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Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-1485-ME

J.L.R. APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE KIMBERLY BLAIR WALSON, JUDGE
ACTION NO. 20-AD-00097

A.L.A.; B.A.; J.L.A.; AND L.C.A., A MINOR CHILD APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND GOODWINE, JUDGES.

COMBS, JUDGE: This is an adoption case. The Appellant, J.L.R., is the child's biological mother (Biological Mother). After our review, we affirm in major part. We vacate and remand only to the extent that we direct the family court to enter a judgment of adoption in accordance with the requirements of KRS[1] 199.502.

[1] Kentucky Revised Statutes.

The child was born on August 5, 2014, exhibiting symptoms associated with withdrawal. Consequently, the Cabinet for Health and Family Services (the Cabinet) filed a neglect petition against Biological Mother in Madison Family Court -- Case No. 14-J-00417-001. Biological Mother stipulated to neglect. The child was placed with his paternal grandparents, the Appellees, A.L.A. and B.A. (Grandparents). By an order entered on July 22, 2015, the court granted permanent custody to Grandparents. As a result of pre-natal exposure to drugs, the baby was born with severe handicaps. The child is now seven years of age and suffers from cerebral palsy and multiple developmental delays which require ongoing medical care and therapy. In her brief, Biological Mother acknowledges that the child was adversely affected by her drug use while he was *in utero.*

On July 22, 2020, Grandparents initiated the proceeding below by filing a "Verified Petition for Termination of Parental Rights and Adoption" in the Madison Circuit Court, Family Division. At that time, both biological parents were incarcerated. The family court appointed a guardian *ad litem* (GAL) for the child and counsel for Biological Mother. Father subsequently filed a waiver of process, entry of appearance, and entry of consent to the voluntary termination of his parental rights to the child. The biological father is not a party to this appeal.

The family court conducted an evidentiary hearing on February 23, 2021,[2] which was concluded on September 23, 2021. On November 19, 2021, the family court entered findings of fact and conclusions of law (FFCL) and a "Judgment of Termination of Parental Rights" from which Mother appeals. We discuss additional facts in our analysis below as relevant to the issues that Biological Mother raises on appeal.

However, as a threshold matter, we must first address what appears to be the subject of ongoing confusion in this critical area of legal practice.

KRS Chapter 199 governs adoptions. KRS Chapter 625 governs the termination of parental rights. Filing a dual petition for adoption **and** termination of parental rights is a "mistaken procedural approach . . . ." *Wright v. Howard*, 711 S.W.2d 492, 496 (Ky. App. 1986). In applying these two statutes, counsel must apply an "either/or" approach.

> By its nature, adoption under KRS 199 vitiates parental rights of biological parents. KRS 199.520(2). When there is a dual petition involving an adoption and involuntary termination of parental rights, the adoption supersedes the termination because KRS 199 encompasses KRS 625.

E.K. v. T.A., 572 S.W.3d 80, 83 (Ky. App. 2019).

[2] By that time, both parents had been released from incarceration.

In *C.J. v. M.S.*, 572 S.W.3d 492, 497 (Ky. App. 2019), this Court re-visited *Wright*, *supra*, and ably set forth its procedural dictates once again:

> When the lives of children are involved, counsel must be **especially diligent** to follow the correct procedures. We are gravely concerned that *Wright*'s lessons have been lost to time. Today, we remind the Bar once again that when the petitioner is the person seeking to adopt a child, **an adoption petition, not a petition for termination of parental rights**, should be filed. If the lower court erroneously allows a dual petition to move forward and enters two judgments, we treat the judgments as one. On appeal, we will review the judgment for compliance with the adoption statutes. If the adoption statute's minimal jurisdictional requirements have not been satisfied, the judgment of adoption is void.

(Emphases added.)

In the case before us, the dual petition was erroneously allowed to move forward, but only one judgment was entered, which -- adding to the confusion -- was erroneously captioned, "Judgment of Termination of Parental Rights."

