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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0136-ME

R.V.K.H.

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE KEVIN D. BISHOP, JUDGE
ACTION NO. 21-AD-00026

S.M.S.; COMMONWEALTH OF
KENTUCKY, CABINET FOR
HEALTH AND FAMILY SERVICES;
D.R.K.S., A MINOR CHILD; AND
D.W.S., JR.

APPELLEES

OPINION AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: ACREE, DIXON, AND McNEILL, JUDGES.

DIXON, JUDGE: R.V.K.H. (Mother) appeals from an order of the Graves Circuit Court granting the petition for adoption filed by S.M.S. (Stepmother) regarding the minor child, D.R.K.S. Following review of the record, briefs, and applicable law,

we affirm in part, reverse in part, and remand for further proceedings consistent with this Opinion.

FACTS AND PROCEDURAL BACKGROUND

Mother and D.W.S., Jr. (Father) were married in Hawaii in January 2014 and divorced in October 2015. There was one child born of the marriage, D.R.K.S. (Child). Although the parties shared joint legal custody, Child resided primarily with Father, who moved to Idaho with Child in March 2015. Mother also moved to Idaho briefly but returned to Hawaii, where she presently resides. Custody and visitation were litigated extensively in the Hawaii court. Although Mother's visitation was expanded, her various motions for change of custody were denied. Evidence introduced at the final hearing in the instant action revealed that Mother did not utilize all her available visitation, nor did she utilize all available Skype calls with Child.

Father and Stepmother married in 2017 and moved to Kentucky in 2019. Mother visited Child in Kentucky for one week in September 2019 and had contact via Skype on January 1, 2020. Between January 1, 2020, and the filing of Stepmother's petition for adoption on May 13, 2021, Mother had no contact with Child. Once Mother was served with Stepmother's petition for adoption, she again sought sole custody of Child in the Hawaii court. Her motion was denied, but the

court entered an order allowing Mother to have visitation with Child in Hawaii for approximately one month, from June to July 2021.

In the instant action, Mother filed a *pro se* answer to the petition for adoption. An attorney subsequently filed an entry of appearance on behalf of Mother but moved to withdraw just six days later, citing a conflict of interest. Mother did not appear at the hearing, and the court entered an order granting counsel's motion to withdraw. Mother did not appear before the circuit court until the date of the final hearing, when she appeared *pro se* via video from Hawaii. Mother did not cross-examine Stepmother's witnesses and did not call any witnesses. When provided an opportunity to present a closing argument, Mother attempted to reference materials that were not introduced into the record. The court sustained Stepmother's objection, and Mother chose not to continue with a closing argument.

The circuit court granted Stepmother's petition to adopt Child. An attorney then entered an appearance on behalf of Mother and filed a motion to alter, amend, or vacate the judgment of adoption, arguing Hawaii retained jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and, therefore, Kentucky did not have jurisdiction to hear Stepmother's adoption petition. The circuit court denied Mother's motion. This appeal followed.

STANDARD OF REVIEW

Mother first argues the circuit court did not have subject matter jurisdiction to hear Stepmother's petition for adoption. Subject matter jurisdiction is "the court's power to hear and rule on a particular type of controversy." *Nordike v. Nordike*, 231 S.W.3d 733, 737 (Ky. 2007). "The question of jurisdiction is ordinarily one of law, meaning that the standard of review to be applied is de novo." *Harrison v. Park Hills Bd. of Adjustment*, 330 S.W.3d 89, 93 (Ky. App. 2011) (citation omitted).

Mother also argues the circuit court erred because it did not inquire about her indigency and did not inform her of her right to appointment of counsel to represent her in the proceedings after her counsel withdrew. This argument is unpreserved. Accordingly, we review for manifest injustice only. *See Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990).

LEGAL ANALYSIS

Mother makes numerous arguments on appeal. However, because we are reversing and remanding, we address only two issues raised by Mother. First, Mother argues Kentucky lacked subject matter jurisdiction to hear Stepmother's adoption petition because Hawaii retained jurisdiction under the UCCJEA. We disagree.

The UCCJEA is codified in Kentucky Revised Statutes (KRS) 403.800 through 403.880 and applies to proceedings “in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence[.]” KRS 403.800(4).¹ Notably, adoption is not mentioned in the statute. Further, KRS 403.802 is entitled “Proceedings governed by other law” and provides, in relevant part, “KRS 403.800 to 403.880 shall not govern an adoption proceeding[.]”² Mother attempts to differentiate from other adoptions, asserting that stepparent adoptions that terminate the parental rights of a biological parent are governed by KRS Chapter 625, which is governed by the UCCJEA. Mother’s argument has no basis in the law.

