfong*, 175 S.W.3d at 91.

Appellant's argument centers on her contention that "[t]he statutory bar for termination of parental rights pursuant to an adoption under KRS Chapter 199 is precariously low, especially in contrast to the grounds that must be proven to terminate parental rights under KRS Chapter 625."[6]After careful review of KRS 199.500, KRS 199.502, and KRS Chapter 625, we cannot conclude that Appellant has overcome the presumption that KRS Chapter 199 is constitutional, nor that Appellant has proven that KRS Chapter 199 clearly, unequivocally, and completely violates provisions of the constitution. *Wilfong*, *supra*.

Appellant asserts that in their current form, KRS 199.500 and KRS 199.502 cast such a wide net that a child whose parent was on military deployment or hospitalized with cancer for more than 90 days is subject to being characterized as abandoned for purposes of KRS 199.502(1) and at risk of involuntary adoption.

This claim is simply untrue. To the contrary, a panel of this Court noted that abandonment is a matter of intent "to forego all parental duties and relinquish all parental claims to the child." *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1985) (internal quotation marks and citation omitted). Were this not the case, "servicemen, prisoners of war, ship captains or persons requiring prolonged hospitalization would

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[6] Appellant's brief at p. 5.

be likely candidates to have their parental rights terminated." *Id*. "Abandonment is a matter of intent which may be proved by external facts and circumstances[.]" *Id*. Facts and circumstances may prove that a mother has abandoned her child via a life of drug addition, crime, and incarceration. Conversely, other facts may prove that no abandonment has occurred if a parent is on military deployment or experiencing extended hospitalization. As this analysis is fact-dependent, it is objectively false that KRS 199.500 and KRS 199.502 cast such an overly broad net that innocent, loving parents may be ensnared and subject to the involuntary and unconstitutional loss of their parental rights.

CONCLUSION

KRS 199.500 and KRS 199.502 are presumed to be constitutional, and the burden rests with Appellant to demonstrate that they clearly, unequivocally, and completely violate provisions of the constitution. *Wilfong*, *supra*. Because KRS 199.500 and KRS 199.502 do not blindly characterize as abandoned any child whose parent is absent for more than 90 days, but rather impose a fact-based analysis of the parent's intent and reasons for the separation, they are not overly broad and do not operate to unconstitutionally terminate a party's parental rights. Appellant has not met her burden of overcoming the presumption that KRS 199.500 and KRS 199.502 are constitutional. Accordingly, we affirm the findings of fact, conclusions of law, and judgment of

adoption of the Jefferson Family Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE, A.A:
Allison S. Russell, Louisville, Kentucky	Hugh Barrow Louisville, Kentucky

APPENDIX C
Judgment of Jefferson Circuit Court
[Filed July 27, 2021]

CASE NO. 20-AD-500011 JEFFERSON CIRCUIT COURT
FAMILY DIVISION SIX (6)

IN RE: SERENITI ELIZABETH ABLE, A MINOR CHILD

JUDGMENT OF ADOPTION

** ** ** ** **

This matter came before the Court on June 2, 2021 for trial on the verified petition of Amber Able to adopt a child born April 18, 2017, more particularly named and described in said verified petition, and after private hearing on the case at which time Petitioner, Respondent and counsel were present and the Court having by separate Order entered this date made Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The name of the infant, born on April 18, 2017, in Jefferson County, Kentucky, named a party Respondent herein, is hereby changed to and shall hereafter be known as SERENITI ELIZABETH ABLE.

2. The infant child, SERENITI ELIZABETH ABLE, from and after the date of the filing of the

Petition herein, shall be deemed the child of Petitioner, AMBER ABLE, and shall be considered for all purposes of inheritance and succession, and for all other legal considerations, the natural and legitimate child and heir-at-law of Petitioner, the same as if born of her body, with all the obligations, rights and privileges of such natural privileges of such natural child and heir.

