RENDERED: DECEMBER 3, 2021; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2020-CA-1167-ME

K.C. APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 19-J-00027-001

CABINET FOR HEALTH AND
FAMILY SERVICES; A.E., A CHILD;
C.L.E.; AND J.D.C. APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND McNEILL, JUDGES.

McNEILL, JUDGE: K.C. ("mother") appeals from the Clark Family Court's August 19, 2020 order granting permanent custody of her daughter, A.E. ("child"), to child's paternal great-grandmother, C.L.E. ("great-grandmother"). She also appeals from the court's September 2, 2020 order denying her motion to alter,

amend, or vacate. After careful review, we affirm in part, reverse in part, and remand to the family court for further proceedings.

On January 25, 2019, the Cabinet for Health and Family Services ("Cabinet") filed a juvenile dependency, neglect, or abuse ("DNA") petition seeking temporary custody of child based upon allegations that mother and child were transient and residing at a homeless shelter. At the time of the petition, mother was seventeen years old and child was nine months old. The petition asserted that G.E., child's grandmother, could not provide a stable environment for mother and child and that both were at risk of harm if they remained in the custody of G.E. The petition further alleged child's father had a history of violence and was currently involved with the juvenile district court. Therefore, there were no appropriate relatives or fictive kin for placement.

Several days later, the family court granted temporary custody of child to the Cabinet, finding "there are no less restrictive alternatives than removal" of child from mother's care. Subsequently, mother stipulated to dependency and great-grandmother moved to intervene for child to be placed in her custody. At a disposition hearing held on March 7, 2019, the family court accepted mother's stipulation that she was "unable to care for [child] without assistance." Child was placed in the custody of the Cabinet but allowed to remain with mother at an independent living program. Mother was given a case plan and

ordered to cooperate with the Cabinet, complete a mental health assessment, complete a parenting assessment, and follow all recommendations. Great-grandmother was granted visitation.

The Cabinet report prepared for the six-month review hearing detailed mother's progress and potential areas of concern. It was reported to the Cabinet by mother's foster care worker that mother had repeatedly refused counseling/therapy services. The worker also stated that mother did not take responsibility for child, often leaving child with the foster mother while she went to her boyfriend's house. Mother has also let child go several hours without changing her diaper, and once failed to return to the foster home after learning child was sick.

The report further detailed an incident where child had been transported to the hospital due to low oxygen levels and mother did not arrive until over three hours later because she was at a tattoo parlor. Another incident involved mother's bathing child in bathwater after child had defecated, with child getting feces on her hands, arms, and around her mouth. Based upon this information, the family court ordered mother to complete a Comprehensive Assessment and Training Services ("CATS") assessment. The family court noted that mother's issue appeared to be an unwillingness, not an inability, to parent child.

An annual permanency review was held on February 13, 2020, and child was removed from mother and placed with great-grandmother, with the

Cabinet retaining custody. The Cabinet reported that mother had not addressed her mental health issues, anger issues, parenting concerns, and continued to make poor decisions. As examples, it stated mother continues to focus on boys instead of parenting child and cannot manage her money, having spent $4000 in less than three months, including buying her paramour and friends new cell phones; giving money to her paramour so that he can buy Christmas presents for his kids; and buying her paramour a gaming system. Mother also had not completed the CATS assessment as ordered. Perhaps most concerning, it was learned mother was pregnant again.

A July 24, 2020 Cabinet report notes that mother stated she wanted what was best for child and told great-grandmother to petition for permanent custody. According to the report, mother said "she felt it was in [child's] best interest that she be placed with [great-grandmother] permanently." The report concludes by requesting that great-grandmother be granted permanent custody of child.

A permanency review hearing was held on August 19, 2020. Mother objected to the Cabinet's permanent custody request. The guardian *ad litem* recommended that great-grandmother be granted permanent custody. After hearing from mother and the guardian *ad litem*, the family court granted permanent custody to great-grandmother. In support of its decision, the family court made

oral findings that mother had "been given any and every type of service that the Cabinet [could] make available to her, from the beginning" but that "mother has shown that she is not capable of safely parenting this child." The court recited the Cabinet's many efforts to help mother, including parenting classes, mental health services, and detailed orders outlining the most basic parenting functions like how often to feed child. Ultimately, the court lamented, "this is a baby whose needs must be addressed appropriately and safely now while the child is young. . . . I don't see that anything is going to make a difference than perhaps maturity and the passage of time. Unfortunately, this child can't wait for that."

At the conclusion of the hearing, the family court entered an AOC-DNA-9 form "Order Permanent Custody Pursuant to KRS[1] 620.027," in addition to its oral rulings. Subsequently, mother filed a CR[2] 59.05 motion to alter, amend, or vacate, again objecting to the award of permanent custody and requesting the court set a visitation schedule pursuant to KRS 403.320(1). The family court denied the motion. This appeal followed.

Mother argues the following errors on appeal: 1) the award of custody is not supported by substantial evidence; 2) the family court failed to make specific findings related to the factors set forth in KRS 403.270(2); and 3) the

[1] Kentucky Revised Statutes.

[2] Kentucky Rules of Civil Procedure.

family court failed to set an appropriate visitation schedule. Because we believe it is dispositive of the appeal, we first address mother's argument concerning the sufficiency of the family court's factual findings supporting its permanent custody determination.

