RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000152-ME

M.K.C. APPELLANT

v.

APPEAL FROM HARDIN FAMILY COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NOS. 04-CI-00272; 03-AD-00016

J.C. III; L.C.;
C.M.S.; P.A.S.;
C.A.C., A MINOR; AND
L.M.C., A MINOR APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY[1] AND TAYLOR, JUDGES; BUCKINGHAM, SENIOR JUDGE.[2]

McANULTY, JUDGE: M.K.C. appeals from the findings of fact, conclusions of law and judgment of the Hardin Circuit Court, Family Court Division. In that judgment, the trial court granted the petition of the paternal grandparents, J.C. III and

[1] This opinion was completed and concurred in prior to Judge William E. McAnulty, Jr.'s resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

[2] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

L.C., to adopt C.A.C. and L.M.C. without the consent of the biological mother, M.K.C. The judgment terminated M.K.C.'s parental rights to C.A.C. and L.M.C. Finding no error, we affirm.

C.A.C. was born on April 8, 1996. Her parents are M.K.C. and J.C. IV, who were not married at the time of C.A.C.'s birth. Not long after C.A.C. was born, M.K.C. filed a paternity action against J.C. IV in the Hardin District Court. "Upon agreement of the parties," the district court issued a judgment on June 6, 1996, determining that J.C. IV was the natural and legal father of C.A.C.

M.K.C. and J.C. IV married on May 9, 1997. L.M.C. was born on December 17, 1999. There is no dispute by M.K.C. that she and J.C. IV are her biological parents.

When L.M.C. was only eight months old and C.A.C. only four years old, the man with whom M.K.C. was having an affair murdered J.C. IV. Additional facts and circumstances of the murder are provided in Cook v. Commonwealth, an unpublished opinion of the Kentucky Supreme Court rendered May 20, 2004, case number 2002-SC-1021-MR. M.K.C. was indicted for complicity to commit murder. She has been in custody since August 18, 2000, two days after J.C. IV's death.

At the time law enforcement came for her, M.K.C. placed C.A.C. and L.M.C. with J.C. IV's parents, J.C. III and

L.C. After M.K.C.'s arrest, the Hardin District Court granted temporary joint custody of C.A.C. and L.M.C. to J.C. III and L.C. and the maternal grandparents, C.M.S. and P.A.S. J.C. III and L.C. were the primary residential custodians, and the maternal grandparents had weekend visitation.

A jury convicted M.K.C. of complicity to commit murder and sentenced her to life in prison without the possibility of probation or parole for twenty-five years. M.K.C. appealed from the judgment of conviction; however, the Kentucky Supreme Court affirmed the judgment. M.K.C. is serving her sentence in the Kentucky Correctional Institute for Women in Peewee Valley, Kentucky.

After M.K.C.'s conviction, J.C. III and L.C. filed a petition for adoption of C.A.C. and L.M.C. in the Hardin Circuit Court (2003-AD-00016). In their petition, they sought the involuntary termination of M.K.C.'s parental rights under KRS 199.500(4) and KRS 199.520(2).

Less than a year after J.C. III and L.C. filed their petition for adoption, M.K.C. filed a pro se action in the Hardin Circuit Court for paternity testing of C.A.C. (2004-CI-00272). The trial court consolidated the adoption and paternity proceedings. As to M.K.C.'s motion for paternity testing, the trial court denied her motion before the final hearing on the adoption petition. The basis of the denial was the 1996

paternity action in which M.K.C. alleged and the district court determined that J.C. IV was C.A.C.'s natural and legal father.

The trial court held a final hearing on the adoption petition on November 4, 2004. L.C., J.C. III, M.K.C., C.M.S., V.M.P. (M.K.C.'s sister), and P.A.S. testified at the hearing. On December 20, 2004, the trial court issued its findings of fact, conclusions of law and judgment terminating M.K.C.'s parental rights, denying her motion for visitation and granting the petition for adoption. M.K.C. files this appeal pro se.

