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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-1480-ME

T.G.-F. APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE MICHAEL DEAN, JUDGE
ACTION NO. 20-AD-00012

J.Y.; A.Y.; G.E.L.G., A MINOR CHILD; AND W.F. APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CETRULO, AND L. THOMPSON, JUDGES.

ACREE, JUDGE: Appellant (Mother) appeals the Estill Circuit Court's judgment granting Appellees' (Aunt and Uncle) petition to adopt Mother's child (Child) without her consent. We vacate and remand for further proceedings consistent with this Opinion.

BACKGROUND

Mother gave birth to Child on July 31, 2019. Child's biological father is deceased. On September 4, 2020, Aunt and Uncle filed their petition to adopt Child without Mother's consent. *See* KRS[1] 199.502. Nothing in the record indicates the Estill Circuit Clerk complied with her statutory duty to send copies of the petition to the Cabinet.[2] KRS 199.510(1) ("Upon filing a petition for the adoption of a minor child, the clerk of the court shall forward two (2) copies of the petition to the cabinet."). If so, that would explain why the Cabinet did not participate in the adoption in any way. Nevertheless, the adoption proceeded.

The circuit court conducted a final hearing on November 4, 2021, and on November 15, 2021, entered (1) a Judgment of Adoption; (2) Findings of Fact and Conclusions of Law; and (3) a Judgment Terminating Parental Rights.[3]

Mother's appeal presents us with four arguments. The last three challenge the sufficiency of evidence that her parental rights should be terminated. However, her first argument is a procedural challenge that the circuit court did not

[1] Kentucky Revised Statutes.

[2] For example, because costs of the adoption are borne by the petitioners, KRS 199.590(6)(a), and because, specifically, "[t]he clerk's fee for copying and forwarding the copies of the petitions required by this section shall be taxed as a cost of the action[,]" KRS 199.510(4), one would expect the itemization of those costs in the record. There is none.

[3] The court entered these as separate documents. We treat them as one judgment.

strictly comply with the adoption statutes before entering the judgment of adoption. We are persuaded by that argument.

A confounding fact in this case is that the petition does not identify whether the adoption is sought pursuant to KRS 199.500(4) or KRS 199.502, and neither do any of the three rulings comprising the circuit court's judgment. (Record (R.) 1-7; 894-905.) However, our review will address the adoption process under KRS 199.502 because Mother, and Aunt and Uncle, only reference that statute in their briefs. (Appellant's brief, pp. 7, 9; Appellees' brief, pp. 2-5.)

We need not address the merits of the allegations in the petition or the sufficiency of evidence to support them. Those allegations are only "pleaded and proved *as part of* the adoption proceeding[.]" KRS 199.502(1) (emphasis added). "KRS 199.502 makes clear that, '[i]f granted, *the adoption itself terminates the parental rights* of the biological parents.'" *M.S.S. v. J.E.B.*, 638 S.W.3d 354, 361 (Ky. 2022) (emphasis added). Because Mother is correct that the circuit court erred by failing to strictly follow the adoption laws, the court's consideration of the merits of Aunt's and Uncle's claims is also error.

STANDARD OF REVIEW

"An adoption without the consent of a living biological parent is, in effect, a proceeding to terminate that parent's parental rights." *B.L. v. J.S.*, 434 S.W.3d 61, 65 (Ky. App. 2014) (citing *Moore v. Asente*, 110 S.W.3d 336 (Ky.

2003)). Because "adoption is a statutory right which severs forever the parental relationship, Kentucky courts have required strict compliance with the procedures provided in order to protect the rights of the natural parents." *Day v. Day*, 937 S.W.2d 717, 719 (Ky. 1997). "Nothing can be assumed, presumed, or inferred and what is not found in the statute is a matter for the legislature to supply and not the courts." *Id*. (citing *Coonradt v. Sailors*, 186 Tenn. 294, 209 S.W.2d 859 (1948)).

