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NOT TO BE PUBLISHED

OPINION OF JANUARY 20, 2012, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002011-ME

R.R.

APPELLANT

v. APPEAL FROM HENDERSON FAMILY COURT
HONORABLE SHEILA N. FARRIS, JUDGE
ACTION NO. 10-J-00410 AND 10-J-00410-001

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; AND J.R., A CHILD

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: CAPERTON, KELLER, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: R.R. (father) appeals from an order of the Henderson Family Court finding that he neglected his daughter. Because we conclude that there was insufficient evidence that father neglected daughter, we reverse.

A juvenile dependency, neglect, and abuse petition was filed against father alleging that on January 25, 2010, he spanked his seventeen-year-old daughter leaving bruises and that he imposed similar discipline in the past. The petition further alleged that father engaged in controlling behavior and refused to cooperate in an anger management assessment.

At a hearing, evidence was introduced concerning the daughter's relationship with her father, twin fifteen-year-old sisters, and mother. The testimony indicated that daughter had emotional instability and had been violent toward her siblings, father and mother. As a result, she had been placed on medication.

Daughter testified that father was controlling and restricted her activities and her friends. She described instances when father became angry and committed acts of domestic violence upon her that began when she was twelve or thirteen. She described two specific instances when her father became angry.

On January 24, 2010, father and daughter had an argument and an altercation occurred. When the police arrived, daughter admitted that she bit and hit father and stated that father did not strike her. Daughter pled guilty to fourth-degree assault and was placed in a juvenile work program.

The following day, father and daughter again had an argument while at the marital residence. Father's parents and the twins were present. Mother was in the home but was in another room when she heard the argument and called

police. The officers who arrived at the scene testified that father admitted spanking daughter but they did not observe any bruises or marks on daughter.

A court liaison for the Henderson County Schools testified that due to their parent's divorce in 2010, the three minor children were in the family transition program. Because of the acrimony between the children, daughter was in a separate class from her siblings.

The social worker involved with the family interviewed the family and found father to be uncooperative. Although father admitted spanking daughter on January 25, 2010, he refused to attend an anger management assessment.

At the hearing, father admitted to spanking daughter on January 25, 2010, but denied that it caused bruising. Daughter's siblings testified that father had not abused daughter but that he used spanking as a form of punishment.

A settlement agreement reached by the parties in their pending dissolution of marriage action provided that daughter reside with mother. Pursuant to the agreement, the twins resided with father.

After hearing the evidence, the family court found that on January 24, 2010, a physical altercation occurred involving father and daughter and that on January 25, 2010, father spanked daughter. Additionally, the family court found as follows:

8. (Father) treats (daughter) differently than (the twins). The twins have labeled (daughter) as having a "poor behavior." The behaviors which (the twins) attribute to (daughter) are the same behaviors which (daughter) and (mother) attribute to (father). These include: throwing

items, hitting walls, destruction of property and yelling at someone with whom they do not agree.

9. The behaviors of (father) described by (daughter) and (mother) were echoed in the behaviors described by Tracy Sturgill when she attempted an investigative interview at the home. Two friends of (daughter) testified to having seen bruises on (daughter), which (daughter) advised were inflicted by (father).

10. A child is a neglected child when a parent creates or allows there to be created physical or a risk of physical injury, by other than accidental means. (Father's) behavior of spanking or striking (daughter) and leaving bruises as a result of those behaviors creates a risk of physical injury.

The court further found that corporal punishment used when a parent is “angry or is used as means of embarrassment as well as discipline, is not appropriate.”

KRS 600.020(1) defines an abused or neglected child as follows:

- 1) “Abused or neglected child” means 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:
 - (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
 - (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;
 - (c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;

- (d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
- (e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
- (f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
- (g) Abandons or exploits the child;
- (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. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or
- (i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months;

Emotional injury is defined in KRS 600.020(24) as follows:

“Emotional injury” means an injury to the mental or psychological capacity or emotional stability of a child as evidenced by a substantial and observable impairment in the child's ability to function within a normal range of performance and behavior with due regard to his age, development, culture, and environment as testified to by a qualified mental health professional[.]

Physical injury is defined in subsection (45) of the statute as “substantial physical pain or any impairment of physical condition[.]”

