COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2021-SC-0100-DE
(2020-CA-000995)

M.S.S. APPELLANT

v. **APPEAL FROM WARREN CIRCUIT COURT**
CIVIL ACTION NO. 18-AD-00043

J.E.B., D.J.B., and K.K.F.S., a child APPELLEES

BRIEF ON BEHALF OF APPELLEES

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of this Brief on Behalf of Appellees was this the 4th day of August, 2021 served by U. S. Mail on Stephen O. Thornton, 1011 Lehman Ave., Ste. 102, Bowling Green, KY 42103; Hon. David A. Lanphear, Judge, Warren Circuit Court, 1001 Center Street, Suite 304, Bowling Green, KY 42101, and Rebecca Lyons, Clerk, KY Court of Appeals, 360 Democrat drive, Frankfort, KY 40601.

D. Bailey Walton
WALTON LAW, P.L.L.C.
P. O. Box 128
Bowling Green, KY 42102-0128
(270) 843-5500 - Telephone
(270) 782-1357 – Facsimile
dbwlaw@bellsouth.net

INTRODUCTION

This is an appeal involving the adoption without the consent of the child's biological parent under KRS 199.502 which was correctly granted by the trial court.

STATEMENT CONCERNING ORAL ARGUMENT

The Court in its Order entered June 9, 2021 specifically stating no oral argument will be scheduled.

COUNTER-STATEMENT OF POINTS AND AUTHORITIES

COUNTER-STATEMENT OF THE CASE

This case began with the Appellees' filing a Verified Petition for Adoption and Termination of Parental Rights on April 18, 2018. (ROA p. 2-7) The infant child was born on January 9, 2011 in Bowling Green, KY and was born out of wedlock. (ROA p. 126) The minor child has her place of residence with the Appellees at 1461 Huron Way, Bowling Green, Kentucky and she has lived continuously with the Appellees since January 9, 2013 and has resided in the home of Petitioners for at least ninety (90) days immediately prior to the filing of this Petition for Adoption. (ROA p. 127)

Megan has had a long involvement with the criminal justice system since shortly after Child's birth. Most of her involvement with the criminal justice system relates to substance abuse or related issues. Megan was first arrested on drug-related charges when 18 years old in 2009. (ROA p. 127) In October 2011, she was convicted of wanton endangerment and bail jumping when Child was only nine (9) months old. (ROA p. 127) Before her incarceration, Megan voluntarily gave custody and guardianship of Child to her mother, Linda Payne, as shown in Warren District Court, Case No. 11-P-615. (ROA p. 127) In April 2012, Megan was granted shock probation, but was incarcerated again for possession of marijuana, for which she was sentenced to one and one-half (1 ½) years. (ROA p. 127) In 2013, she was convicted for possession of methamphetamines and sentenced to one year of incarceration, and in 2015, she was convicted of promoting contraband and sentenced to two and a half (2 1/2) years. (ROA p. 127) She was released in 2017 and has had no other charges since then. (ROA p. 127)

While Megan's mother had custody of Child in December 2012, and while serving in a caretaking role, she [grandmother] tested positive in a drug test for benzodiazepines and opiates. (ROA p. 128) The Cabinet for Health and Family Services filed a neglect or abuse Petition in Warren Circuit Court, Case No. 12-J-806-001 for risk of harm against grandmother. (ROA p. 128)

CHFS also named Megan in the Petition because grandmother did not know Megan's whereabouts. (ROA p. 128) Child was temporarily placed in foster care and then on January 9, 2013, placed in the temporary custody of Appellants. Temporary placement of Child with Petitioners was formalized by a Temporary Removal Order entered February 4, 2013. (ROA p. 128) Meanwhile, Megan plead guilty to possession of a controlled substance, methamphetamine, on July 11, 2013 and was placed on supervised probation. However, she was again incarcerated on August 6, 2013 for a probation violation and granted shock probation again on November 27, 2013. This pattern continued. (ROA p. 128)

