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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000647-ME

SHARON LYNN STORM (F/K/A SHARON LYNN MULLINS) — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE JULIE PAXTON, JUDGE
ACTION NO. 02-AD-00007

JERRY R. MULLINS; LORRAINE MULLINS; A.R.M., A MINOR; AND B.L.M., A MINOR — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Sharon Lynn Storm (f/k/a Sharon Lynn Mullins) has appealed from the Floyd Family Court's March 8, 2005, order denying her CR 60.02 motion to set aside a Judgment of Adoption and to grant her custody of two minor children. Despite the fact that the Judgment of Adoption should never have been

[1] Senior Judge John W. Potter, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

entered for reasons we shall address in this opinion, we reluctantly affirm the family court's decision because Sharon did not attack the validity of the judgment within one year of its entry.

Sharon and her former husband, Preston Mullins, are the natural parents of sisters B.L.M. and A.R.M., who were born on January 11, 1999, and December 25, 2000, respectively. Jerry and Lorraine Mullins are the girls' paternal grandparents. While B.L.M. had lived with Jerry and Lorraine since her birth, A.R.M. only lived with them on and off for her first year of life, and did not live with them on a permanent basis until after her first birthday. On March 27, 2002, Sharon and Preston both signed a Consent to Custody form. Sharon's document read as follows:

> SHARON LYNN MULLINS, states that she is the Respondent in the above styled and number (sic) action; that she has read a copy of the Petition for Custody filed herein by the Petitioner (sic) in said action and hereby enters her appearance to said action for all intents and purposes and declines to plead further and hereby waives all future proceedings herein or notices or hearings that might be necessary or incidental to this action.
>
> The Respondent further states that she is the natural mother of said child (sic), [A.R.M.] and [B.L.M.], and consents to custody being placed with the Petitioner (sic) as placement with the Petitioner (sic) would be in the best interest of the minor children.

Almost two months later, on May 17, 2002, Jerry and Lorraine filed a Petition for Adoption with the family court, in which they sought to adopt B.L.M. and A.R.M. It does not appear that Sharon was served with a copy of the petition. However, the Consent to Custody forms signed by Sharon and Preston the previous March were attached to the petition. The family court appointed John Chafin as the guardian *ad litem* for the children, who after interviewing Jerry and Lorraine stated that it would be in the best interest of the children to grant the adoption.

The Cabinet for Families and Children prepared a Confidential Report dated June 18, 2002, which was filed with the family court a few days later. Based upon an interview with Jerry and Lorraine, during which they stated that the birth parents were able to see the children anytime they wished and this would not change if the adoption petition were granted, the Cabinet recommended granting the adoption, provided that all of the legal requirements had been met. In the two-page letter accompanying the report, Family Services Office Supervisor Kathleen Bohr made the following statement: "The petition states that both parents have consented to the adoption, however, there were no Affidavits of Consent attached to the petition. The birth mother and birth father have completed the DSS-191 and DSS-192; pages four and six of the DSS-191 and the

DSS-192 are attached to this report." Attached to the report were unsigned forms, which were to be completed by the birth mother only, regarding background information for each pregnancy, as well as a Medical Background form completed on the birth mother. Also attached were two unwitnessed DSS-192 Cabinet forms entitled "Biological Parent Statement Regarding Future Contact and/or Inspection of Records", presumably completed and signed by Sharon and Preston on June 13, 2002. The form specifically provides: "Please note this is not a consent to the adoption." The record does not contain a Consent to Adoption signed by either Sharon or Preston, or an order voluntarily or involuntarily terminating their parental rights.

The family court held a brief, three-minute hearing on June 20, 2002,[2] where only Jerry and Lorraine's attorney was listed as being in attendance. On July 1, 2002, the family court entered a Judgment of Adoption, specifically finding that the facts in the petition were true, that the statutory requirements under the adoption law had been met, that Jerry and Lorraine were of good moral character and could properly maintain and educate the children, and that it would be in the children's best interest to grant the adoption. The Judgment of Adoption was not served on Sharon.

[2] The videotaped record of this hearing is not in the certified record.

Almost two and one-half years later, Sharon filed a Verified Petition to Open Adoption Records and Notice pursuant to KRS 199.570. In the petition, Sharon, through her attorney, indicated that she lived in Georgia with her current husband and infant child, that until recently Jerry and Lorraine had permitted her to visit with at least one of the girls on a semi-regular basis, and that she did not believe she executed a consent to the adoption. Sharon's request was granted, and she then filed a Motion to Set Aside Judgment of Adoption and Motion to Grant Respondent Custody and Notice pursuant to CR 60.02 with the family court on January 13, 2005. In the motion, Sharon argued that she never consented to the adoption, meaning that the judgment was void, and that she should be awarded custody. In a response filed January 14, 2005,[3] Jerry and Lorraine agreed that the document filed in the adoption proceeding would necessitate a reopening to determine if it should be converted to an involuntary adoption proceeding. They stated that Sharon had had no contact with the girls for two years, that she had failed to support them, and that they had exercised exclusive custody and had been the girls' sole caretakers for two years. If the petition for adoption were to be denied, they moved the family court to amend the Judgment of Adoption to a judgment of

[3] A motion hour hearing was presumably held the same day, although the record of this was not certified or included in the record on appeal.

custody and to set child support, citing the *de facto* custodian statutes.

