

RENDERED: OCTOBER 17, 2008; 10:00 A.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000516-ME

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NOS. 02-J-00499, 07-J-00247, & 07-J-00248

A.T., A CHILD, P.M., A CHILD, J.M., A
CHILD, V.M., THE RESPONDENTS'
MOTHER, W.M.T., THE RESPONDENTS'
FATHER, AND B.M., THE CUSTODIAN OF
THE CHILDREN

APPELLEES

OPINION
AFFIRMING

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BEFORE: CAPERTON AND MOORE, JUDGES; GUIDUGLI,¹ SENIOR
JUDGE.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

CAPERTON, JUDGE: On January 22, 2008, the Campbell Family Court issued an order requiring the Cabinet for Health and Family Services to pay kinship care funds to B.M., the maternal grandmother of four minor children whose mother is V.M. The Cabinet now appeals this Order, and asserts that the grandmother received custody of the children after the aunt previously relinquished custody. The guardian ad litem disputes this, and our review of the record does not reveal this to be the case. Further, our review of the record does not indicate that the Cabinet properly raised these arguments to the court below. Accordingly, for the reasons set forth herein, we affirm the Campbell Family Court.

Our review of the record indicates that upon a finding of neglect by the mother, an Emergency Custody Order was granted to the maternal grandmother on March 19, 2007. The Cabinet asserts that it had previously determined that the grandmother was not eligible for the kinship care funds, as the aunt had previously been receiving the funds, but was unable to care for her own children and for the children of B.M. As noted, we find no information, nor does the Cabinet cite us to any portion of the record which indicates this to be the case. Our review of the record indicates that since the determination of neglect on the part of the mother, the grandmother has had sole custody of the four minor children at issue.

The Kinship Care Fund is a federal fund established by the Social Security Act, and is codified at 42 USC §601-619. This program provides a federally-funded alternative to foster care for a child who has been determined abused or neglected, and who is placed with a relative. The aforementioned

provisions authorize the Kentucky legislature to determine criterion for eligibility of funds and to create administrative regulations to govern the program. The payment of Kinship Care funds is governed by 922 KAR 1:130, as enabled by KRS 194A.050(1), 205.200(1)(2), and (3), 605.120(6), and 605.150(1).

The Kentucky Revised Statutes require the Cabinet for Health and Family Services to create the administrative regulatory scheme by which individuals may establish eligibility for public assistance. That scheme conforms to the Social Security Act and also authorizes the Cabinet to promulgate administrative regulations to implement those administrative matters.

The issue currently on appeal is whether or not the trial court committed clear error in ordering the Cabinet for Health and Family Services to pay kinship care to the grandmother of A.T. and the other minor children of V.M. The Cabinet asserts that while the family court acted in conformance with the best interests of the children and grandmother, it lacked the statutory authority to order the Cabinet to pay kinship care funds. The Cabinet asserts that as the transfer of kinship care funds between relatives is governed by regulation, the maternal grandmother simply did not qualify pursuant to 922 KAR 1:130 §12. That provision provides as follows:

Section 12. Eligibility Shall Follow the Child.

The initial finding of substantiated abuse or neglect of the child, as specified in Section 2 of this administrative regulation, shall be used for a reapplication and

redetermination of eligibility for financial assistance under the Kinship Care Program if:

(1) The child leaves the home of the kinship caregiver and the cabinet:

(a) Places the child with another caretaker relative due to:

1. Death of the kinship caregiver;

2. An illness or injury of the kinship caregiver, as supported by medical documentation, that inhibits adequate care of the child; or

3. Active duty in military service of the kinship caregiver; or

(b) Returns the child to the kinship caregiver if the absence is temporary in accordance with:

1. Section 16(2) of this administrative regulation; or

2. Paragraph (a)2 or 3 of this subsection; or

(2) A child who is discontinued from the Kinship Care Program due to SSI eligibility subsequently becomes ineligible for SSI.

Based on the foregoing, the Cabinet argues that the trial court's order violates this Commonwealth's constitutional doctrine of separation of powers without express statutory authority to do so. In so arguing, the Cabinet directs this Court to Section 27 of the Kentucky Constitution which mandates the separation of powers, and Section 28, which mandates that one branch of government shall not exercise a power belonging to another branch unless expressly directed or permitted by the constitution.

The Cabinet asserts that these provisions preclude the Courts from exercising executive power, namely, the Cabinet's executive power to determine who is eligible for public assistance. Further, the Cabinet argues that pursuant to Sections 171 and 230 of the Kentucky Constitution, the authority to levy taxes and make appropriations therefrom is a power belonging exclusively to the legislature. Thus, the Cabinet asserts that the Courts are without power to require payments from public funds for a purpose that is not in keeping with the federal scheme.

In response, the guardian ad litem for the four minor children asserts that the children's aunt never had custody, and that therefore, 922 KAR 1:130 §12 does not apply. Further, the guardian ad litem asserts that the Cabinet never informed the guardian ad litem that the grandmother was not eligible for funds but, instead, advised that there was a delay in paperwork. Thus, the guardian ad litem for the minor children moved to order the Cabinet to immediately effectuate said paperwork. Indeed, the guardian ad litem asserts that the first she heard of the Cabinet's assertion that the grandmother was not eligible to receive kinship care funds was when the notice of appeal was filed.

As noted, our complete review of the record indicates that since the time that the mother was found to be unfit to care for the minor children, the maternal grandmother has had custody. Further, the record clearly indicates that on January 29, 2008, the Campbell Family Court issued an Order directing the Cabinet to effectuate all necessary paperwork for the grandmother, B.M., to receive kinship care benefits.

The law in this Commonwealth is clear, insofar as if no evidence exists to support an argument in the record, we are confined to a determination of whether the pleadings supported the judgment. *Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972). We are a *reviewing* court, and it is the obligation of the appellant to include any necessary information in the record to support its arguments. CR 76.12(4)(c)(iv).

First, we find it critical that our review of the record indicates that the grandmother was the first family member to receive custody of the children, and there is no evidence in the record to the contrary. Accordingly, the statute is clear that the grandmother, as the first family member to receive custody of the minor children upon removal from the mother, would be qualified to receive kinship care funds. The trial court made this finding, and we find no evidence in the record to overturn it on appeal. Finding no such evidence in the record, we decline to apply 922 KAR 1:130 §12 to reverse the trial court.

Secondly, and important to disposition of this appeal, our review of the record does not reveal any evidence that the Cabinet raised the arguments presented herein to the trial court, or that the trial court was given an opportunity to consider same. As Appellees have indicated in their brief, the first notice they received of the Cabinet's intent to contest its liability for the kinship care funds ordered in this case was upon the filing of its notice of appeal. The record supports the Appellee's argument.

In *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App.1998), this Court held that an appellate court will not consider an argument unless it has been raised before the trial court, and that court has been given an opportunity to consider the merits of the argument. Further, as our Supreme Court stated in *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky.1976), an appellant “will not be permitted to feed one can of worms to the trial judge and another to the appellate court.” Accordingly, as we find no evidence in the record that these issues were brought before the trial court we do not believe that they are properly before our Court.

Therefore, we affirm the Honorable D. Michael Foellger, Judge, Campbell Circuit Court.

ALL CONCUR.

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