First, M.K.C. argues that the trial court committed reversible error in allowing J.C. III and L.C. to proceed with their adoption petition because they had no standing under KRS 625.050. Second, M.K.C. argues that the final hearing proceedings were fundamentally unfair due to the fact that Judge Bland presided over the original 1996 paternity proceedings and M.K.C.'s criminal trial. She believes Judge Bland should have recused himself, although she admits that she never filed a motion for recusal. Third, M.K.C. contends that the trial court committed reversible error when it concluded that the children were abandoned, neglected, abused and dependent children. Fourth, M.K.C. alleges that the trial court erred in failing to require the presence of the children at the final hearing. Fifth, M.K.C. alleges that the trial court erred when it allowed the petition for termination of parental rights and for adoption

to be presented to the family court in a joined petition. Finally, M.K.C. argues that the trial court erred when it cited cases from other jurisdictions in support of its conclusion that a parent who is convicted of murdering a child's other parent should have her parental rights involuntarily terminated.

J.C. III and L.C. brought their petition for adoption under KRS Chapter 199 et seq. M.K.C., the sole living parent, did not give her voluntary and informed consent to the adoption. See KRS 199.500(1). A circuit court may grant an adoption, however, in spite of the living parent's failure to consent "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." KRS 199.500(4). KRS 625.090, which governs in cases of involuntary termination of parental rights, provides that in order for such a termination to occur, the court must find by clear and convincing evidence that the child either is an abused or neglected child, as defined in KRS 600.020(1), or was previously adjudged to be an abused or neglected child and that termination of the biological parents' parental rights is in the best interest of the child. C.M.C. v. A.L.W., 180 S.W.3d 485, 491 (Ky. App. 2005).

The trial court based its decision to terminate M.K.C.'s parental rights on the following findings and conclusions: M.K.C. has not seen her children since 2000; she

cannot take care of the children's daily needs as she is incarcerated; she has not paid any child support to anyone; M.K.C. is the person responsible for the murder of the children's father; although she denied any involvement in her husband's murder in the criminal trial, she tacitly admitted otherwise in the final hearing; the behavior of the children, especially C.A.C., has changed markedly since her father's death; the relationship between the maternal and paternal grandparents (who were the temporary joint custodians) has deteriorated since J.C. IV's murder; C.A.C. and L.M.C. are abused or neglected children as defined in KRS 600.020(1); termination of M.K.C.'s parental rights is in the best interest of C.A.C. and L.M.C.; M.K.C. has violated KRS 625.090(2)(c) in that she has continuously or repeatedly inflicted on these children emotional harm by causing the death of the father of these children; M.K.C. has violated KRS 625.090(2)(e) in that for a period of not less than six months she has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for these children and there is no reasonable expectation of improvement in parental care and protection, considering the ages of the children; and under KRS 625.090(2)(g), M.K.C., for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of

providing the essential food, clothing, shelter, medical care, or education reasonably necessary and available for the children's well-being, and there is no reasonable expectation of significant improvement in M.K.C.'s conduct in the immediately foreseeable future, considering the ages of the children.

M.K.C.'s arguments of merit pertain to the termination of her parental rights. "This Court's standard of review in a termination of parental rights action is confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings." M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116 (Ky. App. 1998) (citing V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420, 424 (Ky. App. 1986).

In order to grant the involuntary adoption petition, the family court was required to find that "any of the provisions of KRS 625.090 exist with respect to the child." KRS 199.500(4); see C.M.C. v. A.L.W., 180 S.W.3d at 493. In deciding whether the provisions of KRS 625.090 exist with respect to the children, the trial court has a great deal of discretion to determine whether the children fit "within the abused or neglected category and whether the abuse or neglect

warrants termination." Department for Human Resources v. Moore, 552 S.W.2d 672, 675 (Ky. App. 1977).

In this case, we believe the record contains substantial evidence to support the findings of the trial court. Further, we do not conclude the trial court abused its discretion in determining that C.A.C. and L.M.C. fit within the abused or neglected category and that the abuse or neglect warrants termination.

