

RENDERED: SEPTEMBER 15, 2023; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0256-ME

M.S. AND S.S.

APPELLANTS

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 21-AD-00051

D.L.S. AND H.G.S., A MINOR CHILD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, DIXON, AND McNEILL, JUDGES.

McNEILL, JUDGE: Petitioners, M.S. and S.S., appeal from an order of the Whitley Circuit Court, dismissing their petition for adoption and to terminate the parental rights of D.L.S. (Father). During an evidentiary hearing on the matter, the court directed a verdict, finding that Petitioners failed to satisfy their burden of proof. The court entered a summary order memorializing its decision. Petitioners requested additional findings. The court entered an amended order finding in part as follows: “[T]here is a reasonable expectation [Father] will improve, considering

the age of the child. Further, [Father] has consistently tried to get custodial and visitation rights to his child, and has taken advantage of the parenting time he has been awarded.”

It is imperative in this case to clarify that “this is not a termination case governed by KRS^[1] Chapter 625; it is an adoption case governed by KRS Chapter 199.” *C.J. v. M.S.*, 572 S.W.3d 492, 497 (Ky. App. 2019). The trial court’s amended order at issue here makes no mention of KRS Chapter 199 or adoption. Rather, the order confined its analysis to termination under KRS Chapter 625. We addressed a similar issue in *A.K.H. v. J.D.C.*, 619 S.W.3d 425 (Ky. App. 2021) (reversing and remanding where trial court erroneously engaged in an improper analysis under KRS Chapter 625). And while some provisions in Chapters 199 and 625 mirror each other, we cannot be confident that the proper standards were considered here. To be clear, the trial court is well within its discretion to grant or deny an adoption if there is substantial evidence to do so. However, its decision must comport with all relevant statutory provisions.

For the foregoing reasons, the Whitley Circuit Court is reversed. We remand for an adoption determination. “On remand, the family court should follow the adoption statutes set forth in KRS Chapter 199. Specifically, it should

¹ Kentucky Revised Statutes.

not require [Petitioners] to demonstrate full compliance with the termination statute, KRS 625.090” *Id.* at 432.

DIXON, JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent. Although I do not disagree that the circuit court should have applied KRS Chapter 199 instead of Chapter 625 when it ruled upon the underlying adoption petition, our jurisprudence does not mandate reversal on this basis alone.

A fuller reading of the majority’s cited authority reveals this to be true. In *C.J. v. M.S.*, a panel of this Court did caution practitioners against filing dual petitions for termination of parental rights and for adoption; KRS Chapter 625 governs the former, while KRS Chapter 199 governs the latter. 572 S.W.3d 492, 496-97 (Ky. App. 2019). Where judgments of termination of parental rights and adoption are both entered, we treat them as one judgment and review for compliance with the adoption statutes. *Id.* at 497 (citing *Wright v. Howard*, 711 S.W.2d 492, 494 (Ky. App. 1986)). This is so because (1) “[t]he effect of the judgment is the adoption of the child at issue” and (2) the adoption statutes themselves mandate that ““all legal requirements, including jurisdiction, relation to *the adoption* have been complied with”” before an adoption may be granted. *Id.* (quoting KRS 199.520(1)) (emphasis in quotation original).

However, we did not say in *C.J.* that citation to KRS Chapter 625 instead of Chapter 199 in a judgment of adoption is, without more, an error sufficient to remand. Instead, “we will review the judgment for compliance with the adoption statutes.” *Id.* This Court in *C.J.* did that. We completed a thorough analysis of the judgment to determine whether the strictures of KRS Chapter 199 were met. *See id.* at 498-502. And, despite the same error upon which the majority in the present case observes, a unanimous panel of this Court in *C.J.* affirmed the circuit court’s judgment because it complied with the adoption statutes. *Id.* at 502.

The majority also cites *A.K.H. v. J.D.C.*, which it summarizes as a case “where the trial court erroneously engaged in an improper analysis under KRS Chapter 625[,]”² thus requiring reversal and remand. While this statement is correct on its face, a closer look at the nature of the error in *A.K.H.* is required. As in *C.J.*, the circuit court in *A.K.H.* applied KRS Chapter 625 rather than Chapter 199 in evaluating an adoption petition. *A.K.H.*, 619 S.W.3d at 427. This Court reversed and remanded for further proceedings in accordance with the adoption statutes. *Id.* However, we did not remand simply because the circuit court applied the incorrect statutes, but because the circuit court denied an adoption petition upon determining the petitioner had not established the subject child was abused or

² *Infra*, at p. 2.

neglected – a requirement of KRS 625.090 not present under KRS 199.502. *Id.* at 432. Therefore, we were required to reverse and remand because the error *prejudiced* the petitioner. *Id.*

In the unpublished *R.L.M. v. D.L.N.*, this Court determined the circuit court’s citation to KRS Chapter 625 with no reference to Chapter 199 was indeed harmless error. 2022 WL 2080155 at *2-3 (Ky. App. Jun. 10, 2022). Though the circuit court found the proposed adoptive child had been abused or neglected, we determined such finding “does not necessarily mean that the family court failed to make the findings required to permit consideration of adoption without consent under KRS 199.502.” *Id.* at *3. This Court noted the substantial similarity between the conditions for adoption without consent of the parents under KRS 199.502(1) and the required findings of parental unfitness in KRS 625.090(2). *Id.* at *3-4. Because the circuit court made a finding under KRS 625.090(2) which also satisfied one of the conditions listed under KRS 199.502(1) – specifically, “failure or inability to provide essential parental care and protection for at least six months and repeated or continuous failure or inability to provide necessities – with no reasonable expectation of improvement in either regard[,]” we concluded “the error in the family court’s simply referring to KRS 625.090 without also referring to KRS 199.502 was harmless.” *Id.* at *4.

A precondition of termination of parental rights under KRS 625.090 is establishing at least one of the grounds under KRS 625.090(2) by clear and convincing evidence. KRS 625.090(2). The petitioners in the instant case relied upon KRS 625.090(2)(e) and (g), which provide for termination of parental rights upon demonstration of the following:

(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; [or]

....

(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 625.090(2)(e) and (g).

These grounds are identical, word for word, to those required by KRS 199.502(e) and (g), making it a simple task to review the circuit court's opinion for its compliance with the adoption statutes. Consistent with the above, I would not reverse and remand to the circuit court without a closer review of whether the circuit court's ruling complied with the adoption statutes – irrespective of which

chapter of the Kentucky Revised Statutes the circuit court cited. For this reason, I respectfully dissent.

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