When the facts are not in dispute regarding the application of a statute, our review is *de novo*. *Shinkle v. Turner*, 496 S.W.3d 418, 420 (Ky. 2016) ("Being a question of statutory interpretation and a matter of law, we conduct a *de novo* review.").

ANALYSIS

Mother argues the judgment of adoption is fatally defective because it fails to strictly comply with Kentucky's adoption statutes. "Because . . . KRS 199 governs the entirety of the proceeding," *M.S.S.*, 638 S.W.3d at 362, we restrict our review to consideration of that chapter. In doing so, we conclude the circuit court erred by entering a judgment of adoption without the Cabinet's required participation under KRS 199.510(1) or (2).

1. Circuit court proceeded without Cabinet participation.

It is a fact in this case that the Cabinet did not complete an investigation or make a report for the circuit court's consideration prior to granting

the adoption. Nor did the Cabinet notify the circuit court within ten (10) days of receiving copies of the petition that it would not be investigating. The onus is upon the Cabinet to do one or the other because KRS 199.510 requires it in every adoption case. This, of course, presumes the clerk performs the ministerial act of mailing copies of the petition to the Cabinet which this record suggests did not happen. The clerk's failure is the genesis of the judge's failure to strictly comply with the adoption statutes. The Cabinet cannot be blamed for not participating if it had no knowledge that a KRS 199.502 adoption was being pursued.

In any event, our review is for circuit court error. We conclude the court committed reversible error by proceeding to judgment without the Cabinet's participation as required by KRS 199.510.

To be clear, however, the Cabinet need not have participated as a party. The Kentucky Supreme Court made it clear that, "[b]ecause this is an adoption case, and KRS 199 governs the entirety of the proceeding, the Cabinet was . . . not required to be joined as a party." *M.S.S.*, 638 S.W.3d at 362. The opinion effectively holds that KRS 199.502 abrogates the high court's prior ruling that "severance of the natural rights of a parent . . . is a matter of public and not private concern" and an action to sever those rights "could not be maintained by . . . private individuals." *Smith v. Wilson*, 269 S.W.2d 255, 257, 258 (Ky. 1954). Expressly declining to fully address constitutional issues not raised by the appeal,

the Supreme Court held that KRS 199.502 empowers private individuals to utilize state authority to terminate another person's constitutionally protected parental rights. *M.S.S.*, 638 S.W.3d at 363 ("we acknowledge that legitimate questions as to the constitutional sufficiency of the procedures set out in KRS 199.502 may exist, we do not believe those arguments are properly before us today").

The participation required of the Cabinet is defined solely within Chapter 199. The following provisions of the applicable statute are relevant:

> (1) Upon filing a petition for the adoption of a minor child, the *clerk of the court shall forward two (2) copies of the petition to the cabinet*. *The cabinet, or any person, agency or institution designated by it or the court shall, to the extent of available facilities, investigate and report in writing to the court*:
>
> (a) Whether the contents of the petition required by KRS 199.490 are true;
>
> (b) Whether the proposed adoptive parents are financially able and morally fit to have the care, custody and training of the child; and
>
> (c) Whether the adoption is to the best interest of the child and the child is suitable for adoption.
>
> (2) *The report of the cabinet or the designated person, agency or institution shall be filed* with the court as soon as practicable . . . . *If the cabinet or the designated person, agency or institution is unable to make the report, it shall within ten (10) days of receipt of the petition notify the court of its inability to conduct the investigation,* and the court may designate some other person, agency or institution to make the necessary investigation. If the court designates some

> other person, agency or institution, the clerk shall forward one (1) copy of the petition to such person, agency or institution and shall notify the cabinet of such other designation at the time he forwards the petition to the cabinet.

KRS 199.510(1)-(2) (emphasis added). More than once Kentucky's appellate courts have directed attention to the unmistakable provisions of this statute. *R.M. v. R.B.*, 281 S.W.3d 293 (Ky. App. 2009), is an example.

