RENDERED: APRIL 5, 2024; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1270-ME

S.C. APPELLANT

APPEAL FROM ANDERSON FAMILY COURT
v. HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 22-J-00020-001

CABINET FOR HEALTH AND
FAMILY SERVICES; N.C.
A MINOR CHILD; AND J.C.,
BIOLOGICAL FATHER APPELLEES

AND

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ACTION NO. 22-J-00021-001

CABINET FOR HEALTH AND
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OPINION
VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: ACREE, ECKERLE, AND KAREM, JUDGES.

KAREM, JUDGE: These consolidated appeals arise from dependency, neglect, and abuse ("DNA") actions initiated by the Cabinet for Health and Family Services ("the Cabinet") against S.C. ("Mother") and J.C. ("Father"), in Anderson Family Court. Following a disposition hearing, the family court ordered the couple's two sons to remain in the custody of Mother's aunt and uncle ("Aunt and Uncle") and remanded the case from its active docket. Mother contends that the family court failed to schedule subsequent required reviews and did not make sufficiently specific findings of fact to support an award of permanent custody. Upon careful review, we vacate in part and remand for clarification of the family court's orders and, if necessary, further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father are the natural parents of two sons, T.C., born on November 22, 2021 ("Younger Son"), and N.C., born on July 17, 2020 ("Older Son"). On March 18, 2022, the Cabinet filed a petition on behalf of Younger Son, alleging neglect or abuse. The basis of the petition was a report from the University of Kentucky Pediatric Forensic Medicine that Younger Son had been physically abused "into a near fatal state." The forensics team reported that the

infant had "petechiae over purple bruising starting at the nipple line and moving up anteriorly to the face, head, and behind bilateral ears." A CT scan showed "a mildly depressed fracture of the right temporal bone." The injuries were deemed consistent with a diagnosis of inflicted abuse. Through interviews, it was determined that Mother and Father were the sole caretakers when the injury occurred. The Cabinet report stated that, due to the significance of the injuries, Older Son was also at risk for injury. The children were removed from the home and placed with Aunt and Uncle.

Following a hearing, the family court found that the facts supported continued removal of the children, specifically finding that Younger Son suffered a skull fracture, bruising around the eyes and his chest as a result of pressure applied, and that the parents had no explanation of what had happened to the four-month-old baby. The family court entered an order on March 23, 2022, placing the children in the temporary custody of Aunt and Uncle. The parents were provided with supervised visitation at the Butterfly House (later moved to the Sunshine Center), and the parents were to be evaluated by psychologist Dr. Paul Ebben for parenting capacity and competency to stand trial.

On April 27, 2022, following a pretrial conference, the family court entered an order placing the children in the temporary custody of the Cabinet with continued relative placement, after hearing that Aunt and Uncle were not sure how

long they could keep looking after the children. Because of delays caused by scheduling the evaluations with Dr. Ebben, the time requirements for the adjudicatory hearing and final disposition were waived. *See* Kentucky Revised Statutes ("KRS") 620.090(5). The parents were ordered to pay child support.

In June 2022, Dr. Ebben performed a Parental Competency and Risk Assessment of Mother. At that time Mother was receiving Social Security disability benefits for her learning disability and Father was working at Domino's. Dr. Ebben reported that Mother told him she did not know what happened to cause Younger Son's injuries and she did not believe Father did anything wrong. Dr. Ebben's report states:

> It is the undersigned's opinion, based on multiple sources of information, within reasonable psychological certainty, that risk for future child maltreatment is high given medical documentation of inflicted injury and reportedly no one has admitted hurting the child, and both parents deny wrongdoing. Adjudication of a perpetrator will need to occur before additional opinions regarding [Mother] and maltreatment risk can be offered.

In September 2022, Dr. Ebben evaluated Mother again and found her competent to stand trial in a family court proceeding.

