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Commonwealth of Kentucky
Court of Appeals

NO. 2020-CA-0380-ME

A.K.H.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DERWIN L. WEBB, JUDGE
ACTION NO. 18-AD-500282

J.D.C.; G.D.C.; AND K.M.H.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

JONES, JUDGE: The Appellant, A.K.H. (“Stepfather”) appeals the Jefferson Family Court’s February 5, 2020 findings of fact and conclusions of law on termination of parental rights and judgment of adoption. The order was entered following a bifurcated hearing, conducted over Stepfather’s objection, in which the family court considered and ultimately denied Stepfather’s “motion for

termination”¹ of the parental rights of J.D.C. (“Biological Father”) to his minor son, G.D.C. (“Child”). On appeal, Stepfather argues that the family court erred as a matter of law by reviewing the evidence under the purview of KRS² Chapter 625, which governs termination of parental rights instead of under the purview of KRS Chapter 199, which governs adoption.

Stepfather is correct that the family court applied the wrong statutory standard to his prejudice. Specifically, the family court denied the adoption on the basis that Stepfather failed to demonstrate that Biological Father neglected Child through abandonment. This was clear error as one of the fundamental differences between termination of parental rights cases and adoption without consent cases is the absence of an abuse or neglect requirement in the adoption without consent statute. *B.L. v. J.S.*, 434 S.W.3d 61, 67 (Ky. App. 2014). Accordingly, having reviewed the record and being otherwise sufficiently advised, we reverse the family court and remand this matter for additional proceedings to be conducted in accordance with KRS Chapter 199.

¹ As explained in more detail below, Stepfather did not motion the family court to terminate Biological Father’s parental rights; indeed, it would have been impossible for him to do so as he does not fall within the category of persons authorized to request termination under the relevant statutes.

² Kentucky Revised Statutes.

I. BACKGROUND

K.M.H. (“Mother”) and Biological Father married in May of 2010. Mother gave birth to Child in September of 2010. Mother and Biological Father had a tumultuous relationship. The couple divorced in February of 2014. However, they attempted to reconcile and began living together again in June of 2014. They ceased cohabitating in December of 2014 after Biological Father intentionally drove his car into the family residence while Mother and Child were inside the home. This resulted in criminal charges being filed against Biological Father. Ultimately, Biological Father pleaded guilty to felony wanton endangerment. A domestic violence order was also entered prohibiting him from having any contact with Mother and/or Child. Biological Father is currently incarcerated at the Blackburn Correctional Complex; the maximum expiration of his sentence is February of 2035. His next parole eligibility date is in February of 2021.

Mother and Stepfather met in February of 2015. Approximately a year later, Stepfather began residing with Mother and Child. Stepfather and Mother married in August of 2017. Mother and Stepfather gave birth to a daughter, Child’s half-sister, in May of 2018.

On June 28, 2018, Stepfather filed a petition seeking to adopt Child with the Jefferson Family Court. Stepfather named Mother, Child, and Biological

Father as respondents. Stepfather alleged that Biological Father has not provided any support or care for Child since 2014. Stepfather requested the family court grant his request to adopt Child thereby terminating Biological Father's parental rights. Mother filed a verified entry of appearance confirming that she consented to Stepfather's adoption of Child. The family court appointed a guardian *ad litem* to assist Biological Father; thereafter, Biological Father filed a response opposing Stepfather's adoption.

Stepfather's petition was forwarded to the Cabinet for Health and Family Services. On September 18, 2018, the Cabinet provided the family court with its investigative report. As part of its investigation, the Cabinet interviewed Mother, Child, and Stepfather. The Cabinet contacted Biological Father by mail but did not receive a response prior to completion of its investigation. Ultimately, the Cabinet concluded that adoption was in Child's best interests, and it recommended that the adoption be granted provided all legal requirements were met.

The matter was set for a hearing on the adoption petition. On the day set for the hearing, March 1, 2019, the family court held a conference in chambers with the parties' counsel.³ At this time, Biological Father's counsel opined that he

³ This conference is not a part of the record. Our information about the conference is gleaned from filings of counsel in the lower court as well as the briefs filed in this Court. However, there

believed the hearing should be bifurcated. The family court continued the hearing so that counsel could brief the bifurcation issue. Stepfather filed a memorandum of law objecting to bifurcation. Therein, Stepfather argued that it was improper to conduct a termination of parental rights hearing under KRS Chapter 625 apart from the adoption hearing. No response by Biological Father appears in the record.

On May 7, 2019, the family court entered an order bifurcating the proceeding as follows:

Having considered the arguments made and being otherwise sufficiently and duly advised, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

The parties having had [the] opportunity to brief the issues before the Court and upon further review by the Court, the issues before the Court will be bifurcated. The matter of termination shall be heard on August 23, 2019, for two (2) hours from 9:00-11:00 a.m. The matter of the stepparent adoption shall be heard at a later date to be set after a ruling is issued on the termination matter.