The necessity of Cabinet participation became this Court's focus in *R.M. v. R.B.*, even though the parties only addressed the parental rights termination aspect of the adoption. As in the case now before us, the appellants in *R.M. v. R.B.* were the aunt and uncle of a proposed adoptive child. *Id*. at 294. This Court determined the Cabinet's failure to file the investigative report mandated by KRS 199.510 was the best grounds upon which to affirm the circuit court's denial of an adoption petition. *Id.* at 297-98; *see Wells v. Commonwealth*, 512 S.W.3d 720, 721-22 (Ky. 2017) ("Even if a lower court reaches its judgment for the wrong reason, we may affirm a correct result upon any ground supported by the record."). We said, "Without the Cabinet's [r]eport, the circuit court could not grant the adoption as a matter of law." 281 S.W.3d at 298.

R.M. v. R.B. supports the conclusion that Cabinet participation is a prerequisite to every final hearing on an adoption petition. *See id.*; *see also* KRS 199.515 ("After the report of the guardian ad litem, if any, for the child *and the*

report required by KRS 199.510 have been filed, the court at any time on motion of its own or that of any interested party may set a time for a hearing on the petition[.]"). (Emphasis added.) Because the record before us shows the circuit court granted the adoption in disregard of the requirement of Cabinet participation, we cannot avoid concluding the circuit court committed reversible error.

2. <u>Appellees argue Cabinet investigation and report was not required.</u>

Notwithstanding our conclusion, Aunt and Uncle want this Court to interpret KRS 199.470(4)(a) as granting the circuit court sole discretion to order the Cabinet's KRS 199.510 report in all adoptions by relatives designated in that former statute. Their argument is necessarily based on a presumption that in such relative adoptions no Cabinet participation at all is required unless the circuit court orders a KRS 199.510 report. This interpretation of the statute is erroneous.

To the extent relevant to the argument, KRS 199.470 provides:

> (4) No petition for adoption shall be filed unless prior to the filing of the petition the child sought to be adopted has been placed for adoption by a child-placing institution or agency, or by the cabinet, or the child has been placed with written approval of the secretary; but *no* [*pre-petition*] *approval shall be necessary in the case of*:
>
> (a) A child sought to be adopted by a blood relative, including a relative of half-blood, first cousin, aunt, uncle, nephew, niece, and a person of a preceding generation as denoted by prefixes of grand, great, or great-great; stepparent; stepsibling; or fictive kin; however, *the court in its*

> *discretion may order a report in accordance with KRS 199.510 . . . .*

KRS 199.470(4)(a) (emphasis added). Aunt and Uncle argue that because the circuit court did not order the investigation and report, neither was required, and the circuit court lawfully proceeded without them. But this statute cannot be read in isolation. Rules of statutory construction require more.

3. Statutory interpretation requires context with focus on Cabinet's role.

"The particular word, sentence or subsection under review must also be viewed in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent." *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 719 (Ky. 2012) (citations omitted). The fallacy of Aunt's and Uncle's argument is revealed by this kind of analysis.

To begin, our adoption statutes clearly distinguish the Cabinet's separate roles in the pre-petition and post-petition phases of adoptions. While there are certain exceptions to Cabinet participation in the pre-petition phase, there are no exceptions to its participation in the post-petition phase.

> While KRS 199.470(4)(a) makes the Cabinet's *pre*-petition participation unnecessary in some circumstances, KRS 199.510 requires the Cabinet's *post*-petition notification and participation in every adoption. KRS 199.510(1). That participation is in the form of an investigation and report to the court conducted and prepared by the Cabinet or its designee. Only if the Cabinet or its designee is unable to make the report may the court then designate some other person, agency or

> institution to perform that function. KRS 199.510(2). In fact, the Supreme Court has indicated that no adoption hearing should be scheduled until "[*a*]*fter* the report of the guardian *ad litem*, if any, for the child *and the report required by KRS 199.510* have been filed[.]" *Baker v. Webb*, 127 S.W.3d 622, 626 (Ky. 2004) (emphasis supplied).

S.J.L.S. v. T.L.S., 265 S.W.3d 804, 828 (Ky. App. 2008) (emphasis original).