On October 25, 2022, Father's attorney explained his assessment by Dr. Ebben had been delayed because Father had suffered a stroke. The Cabinet also informed the court that Aunt no longer wished to be a foster parent but wished to become a custodian. All the parties present agreed that custody of the children

would be switched from the state to Aunt and Uncle, and that the custody was temporary.

On July 25, 2023, Mother and Father stipulated to a finding of neglect in the care of Younger Son and Older Son. The family court entered an adjudication order finding that it was in the children's best interests to remain in the custody of Aunt and Uncle pending disposition of the matter.

The Cabinet filed a dispositional report on August 15, 2023. It stated that the children were doing well in their relative placement and were receiving necessary services. Their weekly visits with Mother and Father, however, were causing concern to the point that the Sunshine Center was considering terminating visitation. The record contains a letter from the supervised visitation coordinator at the Sunshine Center reporting that Mother repeatedly contacted her at all hours of the night, made negative comments and accusations against Aunt and Uncle, accused the staff at the Sunshine Center of being incredibly unprofessional, and accused the staff of canceling visits on the pretext of illness.

The disposition report stated that Mother and Father were working on a case plan but there were doubts about their ability to understand and utilize the information being taught to them due to problems with their cognitive functioning. The parents were late or did not attend meetings such as First Steps and continued to blame others for the current situation.

The recommended permanency goal was permanent relative custody. The Cabinet recommended continued supervised visitation if the Sunshine Center was willing to accommodate it, with the amount of visitation to be left to the discretion of the custodians.

The report concluded with the following recommendations: the children were to remain in the permanent relative custody of Aunt and Uncle; the parents were to continue to engage in services with the children as they are recommended; the parents were to pay child support to Aunt and Uncle; supervised visitation was to continue at the Sunshine Center if the Center was willing to accommodate it; and the case was to be remanded from the active docket.

At the dispositional hearing on September 12, 2023, the family court summarized the recommendations made in the Cabinet report and asked for any objections. Father's attorney, joined by Mother's attorney, told the court he had "no strenuous objections" but argued Dr. Ebben's assessment was deficient in that he had never witnessed the parents interacting with the children, and consequently had no recommendations regarding how to improve the family unit.

The family court told the parents' attorneys that the parents were free to return to court if they wished to get another psychological assessment but observed that the assessment already performed did not offer much hope for the future. The parents' attorneys stated that they would follow up with Dr. Ebben

individually and the family court reiterated that it was happy for them to return to court if they wanted their clients to get another assessment. The court also told the parents that they were free to return to ask for a different authority to supervise their visitation.

In its disposition orders, the family court found that the facts supported the continued removal of the children and adopted the Cabinet's recommendations. Specifically, it found that it was previously adjudicated that Mother and Father had neglected and/or abused the children after Younger Son was taken to the hospital with a skull fracture and bruising. The court found there were concerns about returning the children to the parents because of incidents at the Sunshine Center visitation facility and the parents' cognitive functioning. It ordered the children to remain out of the home of removal with their Aunt and Uncle, in accordance with KRS 620.140(2). It remanded the case from the active docket and did not schedule any further proceedings. Mother filed a motion to amend the orders to reflect that she had stipulated only to neglect, not to abuse. The family court granted the motion and amended the orders to strike the reference to abuse. These appeals by Mother followed. Father has not appealed, and the Cabinet has not filed an appellee's brief.

STANDARD OF REVIEW

> This Court's standard of review of a family court's award of child custody in a dependency, abuse and

> neglect action is limited to whether the factual findings of the lower court are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. Whether or not the findings are clearly erroneous depends on whether there is substantial evidence in the record to support them. If the findings are supported by substantial evidence, then appellate review is limited to whether the facts support the legal conclusions made by the finder of fact. The legal conclusions are reviewed de novo. If the factual findings are not clearly erroneous and the legal conclusions are correct, the only remaining question on appeal is whether the trial court abused its discretion in applying the law to the facts.

L.D. v. J.H., 350 S.W.3d 828, 829-30 (Ky. App. 2011).

