

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001498-ME

S. N. L.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN P. SCHRADER, JUDGE
ACTION NO. 08-AD-00006

R. V., JR.; K. A. V.; AND
A.N.M.V., A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of an adoption without the consent of the living biological mother. Based upon the foregoing, we affirm the decision of the trial court as we find the biological mother has failed to provide essential parental care and protection for the child and that there is no reasonable expectation of

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

improvement in parental care and protection by the biological mother, considering the age of the child.

FACTUAL BACKGROUND

A.N.M.V. is the daughter of S.N.L. and was born on July 20, 2005. A.N.M.V.'s father was J.M. At the time of her birth, both parents were heavily involved in drugs. As a result of their drug usage, A.N.M.V. was removed from their care at birth and was placed with her maternal grandmother, K.M. Formal temporary custody was given to K.M. on August 2, 2005; however, she was unable to care for the child as she was caring for an older child of S.N.L. At this point, the appellees were approached by the parents regarding the possibility of their caring for A.N.M.V.

The appellees began caring for A.N.M.V. and, after several months, they petitioned the court for permanent residential custody. She has remained in the continuous care of the appellees since that time. S.N.L. as well as K.M. have maintained some contact with A.N.M.V. during this time.

On New Year's Eve of 2006, J.M. died of an accidental drug overdose. S.N.L. testified that this was the catalyst that caused her to enter a twenty-eight day drug rehabilitation program in January of 2007. She continued in that program until it concluded. After this program, S.N.L. decided that she needed continued rehabilitative services and enrolled in a longer term program in Bowling Green, Kentucky.

After spending time at the Bowling Green facility, S.N.L. discovered she was pregnant and returned to Fayette County. She has remained in the area continuously since that time. S.N.L. obtained employment as a waitress at a Red Robin Gourmet Burgers (“Red Robin”) and gave birth to a third child, K.L. She also began having supervised visitation with A.N.M.V.

All testimony indicated that the relationship between S.N.L. and the appellees was strained. S.N.L. stated that she felt uncomfortable calling them and most scheduling and other issues were resolved through K.M. While this method was not ideal, it appears to have worked well for some time.

In early 2008, S.N.L. moved the family court for unsupervised visitation with her daughter. After a mediation involving S.N.L. and the appellees, it was determined that she would begin the unsupervised visit. The first scheduled visitation was on March 11, 2008. This did not occur, however, because the appellees did not bring A.N.M.V. They contend that they would not allow this visit because they did not have proof that S.N.L. had submitted to drug testing. A second visitation was scheduled, however, K.M. informed the appellees that S.N.L. would not be able to make it since she was ill.

No other visitation occurred between S.N.L. and her daughter. She contends that she was hospitalized four or five times during that year which made visitation problematic. S.N.L. also admits that she did not comply with drug testing. She stated that she did not have time to drive the thirty minutes each way to the drug testing facility.

The appellees originally filed a petition for adoption and mailed the petition to an incorrect address. In the summer of 2008, they filed an amended petition with the correct address of S.N.L., but otherwise the amended petition was completely the same.

The appellees and S.N.L. appeared at a confidential hearing before the family court on March 9, 2009. After completion of the testimony, the family court judge found that the adoption should be granted without the consent of S.N.L. He found that she had abandoned her daughter for a period of not less than ninety days and that S.N.L. had not provided support to A.N.M.V., was incapable of providing essential parental care and protection to A.N.M.V., and that it was not foreseeable that she would be able to provide support in the future.

S.N.L. then brought this appeal arguing that the family court did not have sufficient evidence upon which to grant the petition.

DISCUSSION

In *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 1395, 71 L.Ed.2d 599 (1982), the Supreme Court of the United States found that:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even where blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything,

persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

KRS 199.502 provides that adoptions may be granted without the permission of the child's biological living parents. This statute in subsection 1 provides that the following are a basis for such an adoption:

(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; or

(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.

The appellees contended that S.N.L. abandoned her daughter for a period of not less than ninety days when she did not visit her. “[A]bandonment is demonstrated by facts or circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child.” *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983). In *Kantorowicz v. Reams*, 332 S.W.2d 269, 271-

272 (Ky. 1960), the Court found that in order to constitute abandonment, the separation from the child must be willful and harsh.

In this action, the appellees knew where S.N.L. was and that she continued to have an interest in the child. While visitation was not occurring, there is nothing to indicate that she was willfully abandoning A.N.M.V. Thus, we find that the family court erred in finding that S.N.L. had abandoned her daughter.

The second factor used by the family court in determining that the adoption should go forth without S.N.L.'s consent was that she had not provided support for her daughter and that there was no reasonable expectation of improvement in her ability to provide and care for her in the future.

As set forth above, S.N.L. testified at trial that she had a full-time waitress position which she had maintained for two years at Red Robin. She stated that she earned approximately \$1400.00 per month at this job. S.N.L. maintains custody of her youngest child, K.L., and provides support for her. Although S.N.L. has not paid child support to the appellees for her daughter's support, both sides agree that no support order has ever existed nor have the appellees requested support. We believe there was clear and convincing evidence for the trial court to find that S.N.L. was not and had not been supporting her daughter. The sole support S.N.L. testified she gave was in the manner of a few holiday presents of clothing. We also agree with the family court's finding that there was a reasonable certainty that she would not be able to provide support in the future. While S.N.L. is gainfully employed, has maintained employment and is continuing her

education, she had no plan for including A.N.M.V.'s needs into her budget either financially or with her time. S.N.L. testified that she was not interested in taking A.N.M.V. from the care and custody of the appellees. This is indicative of the fact that she is neither planning, nor is she able to provide, essential parental care and protection for A.N.M.V. in the near future. Thus, we find that the trial court correctly granted the adoption based on this issue.

Finally, the family court judge has entered a conclusion that it is in the best interest of A.N.M.V. to be adopted by the appellees. This is the most important aspect of any custody relating to children. The family court found that the care given by the appellees, the care withheld by the biological mother and the child's stability within the family she has come to know and depend upon as her own, all pointed to her best interests being met by the adoption by the appellees. We agree. Thus, we find the family court did not err in finding an adoption without the consent of A.N.M.V.'s mother would be in A.N.M.V.'s best interest.

Based upon the above, we find that the family court correctly granted the adoption petition brought by the appellees without the consent of S.N.L., the biological mother of A.N.M.V. Thus, we affirm the adoption.

NICKELL, JUDGE, AND KNOPF, SENIOR JUDGE, CONCUR IN
RESULT ONLY.

BRIEFS FOR APPELLANT:

J. Ross Stinetorf
Lexington, Kentucky

BRIEF FOR APPELLEE K.A.V.:

Christian Renau Worth
Lexington, Kentucky