



Missouri Court of Appeals

Southern District

Division Two

IN RE THE ADOPTION OF C.M.B.R.,)
a minor.)
)
S.M. and M.M.,)
)
Petitioners-Respondents,)
)
vs.)
)
E.M.B.R.,)
)
Respondent-Mother.)

No. SD30342

Filed: July 21, 2010

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable David C. Dally, Circuit Judge

REVERSED AND REMANDED WITH DIRECTIONS

E.M.B.R. ("Mother"), a citizen of Guatemala, appeals from a judgment granting a petition for adoption of her infant son, C.M.B.R. ("Child"),¹ filed by S.M. and M.M. (collectively, "Respondents"), and entered by the Circuit Court of Jasper County on October 9, 2008. Mother raises fourteen points on appeal, including a claim of error that the trial court granted the adoption without the statutorily-mandated placement

¹ When this case commenced, Child was eleven months old; at present, Child is three.

requirements governing private adoption, pursuant to section 453.014.² This argument is dispositive of the entire appeal and we address Mother's other points only as assistance in discussing this first point.

Initially, we note that Respondents filed a motion to dismiss the appeal for lack of jurisdiction and to strike certain items from the record, which was taken with the case. Respondents claim the notice of appeal was not timely filed and, thus, we have no jurisdiction to address the merits of the appeal. We note that we received this appeal after transfer from the Missouri Supreme Court. In its Order dated July 23, 2009, the Court stated, "[Mother's] application for transfer from the Missouri Court of Appeals, Southern District, ordered treated as a motion for leave to file notice of appeal out of time and sustained." The Supreme Court then vested jurisdiction in the Southern District on February 1, 2010. Respondents argue that the Supreme Court did not have the authority to sustain the motion as it was filed in their court after six months from the date of judgment. We simply note that Mother filed a motion to file her appeal out of time with this Court within six months. We shall treat the Supreme Court's transfer in the nature of a writ ordering us to sustain the motion to file an appeal out of time. The motion to dismiss the appeal for lack of jurisdiction is denied; we shall address the motion to strike portions of the record during our resolution of the point on appeal.

Factual & Procedural Background

On May 22, 2007, Immigration and Customs Enforcement ("ICE") raided the poultry plant in Barry County where Mother was employed. Mother and more than one hundred other undocumented immigrants were taken into custody. Rather than

²All references to statutes are to RSMo 2000, and all rule references are to Missouri Court Rules (2010), unless otherwise specified.

immediately deport Mother and Child, ICE prosecuted Mother for aggravated identity theft, pursuant to 18 U.S.C. § 1028A. In October 2007, Mother pled guilty, and was sentenced to deportation from the United States following a mandatory two years in prison.³

The only evidence concerning the care of Child was the testimony of a parent educator with Parents as Teachers for Carthage R-9 Schools, Laura Davenport ("Ms. Davenport"), and what Respondents heard about Child from others. No evidence was obtained from Mother or any of her family members at the transfer of custody hearing or at the adoption hearing. We recount the following facts as they were presented to the trial court: At the time Mother was arrested, Child was staying with Mother's brother ("Brother"). A few days after Mother's arrest, Brother gave Child to Mother's sister ("Sister") and brother-in-law. Unable to care for Child full-time, Sister sought babysitting services through Ms. Davenport, who referred Sister to Jennifer and Oswaldo Velazco⁴ ("the Velazco family"), local clergy of a Hispanic church in Carthage, Missouri. It was at this point that Sister relied on the Velazco family to help provide childcare for Child. At first, the Velazco family would pick Child up in the morning and Sister would bring Child back home in the evening. This arrangement lasted for a few weeks, when it was decided that instead of shuffling Child back and forth, Child would stay with the Velazco family during the week and Sister would pick him up on Fridays for the weekend. As of September of 2007, Child was still living with Sister on the weekends.

³ Mother's brief contains information concerning Mother's incarceration and release. That information was not provided to the trial court and we sustain Respondents' motion to strike portions of the record that were not before the trial court; however, had a written report been completed pursuant to section 453.026, as discussed in this opinion, the evidence would have been before the trial court.

