

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001947-ME

C.C.

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT  
HONORABLE JEFFREY L. PRESTON, JUDGE  
ACTION NO. 09-J-00038

CABINET FOR HEALTH AND FAMILY SERVICES,  
COMMONWEALTH OF KENTUCKY; and N.R., A  
MINOR CHILD

APPELLEES

AND

NO. 2009-CA-001948-ME

C.C.

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT  
HONORABLE JEFFREY L. PRESTON  
ACTION NO. 09-J-00039

CABINET FOR HEALTH AND FAMILY SERVICES,  
COMMONWEALTH OF KENTUCKY; and Z.C., A  
MINOR CHILD

APPELLEES

OPINION  
AFFIRMING

BEFORE: NICKELL AND STUMBO, JUDGES; WHITE,<sup>1</sup> SENIOR JUDGE.

STUMBO, JUDGE: In this consolidated action, C.C.<sup>2</sup> appeals from Disposition Orders of the Lewis Circuit Court removing her two minor children from her custody and placing them under the custody of the court based on the court's finding of neglect. C.C. (hereinafter referred to as Mother) contends that the court improperly failed to compel the Cabinet's compliance with her discovery request, that its Adjudication Orders and findings of neglect were not supported by substantial evidence, and that it improperly failed to consider less restrictive alternatives to the continued removal of the children from the home. For the reasons stated below, we affirm the Orders on appeal.

On May 15, 2009, the Cabinet for Health and Family Services, Commonwealth of Kentucky, filed two juvenile petitions in Lewis Circuit Court alleging that Mother's minor children, Z.C., a five-year-old female (hereinafter referred to as Child 1) and N.R., a young male (hereinafter referred to as Child 2) were abused or neglected. The Petitions were filed after Beth Arnold, a social worker with the Lewis County Office of the Cabinet for Health and Family Services, visited Mother's residence for the purpose of investigating a complaint that Mother's children were abused or neglected. Arnold was accompanied by a Lewis County Deputy Sheriff.

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<sup>1</sup> Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

<sup>2</sup> C.C.'s initials are used in conformity with our practice of protecting the identity of juvenile abuse victims.

According to the record, when Arnold and the Deputy Sheriff arrived at the residence, Mother allegedly refused to allow them into the residence and was non-compliant with the investigation. Mother allegedly was also very irate and appeared to be irrational.

Based in part on Mother's response to Arnold's visit, the Commonwealth sought an Emergency Custody Order on May 15, 2009. Social worker Arnold and Lewis County Deputy Sheriff Johnny Bivens later testified that they observed that Child 1 was bruised on her upper and lower back from a spanking or beating given by Anthony Stevenson, Mother's boyfriend. Evidence was also tendered that Stevenson hit Mother and Child 1 with a belt; that Child 2 observed these events; and that Mother appeared irrational and irate, and refused to cooperate with the investigation. Based on this evidence, the court granted the Commonwealth's request for the Emergency Custody Order.

On May 16, 2009, Arnold and a Kentucky State Police Trooper went to Mother's residence to enforce the Emergency Custody Order. While there, the Trooper arrested Mother on an unrelated warrant. After being arrested, Mother allegedly yelled to Stevenson not to give anything from the home to the children, screamed about Child 1 in derogatory terms, and told Arnold that she did not want Child 1 back in the home. Deputy Sheriff Bivens would later testify that prior to her arrest, Mother came storming out of the residence in a belligerent manner, again screamed that Child 1 was a liar, a thief and a b\*\*\*\*, and that she would "holler rape" if Bivens tried to take her into custody. As part of the investigation

which followed, Arnold took pictures of bruises on Child 1's right ear, upper back and lower back.

A temporary removal hearing was conducted on May 21, 2009, where Mother acknowledged making derogatory statements about her children. She also stated that she was diagnosed as having ADHD and manic depression but had stopped taking her medicine. Stevenson testified that he spanked Child 1 on May 14, 2009, which was the day before Arnold took photographs of Child 1's bruises. Mother, through counsel, filed a discovery motion the following day in which she sought copies of the photographs and other documentary evidence.

