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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-1682-ME

K.D.T. APPELLANT

v.

APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 17-AD-00008

H.A.M.; P.A.M.; K.B.F., A MINOR
CHILD; AND B.B.F. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; K. THOMPSON AND L. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: K.D.T. (mother) appeals from the Trigg Circuit Court's order granting adoption without consent which terminated mother's parental rights to K.B.F. (child) and allowed him to be adopted by paternal aunt, H.A.M. (aunt), and aunt's husband, P.A.M. (uncle). Mother argues aunt and uncle

were not permitted to bring a termination action against her and there was a reasonable expectation of improvement so termination was inappropriate.

Child was born to mother and B.B.F. (father) in May 2015. Mother and father both had a history of drug abuse. On September 2, 2015, a dependency, neglect, and abuse (DNA) petition was filed against mother and father after child was twice placed in aunt's care when mother used drugs and then was arrested for shoplifting.

On September 8, 2015, the court placed child in the temporary custody of aunt. The court made the findings that father was in jail awaiting a long-term treatment bed and mother was awaiting a short-term treatment bed and was on probation for possession of methamphetamine.

On November 24, 2015, child was returned to mother after she completed a thirty-day residential treatment program at the Fuller Center. On November 28, 2015, mother relapsed and committed another criminal offense.

On November 30, 2015, the Cabinet filed a second DNA petition and emergency custody was granted to aunt. Later, an order following a temporary removal hearing granted temporary custody to aunt. The court found that mother had relapsed on methamphetamine and was incapacitated.

On December 23, 2015, mother entered into a stipulation of neglect or abuse on the basis that "mother relapsed and used drugs while child was in her

care." Mother waived an adjudication hearing and disposition hearing. The court adjudicated child neglected or abused, finding that mother "[c]reated or allowed to be created a risk of physical or emotional injury by other than accidental means" when mother "[e]ngaged in a pattern of conduct that makes her incapable of caring for the immediate and ongoing needs of the child including . . . drug abuse[.]" The court found: "Mom is in jail. Dad is in jail." Child was ordered to remain in the custody of aunt.

In December 2015, mother completed the Genesis twenty-eight-day program. In January 2016, mother was sent to the Trilogy program but was discharged in June 2016 without having completed the program.

In a permanency order entered on October 12, 2016, child was ordered placed with aunt as his permanent custodian, with the court noting: "This is agreed by both parents."

On July 4, 2017, while mother and father were engaged in visitation with child, they were arrested on various drug charges while under the influence of methamphetamine. Later that month they were found to have neglected child by putting child at risk of harm.

Aunt filed a petition for adoption which was amended on October 19, 2017, to add uncle to the petition. On October 30, 2017, child's maternal

grandmother J.T. (grandmother) filed a motion for grandparent visitation. The Cabinet recommended adoption by aunt and uncle.

In January 2018, when mother was released from jail on bond on pending felony charges, mother voluntarily admitted herself into a treatment program at Grace and Mercy.

On March 15, 2018, the circuit court held a trial on grandparent visitation and an order was entered on March 23, 2018. Mother supported grandmother's motion, stating that her mother was an extension of her; father did not oppose the motion if aunt agreed. The circuit court found both mother and father acknowledged that aunt was an appropriate custodian for child and they were unable to be fit parents at this point given their current residences.

The circuit court found by clear and convincing evidence that both parents abandoned child and for reasons other than poverty alone failed to provide essential care for child, there was no reasonable expectation of improvement in the immediate future, and they were not fit parents for purposes of deciding grandparent visitation. The circuit court decided that aunt was a de facto custodian and had the same status as a fit parent in this visitation matter and, thus, was presumed to act in the best interest of child. After reviewing the evidence and considering the relevant factors, the circuit court determined that grandmother had

not carried her burden to rebut this presumption to be entitled to court-ordered visitation.

On July 26, 2018, the adoption trial was held, and the circuit court heard testimony in support of termination and adoption. Father was not present but previously expressed that he had no opposition to the termination and adoption.[1] Mother and Carolyn Self, a representative of Grace and Mercy, testified about the progress mother had made in pursuing sobriety and completing the program.

On August 13, 2018, a final judgment and sentence on a plea of guilty was entered regarding mother's 2017 indictment. She received a total of eighteen months imprisonment, probated for three years.[2]

The circuit court's findings of fact and conclusions of law in the adoption without consent were entered on September 12, 2018. The circuit court considered the record, the Cabinet's report, the testimony and exhibits along with taking judicial notice of the facts found and orders entered in the DNA case, the grandparent visitation case, and mother's felony case in making its decision.

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[1] Because father is not appealing, we do not address evidence relating specifically to him.

