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Commonwealth of Kentucky

Court of Appeals

NO. 2021-CA-0510-ME

S.G. APPELLANT

v. APPEAL FROM WARREN FAMILY COURT
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 20-J-00501-001

CABINET FOR HEALTH AND
FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY;
D.C.; J.S.; AND L.G., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, MCNEILL, AND TAYLOR, JUDGES.

CALDWELL, JUDGE: S.G. (Mother)[1] appeals from the Warren Family Court's finding L.G. (Child) to be neglected, removing Child from the home, and committing Child to the Cabinet for Health and Family Services (CHFS). She

[1] To protect the privacy of the minor child, we refer to him and his natural parents and other family members by initials or relationship terms (such as Mother and Grandfather) rather than by their respective names.

contends that the family court improperly failed to honor the "Power of Attorney for Temporary Delegation of Parental or Legal Custody and Care Pursuant to KRS 403.352 and KRS 403.353"[2] she executed shortly after Child's birth.

Mother claims that she effectively conveyed custodial control and supervision of Child to Child's maternal grandfather J.S. (Grandfather) under this document. She argues the family court erred in denying her motion to dismiss the dependency, neglect, and abuse (DNA) action and in not allowing Child to live with Grandfather pursuant to the power of attorney (POA). But after careful review of the record and applicable law, we discern no reversible error in the family court's decisions based on the facts and procedural history here.

FACTUAL AND PROCEDURAL HISTORY

Mother gave birth to Child on or about November 18, 2020. The morning of November 20, Mother signed the POA/temporary delegation document. Grandfather also signed the document, accepting his designation as the attorney-in-fact. The document was notarized, with the notary's attestation that Mother and Grandfather appeared before the notary at 7:50 A.M. The document was recorded at the Warren County Clerk's office at 8:47 A.M.

[2] KRS refers to "Kentucky Revised Statutes."

About 10:30 A.M. that same morning, CHFS filed a Juvenile Dependency, Neglect or Abuse Petition with Emergency Custody Order Affidavit in the Warren Family Court. The petition stated that Mother had executed a document purportedly making Child's maternal grandmother (Grandmother) – who had a significant history with CHFS – Child's guardian. But the petition made no reference to the POA regarding Grandfather.

According to the DNA petition, Mother had tested positive for marijuana at Child's birth[3] and had tested positive for marijuana and methamphetamine during her pregnancy. The petition further alleged Mother had a significant history with CHFS, that her three older children had all been removed and placed in foster homes, and that Mother had not made significant progress on her case plan causing concern that Child was at risk of harm.[4]

[3] The petition also noted that Child initially tested negative at birth but that his meconium had been sent for further testing.

[4] The petition also indicated that CHFS had concerns about Grandmother's acting as Child's guardian and detailed Grandmother's history with CHFS. And CHFS asserted in the petition that Mother's older children were not placed with Grandmother due to Grandmother's history with CHFS. Mother later asserted to the family court that no children were ever removed from Grandmother's home. Nonetheless, the DNA petition regarding Child indicated a history of Grandmother being investigated by CHFS and needing services. The record does not indicate that Grandmother and Grandfather (maternal grandparents of Child) lived together or were married to each other during the proceedings at issue here.

The petition further stated that Child would likely be discharged from the hospital that same day once custody arrangements were made. Grandfather was listed on the petition as a person living at the same address as Mother.[5]

The family court entered an order granting emergency custody of Child to CHFS that same day. The family court found that Child was in immediate danger due to his parents' failure or refusal to provide for his safety and needs. The emergency custody order (ECO) listed Mother as living at a different address than that listed for her and Grandfather on the DNA petition. The ECO included Grandfather among a list of persons to be present at the temporary removal hearing, which was set for November 23. Child went home with a foster family upon his discharge from the hospital.

Following entry of the ECO, Mother filed a motion to dismiss that same day. She argued that she did not have custody of Child when the DNA petition was filed because of the POA she had executed. She also asserted that, under its own explicit terms, the POA became effective when signed and notarized at 7:50 A.M. that morning.

She claimed her attorney had spoken with a staff member in the family court's office to verify that no DNA petition had been filed nor ECO

[5] The petition also listed a name for Child's father, but it indicated the father's address was unknown. No issues regarding Child's father's rights have been raised in this appeal.

entered prior to the recording of the POA at 8:47 A.M.[6] So, she argued she had authority to execute the POA. And she contended there was no reason to disregard the POA.

The family court conducted the temporary removal hearing via Zoom or similar platform on November 23, 2020. Some concerns were raised by the family court and other parties that proper notice had not been provided and a hearing date and time had not been properly requested from the court for the motion to dismiss. Nonetheless, the parties and family court discussed the POA during this hearing and whether it meant that the motion to dismiss should be granted.

During this discussion, the assistant county attorney pointed out that the POA could be revoked at any time[7] and would terminate after one year at the

[6] She also claimed that the same staff member called her attorney after the POA was recorded to say that a DNA petition had just been filed but that the emergency hearing had not yet been scheduled. However, she did not explicitly state in the motion to dismiss whether her attorney discussed the execution or recording of the POA designating Grandfather as the attorney-in-fact with the staff member. (Her appellant brief claims her attorney told the staff member about the execution of the POA.) Though Mother claims in her brief that the family court was aware of the existence of the POA when the ECO was entered, we are unaware of anything in the record definitively showing whether the family court judge was subjectively aware of the POA before entering the ECO.

[7] From our review of the POA document in the record, it did not explicitly state that Mother was able to revoke the POA at any time although it stated that it would be effective for no longer than one year. However, the POA was styled as a "Power of Attorney for Temporary Delegation of Parental or Legal Custody and Care Pursuant to KRS 403.352 and KRS 403.353." (Record (R.), p. 24.) KRS 403.352(3) explicitly states: "The parent or legal custodian of the child shall have the authority to revoke or withdraw the power of attorney authorized by this section at any time." And the sample form provided in KRS 403.353 contains a provision stating: "I reserve the right

most. And the family court judge succinctly opined that the POA was not really about custody. So, the family court judge denied the motion to dismiss and heard testimony from the ongoing social worker about the reasons for seeking removal. Mother did not present evidence at this hearing.

Following the temporary removal hearing, the family court entered a written order placing Child in CHFS' temporary custody with a recommendation to: "[e]xplore relative placement[.]" (Temporary Removal Order attached to appellant brief, p. 1; also R., p. 25.) Based on the social worker's testimony, the family court found that Mother had a history of substance abuse and mental health issues leading to Child's siblings' removal and that Mother was not in compliance with her case plans. And it found that Mother had tested positive for marijuana during her pregnancy and at Child's birth. The family court noted the social worker did not recommend Grandfather "receiving custody" due to concerns about Mother having resided with Grandfather during her pregnancy. (R., p. 29.)

The family court determined that reasonable efforts had been made to prevent Child's removal from the home and that Child's best interests required a "change of custody of the child from the home of Mother." (R., p. 29.) The family

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to revoke this authority at any time." KRS 403.353(1). Although the executed POA here does not contain such an explicit reservation of the right to revoke, presumably Mother still had a right to revoke under KRS 403.352(3) especially as she styled the POA as being one authorized by KRS 403.352 and KRS 403.353. And Mother has not argued to the family court or to this court that the POA was not revocable.

court also concluded that less restrictive alternatives than removal from Mother's home were not available due to Mother's history of substance abuse and her testing positive for marijuana at Child's birth.

Before the case proceeded to adjudication, Mother filed a second motion to dismiss. After hearing argument on the motion to dismiss, the family court denied this second motion to dismiss. The family court judge orally emphasized the revocable nature of the POA as a basis for this decision.

The adjudication then proceeded. The ongoing social worker testified about Mother's history with CHFS, failure to fully comply with case plans (including drug screening requirements), and positive drug tests during pregnancy and at Child's birth. The family court took judicial notice of its orders entered in Child's siblings' DNA cases.

Mother did not stipulate to a finding of neglect. However, she stipulated to her positive drug tests, her having a substance abuse problem, and it not being appropriate for Child to live with her at present. Neither Mother nor Grandfather testified nor did Mother present any other evidence.

The family court adjudicated Child to be a neglected child. It based its neglect finding upon two grounds: 1) Child's parents having created a risk of harm by non-accidental means, and 2) Child's parents engaging in a pattern of

conduct rendering them unable to meet Child's needs – including but not limited to parental incapacity due to a substance use disorder.

Subsequently, at the disposition hearing, the social worker admitted that the home evaluation of Grandfather had not been finalized. She admitted that Grandfather had no criminal history, besides a citation for failure to wear a seatbelt, and no personal CHFS history (*i.e.*, CHFS had never conducted investigations of possible child abuse or neglect based on his own conduct). But she expressed concerns about Grandfather's protective capacity based on her observing that he failed to intervene when one of Child's older siblings was slapped by the older sibling's father. She also expressed concerns about Mother's having lived in Grandfather's residence when the older children were removed and while Mother was using illicit substances during her pregnancy.

The social worker testified that Mother had recently been frequently seen with Grandfather, who took Mother to visitations and hearings. So, she had concerns about whether Mother would be allowed unsupervised contact with Child despite Grandfather's having said he would not permit such unsupervised contact. However, the social worker indicated that she was consulting her regional office about the matter. The family court judge also expressed concerns that Mother might return to live with Grandfather and revoke the POA.

Mother's attorney advised the family court that Grandfather told the attorney that Grandfather would not allow Mother to live in his home or visit Child outside Grandfather's presence. And counsel pointed out that Grandfather had previously worked nights and thus had not been aware of everything going on at his residence, especially since Mother lived in the basement then. Counsel asserted that none of the parents of Child or his siblings lived in Grandfather's residence anymore, however.

Counsel also said that Grandfather was no longer working outside the home but was simply deriving income from rental homes so Grandfather would be home to take care of Child himself and could better control what others did in the home. Mother's counsel also said Grandfather would agree to CHFS placing cameras in his home to see who was coming and going. However, Grandfather did not testify nor did Mother testify or present other evidence.

The family court judge inquired about when Grandfather's home evaluation would be final and indicated that needed to be filed and reviewed. But she noted that the home evaluation did not determine custody. Ultimately, the family court committed Child to CHFS. (The family court had orally noted at the hearing that CHFS would determine placement.) Its written order included provisions requiring Mother to comply with her case plan, including drug screening, and setting a review hearing about 90 days later.

STANDARD OF REVIEW[8]

Our Supreme Court's precedent indicates that we must review factual findings for clear error, legal conclusions *de novo*, and the determination of whether Child is neglected and what remedial action is taken for abuse of discretion. *See Cabinet for Health and Family Services v. R.S.*, 570 S.W.3d 538, 546 (Ky. 2018). And as our Court has recognized, in reviewing a family court's custody decision in DNA proceedings, "the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion." *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005).

[8] The appellant brief does not comply with the requirement in Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) that an appellant brief "shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Though arguably we could review this case only for manifest injustice rather than under otherwise applicable standards of review due to the lack of a preservation statement in the appellant brief, *see Ford v. Commonwealth*, 628 S.W.3d 147, 155 (Ky. 2021), the issues raised appear to be preserved for appeal (since they were raised to the family court) based on our review of the record.

Given the apparent preservation of the important issues raised in the appellant brief, we decline to review solely for manifest injustice. Though we do not see fit to review only for manifest injustice and we decline to strike the brief under CR 76.12(8)(a), we are not required to be so lenient for future non-compliance. For future reference, we direct counsel's attention to the appellate practice handbook and briefing checklists available as PDF resources on our Court website. https://kycourts.gov/Courts/Court-of-Appeals/Pages/default.aspx. (Last visited Mar. 21, 2022.)

POA Document in Record May be Considered on Appeal

Regardless of whether the POA document attached to the motion to dismiss technically qualified as evidence *per se*,[9] the family court heard arguments about how the POA should affect the proceedings based on our review of the recorded hearings. Since the family court and parties discussed the POA and the document is contained in the written family court record at pages 24 and 74 as an attachment to both motions to dismiss, we reject any arguments that the POA is not in the record or must be wholly ignored in resolving this appeal. On its face, the document appears to have been properly executed. Both Mother and Grandfather signed it and it was notarized.

Though we reject any argument that the family court could not consider the signed and notarized POA in the record at all in this DNA proceeding, the mere existence of the document did not prove whether Grandfather had an

[9] To the extent that any evidentiary nature of the POA document depended on it being submitted as an attachment to a motion to dismiss converted to a motion for summary judgment, publicly recorded documents attached to motions to dismiss have been held not to convert such motions to ones for summary judgment. *See Netherwood v. Fifth Third Bank, Inc*., 514 S.W.3d 558, 563-64 (Ky. App. 2017). Nonetheless, as a document attached to both motions to dismiss, the POA document was available for the family court's consideration. *See Ford v. Faller*, 439 S.W.3d 173, 182 (Ky. App. 2014) ("The exhibits attached to Faller's motion for summary judgment were documents that the Family Trust filed as part of its complaint. As these exhibits were documents attached to a pleading, the trial court did not err in considering them."). Furthermore, the family court and parties discussed some basic characteristics of the POA document such as its revocability. And the family court heard argument from the parties about whether the DNA proceeding should be dismissed because of the POA. So, any arguments that the POA was not presented to the family court for its consideration or that the POA's existence must be completely ignored on appeal are without merit.

enforceable right to custody of Child. For example, KRS 403.352(3) provides that parents have the authority to revoke such POAs temporarily delegating parental authority at any time. And the POA in the record contains a provision – not contained in the sample form at KRS 403.353[10] – that Grandfather's authority under the POA terminates in certain events including Grandfather's becoming incapacitated or otherwise "**unable** or **unwilling** to serve[.]" (R., p. 25) (emphasis added). Clearly, either Mother or Grandfather could terminate the POA at any time for any reason.

Additionally, KRS 403.352(2)(b) specifically provides that any temporary delegation of rights and responsibilities shall not deprive a parent or legal custodian of any parental or legal rights, obligations, or authority regarding the custody, visitation, or support of the child. Thus, the family court reasonably viewed the POA as not providing for Child's care and protection on a long-term basis.

Meanwhile, the family court knew of CHFS' continuing intervention regarding the care and custody of Mother's other children due to substance abuse and mental health issues as well as Mother's recent positive drug tests and lack of full compliance with case plans. Under these circumstances, we discern no

[10] KRS 403.353(1) states that such POAs/temporary delegations may contain directions not in the sample form if such directions are in accord with accepted legal practice and are not otherwise prohibited by other statutes.

reversible error in the family court's not recognizing Grandfather as having custody of Child based simply on the document's existence **without any evidence** showing that the POA had not been revoked or withdrawn and that Grandfather remained willing and able to serve. Furthermore, explicit language in the statutes permitting such temporary delegations of parental authority by revocable POAs indicates that execution of such documents does not preclude a finding of neglect against a parent.

Executing a Revocable Power of Attorney Temporarily Delegating Some Parental Rights and Responsibilities Pursuant to KRS 403.352 and KRS 403.353[11] Does Not Preclude a Finding of Neglect Against a Parent

KRS 403.352(1) states:

> (1) A parent or legal guardian of a child, by a properly executed power of attorney, as established in this section and KRS 403.353, may temporarily delegate to another person, named in the instrument as the attorney-in-fact, for a period not to exceed one (1) year any of the traditional parental rights and responsibilities regarding care and custody of the child except the following authorities:

[11] After the family court proceedings on review here concluded with disposition in the spring of 2021, KRS 403.352 and KRS 403.353 were both amended effective June 29, 2021. One subsection of KRS 403.352 specifically applying only to deployed military service members was removed and remaining subsections were renumbered accordingly. KRS 403.353, which provides a form for these temporary delegations by POA, was also amended to refer to newly enacted legislation regarding deployed military service members in KRS Chapter 403A (Uniform Deployed Parents Custody and Visitation Act). But the substance of KRS 403.352 and KRS 403.353 regarding the issues on appeal here did not change. In fact, subsections 1-10 of KRS 403.352 (portions of which we discuss in this Opinion) were not changed at all by the late-June 2021 amendments.

(a) Consent for the child to marry;

(b) Consent for an abortion or inducement of an abortion to be performed on or for the child; or

(c) The termination of parental rights to the child."[12]

Mother argues that in enacting KRS 403.352 and KRS 403.353, the legislature intended that an attorney-in-fact under such a POA have "custodial control and supervision" of a child. She notes that a child can be found neglected due to certain specified actions or inactions by a "person exercising custodial control or supervision of the child" under KRS 600.020(1)(a). She points out that a *person exercising custodial control or supervision* is defined in KRS 600.020(47) as "a person or agency that has assumed the role and responsibility of a parent or guardian for the child, but that does not necessarily have legal custody of the child[.]"

[12] Though the POA in the record was executed in November 2020 and would have therefore expired in any event by November 2021, Mother presumably could have simply executed another similar POA upon its expiration. *See* KRS 403.352(8). And assuming the November 2020 POA had not been revoked or withdrawn or terminated for other reasons such as Grandfather becoming unable or unwilling to serve, this POA was presumably still in place as it would have not automatically expired during the proceedings on review here as the disposition occurred in the spring of 2021 – less than a year after execution of the POA. Thus, the issues presented here – *i.e.*, whether the motion to dismiss was erroneously denied due to the POA and whether the family court erred in not allowing Child to live with Grandfather pursuant to the POA – have not become moot based on the POA's provision that it would be effective for no more than one year.

Mother argues that only the actions or inactions of such a person with custodial control or supervision could lead to a child being found in neglect.[13] She contends that after the execution of a temporary delegation by POA pursuant to KRS 403.352 and KRS 403.353, only the conduct of the designated attorney-in-fact (here Grandfather) could validly form a basis for finding a child to be neglected. We disagree.

KRS 600.020(1)(a) defines an *abused or neglected child* as "a child whose health or welfare is harmed or threatened with harm" in specified ways by the actions or inactions of: "[h]is or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, **or** other person exercising custodial control or supervision of the child[.]" (Emphasis added.) A *parent* is explicitly defined as "the biological or adoptive mother or father of a child[.]" KRS 600.020(46). Mother is indisputably one of Child's biological parents.

Our Supreme Court rejected a parent's argument that he could not properly be found to have neglected his child because he was not exercising

[13] Mother also states in pages 12-13 of her appellant brief that the family court found or indicated at various stages that Mother was exercising custodial control and supervision over Child. And Mother contends that the family court's orders "are predicated on the wrong assumption that the mother was exercising custodial control over [Child] when the Petition against her [Mother] was filed." (Appellant brief, p. 13.) While we are unaware of any explicit statement that Mother exercised custodial control and/or supervision over Child in the family court's written orders, we do not share Mother's view that a parent must be found to have or exercise custodial control or supervision over his/her child in order to be found in neglect as we explain in the body of this Opinion.

custodial control and supervision of the child. *See Cabinet for Health and Family Services on behalf of C.R. v. C.B.*, 556 S.W.3d 568, 573 (Ky. 2018) ("Grammatical construction, logic, and our prior case law support the statutory interpretation that a parent does not have to be exercising control or supervision in order to be found to have neglected or abused a child."). Specifically, our Supreme Court interpreted the "exercising custodial control or supervision" language in KRS 600.020(1)(a) as modifying the only the reference to an "other person." *Id*. at 572.

Thus, even assuming *arguendo* that Mother (a parent of Child) lacked custodial control or supervision over Child after executing the POA, we cannot disturb the neglect finding based on such lack of custodial control or supervision. *See* Kentucky Supreme Court Rules ("SCR") 1.030(8)(a) (Court of Appeals bound by Supreme Court precedent).

Clearly, a lack of custodial control or supervision does not preclude a finding of neglect against a parent. And a child can be found neglected based on his/her parents' conduct if the family court finds any of several alternate grounds listed in KRS 600.020(1)(a). Here the family court found: 1) Mother created or allowed to be created a risk of injury to Child by non-accidental means, and 2) Mother engaged in a pattern of conduct making her unable to provide for Child's immediate and ongoing needs – including parental incapacity due to substance use disorder. *See* KRS 600.020(1)(a)2.; KRS 600.020(1)(a)3. The family court's

findings noted CHFS' prior involvement with the family due to Mother's drug use, Mother's admitted use of marijuana while pregnant and testing positive for marijuana at Child's birth, Mother's DNA case history regarding her older children, and Mother's failure to fully comply with her case plans including drug screening and attending therapy.

As the finding of neglect is based on Mother's conduct prior to executing the POA, any attempt to delegate custodial control or supervision over Child to Grandfather by executing the POA is irrelevant to reviewing the finding of neglect. And the family court's factual findings are supported by the evidence. In fact, Mother stipulated to her positive drug results during pregnancy and at Child's birth, her substance abuse issues, and her not being able to presently provide appropriate care for Child.

Furthermore, the family court did not abuse its discretion in determining that Mother neglected Child by creating a risk of harm to Child and engaging in a pattern of conduct rendering her unable to meet Child's needs based on the record before us. In short, despite Mother's execution of the POA after Child's birth, there is no reason to disturb the neglect finding against her.

Mother argues, however, that even if the family court could properly find neglect, the family court should have recognized Grandfather as having custody of Child under the POA. We disagree.

Execution of a Revocable Power of Attorney to Temporarily Delegate Some Parental Rights or Responsibilities Pursuant to KRS 403.352 and KRS 403.353 Has Limited Effect and Does Not Affect a Parent's Legal Rights and Obligations Concerning the Child's Care and Custody

Mother argues that because the POA was executed and recorded before the DNA petition was filed, she had authority to execute it. So, she claims there was no reason for the family court to allow the DNA proceedings to continue and that the family court should have just recognized Grandfather as having custody – at least physical – of Child. We disagree.

Persuasive Authority from Other Jurisdictions Construes Similar POAs as Ineffective to Convey Sufficient Parental Authority to Another Person to Avoid DNA Proceedings When Parents are Unable to Care for Child

Regardless of whether she managed to execute or record the POA before the DNA petition regarding Child was filed, the POA could be revoked at any time and its effect was limited so it did not result in Mother's giving up and Grandfather assuming the role and responsibilities of being Child's parent contrary to Mother's argument in her brief. *See In re Welfare of Child of T.C.M.*, 758 N.W.2d 340, 346-47 (Minn. Ct. App. 2008) (rejecting parent's argument in appeal of termination of parental rights, that parent had no parental rights left to terminate after executing a similar revocable POA temporarily delegating parental powers as "[t]he delegation of parental authority is a temporary, revocable grant of a limited power of attorney that does not divest appellant of her parental rights" under Minnesota law). *See also Matter of Maricopa County Juvenile Action No. JD-*

05401, 173 Ariz. 634, 636 n.1, 845 P.2d 1129, 1131 n.1 (Ariz. Ct. App. 1993) (whether a parent's execution of a temporary delegation of parental authority by revocable POA occurred prior to the filing of a dependency petition was irrelevant because revocable POA/temporary delegation does not create a guardianship which would obviate all allegations of dependency under Arizona law).

We recognize that these decisions by other states' courts construe other states' statutes which are not identical to Kentucky statutes. Still, we view the reasoning expressed therein as persuasive – especially given the limitations expressed in KRS 403.352 and in the POA document in the record itself which we address later.

Here, mere execution of the POA by itself did not establish a lack of reason for the family court's intervention, especially given the other DNA cases before the family court in which Mother's other children had been removed and in which CHFS claimed Mother was not fully complying with her case plans (including drug screening requirements).[14] Although Grandfather is clearly a close

[14] *See generally In re Beeler*, No. 337357, 2017 WL 3441775 (Mich. Ct. App. Aug. 10, 2017) (unpublished) (affirming trial court's adjudication of neglect by parents despite their executing a revocable POA/temporary delegation of parental authority to a recent acquaintance prior to child's birth considering mother's mental health issues, termination of Mother's parental rights to other children, and both parents' homelessness). We recognize that this *per curiam*, unpublished opinion from the Michigan Court of Appeals is not binding authority on this Court and that it discusses Michigan law rather than Kentucky law. Nonetheless, it involves some similar issues and its discussion of these issues bears some consideration in light of the apparent lack of Kentucky case law construing the issues here.

relative who Mother presumably has known a long time, Mother's prior history occurring in Grandfather's residence could reasonably elicit concern for Child's protection there in spite of Mother's execution of the POA/temporary delegation of parental authority to Grandfather. Particularly since Mother did not come forward with evidence to address such concerns.

Based upon the evidence in the record before us, we conclude that the family court reached the proper result despite any differences between the family court's reasoning and ours.[15] Though the family court judge did not engage in detailed discussions of the effect of the POA document or various types of custody, the judge explicitly noted that the POA was revocable at any time and generally opined that the POA was not about custody. This view is consistent with case decisions from other states which ultimately found parents' execution of similar revocable POAs/temporary delegations to not preclude courts from exercising jurisdiction in proceedings aimed at protecting children from neglect, abuse, or dependency. *See generally T.C.M.*, 758 N.W.2d 340; *Matter of Maricopa County*, 173 Ariz. 634, 845 P.2d 1129.[16]

[15] To the extent that our reasoning differs from the family court's, we still have the authority to affirm on alternate grounds. "If an appellate court is aware of a reason to affirm the lower court's decision, it must do so, even if on different grounds." *Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co.*, 434 S.W.3d 489, 496 (Ky. 2014).

[16] *See also generally In re Beeler*, 2017 WL 3441775.

Significant Limitations on Effect of Temporary Delegations of Parental Authority by Revocable POAs Are Stated in KRS 403.352

Furthermore, there are significant, express limitations on the legal effect of such temporary delegations by revocable POAs in KRS 403.352 despite the statement in KRS 403.352(6) that: "Unless the power of attorney established by this section is terminated, revoked, or withdrawn, the attorney-in-fact named in the instrument shall exercise parental or legal authority on a continuous basis for the duration of the power of attorney established by this section."

For example, KRS 403.352(2) explicitly provides that the temporary delegation of some parental rights and responsibilities under such a POA "shall not: (a) [o]perate to change or modify any parental or legal rights, obligations, or authority established by an existing court order; or (b) [d]eprive the parent or legal custodian of any parental or legal rights, obligations, or authority regarding the custody, visitation, or support of the child." In short, KRS 403.352(2) recognizes that execution of the type of POA described in KRS 403.352 and KRS 403.353 does not change existing court orders about or otherwise affect a parent's rights, obligations, and authority regarding child custody.

KRS 403.352(7) also states that when a child resides with an attorney-in-fact under such a temporary delegation, foster care rules and regulations do not apply and the arrangement is not considered an out-of-home placement.

And KRS 403.352(8) specifically discusses the effect of a temporary delegation/POA in neglect proceedings:

> Except as otherwise provided pursuant to the Kentucky Revised Statutes, the execution of a power of attorney as established pursuant to this section by a parent or legal guardian shall not by itself constitute evidence of abandonment, abuse, or neglect, unless the parent or legal guardian fails to take custody of the child or execute a new power of attorney after the one (1) year time limit has elapsed. Nothing in this subsection shall be interpreted to prevent an investigation of abuse, neglect, abandonment, other mistreatment of a child, or other crime.

In other words, such a temporary delegation of some parental rights and responsibilities under a POA cannot – by itself – amount to neglect. But KRS 403.352(8) also indicates a parent's execution of a POA under KRS 403.352 and KRS 403.353 does not prevent a finding of neglect since investigations of neglect are explicitly not precluded.

Admittedly, KRS 403.352 does not explicitly state that a parent is forbidden from executing a temporary delegation by POA if the parent has any history of DNA or similar proceedings filed against him or her. Yet, the legal effect of such a temporary delegation by revocable POA is still limited by KRS 403.352(8) and KRS 403.352(2) and other provisions in KRS 403.352.

KRS 403.352 explicitly puts limits on when a parent's execution of this type of POA/temporary delegation can be properly recognized. For example,

the parent may not execute a POA/temporary delegation to permanently avoid parental or legal responsibility for the child's care or for any fraudulent or illegal purpose. KRS 403.352(9)(a). Also, if a parent does not designate a grandparent or other specifically listed close relative as the attorney-in-fact, a criminal background check is required to accompany the POA. KRS 403.352(10). (Though Grandfather is undisputedly Child's grandparent and a criminal background check is thus not required to accompany the POA under the statute, this provision still shows limitations on parental authority to execute such POAs.)

In short, this type of temporary and revocable designation of some parental rights under KRS 403.352[17] and KRS 403.353 does not significantly affect one's parental rights, responsibilities, and obligations – despite the attorney-in-fact's temporarily being able to exercise some parental authority during the POA's existence under KRS 403.352(6). And despite the placement of these statutes in KRS Chapter 403 among other statutes concerning child custody (often in the context of divorce) and the suggested title for a such POA/temporary delegation referring to "parental or legal custody" in the sample form in KRS 403.353,

[17] Though not necessarily relevant to the instant case at the present juncture, KRS 403.352 also contains a provision stating: "Any period of time during which a child resides with an attorney-in-fact under an unexpired and valid power of attorney properly executed pursuant to this section and KRS 403.353, shall not be included in determining whether the child has resided with the attorney-in-fact for the minimum period required to be designated a de facto custodian pursuant to KRS 403.270(1)." That provision appeared at KRS 403.352(12) in the version applicable during the proceedings below which we review here, but it has since been renumbered as KRS 403.352(11) following amendment effective June 29, 2021.

executing such a POA does not amount to a parent's ceding all custody and decision-making power regarding a child to the designated attorney-in-fact. At most, KRS 403.352 allows one to temporarily delegate physical custody of a child to another person – along with limited powers to make certain specific decisions such as enrolling a child in school or seeking medical care for the child – with the parent free to revoke and with the attorney-in-fact free to decline to serve at will.

Mother seemingly concedes that executing a document in conformance with KRS 403.352 and KRS 403.353 does not convey full legal custody of a child to the attorney-in-fact. But Mother argues that even if the finding of neglect against Mother was correct, the family court erred in not recognizing what she perceives as its full legal effect.

Whether Grandfather Was Personally Entitled to Custody of Child Not Properly Before Us

Mother argues in her appellant brief that the family court effectively removed Child from Grandfather without affording him the due process required under Kentucky law.[18] But she does not cite any authority for this proposition nor address how she has the authority to assert Grandfather's due process rights as

[18] Unlike Mother, Grandfather has not filed an appellate brief despite being named as a party to this appeal on Mother's notice of appeal. Furthermore, the notice of appeal lists Mother as the only appellant. There is no indication that Mother's brief was filed on Grandfather's behalf as well as her own or that Mother's attorney also represents Grandfather. In short, we are unaware of Grandfather's views or how he wishes to proceed at this juncture.

opposed to her own. And we are not obligated to research and argue issues for her. *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005).

No Reversible Error in Family Court's Custody and Placement Decisions

Other than unsuccessfully claiming that the family court erred in its finding of neglect and in its not simply recognizing Grandfather as having custody under the POA, Mother does not argue that the family court failed to protect Mother's significant constitutional interests in making decisions about Child's custody and care[19] or that the family court otherwise failed to follow controlling authority in its rulings. For example, Mother does not claim that the family court failed to make statutorily required findings to support its emergency custody, temporary removal, temporary custody, adjudication, or disposition orders. *See generally* KRS 620.060, KRS 620.080, KRS 620.090, KRS 620.130, and KRS 620.140.

Furthermore, Mother does not claim that the family court failed to consider less restrictive alternatives, *see* KRS 620.130, or her wishes for relative placement. *See* KRS 620.060 and KRS 620.090. And though we do not suggest that family courts may never consider a parent's wishes as expressed in a

[19] *See Troxel v. Granville*, 530 U.S. 57, 66-69, 120 S. Ct. 2054, 2060-62, 147 L. Ed. 2d 49 (2000).

temporary delegation by revocable POA,[20] we discern no abuse of discretion in the family court's custody and placement decisions under the facts here.

The main purpose of DNA proceedings is protecting the health and safety of children rather than determining adults' rights to child custody. *See, e.g.*, *N.L. v. W.F.*, 368 S.W.3d 136, 147 (Ky. App. 2012); *S.R. v. J.N.*, 307 S.W.3d 631, 637 (Ky. App. 2010) (recognizing that the purpose of DNA proceedings is to protect children, not to rehash parents' custody issues). And given the evidence presented about the ongoing social worker's concerns about Child's safety in Grandfather's home contrasted with the lack of evidence presented by Mother to refute such concerns,[21] we discern no reversible error in the family court's declining to order that Child begin residing in Grandfather's home at disposition and instead ordering that Child be committed to CHFS at that time.

In sum, we hold that a parent's execution of such a temporary delegation by revocable POA provided for in KRS 403.352 *et seq.*, does not – by itself – require that the family court must place the child in the custody of the designated attorney-in-fact when the family court has found neglect on the parent's part. After all, a finding of neglect indicates a need for some degree of state

[20] Other cases may involve different facts which would lead a court to reasonably conclude that, based upon the evidence before it, placing a child in the custody of the designated attorney-in-fact is in the child's best interest despite the limitations on the effect and duration of the POA.

[21] An attorney's arguments are not evidence. *Dixon v. Commonwealth*, 263 S.W.3d 583, 593 (Ky. 2008).

intervention with the parent/child relationship in order to protect the child[22] and results in the parent no longer having unfettered decision-making authority concerning the child's care and custody. So, a court must carefully consider in such situations whether the parent's wishes as expressed by executing this type of POA may be honored while also making sure that steps are taken to protect the child from known risks of harm – based on the evidence, facts, and circumstances before it. With that in mind, we discern no reversible error in the family court's disposition of this matter under the unique facts and circumstances of this case.

Further arguments in the briefs which we have not discussed herein have been determined to lack merit or relevancy to resolving this appeal.

CONCLUSION

For the reasons stated herein, we AFFIRM.

ALL CONCUR.

[22] *See* 15 LOUISE E. GRAHAM & JAMES E. KELLER, KENTUCKY PRACTICE – DOMESTIC RELATIONS LAW § 6:19 *Protective services – full adjudicatory hearing* (Nov. 2021 update) (whether abuse or neglect occurred is determined at adjudication, where the state must prove its "factual basis for its claim to intervene in the parent-child relationship").

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