⁴ Throughout the proceedings, the babysitters are referred to as the Velasquez family, the Hernandez family, and the Velazcos. The legal file contains a letter from the family, which is signed the Velazco family. Thus, we refer to them in this opinion as such.

In September of 2007, Ms. Davenport visited Mother at the St. Clair County Jail to see if Mother was willing to let Child be adopted. Mother responded that she did not want Child to be adopted.⁵ Yet, on September 24, 2007, the Velazco family contacted Respondents about adopting Child and started granting them visitations with Child. The Velazco family knew Respondents' brother and sister-in-law and they sought out Respondents as a potential adopting family. After ten days of visitation and one overnight visit, Child came to live with Respondents full-time on October 5, 2007.

On October 5, 2007, before the Velazco family informed Sister that Child would not be returned to her, Respondents filed their Petition to adopt Child and terminate Mother's parental rights ancillary to the adoption.⁶ The Summons and Petition for transfer of custody, termination of parental rights, and adoption was served on Mother on October 15, 2007, a mere three days before the transfer of custody hearing. Respondents argue that because Mother was served and did not appear at the transfer of custody hearing, she waived her right to argue improper service. However, a closer review of the

⁵ We were provided with what was purportedly a transcript of the conversation that was taped by the jail official in the St. Clair County jail. Apparently, the transcript was used at a school board hearing concerning the actions of Ms. Davenport. Again, we sustain Respondents' motion to strike the transcript.

⁶ There is a letter in the legal file written by the Velazco family to Mother's family which states,

To Whom It May Concern:

I am writing this letter in regards to [Child]. Who will no longer be in our care or living in our house after 10-7-2007. The couple [Respondents are] pursuing adoption in the case of [Child]. The papers for them to get guardianship of [Child have] already been sent to the family courts of Jasper County by their lawyer. And there is nothing that we can do legally nor can you. The only person that has the chance to do anything is [Mother]. The proper papers have already been sent to [Mother] at the jail. If you wish to know more about this matter you need to be in contact with [Child's Mother]. And we ask that you please no longer contact us in respect to this matter. Because it is out of our hands now.

Sincerely,
The Velazco Family

We sustain the motion to strike the letter as it was not before the trial court.

record demonstrates that the transfer of custody hearing was not scheduled until October 17, 2007 – two days after Mother was served with the Summons and Petition.

Additionally, the caption on the Notice of Hearing indicates that only Joseph Hensley, Respondents' attorney, and Jamey Garrity, the guardian ad litem ("GAL"), received notice of the transfer of custody hearing. Mother was not indicated in the caption and no attorney was noticed on her behalf. The body of the notice of hearing document tells the noticed parties to inform their clients. Thus, it is clear that Mother received no notice of the transfer of custody hearing.

Mother was not present or represented by counsel at the transfer of custody hearing on October 18, 2007; counsel was not appointed for her until December 3, 2007, almost two months after the custody of Child had been transferred to Respondents. Child was never in the jurisdiction of the Juvenile Division of the Circuit Court. The court heard evidence from Respondents about their circumstances and how Child came to be a part of their lives.

During the hearing, Respondents presented a home study that had been completed to assess their fitness to serve as foster parents. The home study addressed Respondents' strengths and weaknesses, along with their backgrounds, which included concerns about S.M.'s criminal history⁷ and the involvement of M.M.'s brother, who M.M. claimed had sexually abused her as a child.⁸ The assessment made two recommendations before Respondents could be licensed foster parents: (1) create a safer home environment for children because Respondents lived in a basement apartment; and (2) further assessment

⁷ According to the report, S.M. was charged with and convicted of various crimes between the ages of sixteen and twenty-one. S.M. was thirty years old at the time of the adoption hearing on October 7, 2008.

⁸ The report stated that M.M. was sexually abused by her brother between ages three and seven.

from the Children's Division representatives regarding the presence of M.M.'s brother in her life. There is no evidence of compliance with either of these requirements in the record, other than M.M.'s verbal confirmation that "everything" was approved.

