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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000165-ME

S.O

APPELLANT

APPEAL FROM HENDERSON CIRCUIT COURT  
v. HONORABLE WILLIAM E. MITCHELL, SPECIAL JUDGE  
ACTION NO. 07-AD-00007

S.O.; B.O.; P.O.;  
COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND FAMILY  
SERVICES

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, S.O., appeals from an order of the Henderson Circuit Court granting Appellee, S.O.'s, petition to adopt Appellant's natural child, B.O.

Appellant and P.O. were married in 1994 and divorced in 1997.

During the marriage, the couple had one child, B.O., born December 22, 1994.

Following the couple's divorce, they shared joint custody of B.O., with Appellant serving as the primary residential custodian. However, in 1998, P.O. was granted temporary custody of B.O. due to Appellant's drug addiction. In November 1999, the trial court entered an order designating P.O. as the primary residential custodian, noting that B.O. had resided with him since February 1998. However, Appellant and P.O. continued to share joint custody. In November 2003, P.O. married Appellee.

In 2005, Appellee filed an action in the Henderson Circuit Court to involuntarily terminate Appellant's parental rights to B.O. In addition, Appellee filed a petition for adoption seeking to adopt B.O. without Appellant's consent pursuant to Kentucky Revised Statutes (KRS) 199.502. Following a trial in January 2006, the court entered a judgment dismissing the petition for adoption. In so doing, the trial court concluded that Appellee had failed to satisfy the requirements of KRS 199.502. The court reasoned that although Appellant had not seen B.O. since November 2003, she had, in fact, been incarcerated for eleven of the following sixteen months, and incarceration alone was not sufficient to prove abandonment. The trial court further noted that P.O. received a monthly check in the amount of \$516 for B.O.'s benefit as a result of social security benefits being paid to Appellant because of her bipolar disorder. The trial court ruled, however, that joint custody was no longer appropriate and awarded P.O. and Appellee joint custody of B.O. Finally, addressing Appellant's request for visitation, the court held,

Given the fact that [Appellant] has not seen [B.O] since November 20, 2003, for whatever reasons, her history of serious drug addiction and [B.O's] reluctance to visit with [Appellant], it is the Court's directive that prior to the institution of any regular contact and visitation as between [Appellant] and [B.O.], that the parties shall participate in counseling sessions with a mental health professional with directions that reports be filed with the Court as to the desirability and frequency of such visitation. Should [Appellant] wish to proceed with this matter, then she should file a Motion with this Court for an entry of an Order arranging and requiring such counseling sessions. Said counseling sessions shall be at the expense of [Appellant].

It was not until June 2006, that Appellant filed a motion to arrange counseling sessions. An order was subsequently entered establishing a counseling schedule through Rivervalley Behavioral Health in Henderson, Kentucky. Although Appellant did prepay for six counseling sessions, she took no further action to participate and eventually the sessions were cancelled. Appellant thereafter made no effort to contact B.O. from June 2006 until February 2007.

On March 28, 2007, Appellee filed a second petition for adoption pursuant to KRS 199.502. Following a trial on August 29, 2007, the trial court entered a judgment of adoption designating B.O. as "the natural, legitimate child" of Appellee. The judgment further stated that Appellant thereafter had no legal relationship to B.O. In an accompanying order, the trial court acknowledged that B.O. wanted to be adopted by Appellee. In addition, the court determined:

This Court finds that [Appellant] has abandoned [B.O.] for a period of not less than ninety (90) days. This Court afforded [Appellant] the opportunity to participate in family counseling sessions with [B.O.] in anticipation of

providing for visitation in its order on April 7, 2006. Appellant did not pursue that opportunity until a hearing held on June 26, 2006. The court arranged for counseling services and advised all parties as to the counselor and the location where it was to be held. [Appellant] did not participate in any of those sessions and had no contact with [B.O] until she began writing letters in February of 2007. The Court further finds that permanency is needed in the life of [B.O]. The petitioner, [Appellee], is of good moral character, reputable standing in the community, able to properly maintain and educate the child, and that the best interest of [B.O.] will be promoted by the adoption and [B.O] is suitable for adoption. The Cabinet for Health and Family Services has filed its report recommending that the adoption be granted.

Appellant thereafter filed a motion to reconsider, which was denied on January 8, 2008. This appeal ensued.