In a later response, Jerry and Lorraine asserted that it was too late for Sharon to collaterally attack the Judgment of Adoption, citing KRS 199.540(2). Sharon argued that their reliance on the statute was misplaced, because the Judgment of Adoption was void as her parental rights were never terminated, she never consented to the adoption, and she was never served with process. On March 9, 2005, the family court entered an order denying Sharon's motion as time barred by operation of KRS 199.540(2) because it was filed past the one-year time limitation following the entry of the Judgment of Adoption. This expedited appeal followed.

On appeal, Sharon continues to argue that the limitation contained in KRS 199.540(2) does not apply to a void judgment, while Jerry, Lorraine, and the guardian *ad litem* all argue that the time limitation bars Sharon's attack and that in any event the Judgment of Adoption was properly entered.

KRS 199.470(1) permits anyone over the age of eighteen who has been a resident of the state for over twelve months to file a petition to adopt a child in the circuit court in which the petitioner lives. Pursuant to KRS 199.500(1), "[a]n adoption shall not be granted without the voluntary and informed consent, as defined in KRS 199.011, of the living parent or

parents of a child born in lawful wedlock. . . .” None of the exceptions to the consent requirement apply in the present case. KRS 199.011(14) defines “voluntary and informed consent” as:

> [A]t the time of the execution of the consent the consenting person was fully informed of the legal effect of the consent, that the consenting person was not given or promised anything of value except those expenses allowable under KRS 199.590(6), that the consenting person was not coerced in any way to execute the consent, and that the consent was voluntarily and knowingly given.

The statute also requires the consent to be in writing, to be signed and sworn to, and to include the date, time and place of execution; the name of the child to be adopted along with the child’s date and place of birth; the consenting person’s relationship to the child; the identity of the proposed adoptive parents (or that the information does not want to be known); a statement of the understanding that the consent will be final and irrevocable unless withdrawn under KRS 199.011(14)(3); the disposition of the child if adoption is denied; a statement that a copy of the signed consent was received at the time it was executed; the name and address of the person who prepared the consent and who explained the consent, along with a verified statement from the consenting person that the consent had been fully explained; and the amount of legal fees incurred by the consenting person related to the execution of the consent.

It is obvious to this Court that the family court never should have entered the Judgment of Adoption in this proceeding. There is absolutely no indication that either Sharon's or Preston's parental rights had been terminated, either voluntarily or involuntarily. Furthermore, neither Sharon nor Preston ever consented to the adoption, as is required by KRS 199.500. Rather, they completed forms entitled "CONSENT BY MOTHER TO CUSTODY BY THE PETITIONER" and "CONSENT BY FATHER TO CUSTODY BY THE PETITIONER", both of which reference the reading of a Petition for Custody, which was never filed. Clearly, neither of them consented to the adoption. Even if the Consent to Custody forms were construed to be consents to the proposed adoption, they do not meet the statutory requirements as defined in KRS 199.011(14). The form signed by Sharon does not contain the time or place of its execution, the place of the children's birth, a statement that she understood the consent would be final and irrevocable unless withdrawn within twenty days after the execution of the consent, the disposition of the children if adoption was not granted, a statement that she received a copy of the form upon its execution, the name of the person who prepared and explained the consent to her, or the total amount of the legal fees she incurred, if any. The statement in the Judgment of Adoption "that all legal requirements under the adoption statutes have been complied

with" is clearly in error and is not supported by the record, as Sharon never consented to the adoption pursuant to KRS 199.500. Furthermore, Jerry and Lorraine agreed that this finding was incorrect. Additionally, we also disagree with the statement in the Petition for Adoption, which was found to be true in the Judgment of Adoption, that both children had lived with Jerry and Lorraine since birth. In the Confidential Report, the Cabinet indicated that pursuant to Jerry and Lorraine's statement during the interview, A.R.M. had only lived with them off and on for the first year of her life.

We also take issue with several statements made in the briefs filed by counsel for Jerry and Lorraine and by the guardian *ad litem*. Both briefs incorrectly relate to the Court that Sharon signed the Consent to Custody form after she had read the Petition for Adoption, when in actuality the Consent to Custody indicates that Sharon read the Petition for Custody, a document that apparently does not exist or at least was never filed. The only support from the record Jerry and Lorraine point to regarding Sharon's "knowledge" of the adoption proceeding was her signing of the DSS-192 form. However, we have already indicated that the DSS-192 form presumably completed by Sharon was not witnessed. The guardian *ad litem*'s brief incorrectly states that both children had lived with Jerry and Lorraine since birth, that the Consent to Custody forms were

signed and the Petition for Adoption was filed on the same day (the Consent to Custody forms were signed on March 27, while the Petition for Adoption was filed May 17), and that "[t]he interview of [Sharon] by the Cabinet clearly establishes that she was well aware of the adoption proceeding." There is no indication in the record that the Cabinet ever interviewed Sharon.