The GAL recommended transfer of custody, stating that "there was an emergency situation in that nobody had the ability to care for [Child] . . . so maybe with this transfer of custody [Respondents will] be able to take [Child] to the doctor or get him his needed shots or checkups." The court granted Respondents care and custody of Child pending further proceedings.

The adoption hearing was held on October 7, 2008. At that hearing, Respondents' counsel offered and the court admitted a letter he sent to Mother that was returned refused and M.M. testified that Respondents' attorney sent letters to Mother in jail. Additionally, a letter from the court advising Mother about her first appointment of counsel was also returned refused. The court later withdrew that appointment, and it was at this point that Respondents hired Aldo Dominguez ("Mr. Dominguez") to represent Mother in the termination of parental rights and adoption proceedings. Other than the two letters sent by Respondents, no effort was made to locate Mother or to ensure she had knowledge of the termination and adoption proceeding. Furthermore, there is no evidence that the GAL attempted to find Mother or her family.

The termination and adoption hearing lasted for a total of 106 minutes. A substantial portion of the hearing was devoted to Respondents' purported fitness as parents for Child and no evidence was presented on behalf of Mother⁹ other than a letter indicating:

⁹ Child's father is unknown and is not a party to this appeal.

I have suffered too much by knowing nothing about my little one, asking God to take care of him for me and let me be reunited with him soon.

Please, Mr. Dominguez, look for the means to send my son [Child] with my family in Guatemala. This is the telephone number of my sister in Guatemala, I spoke to her and she will welcome him in my country.

Mother was represented by counsel, who was paid for by Respondents, and she was not present. Additionally, there was no report or investigation into Mother's background to show why she was unfit to be a parent or why termination of parental rights was in Child's best interests. In fact, the court admits that "[n]ot much is known about [Mother] except what could be discovered through her plea agreement and the testimony of [Ms.] Davenport[.]"

The court found that Mother "abandoned" Child, as used in sections 453.040(7) and 211.447.2(2)(b), RSMo Cum. Supp. 2007, when she went to prison without making provisions for care of Child.¹⁰ In addition, the court stated that Mother had no contact with Child nor attempted to communicate with him from the time she was arrested. The court had two letters from Mother in its file. One was a letter dated October 28, 2007, indicating that Mother did not want Child adopted. The other one was a letter sent to Respondents' attorney, according to the testimony of S.M., on September 16, 2008, indicating that Mother did not want Child adopted. No evidence was presented at trial to show whether Mother had contacted her family about Child or whether she was capable of providing support for Child while she was imprisoned. Additionally, nothing in the record indicates that Mother knew how to contact Child or where to find him once he was placed with Respondents – last she heard, Child was still being cared for by Sister.

¹⁰ We do not address whether this finding was supported by substantial evidence even from the testimony at the hearing. It is undisputed that Mother left Child in the custody of her family. There is no evidence that she was given an opportunity to make further arrangements if her family was not able to care for Child.

Respondents asserted that their contact information was on the pleadings so Mother could find them; however, it was clear from the testimony at trial that Mother did not speak English. There was no clear evidence whether Mother had a translator available to interpret the documents for her or to help her understand the gravity of the situation.

When considering Mother's present circumstances, the court noted that Mother was unable to offer proof that she would be employable in Guatemala, had a home there, or had any way to care for Child, "leaving the court to believe that [Mother] would be unable to provide adequate food, clothing, or shelter to [Child] in her physical custody in the future." Moreover, the court stated that "[Mother's] lifestyle, that of smuggling herself into a country illegally and committing crimes in this country is not a lifestyle that can provide any stability for a child. A child cannot be educated in this way, always in hiding or on the run." There was no investigative report about Mother's ability to parent, and there was no evidence to indicate that Mother was an unfit parent. The only evidence presented on behalf of Mother was a letter from her, indicating that she had someone on stand-by ready and willing to take responsibility for Child until Mother was released from prison and deported to Guatemala. The court indicated, "[t]he only certainties in [Mother's] future is that she will remain incarcerated until next year, and that she will be deported thereafter." The court stated that "[Mother] appeared to put forth no effort to locate [Child] and, in fact, should have known where [Child] was." The court granted Respondents' petition to adopt Child and terminated Mother's parental rights.