The Adjudication hearing in Child's juvenile case was held on December 10, 2013, at which time, Megan stipulated to Dependency. (ROA p. 128) The Adjudication Order entered December 13, 2013, ordered that Child remain in the temporary custody of Appellees, and Megan was permitted visitation at the discretion of the Appellees. (ROA p. 128) Based on the testimony, this visitation was very sporadic, bordering on not existent. (ROA p. 128) A Disposition Order was entered March 12, 2014, and Child was left in the custody of Appellees. (ROA p. 128) Megan was directed to complete her case plan, although there is nothing in the Juvenile file or this record that she completed each item. (ROA p. 128) This Court then entered the Decrees of De Facto Custodianship and Custody in favor of Appellees on December 15, 2014 in the Juvenile case. (ROA p. 128)

At the time of trial in this case, Child was eight (8) years old. Megan was incarcerated for approximately five (5) of those eight (8) years. She has remained out of prison since August 2017, when she was released on probation. Megan testified that she has been sober since November 2015. (ROA p. 128)

While Megan was very candid and open about her sobriety and addiction issues, and has clearly made progress in her life, this was a very difficult case for the Court. Child is eight years

old at the time of the trial and does not know Megan. (ROA p. 131) This Child has from the very beginnings of her memory lived in this small, secure world where Appellees are mom and dad. (ROA p. 131) The Trial Court acknowledged that incarceration alone is insufficient to support termination of one's parental rights to a child, citing A.F. v. L.B., 572 S.W.3d 64 (KY. App. 2019). (ROA p. 131) Megan did not serve one long, continuous sentence that separated her from Child. (ROA p. 131) Instead, the history in this case, though not unusual, is that for at least eight years—beginning in 2009, even before Child was born—Megan was involved in substance use and abuse that led her into a wretched lifestyle that did not include this child or help her to be a capable and effective parent for this child. (ROA p. 131) She was incarcerated time after time after time for a variety of different offenses, and several times probated by the Court. However, she either violated her probation or committed another offense. From 2012 until her release in August 2017, she served jail sentences for possession of marijuana, possession of methamphetamines and promoting contraband. (ROA p. 131)

During the periods of time when Megan was not in custody, she did not devote herself to parenting Child. Even though she was not in jail for a full year from November 2014 to November 2015, she admitted that she had no contact with Child, and in fact, has had no contact with Child since her son was born on November 24, 2014. (ROA p. 131) Instead, she was involved in activities which led to her re-incarceration for promoting contraband. (ROA p. 131) Finally, the was testimony from Dr. Robert Bruce Fane, a psychologist who has seen the Child and Megan. Dr. Fane testified that the Child has no memory of Megan or memory of living with her. (ROA p. 133)

ARGUMENT

I. THE APPELLEES HAVE THE RIGHT TO INITIATE AN ADOPTION WITHOUT CONSENT PROCEEDING UNDER KRS 199.502 WITHOUT THE CABINET FOR HEALTH AND FAMILY SERVICES INITIATING A TERMINATION ACTION UNDER KRS CHAPTER 625.

There are two separate and distinct statutory chapters that deal with the termination of parental rights, one under KRS Chapter 625 and the other under KRS Chapter 199. Specifically, KRS 625.050(3) provides that "[p]roceedings for involuntary termination of parental rights may be initiated upon petition by the cabinet, any child-placing agency licensed by the cabinet, any county or Commonwealth's attorney or parent." Only one of the five (5) entities set out in the statute can institute such a proceeding. *S.B.P. v. R.L.* 567 S.W.3d 142. (Ky. App. 2018). In *S.B.P.*, the maternal great-grandparents filed the petition under KRS Ch. 625 which the Court of Appeals found fatal. The Appellees are clearly not one of the entities who could initiate such an action when the Cabinet for Health and Family Services ("Cabinet") has failed or refused to bring such an action.

The other process for terminating a parent's rights as part of an adoption without consent is set out in KRS 199.501(4) which states:

> "(4) 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."

As such, the only avenue for the Appellees to proceed with an adoption without consent was to strictly comply with KRS Chapter 199, which the Appellees have done. Their Petition clearly pleads that the natural parents have abandoned the child for a period of not less than ninety (90) days and that their parental rights should be terminated pursuant to KRS 199.502.

KRS 625.090 and KRS 199.502 are very similar. KRS 625.090(2)(a) states:

"No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:
(a) That the parent has abandoned the child for a period of not less than ninety (90) days;.