We acknowledge, however, that the factual scenarios of *S.J.L.S.*, *Baker v. Webb* (as quoted in *S.J.L.S.*, *supra*), and *R.M. v. R.B.*, *supra*, drove the respective courts in these cases to focus on the Cabinet's investigation and report, thereby presenting a slightly incomplete analysis. Those opinions would have been more accurate had they said, in a general way, that the statutes require Cabinet *participation* for, as we know, there have been cases – rare cases as our experience reveals – that proceeded without an investigation and report. *See Keeling v. Minton*, 339 S.W.2d 464, 465 (Ky. 1960); *Welsh v. Young*, 240 S.W.2d 584, 585 (Ky. 1951).

But adoptions without an investigation and report never happen for the reason Aunt and Uncle suggest – *i.e.*, that nothing compels an investigation and report unless the circuit court orders it. The legislation's context shows the circuit court is not empowered by either version of discretion found in KRS 199.470 or KRS 199.510 until the Cabinet first participates by declining to investigate, or as explained below, when the Cabinet fails to participate at all.

4. Longstanding requirement of Cabinet participation in every adoption.

Before the proliferation of federal and state agencies that make up the modern administrative state,[4] there was no executive branch participation in adoptions. *See Villier v. Watson*, 168 Ky. 631, 182 S.W. 869, 870-71, 872 (1916) (quoting then prevailing adoption statutes, KS[5] 2071 and 2072, "The courts are invested with authority, in proper cases, to take the parental control of children from their parents and to vest such control in another . . . ."). That changed when more comprehensive adoption laws were enacted in 1936.

The 1936 enactments required the Cabinet's predecessor, the State Department of Welfare, to investigate and report on every adoption without exception. *See* KS 331b-4(1), 331b-5(4) (1936).[6] This proved a problem. By 1949, resource limitations prevented the Department from complying with its

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[4] *See Baker v. Commonwealth*, No. 2005-CA-001588-MR, 2007 WL 3037718, at *16 n.18 (Ky. App. Oct. 19, 2007) (discussing "the modern administrative state" and the Kentucky Supreme Court's reference to the "fourth branch of government" (quoting *Am. Beauty Homes Corp. v. Louisville and Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 454 n.4 (Ky. 1964); *Kentucky Comm'n on Hum. Rights v. Fraser*, 625 S.W.2d 852, 857 (Ky. 1981) (Sternberg, J., dissenting); and *Legislative Research Comm'n By and Through Prather v. Brown*, 664 S.W.2d 907, 916 (Ky. 1984)).

[5] Kentucky Statutes.

[6] In pertinent part, these former adoption statutes said, "[T]he court shall cause an investigation to be made . . . by the State Department of Welfare, or by any agency which the State Department of Welfare may authorize to conduct the investigation[,]" KS 331b-4(1), and, "[i]n the case of a child, not born in lawful wedlock, . . . [adoption] shall not be permitted without the consent of the State Department of Welfare, or some other agency designated by it to give such consent, after a full investigation of the case has been made by the State Department of Welfare, or some other agency designated by it to make such investigation." KS 331b-5(4).

statutory duty. The adoption record in *Welsh v. Young* "contains two letters from an agent of the Department, dated July 27 and August 29, 1949, stating, in substance, that due to a shortage of personnel the Department would be unable to make a report on the case . . . ." 240 S.W.2d at 585. The legislature soon reacted.

The adoption laws first enacted in 1936 "were repealed by the 1950 Legislature, and reenacted, with modifications, as KRS 199.470-199.590." *Id.* The legislature made specific provision for the possibility that the agency might lack sufficient resources to investigate and report on every adoption of every kind.

The sections of the 1950 Act relating to adoptions that became KRS 199.510 read remarkably like today's version of the statute. They say:

> The Department or any agency or institution designated by it, shall, *to the extent of available facilities*, verify the allegations of the petition, make an investigation of the matter and report its findings in writing to the court . . . provided that if the Department or designated agency or institution is unable to make the report it shall immediately notify the court of its inability to conduct an investigation, and the court may designate some other agency of suitable person to make the necessary investigation . . . .

