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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002223-ME

T.S.M.

APPELLANT

APPEAL FROM PULASKI FAMILY COURT
v. HONORABLE WALTER F. MAGUIRE, JUDGE
ACTION NOS. 07-J-00218 & 07-J-00219

CABINET FOR HEALTH AND FAMILY
SERVICES; MARK BIRDWHISTELL,
SECRETARY; K.J.P.; AND K.K.P.

APPELLEES

OPINION
REVERSING

*** * * * *

BEFORE: CAPERTON, KELLER, AND NICKELL, JUDGES.

KELLER, JUDGE: T.S.M., the natural mother of K.J.P. (Child A) and K.K.P.

(Child B), has appealed from the October 2, 2007, orders of the Pulaski Family Court finding that her children were dependent. Having determined that the family court did not hold an adjudication hearing within forty-five days after granting

temporary custody to the Cabinet for Health and Family Services (the Cabinet) or provide written reasons for extension of that time period, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

D.P. (the father) and T.S.M. (the mother) were never married but maintained a ten-year relationship that ended in May 2006. In July 2006, the father filed a Petition for Custody of the children in Pulaski Family Court. In support of his petition, the father asserted that the mother was unfit to care for the children due to her mental state and bizarre behavior. That “bizarre” behavior allegedly included use of offensive language and physical fights with family members while in the presence of the children. Through affidavits attached to the petition, the father sought to establish that the mother had neglected the children and subjected them to emotional damage. In her response, the mother stated that she was a victim of domestic violence and accused the father of being physically and verbally abusive to both her and the children. She also stated that she left when he demanded that she do so.

The matter initially proceeded as a custody dispute between the parents. Through mediation, the parties reached a partial agreement giving temporary custody to the mother with the father having supervised visitation. The court also ordered the Cabinet to investigate the family and appointed a *guardian ad litem* (GAL) for the children. Cabinet worker Tonya Crawford (Crawford) interviewed the parties and the children. Based on her investigation, Crawford stated that no additional Cabinet involvement was necessary; however, she

recommended that the children undergo counseling. Consistent with Crawford's report, the court ordered the mother to make appointments for the children at the Comprehensive Care agency in Whitley County and ordered the parents to undergo mental health evaluations.¹

In an interim report dated November 30, 2006, the GAL recommended that the children live primarily with their father due to their mother's unstable living conditions and her husband's health problems.² In December 2006, the parties reached an agreement, entered by the family court as an Agreed Order, that Child A would live primarily with her mother and Child B would live primarily with her father, and each child would visit with the other parent three or four days per week.

On March 20, 2007, the parties entered into another agreement, whereby the family court awarded the parties temporary joint custody of the children and set up a schedule for transportation and visitation. Less than three months later, the mother filed a motion for emergency sole custody with supervised visitation for the father. In her motion, the mother argued that the father's home environment presented a serious danger to the children's physical and emotional well-being, and she alleged that the father had been physically and verbally abusive to the children.

¹ The parties underwent a Comprehensive Custodial Evaluation conducted by Feinberg & Associates in early 2007.

² The mother married another man shortly after leaving the father.

On June 8, 2007, the court heard testimony from Misty Robertson (Robertson), the children's counselor, and from the GAL. Based on this testimony, and on its own motion, the court ordered the children to be placed in emergency custody of the Cabinet for placement in therapeutic foster care. The court also converted the custody case into two juvenile cases and scheduled a removal hearing for June 11, 2007. Following that hearing, the court stated that it found by clear and convincing evidence that the children were dependent. The court based its finding on testimony from Cabinet worker Amanda Dick (Dick), the GAL, and a report that had been prepared by Feinberg & Associates (the Feinberg report)³ for the custody proceedings. The court noted that the parents had failed to follow through with the recommendations in the Feinberg report that they obtain mental health evaluations and that they get assistance and education to permit them to better care for their children and to cooperate with each other. The court also found that the children were in serious need of intensive treatment, and ordered them placed in the temporary custody of the Cabinet for placement with a third party. In doing so, the family court stated that the removal of the children would allow the parents to get the treatment, education, and training necessary to facilitate reunification.

³ The report details some of the family history, and includes several recommendations. The report noted that Child B had close relationships with both parents, while Child A had a significantly strained relationship with her father. Both parents exhibited questionable judgment in parenting, and both children had suffered emotionally. The report concluded that both children were at risk, as they had been exposed to instability and inappropriate situations by both parents. Ultimately, the report recommended that the mother be named the primary residential custodial parent in a joint custody arrangement, with visitation for the father.

