RENDERED: MARCH 11, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000104-ME

E.Y. APPELLANT

v. APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 14-J-00046

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; R.C., FATHER; AND B.Y., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: E.Y. appeals from the Spencer Circuit Court's denial of her motion to alter, amend or vacate the court's September 29, 2014 adjudication order finding E.Y.'s minor child, B.Y., dependent. For the following reasons, we affirm.

E.Y. is the mother to two children, M.Y., age 2, and B.Y., age 9 months. She is unemployed, lives with her mother, and does not have a driver's license. M.Y. has special needs; specifically, she has low muscle tone and is developmentally delayed. M.Y. was removed from her mother's care by the Cabinet for Health and Family Services ("Cabinet") under an emergency petition filed October 8, 2013, after E.Y. was observed sitting outside her home on a trampoline with M.Y. while the house was being bombed for insects. M.Y. had not been fed that day and had fleas in her hair. At M.Y.'s adjudication hearing, E.Y. stipulated to risk of neglect and M.Y. has been in the Cabinet's custody since.

B.Y. was born June 3, 2014, and was removed the next day pursuant to an emergency petition. That same day, the Cabinet filed a juvenile dependency, abuse and neglect petition with respect to B.Y., alleging risk of neglect. An adjudication hearing on the petition filed for B.Y. was held on September 23, 2014. At the adjudication hearing, both E.Y. and the Cabinet attempted to proffer expert testimony concerning E.Y.'s intelligence level. However, the Cabinet's expert was unavailable on the date of the hearing, and the court denied the Cabinet's motion for a continuance. E.Y. did not disclose her expert prior to the hearing, and thus her expert's testimony was excluded from trial and was only permitted to be provided as an avowal. Accordingly, no expert testimony was heard on the subject of E.Y.'s mental capabilities.

The social workers assigned to B.Y.'s case testified that E.Y. has trouble making parenting decisions. They each noted that while E.Y. can go

through the motions of parenting, she cannot make decisions without prompting or instruction; for example, E.Y. had trouble with overfeeding B.Y. Both social workers also testified that E.Y. often became frustrated with M.Y. and had once forcefully pushed M.Y.'s head back when M.Y. failed to hold her head up while feeding. Furthermore, E.Y. had not completed her case plan provided to her by the Cabinet for M.Y.; she did not complete mental health treatment or vocational rehabilitation, and she failed to find employment or independent housing. Additionally, E.Y. often missed or showed up late to M.Y.'s medical and therapeutic appointments. E.Y. testified that adhering to the schedule set by the Cabinet for M.Y.'s many appointments was difficult and made finding an employer who could work around that schedule impossible. She further testified that she has passed the written portion of the driver's license exam, but has yet to pass the driving portion.

At the conclusion of the adjudication hearing, the trial court found that the Cabinet had not met its burden with respect to the neglect allegations. However, the trial court found B.Y. to be dependent and ordered that B.Y. remain in the temporary custody of the Cabinet. The court's order on the adjudication hearing states that the allegations in the petition have been proven by a preponderance of the evidence,[1] and makes the following specific findings of fact:

[1] The trial court, in the interest of clarity, likely should have marked out or somehow adjusted the form language in the adjudication order form to accommodate its specific findings and conclusions; *i.e.,* that the facts alleged in the petition had not been proven, but that the court had reached a different conclusion. However, E.Y. does not raise this issue in her brief, so we will not consider this discrepancy.

"Mother has no job[,] no transportation[.] [Q]uestionable ability for mother to care for children on her own." The court's order then concludes that B.Y. is a dependent child and orders that she remain in the Cabinet's custody. E.Y. filed a motion to alter, amend or vacate the court's adjudication order, which the court subsequently denied.

Following the trial court's denial of her motion to alter, amend or vacate, but prior to the disposition hearing, E.Y. filed a notice of appeal. The Cabinet filed a motion to dismiss the appeal as interlocutory since a disposition order had not yet been entered.[2] This Court denied that motion, finding that an adjudication order is final and appealable. *See B.C. v. B.T.*, 182 S.W.3d 213, 217 (Ky. App. 2005) ("The adjudication, which determines whether a child has in fact been neglected or abused is considered a trial and the parties have a right to appeal."). This appeal follows.[3]

E.Y. makes five arguments on appeal. First, she argues that since dependency was not alleged in the petition, and the Cabinet never moved to amend the petition, the court had no authority to find B.Y. dependent. Second, E.Y. claims the Cabinet should not have been permitted to refer to M.Y.'s case during an adjudication concerning B.Y. Next, she claims that certain hearsay evidence

[2] A disposition hearing was ultimately held on August 26, 2015, and a disposition order was entered on August 28, 2015. The disposition order ordered that B.Y. be committed or remain committed to the Cabinet's custody. E.Y. subsequently filed an amended notice of appeal which includes the disposition order in her appeal but raises no additional issues.

[3] The Cabinet has not filed a brief with this court. Under these circumstances, the provisions of Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) permit the panel to reverse the trial court's order if the appellant's brief reasonably appears to support such a result. We do not believe E.Y.'s brief justifies such a reversal.

should not have been admitted. Fourth, E.Y. alleges that the court's findings were insufficient to support removal, and fifth, that less restrictive alternatives to removal were available.

This court, in *L.D. v. J.H.*, 350 S.W.3d 828, 829-830 (Ky. App. 2011), provided a thorough explanation of the standard of review in dependency, abuse and neglect actions.

> 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. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). 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*]. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003). 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. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). Finally, "[s]ince the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed absent an abuse of discretion." *Id.*

Id.

First, E.Y. claims the trial court did not have the authority to find B.Y. dependent when the Cabinet's petition only alleged that B.Y. was neglected. E.Y. did not object to the trial court's dependency finding at the adjudication hearing, but rather raised that issue for the first time in her motion to alter, amend or vacate. "A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). Therefore, we may only review this issue for palpable error. CR 61.02 states:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In other words, palpable error relief is not available unless three conditions are present. The error must have (1) been clear or plain under existing law, (2) been more likely than ordinary error to have affected the judgment, and (3) so seriously affected the fairness, integrity or public reputation of the proceeding to have been jurisdictionally intolerable.[4]

KRS[5] 620.100(3) states in relevant part,

[4] *Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009). We recognize that *Jones* discusses RCr (Kentucky Rules of Criminal Procedure) 10.26, the criminal rule regarding palpable error. However, since the criminal and civil rules regarding palpable error employ identical language, we find no reason or precedent for the analysis under the civil rule to be any different from that of the criminal rule.

[5] Kentucky Revised Statutes.

> The adjudication shall determine the truth or falsity of the allegations in the complaint. The burden of proof shall be upon the complainant, and a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence.

KRS 610.080(1) further instructs, "[t]he adjudication shall determine the truth or falsity of the allegations in the petition[.]" E.Y. claims that a finding of dependency, when the petition alleged neglect, is not a determination of "truth or falsity of the allegations in the petition." In support of this contention, E.Y. cites an Arizona case, *Carolina H. v. Ariz. Dep't of Econ. Sec.*, 307 P.3d 996, 232 Ariz. 569 (Ariz. Ct. App. 2013), in which the Arizona Court of Appeals found that upon the trial court's ruling that the allegations of abuse contained in the petition were not proven, the court was required to dismiss the petition and lacked the authority to amend the petition to dependency. However, this case is distinguishable from the instant case. The Arizona court's ruling was founded upon an Arizona statute which explicitly required the trial court to dismiss the petition if the court finds that the allegations contained in the petition are not true. *Id*. at 998; A.R.S.[6] § 8–844(C)(2). Kentucky's statutes concerning dependency, abuse and neglect petitions do not contain such a requirement. *See* KRS 620.100; KRS 610.080.[7] In fact, nothing in Kentucky's statutory scheme prohibits the court from finding

[6] Arizona Revised Statutes.

[7] Furthermore, the Arizona court also declined to permit the trial court to amend the petition on grounds that Arizona case law clearly prohibited a trial court from amending a complaint or petition on its own motion so that it would conform to the evidence. Kentucky does not have similar precedent.

dependency following a hearing on a neglect petition as long as the statutory requirements are met.

Here, the trial court explicitly determined that the Cabinet did not meet its burden with respect to the neglect alleged in the petition. A "dependent child" is defined as "any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child[.]" KRS 600.020(19). Since the trial court found that B.Y. was not a neglected child, such a finding made her eligible to be found dependent. We believe a finding of dependency is akin to a lesser-included offense of neglect; it applies in circumstances similar to those of neglect, albeit those without the element of parental intent. *Compare* KRS 600.020(1) *with* KRS 600.020(19). Given that the true goal of dependency, neglect and abuse proceedings is to serve the best interests of the child, and based on the evidence, we do not believe the court erred in finding B.Y. dependent, despite the lack of an explicit dependency allegation in the Cabinet's petition.

Next, E.Y. alleges that the trial court erred by allowing testimony regarding the removal of M.Y. to be presented at the adjudication hearing for B.Y. This court has held that "evidence proving dependency, or, abuse or neglect, of one child" does not mean that "the same condition may be inferred about another child who lives in the same household." *J.H. v. Commonwealth*, 767 S.W.2d 330, 333 (Ky. App. 1988). We agree that due process requires proof that each child sought

to be removed is dependent, neglected or abused. Nonetheless, we do not believe the trial court inferred that B.Y. was dependent simply because E.Y. stipulated that M.Y. was at a risk of neglect. The trial court heard and considered testimony concerning E.Y.'s interactions with B.Y. as well as M.Y. Since B.Y. and M.Y. have the same mother, we do not believe the trial court erred by considering the social workers' observations of E.Y.'s parenting skills and interactions with M.Y. when evaluating B.Y.'s situation.

