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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001036-ME

S.B., FATHER; AND
J.L., PERSON EXERCISING
CUSTODIAL CARE

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NOS. 09-J-500293 AND 09-J-500294

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND
CHILDREN; COMMONWEALTH
OF KENTUCKY, JEFFERSON COUNTY,
KENTUCKY; Z.B. AND W.B.,
CHILDREN, BY AND THROUGH
THEIR GUARDIAN AD LITEM,
JOSEPH ELDER, II;
AND K.E., MOTHER

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,[1] SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: S.B. and J.L. bring this appeal from an April 12, 2010, judgment finding that S.B.'s biological child, W.B., was abused and his twin, Z.B., was at risk of abuse. We affirm.

On July 2, 2009, three-year old W.B. was taken to the emergency room of Kosair Children's Hospital by his father, S.B., and by his father's live-in girlfriend, J.L. W.B. was vomiting and lethargic. S.B. and J.L. had previously received a call from W.B.'s daycare reporting that "W.B. did not eat lunch, did not look well, was not acting like himself and that they needed to come and take him to the doctor or to the hospital." Commonwealth of Kentucky, Cabinet for Families and Children's[2] Brief at 1. J.L. reported to hospital personnel that W.B. fell at home and hit his forehead on the concrete patio steps before she took him to daycare. W.B. was ultimately admitted into Kosair's Pediatric Intensive Care Unit.

A computed axial tomography (CT) scan was conducted on W.B. The CT scan revealed that W.B. had two separate skull fractures and an associated subdural hematoma. And, an MRI of W.B.'s spine demonstrated multiple compression fractures.

[1] Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

[2] Commonwealth of Kentucky, Cabinet for Families and Children hereinafter referred to as the Cabinet.

Due to the severity and multiplicity of W.B.'s injuries, he was referred for an assessment by Pediatric Forensic Medicine.[3] Dr. Melissa Currie, Director, Division of Forensic Medicine, reported the following after her July 2, 2009, evaluation of W.B.:

> CT scans conducted at KCH [Kosair Children's Hospital] on 7/2/09 and 7/3/09 demonstrated skull fractures involving the right coronal suture, left occipital skull and right frontal/parietal skull. There was an associated small subdural hematoma of the right frontotemporal region. Of note, neither of two skull fractures corresponded to the area of abrasion/petechia on [W.B.]'s forehead. A skeletal survey did not reveal any additional fractures. A CT scan of the abdomen and pelvis did not reveal any intra-abdominal pathology. [W.B.] continued to vomit in the ED [Emergency Department] when given fluids. Because of the two skull fractures, intracranial bleeding, and symptoms of concussion/head injury (vomiting), he was admitted to the Pediatric Intensive Care Unit (PICU) for further evaluation and care.
>
> Physical examination and clinical photographs were completed by Pediatric Forensic Medicine in the KCH PICU by Pediatric Forensic Medicine. [W.B.] had a large patterned abrasion with hematoma just left of the center of the forehead. The pattern of petechia was consistent with blunt force trauma and contact with a textured surface such as concrete or coarse fabric. There are two separate areas of ecchymosis, tenderness, and swelling of the scalp: one in the right parietal area and one on the left posterior/occipital area. A developing circular blue contusion with associated redness, tenderness, and swelling is present on the chest medial to the left nipple. This contusion was more visible the following day. There are several petechial contusions of the mid/right abdomen, with one area of parallel linear configuration that is consistent with blunt trauma from a

[3] The July 2, 2009, referral to Pediatric Forensic Medicine was the third referral for W.B. since May 1, 2008.

hand or fist. There are several nonspecific linear scratch abrasions of the right upper chest and abdomen, as well as adhesive residue presumably from his heart monitor leads placed in the ED.

[W.B.] was admitted to PICU and remained hospitalized for 2 days during which his neurological status was monitored closely. Both neurosurgery and general surgery were consulted. He was discharged on 7/4/09 to the care of his NF [natural father] and two paternal aunts approved by the Cabinet. Follow-up with neurosurgery and a repeat CT scan is scheduled one month post discharge.

Twin sibling, [Z.B.], was evaluated in the KCH ED on 7/3/09 and underwent a skeletal survey. Superficial linear abrasions were noted from a haircut with "clippers" that day. No other cutaneous or bony injuries were identified.

