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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-000314-ME
AND
NO. 2013-CA-000315-ME

B.R.P.E. APPELLANT

v.

APPEALS FROM JACKSON CIRCUIT COURT
HONORABLE GENE CLARK, JUDGE
ACTION NO. 11-AD-00003 AND 11-AD-00004

R.P.; C.T.E.; T.P.; AND J.E.R., JR. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CLAYTON, JUDGE: In two separate appeals, B.R.P.E. appeals the Jackson Family Court's denial of Kentucky Rules of Civil Procedure (CR) 60.02 motions to vacate the adoption judgments of her two minor children, C.T.E. and C.N.E. After careful consideration, we affirm the family court.

## FACTUAL AND PROCEDURAL HISTORY

On June 7, 2011, R.P., the maternal grandfather, and his wife, T.P., filed a verified petition for termination of parental rights and adoption of C.T.E. and C.N.E. The children had been living with R.P. and T.P. since June 2008. Additionally, the petition noted that R.P. and T.P. had been awarded permanent custody of the children on March 17, 2009. Not only were they the children's primary caregivers and financial supporters, but they were also capable of maintaining this support.

When the petition for adoption was filed, the biological parents were married. The biological father, who was incarcerated in at the Federal Correctional Institute in Ashland, Kentucky, submitted his written consent and entry of appearance with the petition. The biological mother, B.R.P.E., had not been heard from in three years. Consequently, the family court ordered the appointment of a warning order attorney to locate her. In addition, the family court appointed guardians ad litem for the children.

Notwithstanding the warning order attorney's inability to locate the mother, B.R.P.E., she contacted R.P. and T.P. in early September 2011. After getting in touch with them, she stayed with them at their home for a weekend. During the stay, the parties discussed the adoption, and B.R.P.E. spoke by phone with her husband about it.

On September 19, 2011, B.R.P.E. went with T.P. to the attorney's office to sign the consent forms for the adoptions. The attorney's secretary,

Angela Silva, asked B.R.P.E. if she needed the consent forms to be read to her. B.R.P.E. demurred. Silva then explained the consent process to B.R.P.E. Silva clarified that B.R.P.E. would be giving up the rights to her children by signing the consent forms. She then asked B.R.P.E., at least two times, if B.R.P.E. understood the ramifications of signing the forms. B.R.P.E. acquiesced and executed the consent forms. The entry of appearance and consent forms were entered on September 21, 2011.

A final hearing on the adoptions was held on November 22, 2011, and the findings of fact, conclusions of law, and the judgments of adoption were entered on November 23, 2011.

Next, almost one year later, on November 21, 2012, B.R.P.E. filed CR 60.02 motions to vacate and set aside the judgments of adoption arguing that the judgments were invalid or void. A hearing was held on December 11, 2012. Subsequently, on January 14, 2013, the family court denied the motions to vacate the judgments of adoption. B.R.P.E. now appeals from the judgments of adoptions and the denial of the motions to vacate these judgments.

## ISSUES

B.R.P.E. argues, pursuant to the CR 60.02 motions, that the adoptions did not strictly comply with the adoption statutes, and thus, the adoption judgments were not valid. She cited two cases to support the claim – *Wright v. Howard*, 711 S.W.2d 492 (Ky. App. 1986) and *Day v. Day*, 937 S.W.2d 717 (Ky. 1997).

In particular, she argues that R.P. and T.P. did not strictly comply with the requirements of KRS 199.011(14), KRS 199.480, and Kentucky Family Court Rules of Procedure and Practice (FCRPP) 32(2)(b).

In response, R.P. and T.P. maintain that they strictly complied with KRS 199.011 and FCRPP 32(2)(b). Further, they argue that any issues regarding KRS 199.480 are moot because they were not preserved and are outside the time period for challenging an adoption found in KRS 199.540(2).

STANDARD OF REVIEW

Appellate review of a trial court's denial of a CR 60.02 motion is performed under an abuse of discretion standard. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999). Accordingly, absent a "flagrant miscarriage of justice," we will affirm the trial court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

ANALYSIS

We begin our analysis by recognizing that the right of adoption exists only by statute and that adoption statutes require strict compliance. *Wright*, 711 S.W.2d at 494.