3. The parental control of said infant Respondent, SERENITI ELIZABETH ABLE, is hereby granted to Petitioner, AMBER ABLE, and Petitioner shall hereafter be under the same responsibility to the said infant child and be entitled to the same rights and privileges as if she were her natural child, and the said infant child shall from the date hereof have no legal relationship to her birthparents in respect to either personal or property rights, and all legal relationship between the said infant child and the biological parents shall be and hereby is terminated.

4. A copy of the Judgment of Adoption shall be forwarded by the Clerk of the Jefferson Circuit Court to the Cabinet for Health and Family Services for the birth certificate of the said infant child to be changed in accordance with KRS 199.570(3).

IT IS FURTHER ORDERED that a certified copy of this Decree of Adoption may be furnished to the Cabinet for Health and Family Services,

Commonwealth of Kentucky, if necessary and/or requested.

THIS IS A FINAL AND APPEALABLE ORDER, THERE BEING NO JUST REASON FOR DELAY IN ITS ENTRY.

_____
A. CHRISTINE WARD, JUDGE
JEFFERSON CIRCUIT COURT
FAMILY DIVISION SIX

CLERK'S CERTIFICATION

I hereby certify that a stamped and certified copy of the foregoing was mailed to the following this the ____ day of _____ 2021.

Hon. Hugh W. Barrow
2501 Nelson Miller Pkwy, Suite 102
Louisville, KY 40223
Counsel for Petitioner

Hon. Allison Russell
2429 Bush Ridge Dr., Suite 102
Louisville, KY 40245
Counsel for Respondent

Hon. Teresa Kinberger
11707 Main St.
Louisville, KY 40243
Guardian ad Litem

_____
CLERK, JEFFERSON FAMILY COURT

APPENDIX D
Findings of Fact and Conclusions of Law of Jefferson Circuit Court
[Filed July 27, 2021]

CASE NO. 20-AD-500011 JEFFERSON CIRCUIT COURT
FAMILY DIVISION SIX (6)

AMBER ABLE PETITIONER

v. **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

MIRANDA NICOLE NELSON RESPONDENTS
AND
SERENITI FAYTH JADYN BOLIN, A MINOR CHILD

***** *** *****

This matter came before the Court on June 2, 2021 for trial on the Petition, filed January 6, 2020, to adopt the minor child, Sereniti Fayth Jadyn Bolin. The Petitioner appeared, represented by the Hon. Hugh Barrow. The Respondent Nelson appeared, represented by the Hon. Allison Russell. The Hon. Teresa Kinberger, appointed Guardian ad Litem for Respondent Child also appeared. Each party testified. Respondent Nelson's father, Todd Nelson, also testified.

Having considered the evidence, applied the law, and being otherwise duly and sufficiently advised, the Court finds and concludes as follows:

RELEVANT PROCEDURAL BACKGROUND

Prior to this action, Respondent child was the subject of a Dependency Neglect and Abuse action, Case No. 17-J-00112-001, initiated on April 25, 2017, in Shelby County, Kentucky. Respondent Nelson ultimately failed to regain custody and Petitioner Able was granted permanent custody of Sereniti.

Subsequently, Petitioner Able filed an adoption action in Shelby County. At the time of the adoption petition, Petitioner Able was unaware of Respondent Nelson's location, as she did not have a permanent residence. Respondent Nelson was served in that action, via Warning Order Attorney, on July 2, 2019. The Cabinet for Health and Family Services recommended the adoption on or about September 16, 2019. However, the Shelby County Court subsequently dismissed the action on October 17, 2019 and directed Petitioner Able to file the action in Jefferson County, Kentucky.