1950 Ky. Acts ch. 125 § 14(1)-(2) (emphasis added); *see* KRS 199.510(1)-(2) (nearly identical language but adding 10-day notice requirement).

This accommodation for lack of resources, first appearing in 1950 and carrying through to the present, does not mean the Cabinet or its predecessor does not participate at all. It means only that the nature of that participation changes.

The legislation compels the Cabinet's investigation and report "to the extent of available facilities[.]" KRS 199.510(1). By necessary implication then, the Cabinet[7] must choose which adoptions it will not investigate based on a lack of resources. But the Cabinet's duty of participation remains as it has always, or at least as it has since 1950. The Cabinet "shall within ten (10) days of receipt of the petition notify the court of its inability to conduct the investigation . . . ." KRS 199.510(2); *see* 1950 Ky. Acts ch. 125 § 14(1)-(2) (notice must be "immediate").

5. Cabinet's decision not to investigate and report effectuates court's discretion.

The legislative intent of KRS 199.510(2) is clear that the Cabinet's notice to the circuit court, and only that notice, brings to life the court's discretionary authority. After receipt of the Cabinet's notice, "the court may designate some other person, agency or institution to make the necessary investigation."[8] KRS 199.510(2).

But because the statute uses the word "may," the discretion effectuated by the Cabinet's notice also includes the authority to proceed without any investigation and report. *Keeling*, 339 S.W.2d at 465 ("statute says the court 'may' refer the matter to another person or agency for investigation. It is not

[7] Obviously, the decision is made today by the Secretary or his or her designated subordinate.

[8] Since 1956, if the circuit court does designate another investigator, the clerk of court is required to notify the Cabinet or its predecessor Department of Welfare "of such other designation . . . ." 1956 Ky. Acts ch. 157 § 12; KRS 199.510(2).

mandatory"). In other words, the court may "cho[o]se rather to use a hearing as [its] method of investigation." *Id.* However, we emphasize that neither option (to designate another investigator or proceed without a report) is available to the circuit court until receipt of the Cabinet's notice under KRS 199.510(2). *Kantorowicz v. Reams*, 332 S.W.2d 269, 271 (Ky. 1959), *as modified on denial of reh'g* (Mar. 4, 1960) ("the absence of any report to the court . . . makes the adoption unauthorized").

Since 1950, such discretion has been available under KRS 199.510 in every kind of adoption case. *Id.* But the statutory grant of discretionary authority upon which Aunt and Uncle rely derives from a different, more recently created source – KRS 199.470(4)(a), as amended.

6. Discretion under KRS 199.470 differs from that under KRS 199.510.

The discretionary authority in KRS 199.470(4)(a) to order the Cabinet to investigate and report was not a part of the adoption statutes until 2005. Legislative history sheds light as to why that additional discretion seemed necessary. We begin where the legislature must have begun, with the 1950 Act. The historical amendments reveal the original shortcomings which the legislature deemed necessary to correct.

The 1950 Act did not limit to any category (*e.g.*, relative adoptions, consensual adoptions) the adoptions the Cabinet could elect not to investigate

when lacking the resources. Our case law indicates the Cabinet's practice was to opt out of investigating and reporting on some adoptions when they proceeded with the consent of the parents. *See, e.g*., *Welsh*, 240 S.W.2d at 585; *Keeling*, 339 S.W.2d at 465. The 1962 amendments to the adoption statutes first recognized a different category of adoptions which, it could easily be anticipated, might induce the Cabinet to opt not to investigate – relative adoptions.

