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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0091-ME

J.S. APPELLANT

v.

APPEAL FROM ALLEN FAMILY COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 20-J-00065-002

M.M.; S.P.; COMMONWEALTH OF KENTUCKY; CABINET FOR HEALTH AND FAMILY SERVICES; AND S.M., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CETRULO, COMBS AND GOODWINE, JUDGES.

CETRULO, JUDGE: One of the primary issues presented in this appeal concerns *when* a relative is entitled to "preference" in having a child, who has been removed from the home as a consequence of dependency, neglect, or abuse ("DNA") proceedings, placed in their custody. As this Court explained in *Cabinet for*

Health and Family Services v. Batie, 645 S.W.3d 452 (Ky. App. 2022), such a preference stems from KRS[1] 620.090(2),[2] and is only effective for a limited time: "The transition from a temporary custody order to an order of commitment brings to an end the relative placement preference of KRS 620.090(2)." 645 S.W.3d at 468. With that in mind, the focus of this appeal is a request – made approximately ten months after the entry of an order of commitment – to have a child who has been removed from the home due to DNA proceedings placed in the custody of a relative. Specifically, J.S. ("Mother") appeals a post-dispositional order of the Allen Family Court denying her motion to have her minor daughter, S.M. ("Child"), placed with S.M.'s paternal grandmother, S.P. ("Grandmother"). Upon review, we affirm.

The facts and procedural history relevant to this appeal are as follows. Child was born November 25, 2019. Her father is M.M. ("Father"). In May 2020, Father attacked and cut Mother with a knife in a motel room while Child was

[1] Kentucky Revised Statute.

[2] In relevant part, KRS 620.090(2) provides:

> (2) In placing a child under an order of temporary custody, the cabinet or its designee shall use the least restrictive appropriate placement available. Preference shall be given to available and qualified relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision, if known. The child may also be placed in a facility or program operated or approved by the cabinet, including a foster home, or any other appropriate available placement. . . .

present. Consequently, Father was arrested and charged with second-degree assault. On June 30, 2020,[3] while Father's charge remained pending, a domestic violence order ("DVO") was entered against Father providing, "child in sole temporary custody of mother. Father shall have no contact with child directly or indirectly. Mother shall ensure child has no contact with father." Due to what is set forth above, the Cabinet for Health and Family Services ("Cabinet") filed a DNA action against Father in Allen Family Court (No. 20-J-00065-001). Since then, Father's DVO has remained in effect.

However, on August 30, 2020, DCBS[4] social worker Jennifer Woods spotted Father and Mother together at a grocery store in Scottsville with Child. Father was acting in a caregiving role toward Child at the time. Grandmother was with them, having apparently provided Mother, Father, and Child a ride to the grocery store. Woods contacted the authorities, and the Scottsville Police Department conducted a welfare check at Mother's home later that day. During the welfare check, Mother admitted Father had been with her earlier that day, despite the DVO. The investigating officers also noted the poor living conditions in the residence Mother shared with Child. Based upon environmental neglect, as well as Mother's violation of the protective order, the Cabinet filed a DNA action

[3] The DVO is not of record, but it was described in the Cabinet's DNA petition.

[4] Department of Community Based Services.

against Mother in Allen Family Court (No. 20-J-00065-002). The family court entered an emergency custody order the next day, and Child was placed in the emergency custody of the Cabinet. On September 4, 2020, following a temporary removal hearing, the family court then placed Child in the temporary custody of the Cabinet.

The following October, after an adjudication hearing, the family court entered an order determining Child had been neglected by both parents, and that Child was to remain in the temporary custody of the Cabinet. The dispositional hearing was held on December 8, 2020. There, the family court considered the Cabinet's recommendations set forth in its December 7, 2020 dispositional review report. Notably, the Cabinet's report indicated Father "reports he is living with his parents in Scottsville;" thus, he was residing with Grandmother. It indicated Child had been "placed with fictive kin and doing very well in the home. All of her needs are being met[.]" Further, the Cabinet's report recommended Child's placement "remain with fictive kin," but that her goal be "return to parent," subject to Mother completing her case plan. The following day, the family court entered a dispositional order adopting the Cabinet's report and recommendations. Importantly, the dispositional order also *committed* Child to the Cabinet. In its subsequent permanency progress review ("PPR") order of March 24, 2021, the family court again directed the Cabinet to retain custody of Child.

