

RENDERED: JANUARY 28, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002589-MR

GENOLA WEST

APPELLANT

APPEAL FROM PULASKI FAMILY COURT
v. HONORABLE DEBRA H. LAMBERT, JUDGE
ACTION NOS. 02-J-00287 & 02-J-00288 & 02-J-00289

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Genola West appeals from orders¹ of the Pulaski Family Court committing custody of her three children to the Commonwealth's Cabinet for Families and Children. West contends that the family court erred by finding that she neglected the children by knowingly exposing them to drug manufacturing activities and by permitting her husband, against whom a no-

¹ The orders were entered September 30, 2003, and November 3, 2003.

contact domestic violence order was in effect, to care for them. Convinced that substantial evidence supports these findings and that the findings justify the family court's dispositions, we affirm.

During the evening of September 25, 2002, Pulaski County police officers entered the residence of Genola and Nelson West and discovered the implements and materials of a methamphetamine lab apparently in the early stages of production. The police arrested Nelson, who admitted the drug manufacturing, but claimed that his friends were making the drug and that he was involved only to the extent of allowing the use of his house. A social worker took custody of Genola's three children.² Genola, who had gone to work before the police began their surveillance of the residence, did not arrive home until about midnight. By then the police had nearly finished their investigation. She told the police that she had not known of Nelson's drug manufacturing.

Following a removal hearing on September 27, 2002, the Cabinet for Families and Children (CFC) obtained an order granting it temporary custody of the three children. Based on the social worker's testimony, the court found that the parents' drug activity had placed the children at risk of injury and that

² Two of the children are Genola's by prior relationships and one is hers and Nelson's.

the risk was likely to be continuing. It also ordered Genola to submit to random drug screens. Those orders remained in effect following a pre-trial hearing on October 7, 2002, at which one of the police officers testified about the drug paraphernalia he found at the Wests' residence.

The court scheduled the final custody adjudication for early November 2002. When the absence of certain witnesses necessitated the postponement of the hearing, the court returned custody of the children to Genola pending further proceedings. Genola remained subject to the case plan CFC had devised for her, which apparently required her to continue to submit to random drug screens and to permit CFC workers to inspect her home.

In early February 2003, Genola obtained a domestic violence order against Nelson. Nelson was to have no contact with Genola or her family, although he was permitted visitation with his son to be arranged through CFC. The order was to remain in effect until February 2006.

After several postponements of the final custody adjudication, the matter was convened yet again on July 28, 2003. Again one of the Cabinet's witnesses did not appear, so again the final hearing was postponed. The Cabinet's representative testified, however, that Genola had been neglecting the drug screens and that she had allowed Nelson to

have contact with the children in violation of the domestic violence order. When Genola admitted that Nelson sometimes cared for the children while she was at work, the court ordered that custody of the children be returned to CFC.

On August 11, 2003, the custody adjudication at last commenced. A police officer testified about methamphetamine production and about the implements of production he had found in the Wests' residence. According to the officer, methamphetamine labs could be assembled quickly, that depending on the method employed production of the drug required between three and eighteen hours, and that the intermediate stage of the process discovered in the Wests' house could have been reached in two or three hours.

Genola's eldest son, who was about ten at the time, testified that on the night of Nelson's arrest he had been asleep for three or four hours when Nelson and another man awakened him. Other men were downstairs who had him and his brothers leave the house and wait in a car until a social worker arrived and took them to CFC facilities. He recalled seeing a large jar that night containing an unusual substance, but said that he had never before seen anything like that in the house and had never heard his parents speak of drugs.

Upon Genola's motion for a directed verdict, the Cabinet conceded that the officer's and the boy's testimonies

alone did not show that Genola was aware of the manufacturing that night. It argued, however, that the entire evidence, including police photographs of the scene showing the large assortment of chemicals and implements used in the production, some of which were found apparently stored in a toy box, indicated that Genola was likely to have known of the presence and the purpose of those materials. Because the photographs had been introduced at the October 7, 2002, pre-trial hearing, before Genola had had an opportunity to consult with appointed counsel, the court granted a continuance to permit her to recall the police officer and cross-examine him regarding them.

That cross-examination took place on September 29, 2003, following which the court found that Genola had known of Nelson's drug manufacturing and that both parents had thus neglected the children by exposing them to dangerous substances. The court further found that Genola had neglected the children by allowing Nelson to care for them in violation of the domestic violence order. At the disposition hearing on November 3, 2003, the court awarded custody of one of the children to his father and of the other two to CFC. It is from the findings of neglect and the adverse dispositions that Genola has appealed. She contends that the first finding of neglect is not based on sufficient evidence that she was aware of Nelson's drug making

and that the second was based on an allegation not properly before the court.

Kentucky Revised Statute 600.020(1) provides in pertinent part that an "abused or neglected child" is

a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child: . . . (b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means; . . . (h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being.

KRS 620.060 - KRS 620.100 create a procedure whereby abused or neglected children may be removed from their homes and placed in the custody of CFC. The removal is intended to protect the child and to permit CFC to provide rehabilitative services to the parents. The burden of proving abuse or neglect is on the complainant, CFC here, and the final "determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence."³

Genola insists that there was no evidence of drug manufacturing at any time other than the night of Nelson's arrest. The police officer's testimony, moreover, that the stage at which the manufacturing process had been discovered

³ KRS 620.100(3).

that night could have been reached in as little as two hours, together with the child's testimony that he had never before seen jars in the house like the one he saw that night, imply that Nelson's friends brought the manufacturing implements to the Wests' home that evening after Genola had gone to work and without her awareness.

Although Genola's scenario is conceivable under the evidence, we do not agree with her assertion that it must be deemed as likely as any other scenario. Particularly in light of the photographs showing paraphernalia that appears to have been stored in a closet and in the toy box, the trial court could reasonably find it more likely than not that the men were working at Nelson's house because that is where the equipment and supplies had previously been collected. And Genola, the trial court could reasonably infer, would more likely than not have known what was there and why. Because the presence of volatile and poisonous chemicals poses an obvious risk of injury to the children, the court did not err by finding Genola neglectful on this ground.

Nor did the court err by finding her neglectful for having failed to provide adequate care and supervision of the children when, in violation of the DVO, she allowed Nelson to watch them. Genola contends that because CFC did not raise this issue in its pleading, the trial court erred by addressing it.

As CFC correctly points out, however, CR 15.02 permits the trial court to treat as pled any issue "tried by express or implied consent of the parties." Because this issue was tried without objection, the trial court did not abuse its discretion by treating it as if it had been pled.⁴

In sum, the record contains sufficient evidence of Genola's neglect to support the court's awards of custody to a father of one child and to the Cabinet for Families and Children. Accordingly, we affirm the September 30, 2003, and November 3, 2003, orders of the Pulaski Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ralph D. Gibson
Burnside, Kentucky

BRIEF FOR APPELLEE:

Carrie D. Wiese
Somerset, Kentucky

⁴ Nucor Corporation v. General Electric Company, 812 S.W.2d 136 (Ky. 1991).