[2] The court adjudged mother guilty and concurrently sentenced her as follows: (1) possession of a controlled substance, first degree—complicity (eighteen months); (2) possession of a controlled substance, second degree—complicity (twelve months); (3) possession of a controlled substance, third degree—complicity (twelve months); (4) possession of drug paraphernalia—complicity (twelve months); (5) endangering the welfare of a minor—complicity (twelve months); and (6) public intoxication (forty-five days).

As to mother's attempts at treatment, the circuit court acknowledged mother was more successful with the Grace and Mercy rehabilitation program than she had been in her four previous rehabilitation attempts. The circuit court noted that at the time of the bench trial mother was sober for one year, three weeks, and one day; was in the third phase of six phases; and was currently employed. However, the circuit court found that mother admitted "she has made no provision for the needs of the child, has no current place for the child to live, and has insufficient income at present to support the child."

The circuit court concluded that mother and father for a period of not less than six months have continuously or repeatedly failed or refused to provide or have been substantially incapable of providing essential parental care or protection for child, and there is no reasonable expectation of improvement in parental care and protection, considering the age of child; and mother and father for reasons other than poverty alone have continuously or repeatedly failed to provide or are incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for child's well-being, and there is no reasonable expectation of significant improvement in mother's and father's conduct in the immediately foreseeable future, considering the age of child. The circuit court specifically found that "[d]ue to the nature of addiction and the

frequent relapses of both Respondent parents, there is no reasonable expectation of significant improvement in the future."

The circuit court decided to terminate mother's and father's parental rights because it found that would be in child's best interest, finding that aunt and uncle were the only parents child has known since he was three months old and their household became his home, they have stable lives, and they can offer child a stable home "free from the turmoil of having parents who have successive periods of sobriety followed by relapses."

The circuit court applied Kentucky Revised Statutes (KRS) 199.502(1)(e) and (g) in concluding that it was appropriate to grant adoption without consent. It concluded it was in the best interest of child that the parental rights of mother and father be terminated. The circuit court explained that child was determined to be neglected in the DNA case based upon the stipulation of mother and father and that each individual ground of termination was sufficient for termination pursuant to KRS 625.090 and KRS 199.502. An adoption judgment was also entered on September 12, 2018, in which the circuit court terminated mother's and father's parental rights and made child the legal child of aunt and uncle.

Mother appealed. Mother then filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 requesting that the circuit court set aside the

adoption, arguing that aunt and uncle could not initiate a termination of her parental rights to child. The circuit court denied mother's motion on March 7, 2019.

Although this case was determined appropriate for expedited handling, our review was delayed by an incomplete record.[3]

"[A] petition seeking adoption of a child against the child's biological parent's wishes is a discrete subset of involuntary termination of parental rights cases," which is governed by KRS Chapter 199. *C.M.C. v. A.L.W.*, 180 S.W.3d 485, 490 (Ky.App. 2005). Accordingly, "[p]rovisions of KRS Chapter 625 are applicable only as permitted by KRS 199.500(4), and as specifically enumerated in KRS 199.502." *R.M. v. R.B.*, 281 S.W.3d 293, 297 (Ky.App. 2009).

While KRS 199.500(1) provides that an adoption shall not be granted without the voluntary and informed consent of the parents, KRS 199.500(4) states:

> Notwithstanding the provisions of subsection (1) of this section, an adoption may be granted without the consent of the biological living parents of a child 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.

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[3] Mother filed a motion with our Court to supplement the record to include the companion cases that the circuit court relied upon. Mother also filed a motion to hold the case in abeyance while the CR 60.02 motion to set aside the adoption was considered. Our Court granted the motion to supplement the record and allowed mother an extension in when her brief was due but denied the motion to hold the case in abeyance as moot because the circuit court had already denied mother's CR 60.02 motion in the interim.

KRS 199.502(1) states that "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 at least one enumerated condition which would establish abuse or neglect and a ground for termination exists.

> KRS 625.090, which governs the grounds for 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 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. That statute later sets forth the factors that the Court must consider in determining the best interest of the child.

C.M.C., 180 S.W.3d at 491 (footnotes omitted).

> After hearing the case, the court shall enter a judgment of adoption, if it finds that the facts stated in the petition were established; that all legal requirements, including jurisdiction, relating to the adoption have been complied with; that the petitioners are of good moral character, of reputable standing in the community and of ability to properly maintain and educate the child; and that the best interest of the child will be promoted by the adoption and that the child is suitable for adoption.

KRS 199.520(1).

Mother argues, in reliance on *S.B.P. v. R.L.*, 567 S.W.3d 142 (Ky.App. 2018), that the circuit court erred with proceeding with the adoption petition before termination of parental rights by an authorized entity.

In *S.B.P.*, the relatives seeking to adopt the child initiated an involuntary termination of parental rights under KRS Chapter 625. The relatives could not bring a termination in such a manner because they were not one of the five entities specifically authorized to file a petition seeking involuntary termination of parental rights under KRS 625.050(3). Even after the petition was amended to include a prayer for adoption, it failed to follow the requirements for adoption pursuant to KRS Chapter 199.