*Statutory compliance regarding consent*

Because these cases involve adoption proceedings where the parental rights had not yet been terminated, it was necessary to file the biological parents' sworn consent to the adoptions. KRS 199.500(1). "Voluntary and informed consent"

is defined in KRS 199.011(14). Initially, B.R.P.E. argues that R.P. and T.P did not comply with the statutory requirements under KRS 199.011(14)(h), because, according to her, the "name and address of the person who reviewed and explained the consent to the consenting person . . ." was not listed on either parents' consent forms.

The specific statutory language is as follows:

> "Voluntary and informed consent" means that at the time of the execution of the consent the consenting person was fully informed of the legal effect of the consent, that the consenting person was not given or promised anything of value except those expenses allowable under KRS 199.590(6), that the consenting person was not coerced in any way to execute the consent, and that the consent was voluntarily and knowingly given. If at the time of the execution of the consent the consenting person was represented by independent legal counsel, there shall be a presumption that the consent was voluntary and informed. The consent shall be in writing, signed and sworn to by the consenting person and include the following:
>
> . . .
>
> (h) Name and address of the person who prepared the consent, name and address of the person who reviewed and explained the consent to the consenting person, and a verified statement from the consenting person that the consent has been reviewed with and fully explained to the consenting person;

KRS 199.011(14).

As noted in the family court's order denying the CR 60.02 motion, the secretary for R.P. and T.P.'s attorney explained the consent to the mother. And the address on the consent form is the address of the attorney for whom she worked. Based on the listing of the attorney's address and the secretary's status as the attorney's agent, the family court deemed that the statutory requirement for listing an address had been met. We concur. Bolstering our decision is the fact that the statute does not designate a requirement for a person's "home" address. In general, people who are employed receive mail at two addresses – home and business. The underlying purpose of this requirement is the ability to locate the person who explained consent. Clearly, that purpose was satisfied here – Silva testified.

With regard to B.R.P.E.'s contention that the father's consent was also flawed because of a similar deficiency, it is significant that the father is not appealing the judgments of adoption. Indeed, he is listed as an appellee in the amended notice of appeal.

More important, however, is that B.R.P.E. does not have standing to challenge the adoption judgments on behalf of the father. Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right, or, in other words, "the right to bring an action in the first instance." *Posey v. Powell*, 965 S.W.2d 836, 839 (Ky. App. 1998). Therefore, only the father can challenge

the validity of his consent. B.R.P.E.'s argument fails because she does not have standing to challenge the judgments for him; only he does.

Besides B.R.P.E.'s lack of standing, the father was represented by counsel. As observed in *Moore v. Asente*, 110 S.W.3d 336, 352 (Ky. 2003), regarding the issue of consent, when a party is represented, consent is presumed to be voluntary and informed. The father's attorney was at the final hearing and tendered the father's response to the judgments on that day. The attorney reported that he had spoken with the children's father on November 11, 2011, discussed the implications of the adoption and explained to the father that he would no longer have rights to the children. Again, the father consented to the adoption.

In the case at bar, the father has acquiesced at every stage of the adoption, beginning with filing of the petition to adopt the children. As the record indicates, the father was incarcerated and knew the children would be grown before he had served his time. Again, considering that the meaning of "voluntary and informed consent," plain and unambiguous evidence underscores that the father understood his actions and desired the adoption.

B.R.P.E.'s next claim is based on the statutory language in KRS 199.011(14)(h) that says the written consent must include "a verified statement from the consenting person that **the consent has been reviewed and fully explained to the consenting person**." (Emphasis added.) From this statutory definition, she argues that the above- emphasized language of the statute is mandatory, that is, these exact words must be used.

We disagree with this assumption. The plain language in KRS 199.011(14)(h) is that the consent form contains a statement that is verified and provides information that consent was reviewed and fully explained. Nowhere in the statute is any specific language proscribed. Again, B.R.P.E.'s contention is not persuasive.

