

RENDERED: JULY 15, 2022; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-0966-ME

A.H. AND W.H.

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE W. KENT VARNEY, JUDGE
ACTION NO. 20-J-00060-001

R.H., A CHILD; AND CABINET FOR
HEALTH AND FAMILY SERVICES

APPELLEES

AND

NO. 2021-CA-0969-ME

A.H. AND W.H.

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE W. KENT VARNEY, JUDGE
ACTION NO. 20-J-00060-002

R.H., A CHILD; AND CABINET FOR
HEALTH AND FAMILY SERVICES

APPELLEES

AND

NO. 2021-CA-0970-ME

A.H. AND W.H.

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE W. KENT VARNEY, JUDGE
ACTION NO. 20-J-00061-001

R.H., A CHILD; AND CABINET FOR
HEALTH AND FAMILY SERVICES

APPELLEES

AND

NO. 2021-CA-0971-ME

A.H. AND W.H.

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE W. KENT VARNEY, JUDGE
ACTION NO. 20-J-00061-002

R.H., A CHILD; AND CABINET FOR
HEALTH AND FAMILY SERVICES

APPELLEES

OPINION
AFFIRMING IN PART AND
DISMISSING IN PART

** ** * * * * *

BEFORE: CALDWELL, GOODWINE, AND JONES, JUDGES.

GOODWINE, JUDGE: A.H. and W.H., parents of the two subject children, appeal the July 20, 2021 adjudication and disposition orders in Nos. 2021-CA-0969-ME and 2021-CA-0971-ME, and orders on permanency in Nos. 2021-CA-0966-ME and 2021-CA-0970-ME of the Pike Circuit Court, Family Division. After careful review, we dismiss appeals Nos. 2021-CA-0966-ME and 2021-CA-0970-ME as untimely, and affirm the court's orders in Nos. 2021-CA-0969-ME and 2021-CA-0971-ME.

The Cabinet for Health and Family Services (“Cabinet”) became involved with this family in 2018. Initially, the children were not removed from their parents’ care. However, after the parents’ noncompliance with services, the Cabinet petitioned for removal of the children on March 9, 2020.¹ The Cabinet alleged environmental concerns and substance abuse by the parents. On June 1, 2020, both parents stipulated to neglect without specific findings of fact and waived their right under KRS² 610.080 to distinct adjudication and disposition hearings on separate days. Pursuant to the disposition order, the children were placed in the care of their maternal grandmother, L.M.

¹ These petitions were filed in Nos. 20-J-00060-001 and 20-J-00061-001. These are appeals Nos. 2021-CA-0966-ME and 2021-CA-0970-ME, respectively.

² Kentucky Revised Statutes.

On September 3, 2020, the Cabinet petitioned to remove the children from the care of their grandparents, L.M. and A.M.³ The petitions were filed against both the parents and grandparents, alleging the grandparents abused illicit substances and allowed the parents to have unsupervised visitation. The family court granted temporary removal of the children on September 4, 2020. After a hearing, the court entered adjudication and disposition orders on July 20, 2021, finding the parents and grandparents neglected the children and granting the Cabinet temporary custody. On the same day, in the prior cases, appeals Nos. 2021-CA-0966-ME and 2021-CA-0970-ME, the family court entered an order on permanency changing the goal of the cases to adoption.

These appeals followed.

Before addressing the merits of the parents' appeals, we must address procedural and jurisdictional deficiencies. First, appellees failed to file briefs in these appeals.⁴

³ These petitions were filed in Nos. 20-J-00060-002 and 20-J-00061-002. These are appeals Nos. 2021-CA-0969-ME and 2021-CA-0971-ME, respectively.

⁴ The parents named only the children as appellees in the notices of appeal. This Court entered an order for the parents to show cause why the appeals should not be dismissed for failure to name the Cabinet as a party. A panel of this Court determined the appeals should not be dismissed because the clerk of the circuit court sent notice of the appeals to all parties, including the Cabinet, and attorneys of record. *See M.A.B. v. Cabinet for Health and Family Services*, 635 S.W.3d 90, 96-97 (Ky. 2021); *see also* Proposed Rules of Appellate Procedure, Art. II 2(A)(2) (open for public comment until June 30, 2022) (making "all parties to the proceedings from which the appeal is taken, except those who have been dismissed in an earlier final and appealable order," parties before the appellate court).

If the appellee's brief has not been filed within the time allowed, the 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.

CR⁵ 76.12(8)(c). Herein, we will accept the parents' statement of facts and issues as correct. *Id.*

Next, CR 73.02(1)(a) requires dismissal of appeals Nos. 2021-CA-0966-ME and 2021-CA-0970-ME.⁶ A notice of appeal must be filed within 30 days after the date of notation of service of the final judgment or order from which the appeal is taken. CR 73.02(1)(a). In dependency, neglect, and abuse ("DNA") actions, the disposition order is the final order from which an appeal may be taken. *J.E. v. Cabinet for Health and Family Services*, 553 S.W.3d 850, 852 (Ky. App. 2018). By this reasoning, an appeal may not be taken from a permanency order changing the goal of a DNA case to adoption.

In both Nos. 2021-CA-0966-ME and 2021-CA-0970-ME, the disposition orders were entered and the notations of service were made on June 1, 2020. Permanency orders were entered on July 20, 2021. The notices of appeal

⁵ Kentucky Rules of Civil Procedure.

⁶ A panel of this Court previously ordered the parents to show cause why these appeals should not be dismissed as untimely. The panel determined, based on the limited records available at the time, that the appeals were timely.

were filed on August 19, 2021, within thirty days of entry of the permanency order but more than a year after entry of the disposition order. On this basis, we must dismiss appeals Nos. 2021-CA-0966-ME and 2021-CA-0970-ME.

We will now consider appeals Nos. 2021-CA-0969-ME and 2021-CA-0971-ME wherein the parents argue they were entitled to distinct adjudication and disposition hearings under KRS 610.080. However, the parents' brief does not include a statement "showing whether the issue was properly preserved for review and, if so, in what manner." CR 76.12(4)(c)(v). Without such a statement, we will review for palpable error. *Ford v. Commonwealth*, 628 S.W.3d 147, 155 (Ky. 2021) (citing *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)). "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that *manifest injustice* has resulted from the error." *Id.* "Manifest injustice" requires an error that "so seriously affect[s] the fairness, integrity, or public reputation of the proceeding as to be shocking or jurisprudentially intolerable." *Iraola-Lovaco v. Commonwealth*, 586 S.W.3d 241, 245 (Ky. 2019) (internal quotation marks and citations omitted).

Herein, the parents argue the court was deprived of the opportunity to consider alternatives to removal because there was no separate disposition hearing.

Both the court’s adjudication and disposition orders state “[r]easonable efforts were made to prevent the child[ren’s] removal from the home” and there “are no less restrictive alternatives than removal from the home[.]” Record at 135-36.

Although KRS 610.080 mandates separate adjudication and disposition hearings, the orders indicate the family court considered and rejected alternatives to removal.

In light of these findings, the parents have failed to prove manifest injustice resulted from the court’s error.

Based on the foregoing, we dismiss appeals Nos. 2021-CA-0966-ME and 2021-CA-0970-ME and affirm the orders of the Pike Circuit Court, Family Division in appeals Nos. 2021-CA-0969-ME and 2021-CA-0971-ME.

ALL CONCUR.

BRIEF FOR APPELLANTS:

NO BRIEFS FOR APPELLEES.

Lawrence R. Webster
Pikeville, Kentucky