As an initial matter, we must address a deficiency in mother's brief. CR 76.12(4)(c)(v) requires "at the beginning of [each] argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Mother failed to include a preservation statement concerning this argument. "Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (citation omitted). In this instance, we have chosen to ignore the deficiency and proceed with our review.

> In order to grant permanent custody via a custody decree in a dependency action arising under KRS Chapter 620, the court must comply with the standards set out by the General Assembly in KRS 403.270(2):
>
> > (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now

> seeking custody to seek employment, work, or attend school.

*N.L. v. W.F.*, 368 S.W.3d 136, 148 (Ky. App. 2012) (citation omitted).

In making this determination, the family court must "find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" CR 52.01. Moreover, "compliance with CR 52.01 and the applicable sections of KRS Chapter 403 requires *written* findings." *Keifer v. Keifer*, 354 S.W.3d 123, 125-26 (Ky. 2011). "Thus, a rigid standard of reciting statutory standards – coupled with supporting facts – has now become a requirement." *Hicks v. Halsey*, 402 S.W.3d 79, 84 (Ky. App. 2013).

In ruling on custody, the family court utilized the AOC-DNA-9 form order. The court checked the box that provided: "Pursuant to the authority granted in KRS 620.027, custody is being determined in accordance with the best interests of the child . . . pursuant to the following factors (*check all that apply*)[.]" It then checked three boxes addressing three factors in KRS 403.270(2): the child's adjustment to his home, school, and community; the mental and physical health of all individuals involved; and the extent to which the child has been cared for, nurtured, and supported by any de facto custodian. The family court did not make any additional specific findings in the space provided on the form.

In *N.L.*, 368 S.W.3d 136, a panel of this Court held under similar facts that a family court's failure to make specific factual findings related to the factors

in KRS 403.270(2) was reversible error. In that case, the family court had also utilized the AOC-DNA-9 form order, checking several boxes in support of its custody determination. The Court of Appeals held that the family court "failed to sufficiently consider and make findings related to the factors set forth in KRS 403.270(2)." *Id.* at 149. Despite checking the boxes on the form order, "the family court did not include any additional findings upon which those rulings were based." *Id.* The Court of Appeals remanded for the family court "to properly consider and make sufficient findings regarding the factors contained in KRS 403.270 before reaching a decision as to custody[.]" *Id.*

Similarly, here, the family court did not specifically address any of the statutory factors in relation to the evidence presented. While it checked off several of KRS 403.270(2)'s factors on the form order, no specific factual findings were made in support of that determination. Neither did the family court address the statutory factors in its oral findings, nor did its oral findings relate to the factors checked on the form order. Even more, its oral findings were not "specifically incorporated into a written and properly entered order." *Boone v. Boone*, 463 S.W.3d 767, 768 (Ky. App. 2015) (citation omitted). As noted above, "KRS Chapter 403 requires *written* findings." *Keifer*, 354 S.W.3d at 126. Therefore, we are compelled to remand for the family court to properly consider and make specific, written factual findings and conclusions regarding the factors in KRS

403.270(2) based upon the evidence.[3] Because we are remanding for additional findings, we necessarily do not reach mother's argument that the family court's findings were not supported by substantial evidence.

Finally, mother argues the family court erred in failing to set a specific visitation schedule pursuant to KRS 403.320(1). Following the court's custody order, mother filed a CR 59.05 motion to alter, amend, or vacate the custody award. In the motion, mother also requested the court set a visitation schedule. Mother stated she was receiving regular visitation prior to the permanent custody award, but since its entry, the custodian had refused visitation. At a hearing on the motion, the family court denied mother's request for a visitation schedule, holding that such motion would be better brought in the companion civil action.

KRS 403.320(1) provides in relevant part: "[u]pon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child." However, "[t]he purpose of the dependency,

[3] Although mother failed to request additional findings pursuant to CR 52.04, we believe this case falls under our Supreme Court's holding in *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011): "CR 52.01 requires that the judge engage in at least a good faith effort at fact-finding and that the found facts be included in a written order. Failure to do so allows an appellate court to remand the case for findings, even where the complaining party failed to bring the lack of specific findings to the trial court's attention." *Id.* at 458.

neglect, and abuse statutes is to provide for the health, safety, and overall wellbeing of the child." *S.R. v. J.N.*, 307 S.W.3d 631, 637 (Ky. App. 2010) (citing KRS 620.010). "It is not to determine custody rights which belong to the parents. A dependency, neglect or abuse adjudication hearing is simply not the appropriate forum for rehashing custody issues." *Id.*

Here, the family court determined that mother's request for a visitation schedule would be better brought in the pending civil action between mother and great-grandmother, feeling compelled to "close out some of these Cabinet cases when we have achieved permanency." It did not foreclose mother's opportunity to move for visitation or even substantively rule on the motion. The family court merely held that the DNA proceeding was not the appropriate forum. We find no error. For the foregoing reasons, we affirm in part, reverse in part, and remand this matter to the Clark Family Court for further proceedings in accordance with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

John M. Hendricks
Winchester, Kentucky

BRIEF FOR APPELLEE C.L.E.:

Dodd D. Dixon
Winchester, Kentucky

BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

R. Mitchell Berryman
Winchester, Kentucky