

# Choosing Paramours Over Parenting:

## A Closer Look at the Relationship Between Parent and Non-Parent as a Factor in Termination of Parental Rights Cases

By Jerry M. Lovitt

Since its passage with wide bipartisan support on November 19, 1997, the Adoption and Safe Families Act, commonly known as ASFA, has been the primary mechanism for ensuring that children who have been removed from unacceptable surroundings are granted permanency in a safe and stable home environment.<sup>1</sup>

Although many of the individual state's adoption of ASFA requirements contain subtle variations, a common thread throughout the act is the emphasis on minimizing the duration of time a removed child spends in out-of-home care. For the most part, ASFA was specifically targeted to remedy the myriad of problems that are associated with removed children languishing in foster care for extended periods of time.<sup>2</sup>

In accomplishing this goal, ASFA requires that (absent compelling reasons to the contrary<sup>3</sup>) the state file a petition to terminate the rights of any parent whose child has been in foster care for 15 of the past consecutive 22 months, with the ending point being the date the petition is actually filed.<sup>4</sup> In order to prevent losing federal assistance funding under Title IV-E of the Social Security Act, individual states were required to pass legislation in compliance with ASFA requirements.<sup>5</sup> In response, Kentucky has codified ASFA's mandates primarily in its juvenile code, contained in Chapters 600 through 625 of the Kentucky Revised Statutes, with the specific grounds for termination of parental rights set forth in KRS 625.090.

Few trials presided over by a family court judge will be more emotionally charged than a contested involuntary termination of parental rights case. For the parent refuting the petition, it is their own flesh and blood and family legacy

being brought before the court by a petitioner – usually the Cabinet for Health & Family Services – seeking to sever permanently what is often one of the most meaningful and longest lasting relationships the parent has had in his or her lifetime. Unlike other civil trials that focus on money damages or property interests, a termination of parental rights trial goes to the very core of human attachment and involvement. Additionally, courts have long considered a biological parent's right to raise his or her own child fundamental in nature, and one worthy of constitutional protections.<sup>6</sup>

In light of the foregoing principles, there is a rigorous burden of proof placed on the petitioner seeking the involuntary termination, and strict adherence to the pled statutory grounds must be met by the “clear and convincing” standard.<sup>7</sup> Although the focus at trial is certainly on the parent, the entire proceeding is viewed through the lens of the best interests of the child being paramount.<sup>8</sup> Perhaps not surprisingly, it is the rarest of circumstances when a child is removed from a nuclear family consisting of a two-parent household of married adults. Rather, in the vast majority of cases the child is removed from a single parent who has a relationship with a paramour.<sup>9</sup> Oftentimes, the paramour will either reside full-time or spend considerable amounts of time in the same household as the child.

The number of reported incidents of either child abuse or neglect in which the perpetrator is a non-parent is startling. For example, during the calendar year of 2008 in Franklin County alone, there were 60 incidents of reported child abuse or neglect in which the Cabinet for Health & Family Services substantiated the claim – i.e., found by a preponderance of the evidence that the abuse or neglect had occurred.<sup>10</sup> Of

those, only 14 involved actions by a parent, with the other 46 incidents being attributed to paramours, step-parents, or exact relationship status not known.<sup>11</sup>

When considering the potential impact of such a person having so much access and involvement in the child's surroundings, it is somewhat surprising that the statute specifically setting forth the grounds for involuntary termination of parental rights – KRS 625.090 – makes virtually no mention of this “other adult” in the child's life, regardless of the amount of destructive behaviors, including abuse, the paramour may display toward the child. In fact, it is only subparts (b) and (c) of section (2) of the statute that come closest to holding the parent accountable for actions of a paramour. Said section attributes to the parent any harm that said parent “allowed to be inflicted” on the subject child.<sup>12</sup> Essentially, this provision attempts to hold parents accountable for their omissions or, for purposes of this discussion, their complete inability to stop the paramour from harming their child.

Trying to prove whether a parent allowed an injury to occur basically means determining the degree of awareness the parent had at the time of the incident, whether they consented to the conduct, and whether or not their subjective response to the event was reasonable. Needless to say, this facet of the statute would be difficult to prove under *any* standard, let alone the clear and convincing level required to be met by the petitioner.<sup>13</sup> Even the worst of parents that come before the court would not ordinarily just sit back and openly allow their child to be harmed, and attempting to define – for the first time at trial, no less – just what the phrase “allows to be inflicted” means within the context of the statute does

not provide much assistance.