KRS 199.502 parallels KRS 625.090(2)(a) and states:

"Notwithstanding the provisions of KRS 199.500(1), 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 exist with respect to the child:
(a) That the parent has abandoned the child for a period of not less than ninety (90) days;"

These requirements of KRS Ch. 199 were addressed in K.D.T. v. H.A.M., No. 2018-CA-1682-ME, 2020 WL 6375194, (Ky. App. 10/30/2020), an unpublished Opinion rendered by the Court of Appeals. Therein the Court states:

"[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."

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 and a ground for termination exists.

It is clear that the Legislature has carved out a special statutory procedure under KRS Chapter 199 to commence such an adoption without consent action by a private individual who meets the

criteria whereas KRS Chapter 625 clearly prohibits anyone from using that chapter if they are not a specifically named entity under KRS 625.050(3). This can be further demonstrated as set out in *K.D.T. v. H.A.M.* where the Court when on to state:

> "*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. *S.B.P. v. R.L.* 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."

The Legislature has not set out any other statutory procedures nor have they delineated any priority between the two procedures except one is strictly limited to five (5) entities. As noted by the Court in *S.B.P. v. R.L.*, 567 S.W.3d 142 (Ky. App. 2018), [t]he law of adoption is in derogation of the common law. Nothing can be assumed, presumed, or inferred and what is not found in the statute is a matter for the legislature to supply and not the courts. *Day v. Day*, 937 S.W.2d 717 (Ky. 1997). The Court also stated that "because "two basic rules" govern all adoptions: 1) the right of adoption exists only by statute; and 2) there must be strict compliance with the adoption statutes." *Id.*

The Appellant's reliance on *K.N. v L.P.* ,No. 2007-CA-0001881-MR, 2008 WL 275106, (Ky. App. 2/1/2008) is misplaced. In *K.N.*, there were numerous errors with strict compliance with KRS 199.502. First, the case was simply started as an involuntary termination of parental rights and not practiced under KRS 199.502. It was only after the trial court terminated the rights that it was announced that an adoption was now being

sought. As the Court noted, KRS 199.502 does not require that a proceeding to terminate parental rights take place before an adoption proceeding. Rather, and as the language of the statute specifically states, "an adoption may be granted without the consent of the biological parents of a child if it is pleaded and proved as part of the *adoption* proceedings that any [of a number of conditions exists]." (Emphasis added). Id. at p. 10. The instant case clearly started as an Adoption without consent as set out in KRS 199.502. There is no statutory requirement that the Cabinet must initiate the proceedings first.

Appellees acknowledge that this Supreme Court has directed the parties to specifically address the issue set out above. However, Appellees, with all due respect are perplexed about this specific issue as it was not raised before the trial court or with the Court of Appeals. This issue was addressed in *Jones v. Livesay*, 551 S.W.3d 47, 52–53 (Ky. App. 2018) which stated in part:

> "It has long been this Court's view that specific grounds not raised before the trial court but raised for the first time on appeal will not support a favorable ruling on appeal. Most simply put, "[a] new theory of error cannot be raised for the first time on appeal." *Citations omitted* "[A]ppellant is precluded from raising that question on appeal because it was not raised or relied upon in the court below. "[I]t is the accepted rule that a question of law which is not presented to or passed upon by the trial court cannot be raised here for the first time." *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461, 466 (Ky. 1955)"

Again, the Appellant did not raise this specific issue that the Supreme Court has ordered to be address with the trial court nor did she raise it with the Court of Appeals. It is Appellees position, with all due respect, that this issue should not be raised now.

II. THE TRIAL COURT DID NOT ERR WHEN IT TERMINATED APPELLANT'S PARENTAL RIGHTS AS THERE IS CLEAR AND CONVINCING EVIDENCE OF APPELLANT'S ABANDOMENT.

KRS 199.502 sets out ten (10) separate criteria for an adoption without the consent of the child' biological living parents. Only one of the criteria needs to be met. Specifically, KRS 199.502(1)(a) states as follows:

> "(l) Notwithstanding the provisions of KRS 199.500(1), 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 exist with respect to the child:
> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;" (Emphasis added)

The trial court focused on this specific subsection of the statute in granting the adoption without Megan's consent. It is Appellees position that the trial court had clear and convincing evidence that Megan had abandoned the Child.