With that analysis in mind, we turn to the issues Biological Mother raises on appeal. Her brief does not contain a statement of preservation as required by CR[3] 76.12(4)(c)(v). That rule mandates that appellant's brief include "at the beginning of the argument a statement with reference to the record showing

[3] Kentucky Rules of Civil Procedure.

whether the issue was properly preserved for review and, if so, in what manner."

We reiterate:

> A statement of preservation is vitally important because a new theory of error cannot be raised for the first time on appeal. Stating how and where an issue is preserved ensures this Court the issue being raised was argued to the trial court, the trial court had an opportunity to correct any error, and the issue is properly before us.
>
> The statement of preservation determines whether we apply a recognized standard of review or consider granting a request for palpable error review of an unpreserved claim. Requiring a statement of preservation serves as a check for the practitioner -- a forced review of the record. If the issue sought to be raised was not argued to the trial court, palpable error review may be requested -- if appropriate -- or the issue must be abandoned.
>
> [Appellant] has not claimed any errors raised in this Court were argued to the trial court. More particularly, he has not told us *where and how* any claim was preserved, if at all. Nor has he requested palpable error review. . . .
>
> . . .
>
> Failure to obey CR 76.12 is not automatically fatal, but we could exercise our discretion and strike [appellant's] brief or dismiss his appeal. Due to the sensitive nature of custody issues, we have chosen not to dismiss the appeal or strike the brief, but instead will limit our review and caution counsel to heed the rules of appellate practice in future appeals.

G.P. v. Cabinet for Health and Family Services, 572 S.W.3d 484, 489-90 (Ky. App. 2019) (emphasis original) (internal quotation marks and citations omitted).

Due to the sensitive nature of the case before us, we will nonetheless review the issues that Biological Mother has raised -- despite her noncompliance with CR 76.12.

Her first argument is essentially a conclusory statement that the family court erred in applying the statutory provisions of KRS 625.090 and that the applicable statutes for adoption without consent are KRS 199.502 and KRS 199.520. We agree those are the applicable statutes. The pertinent question is whether there was compliance with them.

KRS 199.520 governs judgments in adoption cases and provides as follows:

> (1) After hearing the case, **the court shall enter a judgment of adoption**, if it finds 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. In the judgment, the name of the child shall be changed to conform with the prayer of the petition. **The judgment and all orders required to be entered and recorded in the order book, including the caption, shall contain only the names of the petitioners and the proposed adopted name of the child, without any reference to its former name or the names of its birth parents**.

(Emphases added.)

Following the hearing, the family court entered its FFCL. It found that the allegations in Grandparents' petition are true. The language of the petition and the court's findings essentially track the language of KRS 199.470 governing the contents of the petition of adoption. The court further found that the "Petitioners, [Grandparents], are of good moral character, reputable standing in the community, able to properly maintain and educate the child, and the best interest of the child will be promoted by the adoption and the child is suitable for adoption." The family court's findings generally satisfy the requirements of KRS 199.520(1) for entry of a judgment of adoption. However, the judgment entered by the family court includes the names of the birth parents -- contrary to the dictates of KRS 199.520(1). On remand, the family court shall correct this error.

KRS 199.502 sets forth the conditions necessary for an adoption without consent and provides as follows in relevant part:

> (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:
>
> . . . .
>
> (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;

. . . .

(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;

. . .

(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.

(Emphasis added.)

KRS 199.500(4), entitled, "Consent to adoption," also provides that:

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.[4]

(Emphases added.)

In their petition, Grandparents pled that:

a. [Biological Mother], 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 for improvement in parental care and protection considering the age of the child.

b. That she, 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 reasonable necessary [*sic*] and available for the child's well being and that there is no reasonable expectation of significant improvement in the parents [*sic*] conduct in the immediately foreseeable future, considering the age of the child;

c. That she has been found by the Madison Family Court in case number 14-J-00417-001 to have neglected the child.

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[4] Among those conditions is neglect. KRS 625.090 provides that:

(1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:

(a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding[.]