ANALYSIS

Mother argues that it is unclear from the disposition orders whether the family court awarded Aunt and Uncle permanent relative custody, temporary custody, or placement. She contends that the family court should have awarded, and did award, temporary custody to the Cabinet and placed the children with Aunt and Uncle. In the alternative, she believes Aunt and Uncle were awarded temporary custody. She contends that the family court improperly claimed to have achieved permanency but if it awarded temporary custody to Aunt and Uncle or to the Cabinet, permanency has not been achieved. She argues that by claiming permanency and remanding the case from the docket, the family court had taken the case "off the rails" for Mother and Father, leaving them with no counsel, no return court date, and no ongoing path toward reunification that they can

reasonably achieve. She further argues that the family court made a custody determination without considering and making findings pursuant to the factors listed in KRS 403.270(2) and KRS 620.023(2). Specifically, she contends that the family court did not consider the wishes of the parents or the children, made no findings regarding mental illness or intellectual disabilities, and failed to consider the rehabilitative efforts made by the parents in cooperating with the Cabinet's case plan, specifically the "multiple assessments" by Dr. Ebben and their regular supervised visitation.

These arguments are unpreserved because Mother did not raise them before the family court, either at the disposition hearing or by written motion. "We have long held in Kentucky that an issue not raised in the circuit court may not be presented for the first time on appeal." *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky. App. 2008) (citation omitted). "It is a matter of fundamental law that the trial court should be given an opportunity to consider an issue, so an appellate court will not review an issue not previously raised in the trial court." *Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky. App. 2003), *as modified on reh'g* (Jan. 30, 2004). Mother's attorney acquiesced in the family court's ruling at the disposition hearing. He did not ask for clarification of the ruling; he did not ask the court to make any additional findings; and he did not ask the court to keep the case on its active docket.

"[I]f a party has not preserved the question he is asking an appellate court to review, it can only be reviewed as palpable error on appeal, which requires a finding of manifest injustice to prevail. *See* CR 61.02." *Fischer v. Fischer*, 348 S.W.3d 582, 589 (Ky. 2011), *as modified* (Sep. 20, 2011), *abrogated by Nami Resources Company, L.L.C. v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323 (Ky. 2018). "[T]he task of the appellate court in review under CR 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken *by the court*." *Fraley v. Rice-Fraley*, 313 S.W.3d 635, 641 (Ky. App. 2010) (citation omitted). With these principles in mind, we will address Mother's arguments.

A permanent custody hearing and award are possible in a DNA proceeding, but only if "the proper procedures are followed." *N.L. v. W.F.*, 368 S.W.3d 136, 147 (Ky. App. 2012). KRS 620.027 provides:

> The District Court has jurisdiction, concurrent with that of the Circuit Court, to determine matters of child custody and visitation in cases that come before the District Court where the need for a permanent placement and custody order is established as set forth in this chapter. The District Court, in making these determinations, shall utilize the provisions of KRS Chapter 403 relating to child custody and visitation.

KRS 620.027.

A permanent custody award must comply with KRS 403.270(2), which requires specific findings to support a best interests determination. *London v. Collins*, 242 S.W.3d 351, 356 (Ky. App. 2007).

The family court's orders do not contain the specific findings required under KRS 403.270(2) to make an award of permanent custody. The orders were completed on Form AOC-DNA-5, the form used for orders following a disposition hearing. The orders complied with one of the dispositional alternatives provided in KRS 620.140(4)(c), specifically "[r]emoval of the child to the custody of an adult relative[.]" The family court made a finding, as stipulated, that Mother and Father neglected the children. The orders continue the custodial arrangement with Aunt and Uncle, based on the finding that return to the parents was not appropriate based on incidents that occurred at the visitation facility and concerns about the parents' cognitive functioning. These findings are supported by substantial evidence in the record and will not be reversed on appeal.