Following commencement of the action herein, Respondent Nelson was again served via Warning Order Attorney on January 28, 2020. The Hon. Teresa Kinberger was appointed as Guardian ad Litem for the minor child by Order entered August 21, 2021. The Petitioner filed an Amended Petition on December 23, 2020 joining Mr. Paul Jason Bolin as a Respondent. Although the parties stipulate that Mr. Bolin is not the child's father, he

was joined in this action in compliance with statute as he appears on the birth certificate as the child's father. Thereafter, Mr. Bolin was served by Warning Order Attorney, the Hon. Mark Mulloy on March 30, 2021. Mr. Bolin did not respond. Respondent Nelson filed her Answer to the Petition in this action on March 31, 2021. This matter was scheduled for trial by Order entered April 27, 2021.

Prior to the June 2, 2021 Trial in this matter, Petitioner Able filed the following Motions in Limine: 1) Motion to Exclude the Testimony of Respondent's Witnesses and 2) Motion to Deem Admissions Admitted. The Court declined to exclude the testimony of Respondent Nelson's witnesses, given that Respondent Nelson provided notice of her anticipated witnesses in her Pretrial Memorandum filed May 28, 2021 and her discovery responses. Additionally, the Court noted that Respondent Nelson's intended witnesses were not being solicited for expert testimony. Nevertheless, the Court advised Petitioner Able that it would entertain a Motion for a Continuance should one be requested. Petitioner Able declined the opportunity for a continuance and advised the Court she wanted to move forward as scheduled.

Regarding Petitioner Able's Motion to Deem Certain Facts Admitted, Respondent Nelson did not object. Consequently, by Order entered June 3, 2021, the parties stipulated to the following facts:

1. Shelby County Family Court found that Respondent Miranda Nicole Nelson engaged in conduct that made her incapable for caring for Sereniti's immediate and ongoing needs.

2. Respondent Miranda Nicole Nelson stipulated to facts supporting a finding of neglect or abuse on August 16, 2017.

3. Shelby County Family Court found that Sereniti was neglected or abused.

4. Respondent Miranda Nicole Nelson has been incapable of caring for Sereniti at times since her birth due to Respondent's incarceration.

5. Paul Jason Bolin is not Sereniti's biological father.

6. Respondent Miranda Nicole Nelson does not know the identity of Sereniti's biological father.

FINDINGS OF FACT

Respondent Nelson is thirty years old and the biological mother of the Minor Child subject to this action, Sereniti Fayth Bolin, born April 18, 2017. Respondent Nelson resides with her father and stepmother. The natural father of the child is unknown.

Petitioner Able is Respondent Nelson's cousin and has four biological children of her own, one of whom is emancipated. Petitioner Able was granted permanent custody of Sereniti in Shelby County Family Court Case 17- J-00112-001. Since birth, Sereniti has solely resided with Petitioner Able with no involvement from Respondent Nelson.

Respondent Nelson is a recovering drug addict. Her battle with addiction began with the use of alcohol at the age of fifteen. Shortly thereafter, Respondent Nelson was prescribed pain medication including Percocet and Lortab for scoliosis. When Respondent Nelson no longer received pain medication prescribed by physicians, she began purchasing pills off the street. This pattern ultimately led her to using heroin. Respondent Nelson became a daily heroin user at the age of 21. In addition to heroin, Respondent Nelson acknowledged previously using marijuana, opiates, alcohol, crack cocaine, powder cocaine and methamphetamine. Due to her addiction, Respondent Nelson has suffered from periods of homelessness and incarceration, including for theft and prostitution. Respondent Nelson acknowledged using heroin, alcohol, methamphetamine, cocaine and marijuana during her pregnancy, ultimately resulting in Sereniti's removal from her care shortly after birth. Although Child Protective Services attempted interventions and numerous resources were offered, Respondent Nelson failed to comply with

these remedial measures. Consequently, Sereniti was never returned to her care. Respondent Nelson eventually signed a stipulation on August 16, 2017 admitting to Sereniti being dependent, neglected, or abused.[7] Consequently, custody of Sereniti has remained with Petitioner Able since that time.