On June 11, 2021, the Cabinet submitted a PPR report indicating Child would soon be moved from her current placement to another placement, as her current placement would "not be approved as a foster home due to ongoing environmental safety issues that have not been corrected." Additionally, it noted Father "reports living with his parents and not having employment or income," and that it had "received information that [Mother] may be continuing a romantic relationship with [Father]." The family court reviewed the Cabinet's report at a PPR hearing on June 15, 2021. It deemed immaterial the issue of whether Mother remained involved with Father because, at that juncture, Mother was noncompliant with her case requirements and there was accordingly no immediate plan to return Child to her care. In its June 16, 2021 PPR order, the family court directed Child to "remain committed to [the Cabinet]."

On June 22, 2021, Mother filed a "motion for relative placement," asking the family court to consider placing Child with Child's paternal great-aunt and great-uncle. Her motion was heard on August 3, 2021. During that hearing, the Commonwealth asserted Mother's motion was a post-dispositional "motion to modify placement;" and that as such, relatives were not entitled to any form of placement preference, and the only relevant consideration was whether granting the motion was in Child's best interests. The family court deferred consideration

of Mother's motion to August 24, 2021, the date of the annual permanency hearing.

At the conclusion of the August 3, 2021 hearing, Mother then moved the family court to consider an additional "relative placement" – namely, Grandmother. As discussed, this motion is the subject of the instant appeal. By and through counsel, Mother explained that on August 2, 2021, Grandmother had expressed interest in receiving custody of Child; and, she asserted that Grandmother would be an appropriate placement for Child because Father was no longer living at Grandmother's house and was instead living with a sister in Burkesville, Kentucky.

In light of Mother's motion, the family court ordered a home evaluation of Grandmother's residence and directed the Cabinet to provide the results of the evaluation on or before the August 24, 2021 hearing. Prior to the hearing, the Cabinet filed two August 22, 2021 reports into the record. The first, an annual permanency review report, recommended Child remain in the Cabinet's custody; that Mother's and Father's visitation be stopped for the time being; and that Child's permanency goal be changed to adoption. The report provided in relevant part:

> **Current Status of the Parents**: [Mother] is non-compliant with her court ordered psychological evaluation and court-ordered hair follicle drug screen. [Mother] refuses to submit to any random drug screens

> requested by the Cabinet as well. [Mother] also reported that she will find another provider to complete her psychological evaluation because she does not trust Peaceful Solutions. [Mother] continues to work on the environmental issues in her home. [Mother] is currently allowing other high risk individuals to reside in her home. [Mother] does not have stable employment and continues to rely on family member to pay her monthly bills. The Cabinet is concerned that [Mother] will not be able to meet the basic needs of [Child]. [Mother] is not consistent with visits with [Child]. [Mother] has only attended one visit with [Child] in the past month.
>
> [Father] has reported that he is residing in the Burkesville area but is unable to provide proof of his residency. In fact, [Father's] address is still showing the above address which belongs to [Grandmother], [Father's] mother.
>
> **Current Status of the Child**: [Child] is currently placed in a DCBS foster home. [Child] has formed an attachment to her foster parents and continues to adjust to her placement. The foster family continues to meet the needs for the child. The child appears to be on target developmental [sic] and continues to meet her milestones. The child is not currently receiving any services due to her age.

The second report was of the Cabinet's evaluation of Grandmother's home. Its "overall review summary including justification of final recommendation" was as follows:

> The Cabinet cannot approve the placement due to the grandmother allowing the child to be placed in harm's way by allowing her son, [Father] access to the child. [Grandmother] disregarded a court order, ordering [Father] have no direct or indirect contact with the child. A DCBS worker, Jennifer Woods observed [Father], [Mother], and [Grandmother] at a local supermarket with

> the child. The child was removed from the mother and was placed in the custody of the Cabinet due to putting the child at risk of harm. [Grandmother] denies [Father] is residing in her home. [Grandmother] reported that [Father] had moved out of her home and is currently residing in Burkesville, Kentucky. The Cabinet has asked that [Father] provide documentation confirming that he resides in the Burkesville area. [Father] is unable to provide any form of legal documentation that would confirm that he does reside in the area. In fact, [Father's] current address can be confirmed that he continues to reside at [Grandmother's address].

At the August 24, 2021 permanency hearing, the family court revisited Mother's motion to have Child placed with Grandmother. There, Mother's counsel informed the family court that Grandmother and Father were willing to testify that Father no longer resided with Grandmother, and that Grandmother would respect any court order prohibiting Father from having direct or indirect contact with Child.