As set out in in the Appellees Counterstatement, there are numerous facts found by the trial court, based on Megan's own testimony, that clearly support the trial court's decision. The case at bar is not too dissimilar that *A.F. v. L.B.*, 572 S.W.3d 64, 76 (Ky. App. 2019). Megan has had substantial substance abuse issues since the child was born. In October 2011, she was convicted of wanton endangerment and bail jumping when Child was only nine (9) months old. (ROA p. 127) Before her incarceration, Megan voluntarily gave custody and guardianship of Child to her mother, Linda Payne, as shown in Warren District Court, Case No. 11-P-615. (ROA p. 127) In April 2012, Megan was granted shock probation, but was incarcerated again for possession of marijuana, for which she was sentenced to one and one-half (1 ½) years. (ROA p. 127) In 2013, she was convicted for possession of methamphetamines and sentenced to one year of incarceration, and in 2015, she was convicted of promoting contraband and sentenced to two and a half (2 1/2) years. (ROA p. 127) She was released in 2017 and has had no other charges since then. (ROA p. 127).

However, the most telling facts found by the trial court was Megan's own admissions. During the periods of time when Megan was not in custody, she did not devote herself to parenting Child. Even though she was not in jail for a full year from November 2014 to November 2015, Megan admitted that she had no contact with Child, and in fact, she has had no contact with Child since her son was born on November 24, 2014. (ROA p. 131) Instead, Megan was involved in activities which led to her re-incarceration for promoting contraband. (ROA p. 131) At the time of trial in this case, Child was eight (8) years old. Megan was incarcerated for approximately five (5) of those eight (8) years. She has remained out of prison since August 2017, when she was released on probation. Megan testified that she has been sober since November 2015. (ROA p. 128) There was even the testimony of Dr. Robert Bruce Fane, a psychologist who has seen the Child and Megan. Dr. Fane testified that the Child has no memory of Megan or memory of living with her. (ROA p. 133)

As described in *A.F. v. L.B.*, 572 S.W.3d 64, 76 (Ky. App. 2019): "The family court considered Mother's recent efforts. That is apparent from the record. However, the judgment implicitly reflects that the family court considered Mother's efforts too little and too late to reclaim a relationship with Child which, for Child's tenderest years, Mother voluntarily subordinated to pursue an illicit life of drugs and company with those who do worse." That is what the trial court also did in the case at bar. In addition, the trial court also considered *R.P., Jr. v. T.A.C.*, 469 S.W.3d 425, 427 (Ky. App. 2015) which set out: "[A]bandonment is demonstrated by facts or circumstances that evince a settled purpose to forgo all parental duties and relinquish all parental claims to the child." After over a year after the trial, the trial court was persuaded by clear and convincing evidence that pursuant to KRS 199.502 (1)(a) that Megan abandoned Child for a period of not less than ninety (90) days. (ROA p. 132) The family court bears the responsibility to weigh the evidence and make factual findings based on clear and convincing

evidence. The Court of Appeals cannot substitute its judgment for that of the family court unless those findings are clearly erroneous. *A.F. v. L.B.*, 572 S.W.3d 64, (Ky. App. 2019). The trial court's findings and rulings are not clearly erroneous and should be upheld.

CONCLUSION

The Appellees followed the correct statutory requirements for initiating an adoption without consent as set out by the Legislature. It is Appellees position that this issue was not properly preserved by the Appellant and it should not be raised now. The trial court has correctly applied KRS 109.502(1)(a) to the case at bar. The facts are supported by clear and convincing evidence that Megan has abandoned the Child for a period of not less than ninety (90) days. The trial court noted that Megan has made changes to her life. (ROA 129) However, the trial court also found it was too little, too late, in this case due to Megan's non-involvement in the child's life while note incarcerated. The trial court's decision should be affirmed by this honorable Court.

This the 4th day of August, 2021.

D. Bailey Walton, Attorney for Appellees
WALTON LAW, P.L.L.C.
P.O. Box 128 – 1131 Fairway Street
Bowling Green, KY 42102-0128
Phone: (270) 843-5500
Fax: (270) 782-1357
Email: dbwlaw@bellsouth.net