Essentially, the petition conformed to neither the requirements of the termination chapter nor the adoption chapter (which includes involuntary adoption in which termination occurs). The Court explained:

> While KRS 625.050(1) requires a petition for involuntary TPR to be styled "in the interest of . . . , a child," an adoption proceeding—which this case became when the [relatives] were granted leave to amend the TPR petition to include a prayer for adoption—has different requirements—too many of which have been ignored.

S.B.P., 567 S.W.3d at 146. The opinion detailed the adoption chapter requirements that were not met: the child was not named as a party, the guardian *ad litem* for the child was not served, the Cabinet was not served, and the Cabinet never filed a report. *Id.* at 147-48. In reliance on *R.M.*, 281 S.W.3d at 297-98, which affirmed the denial of an adoption petition where no investigation was made by the Cabinet and no report was filed, the Court vacated the adoption, stating that "[w]ith strict

adherence to KRS Chapter 199, the [relatives] may file a new adoption petition." *S.B.P.*, 567 S.W.3d at 148.

S.B.P. does not stand for the proposition that relatives may not file for an involuntary adoption which includes an involuntary termination of parental rights. Instead, it stands for the proposition that the termination and adoption statutes are subject to strict compliance and, thus, if relatives wish to adopt a child they cannot circumvent the requirements of the adoption chapter by intermingling aspects of the termination and adoption chapters. *Id.* at 147.

KRS 199.500(4) and KRS 199.502(1) provide for adoption without consent if grounds for involuntary termination of parental rights are met. Mother's argument would result in these statutory provisions being nullities. Therefore, we conclude that aunt and uncle were statutorily authorized to seek termination of mother's and father's parental rights through an involuntary adoption so long as the proper steps were taken. Since the statutorily mandated requirements were fulfilled, termination was appropriate in this adoption proceeding.

Mother argues that the circuit court erroneously found there was no reasonable expectation of improvement in her conduct, when she proved improvement in her sobriety through Self's testimony and mother's testimony. Mother describes in detail the testimony of Self, who testified about Grace and Mercy's high success rate and mother's progress in completing three of six levels

of the program. Mother also recounts key portions of her own testimony as to the classes she completed, her length of sobriety, her success in obtaining a job, and her work on transitioning to outside housing. Essentially, it is her argument that it was improper for the circuit court to not credit her progress in which she has demonstrated significant improvement. We disagree.

The circuit court granted the termination and adoption in accordance with its findings and conclusions that the following conditions existed with respect to child:

> (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child, and that *there is no reasonable expectation of improvement* in parental care and protection, *considering the age of the child*; [and]
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> . . .
>
> (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that *there is no reasonable expectation of significant improvement* in the parent's conduct *in the immediately foreseeable future, considering the age of the child*[.]

KRS 199.502(1) (emphasis added). These provisions are the same as those contained in KRS 625.090(2)(e) and (g). While both provisions require the lack of reasonable expectations of improvement, (e) modifies this with "considering the

age of the child" and (g) modifies this with "significant" and "immediately foreseeable future, considering the age of the child[.]" This additional modifying language is important.

While mother's progress is to be commended and we hope that mother has continued to make progress with maintaining her sobriety, it is appropriate for the circuit court to consider mother's past history and the fact that mother has not completed the Grace and Mercy program, has not shown that she can live independently and maintain sobriety, and does not have appropriate housing for child. There was also evidence that she had a history of repeatedly relapsing both during and after completing drug treatment programs and putting child at risk, similar to what occurred with the mother in *A.F. v. L.B.*, 572 S.W.3d 64, 74 (Ky.App. 2019), who relapsed multiple times in her drug use and repeatedly failed drug treatment programs.

Given child's young age and the fact aunt and uncle have been providing parental care since child was three months old, the circuit court properly acted within its discretion to decide that it was not appropriate to have child wait indefinitely until mother sufficiently progressed with her sobriety that reunification would be appropriate. As with *A.F.*, the circuit court properly considered mother's progress and credited her with making progress with her current program. However, it properly concluded that this progress was not sufficient given the

circumstances, and mother's efforts were insufficient to regain a parental relationship with child, during most of whose life she was voluntarily absent because of drug use. *Id.* at 75. The circuit court's finding of no reasonable expectation of improvement is not clearly erroneous and is appropriately within its discretion.

All of the elements were properly established for termination of mother's parental rights in this involuntary adoption case. Neglect was previously established, grounds for termination were established, and it was in child's best interest to be adopted by aunt and uncle.

Accordingly, we affirm the Trigg Circuit Court's order granting adoption without consent.

ALL CONCUR.

BRIEF FOR APPELLANT:

H.B. Quinn
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BRIEF FOR APPELLEES H.A.M. AND P.A.M.:

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