In its FFCL, the family court found, *inter alia*, that Biological Mother has:

> a. Abused or neglected the child . . . by clear and convincing evidence due to her substance abuse while she was pregnant with [the child]. This substance abuse caused [the child] to suffer delays and medical diagnoses which have severely impacted his life.
>
> . . .
>
> c. 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.
>
> d. 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.

The family court found that Biological Mother failed to pay child support. It also found that after her release from incarceration, Biological Mother resumed a relationship with an abusive paramour; she had only recently ended that relationship. In considering the reasonable expectation of improvement, the court did acknowledge that Biological Mother "did a great deal of improvement and took advantage of opportunities" while she was incarcerated. Nonetheless, the court did not believe that the child's life could improve from having a relationship with Biological Mother.

We are satisfied from our review of the record that Grandparents have pled and proven the conditions of grounds for adoption without consent under KRS 199.502(e) and (g) -- as well as KRS 199.500(4) -- notwithstanding any reference in the pleadings or by the family court to KRS Chapter 625.

Next, Biological Mother contends that the family court's findings of fact were not supported by clear and convincing evidence.

> [I]n adoption without consent cases we apply the same standard of review that governs parental termination cases. Our review is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence. The family court's findings will not be disturbed unless there exists no substantial evidence in the record to support them.
>
> Clear and convincing proof does not necessarily mean uncontradicted proof; but rather, requires there is proof of a probative and substantial nature that is sufficient to convince ordinarily prudent minded people. Under this standard, we are required to give considerable deference to the [family] court's findings, and we will not disturb those findings unless the record provides no substantial support for them.

C.J. v. M.S., 572 S.W.3d at 496 (internal quotation marks, citations, and footnote omitted).

On appeal, Biological Mother re-argues her case. She contends that despite the fact that she and the biological father had similar criminal and substance abuse histories, the biological father could continue to have contact with

the child because his parents are the adoptive parents. That fact, although true, is irrelevant legally since he voluntarily consented to the adoption.

Biological Mother also relies upon various oral statements made by the court during the hearings. However, we note that a court officially speaks only through its written record. A court's "oral pronouncement is not a judgment until it is reduced to writing. . . . [W]hen there is a conflict between a court's oral statements and the written judgment, the written judgment controls." *Brock v. Commonwealth*, 407 S.W.3d 536, 538 (Ky. 2013) (internal quotation marks and citations omitted).

Biological Mother's third and final argument is that termination of parental rights was not in the child's best interests. Once again, she re-argues her case. Substantial evidence supports the family court's finding that the best interest of the child will be promoted by the adoption. The Cabinet's investigative report filed pursuant to KRS 199.510 reflects that the child has lived with Grandparents since birth; that they have cared for his many, serious needs; that the child views them as his parents; and that the family is well adjusted and attached to one another. The Cabinet recommended adoption provided that all legal requirements have been met. The report of the child's occupational therapist, entered as an exhibit at the hearing, underscores the child's need for an environment with

structure, routine, and consistency -- all of which Grandparents have provided. It was duly observed that change creates stress for the child.

We are satisfied from our review of the record that the requirements of KRS 199.520 for entry of a judgment of adoption are substantively satisfied. The Grandparents have pled and proven the existence of conditions for adoption without consent under KRS 199.502(e) and (g) and KRS 199.500(4). The family court's findings have a substantial evidentiary foundation. In its FFCL, the court properly concluded that a judgment of adoption should be granted. However, the family court erroneously entered a judgment of termination of parental rights -- a caption that is a clear failure to comply with KRS 199.520.

Accordingly, we vacate the judgment of the family court terminating parental rights, and we remand it to the family court with two instructions: (1) that it correct its error with respect to erroneously naming the birth parents in its judgment as noted earlier in this Opinion and (2) that it enter a judgment of adoption (rather than termination) in accordance with the requirements of KRS 199.520. "**These statutory requirements can be satisfied by using in the judgment the exact language of the statute** rather than resorting to a detailed recitation of those facts that go to make up the ultimate statutory requirements." *Wright*, 711 S.W.2d at 496 (emphasis added). We affirm the substance of its judgment in all other respects.

Finally, we direct the court to expedite this matter as soon as possible.

ALL CONCUR.

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