The family court found that father spanked daughter resulting in bruises and, therefore, his behavior created a risk of physical injury. Although the family court did not find that father abused daughter, the finding of neglect was nevertheless based on the finding that he inflicted physical injury upon daughter. After our review of the record, we reverse.

KRS 620.100(3) provides that a family court must find the complaint of neglect true by a preponderance of the evidence following a dependency, neglect, and abuse adjudication hearing. The burden to prove child neglect lies with the complainant. *Id.*

In determining whether a child has been neglected, the trial court has broad discretion. *R.C.R. v. Com. Cabinet For Human Resources*, 988 S.W.2d 36, 38 (Ky.App. 1998). We review the family court's factual findings under the clearly erroneous standard. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Factual findings are not clearly erroneous if supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence that a reasonable mind would find sufficient to support a conclusion. *Id.* Despite the fact that a reviewing court might have found differently, an appellate court cannot substitute its judgment for that of the trial court with regard to the credibility and weight of the evidence. *New v. Commonwealth*, 156 S.W.3d 769, 773 (Ky.App. 2005).

We are mindful of our standard of review requiring that we give great deference to the family court in determining whether a child is neglected. However, the conclusion reached in this case was not supported by substantial evidence.

First, we point out that there is a distinction between abuse and neglect. KRS 600.020(1)(a) and (b) refer to abuse while subsections (c) thru (h) address the facts that must be established to support a finding of neglect. Thus, even if there was substantial evidence that father inflicted physical or emotional injury upon daughter, to be consistent with the facts, the family court could only have properly found that he abused daughter. Nevertheless, because this Court does not lightly dismiss allegations of child abuse, we have thoroughly reviewed the record to determine if the allegations in the complaint were proven by a preponderance of the evidence.

The evidence reveals that father and daughter have had a strained relationship. Additionally, father admitted the allegation in the complaint that on January 25, 2010, he spanked daughter. However, the police officers called to the scene testified that they did not observe any bruising on daughter immediately after the incident and left the residence without arresting father. There was no physical evidence presented that father's spanking resulted in bruising or that father's conduct caused daughter to suffer an emotional injury as defined in KRS 600.020. Additionally, the dependency, abuse and neglect petition was not filed until six months after father spanked daughter.

Although father devotes a portion of his brief to his argument that he had parental discretion to impose physical discipline on daughter, we need not address that question. Our holding is that despite our deference to the family court's factual findings, the family court's conclusion that father neglected daughter was not supported by substantial evidence.

Based on the foregoing, the order of the Henderson Family Court is reversed.

CAPERTON, JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: I respectfully dissent from the majority's opinion. Initially, I note that this appeal has followed a somewhat unusual path. Judge Wine, now retired, authored the majority opinion rendered by this panel on January 20, 2012, with Judge Thompson dissenting. In that opinion, the majority affirmed the trial court, holding that the court's findings were not clearly erroneous.

On February 13, 2012, R.R. filed a petition for rehearing. Because Judge Wine retired before R.R.'s petition could be heard, Judge Caperton was designated to take his place on the panel. Judges Caperton and Thompson then voted to grant R.R.'s petition.

With that background in mind, I dissent for two reasons. First, CR 76.32(1)(b) states that “[e]xcept in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the

appeal and will be granted only when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto.” This majority does not state in its order granting R.R.'s petition or in its opinion how the original majority opinion overlooked a material fact, controlling statute, or decision, or how it misconceived the issues presented. I recognize that the Supreme Court of Kentucky has held that, if this Court does not state why it granted a petition for rehearing the Supreme Court can assume that it did so based on the reasons set forth in the petition. *See Shraberg v. Shraberg*, 939 S.W.2d 330, 332 (Ky. 1997). However, in this case, I believe that the majority should have stated why it granted the petition.

Second, R.R. argues in his petition that the initial opinion failed to address certain issues. However, taken as a whole, the petition simply asks this new panel to re-visit the record, re-evaluate it, and come to a different conclusion. I see no reason to do so, as I agreed with Judge Wine's well reasoned initial opinion that the trial court's findings were supported by evidence of substance.

Therefore, I would vote to deny the petition for reconsideration and I dissent from this new majority opinion.

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