This is not a case, as M.K.C. argues, in which incarceration is the sole ground for termination of parental rights. See J.H. v. Cabinet for Human Resources, 704 S.W.2d 661, 663 (Ky.App. 1985). This is a case in which M.K.C. solicited her boyfriend to brutally murder her husband in the family's home, leaving her children with no father and a mother in prison serving a life sentence without the possibility of probation or parole for twenty-five years. This is not additional punishment heaped upon her, as she argues in her brief, or abuse of the children by the courts. These are the real and serious consequences of M.K.C.'s actions. M.K.C. will not be heard to argue that she can be a parent to these young girls in these circumstances. By the time M.K.C. is released from prison in 2025, C.A.C. will be 29 years old and L.M.C. will be 26 years old. Any meaningful visitation that she may have had with C.A.C. and L.M.C. was foreclosed by statute once she

was convicted for the murder of the children's father and did not meet her burden of proving that visitation was in the best interest of C.A.C. and L.M.C. See KRS 403.325.

M.K.C. argues that she has not abandoned the children because she left them in the care of their grandparents, she sends them cards and letters and she would send them all she had if requested to do so. But the trial court did not find that M.K.C. abandoned her children. It concluded that her situation was "incompatible with parenting." J.H. v. Cabinet, 704 S.W.2d at 664.

The evidence was that J.C. III and L.C. provided C.A.C. and L.M.C. with the essential parental care, food, clothing, shelter, medical care, and education reasonably necessary and available for the children's well-being, not M.K.C. Cards, letters and withheld financial support are no substitute for that.

The trial court reached a conclusion based on the unique facts and circumstances of this case. There is no reversible error in the trial court's citation to opinions rendered by other state courts that have dealt with the termination of parental rights when one spouse is convicted of murdering the other spouse. A review of these opinions reveals that the courts take a case-by-case approach, and do not always terminate parental rights in such cases. See, e.g., In Interest

of H.L.T., 298 S.E.2d 33 (Ga. App. 1982); Veselits v. Cruthirds, 548 So.2d 1312, 1316 (Miss. 1989); In re Interest of Ditter, 322 N.W.2d 642 (Neb. 1982); In re Thomas M., 676 A.2d 113 (N.H. 1996).

We turn to M.K.C.'s arguments pertaining to standing, the adoption petition proceedings, recusal, and the children's attendance at the final hearing.

As for the standing of J.C. III and L.C. to file the adoption petition, they had standing under KRS 199.470, which controls in adoption proceedings. See D.S. v. F.A.H., 684 S.W.2d 320, 321-322 (Ky. App. 1985) (distinguishing between action to terminate parental rights and a petition for adoption in which a parent does not consent and noting that adoption petition, if granted, has same legal effect of terminating parental rights); KRS 199.520(2). For the same reason, M.K.C.'s argument pertaining to the adoption petition also fails as it was filed under KRS Chapter 199 et seq., not KRS Chapter 625 et seq.

We move to the issue of recusal. Notwithstanding M.K.C.'s failure to object, M.K.C. argues that the trial judge should have recused himself because he presided over the 1996 paternity proceedings and M.K.C.'s criminal trial.

Upon review, we do not perceive any evidence of actual bias or impartiality given the court's task in this petition for

adoption. It was required to hear the case, which necessarily focused on M.K.C.'s criminal conduct, judge credibility, make factual findings, and issue a judgment of adoption if J.C. III and L.C. established the requisites of KRS Chapter 199 et seq.

M.K.C. does not point to any facts that demonstrate that the trial court derived any information from an extra-judicial source. See Marlowe v. Commonwealth, 709 S.W.2d 424, 428 (Ky. 1986) (adopting "the Ninth Circuit's view as expressed in United States v. Winston, 613 F.2d 221, 223 (9th Cir. 1980): '. . . [R]ecusal is appropriate only when the information is derived from an extra-judicial source. Knowledge obtained in the course of earlier participation in the same case does not require that a judge recuse himself.'") Thus she does not sustain her burden of proving that recusal was warranted in this case. See Stopher v. Commonwealth, 57 S.W.3d 787, 794-795 (Ky. 2001) ("The burden of proof required for recusal of a trial judge is an onerous one.")

Finally, we address M.K.C.'s argument that C.A.C. and L.M.C. were indispensable parties to the action. To the contrary, as required by KRS 199.480, C.A.C. and L.M.C. were defendants in the adoption proceedings.

For the reasons stated above, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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