Analysis

Mother's first point on appeal contends that the trial court failed to scrupulously adhere to the statutorily mandated placement requirements, in section 453.014, which

specify who may place a child for adoption. Mother argues that the private adoption of Child should not have occurred because the Velazco family was not authorized to place Child with Respondents. We agree.

"Adoption proceedings are governed by statute, Chapter 453, and this chapter is considered a code unto itself." *In re E.C.N.*, 517 S.W.2d 709, 712 (Mo. App. St.L.D. 1974). Adoption statutes, like all other similar statutes, must be strictly complied with and must be strictly construed in favor of the natural parent when the destruction of the parent-child relationship is at issue. *In re G.K.D.*, 332 S.W.2d 62, 66 (Mo. App. St.L.D. 1960); *In re Adams*, 248 S.W.2d 63, 66 (Mo App. St.L.D. 1952).

In addition to these general rules of statutory construction, Chapter 453 contains its own interpretation guidelines. Section 453.005 provides "[t]he provisions of sections 453.005 to 453.400 shall be construed so as to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home." Section 453.005.1, RSMo Cum. Supp. 2001. This concept was addressed in *In re Perkins*, 117 S.W.2d 686 (Mo. App. St.L.D. 1938), as follows:

It is of course true that the [adoption] statute is to be liberally construed with a view to promoting the best interests of the child, but such liberal construction is obviously not to be extended to the question of when the natural parents may be divested of their rights to the end that all legal relationship between them and their child shall cease and determine. . . . [I]t must always be borne in mind that the rights of natural parents to the custody and possession of their children are among the highest of natural rights[.]

Id. at 691. "Adoption is purely a creature of statute and even 'the best interests of the child' cannot give the court jurisdiction where it has none." *In re E.C.N.*, 517 S.W.2d at 712 (quoting *In re Adoption of J.M.K.*, 363 S.W.2d 67, 74-5 (Mo. App. K.C.D. 1962)).

Placement of the child is one of the first steps in any adoption proceeding. *In re C.D.G.*, 108 S.W.3d 669, 676 (Mo. App. W.D. 2002). While not defined in Chapter 453, "placement" refers to the transfer of custody to the potential adopting parents for the purpose of future adoption. *Id.* Section 453.014 specifically states the parties who may place a minor for adoption and what rules govern those parties:

1. The following persons may place a minor for adoption:

(1) The **division of family services** of the department of social services;

(2) A **child placing agency** licensed pursuant to sections 210.481 to 210.536, RSMo;

(3) The **child's parents**, without the direct or indirect assistance of an intermediary, in the home of a relative of the child within the third degree;

(4) An **intermediary**, which shall include an **attorney** licensed pursuant to chapter 484, RSMo; a **physician** licensed pursuant to chapter 334, RSMo; or a **clergyman of the parents**.

2. All persons **granted the authority** to place a minor child for adoption **as designated in subdivision (1), (2) or (4) of subsection 1** of this section shall comply with the rules and regulations promulgated by the department of social services and the department of health and senior services for such placement.

3. The department of social services, division of family services and the department of health and senior services shall promulgate rules and regulations regarding the placement of a minor for adoption.

Section 453.014 (emphasis added). Here, neither the Children's Division nor a child placing agency was involved in the placement of Child with Respondents. It is clear from the record that Mother did not consent to the adoption and did not give anyone authority to place Child for adoption. Finally, neither Sister nor the Velazco family constitutes an intermediary, which the statutory language describes as an attorney, physician or clergyman of the parents.

Respondents argue that the legislature did not intend to restrict the class of intermediaries to only attorneys, physicians, or clergyman of the parents, because the use of the word "include" indicates that there may be more intermediaries that are not mentioned in the provision. If ambiguities exist in the adoption code, we strictly construe the statute in favor of the natural parent, which would make the intermediary provision exclusive to just those parties listed. *In re G.K.D.*, 332 S.W.2d at 66. Because neither the Velazco family nor Sister were intermediaries, they were not authorized to "place" Child with Respondents, and as such this private adoption should not have occurred. Furthermore, Respondents' argument places no limit as to who may place a child for adoption without the consent of the parents. Respondents argue that anyone can place the child for adoption and it is up to the parent to contact the police in opposition to the placement prior to the court allowing a transfer of custody. This proposition has no support in our laws or a civilized society.

