

RENDERED: OCTOBER 1, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001943-ME

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE D. MICHAEL FOELLGER, JUDGE
ACTION NOS. 01-J-352-002, 01-J-353-002, 08-J-913-001

A.N., AN INFANT; A.N., AN INFANT;
A.N., AN INFANT; A.C.; F.M; M.N.;
C.N.; AND HON. KEITH GAMBREL

APPELLEES

OPINION
REVERSING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,¹ SENIOR
JUDGE.

HENRY, SENIOR JUDGE: This is an appeal from a Campbell Family Court order
requiring the Cabinet for Health and Family Services to pay Kinship Care funds to

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

grandparents who have been appointed the permanent custodians of three children. The Cabinet argues that the circuit court exceeded its authority because the grandparents did not meet the statutory and regulatory requirements to qualify for the funds. Although we sympathize with the family court's wish to assist this family, we agree with the Cabinet and therefore reverse.

Kinship Care is a federally funded program which promotes the placement of children with a qualified relative as an alternative to foster care. See 42 U.S.C. § § 601-609. Kentucky Revised Statutes (KRS) 605.120 authorizes the Cabinet to establish such a program, and to promulgate regulations to administer it. The portions of the statute which are pertinent to this appeal specify that the funds are to be made available to the qualified relatives of children who "would otherwise be placed in foster care due to abuse, neglect, or death of both parents." KRS 605.120(5).

As required under the statute, the Cabinet has promulgated regulations at 922 Kentucky Administrative Regulations (KAR) 1:130 regarding eligibility requirements. *See* KRS 605.120(6). The pertinent sections of the regulations provide that a child shall be eligible for Kinship Care only if he or she is found to be abused, neglected or orphaned. 922 KAR 1:130 Section 2. The regulations specifically state that a child shall not be eligible if the child's removal is based on a Cabinet finding of dependency, except for a finding of dependency based on the death of both parents of the child. 922 KAR 1:130 Section 9(5). Furthermore,

children or caretaker relatives who live in or relocate to another state are not eligible for the program. 922 KAR 1:130 Section 9(4).

On August 21, 2009, the three children in this case were committed to the permanent custody of their maternal grandparents, due to their natural mother's ongoing drug dependency problems. They were not found to be abused or neglected, nor are they orphaned. Their grandparents reside in Indiana, where they are unable to obtain Kinship Care because that state has opted out of the federal program. The family court ordered the Cabinet to pay Kinship Care to the grandparents. The Cabinet filed a motion to alter, amend or vacate, arguing that the children's custodians were ineligible for Kinship Care benefits because (1) the children have been deemed dependent, not abused or neglected nor have their parents died; and (2) Kinship Care is only available to caregivers who reside within the Commonwealth of Kentucky.

The family court denied the motion and entered lengthy findings of fact. It ruled that the exclusion from eligibility for Kinship Care of children found to be dependent was not in line with the legislative purpose of KRS 605.120. The court further found that it was unfair to deny the funds to a caregiver who had moved from Kentucky when the regulations do provide coverage for a child that is placed with a caretaker relative in Kentucky by another state. 922 KAR 1:130 Section 2(2). This appeal by the Cabinet followed.

The Cabinet argues that the family court's order violates the doctrine of separation of powers found at Section 230 of the Kentucky Constitution because

it encroaches on the authority of the legislature to order expenditures from the public purse. In the absence of a specific statute authorizing the court to assess such payments, the Cabinet contends that the decision to award Kinship Care funds remains within the sole purview of the Cabinet. However, as the Cabinet itself has indirectly acknowledged by citing our opinion in *Commonwealth, Cabinet for Health and Family Services v. G.W.F.*, 229 S.W.3d 596, 599 (Ky. App. 2007), a due process violation warranting judicial intercession could arise if a child and caregiver who were qualified for the program were arbitrarily denied coverage. In *G.W.F.*, this Court observed that a significant potential infringement of a parent's due process rights could serve to bring an issue within the purview of the court's inherent powers to administer justice. *Id.* (citing *G.G.L. v. Cabinet for Human Resources*, 686 S.W.2d 826 (Ky. App.1985)). In this case, the family court based its ruling in large part on a finding that the statute and regulations governing eligibility for the program were vague and arbitrary. To that extent, it was acting well within its inherent powers to administer justice, and did not violate the doctrine of separation of powers.

The family court ruled that the enabling statute, KRS 605.120, was vague and lacked sufficient legislative criteria regarding eligibility for Kinship Care by confining coverage only to children who are abused, neglected or orphaned while excluding children who are deemed dependent. The court reasoned that, because a child who has suffered the death of both parents meets the definition of a dependent child, a finding of dependency on any grounds should

qualify a child for Kinship Care. In reviewing this argument, we are required to show deference to the actions of the legislature.

Statutes are presumed to be valid and those concerning social or economic matters generally comply with federal equal protection requirements if the classifications that they create are rationally related to a legitimate state interest. Sections 1, 2, and 3 of the Kentucky Constitution provide that the legislature does not have arbitrary power and shall treat all persons equally. A statute complies with Kentucky equal protection requirements if a “reasonable basis” or “substantial and justifiable reason” supports the classifications that it creates. Analysis begins with the presumption that legislative acts are constitutional.

Cain v. Lodestar Energy, Inc., 302 S.W.3d 39, 42-43 (Ky. 2009) (internal footnotes and citations omitted).

The Cabinet has argued that the statute and the corresponding regulations further the legislature’s specific goal of assisting abused, neglected or orphaned children, that is, those children who have endured the most grave and traumatic of events. We agree with the Cabinet that this classification has a reasonable basis and is rationally related to a legitimate state interest. The legislature did not act arbitrarily in limiting Kinship Care assistance in this manner.

As to the family court’s finding that it is unfair for the Cabinet to deny coverage to a caregiver who does not reside in Kentucky, but to provide funds for a child who is placed here by another state, we see nothing arbitrary in restricting Kinship Care to children and caregivers who actually reside in Kentucky. This exclusion is a reasonable limitation on the scope of coverage of the program.

The order of the Campbell Circuit Court is therefore reversed in
accordance with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Services
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BRIEF FOR APPELLEES:

None filed