This is the 3rd referral on [W.B.] to Pediatric Forensic Medicine since 5/1/08. We have extensively reviewed his medical records as part of our previous referrals and have documented our concerns regarding his history of unexplained bruising, bilateral hand burns, delayed medical treatment, lack of primary well-child care and failure to accurately disclose pertinent medical information in an at-risk child. ([W.B.] was a 25 week premature infant). In January, 2009 we evaluated [W.B.] for a fall onto concrete steps that resulted in two days of vomiting and lethargy (for which we were concerned about the delay in seeking care). Now, he has returned with a serious and potentially life threatening head injury. The history of a single fall onto a concrete patio is NOT a plausible explanation for two separate skull fractures, which include multiple impact sites. Further, he also had patterned abdominal bruising consistent with a blow from a hand that is NOT consistent with a fall or an accidental 'bump' into an object. We have GRAVE concerns for the safety of this child if returned to the environment in which these injuries occurred. These most recent injuries qualify as a near-fatality.

On July 13, 2009, the Cabinet filed a petition alleging that W.B. and Z.B. were abused under KRS 600.020. Following an adjudicatory hearing, the family court rendered an order extensively detailing the injuries inflicted upon W.B. The court ultimately found that W.B. was abused and that Z.B. was at risk of abuse. In particular, the family court found:

> [T]he injuries that [W.B.] suffered could not have occurred in a non-accident manner. They were inflicted.
>
> Therefore, the Court concludes that [W.B.] was abused, and that [Z.B.] was at risk of abuse. The perpetrator is unknown.

Being dissatisfied with the family court's decision, S.B. and J.L. pursued this appeal.

S.B. and J.L. contend that the family court erred by finding that W.B. was abused and that Z.B. was at risk of abuse without also identifying the perpetrator of said abuse. S.B. and J.L. assert that Kentucky Revised Statutes (KRS) 600.020 requires the court to identify the perpetrator of abuse before it can find that abuse of a child has occurred. Simply stated, the question presented is whether a court can find that a child has been abused or is at risk of abuse without identifying the perpetrator of said abuse under KRS 600.020. This question revolves around interpretation of KRS 600.020.

It is recognized that statutory interpretation is purely a question of law; thus, our review proceeds *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717 (Ky. 2000).

KRS 600.020(1) reads 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[.]

Relevant to this appeal, KRS 600.020(1) defines an abused child as one whose health or welfare is harmed when a parent or other person exercising custodial control "inflicts or allows to be inflicted" physical injury or "creates or allows to be created" a risk of physical injury by other than accidental means. From this language, it is simply unnecessary for the family court to identify the perpetrator of the abuse; rather, a court may merely find that the parent/custodian has either inflicted or allowed to be inflicted physical injury or has created or allowed to be created the risk of physical injury. Under either scenario, the identity of the perpetrator is simply irrelevant under KRS 600.020 to the issue of abuse.

Our interpretation of KRS 600.020 is buttressed by the case of *Commonwealth, Cabinet for Health and Family Services v. R.H., K.H., and M.H.*, 199 S.W.3d 201 (Ky. App. 2006). Therein, the court concluded:

> In order for the court to conclude that a child has been abused or neglected, the statute requires a finding that a parent or guardian has created or allowed to be created a risk that the child will be the victim of sexual abuse or

> exploitation. The identity of the perpetrator of the abuse is not material to that finding.

Id. at 204. Therefore, we hold that the family court may find a child abused or at risk of abuse without identifying the perpetrator under KRS 600.020(1). Accordingly, we view as meritless S.B. and J.L.'s contention that the family court erred by failing to identify the perpetrator under KRS 600.020(1).

S.B. and J.L. next contend that KRS 620.040(1)(d) and KRS 620.100(2) and (3) also require the family court to identify the perpetrator of the abuse under KRS 600.020. We will address each statute separately.

KRS 620.040 is entitled "Duties of prosecutor, police, and cabinet; prohibition as to school personnel; multidisciplinary teams." Subsection (1)(d) specifically provides:

> If the report alleges abuse or neglect by someone other than a parent, guardian, or person exercising custodial control or supervision, the cabinet shall immediately notify the Commonwealth's or county attorney and the local law enforcement agency or the Department of Kentucky State Police.

KRS 620.04091)(d). Reliance by S.B. and J.L. upon KRS 620.040 is erroneous. KRS 620.040 merely outlines the mandatory reporting duties upon receipt of a report of abuse involving a child. It provides that where a report alleges abuse by someone other than a parent, guardian, or person exercising custodial control, the Cabinet must notify the appropriate prosecutor or the state police. Thus, KRS 620.040 does not require the circuit court to identify the perpetrator of the abuse.