In the alternative, Respondents argue (1) that the illegality of the initial placement became irrelevant when the trial court entered its transfer of custody order on October 18, 2007, or (2) that the court may "place" a child for adoption if it is in the best interests of the child. The Western District of this Court addressed and rejected the second proposition in *In re C.D.G.*, where it stated that a court has authority to approve the placement of a child, but is not one of the authorized parties, under section 453.014, to place a child. *In re C.D.G.*, 108 S.W.3d at 675-76 n.6. As to the first proposition, an analysis of the following adoption statutes illustrates that the court approval of an initially illegal placement does not place a judicial stamp of approval on an unauthorized placement.

Section 453.026 provides that "**before** a prospective adoptive parent accepts physical custody of a child, the **person placing the child** for adoption, **as authorized by section 453.014**, shall furnish to the court, the guardian ad litem and the prospective adoptive parent a written report regarding the child." Section 453.026.1 (emphasis added). Here, the Velazco family was not authorized to place Child for adoption, Child was placed before any report was furnished to the court and the GAL, no report under section 453.026.1 was prepared at all, and no inquiry was made by the trial court as to what gave the Velazco family the authority to place Child for adoption. This is important because a court can only enter a transfer of custody order

if the court finds **all of the following**:

(1) A family assessment has been made as required in section 453.070 and has been reviewed by the court;

(2) A recommendation has been made by the guardian ad litem;

(3) A petition for transfer of custody for adoption has been properly filed or an order terminating parental rights has been properly filed;

(4) The financial affidavit has been filed as required under section 453.075;

(5) **The written report regarding the child who is the subject of the petition containing the information has been submitted as required by section 453.026;**

(6) Compliance with the Indian Child Welfare Act, if applicable; and

(7) Compliance with the Interstate Compact on the Placement of Children pursuant to section 210.620, RSMo.

Section 453.110.6, RSMo Cum. Supp. 2004 (emphasis added). The order transferring custody of Child to Respondents failed to adhere to the requirements of sections 453.026.1 and 453.014. To hold otherwise would strip the adoption statutes of their

effectiveness because each one of the seven required items serves a purpose in protecting both the natural parents' rights and the best interests of the child.

Additionally, sections 453.080 and 453.110.1 are instructive. Section 453.080 states that "[l]awful and actual custody' shall include a transfer of custody pursuant to the **laws of this state**, another state, a territory of the United States, or another country."

Section 453.080.1(1), RSMo Cum. Supp. 2001 (emphasis added). Thus, if the statutes are not followed, as is the case here, no lawful custody was transferred. Furthermore, section 453.110 provides:

No person, agency, organization or institution shall surrender custody of a minor child, or **transfer the custody** of such a child to another, and no person, agency, organization or institution shall take possession or charge of a minor child so transferred, without first having filed a petition before the circuit court sitting as a juvenile court of the county where the child may be, praying that such surrender or transfer may be made, and having obtained such an order from such court approving or ordering transfer of custody.

Section 453.110.1, RSMo Cum. Supp. 2004 (emphasis added). By enacting this section, the legislature intended to prohibit the indiscriminate transfer of children, meaning that someone could not pass a child around like chattel. *In re S.J.S.*, 134 S.W.3d 673, 676 (Mo. App. E.D. 2004). Instead, such transfer must be authorized by a valid court order. *Id.* at 676-77. Thus, because the requirements for a transfer of custody order were not met, the court order granting Respondents custody of Child was invalid.

