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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000014-ME

J.L. APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 07-AD-00007

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY; J.C.; L.C.;
AND M.G., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND STUMBO, JUDGES.

STUMBO, JUDGE: "J.L.,"[1] hereafter referred to as Grandmother, appeals from an Order of the Lewis Circuit Court overruling her motion to set aside a Judgment of Adoption rendered in Lewis County, Kentucky. Grandmother argues that as *de*

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[1] Pursuant to prior Order of this Court, the Record has been directed to be held as Confidential. As such, we will use the parties' initials.

facto custodian of the minor child "M.G.," hereinafter "Child," her due process rights arising under the constitutions of the United States and of Kentucky were violated when she was not made aware of or allowed to participate in the adoption proceedings. She also argues that the Appellees committed a fraud upon the court by representing that all interested parties had been notified of the adoption petition. We agree with the circuit court's conclusion that KRS 199.540(2) operates to bar an attack on the Judgment occurring more than one year after entry of the Judgment, and accordingly affirm the Order on appeal.

This matter has an extensive procedural history. On September 1, 2006, Grandmother filed a petition seeking to be declared the *de facto* custodian of Child. At the time of the filing, Child was approximately 9-years old. The Cabinet for Health and Family Services had previously been awarded temporary custody of Child by the Fleming District Court, and a termination of parental rights action was pending in Fleming Circuit Court. In her petition, Grandmother alleged that she was the *de facto* custodian of Child because she had been the primary caregiver and financial supporter of Child from October, 1997, through April, 2001. The petition also stated that after April, 2001, Child had lived with his biological mother from time to time, and later was placed in the custody of the Cabinet from January, 2004, until the filing of the petition.

The matter proceeded in circuit court, whereupon Child's guardian ad litem argued that Grandmother had not demonstrated that she was the *de facto* custodian. In the alternative, the guardian maintained that the lapse of time

between April, 2001, and the September, 2006 petition indicated a waiver or abandonment of any *de facto* custodian status. The Cabinet later stipulated that Grandmother was Child's primary caregiver and financial supporter for at least six months.

On March 27, 2007, the circuit court rendered Findings of Fact, Conclusions of Law and Judgment in which it determined that Grandmother demonstrated by clear and convincing evidence that she was the *de facto* custodian of Child pursuant to KRS 403.270. On May, 24, 2007, the court rendered separate Findings of Fact, Conclusions of Law and Judgment in the combined custody and termination of parental right proceeding. The court found in relevant part that Grandmother was the *de facto* custodian of Child prior to June, 2001, but that she had not served as custodian after that date. It went on to conclude that while Grandmother expressed a sincere desire to care for Child, her daughter and Child's mother "has been shown to live an extraordinarily unstable life." The court determined that it would be virtually impossible for Grandmother to care for Child without allowing Child's mother to be in frequent contact with Child. It opined that Child would have no chance of a normal childhood if his mother were allowed contact with him. The court concluded that it was not in the best interest of Child that Grandmother be awarded permanent custody of Child. Rather, the court found that Child's best interests were served by continued placement with the Cabinet, which had placed Child with foster parents.

On June 6, 2007, Grandmother filed a motion to reconsider. Though the record does not so state, it appears that the motion was overruled. Grandmother then prosecuted an appeal to this Court.

The matter proceeded before a panel of this Court in August, 2009. She argued that the Fleming Circuit Court erred when it dismissed her petition for custody after it had declared her to be a *de facto* custodian by a prior Order. She also claimed that the circuit court erred in failing to treat her as equal to a parent in determining custody, by failing to grant her custody of Child, by conducting the termination and custody hearings simultaneously, and by taking into account Child's opinion that he wanted to stay with his foster parents. Citing a March 27, 2007 Order which ruled that Grandmother was a *de facto* custodian of Child pursuant to KRS 403.270, the panel of this Court determined that the circuit court erred in failing to grant Grandmother the same standing in custody matters as a parent. It reversed and remanded the matter to the circuit court for further adjudication.

During the pendency of the foregoing appeal, Appellees "J.C." and "L.C." – who were Child's foster parents, and to whom we now refer to as Adoptive Parents - filed a Petition to adopt Child. The Petition was granted on February 7, 2008. Grandmother would later claim that she was never made aware of the Petition, and was not named as a party to the proceedings despite having a custodial interest in Child. On November 13, 2009 – some 21 months after the Adoptive Parents adopted Child - Grandmother moved to intervene in the adoption

proceeding and to set aside the adoption. As a basis for the motion, she claimed that the adoption proceedings were hidden from her, that she has a custodial interest in Child by virtue of her status as *de facto* custodian, and that the adoption should be set aside.

The Adoptive Parents pointed to KRS 199.540(2), which provides that an adoption is not subject to direct or collateral attack after the expiration of one year from the date of entry of judgment. Conversely, Grandmother argued that *Storm v. Mullins*, 199 S.W.3d 156 (Ky. 2006), operated to support her argument because there was a due process violation resulting from the Adoptive Parents' failure to serve or otherwise notify her of the proceedings. The circuit court overruled the motion upon determining that KRS 199.540(2) was controlling. It found that Grandmother knew that an adoption proceeding was under way because she was a party to the termination of parental rights action in Fleming County, Kentucky. The court went on to opine that Grandmother and the Adoptive Parents should undergo custody litigation, if at all, in Fleming Circuit Court where the joint termination and custody proceeding was adjudicated. This appeal followed.