Record on Appeal (“R.”) at 54.

The family court conducted the “termination” hearing on August 23, 2019. Biological Father’s counsel, Stepfather and his counsel, and Mother appeared in person at the hearing. Biological Father was present by telephone. Stepfather, Biological Father, and Mother each testified.

does not appear to be any significant disagreement regarding the substance of the in-chambers conference.

Following the hearing, the family court entered findings of fact and conclusions of law on termination of parental rights and judgment of adoption.

After recounting the substance of the parties' testimony, the family court turned to the law. Its order provides in relevant part:

The Kentucky termination statute . . . KRS [625.090] provides the Court may involuntarily terminate parental rights only if the court finds by clear and convincing evidence that a three-pronged test has been met: (1) the child/ren must be abused or neglected, as defined in KRS 600.020; (2) termination of parental rights must be in the child/ren's best interest; and (3) the Court must find that any of the enumerated grounds per KRS 625.090(2) exists supporting termination.

. . .

When considering the best interests of the child, the termination statute establishes different standards of proof for the Cabinet and the parents whose rights are to be terminated. While the Cabinet must prove the mandatory statutory allegations by clear and convincing evidence for this Court to terminate parental rights, parents must demonstrate by a preponderance of the evidence that the child will not be abused or neglected in the future to permit this Court to exercise its discretion in this proceeding.

Per Kentucky's Unified Juvenile Code, a *neglected child* is one whose parent "[c]reates or allows to be created a risk of physical or emotional injury . . . by other than accidental means" or "[a]bandons or exploits the child" KRS 600.020(1)(a)(2). Deciding whether a child is a *neglected child* must be determined by a preponderance of the evidence. The term *abandon[ment]* is not defined in the aforementioned statute, however, Kentucky Courts have made clear the bounds [they are]

willing to reach to find what is abandonment as a matter of law.

...

... [T]his court is unwilling to find that [Biological Father] abandoned [Child] as a matter of law because of his incarceration, or alternatively, because he is prohibited from contacting his son pursuant to the outstanding DVO.

...

While the Court recognizes that the absence of [Biological Father] has helped to create the bond that is developing between [Stepfather] and [Child], a termination of parental rights is premature at this time. Given that [Biological Father's] stint of incarceration is for the purpose of rehabilitation, it would be unjust to hand down an additional sentence of parental termination but for the fact that his absence is a nexus to his incarceration. Accordingly, [Stepfather's] Motion for Termination of Parental Rights is DENIED.

This Order is final and there being no just cause for delay in its entry or execution.

R. at 69-72 (emphasis in original).

This appeal followed.

II. ANALYSIS

This case involves an adoption. “[T]wo basic rules’ govern all adoptions: 1) the right of adoption exists only by statute; and, 2) there must be strict compliance with the adoption statutes.” *S.B.P. v. R.L.*, 567 S.W.3d 142, 147

(Ky. App. 2018) (internal quotation marks omitted). The statutes governing adoptions in this Commonwealth are codified in KRS Chapter 199.

We begin our review with KRS 199.520(1). It provides that the family court shall enter a judgment of adoption if after a hearing, the court is satisfied that:

the facts stated in the petition were established; that all legal requirements, including jurisdiction, relating to the adoption have been complied with; that the petitioners are of good moral character, of reputable standing in the community and of ability to properly maintain and educate the child; and that the best interest of the child will be promoted by the adoption and that the child is suitable for adoption.

KRS 199.520(1). “Upon granting an adoption, all legal relationship between the adopted child and the biological parents shall be terminated except the relationship of a biological parent who is the spouse of an adoptive parent.” KRS 199.520(2).

Adoptions can be granted with or without the consent of the biological parents.

KRS 199.500.

Adoption without consent is governed by KRS 199.502. It provides:

(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.

Id.

The family court referred several times to Stepfather's "motion" to terminate Biological Father's parental rights. Stepfather never filed such a motion

and would not have standing to do so.⁴ Stepfather filed an adoption petition. As such, it was wholly unnecessary for him to separately motion or petition the family court for termination of Biological Father’s parental rights. “[T]he adoption judgment itself terminates parental rights by virtue of the provisions of KRS 199.520(2)[.]” *Wright v. Howard*, 711 S.W.2d 492, 495 (Ky. App. 1986).

We now turn to the family court’s decision to bifurcate the adoption proceeding. While bifurcation in adoption proceedings is unusual, we have never held it to be reversible error *per se*. *A.F. v. L.B.*, 572 S.W.3d 64 (Ky. App. 2019). However, where bifurcation is ordered by the family court in an adoption proceeding, it must be conducted in accordance with KRS Chapter 199. When broken down, an adoption without consent involves four distinct considerations: (1) did the petitioner comply with the jurisdictional requirements for adoption;⁵ (2) have any of the conditions outlined in KRS 199.502(1) been established; (3) is the petitioner of good moral character, of reputable standing in the community and of ability to properly maintain and educate the child as required by the first portion of KRS 199.520(1); and (4) finally, will the best interest of the child be promoted by the adoption, and is the child suitable for adoption as required by the final

⁴ Pursuant to KRS 625.050(3), only the Cabinet, any child-placing agency licensed by the Cabinet, any county or Commonwealth’s attorney, or parent has standing to seek involuntary termination of parental rights. *A.F. v. L.B.*, 572 S.W.3d 64 (Ky. App. 2019).

