NOT DESIGNATED FOR PUBLICATION

No. 98,787

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE INTEREST OF A.F.

MEMORANDUM OPINION

Appeal from Brown District Court; David J. King, judge. Opinion filed February 8, 2008. Affirmed in part and dismissed in part.

William C. O'Keefe, of Seneca, for appellant natural father.

Hillary J. Boye, assistant county attorney, for appellee.

Before RULON, C.J., ELLIOTT and HILL, JJ.

PER CURIAM.

B.B., a man serving two life sentences for kidnapping and aggravated sexual abuse of a child, brings this appeal from a district court's order severing his parental rights to his young daughter A.F. He claims the Brown County District Court had no jurisdiction to hear the case because the Leavenworth County District Court had earlier ruled on his paternity action. He also contends the State failed to present enough evidence to support the decision to end his parental rights. Finally, he argues the court erred when it did not consider placement of A.F. with his parents.

The law allows child in need of care petitions to be filed in the county where the child is found. Mother abandoned A.F. with friends in Brown County for several months prior to the State filing the petition. Therefore, we hold venue and jurisdiction of this matter was properly

fixed in Brown County District Court. Concerning the evidence presented, we point out the obvious, a man serving two life sentences is in no place to act as a parent. Further, the record has many references to B.B.'s sexual abuse of this child. We think there is sufficient evidence for termination here. Finally, B.B. has no standing to raise the issue of posttermination placement of the child with his parents because his rights are not affected by that order. His parents were granted interested party status by the court and have made no appeal. B.B. cannot claim as error the court's refusal to place A.F. with them.

A review of the facts shows need for change.

On June 24, 2002, B.B. was sentenced in the United States District Court for the Western District of Arkansas to two concurrent life sentences for kidnaping and aggravated sexual abuse of a 10-year-old child. See United States v. Brown, 330 F.3d 1073, 1076 (8th Cir.), cert. denied 540 U.S. 975 (2003). In this case, A.F. was left in the care of her mother, who abandoned the child, leaving her in the care of friends in Powhattan.

When A.F. began to display sexual acting out behaviors, the friends were unable to cope. They made contact with the Kansas Department of Social and Rehabilitation Services (SRS). SRS requested the Brown County attorney to file a child in need of care (CINC) petition. The petition was filed on May 5, 2004. All parties stipulated to A.F.'s CINC status. The district court found her to be in need of care and placed A.F. in SRS care. The court restricted the natural father and the natural father's family from having contact with A.F. The original case plan aimed to reintegrate A.F. with the natural mother.

After several years of therapy for A.F. and out of home placement, the district court ordered SRS to keep custody of A.F. in 2005, noting her mother had expressed a wish to give up her parental rights. The court suggested B.B.'s rights should be terminated so the case could

advance to adoption. At that time the district court continued its order forbidding the natural father from contacting A.F.

The State filed a motion to terminate B.B.'s parental rights, asserting he was unfit because of his imprisonment for offenses involving the abduction and sexual abuse of a minor. Eventually, the district court found that B.B. was unfit to parent A.F. and the situation was not likely to change. The court ordered B.B.'s parental rights severed. A.F. was then placed in a permanent guardianship with her maternal grandparents.

Child in need of care petition may be filed in county where child is found.

B.B. now contends the Brown County District Court lacked jurisdiction because jurisdiction was proper in Leavenworth County. He provides no legal authority to support his argument but bases his argument on the child support and custody decrees issued by the Leavenworth County District Court in his paternity action.

Jurisdiction and venue are creatures of statute. The Kansas Code for the Care of Children, K.S.A. 38-1501 et seq., rules that jurisdiction of the district court is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), K.S.A. 38-1301 et. seq. See K.S.A.2005 Supp. 38-1503(b). Under the UCCJEA, jurisdiction is proper in a district court of the child's home state. K.S.A. 38-1348(a)(1). " "Home state" ' is defined as

"the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period." (Emphasis added.) K.S.A. 38-1337(8).