To illustrate, in the typical scenario the harm done to the child occurs when the parent is away from the home (usually at work), and the paramour is left alone with the child.<sup>14</sup> Unless there are several repeated incidents of harm to the child in their absence, and with no corrective measures taken by the parent, merely being physically absent from the child's presence when the injury occurred would not likely constitute "allowing" the injury to be inflicted within the meaning of the statute,<sup>15</sup> especially when considering that the term "allow" basically means an express granting of permission, and doing so with informed consent.<sup>16</sup>

However, in contrast to this requirement, the legal standard for the initial removal of the child from the home is considerably lower than the above-mentioned grounds for termination, as KRS 620.060(1) only requires that the petitioner of the ECO have reasonable grounds to believe that the parent is "unable or unwilling to protect" the child


from harm. Thus, if a child has suspicious injuries while left in the care of a paramour, the Cabinet can fairly easily meet the criterion for removing the child from the parent's care, as merely being "unable to protect" their child (e.g., being away from the home while at work) is a notably less stringent standard as compared to openly "allowing" their child to be harmed, as required by the termination statute in KRS 625.090.

With a lower requirement in place for initially bringing a child into the Cabinet's care, and a much higher legal standard – including a higher burden of proof – governing the exact same situation if the parent's living situation remains unchanged until ASFA requires a termination petition to be filed, one can see the inevitable legal showdown of competing interests in these cases, as the two differing standards leaves the Cabinet in a bit of a Catch 22 situation. That is, the Cabinet for Health & Family Services has an express statutory obligation to ensure that each child of the Commonwealth has a safe and nur-

turing home.<sup>17</sup> Thus, any injury to the child which cannot be explained through accidental means would preclude the Cabinet from returning the child to the home until the threat of harm is removed, i.e., the paramour.<sup>18</sup>


On the other hand, being a state agency the Cabinet obviously cannot tell an individual citizen with whom they should have a romantic relationship. Further, the Cabinet certainly could not give a parent the ultimatum of choosing between either the romantic relationship with the paramour or the parental relationship they have with their child. Complicating the matter further still is the fact that the paramour has no biological connection or obligation to the child, and they are perfectly within their rights to simply refuse any reunification services or case plans offered to them by the Cabinet.

Although difficult for most to imagine, many parents of removed children who are in destructive relationships often remain in the relationship knowing full well that their association with the paramour is the primary reason their child remains in the Cabinet's care. The parent's romantic involvement with the paramour facilitates their entering into a state of denial that is tantamount to what the law often refers to as "willful blindness."<sup>19</sup> As a result, a stalemate is created by which the Cabinet cannot safely reunify the parent with their child due to the threat of harm represented by the paramour, but at the same time cannot force the parent to leave the paramour and then return their child to them as the "reward" for doing so. Con-



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sequently, this situation can continue until the child has reached 15 months in the Cabinet's care and, as mentioned above, the requirements of ASFA mandate that a termination of parental rights petition be filed. Fortunately, the inherent difficulty imposed on the Cabinet by having a lesser standard by which to initially remove a child from an abusive paramour – as compared to one which seeks to permanently remove the child from this danger<sup>20</sup> – has been addressed in the Kentucky court system.

In *A.D.B. v. Cabinet for Health & Family Services*<sup>21</sup>, the Kentucky Court of Appeals affirmed the trial court's involuntary termination of the Appellant's parental rights, which was based largely on the fact that the mother failed to appreciate the danger that her paramour represented to the child. The facts of *A.D.B.* are indeed tragic, as after having difficulty trying to place a pullover shirt on the child, the mother (A.D.B.) noticed that the child's head was swollen, and then promptly took D.W.G. (the 6 month old infant) to the local health department. The child was then referred to a specialist, and a C-scan revealed that the child had two significant brain bleeds, one that appeared recent and another that was at least a week old, although the exact date of either injury could not be determined.

Following the hospital's referral,<sup>22</sup> D.W.G. was removed by the Cabinet, and an investigation was commenced regarding the child's injuries. The results of the investigation strongly suggested that the child was injured by A.D.B.'s live in paramour, P.G., although he was never criminally charged with child abuse. However, the investigating detective testified that when he was questioning A.D.B. regarding the child's injuries, she stated to him that she "expressed her suspicion that P.G. was the one who had injured D.W.G."<sup>23</sup>

As is often the case, once the matter came to trial A.D.B. did a complete reversal on the witness stand, and vigorously defended her paramour by stating that she absolutely did not believe he caused the child's injuries, and that she stayed with him even though he refused Cabinet services because "she thought she could get D.W.G. back [from the

Cabinet] quicker if she stayed with P.G. as a family than as a single mom."<sup>24</sup> This pattern of choosing the paramour over the child is not uncommon, and there is no specific ground enumerated in the termination of parental rights statute that addresses it. Fortunately, in interpreting KRS 625.090 broadly, and with the best interest of the child at the forefront, the *A.D.B.* court held that:

"And, finally, in terms of the efforts and adjustments made by A.D.B. in her conduct and circumstances in order to be reunited with D.W.G. (subsection (d)), the most significant change made by A.D.B. was finally making P.G. move out. However, what is more persuasive and troubling to this Court, as it was to the family court, is the fact that A.D.B. continued to live with P.G. for 14 months in spite of her knowing there was a good chance he was the one who had abused D.W.G. A.D.B. testified that the Cabinet made it clear that she would have to leave P.G. to get D.W.G. back, yet she stayed with P.G. until one month prior to the termination hearing. In our view, A.D.B.'s continued cohabitation and relationship with P.G. demonstrates that she was not willing to put the child's welfare first and she was not committed to being reunited with D.W.G."<sup>25</sup>

Although in this case there were other provisions of KRS 625.090 where the Cabinet had arguably met its burden of proof, it is apparent that the *A.D.B.* court attached significant weight to the fact that the mother refused to appreciate the danger her paramour represented to the child. Of course, the threat of harm imposed by a paramour is not limited to just physical abuse, but sexual abuse as well.

