

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001316-ME

J.L. (MOTHER)

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NOS. 08-J-504122 & 08-J-504121

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH & FAMILY
SERVICES; K.M. AND D.M. (MINOR
CHILDREN); AND G.M. (FATHER)

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: J.L. (Mother) appeals from a Jefferson Family Court Order (Order) that found that K.M. (Daughter) and D.M. (Son) were abused or neglected, under KRS 600.020, and granted the Cabinet for Health and Family

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Services' (Cabinet) petition to temporarily remove the children from Mother's custody. Mother claims that the Cabinet failed to present sufficient evidence that Daughter and Son were abused or neglected. Further, Mother claims that the "Castle Doctrine", KRS 500.055, precludes the court's finding of abuse. After a careful review of the briefs, the record, and applicable case law, we affirm the Jefferson Family Court Order.

FACTUAL BACKGROUND

During the summer of 1998, Daughter had been dating Q.G. (Boyfriend) for approximately one year without Mother's knowledge. Daughter, who was fifteen years old at the time, and Son, who was thirteen years old, had been sneaking Boyfriend into the house at night. On the morning of June 9, 2008, Daughter woke up and started to shower and dress for summer school. While Daughter was still in the shower, Mother went into Daughter's room and found Boyfriend lying in Daughter's bed.

In a police interview, Mother told Louisville Metro Police (LMPD) Detective Todd Roadhouse that she walked into Daughter's room and saw a head under the blankets. Daughter returned to the room and found Mother with a phone in her hand. Mother repeatedly asked Daughter who was in the bed. Daughter did not identify Boyfriend by name and simply replied, "A boy."

Mother instructed Daughter to leave the room and shut and locked the door. After she put on clothes, Daughter tried to re-enter the room but could not force the door open. Mother called 911 and reported that an intruder was in her

home. Then Mother shot boyfriend's leg. Mother called 911 again, and LMPD responded to the scene and arrested Mother.

Following the shooting, Daughter and Son were afraid of Mother. While Mother was in jail, the children stayed with their maternal grandmother. When Mother was released, however, she refused to allow the children to continue staying with their grandmother. The children fled to the YMCA Shelter House (Safe Place) but only stayed one night before Mother went to get them.

Mother demanded that Son and Daughter return home and attempted to forcibly remove them. Daughter testified that Mother grabbed her by the shoulders and pushed her to the floor. A Safe Place staff member testified that Daughter held onto table legs while Mother pulled her from behind. Daughter sustained cuts from the altercation.

Based upon Mother's violent behavior, the Cabinet obtained an emergency custody order to allow Daughter and Son to remain at the Safe Place. The children eventually left the Safe Place to live with their father.

On June 24, 2008, the Cabinet petitioned the Jefferson Family Court to temporarily remove Daughter and Son from Mother's custody. On February 24, 2010, the court held a temporary removal hearing. The court found that Daughter and Son were abused or neglected. The court rejected Mother's argument that she could have reasonably believed that Boyfriend was an intruder. Based upon the violence that occurred in the family's home and the violence at the Safe Place, on

February 24, 2010, the Court granted the Cabinet's motion for temporary removal.

This appeal follows.

ABUSE OR NEGLECT UNDER KRS 600.020

A. Standard of Review

Family Courts have a great deal of discretion to determine whether a child fits within the abused or neglected category. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). On appeal, the court's finding will be reviewed under the "clearly erroneous" standard. *C.R.G. v. Cabinet for Health & Family Services*, 297 S.W.3d 914, 916 (Ky. App. 2009). "Clearly erroneous" does not mean absent contradicted proof. Instead, the "clearly erroneous" standard "requires that there be proof of a probative and substantive nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *Id.*

B. Evidence to Support the Family Court's Finding of Abuse or Neglect

Our review of the record shows that substantial evidence existed to support the Family Court's findings that Daughter and Son were abused or neglected. KRS 600.020 provides,

- (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.

Mother argues that there was no proof of abuse or neglect presented at the hearing. Certainly, the record includes testimony detailing the physical altercation that occurred between Mother and Daughter at the Safe Place, in which Daughter testified that she sustained cuts. Daughter's testimony concerning the altercation was supported by the testimony of a Safe Place staff worker. The hearing testimony showed that the altercation at the Safe Place may have not resulted in serious physical injuries but it confirmed and advanced Daughter's fear of Mother.

The record also includes testimony concerning the events surrounding the shooting and the emotional trauma that it placed upon Daughter and Son. Mother, however, claims that the shooting was not abuse or neglect but instead qualifies as self defense under KRS 503.055, or the "Castle Doctrine." Under this statute,

- (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
 - (a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
 - (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

- (2) The presumption set forth in subsection (1) of this section does not apply if:
- (a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person;
 - (b) The person sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used;
 - (c) The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or
 - (d) The person against whom the defensive force is used is a peace officer, as defined in KRS 446.010, who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties, and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a peace officer.
- (3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.
- (4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

KRS 503.055.

The Family Court found that Mother was not absolved by the Castle Doctrine because it was unreasonable to believe that Boyfriend was an intruder. The record supports this finding. Although Mother reportedly did not know that Daughter and Boyfriend were involved in a relationship, Daughter testified that Mother knew Boyfriend from the neighborhood. In light of Boyfriend's young age, where he was laying when mother walked in the room, and Daughter's lack of fear of "the intruder", there was ample evidence for the Family Court to reasonably conclude that Mother's alleged belief was unreasonable and/or incredible.

Mother also claims that there was no evidence presented to show abuse or neglect specifically directed toward Son. The record indicates otherwise. Son was in the home at the time that Mother shot Boyfriend. He could hear the shot and experienced the immediate aftermath of Mother's violence. Son was also at the Safe Place at the time of the physical altercation. Son willingly fled Mother's custody out of fear. A review of the record supports the Family Court's findings and conclusions.

Accordingly, the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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