The statutes governing adoption proceedings are codified in KRS 199.470 through 199.590. Adoptions without the consent of the biological parents are governed by KRS 199.502, which does not require termination of parental rights under KRS Chapter 625. Further, KRS 199.520(2) provides, in relevant part, that “[u]pon granting an adoption, all legal relationship between the adopted

¹ Hawaii has also adopted the UCCJEA. The definition of “child custody proceeding” is identical to that of KRS 403.800(4) and is found in Hawaii Revised Statutes Annotated (Haw. Rev. Stat. Ann.) § 583A-102.

² Hawaii’s equivalent statute is Haw. Rev. Stat. Ann. § 583A-103.

child and the biological parents shall be terminated except the relationship of a biological parent who is the spouse of an adoptive parent.” In other words, the adoption itself, under KRS Chapter 199, terminates parental rights. *C.J. v. M.S.*, 572 S.W.3d 492, 497 (Ky. App. 2019).³ “Provisions of KRS Chapter 625 are applicable only as permitted by KRS 199.500(4), and as specifically enumerated in KRS 199.502.” *A.F. v. L.B.*, 572 S.W.3d 64, 70 (Ky. App. 2019) (footnote and citation omitted).

The UCCJEA explicitly and unambiguously provides that it does not apply to adoption proceedings. *See* KRS 403.800(4) and KRS 403.802. Although Mother’s rights may be terminated in the adoption, it is not a proceeding governed by KRS Chapter 625; hence, it is not subject to the UCCJEA. Accordingly, the Kentucky circuit court has jurisdiction to hear Stepmother’s petition for adoption, and we affirm the circuit court in this regard.

Mother also argues the circuit court erred because, when she appeared *pro se* for the final hearing, the court did not make an inquiry as to her indigency or inform her of her right to counsel. Although this issue is unpreserved, we review for manifest injustice. Parental rights are a “fundamental liberty interest protected by the Fourteenth Amendment” of the United States Constitution.

³ Further, a petition for termination of parental rights can be filed only by “the cabinet, any child-placing agency licensed by the cabinet, any county or Commonwealth’s attorney, or parent.” KRS 625.050.

Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599 (1982). Because Mother stands to have her parental rights terminated as a result of the adoption, the action must be approached by the circuit court with “utmost caution.” *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 427 (Ky. App. 2015) (citation omitted).

KRS 199.502(3) provides, in relevant part:

[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[.]

(Emphasis added.)

When Mother appeared before the circuit court for the first and only time at the final hearing, the court inquired whether she had an attorney, and she responded that she did not. The circuit court next confirmed that Mother previously had an attorney who withdrew. Finally, the circuit court asked Mother if she was ready to proceed, and she responded affirmatively. In contravention of KRS 199.502(3), at no time did the circuit court inquire as to whether Mother was indigent, nor did it inform her of her right to appointment of counsel.

This Court recently rendered *W.H.J. v. J.N.W.*, 669 S.W.3d 52 (Ky. App. 2023), also a stepparent adoption, in which the circuit court did not inform natural father of his right to counsel and did not inquire whether he was indigent at any time, including the final hearing. At one point, the circuit court asked natural father if he planned to hire an attorney and mentioned an affidavit of indigency but did not explain it to him or make any inquiries as to whether he was indigent. On appeal, Father argued he did not understand what the family court meant when it told him about an affidavit of indigency. This Court acknowledged that, although the circuit court mentioned an affidavit of indigency, a layperson could not be expected to understand legal terminology. We went on to explain, in relevant part:

the family court did not ever plainly tell Father that he had a statutory right to have counsel appointed for him if he could not afford to retain one. We encourage trial courts to state plainly to a parent contesting an adoption that he or she has a right to have counsel appointed if the parent cannot afford to retain one.

Id. at 58.⁴

Herein, not only did the circuit court not *plainly* tell Mother she had a statutory right to counsel if she could not afford one, it did not inquire about her indigency or inform of her right to counsel at all. Plain reading of KRS 199.502(3)

⁴ *W.H.J.* was remanded for a new trial for failure to utilize the clear and convincing evidence standard. However, this Court also provided instructions on remand regarding appointment of counsel.

reveals the instructions to the circuit court therein are mandatory.⁵ As in *W.H.J.*, we also acknowledge it seems incongruous that Mother argues indigency and her right to appointment of counsel when she is currently represented by unappointed counsel. However, we similarly “do not know whether [Mother’s] counsel is representing [her] *pro bono* or whether [Mother’s] financial status has recently improved. Given those uncertainties, we cannot conclude that [her] arguments about being entitled to appointed counsel are moot.” *Id.* at 57-58. Accordingly, we reverse the circuit court on this issue.

CONCLUSION

For the aforementioned reasons, the order of the Graves Circuit Court is **AFFIRMED IN PART, REVERSED IN PART, and REMANDED** for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Louis P. Winner
Louisville, Kentucky

BRIEF FOR APPELLEE S.M.S.:

Jesse E. Wright
Mayfield, Kentucky

⁵ Generally, when “shall” appears in a statute, it is mandatory. *See* KRS 446.010(39); *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000).