In 1962, when the fabric of extended family generally was perceived to be closely knit, the legislature amended KRS 199.470 to eliminate, for the first time, the requirement of the Cabinet's pre-petition approval if the petitioner is "a stepparent, grandparent, sister, brother, aunt or uncle[.]" 1962 Ky. Acts ch. 211 § 3; *see also* KRS 199.490(3) ("If . . . not excepted by KRS 199.470(4), a copy of the written approval of the secretary of the Cabinet . . . shall be filed with the petition." (1994 Kentucky Acts ch. 242 § 5 (eff. Jul. 15, 1994))). Perhaps the legislature perceived the idea of a relative adoption as evoking a sense of security not present when the adoption petitioner is unrelated. Regardless of the reason, the statute was thus amended.

Eliminating the Cabinet's pre-petition participation is not, however, the same as dispensing with the requirement of the investigation and report required by KRS 199.510(1). Might the sense of security evoked by a relative adoption tempt the Cabinet to refrain from investigating (to conserve resources)

even when the adoption is pursued without a parent's consent? If that was a concern of the legislature, it is not reflected in the 1962 Act amending the statutes.

However, the next decades saw changes in adoption practice not anticipated by the legislation. There was even a new species – open adoptions.[9] They were not without their own problems, including parents who consent then change their mind. *See, e.g.*, *Boatwright v. Walker*, 715 S.W.2d 237, 242 (Ky. App. 1986) (discussing such cases). Then, in 1992, a University of Louisville Journal of Family Law article urged imposing a time-limit after which a parent's consent to adoption becomes irrevocable.[10] The next year, the legislature did just

[9] "Generally speaking, an 'open adoption' is one where the birth parents continue to maintain a relationship with the child. Many private adoptions, especially where a grandparent or other relative adopts the child, are open adoptions." *Moore*, 110 S.W.3d at 351 n.43. *McNames v. Corum* exemplified "the classical pattern of private adoptions" in this era; "appellants are college educated, successful persons, motivated by a true desire for children, and frustrated by four miscarriages, a prematurely born infant who died, and the prospect of a five-year wait for public placement. The appellee is a 16-year-old unwed mother . . . ." 683 S.W.2d 246, 246 (Ky. 1984), *as modified* (Jan. 17, 1985).

[10] The Kentucky Supreme Court quoted this student note with approval in a different context in *Day*, 937 S.W.2d at 720. Regarding the article's specific topic, the author concluded the piece as follows:

> It is unfortunate that [some states] have chosen to allow natural parents to withdraw arbitrarily their consent prior to the entry of a final decree of adoption without considering the child's welfare. . . . [P]erhaps a very short 'cooling off' period, such as ten days, would be more compassionate for the natural parents who very often find it so difficult to consent to adoption and thus experience mixed feelings. Giving natural parents ten days to revoke consent is certainly very limited and would prevent the child from forming bonds with the adoptive parents. After ten days, the consent would be irrevocable absent fraud or duress.

that, adding a provision that "voluntary and informed consent . . . shall become final and irrevocable twenty (20) days after . . . execution of the consent . . . ." 1994 Ky. Acts ch. 242 § 6 (amending KRS 199.500(5)).

By 2003, the parental consent/private adoption approach had "become increasingly popular[.]" *Moore*, 110 S.W.3d at 351. Not surprisingly in hindsight, private adoptions had already become "a source of confusion for both the bar and the bench." *Boatwright*, 715 S.W.2d at 244. The difficulties are not better revealed than in *Moore v. Asente*.

One of the Supreme Court's most cited cases, *Moore v. Asente*, "resulted from the breakdown of a proposed private adoption" when the parents' consents were twice given and twice withdrawn, and no mention is made of pre-petition approval or any investigation or report by the Cabinet. 110 S.W.3d at 339. In the wake of *Moore v. Asente*, the legislature again amended the adoption laws. Relevant here, those changes took two forms.