Shortly following Sereniti's birth, Respondent Nelson exercised supervised visitation several times each week. In October 2017, however, visits between Respondent Nelson and Sereniti abruptly ended when Respondent Nelson failed to appear for a supervised visit. Petitioner Able did not hear from Respondent Nelson until April 18, 2018, Sereniti's first birthday when Respondent Nelson sent her a text message. However, Respondent Nelson did not request to see Sereniti at this time. Thereafter Petitioner Able did not hear from Respondent Nelson until November 2018 at which time Respondent Nelson contacted Petitioner Able advising she was recently released from incarceration. Respondent Nelson acknowledged her initial phone call, following her release, was to a friend in order to secure heroin. Thereafter she contacted Petitioner Able and requested to visit Sereniti. Petitioner Able obliged and met Respondent Nelson at a local McDonald's restaurant. Respondent Nelson acknowledged using heroin two days prior to this visitation.

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[7] Shelby County Family Court Case 17-J-00112-001.

Following this visit in November 2018, Respondent Nelson did not contact Petitioner Able or attempt to meet with Sereniti until October 2020, over two years later. Since 2018, Respondent Nelson acknowledged seeing Sereniti only on three occasions, despite not having any Orders restricting contact with the minor child. Respondent Nelson has never exercised unsupervised visitation or overnight visitation with Sereniti.

During this time, Respondent Nelson continued to struggle with her sobriety, homelessness, and poverty. Respondent Nelson maintains she has been sober since August 3, 2020 and currently attends a suboxone program at NuLease Medical Solutions and therapy at Kentucky Mental Health Care. Respondent Nelson has previously attended various rehabilitation and drug treatment facilities including: Centerstone, Jefferson Alcohol Drug Abuse Center, Our Lady of Peace, The Healing Place, The Women Renaissance's Program, Recovery Works and Step Works. Respondent Nelson relapsed with each of these programs. Respondent Nelson insists that she is compliant with current treatment and consistently attends her counseling appointments. When cross examined as to recently missed therapy appointments, Respondent Nelson insisted that any "no shows" reflected in her counseling records were incorrect.

As further proof of her stability, Respondent Nelson insists she has maintained consistent employment at Chili's Restaurant since October 2020. Respondent Nelson only works part time and testified that when she initially began employment, she suffered from medical conditions which impacted her ability to work full time. However, Respondent Nelson later acknowledged she disclosed to her therapist on April 26, 2021 that she "could not handle" working full time and chose not to go to work following an altercation with her boss. Respondent Nelson insisted she would now be able to be employed full time, despite advising her therapist, again, on May 12, 2021 that she would be "reducing her work hours as she felt overwhelmed." Despite Respondent Nelson being employed since October 2020, she has not provided any financial support on behalf of the minor child. Despite her lack of financial assistance to her daughter, Respondent Nelson acknowledged saving her money in order to purchase tickets to vacation in Florida in April 2021. Respondent Nelson provided no other reason for her lack of financial support of Sereniti.

CONCLUSIONS OF LAW AND ORDER

Petitioner Able seeks to adopt Sereniti without the consent of Respondent Nelson. As such, the Court is guided by Kentucky Revised Statute 199.502 ("KRS 199.502) which directs as follows:

1) Notwithstanding the provisions of KRS 199.500(1), an adoption may be granted without the consent of the biological living parents of a child if it is pleaded and proved as part of the adoption proceeding that any of the following conditions exist with respect to the child:

(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;

(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;

(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;

(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
3. The condition or factor which was the basis for the previous termination finding has not been corrected;

(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; or

(j) That the parent is a putative father, as defined in KRS 199.503, who fails to register as the minor's putative father with the putative father registry established under KRS 199.503 or the court finds, after proper service of notice and hearing, that:

1. The putative father is not the father of the minor;
2. The putative father has willfully abandoned or willfully failed to care for and support the minor; or

> 3. The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

The Court concludes that the evidence presented supports a finding that Respondent Nelson abandoned Sereniti for a period well in excess of the ninety days set forth as a minimum in KRS 199.502(1)(a). Per the parties' stipulation, Respondent Nelson has been incapable of caring for Sereniti at times since her birth due to Respondent's incarceration. By Respondent Nelson's own admission, she has visited with Sereniti only on three occasions since 2018. The Court concludes that Sereniti has been in Petitioner Able's care for a period of four years with little to no contact from Respondent Nelson.