None of the parties dispute that A.F.'s home state is Kansas. Although A.F. would occasionally travel with B.B., she was born in Kansas and has lived only in Kansas, except when traveling. Therefore, a district court in Kansas has jurisdiction over the CINC adjudication in this case.

While it is true that K.S.A. 38-1349(a) grants continuing and exclusive jurisdiction with limited exceptions to a district court that has made a prior custody determination, the UCCJEA provides that a custody determination is binding only to the people properly notified of the action. K.S.A. 38-1341. Therefore, the Leavenworth County District Court possessed continuing and exclusive jurisdiction over a child custody determination of a dispute arising between father and mother, but not the State which was not a party to the paternity action.

At the termination hearing, the State proffered evidence that A.F. was staying with relatives or friends in Brown County when the CINC petition was filed on May 5, 2004. A return service affidavit is included in the record showing that A.F. as well as the couple with whom she was living were served on May 9, 2004, in Brown County. B.B. presented no evidence to dispute this evidence but simply alleged A .F. was living with her mother in Jackson County from May 10 to May 18, 2004. The evidence in the record supports the district court's finding that Brown County was a proper venue for the CINC proceeding. The Brown County District Court properly exercised jurisdiction over the CINC and termination proceedings in this case.

Specifically, venue in an action filed under the Kansas Code for the Care of Children is in "the county of the child's residence or in the county where the child may be found." K.S.A. 38-1504(a). (The 2007 revisions to the Revised Code do not apply here.) A.F. had been left with her

mother's friends in Powhattan. When she started acting out, the friends notified the authorities in their county. Jurisdiction and venue for this case was properly in Brown County District Court.

Sufficient evidence was presented to terminate parental rights.

When the findings of a district court are challenged on appeal, the reviewing court examines the record to decide whether substantial and competent evidence exists to support the findings. An appellate court does not weigh evidence or pass on the credibility of witnesses but reviews conflicting evidence in a light most favorable to the prevailing party below. In re J.J.G., 32 Kan.App.2d 448, 454, 83 P.3d 1264 (2004).

A district court may terminate parental rights when the court finds clear and convincing evidence of parental unfitness by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change for the foreseeable future. K.S.A.2005 Supp. 38-1583(a). The Kansas Code for Care of Children includes a list of nonexclusive factors the court must consider in deciding whether termination of parental rights is in the best interests of the child. K.S.A.2005 Supp. 38-1583(b). Any one of the factors may be, but is not necessarily, enough to set up a basis for terminating parental rights. K.S.A. 38-1585(e); In re C.C., 29 Kan.App.2d 950, 953, 34 P.3d 462 (2001).

In finding B.B. to be unfit, the district court applied the rebuttable presumption of unfitness created by K.S.A. 38-1585(a)(2):

> "(a) It is presumed in the manner provided in K.S.A. 60-414 and amendments thereto that a parent is unfit by reason of conduct or condition which renders the parent unable to fully care for a child, if the state establishes by clear and convincing evidence that:
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> ....
>
> "(2) a parent has twice before been convicted of a crime specified in article 34, 35, or 36 of chapter 21 of the Kansas Statutes Annotated, or comparable offenses under the laws of another state, the federal government or any

> foreign government, or an attempt or attempts to commit such crimes and the victim was under the age of 18 years."

The State attached copies of motions filed by B.B. in his federal criminal proceedings, which prove his federal convictions involved the kidnapping and aggravated sexual abuse of a 10-year-old child, in violation of 18 U.S.C. §§ 1201(a) and 2241(c) (2000), respectively. See Brown, 330 F.3d at 1076. These federal offenses, as charged, find comparable Kansas offenses in Articles 34 and 35 of Chapter 21 of the Kansas Statutes Annotated, i.e., K.S .A. 21-3420 (kidnapping) and K.S.A. 21-3504 (aggravated indecent liberties with a child). Therefore, the district court properly applied a presumption of unfitness against B.B.

"Subject to K.S.A. 60-416 ... (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates; (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved." K.S.A. 60-414.