Appellant argues on appeal that the trial court erred in granting the adoption because KRS 199.500(1)(b) mandates that before there can be any adoption without the consent of the natural parent, the rights of that parent must be terminated pursuant to KRS Chapter 625. And Appellant contends that KRS 625.090(1) requires a finding that (1) the child has been abused or neglected as defined by KRS 600.020(1) or the parent has been convicted of a criminal charge relating to the physical or sexual abuse, or neglect of the child; (2) the physical or sexual abuse, or neglect is likely to occur if the parental rights are not terminated; and (3) termination is in the best interests of the child. Appellant maintains that these mandatory requirements for the involuntary termination of her parental rights were not supported by the evidence.

A trial court's decision to terminate a natural parent's parental rights and to grant an adoption is entitled to considerable deference. *Commonwealth, Cabinet for Families and Children v. G.C.W.*, 139 S.W.3d 172 (Ky. App. 2004). The trial court's findings will not be disturbed unless there exists no substantial evidence in the record to support such findings. *Id; V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky. App. 1986). However, because "the right of adoption exists only by statute . . . there must be strict compliance with the adoption statutes. Failure to do so results in an invalid judgment." *Wright v. Howard*, 711 S.W.2d 492, 494 (Ky. App. 1986) (Citations omitted); *see also Day v. Day*, 937 S.W.2d 717, 719 (Ky. 1997).

This case did not proceed as a termination of parental rights action, but rather as an adoption proceeding. KRS 199.502 governs adoptions without a natural parent's consent, and provides in relevant part:

[A]n 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;

.....

(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.

Contrary to Appellant's argument, KRS 199.502 does not require that a proceeding to terminate parental rights take place before a petition for adoption is granted. Instead, as the language of the statute specifically states, "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 [of KRS 625.090] exist with respect to the child[.]" (Emphasis added). As explained in *Wright, supra*, "the adoption itself terminates the non-consenting parent's parental rights." *Id.* at 496. In accordance, KRS 199.520(2) specifically states,

Upon entry of the judgment of adoption, from and after the date of the filing of the petition, the child shall be deemed the child of petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting it the same as if born of their bodies. Upon granting an adoption, all legal relationship between the adopted child and the biological parents shall be terminated except the relationship of a biological parent who is the spouse of an adoptive parent.

Appellant further argues that the trial court erred in finding that she had abandoned B.O. for a period of not less than ninety days. KRS 199.502(1)(a). Appellant maintains that because B.O. is with her natural father, and receives monetary support from Appellant, she cannot be considered "abandoned." We disagree.

In *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 663 (Ky. App. 1986), a panel of this Court held that “abandonment is demonstrated by facts and circumstances that evince a settled purpose to forgo all parental duties and relinquish all parental claims to the child.” (Citing *O.S. v. C.F.*, 655 S.W.2d 32, 34 (Ky. App. 1983)). See also *D.S. v. F.A.H.*, 684 S.W.2d 320 (Ky. App. 1985). The trial court’s judgment denying Appellee’s first petition to adopt B.O. was based, in part, upon a finding that Appellant’s incarceration alone was insufficient to constitute abandonment. See *L.S.J. v. E.B.*, 672 S.W.2d 937 (Ky. App. 1984). At that time, the court provided Appellant the opportunity to engage in counseling sessions with B.O. in an effort to eventually establish a visitation schedule. However, as the trial court noted in its judgment herein, Appellant failed to avail herself of that opportunity and, for whatever reason, chose to have no contact with B.O. for the following seven months.

Moreover, we cannot conclude that B.O.’s receipt of the social security benefit as a result of Appellant’s disability constitutes “support.” Certainly, disability benefits are characterized as a credit toward owed child support, although not considered actual support itself. See KRS 403.211(14). However, as Appellee aptly points out, the government issues the monthly check to B.O. Appellant takes no affirmative action in B.O.’s receiving the monetary benefit.

The evidence herein clearly and convincingly demonstrates that Appellant has consistently failed to have any involvement in B.O.’s life. Even

after the trial court denied Appellee's first petition for adoption and offered Appellant the opportunity to establish a relationship with B.O., she failed to do so. Sadly, Appellant has had a history of substance abuse and continues to battle addiction. While we are sympathetic to her plea herein, we cannot conclude that the trial court erred in finding that the requirements of KRS 199.502 have been met and that Appellee's adoption of B.O. is proper.

The judgment of adoption of the Henderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Zack N. Womack  
Henderson, Kentucky

BRIEF FOR APPELLEE:

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Henderson, Kentucky