

RENDERED: AUGUST 5, 2016; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2015-CA-001849-ME

D.W.

APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT  
HONORABLE BRANDI D. ROGERS, JUDGE  
ACTION NO. 14-J-00030-001

CABINET FOR HEALTH AND FAMILY  
SERVICES, COMMONWEALTH OF  
KENTUCKY; AND B.W. (A MINOR  
CHILD)

APPELLEES

AND

NO. 2015-CA-001850-ME

D.W.

APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT  
HONORABLE BRANDI D. ROGERS, JUDGE  
ACTION NO. 14-J-00031-001

CABINET FOR HEALTH AND FAMILY  
SERVICES, COMMONWEALTH OF  
KENTUCKY; AND C.M.W. (A MINOR  
CHILD)

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

ACREE, JUDGE: D.W. (Father), brings Appeals No. 2015–CA–001849–ME and No. 2015–CA–001850–ME from orders of the Union Circuit Court, entered October 22, 2015, and November 6, 2015, ruling that two of his children, B.W. and C.W., were abused as defined in KRS<sup>1</sup> 600.020(1), and ordering the children to remain committed to the Cabinet for Health and Family Services (Cabinet). We affirm.<sup>2</sup>

On March 14, 2014, the Cabinet filed dependency, neglect, and abuse petitions on behalf of fifteen-month old B.W. and three-week old C.W. The petitions stated that C.W. had bruises on his chin and cheek area and a swollen and bruised left ear. C.W. was evaluated at Union City Methodist Hospital on March 13, 2014, at the Cabinet’s request. An examination and x-rays revealed fractures in each bone in the left forearm and possible fracture in the left leg. C.W. was then

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

transported by ambulance to Kosair Children's Hospital for further examination. The petitions stated that due to C.W.'s injuries, medical authorities believed C.W. was physically abused and, consequently, his sibling, B.W., was believed to be at risk of harm. The Cabinet requested emergency custody of the children. A temporary removal hearing was held on March 14, 2014, and both children were placed in the custody of the Cabinet.

The subsequent proceedings of the dependency action were delayed because criminal charges were brought against Mother. Mother was charged with first-degree assault (domestic violence) and first-degree criminal abuse. She ultimately entered an *Alford* plea on those charges. An annual permanency review was conducted on April 15, 2015. A worker from the Cabinet testified that the children had been in the same foster home since their removal and were doing well. The parents exercised weekly supervised visitation with the children and were working their case plans. Scheduling of the adjudication hearing was continued until October 21, 2015, due to Mother's criminal trial.

Prior to the adjudication, Mother filed a motion for relative placement and change of temporary custody to the children's maternal grandfather who resided in Missouri. The family court heard the motion on June 3, 2015. Rhonda Welch, a supervisor from the Kentucky Cabinet, testified that the Kentucky Interstate Compact request had been made and that the Missouri Cabinet had requested more documentation. