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Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-0441-ME

T.C. AND J.C.

APPELLANTS

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA K. ADDINGTON, JUDGE
ACTION NO. 17-J-00010-001

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; THE HARDIN COUNTY
ATTORNEY'S OFFICE; W.P.; L.P.; AND K.C.,
A MINOR CHILD

APPELLEES

AND

NO. 2021-CA-0445-ME

T.C. AND J.C.

APPELLANTS

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA K. ADDINGTON, JUDGE
ACTION NO. 17-J-00012-001

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; THE HARDIN COUNTY
ATTORNEY’S OFFICE; W.P.; L.P.; AND L.C.,
A MINOR CHILD

APPELLEES

AND

NO. 2021-CA-0446-ME

T.C. AND J.C.

APPELLANTS

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA K. ADDINGTON, JUDGE
ACTION NO. 17-J-00018-001

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; THE HARDIN COUNTY
ATTORNEY’S OFFICE; D.P.; T.P.; AND R.C.,
A MINOR CHILD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: T.C. (Mother) and J.C. (Father) appeal the orders of the Hardin Family Court removing their three daughters, K.C., L.C., and R.C., from their

commitment to Appellee, Cabinet for Health and Family Services (Cabinet), and placing them in the temporary custody of the children's foster parents, Appellees, W.P. and L.P. and D.P. and T.P.

We conclude: (1) the family court made an unauthorized custodial disposition to third parties; (2) the family court made said disposition to individuals who had no standing; (3) the family court usurped the Cabinet's executive branch authority; and (4) the family court failed to make required findings of fact. Therefore, on the grounds that the family court abused its discretion, we reverse and remand.

BACKGROUND

Based upon reports of domestic violence and drug use by Father and Mother, a juvenile dependency/neglect or abuse (DNA) petition was initiated as to K.C. and L.C. on January 6, 2017. Emergency custody was granted to the Cabinet. After Father and Mother waived their temporary removal hearing, the children were placed in the temporary custody of the Cabinet. At the adjudication hearing, Father and Mother stipulated to dependency/neglect and an order was entered on January 18, 2017, whereby the children were to be "placed or continue to remain in the temporary custody" of the Cabinet. The Cabinet then placed them with their foster parents, W.P. and L.P. The disposition order, entered February 14, 2017, stated that the children would "be committed or remain committed" to the Cabinet.

The Form AOC-DNA-5 notes that, as per KRS¹ 620.140(2), an award of temporary custody to the Cabinet is not a permissible dispositional alternative. Nevertheless, Father and Mother were directed to follow all recommendations including mental health and drug/alcohol assessments (with associated recommendations for follow-up), attend parenting classes, remain clean and sober, maintain stable employment and housing for six months, and cooperate with the Cabinet/ service providers. They were also to complete parental capacity assessments with any necessary follow-up.

At the time of the first six-month review on July 26, 2017, K.C. and L.C. remained committed to the Cabinet. When the third child, R.C., was born on October 11, 2017, she was removed from her parents' home, committed to the Cabinet, and placed with foster parents, D.P. and T.P.

Throughout 2017 the parents made minimal progress on their case plans. Father tested positive for opiates and marijuana and did not attend regular visitation with the children. However, he contacted the Veterans Administration (VA) to deal with post-traumatic stress disorder (PTSD) and addiction. He began therapy. Mother had negative drug screens. Both parents were allowed supervised visitation twice a week. The parents completed forensic mental health evaluations with Dr. McCrary. However, neither of them met minimum parenting standards.

¹ Kentucky Revised Statutes.

At the time of the first permanency hearing on January 8, 2018, an order was entered indicating that while the goal for these children was return to their parents, they remained committed to the Cabinet.

However, by July of 2018, the Cabinet was able to advise the family court that the parents had made “significant progress” on their case plans. Father continued to attend AA/NA,² therapy, and Veterans Drug Court. CASA³ reported that Father maintained consistent visitation with the children and both parents were “very attentive.” Mother also continued to have negative drug screens.

In October of 2018, the social worker on the case conducted a home visit and reviewed the parents’ progress with their case plans. Father continued to be involved with Veterans Drug Court, completed drug screens, and attended AA/NA meetings. Mother had attended 63 AA/NA meetings since March of 2018. On November 30, 2018, the family court ordered visitation increased.

In January of 2019, the Cabinet filed its annual permanency review report, noting the parents’ progress, and requesting that Dr. McCrary re-evaluate their parenting skills. In April of 2019, social worker Kelly sought an ASFA⁴ exemption, reporting that the parents continued to make progress. Although the

² Alcoholics Anonymous/Narcotics Anonymous.

³ Court appointed special advocate.

⁴ Adoption and Safe Families Act of 1997.

family court denied the motion for an ASFA exemption, the goal remained return to parents.

In May of 2019, Dr. McCrary found that both parents met the minimum standard for adequate parenting and provided guidance as to transition. In June, the Cabinet recommended unsupervised visitation. In July, CASA reported parental improvement and the family court ordered additional visitation with the children.

In January of 2020, both the Cabinet and CASA recommended more unsupervised visitation. The family court denied the request, but the goal remained return to parents. In February of 2020, Kelly negotiated a modified case plan with the parents providing for additional responsibilities. Parental visitation and attendance at medical appointments continued until suspended due to COVID-19. However, the parents were able to conduct visitations by video chat. In May of 2020, the family court expanded visitation, pending lifting of the COVID-19 restrictions.

In fact, a return to parents remained the family court's goal until May 27, 2020, when W.P. and L.P. filed their motion to intervene for purposes of requesting custody of K.C. and L.C. They also filed a separate custody action. Father, Mother, and the Cabinet objected to intervention but, following a hearing, the family court granted the motion to intervene, and temporary custody was

awarded to W.P. and L.P. Father and Mother's motion to alter, amend, or vacate was denied by order entered September 3, 2020. On October 6, 2020, the family court ordered that the DNA cases be closed and that all future motions be filed in the custody action. Father and Mother moved the court for findings of fact and conclusions of law.

A motion to intervene and for temporary custody was also filed by D.P. and T.P. as to R.C. in January of 2021. Those motions were also granted. On January 4, 2021, the family court entered its findings of fact, conclusions of law, and order regarding its previous orders of September 3, 2020, and October 6, 2020. R.C.'s case was then considered in the family court's supplemental findings of fact and conclusions of law entered on March 17, 2021.

In its initial findings of fact, conclusions of law, and order, the family court found as follows:

1. The parties were determined by a forensic mental health evaluation report dated 12/4/2017 that both parties lacked even minimal parenting skills.
2. The parties even since this time have not displayed appropriate parenting skills towards these children.
3. Even during periods of supervised visitation, the parties do not display appropriate parenting skills despite their completion of a case plan.
4. Even after the parents made a genuine effort to work their case plan it took approximately 15 months for them to complete it.

5. The Court commends that parties [sic] for overcoming any drug dependency they may have experienced in the past; however, the lives of these children also went on and they needed love, protection, consistency, stability, and permanency.
6. The minor children who were extremely young at the time of removal have become extremely attached to their foster parents. [R.C.] has not formed an attachment, or very little attachment, to her biological parents and cries during visits when she is required to go to her natural parents.

The family court then considered the Cabinet's position and found that its "primary goal is return to parent and not the best interest of the children regardless of the evidence that the parents have not substantially benefited from the various steps to correct their lack of parenting skills in their case plan." The family court also held that "[t]he [C]abinet should have taken action on this case much earlier to waive reasonable efforts[.]" It then stated that "[t]his Court has lost confidence in the Cabinet to seek the best interest of these children to allow the Cabinet to continue to have temporary custody would not be in the best interest of the minor children since the Cabinet has the exclusive right to determine placement of minor children in their custody." The court determined that it would be in the best interests of the children to allow W.P. and L.P. to intervene and award them temporary custody. In the family court's view, the Cabinet no longer had custody, it concluded that the issues no longer constituted a DNA proceeding, and the case was therefore ordered closed.

The court’s supplemental findings of fact, conclusions of law, and order, entered on March 17, 2021, contained virtually identical language, specifically awarding temporary custody of R.C. to D.P. and T.P. However, the order also provides for continued visitation of all three children by the natural parents. It then reiterates that the Cabinet is to close its file. It directs the parties to file all future motions in the pending custody cases. It is designated “final and appealable.”⁵

On appeal, Father and Mother argue, first, that the family court abused its discretion by violating the separation of powers doctrine by infringing on the Cabinet’s duties as part of the executive branch. Second, they assert that the foster parents are not “persons acting as a parent” for purposes of standing as provided in KRS 403.800(13). Finally, they claim that the family court committed a violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) by allowing the foster parents access to their forensic mental health evaluations. The Cabinet did not separately appeal from these orders and is designated as an

⁵ This matter was previously before this Court on the Appellees’ (W.P., L.P., D.P., and T.P.) motion to dismiss for lack of jurisdiction, arguing that the orders resulting in this appeal awarded temporary custody and therefore were interlocutory. The Court found that, because the March 17, 2021, order awarding custody closes the DNA cases and directs that all additional motions be filed in the custody actions, the order was final and appealable as provided in CR 54.02. Further, as the notice of appeal was filed within thirty days of the family court’s final order, it was timely and therefore dismissal was unwarranted. That order also granted the Appellees thirty days from the date of entry, January 12, 2021, to file their briefs. The Appellees’ briefs were not filed until February 10, 2022 (W.P., L.P., D.P., and T.P.) and April 8, 2022 (the Cabinet). Therefore, although expedited, the appeal did not reach the three-Judge panel until its June of 2022 session.

Appellee in these appeals. However, the Cabinet joins in Father and Mother's appellate arguments.

STANDARD OF REVIEW

In *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005), this Court described the proper analysis of a custody determination arising out of a DNA petition, particularly in the context of the family court system. While family court remains a circuit court with traditional jurisdiction, including the ability to adjudicate such issues as child custody and visitation, it also has "additional jurisdiction" over dependency, abuse, or neglect issues as provided in KRS Chapter 620. The Court then concluded that "the family court when hearing cases normally within the district court's jurisdiction, is not sitting as a district court, but rather as a circuit court given special jurisdiction to hear cases normally under the district court's charge." *Id.* at 216.

Once the family court has determined that a child is dependent or abused/ neglected, it must then make a proper disposition based upon the alternatives set forth in KRS 620.140, and in so doing, it must consider the best interests of that child in reliance upon KRS Chapter 403. *B.C.*, 182 S.W.3d at 218. Once that placement is made, a family member, custodian, guardian, or other legal representative of the child may move to continue that order.

The Court therein recognized, “In reviewing a child-custody award, the appellate standard of review includes a determination of whether the factual findings of the family court are clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person.” *Id.* at 219 (footnotes omitted). Once the appellate court determines that a factual finding is supported by such evidence, the lower court’s ruling will stand absent a showing of an abuse of discretion such that the ruling may be considered “unreasonable or unfair.” *Id.* See also *N.L. v. W.F.*, 368 S.W.3d 136 (Ky. App. 2012).

STANDING

KRS 405.020(3) provides that a *de facto* custodian may bring an action for “legal custody of a child[,]” upon a showing of that status as defined in KRS 403.270.

In *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010) (footnote omitted), a custody dispute between same-sex partners, the Kentucky Supreme Court held that:

Parents of a child have a fundamental, basic, and constitutional right to raise, care for, and control their own children. *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989). When a non-parent does not meet the statutory standard of *de facto* custodian in KRS 403.270, the non-parent pursuing custody must prove either of the following two exceptions to a parent’s superior right or entitlement to custody: (1) that the parent is shown by

clear and convincing evidence to be an unfit custodian, or (2) that the parent has waived his or her superior right to custody by clear and convincing evidence. [*Moore v. Asente*, 110 S.W.3d 336, 359 (Ky. 2003).]

However, in *Swiss v. Cabinet for Families and Children*, 43 S.W.3d 796 (Ky. App. 2001), the issue of standing was raised as to the foster parents' ability to petition for custody against the Cabinet. In that case, the parental rights of the child's biological parents had been terminated. On appeal, this Court affirmed the trial court's determination that the foster parents lacked standing and could not qualify as *de facto* custodians under KRS 403.270(1)(a) and (b). The Court concluded that "foster parents such as the Swisses may not use the *de facto* custodian statutes to challenge the cabinet's custody of the child where the child was placed with the foster parents by the cabinet." 43 S.W.3d at 797. The Court found that KRS 403.270 (1)(a) and (b) were meant to "apply to situations where the *de facto* custodian was involved in a dispute with a parent or parents." 43 S.W.3d at 798. Thus, while this requirement might be necessary in relation to the foster parents' custody action, in DNA cases such as this where temporary custody has effectively been awarded to the Cabinet, foster parents may not rely upon *de facto* custodian status to confer standing. *See also Truman v. Lillard*, 404 S.W.3d 863, 868 (Ky. App. 2012).

Not only has there been no finding that the foster parents herein qualify as *de facto* custodians, but there has been no finding that Father or Mother

has waived the right to custody, nor has there been any finding that either of them has been declared unfit. Thus, the foster parents cannot seek custody since there have been no findings that they have met the requirements for standing.

However, the foster parents have argued that, even if they do not have standing as *de facto* custodians, they still have standing as “[p]erson[s] acting as parents” as set forth in KRS 403.800(13), since they have had “physical custody for a period of six (6) consecutive months” and they have been “awarded legal custody by a court[.]”

KRS 620.140 sets forth the dispositional alternatives available to the court in a DNA case. An order awarding temporary custody to a third-party/non-relative is not among them. Further, this Court notes that KRS 620.360(1)(a)-(r), which sets forth the rights of foster parents, contains no provision permitting foster parents to seek custody. Therefore, there is no legal basis for them to assert a claim for custody in the DNA action. As such, this Court finds that the family court’s order awarding temporary custody to the foster parents must be reversed.

FINDINGS OF FACT

Furthermore, the family court failed to make any of the necessary findings which would have authorized it to grant custody to the foster parents.

KRS 403.270(2) requires a court in making a custody determination to consider **all** relevant factors including:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his or her custody;
- (b) The wishes of the child as to his or her custodian, with due consideration given to the influence a parent or de facto custodian may have over the child's wishes;
- (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interests;
- (d) The motivation of the adults participating in the custody proceeding;
- (e) The child's adjustment and continuing proximity to his or her home, school, and community;
- (f) The mental and physical health of all individuals involved;
- (g) A finding by the court that domestic violence and abuse, as defined in KRS 403.720, has been committed by one (1) of the parties against a child of the parties or against another party. The court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to each party, with due consideration given to efforts made by a party toward the completion of any domestic violence treatment, counseling, or program;
- (h) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (i) The intent of the parent or parents in placing the child with a de facto custodian;
- (j) 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; and

(k) The likelihood a party will allow the child frequent, meaningful, and continuing contact with the other parent or de facto custodian, except that the court shall not consider this likelihood if there is a finding that the other parent or de facto custodian engaged in domestic violence and abuse, as defined in KRS 403.720, against the party or a child and that a continuing relationship with the other parent will endanger the health or safety of either that party or the child.

(Emphasis added.)

This Court concludes that the family court's findings do not reflect consideration of the wishes of either the parents or the children. The court did not consider the motivation of the adults in the DNA case. The court made no findings as to the issue of domestic violence, although there appears to be some evidence of it in the record. The court did not indicate that it considered the likelihood that the foster parents would permit continuing contact with the parents. Finally, as set forth above, the family court made no finding as to the status of any party herein as a "*de facto* custodian" for purposes of standing. Clearly, these findings do not encompass "all relevant factors."

Further, this Court also notes that, with reference to custody determinations in cases under KRS Chapter 620, additional factors are to be considered in making a “best interest” finding. These include:

- (a) Mental illness as defined in KRS 202A.011 or an intellectual disability as defined in KRS 202B.010 of the parent, as attested to by a qualified mental health professional, which renders the parent unable to care for the immediate and ongoing needs of the child;
- (b) Acts of abuse or neglect as defined in KRS 600.020 toward any child;
- (c) Substance use disorder, as defined in KRS 222.005, that results in an incapacity by the parent or caretaker to provide essential care and protection for the child;
- (d) A finding of domestic violence and abuse as defined in KRS 403.720, whether or not committed in the presence of the child;
- (e) Any other crime committed by a parent which results in the death or permanent physical or mental disability of a member of that parent’s family or household; and
- (f) The existence of any guardianship or conservatorship of the parent pursuant to a determination of disability or partial disability as made under KRS 387.500 to 387.770 and 387.990.

KRS 620.023(1).

Perhaps most significant to this case is the application of KRS 620.023(2), which states, “In determining the best interest of the child, the court may consider the effectiveness of rehabilitative efforts made by the parent or

caretaker intended to address circumstances in this section.” The family court’s failure to make findings as to any of the above-referenced factors would have resulted in the necessity for reversal even if this Court had determined that W.P. and L.P. and D.P. and T.P. had standing to seek custody.

SEPARATION OF POWERS

Father and Mother, along with the Cabinet, also argue that the family court was without authority to order the DNA cases to be closed. In *Cabinet for Health and Family Services v. Huddleston*, 185 S.W.3d 222 (Ky. App. 2006), the Cabinet appealed an order of the family court directing it to keep children committed to its custody in Simpson County, despite the hardship it placed on the child’s mother to commute two hours for visitation. The Cabinet argued that the family court’s order violated the doctrine of separation of powers. This Court, relying on *Commonwealth v. Partin*, 702 S.W.2d 51, 53 (Ky. App. 1985), held that such an order violated Kentucky Constitution §§ 27 and 28 precluding the lower court from exercising the powers of the executive branch.

More recently, in *Cabinet for Health and Family Services v. Garber*, 340 S.W.3d 588, 590 (Ky. App. 2011), this Court held that by ordering the Cabinet to conduct an investigation into the potential for dependency, neglect, or abuse, the family court infringed upon the executive power vested in the Cabinet. The Court made a similar determination regarding a family court order directing the Cabinet

to open a case. *T.C. v. M.E.*, 603 S.W.3d 663 (Ky. App. 2020). Based on this precedent, the Court concludes that the family court did not have the authority to order the Cabinet to close its cases herein. Therefore, the family court's order must be vacated to that extent.

HIPAA VIOLATION

However, the final basis for reversal asserted by Mother and Father must be rejected. The case of *Caldwell v. Chauvin* contains an excellent overview of the operation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Court stated that:

The cornerstone of HIPAA's privacy rule presents a broad prohibition on the disclosure of medical information, providing that "[a] covered entity or business associate may not use or disclose protected health information, except as permitted or required by this subpart." A *covered entity* is defined to include health plans; health care clearinghouses; and health care providers, such as physicians and hospitals. *Protected health information* includes, with exceptions irrelevant here, "individually identifiable health information" transmitted or maintained in whatever form or medium. *Health information* includes information "whether oral or recorded in any form or medium" that pertains to the physical health of an individual.

464 S.W.3d 139, 148-49 (Ky. 2015) (footnotes omitted).

While the Court acknowledged that there are only two mandatory disclosure requirements, there are also certain "*permissible*" uses. Among those uses is the so-called "litigation exception," which provides for disclosure of

protected health information “in the course of any judicial or administrative proceeding” either “[i]n response to an order of a court of [sic] administrative tribunal” or “[i]n response to a subpoena, discovery request, or other lawful process, so long as additional safeguards are met.” *Id.* at 149 (quoting 45 C.F.R.⁶ § 164.512(e)(1)(i)-(ii)).

In this case, the “covered entity” made disclosure to the family court, and it was the *court* that ordered the forensic mental health evaluations to be disseminated to the foster parents. Therefore, no HIPAA violations occurred.

CONCLUSION

This Court holds as follows:

- 1) The family court abused its discretion by awarding temporary custody of K.C. and L.C. to W.P. and L.P., based on its lack of statutory authority to make such a disposition, its failure to make the necessary statutory findings to warrant such an award, and the movants’ lack of standing as either *de facto* custodians or as “persons acting as parents.”
- 2) The family court abused its discretion by awarding temporary custody of R.C. to D.P. and T.P. based on its lack of statutory authority to make such a disposition, its failure to make the

⁶ Code of Federal Regulations.

necessary statutory findings to warrant such an award, and the movants' lack of standing.

- 3) The family court further abused its discretion in ordering the Cabinet to close the DNA actions by violating the separation of powers doctrine.
- 4) Our holdings on these matters are applicable only with respect to the pending DNA actions. Any related issues pending in the custody actions are not before this Court and are not ripe for adjudication.

Accordingly, we reverse the temporary custody awards and remand the issues to the Hardin Family Court for continuation of the DNA actions in accordance with the *status quo* prior to the family court's award of temporary custody.

ALL CONCUR.

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