E.Y. further argues that the court improperly took judicial notice of the adjudication order concerning M.Y. However, we do not find anything in the record indicating that the trial court took judicial notice of M.Y.'s adjudication order. During the hearing concerning B.Y., E.Y. acknowledged that she stipulated to risk of neglect in M.Y.'s case. She now disputes whether such a stipulation meant that she stipulated to all of the facts contained in the petition. This, however, is irrelevant. The court heard sufficient testimony on E.Y.'s interactions with M.Y. via the social workers' observations. It does not appear that the court took judicial notice of M.Y.'s adjudication order, and thus we find no error.

Third, E.Y. claims that improper hearsay evidence, specifically testimony concerning M.Y.'s petition, tainted the pool of evidence. E.Y. argues that since neither social worker had personal knowledge of the events detailed in M.Y.'s neglect petition, specifically an incident involving the conditions of E.Y.'s home and a day on which M.Y. had not been fed, they were unable to testify to those facts. KRS 620.080(2) permits hearsay testimony for good cause at a

temporary removal hearing, and E.Y. argues that by negative implication, this relaxation of evidentiary standards does not apply to adjudication hearings. While we agree that the rules of evidence apply to adjudication hearings, we do not believe that inadmissible hearsay evidence was admitted. All of the social workers' testimony was based on first-hand observations or information contained in the Cabinet's records. Such records are kept as a matter of course in a public agency, and thus fall under the public records and reports exception to the hearsay rule. KRE[8] 803(8).[9]

Fourth, E.Y. argues that the trial court's findings were insufficient to warrant removal. This issue was not raised before the trial court, and thus we may only review it for palpable error. An issue not presented to the trial court cannot be raised on appeal for the first time, and may only be reviewed for palpable error, which requires a finding of manifest injustice to prevail. *Fischer v. Fischer*, 348 S.W.3d 582, 589 (Ky. 2011) (citing CR 61.02). E.Y. cites KRS 620.060, which pertains to emergency custody orders issued prior to a dependency, abuse and neglect adjudication, arguing that children cannot be removed from parental custody without proving one or more of the listed factors. However, KRS 620.060 is not relevant to the adjudication order since B.Y. was already in the Cabinet's custody at the time of the adjudication hearing. E.Y. also cites KRS 625.090,

[8] Kentucky Rules of Evidence.

[9] E.Y. also claims that the court relied on evidence concerning her mental abilities that did not come from a qualified mental health professional. *See* KRS 620.030. We find no point in the record in which a non-expert testified to E.Y.'s intelligence or mental capabilities, and thus we find no error.

which pertains to involuntary termination of parental rights. KRS 625.090 is also irrelevant, since E.Y.'s parental rights have not been terminated. We believe the trial court based its conclusion on sufficient evidence; E.Y.'s inability to provide for her children without a job or means of transportation and her inability to make independent parenting decisions support a conclusion of dependency. Thus, we find no palpable error.

Lastly, E.Y. claims that the court erred by refusing to order that services be provided to E.Y. and B.Y. as a less restrictive alternative to removal from the home. Again, E.Y. did not raise this issue before the trial court, and we may only review it for palpable error. KRS 620.130 states:

> (1) In any proceeding under this chapter, when the court is petitioned to remove or continue the removal of a child from the custody of his parent or other person exercising custodial control or supervision, the court shall first consider whether the child may be reasonably protected against the alleged dependency, neglect or abuse, by alternatives less restrictive than removal. Such alternatives may include, but shall not be limited to, the provision of medical, educational, psychiatric, psychological, social work, counseling, day care, or homemaking services with monitoring wherever necessary by the cabinet or other appropriate agency. Where the court specifically finds that such alternatives are adequate to reasonably protect the child against the alleged dependency, neglect or abuse, the court shall not order the removal or continued removal of the child.
>
> (2) If the court orders the removal or continues the removal of the child, services provided to the parent and the child shall be designed to promote the protection of the child and the return of the child safely to the child's home as soon as possible. The cabinet shall develop a treatment plan for each child designed to meet the needs

> of the child. The cabinet may change the child's placement or treatment plan as the cabinet may require. The cabinet shall notify the committing court of the change, in writing, within fourteen (14) days after the change has been implemented.

While E.Y. and B.Y. would qualify for several services, we believe the court fairly decided that removal was the only option in B.Y.'s case. The court heard testimony regarding E.Y.'s inconsistent participation in her case plan with regard to M.Y. despite the services provided to her. That evidence, combined with the social workers' testimony regarding E.Y.'s parenting difficulties with respect to B.Y., is sufficient to conclude that removal is in B.Y.'s best interest at this point. We find no palpable error in the trial court's order of removal.

For the above reasons, the order of the Spencer Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Gilmore Dutton, III
Shelbyville, Kentucky

NO BRIEF FOR APPELLEE: