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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-002026-ME

G.H.M.

APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
FAMILY COURT DIVISION

v.

HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 17-J-00514-001

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH
OF KENTUCKY; J.A.H.M., A
MINOR CHILD; AND P.M., FATHER

APPELLEES

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: D. LAMBERT,¹ NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: G.H.M. appeals from an order entered on the calendar docket
of the Campbell Circuit Court, Family Court Division, on November 29, 2017,

¹ Judge Debra Hembree Lambert dissented in this opinion prior to her accepting election to the Kentucky Supreme Court effective January 7, 2019.

disposing by informal adjustment a juvenile dependency, neglect or abuse (DNA) petition she filed regarding her minor child, J.A.H.M. Because the record does not reflect that the necessary parties agreed to the informal adjustment, we vacate and remand.

On October 1, 2017, G.H.M. filed a DNA petition in the Campbell Circuit Court, Family Court Division, stating that she is the natural mother of J.A.H.M., who was born in Guatemala in 2002. J.A.H.M. resided in Guatemala with G.H.M.'s parents until June of 2016, when at the age of 14, he entered the United States to reside with G.H.M. and her husband. The petition states that J.A.H.M. had no contact with his biological father nor received any support from him. G.H.M. alleges that she and her husband were only capable of providing a minimal amount of support for J.A.H.M. The petition further alleges that J.A.H.M. is dependent and would likely be eligible for a Special Juvenile Immigrant visa, but he would need a court order holding that he is dependent and that it was not in his best interest to return to Guatemala.

After appointing counsel, on November 29, 2017, the Campbell Circuit Court, Family Court Division, conducted a hearing on the petition, which the court described as an arraignment.² During the hearing, the attorney for the Cabinet for Health and Family Services, Commonwealth of Kentucky (Cabinet)

² The record reflects that the hearing in this case lasted about one and one-half minutes.

opined that J.A.H.M. could not be deemed dependent for DNA purposes because he was living with his biological mother.³ Counsel further recommended the case be informally adjusted. Without G.H.M. or J.A.H.M.'s consent, the family court immediately stated that the court would informally adjust the petition. The entirety of the family court's order is a handwritten notation on the November 29, 2017, docket sheet stating:

INF[ormal] ADJ[ustment] – on motion of Prosecution
[sic] – As child is Living w/ [with] Bio[logical] Mom +
Being Cared For Appropriately[.]

G.H.M. timely filed this appeal on December 22, 2017.

Both parties' briefs on appeal discuss whether the family court was required to make findings which would enable J.A.H.M. to seek special immigrant status under 8 United States Code (U.S.C.) §1101(a)(27)(J).⁴ However, a finding

³ An attorney from the Campbell County Attorney's Office was present at the hearing on behalf of the Cabinet for Health and Family Services, Commonwealth of Kentucky (Cabinet).

⁴ In relevant part, a person who qualifies for special immigrant status is:

- (J) [A]n immigrant who is present in the United States - -
- (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
 - (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's

regarding whether it would not be in J.A.H.M.’s best interest to return to Guatemala is contingent upon the family court first finding J.A.H.M. to be dependent as defined in Kentucky Revised Statutes (KRS) 600.020(20).⁵ As noted, the trial court did not address the issue of J.A.H.M.’s dependency status, concluding on recommendation of the Cabinet, that the court could informally adjust the petition without an evidentiary hearing.

Informal adjustment is defined in relevant part as “an *agreement reached among the parties . . .* which is approved by the court, that the best interest of the child would be served without formal adjudication and disposition[.]” KRS 600.020(36) (emphasis added).⁶ Informal adjustment is a dispositional alternative provided in KRS 620.140. The Kentucky Supreme Court has emphasized that an informal adjustment “*must*” be based upon an agreement between the parties. *See Q.M. v. Commonwealth*, 459 S.W.3d 360, 368 (Ky. 2015).

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- or parent’s previous country of nationality or country of last habitual residence; and
 - (iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status

⁸ United States Code §1101(a)(27)(J).

⁵ J.A.H.M. would be dependent if he were found to not be “abused or neglected” but was “under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child[.]” Kentucky Revised Statutes (KRS) 600.020(20) (formerly KRS 600.020(19)).

⁶ This statute was formerly numbered as KRS 600.020(34).

In this case, there is nothing in the record to establish that G.H.M. (or J.A.H.M.) agreed to the Cabinet's oral recommendation to informally adjust the petition.⁷ Instead, immediately after the county attorney, on behalf of the Cabinet, orally stated her belief that J.A.H.M. was not dependent because he lived with his biological mother, the court declared that it would informally adjust the petition, despite G.H.M.'s objection. Because there was no agreement between the relevant parties, informal adjustment was not permissible and the court erred as a matter of law.

As a result of the family court's ruling, there is no testimony or other evidence in the record to establish whether J.A.H.M. is dependent, and, consequently, we express no opinion on that issue. On remand, the family court must formally resolve the petition and make a finding as to whether J.A.H.M. is dependent under KRS Chapter 620.⁸ If the family court adjudicates that J.A.H.M. is dependent, it must also make findings pursuant to 8 U.S.C. § 1101(a)(27)(J) and

⁷ The brief submitted on behalf of the Cabinet states that there was an agreement to informally adjust the case. Interestingly, counsel does not cite to any specific portion of the record to support that erroneous assertion. Based on our review of the hearing tape and the nine-page record on appeal, there was no agreement reached by the parties for an informal adjustment. Counsel's representation to the contrary is perilously close to an ethical misrepresentation to this Court.

⁸ Contrary to the family court's statements on the record, the fact that J.A.H.M. resides with his biological mother does not, standing alone, inherently preclude a finding that he is dependent. Indeed, there is nothing in the record whatsoever to support the trial court's *sua sponte* conclusion that J.A.H.M. was being cared for appropriately by his mother, given there was no evidence presented or considered on the issue.

8 Code of Federal Regulations § 204.11. *See N.B.D. v. Cabinet for Health and Family Services*, ____S.W.3d ____, 2018 WL 5725968, at *5 (Ky. App. Nov. 2, 2018) (rejecting in a similar case the same constitutional and statutory arguments made by appellees in this case and holding that Kentucky family courts have the ability and obligation to make findings regarding special immigrant status under 8 U.S.C. §1101(a)(27)(J) in DNA proceedings).

Finally, we note that the Cabinet argues in its brief that the Campbell Circuit Court, Family Court Division, lacked jurisdiction and venue to hear this DNA proceeding since J.A.H.M. and G.H.M. reside in Boone County. Ironically, counsel for G.H.M., not the Cabinet, raised this issue at the end of the short hearing on November 29, 2017, whereupon the family court assumed jurisdiction, without objection by counsel for the Cabinet. G.H.M. did not raise this issue on appeal, nor did the Cabinet cross-appeal. Notwithstanding, the family court clearly has jurisdiction to hear this DNA proceeding and appellees waived any objection to venue by not timely raising the same before the family court. *See N.B.D.*, 2018 WL 5725968, at *5 (citing *Gibson v. Fuel Transp., Inc.*, 410 S.W.3d 56, 62 (Ky. 2013)). Thus, this argument is without merit.

For the foregoing reasons, the November 29, 2017, order of the Campbell Circuit Court, Family Court Division, is vacated, and the matter is remanded for further proceedings consistent with this opinion.

NICKELL, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS AND WRITES SEPARATE
OPINION.

LAMBERT, D., JUDGE, DISSENTING: I respectfully dissent.

For a clearer understanding of the matter, the Mother's affidavit
contained within the Petition is quoted fully:

I am [J.A.H.M.] natural mother. I am from Guatemala. I have been in the U.S. for 12 years. My son [J.A.H.M.] was born in Guatemala. He has been living with my elderly parents in Guatemala. He entered the U.S. unaccompanied in June 2016. He came to live with me and my current husband and family. His natural father has no contact with him and does not support him. I can provide a small amount of support and my current husband has to support our family and our two other children. [J.A.H.M.] will likely be eligible for a Special Juvenile Immigrant visa. He will need a predicate order that he is dependent and that it is not in his best interest to return to Guatemala.

J.A.H.M. was born in February of 2002 and is a student at Boone County High School. At the time his mother filed the juvenile petition in October of 2017, he had already been living with his mother for over a year. His mother does not indicate that she is now unable to provide a home for J.A.H.M. and does not ask for him to be placed in the temporary or permanent custody of the state. She indicates that she is married and has two other children who are half siblings to

J.A.H.M., and that she can provide a small amount of support but focuses her petition on directing the court as to his immigration needs.

There are circumstances when children who were not in the country legally became dependent, such as through death or disability or abandonment of the caregiver here in the United States. Our juvenile court statutes are certainly available to protect and provide for the needs of children in our country, regardless of their citizenship status. However, in this case, the mother only petitions the court for the purposes of a “predicate order that he is dependent and that is not in his best interest to return to Guatemala” and notes that he will likely be eligible for a “Special Immigrant visa.” As her petition fails to show that J.A.H.M. is dependent under the statutory definition of KRS 600.020(20)⁹, the Court was correct to dismiss the matter as the petition fails to state a claim that would invoke the jurisdiction of the court to act.

⁹ KRS 600.020(20) states that a “[d]ependent child’ means any child, other than an abused or neglected child, who is under **improper** care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child.” (Emphasis added.)

BRIEFS FOR APPELLANT:

Teresa Cunningham
Burlington, Kentucky

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

Thomas Edge
Assistant Campbell County Attorney
Newport, Kentucky