Grandmother now argues that the circuit court erred in failing to set aside the Judgment of Adoption. She maintains that at the time of the filing of the petition, she had a custody interest in Child by virtue of her status as *de facto* custodian. She also argues that the Adoptive Parents "wrongfully, knowingly, and fraudulently represented to the court that the adoption was proper, and all interested parties had been notified." Grandmother then argues that because of the

Adoptive Parents' actions, she was wrongfully deprived of custody of her grandchild.

As a basis for her claim of error, Grandmother maintains that she was deprived of basic constitutional guarantees of due process. Citing *Storm v. Mullins*, s*upra*, Grandmother argues that at a minimum she was entitled to notice and an opportunity to be heard because the deprivation of her claimed custodial interest was tantamount to a deprivation of life, liberty or property. Specifically, she claims that her *de facto* custodial interest is tantamount to a parental interest, and parental rights in adoption proceedings are a liberty interest entitling her to due process. The focus of her argument is that because she was *de facto* custodian of Child at the time of the filing of the petition for adoption, the circuit court erred in adjudicating the petition without providing her notice and an opportunity to be heard.

We have closely examined the record, the law and the written arguments, and find no basis for reversing the circuit court's denial of Grandmother's motion to set aside the Judgment of Adoption. In overruling Grandmother's motion, the circuit court relied on KRS 199.540(2), which states that,

> After the expiration of one (1) year from the date of the entry of judgment of adoption, the validity thereof shall not be subject to attack in any action, collateral or direct, by reason of any irregularity or failure to comply with KRS 199.470 to 199.520, either procedurally or substantively.

The Judgment of Adoption was rendered on February 7, 2008. Grandmother, through counsel, filed the Motion to set aside the Judgment of Adoption on November 13, 2009, or some 21 months later after the Adoptive Parents had been granted the status of legal parents of Child. KRS 199.540(2) is clear and unambiguous, and its application to the facts at bar supports the circuit court's conclusion that the adoption at issue was no longer subject to attack. Grandmother properly notes that the standard of review is whether the trial court's conclusion was clearly erroneous and/or constituted an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982). The uncontroverted fact that Grandmother's motion was filed some 21 months after the adoption demonstrates that the circuit court's conclusion on this issue was not clearly erroneous, nor constituted an abuse of discretion. It is also worth noting that at the time the adoption at issue was being adjudicated, Grandmother had no legal status as *de facto* custodian. Though that status was later reinstated, or at least recognized anew by a panel of this Court, Grandmother had no legal status of *de facto* custodian when the petition for adoption was filed. As such, it cannot reasonably be said that she was entitled to notice of the proceeding. Nevertheless, the circuit court found that she was aware of the proceeding.

Grandmother claims that *Storm v. Mullins, supra*, should operate to avoid the application of KRS 199.540(2). *Storm* held in relevant part that the strict application of KRS 199.540(2) would violate a movant's right to due process when it can be shown that the movant did not receive proper notice of the adoption

proceeding. In the matter at bar, the circuit court expressly found that Grandmother "in fact, knew that an adoption proceeding was under way because she was a party of the termination of parental rights action in Fleming County." This finding is supported by the record, and may not be set aside absent a showing that it is clearly erroneous. CR 52.01. No such showing has been made. As such, we cannot conclude that the circuit court's refusal to apply *Storm* was clearly erroneous. *Cherry*, *supra*.

While the previous panel of this Court reaffirmed Grandmother's legal status of *de facto* custodian, it is uncontroverted that Grandmother has not served in that capacity for 9 years. Additionally, Child, who turns 13-years old this year, has lived with the Adoptive Parents for the past 5 years. While these facts are by no means dispositive of Grandmother's claim of error, they do not bolster her argument that she should be availed of the opportunity to intervene in an adoption proceeding some 21 months after its conclusion, and well beyond the statutory period of limitation set out in KRS 199.540(2).

In sum, we must conclude that the circuit court properly determined that KRS 199.540(2) operated to bar Grandmother from disturbing the Judgment of Adoption. Furthermore, because evidence exists in the record to support the circuit court's finding that Grandmother was aware of the adoption even in the absence of legal notice, we agree with the circuit court's conclusion that *Storm* did not overcome or otherwise circumvent the application of KRS 199.540(2). We find no error.

Grandmother's motion to set aside was based on CR 60.02. She contends that in overruling the motion, the circuit court erred in failing to properly apply CR 60.02. This argument is not persuasive, as it is subsumed by the circuit court's proper conclusion that KRS 199.540(2) is dispositive. And finally, Grandmother maintains that she was improperly barred from intervening in the adoption proceeding. Setting aside the fact that Grandmother sought to intervene some 21 months after the adoption had been finalized, we also find Grandmother's argument on this issue not persuasive. Grandmother's underlying argument to set aside the Judgment of Adoption was disposed of on its merits. So as a practical matter, Grandmother was given leave to intervene, and her CR 60.02 argument was presented to and rejected by the circuit court. As such, we find no error.

For the foregoing reasons, we affirm the Order of the Lewis Circuit Court overruling Grandmother's motion to set aside the Judgment of Adoption.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Tasha K. Scott
Florence, Kentucky

BRIEF FOR APPELLEE,
CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF
KENTUCKY:

Mona S. Womack
Deputy General Counsel
Office of Legal Services
Cabinet for Health and Family
Services
Frankfort, Kentucky

BRIEF FOR APPELLEES,
J.C. AND L.C.:

Delores Woods Baker
Maysville, Kentucky