At a status hearing on June 13, 2007, a Cabinet worker reported that the children were doing well in foster care. The court again voiced the opinion that the parents were dysfunctional and that, in order to improve, the children needed consistency and stability, along with intensive counseling. The court did not believe the children could recover with the parents involved. The court also stated that the parents had to “get themselves okay” and likened the removal to a “time out” for the parents designed to give them the opportunity to heal. At the conclusion of the hearing, the court recognized that the adjudication hearing needed to be held within forty-five days, and accordingly scheduled that hearing for July 23, 2007.

On July 23, 2007, the day scheduled for adjudication, the Cabinet tendered petitions alleging that the children had been neglected. Cabinet workers stated that a case plan had been created a few days after the children’s removal; that the children were in therapeutic foster care; and that the children were doing well as they no longer had contact with their parents. The family court, over the mother’s objection, continued the adjudication hearing to August 20, 2007, and later to August 27, 2007. On August 27th, the family court again continued the adjudication hearing to October 1, 2007, 112 days after the children were temporarily removed from the parents and placed with the Cabinet.

At the adjudication hearing, Robertson testified that the children were nonverbal when she started treating them in early 2007. However, by the date of the hearing, the children were doing well, laughing and playing together.

Robertson opined that the children would have been in substantial risk of harm due to emotional and mental neglect had they not been removed from their parents and placed with the Cabinet. Dick testified that the parents did not follow through with the recommendations in the Feinberg report. The mother testified that she began going to parenting classes one month after the Feinberg report was issued and that she was getting required counseling. She also testified that she had done all that was ordered in the report, except couple's therapy. Social worker Brenda White testified that the mother had completed a twelve-session program related to domestic violence.

At the conclusion of the adjudication hearing, the court found that the children were not neglected, as the parents had made efforts to care for them to the best of their abilities. However, the court also found that the ongoing conflict had a negative impact on the children's emotional welfare, and that they were flourishing in an independent environment. Accordingly, the court found that the children were dependent, as their parents failed to ensure their emotional health. The court also ordered the parents to obtain mental health evaluations, at the expense of the Cabinet. It is from these adjudication orders finding that the children were dependent that the mother has taken the present appeal.

On appeal, the mother raises three arguments: 1) that the family court removed the children without any evidence of abuse, neglect, or dependency to support its decision; 2) that the family court did not consider any alternative to removal; and 3) that the adjudicatory hearing was not timely held.

The Cabinet did not file a brief in this matter. Therefore, pursuant to Kentucky Rules of Civil Procedure (CR) 76.12(8)(c), this Court may:

- (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Because of the ramifications our decision in this appeal may have, we decline to impose any penalties and review the merits of the mother's appeal.

Because it is determinative of the appeal as a whole, we will only address the mother's argument that the court failed to timely hold the adjudicatory hearing. Kentucky Revised Statute (KRS) 620.090(5) provides that, after the court has awarded temporary custody to the Cabinet, it

shall make a final disposition within forty-five (45) days of the removal of the child. The court may extend such time after making written findings establishing the need for the extension and after finding that the extension is in the child's best interest.

The forty-five-day time limitation is discussed in 15 Louise Everett Graham & James E. Keller, *Kentucky Practice* § 6:18 (3d ed.2008):

A temporary custody order under KRS 620.090 is a short-term order. The statute gives the court only forty-five days from the date of the child's removal to make a final disposition, either returning the child to its home or granting custody to the state or an alternative custodian. Thus, the adjudicatory hearing must be held and the court's decision after the hearing must be reached within the forty-five day period. If the court extends the forty-five day period it must make written findings that meet two criteria. First, the findings must establish the need for the extension and second, the findings must establish

that the extension is in the child's best interest. The statute's requirement for specific findings implies that extensions should be given only in exceptional cases and should not be granted as a matter of course.

Based upon our review of the statutory language and the above-cited paragraph, we recognize that the forty-five-day rule is mandatory. Before the court can extend that time limit, the judge must make written findings setting forth the need for the extension and how the extension will be in the child's best interests.

In the present case, the children were removed and placed in the temporary custody of the Cabinet on June 8, 2007.⁴ The adjudicatory hearing was originally scheduled for July 23, 2007; however, the hearing was continued pursuant to a motion by the Cabinet. On the record, the judge stated that he believed that a continuance would be appropriate so that the children could have time to adequately adjust to their surroundings in therapeutic foster care and to receive counseling. However, the judge did not reduce those statements to writing. The only written order is the judge's notation on the docket sheet stating as follows:

Child[ren]'s parents present w/counsel. Petitions related to this (these) matters filed.

Petitions read into the record and understood by counsel. CFC has completed case plans. Children are in therapeutic foster care together. Cont. to 8/20/07 1:30 for reports & adjudication. Phoenix Report submitted and objected to by Mr. Lyon [counsel for the father] due to lack of reasonable notice & time to evaluate report.

⁴ It appears that the children were actually removed on June 8, 2007, pursuant to a handwritten note on the docket sheet. The formal order of temporary removal on AOC form DNA-3, was entered on June 11, 2007.

Ms. Line [counsel for the mother] objects to continuance of adjudication due to child(s) removal 44 days previous.

On August 27, 2007, the Cabinet requested another continuance, citing its need to obtain a complete copy of the Feinberg report prior to the adjudication hearing.⁵ In a written docket order, the family court ruled as follows:

Cont. to 10/1/07 @ 1:30 for adjudication. Children remain in Foster Care and reported to be progressing. No Contact provisions are amended to permit therapeutic contact at the discretion of Ms. Robertson, Phoenix Preferred Care. Payment of Feinberg Report costs to be resolved.

In the videotaped record from August 27, 2007, the court stated that the matter should be continued pending receipt of a complete copy of the Feinberg report. The adjudication hearing was finally held on October 1, 2007, 112 days after the children had been temporarily removed by the family court, or sixty-seven days past the forty-five-day deadline contained in KRS 620.090(5).

Pursuant to the clear and mandatory terms of KRS 620.090(5), the family court was required to hold the adjudication hearing within forty-five days of the children's removal, or to extend the time period by written order setting forth the need to extend the time and that the extension would be in the children's best interests. Such mandatory terms are in place in order to give effect to the express legislative purpose that "all parties are assured prompt and fair hearings." KRS

⁵ The Feinberg report in the record contains a statement that it is not a comprehensive custodial report. We note that no one obtained the complete Feinberg report because an additional \$1,500 fee would be assessed for the complete report. Neither the mother nor the father had the required fee.

600.010(2)(g). In the present case, although the family court did make some limited oral findings, it failed to make any written findings to justify its three continuances of the adjudication hearing. Therefore, we must reverse the family court's orders finding the children dependent based upon the violation of the forty-five-day limitation in KRS 620.090(5).

Even if we were to consider the court's oral findings, the reasons cited for the multiple continuances would not justify the extension of time in the present matter. The reason cited for the July 23rd continuance was that the children needed time to adjust. However, by that time, the children had already been in counseling for many months and had been in therapeutic foster care for the preceding six weeks. Neither the record nor the family court's oral findings specify how additional time in foster care and counseling would have been in the children's best interest.

Regarding the August 27th continuance, the Cabinet indicated that it needed to obtain the completed Feinberg report. However, the Feinberg report was dated February 6, 2007, and is located in the record with a "filed" stamp dated June 11, 2007. Therefore, the Cabinet had more than enough time to obtain the completed Feinberg report, or to at least bring the problem to the attention of the family court prior to the August 27, 2007, hearing date. Accordingly, we hold that neither prong of the statutorily mandated test to grant an extension of time had been satisfied.

Based on this holding, the mother's arguments regarding the absence of a basis for the court's findings of dependency are moot. Therefore, we will not address them. However, we note that it appears from the record that the court did have the best interests of the children at heart. Furthermore, it appears that the children did improve while in the custody of the Cabinet and in foster care.

For the foregoing reasons, the orders of the Pulaski Family Court finding the children to be dependent are reversed.

NICKELL, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: Today we consider the decisions of our family courts concerning our children under KRS 620.090(5). It is true that KRS 620.090(5) requires a disposition within 45 days of commencement of the action, and a continuance beyond such time is to be in writing. The court's extension of time to conduct a final disposition requires the court to make "written findings establishing the need for the extension and after finding that the extension is in the child's best interest." KRS 620.090(5). The family court sub judice made oral findings.

Next we must consider whether the actions of the family court warrant affirmation, reversal, or other appropriate action. The history of the case suggests that the family court had dealt with the family situation for a period of time and was likely well-informed of the circumstances in this particular matter. A hearing

was held and the family court made disposition, albeit not within the 45 day period and not with the required “written findings.”

Under CR 76.12(8)(c)(i), our Court may “accept the Appellant’s statement of the facts and issues as correct” when the Appellee fails to file a brief. I hasten to add that the remainder of the options under the rule are in the disjunctive, thereby allowing us to consider the issues and render an appropriate opinion.

Respectfully, I would remand to the family court for the required written findings, perhaps *nunc pro tunc*.

BRIEF FOR APPELLANT: No brief for appellees.

Lisa-Marie Line
Somerset, Kentucky