The legislature expanded by a generation the list of relatives who would be exempt from the Cabinet's pre-petition approval; since then, the list has also included the adoptive child's "great grandparent, great aunt, or great

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Susan Yates Ely, Note, *Natural Parents' Right To Withdraw Consent To Adoption: How Far Should The Right Extend?*, 31 U. LOUISVILLE J. FAM. L. 685, 704-05 (1992). As noted, the Kentucky legislature included a "cooling off" period of twenty (20) days a year later.

uncle[.]"[11] 2005 Ky. Acts ch. 175 § 1 (eff. Jun. 20, 2005) (amending KRS 199.470). However, with what seems a balance to the expansion of the degree of consanguinity of relatives excepted from the pre-petition approval requirement, the legislature added another tool to aid the circuit court in assuring it was acting in the child's best interest.

The 2005 amendment to KRS 199.470(4)(a) authorized the court, in its discretion, to override the Cabinet's decision under KRS 199.510 not to use its own resources to investigate and report on the petitioners, even in parental consent-based adoptions by relatives. *Id.* In fact, the legislature went even further and authorized the court to order "a background check as provided in KRS 199.473(8)[.]" KRS 199.470(4)(a). If the Cabinet determines it lacks resources to investigate a relative adoption, the court can still order the Cabinet to do so and report. However, neither the ability nor the need to exercise discretion granted in KRS 199.470(4)(a) or, for that matter, discretion already available under KRS 199.510(2), arises until the Cabinet notifies the court it will not investigate.

[11] In 2018, the legislature would again amend KRS 199.470(4)(a), broadening the list to include "blood relative[s]" and "fictive kin[,]" 2018 Ky. Acts ch. 159 § 4 (eff. Jul. 14, 2018), which is someone "who is not related by birth, adoption, or marriage to a child, but who has an emotionally significant relationship with the child . . . ." KRS 600.020(28).

7. The circuit court failed to avoid reversible error.

We apply the foregoing analysis to the facts of this case which, necessarily, requires this Opinion to identify the next point in the trajectory of the law in this area. It reveals another purpose and need for the discretion of KRS 199.470(4)(a) by answering this question: What must a circuit court do to avoid error when the Cabinet does not participate at all?

The starting point for the court is to confirm the court clerk performed her statutory duty: "Upon filing a petition for the adoption of a minor child, the clerk of the court shall forward two (2) copies of the petition to the cabinet." KRS 199.510(1). If the clerk failed to do so, the court can order it done.

But what if, despite indications to the contrary, the clerk did in fact send two copies of the petition to the Cabinet? What if, in this case or another, the blame does lie with the Cabinet because, despite receiving the clerk's notice, it failed either to investigate and report pursuant to section (1) of KRS 199.510 or to notify the circuit court that it lacks the resources to do so under section (2)?

First, we eliminate the notion that the Cabinet's silence equates to or satisfies its statutory 10-day notice requirement. The Cabinet's mandate under KRS 199.510(1) and (2) clearly defines an affirmative duty the agency cannot discharge by inaction or disregard.

The circuit court's answer when the Cabinet fails to perform its statutory duty under KRS 199.510 is to order it to do so. Ordinarily, because the Cabinet is not a party, the circuit court would lack personal jurisdiction over the Cabinet to order the report. *See Soileau v. Bowman*, 382 S.W.3d 888, 892 (Ky. App. 2012) ("[T]he trial court did not exercise personal jurisdiction over [a non-party], and thus the orders affecting him are void."). One purpose of KRS 199.470(4)(a) is to solve that problem by authorizing the court to order the Cabinet, even when not a party, to conduct the investigation. *Cf. Lewis v. Lewis*, 534 S.W.2d 800, 801 (Ky. 1976) ("KRS 403.300 provides that in child custody proceedings the court may order an investigation and report to be made by such an agency as the court selects.").

The circuit court proceeded to judgment in this case without any participation by the Cabinet and, despite the KRS 199.470(4)(a) authority at its disposal, did not order that failing corrected. This is reversible error.

Mother's other claims of error are made moot by this ruling.

CONCLUSION

We vacate the Estill Circuit Court's November 15, 2021 Judgment of Adoption, Findings of Fact and Conclusions of Law, and Judgment Terminating Parental Rights, and remand for proceedings consistent with this Opinion.

THOMPSON, L., JUDGE, CONCURS.

CETRULO, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
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