Instead of presenting evidence to rebut the presumption, B.B. concedes his condition prevents him from caring for A.F. Nevertheless, the district court did not rely solely on the presumption of unfitness but went further and examined the factors set out by K.S.A.2005 Supp. 38-1583(b). The district court relied principally on K.S.A.2005 Supp. 38-1583(b)(4) and (5). Subsection (b)(4) applies to evidence the parent has physically, mentally, or emotionally neglected the child. Subsection (b)(5) applies to evidence of a felony conviction and imprisonment. Both findings are adequately supported by the record on appeal. B.B. is serving

two concurrent life sentences, and his direct criminal appeals have affirmed those convictions. Brown, 330 F.3d at 1080. At least one collateral attack on the convictions and sentences has failed. See United States v. Brown, 2006 WL 1981789 (W.D.Ark., July 13, 2006) (unpublished opinion). The convictions have prevented B.B. from meeting the physical, emotional, and mental needs of A.F. and will continue to foreclose any future parenting.

Even if B.B.'s convictions are later overturned or his sentences are reduced for good behavior, his ability to provide parenting to A .F. at any point in the future is speculative. When deciding whether a parent's conduct or condition is likely to change in the foreseeable future, a court views the potential change from the child's perspective, not the parent's perspective. See In re C.C., 29 Kan.App.2d at 954 (finding a change in mother's circumstances to be unlikely within the "foreseeable future" when mother would serve at least 30 more months on a prison sentence).

This court has previously found that a parent's imprisonment which prevents the parent from meeting the physical, emotional, and mental needs of a child is enough to terminate parental rights. See In re C.C., 29 Kan.App.2d at 953-54. Therefore, the district court's findings of unfitness are adequately supported by the record on appeal.

B.B.'s rights are not affected by court's decision not to place child with his parents.

B.B. also challenges the district court's order forbidding contact between A.F. and himself and his family. Because the "no contact" order was made in the temporary custody ruling and in the CINC adjudication, the no contact order should have been appealed within 30 days of these rulings. A challenge to the no contact order is not properly before this court in an appeal from the judgment terminating the natural father's parental rights. In re D.I.G., 34 Kan.App.2d 34, 35-36, 114 P.3d 173 (2005).

Even if the issue was properly before the court, any error committed by the district court in forbidding contact between B.B.'s family and A.F. is harmless as it applies to B.B.'s rights. Under K.S.A. 38-1563(g), a district court in its discretion may order an alleged perpetrator of physical, sexual, mental, or emotional abuse of the child to refrain from visiting or contacting the child. Although B.B. disputed the allegations and the State did not use the allegations as a basis for seeking to terminate his parental rights, the record is replete with allegations of sexual abuse against A.F. by B.B. Thus, the district court did not abuse its discretion in restricting B.B. from contacting A.F.

Since B.B. could not contact A.F., any potentially mistaken order restricting his family from contacting A.F. has not prejudiced B.B.'s substantial rights and is, as a result, harmless. Smith v. Printup, 262 Kan. 587, 603, 938 P.2d 1261 (1997) (refusing to reverse a judgment based on an error which has not affected the substantial rights of the parties). B.B. holds no standing to challenge an error which affects only the rights of others. See Varney Business Services, Inc. v. Pottroff, 275 Kan. 20, 30, 59 P.3d 1003 (2002) ("Standing is a question of whether the plaintiff has alleged such a personal stake in ... an otherwise justiciable controversy as to obtain judicial resolution of that controversy.").

Also, to the extent the natural father is trying to challenge the permanent placement decision, a parent whose rights have been lawfully ended lacks standing to challenge the posttermination placement of the child. In re C.C., 29 Kan.App.2d at 956-57. The paternal grandparents have not challenged the district court's failure to consider placing A.F. with them. Thus, B.B.'s attempt to challenge the temporary or permanent placement of A.F. in this appeal is not properly before this court and is hearby dismissed.

Affirmed in part and dismissed in part.