In a final effort to overcome the failure of the trial court to strictly follow the adoption procedures, Respondents argue that Mother has not demonstrated prejudice. The custody of Child was transferred to Respondents by a person unknown to Mother and without any input from Mother. Although we do not vouch for the veracity of the evidence presented on Mother's behalf in this appeal, the fact that none of this evidence

was presented to the trial court is a result of Respondents' failure to follow the statutory process. The legislature developed a set of laws to determine how custody may be lawfully taken away from a parent; therefore, substantial actions outside of that statutory scheme were prejudicial to Mother.

A parent's right to raise her children is a fundamental liberty interest protected by the constitutional guarantee of due process and is, in fact, one of the oldest fundamental liberty interests recognized by the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). We do not agree with Respondents' argument that any party can place any child for adoption so long as the court finds that it is in the best interests of the child. We have never allowed courts to choose between competing parents on the simple standard of "best interests" of the child. By allowing this type of transfer, we would not only contradict the statutory requirements, but would also open the door to the black-marketing of children. The failure to comply with the adoption procedures invites fraudulent presentations of incomplete information to the trial court.

If Mother's immigration status was considered as a factor, we note that immigration status has never been one of the factors to consider when determining whether to terminate parental rights. There is no Missouri case expressly addressing how to handle immigration status of the parents. The closest we come to an answer is through a case in the Nebraska Supreme Court, which stated:

[W]hether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests . . . the 'best interests' of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another.

In re Angelica L., 767 N.W.2d 74, 94 (Neb. 2009). While the trial court did not expressly say that Respondents could provide a better home in the United States for Child, it did so through its actions because it found for Respondents even though it had no knowledge of the type of home Mother could offer to Child in Guatemala.

We conclude that adoption statutes must be strictly complied with and must be construed in favor of the natural parents. *In re G.K.D.*, 332 S.W.2d at 66. We cannot excuse strict compliance or write exceptions into the statutes because the natural parents' rights to their children cannot be unreasonably disregarded. *In re Adams*, 248 S.W.2d at 66; *In re E.C.N.*, 517 S.W.2d at 712. The trial court has the obligation to make sure the statutes are strictly followed, and the failure to do so in this case results in a deprivation of Mother's right to raise Child.

Although Respondents have posited that this appeal should be dismissed because Mother never challenged the legality of Child's placement with Respondents at any time prior to this appeal, it is within this Court's discretion to review for plain error. Rule 84.13(c). In determining whether to exercise our discretion, we look to whether there is a substantial ground for believing that the trial court "committed error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice." *In re J.L.B.*, 280 S.W.3d 147, 155 (Mo. App. S.D. 2009). Because of the importance of the rights involved, we have exercised our discretion and reviewed Mother's first point.

It is clear from the record that there were serious failures to follow statutory requirements in this case, including: (1) the Velazco family had absolutely no legal authority to place Child with Respondents, a violation of section 453.014.1; (2) Mother was given no notice for the transfer of custody hearing, in violation of Rule 44.01(d),

Mother did not attend the hearing, and was prejudiced by not being present; (3) Mother was not appointed counsel until two months after the transfer of custody hearing was held, in violation of section 453.030.12, RSMo Cum. Supp. 2004, and there was absolutely no evidence that the initial counsel tried to contact Mother or whether Mother knew about said counsel; (4) no report or investigation was done into Mother's background, history, or ability to care for Child, a violation of section 453.026.1; (5) no report was done on Child's relationship with Mother prior to her arrest, in contravention of section 453.026.1; (7) there was no evidence that Respondents were licensed foster parents, pursuant to section 210.486, thus, they were not eligible to seek adoption under section 210.566.4(1), RSMo Cum. Supp. 2006; and (8) the transfer of custody occurred prior to a court order granting such transfer, in violation of section 453.110(1), RSMo Cum. Supp. 2004. Because of these open, obvious, and evident errors, which resulted in manifest injustice to Mother, we have exercised plain error review.

The trial court lacked the statutory authority to transfer custody of Child, to consider Respondents' adoption petition, and to terminate Mother's parental rights. We reverse the judgment ordering adoption of Child and termination of Mother's parental rights, and direct the trial court to dismiss the petition.

Nancy Steffen Rahmeyer, Judge

Lynch, P.J., Francis, J., concur.

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Division II