⁵ For the most part, these conditions are outlined in KRS 199.470 and KRS 199.490.

portion of KRS 199.520(1). Conceivably, the family court could bifurcate the proceeding consistent with making findings and conclusions in accordance with any one of these four considerations.

In this case, the family court elected to conduct a termination of parental rights hearing under KRS 625.090. However, KRS 625.090 is only applicable to the extent specified in the adoption statutes. As our prior case law makes clear, adoption without consent does not require that all the requirements of the termination statute be satisfied. Specifically, adoption without consent does not require a finding by the family court that the child had been neglected or abused or a consideration of whether additional services might be provided to bring about reunification. *See B.L.*, 434 S.W.3d at 67. In fact, KRS 199.500(4) provides that adoption without consent may be granted if it is pleaded and proved as part of the adoption proceedings that *any* of the provisions of KRS 625.090 are met with respect to the child. Any does not mean all. This Court previously explained:

KRS 199.500(4) says “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 such child.” KRS 199.500(4) (emphasis added; quoted from 1994 Ky. Acts ch. 242 (H.B. 191) § 6, amending KRS 199.500 as the statute reads, in this regard, today). Subsection (4) was enacted well before KRS 625.090 was amended in 1998 to add fact-finding requirements, but these additional

requirements were not also added to Chapter 199. See 1998 Ky. Acts ch. 57 § 18 (adding the current section (1) of KRS 625.090). The termination of parental rights provisions attendant to an adoption remain distinct from parental rights terminations under Chapter 625. For example, “proceedings to involuntarily terminate parental rights can *only* be initiated by the Cabinet, any child-placing agency licensed by the Cabinet, any County or Commonwealth’s Attorney, or a parent. KRS 625.050(3).” *R.M. v. R.B.*, 281 S.W.3d 293, 296 (Ky. App. 2009) (emphasis added). . . . Neither KRS 199.500(4) nor KRS 199.502(1) has ever been amended to require satisfaction of more than one condition to terminate parental rights. Today, as before amendments to KRS 625.090 adding additional elements, both KRS 199.500(4) and KRS 199.502(1) require clear and convincing evidence of only one of the respective identified provisions (“any of the provisions of KRS 625.090” for KRS 199.500(4), and any of the conditions contained in KRS 199.502(1) for that statute). KRS 199.502 makes no reference to Chapter 625, Chapter 620, or Chapter 600 of the Kentucky Revised Statutes or their standards. Notably, because of KRS 199.520(1) the family court must find “that the best interest of the child will be promoted *by the adoption*. . . .” (emphasis added).

A.F., 572 S.W.3d at 71 n.8.

In this particular case, the family court held a termination hearing pursuant to KRS 625.090. A review of the family court’s opinion makes clear that it believed Stepfather had to satisfy all prongs of the parental termination statute, KRS 625.090, before adoption could be granted. The family court first analyzed whether Stepfather had proved Biological Father abused or neglected Child through abandonment. This was plain error as the adoption statutes do not require

a separate finding of abuse or neglect. *B.L.*, 434 S.W.3d at 67. Instead, the family court should have confined its review to a determination of whether Stepfather proved the existence of any one of the conditions outlined in KRS 199.502(1)(a)-(j), which substantially mirror the conditions set out in KRS 625.090(2). We believe this error prejudiced Stepfather and requires reversal and remand. On remand, the family court should follow the adoption statutes set forth in KRS Chapter 199. Specifically, it should not require Stepfather to demonstrate full compliance with the termination statute, KRS 625.090, as occurred during the prior bifurcated hearing in this case.

Because the parties have raised the issue and it is likely to come up during remand, we will briefly address the proper burden of proof for an adoption proceeding. “By its nature, adoption under KRS 199 vitiates parental rights of biological parents.” *E.K. v. T.A.*, 572 S.W.3d 80, 83 (Ky. App. 2019). Fundamental fairness and the private interest affected by parental rights termination proceedings requires clear and convincing proof be used. *Santosky v. Kramer*, 455 U.S. 745, 757-58, 102 S. Ct. 1388, 1397, 71 L. Ed. 2d 599 (1982); *see also D.S. v. F.A.H.*, 684 S.W.2d 320, 323 (Ky. App. 1985) (“[T]he same procedural safeguards mandated [in *Santosky*] should apply regardless of whether one is threatened with the loss of his 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.”).

III. CONCLUSION

For the reasons set forth above, we reverse and remand for additional proceedings consistent with the opinion expressed herein.

ALL CONCUR.

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