The Cabinet opposed the motion. Citing the substance of its reports, the Cabinet argued it would not be in Child's best interests to leave her current placement to live with Grandmother. It questioned Grandmother's credibility, noting Grandmother had facilitated Mother's and Father's disregard of the DVO, and had exposed Child to potential harm, when she took Mother, Father, and Child to the grocery store on August 30, 2020. The Cabinet also urged that if the family court accepted any proof of Father's current residence, it should not consider Grandmother's and Father's unsupported testimony to that effect; rather, it should

only consider legal documentation – such as Father's driver's license or health insurance information.

In response, Mother's counsel noted that Father had numerous prescriptions for various medical conditions. Her counsel suggested the family court could therefore take judicial notice of the address printed on any pill bottles Father had with him and accept it as evidence of Father's current residence. Shortly thereafter, Father handed his own counsel a large, transparent bag containing several bottles of his prescription medications. Father's counsel then read aloud the address labeled on the bottles for the benefit of the court. As it turned out, the address labeled on the bottles was *Grandmother's* address.

Mother's counsel then asserted Father could also provide a picture of a "change of address form" Father had recently submitted to the United States Postal Service. However, the family court held the picture would be of little evidentiary value, explaining:

> Well, it's documented here and with family court that he's still living at his mother's house, as I understand it. . . the documentation is what's here. And like I say, as [the Cabinet] indicated, there's a question here with regard to credibility, too. And I know it's hard for them to prove a negative, but in the court's view, the documentary evidence, you know, speaks louder than otherwise.

Ruling from the bench, the family court held that removing Child from the Cabinet's custody and placing her with Grandmother would not be in

Child's best interests. In support, it pointed to the Cabinet's August 22, 2021 reports, which it deemed credible, and cited Mother's and Father's lack of progress on their case plans; their lack of cooperation with the Cabinet; Grandmother's documented disregard of the DVO; and the Cabinet's recommendation that Child should be placed for adoption. The following day, consistent with the foregoing, the family court entered a permanency hearing order changing Child's goal to adoption and reaffirming that Child was to remain committed to the Cabinet's custody. A separate order denying Mother's motion to have Child placed with Grandmother was also entered.

Mother thereafter moved the family court, pursuant to CR[5] 59.05, to alter, amend, or vacate its order denying her placement request. In sum, she argued: (1) the family court had erred by ignoring KRS 620.090, which in her view entitled Grandmother at all times to "preference" as a placement option for Child; (2) the family court should consider *new* evidence which supported that Father was indeed living with a sister in Burkesville, rather than Grandmother; (3) the Cabinet had failed to prove, at the time of the permanency hearing, that Father *was* living with Grandmother; and (4) the Cabinet's recommendation that Child should be placed for adoption should have had no bearing upon the family court's placement determination.

[5] Kentucky Rule of Civil Procedure.

The family court considered Mother's CR 59.05 motion during a hearing on December 14, 2021, and it entered a written order denying her motion two days later. In its order to that effect, the family court reiterated that the evidence adduced at the August 24, 2021 hearing established, in its view, a risk that Grandmother would allow Father to have contact with Child despite the DVO. Noting that the Cabinet had a pending petition to terminate Mother's and Father's parental rights, and crediting the Cabinet's representation that Child was residing in a stable, loving, and adoptive foster home, the family court once again concluded that changing Child's placement, and instead placing her with Grandmother, was not in Child's best interests. This appeal followed, and Mother now asserts the same arguments she raised in her CR 59.05 motion.

We conduct an appellate review of a family court's order denying relative placement for clear error. *Cf. L.D. v. J.H.*, 350 S.W.3d 828, 829-30 (Ky. App. 2011) (citing CR 52.01). We give "due regard" to the family court's judgment of witness credibility, CR 52.01, and we review whether the court's findings are supported by substantial evidence, *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). If the factual findings are correct and the correct law was applied, "a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion." *Id*.

Here, the family court applied the correct law, and substantial evidence supported the family court's findings. Specifically, Mother's first argument is incorrect. Relative placement is never *required* if it is not in the best interests of the child. *P.W. v. Cabinet for Health and Family Services*, 417 S.W.3d 758, 761 (Ky. App. 2013). Furthermore, as noted at the outset of this opinion, KRS 620.090(2) only requires preferential consideration of relatives when placing a child under an order of temporary custody. *Batie*, 645 S.W.3d at 465-66. The "preference" set forth in that statutory provision is only operative while a temporary removal order is effect. *Id*. at 468. Here, ten months before Mother's motion, the family court's temporary custody order was no longer in effect, and Child had already been committed to the Cabinet's custody. Therefore, Grandmother was not entitled to any "preference" whatsoever.

As to her second argument regarding "new evidence," we begin by noting that a CR 59.05 motion is not a vehicle for presenting evidence or arguments that should have been presented during the proceedings before the entry of the judgment. *Gullion v. Gullion*, 163 S.W.3d 888, 894 (Ky. 2005). That aside, the "new evidence" Mother describes – and filed of record on January 11, 2022 – is largely irrelevant. It consists of: (1) a picture of an "official change-of-address confirmation" from the United States Postal Service, indicating Father's address at some point prior to January 11, 2022, changed to a location in Burkesville,

Kentucky; (2) a letter from an acquaintance of Father's, directed to that address, bearing a postmark of August 25, 2021; and (3) a photocopy of what appears to be a report of Father's medical expenses generated by a pharmacy in Burkesville, representing Father's address as somewhere other than Grandmother's address.

At most, this was evidence of where Father *said* he lived. Considering Father's noted lack of employment or income; the fact that he apparently resided at the Burkesville address as merely his sister's guest; and the fact that he previously resided with Grandmother for an extended period of time, none of this documentation proves Father would *stay* at that address and not come back. That leads to the heart of this matter. None of this evidence addresses the crux of the family court's concern; namely, that there was an established risk that Grandmother would allow Father to have contact with Child despite the DVO.

Similarly unavailing is Mother's argument that the Cabinet failed to prove, at the time of the permanency hearing, that Father *was* living with Grandmother. To begin, Father proved that point well enough during the hearing; as discussed, he took up the *invitation of mother's counsel* to prove the location of his residence by using the labels affixed to his various bottles of prescription medications – all of which listed *Grandmother's* address. Apart from that, it was never the Cabinet's burden to prove *where* Father lived. Even when the

"preference" for relative placement set forth in KRS 620.090 is in effect during the temporary removal phase,

> the identified interest is the right of known relatives to be evaluated for relative placement, as mandated by the Cabinet's own policies and regulations, after which the Cabinet can make an informed recommendation to the circuit court as to the best placement option for the child[.]

Batie, 645 S.W.3d at 465 (internal quotation marks and brackets omitted).

Here, the Cabinet evaluated Grandmother for placement. It was dissatisfied with Father's and Grandmother's inability to produce legal documentation of Father's residence. It was cognizant of Grandmother's past disregard of the DVO. It made an informed recommendation to the family court that a risk of harm would exist if Child were placed with Grandmother. Nothing further was required of the Cabinet.

Additionally, Mother identifies no statutory or constitutional provision which entitled her motion to more consideration from the family court than it received below. Mother was granted a hearing on her motion. The family court based its decision to deny her motion, in large part, upon the facts included with the Cabinet's August 22, 2020 reports, which qualified as substantial evidence. It also based its decision upon its unwillingness to risk Child's safety, and the stability of Child's current placement, based solely upon any self-serving

testimony that Grandmother and Father might have otherwise provided regarding Child's safety in Grandmother's care.

Finally, considering what is set forth above, we see no error in the family court's decision to deny Mother's motion to place Child with Grandmother *regardless* of whether the family court changed Child's permanency goal to adoption. We note, however, that a relative is only permitted to intervene as a matter of *right*[6] in an adoption proceeding and to seek placement of the child if, apart from satisfying other conditions, the relative "asserts the interest while the child is still subject to an order of temporary custody under KRS 620.090(1) – *i.e.*, before the 'present' interest under KRS 620.090(2) lapses." *Batie*, 645 S.W.3d at 468 (citation omitted). As discussed, Grandmother was not even suggested as a placement option for Child until well after any interest Grandmother could have asserted under that statute had long since lapsed.[7]

[6] As a caveat, even after a disposition order is entered, if the Cabinet can succeed in securing a relative placement, the Cabinet is required to "request an exception for proceeding with involuntary termination of parental rights[.]" 922 Kentucky Administrative Regulation 1:140 § 6(2)(a).

[7] To be sure, Grandmother *was* granted leave to intervene in this matter. She filed a motion to intervene on November 11, 2021, and her motion was granted from the bench during the December 14, 2021 hearing. Grandmother also filed a motion for placement and custody of Child on November 11, 2021, but the family court denied her motion for the same reasons it denied Mother's motion. However, unlike Mother, Grandmother filed no appeal; as evinced by the caption of this appeal, she is now only an *appellee*. That said, we will not address whether Grandmother's refusal to appeal affected Mother's standing to effectively appeal on Grandmother's behalf, as that issue has never been raised. *See, e.g.*, *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010) ("[A] right to contest standing may be waived, even in child custody cases.").

In conclusion, we find no error in the family court's judgment. We therefore AFFIRM.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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