Despite our reservations about the adoption proceeding, we are compelled to affirm the family court's order in the present matter. KRS 199.540, which allows for the annulment of an adoption, provides as follows:

> (2) After the expiration of one (1) year from the date of the entry of judgment of adoption, the validity thereof shall not be subject to attack in any action, collateral or direct, by reason of any irregularity or failure to comply with KRS 199.470 to 199.520, either procedurally or substantively.

Court cases construing a previous version of this statute, providing for a two-year limitations period, have held that the time limitation applies to block attacks other than for fraud.[4] In this case, there is no dispute that Sharon filed her collateral attack on the Judgment of Adoption one and one-half years too late or that the attack centered on a failure to comply with KRS 199.500. Furthermore, Sharon never alleged that

[4] See Jones v. Sutton, 255 S.W.2d 658 (Ky. 1953); Allen v. Martin, 735 S.W.2d 332 (Ky.App. 1987).

there was any fraud involved, only that a mistake was made or that the consent form was misconstrued. Because Sharon's collateral attack was filed outside of the one-year limitation provided in KRS 199.540(2), the family court properly denied her motion to vacate pursuant to CR 60.02. Had Sharon's motion been timely filed, we have no doubt that a different result would have been reached.

For the foregoing reasons, the order of the Floyd Family Court is affirmed.

HENRY, JUDGE, CONCURS.

POTTER, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

POTTER, SENIOR JUDGE, DISSENTING. I respectfully dissent from the majority's affirmance of a judgment which can be characterized only as constitutionally infirm and void.

Courts have been quick to give effect to the public policy that adoptions, more than other legal proceedings, need to provide certainty and finality for the child, as well as the adoptive parents. Annot. 83 A.L.R.2d 945 (1962). However, a line must be drawn somewhere, and I am convinced that the facts as stated by the majority place this case clearly over that line. Squarely facing the issues, the majority recites with clarity the adoption proceeding's shortcomings. It candidly acknowledges that on the present record Sharon did not consent

to the adoption. That fact alone makes the judgment void and deprives this Court of authority to validate it. Subject to certain enumerated exceptions not pertinent to this case, KRS 199.500(1) states that "[A]n adoption shall not be granted without the voluntary and informed consent . . . of the living parent or parents. . . ."[5] The effect of failure to comply with the mandatory requirements of the adoption statutes was succinctly stated by this Court in Wright v. Howard:[6]

> It is appropriate for the sake of efficiency to first recite two basic rules regarding adoptions: 1) the right of adoption exists only by statute; and, 2) there must be strict compliance with the adoption statutes. Failure to do so results in an invalid judgment. Goldfuss v. Goldfuss, Ky., 565 S.W.2d 441 (1978); Juett v. Rhorer, Ky., 339 S.W.2d 865 (1960); Higgason v. Henry, Ky., 313 S.W.2d 275 (1958).

The consequences attached to the entry of an invalid judgment are clearly explained in Foremost Ins. Co. v. Whitaker:[7]

> A void judgment is not entitled to any respect or deference by the courts. . . . A void judgment is a legal nullity, and a court has no discretion in determining whether it should be set aside.

This Court is not at liberty to ignore this principle by condoning the flagrant disregard of the most essential element set by the legislature in regard to the granting of adoptions.

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[5] Emphasis added.

[6] 711 S.W.2d 492, 494 (Ky.App. 1986).

[7] 892 S.W.2d 607, 610 (Ky.App. 1995).

Citing Jones v. Sutton[8] and Allen v. Martin,[9] the majority acknowledges that an out-of-time challenge may be granted in the case of an adoption obtained by fraud. A void judgment cannot be entitled to greater deference. In my opinion, to the extent that KRS 199.540(2) is construed as permitting the enforcement of a void judgment, it is no doubt unconstitutional.[10]

This is not a case in which the courts must look the other way in order to protect the best interests of the child. This is an intra-family adoption. Setting it aside will not automatically return the children to Sharon, and upholding it does not remove her completely from the children's lives. Because the trial court dismissed Sharon's motion without a hearing, it is impossible to determine whether additional evidence exists to support the judgment. In any event, the trial court retains the power to award custody in the children's best interest or, if the facts warrant it, involuntarily terminate the mother's parental rights.

I would reverse the dismissal of Sharon's motion as time-barred and remand the case for a hearing on her motion.

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[8] 255 S.W.2d 658 (Ky. 1953).

[9] 735 S.W.2d 332 (Ky.App. 1987).

[10] See, In re Adoption of Knipper, 30 Ohio App.3d 214, 507 N.E.2d 436 (Ohio App. 1986), and White v. Davis, 163 Colo. 122, 428 P.2d 909 (Colo. 1967).

BRIEFS FOR APPELLANT:

Stephen L. Hogg
Pikeville, KY

BRIEF FOR APPELLEES, JERRY MULLINS AND LORRAINE MULLINS:

Jimmy C. Webb
Prestonsburg, KY

BRIEF OF GUARDIAN AD LITEM FOR APPELLEES, A.R.M. AND B.L.M.:

John T. Chafin
Prestonsburg, KY