KRS 620.100 is entitled "Appointment of separate counsel; court-appointed special advocate volunteer; full adjudicatory hearing." Subsection (2) and (3) provide as follows:

> (2) If the court determines that further proceedings are required, the court also shall advise the child and his parent or other person exercising custodial control or supervision that they have a right to not incriminate themselves, and a right to a full adjudicatory hearing at which they may confront and cross-examine all adverse witnesses, present evidence on their own behalf and to an appeal.
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> (3) 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. The Kentucky Rules of Civil Procedure shall apply.

KRS 620.100 (2) and (3). KRS 620.100(2) states that parties are entitled to a full adjudicatory hearing with representation by counsel if further proceedings are required after a temporary removal hearing. Subsection (3) mandates the procedure to be followed in such hearing, it does not require that the family court identify the perpetrator. KRS 620.100. As such, neither KRS 620.040 nor KRS 620.100 is applicable to S.B. and J.L.'s argument that the perpetrator must be identified under KRS 600.020.

S.B. and J.L. finally maintain that the family court erred by relying upon the opinion of Dr. Currie in making its finding that W.B. was abused. S.B. and J.L. specifically complain as follows:

> The "Currie theory" has as its basic premise the lack of evidence. The theory is fundamentally flawed in that it presumes that [W.B.] was abused unless an event that caused the injuries can be proven that is accidental in nature. The theory by its nature shifts the burden of proving the injuries were accidental to S.B. and J.L. all the while positing nothing to support the proposition that the injuries were inflicted except for the Currie presumption.
>
> The "Currie theory" posits that the lack of evidence of when an injury occurred, where an injury occurred, why an injury occurred, how it occurred and who was involved in the unknown events surrounding the injury necessarily means the injuries were inflicted.
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> Dr. Currie's opinion is founded upon the presumption that the injuries are deemed inflicted unless there is proof that the injuries were the result of a known accidental event.
>
> . . . .
>
> Dr. Currie was unable to identify when any particular injury occurred. She was unable to give a mechanism of injury to explain how the injuries occurred but did believe the forehead abrasion was consistent with a fall. She was unable to testify as to where the other injuries occurred, be it day care, home or somewhere in between. She was unable to testify as to how any of the injuries occurred except for the fist or hand impression. She was unable to identify the owner of the fist involved in making the impression.

S.B. and J.L.'s Brief at 17-20.

We begin our analysis by noting that the circuit court tried this action without a jury. We thus review findings of fact made by the circuit court under the clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01. Findings of fact are clearly erroneous if not supported by substantial evidence.

Moore v. Assente, 110 S.W.3d 336 (Ky. 2003). Substantial evidence is evidence of a probative value that a reasonable person would accept to support a conclusion. *Id.* And, we must also give deference to the trial court's opportunity to judge the credibility of witnesses. CR 52.01. We, however, review issues of law *de novo*.

In this case, Dr. Currie explained in great detail the severity and possible causes of the numerous injuries inflicted upon W.B. Dr. Currie testified that the reported fall on the patio could not account for the multiple fractures to W.B.'s skull and spine. Dr. Currie stated that the type of compression fractures to W.B.'s spine often occurs in children upon being slammed down into a seated position or shaken. She further stated that the only accidental explanation for W.B.'s spinal injuries would be a serious motor vehicle accident. As there was no allegation of a motor vehicle accident, Dr. Currie opined that W.B.'s spinal injuries were intentionally inflicted. Dr. Currie stressed that the severe injuries suffered by W.B. were simply inconsistent with the accidental fall upon the concrete patio as maintained by J.L.

S.B. and J.L.'s challenge to Dr. Currie's testimony goes to the weight and credibility of same. The determination of weight and credibility of evidence is clearly within the circuit court's discretion as fact-finder. *See Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). The circuit court obviously found Dr. Currie's testimony credible and acted well-within its discretion in so doing. Simply put, Dr. Currie's testimony constituted evidence of a probative value and evidence of W.B.'s abuse was more than sufficient to support the circuit court's finding of such

abuse. Accordingly, we conclude that the circuit court's finding of abuse was supported by substantial evidence and did not constitute an abuse of discretion. *See* CR 52.01.

For the foregoing reasons, the judgment of the Jefferson Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

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