In conformity with KRS 620.090(5), an adjudication hearing was scheduled to occur within 45 days of the removal hearing.<sup>3</sup> The adjudication hearing was continued at the request of Mother's counsel, based on counsel's contention that the Commonwealth had not complied with the discovery request for the production of the pictures that Arnold took of Child 1's bruised body. The court determined that Mother had a right to inspect the record, but could not compel the Commonwealth via a discovery request. It rendered an Order to that effect on July 21, 2009, wherein it stated that while Mother was entitled to discovery in preparation for the adjudication hearing, the discovery provisions of KRS 620.100(3) did not apply to "pre-adjudicative matters."

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<sup>3</sup> KRS 620.100 requires bifurcated hearings in juvenile proceedings. An "adjudication" hearing shall be conducted to determine by a preponderance of the evidence the truth or falsity of the allegations. The Kentucky Rules of Civil Procedure are applicable in such hearings. Thereafter, a "disposition" hearing is conducted to determine the action, if any, to be taken. *See also*, KRS 610.080.

The adjudication hearing was conducted on July 23, 2009, where both parties tendered proof. As a result of the hearing, the court rendered pro forma Orders (one each for Child 1 and Child 2) determining that the Commonwealth had proven by a preponderance of the evidence that Child 1 and Child 2 were neglected children, that the children's best interest required a change of custody, that reasonable efforts were made to prevent the children's removal from the home, and that there were no less restrictive alternatives to removal. As a basis for these conclusions, the court found that Mother had allowed Stevenson to beat Child 1, that Mother had been verbally abusive to Child 1, and that Child 2 had observed these events.

Pursuant to KRS 620.090, a disposition hearing was conducted on or about October 8, 2009. The court again determined that the best interests of the children required a change in custody, with placement of the children outside the home with relatives or other appropriate persons or agency. This appeal followed.

Mother's primary argument on appeal is that the trial court's failure to compel discovery of the photographs taken by Arnold, as well as other documentary evidence, is reversible error. Mother notes that the discovery motion was tendered on the day following the May 21, 2009 temporary removal hearing, and in anticipation of the adjudication hearing. Directing our attention to Kentucky case law, Mother maintains that parental rights are basic and essential civil rights which are far more precious than property rights. She argues that one of the fundamental purposes of the Kentucky Unified Juvenile Code is the

protection of the parent-child relationship, which can only be accomplished via judicial proceedings in which Due Process and fundamental issues of procedural fairness are exercised. Specifically, Mother points to KRS 620.100(3), which states that “[T]he adjudication shall determine the truth or falsity of the allegations in the complaint. The burden of proof shall be made by a preponderance of the evidence. The Kentucky Rules of Civil Procedure shall apply.”

Mother directs our attention to the discovery provisions set out in CR 26, CR 33 and CR 34, and notes that the Commonwealth admitted the photographs into evidence at the adjudication hearing which it had not disclosed via discovery. Mother argues that the court’s Order denying her motion to compel discovery was violative of KRS 620.100(3), improperly denied her Due Process and prevented her from having a meaningful basis for cross-examining the Commonwealth’s witnesses.

In response, the Commonwealth contends that there are practical reasons why general discovery practices are not applicable in the framework of preliminary dependency, neglect and abuse cases. It maintains that it is not possible to engage in protracted discovery in preliminary matters while still complying with the statutory mandate to conclude adjudication and disposition within 45 days. Further, the Commonwealth argues that due to the unique nature of such cases, confidentiality issues would be compromised by the application of general discovery. Ultimately, it contends that the procedural process afforded Mother in the instant case fairly and adequately protected the rights of all involved

parties by providing the application of the Civil Rules beginning with the adjudication hearing, and that no harm can be found by the introduction of the photographs which were not made discoverable.