Kentucky courts have not addressed the specific question of paramour sexual abuse, but there is persuasive authority in the case of *In re S.L.E.*,<sup>26</sup> which involved a minor child who was sexually molested by her mother's live in boyfriend, J.M. The *S.L.E.* court found that it was error for the family court to

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have closed the case despite J.M.'s refusal to comply with child protective services recommendations, holding that:

"The trial judge thus released S.L.E. from the jurisdiction of the court without any significant compliance by the child's abuser with the very modest requirements imposed on him by the judge. It is not surprising, under these circumstances, that S.L.E. came to believe that the unspeakable acts which had been perpetrated upon her were not being taken very seriously by those who called the shots, and that her abuser had essentially 'gotten away with it.'"<sup>27</sup>

The *S.L.E.* court then went on to actually point out that the trial court's actions were almost complicit in the failure to protect the child from the paramour, stating that:


"In reality, the court actually enabled J.M. to escape responsibility for his actions by simply claiming that he could not remember the incident because he was 'high,' and placed the responsibility of avoiding further abuse on the child. Now the child has to live in constant fear that whenever her mother's boyfriend, who was then and probably still is living in the home, 'gets high,' she has to look out for herself, and that is wrong."<sup>28</sup>

In light of the foregoing, courts should not lose sight of the fact that the paramount interest in a termination of

parental rights proceeding is still the best interest of the child, despite the fact that practically all of the evidence presented – as well as the burden of proof – is aimed entirely at the parent. The implementation of family courts greatly assists in maintaining this focus, as it has been the author's experience that family court judges have excellent memories regarding the harmful associations of the parents, and it is oftentimes the case that the paramour will have already appeared before the judge on a juvenile abuse/neglect, child support, or domestic violence docket.

Although case law is certainly helpful in filling in the statutory gaps regarding the potential harm of paramours in a termination of parental rights, a better solution would be to modify KRS 625.090 so that the same standard of danger to the child which triggers the initial removal from the home is also the same one that applies to a subsequent termination trial. In other words, simply modify the language to remove the term "allowed" the child to be harmed, which implies an express grant of permission by the parent, and replace it with "unable to protect" the child.

With this modification, parents who deliberately turn a blind-eye to the abusive actions of their paramours would be held accountable for their state of denial if the practice continued until the child has been removed from the home for 15 consecutive months. This would be the case if the parent takes no other corrective action, and refuses to acknowledge the danger to the child by maintaining the status quo of a relationship with the paramour. Unless and/or

until this suggested statutory revision happens, Kentucky family courts will have to look to the valuable precedent of *A.D.B.* and other persuasive authority to supplement their interpretation of KRS 625.090 when deciding cases that involve paramours, and to emphasize the best interests of the child in their decision to terminate parental rights. 

#### ENDNOTES

1. Pub. L. 103-89.
2. *Cabinet for Families and Children v. G.C.W.*, 139 S.W.3d 172 (Ky. App. 2004).
3. KRS 610.125; 45 C.F.R. § 1356.21.
4. 45 C.F.R. § 1356.21(i)(1).
5. Title 32 U.S.C. §§ 620-632, 670-679.
6. *Lassiter v. Department of Social Services of Durham County, N. C.*, 452 U.S. 18, 101 S.Ct. 2153 (1981).
7. *W.A. v. Cabinet for Health and Family Services, Com.*, 275 S.W.3d 214 (Ky. App. 2008).
8. *Thomas v. Cabinet for Families & Children*, 57 S.W.3d 262 (Ky. 2001).
9. *Relationship of Alleged Perpetrators in Substantiated Investigations*, Department for Community Based Services, Division of Protection & Permanency, Child Safety Branch, *Office of Child Protective Services*.
10. *Id.*
11. *Id.*
12. KRS 625.090(2).
13. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982).
14. Howard Davidson, *Child Protection Policy at Century's End*, 33 Fam. Law Qtrly 765 (1999).
15. KRS 625.090(2)(b) and (c).
16. Merriam-Webster Dictionary, 2007.
17. KRS 600.010(b).
18. 922 KAR 1:230.
19. *U.S. v. Hoffman*, 918 F.2d 44 (Sixth Cir. 1990).
20. KRS 625.090.
21. 205 S.W.3d 255 (Ky. App. 2006).
22. KRS 620.030; 922 KAR 1:330.
23. *A.D.B.*, supra at 257.
24. *Id.* at 260.
25. *Id.* at 263.
26. 677 A.2d 514 (D.C. 1996).
27. *Id.* at 520.
28. *Id.* at 522.

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