Form AOC-DNA-9 is the form that is utilized for an order of permanent custody pursuant to KRS 620.027. This form lists the best interests factors in KRS 403.270(2) and enables the family court to indicate which of the factors support its award of permanent custody.

The family court "speaks only through written orders entered upon the official record." *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d

347, 349 (Ky. App. 2010). There is no indication that the dispositional orders in this case were intended to award permanent custody pursuant to KRS 620.027 and KRS 403.270.

The DNA statutes and regulations provide the court with ongoing jurisdiction over custody matters, as summarized in the following unpublished opinion of this Court:

> Our statutes and regulations form a cohesive whole in providing reasonable procedures for the removal of children from parental care, mandating what efforts must be made to reunite parents with their children, and ultimately, for termination of parental rights if sufficient progress is not made to safely return children to their parents. For this system to function properly, the Cabinet must faithfully fulfill all its statutory and regulatory duties to the children in its care and their parents. These include: holding a case conference within ten days of removal and then case reviews at six months, and thereafter every three months if child is still in the custody of the Cabinet; locating the children's parents within thirty days; engaging in appropriate permanency planning pursuant to a written court-approved case plan which must be filed within thirty days; filing written case progress reports with the family court every six months; and initiating annual permanency hearings. *See* KRS 620.180(2)(a)1, (c)1-2 (case conferences and case reviews); KRS 620.230 (case permanency plans); KRS 620.240 (case progress reports); KRS 610.125(1) (permanency hearings); 922 Kentucky Administrative Regulations (KAR) 1:140 (permanency planning). A lack of sufficient parental progress on a case plan can justify a change in a permanency goal, constitute abuse or neglect, and the subsequent elapse of time can be grounds for termination of parental rights. KRS

> 600.020(1)(a)9; KRS 625.090(2)(j); 922 KAR 1:140 § 5(2).

A.M.S. v. Cabinet for Health and Family Services, No. 2020-CA-0616-ME, 2021 WL 840366, at *6 (Ky. App. Mar. 5, 2021) (cited pursuant to Kentucky Rules of Appellate Procedure ("RAP") 41(A)).

The question is whether the family court's removal of the cases from its active docket without scheduling any further proceedings resulted in manifest injustice to Mother.

It is not clear whether the family court considered the prior proceedings constituted a permanency hearing pursuant to KRS 610.125. The removal of the cases from the docket means family court has also not scheduled a subsequent annual permanency hearing or any other form of review.

"The Courts of the Commonwealth have consistently recognized a parent's superior right to the care and custody of [her] biological children and that [she] has a fundamental, basic and constitutionally protected right to raise [her] own children." *London*, 242 S.W.3d at 357. Because the lack of clarity in the family court's orders directly affects these substantial rights belonging to Mother, it rises to the level of manifest injustice under CR 61.02.

Consequently, the dispositional orders are affirmed in all respects except the removal of the cases from the family court's active docket. The cases are remanded for the family court to clarify the permanency status of the children

and to schedule further proceedings if necessary. Mother is entitled to be represented at all stages of these proceedings if she demonstrates indigency. "[H]ere in the Commonwealth, . . . the legislature mandates routine appointment of counsel to represent indigent parents not only in termination cases but also in dependency cases. *See* Kentucky Revised Statutes (KRS) 625.080(3) and KRS 620.100(1). Hence, Kentucky's statutory scheme to protect children and to adjudicate parental rights provides for the appointment of counsel throughout all the proceedings." *A.P. v. Commonwealth*, 270 S.W.3d 418, 420-21 (Ky. App. 2008).

CONCLUSION

The Anderson Family Court's amended dispositional orders pertaining to Younger Son and Older Son are affirmed in all respects except insofar as the cases were remanded from the family court's active docket. Those portions of the orders are vacated, and the cases are remanded for the family court to clarify the placement status of the children and to schedule further permanency proceedings if necessary.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Corey M. Nichols
Lexington, Kentucky

NO BRIEFS FILED FOR APPELLEES.