We find no error in the Lewis Circuit Court's determination that Mother was not entitled to discovery until the commencement of the adjudication hearing process. In denying Mother's motion to compel discovery, the court cited KRS 620.100(3), which states that "[T]he adjudication shall determine the truth or falsity of the allegations in the complaint. The burden of proof shall be upon the complainant, and a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence. The Kentucky Rules of Civil Procedure shall apply." Nothing in the Civil Rules, the statutory law, or case law compels the court to give effect to the Civil Rules, and therefore to compel discovery, prior to the adjudication hearing. The Cabinet properly notes that dependency, neglect and abuse procedure is a product of statute, namely KRS Chapter 600, et seq. KRS 620.090(5), for example, requires the court to conduct the adjudicatory hearing and make a final disposition within forty-five days of the removal of the child. In most cases, it would be not only impractical but indeed impossible to conduct meaningful discovery, including the production of documents, depositions and interrogatories, within the timeframe proscribed by statute.

We are also persuaded by the Cabinet's contention that the process afforded Mother fairly and adequately protected the rights of all parties involved. Mother's right to be represented by counsel, to confront and cross-examine

witnesses, etc., as set out in KRS 610.060, was satisfied by the appointment of counsel, who assisted in Mother's full participation in the adjudication and disposition hearings. Furthermore, the record indicates that the Cabinet and the court agreed that Mother would be permitted to examine the Cabinet's evidence *prior to* the adjudication hearing. Mother, through counsel, could have examined the photographs of Child 1 and the other documentary evidence had she chosen to do so, even though there is nothing in the statutory law or case law compelling the Cabinet to provide access to its records.

The burden does not rest with the Cabinet to demonstrate that Mother was not entitled to full discovery prior to the adjudication hearing. Rather, the burden rests with Mother to overcome the strong presumption that the trial court's ruling on this issue was correct. *Parrish v. Parrish*, 432 S.W.2d 632 (Ky. 1968). She has not met that burden, and accordingly, we find no error on this issue.

Mother next briefly argues that the trial court's Adjudication Order and findings of neglect were not supported by substantial evidence. The focus of this argument is her contention that if the photographs at issue were not significant enough to have been disclosed prior to the adjudication hearing, then they are not properly characterized as substantial evidence. We are not persuaded by this argument. To reiterate, Mother was availed of the opportunity to examine the photographs prior to the adjudication hearing. There is nothing in the record indicating that she did so, nor does she assert in her written argument that she examined the photographs. This point aside, the Cabinet had only to demonstrate

by a preponderance of the evidence that Child 1 and Child 2 were abused or neglected. KRS 620.100(3). The testimony of social worker Arnold, two law enforcement officers and Stevenson, in conjunction with the photographs of Child 1's bruised body, reasonably constitute substantial evidence for purposes of concluding that the circuit court did not abuse its broad discretion in determining, by a preponderance of the evidence, that the children were abused or neglected. KRS 600.020; *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky. App. 1998). Accordingly, we find no error on this issue.

Lastly, Mother argues that the circuit court failed to consider less restrictive alternatives to the continued removal of the children from the home as required by KRS 620.130. She notes that the court failed to check off the box on the disposition hearing form, and maintains that this represents a basis for reversing the Orders on appeal. While Mother is correct that the "no less restrictive alternatives" box was not checked on the disposition form, the circuit court did note at the adjudication hearing that there were no less restrictive alternatives than the removal of the children from the home. This is evidenced by the court checking the "no less restrictive alternatives" box on the adjudication form. This is sufficient to satisfy the statutory requirement that the court consider less restrictive alternatives as set out in KRS 620.130, and we find no error.

For the foregoing reasons, we affirm the Disposition Orders of the Lewis Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bryan Underwood  
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BRIEF FOR APPELLEE:

Clayton G. Lykins, Jr.  
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