Furthermore, by the testimony of Petitioner Able, it is clear that Respondent Nelson has been "substantially incapable of providing essential parental care and protection for the child." KRS 199.502(1)(e). As Petitioner Able has been Sereniti's primary caretaker form birth, it is undeniable that Respondent Nelson failed to provide Sereniti with protection as she was completely absent for the minor child's life.

Additionally, it is clear that Respondent Nelson has continuously and repeatedly failed to

provide or has been incapable of providing Sereniti with "essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being." KRS 199.502(1)(g). Although Respondent Nelson is capable of working, she has not consistently or meaningfully provided for the child. Despite her contention that she has been gainfully employed since October 2020, she has not offered any significant financial assistance to meet the material needs of her child and instead opted to expend what funds were available on a vacation rather than the care of her child. Respondent Nelson's failure or inability to meet the material needs of her child is due more to choices made on her part and voluntary abandonment of the child than any other single factor. In any event, it is clear that Respondent Nelson's on-going failure or inability to provide Sereniti with the material necessities of life is "for reasons other than poverty alone[.]" Id.

As noted above, portions of the foregoing statutory grounds require a trial court to make reasonable inferences regarding future parental conduct so as to determine whether there is reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child. The Court, given the Respondent's lack of involvement, contribution, and consistency over the past four years, finds no reasonable

expectation for improvement. Respondent Nelson has visited the child on only three occasions over the past three years and has gone years without seeing her. Respondent Nelson has continued to completely abandon any responsibility to Sereniti, whether emotional or financial, during this time. Respondent Nelson's recent decision to vacation in Florida rather than to provide any assistance for Sereniti's care confirms her lack of maturity and her inability to prioritize Sereniti's needs over her own. Given Respondent Nelson's lack of candor, numerous relapses, and continued self-centered behavior, the Court concludes it is unlikely that there is any reasonable expectation of significant improvement.

Respondent Nelson objects to Sereniti's adoption and argues that Kentucky Revised Statute 199.502 ("KRS 199.502") is unconstitutional noting that the statutory bar for termination of parental rights pursuant to an adoption under KRS Chapter 199 is precariously low in relation to the grounds which must be proven to terminate parental rights under Kentucky Revised Statute 625. As this Court is not charged with adjudicating the constitutionality of the laws by which it is governed, the Court need not address this argument other than to state that the obvious; there is clearly a distinction in terminating parental rights pursuant to adoption under KRS Chapter 199 and terminating parental rights under Chapter 625. The Court need not set

forth here a dissertation of the public policy behind the legislature's distinction – this Court must simply follow the law set forth by Kentucky's legislative body.

Based on the foregoing Findings of Fact and Conclusions of Law Petitioner, AMBER ABLE's, petition for adoption shall be **GRANTED** by separate order entered simultaneous hereto.

_____

A. CHRISTINE WARD, JUDGE
JEFFERSON CIRCUIT COURT
FAMILY DIVISION SIX

CLERK'S CERTIFICATION

I hereby certify that a stamped and certified copy of the foregoing was mailed to the following this the ____ day of _____ 2021.

Hon. Hugh W. Barrow
2501 Nelson Miller Pkwy, Suite 102
Louisville, KY 40223
Counsel for Petitioner

Hon. Allison Russell
2429 Bush Ridge Dr., Suite 102
Louisville, KY 40245
Counsel for Respondent

Hon. Teresa Kinberger
11707 Main St.
Louisville, KY 40243
Guardian ad Litem

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CLERK, JEFFERSON FAMILY COURT