The primary objective of the voluntary and informed consent statute is to ensure that biological parents understand the ramifications of consenting to an adoption of their biological children and are not coerced into it. B.R.P.E. has not established that the requisites of KRS 199.011(14)(h) were not met or that the parents did not consent voluntarily and with knowledge of the results of their actions. Hence, the family court did not abuse its discretion in determining that the parents' consent was legal. We agree with the family court's assessment that both parents' consent was voluntary, informed, and complied with the statute.

*Statutory compliance regarding the service of process on the children*

B.R.P.E. contends that the adoption did not strictly comply with certain statutory requirements found in KRS 199.480. This adoption statute provides guidance as to who must be named a defendant in an adoption proceeding, the proper method for service of process, and issues concerning the appointment of a guardian ad litem. While B.R.P.E. notes that the proper parties were made defendants in the adoption proceeding pursuant to KRS 199.480, she asserts that service of process on the children was improper since the service was on the children's guardians ad litem.

But as pointed out by R.P. and T.P., these claims of noncompliance with KRS 199.480 were not preserved for our review. A review of the record reflects that B.R.P.E. did not specifically raise this issue during the proceedings or in the proffered CR 60.02 motion to vacate.

Nevertheless, she counters that by raising the issue of R.P. and T.P.'s noncompliance with the adoption statutes, she properly preserved the issue of noncompliance with any adoption statute. We are not convinced by this line of reasoning. The implication that by mentioning the issue of noncompliance with any and all adoption statutes obviates the necessity to denote the specific issue of noncompliance for preservation on appeal is injudicious. Parties are required, as a rule, to raise issues precisely in a lower court to preserve them for review. *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 42 (Ky. 2009) (*quoting Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859, 860 (Ky. App. 1940)).

We hold that issues of noncompliance with KRS 199.480 were not preserved, and therefore, are not reviewable on appeal. Nonetheless, we would be remiss if we did not point out that all parties to this action, including the children, had notice of the action, and as such, no manifest injustice results from our decision.

*Compliance with Family Court Rules*

Lastly, B.R.P.E. asserts that because R.P. and T.P. did not list two dependency, neglect, or abuse cases from Jackson Family Court on the adoption petition, they violated FCRPP 32(2)(b), which says:

> Every petition in an adoption or termination of parental rights action shall include the case number of any underlying juvenile case, specifically dependency, neglect or abuse or termination of parental rights cases, and shall include the name of any guardian ad litem previously appointed.

The family court in its order explained that the two mentioned cases had both been dismissed roughly three years prior to the filing of the petitions for adoption. Thus, the family court determined that neither case was an underlying case as referred to in the Family Court Rules. Further, the family court explained that the underlying case properly mentioned was the Whitley Circuit Court custody action, which gave permanent custody of the children to R.P. and T.P.

We concur with the family court's reasoning and hold that no violation of FCRPP 32(b) occurred. Nonetheless, we would be remiss if we did not correct the dicta in the family court order wherein the family court order opined that FCRPP 32(b) is an unauthorized execution of authority by the Supreme Court. The Kentucky Constitution (Ky. Const.) § 116 provides that "[t]he Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and **rules of practice and procedure for the Court of Justice**." (Emphasis added.)

In particular, the FCRPP state in the Title and Scope of the Rules:

> These Rules shall be applicable to the procedure and practice in all actions pertaining to dissolution of marriage; custody and child support; visitation and timesharing; property division; maintenance; domestic

> violence; paternity; dependency; neglect or abuse; termination of parental rights; adoption; and status offenses, or any other matter exclusively within family law jurisdiction, except for any special statutory proceedings, which shall prevail over any inconsistent procedures set forth in these Rules.

FCRPP 1.

In sum, the judicial branch has constitutional authority to provide rules of procedure for the conduct of actions in its courts. However, these rules are not statutes, and thus, do not violate the separation of powers doctrine nor overstep the authority of the legislature to make our laws. Furthermore, since the rules are not statutes, in the case at hand, whether the rules are strictly followed is not implicated in the requirement for strict compliance with adoption statutes. The family court did not abuse its discretion with regards to this issue since its decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

## CONCLUSION

For the foregoing reasons, we affirm the orders of the Jackson Family Court, which denied B.R.P.E.'s motions to vacate and set aside the Judgments of Adoption.

JONES, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN RESULT ONLY.

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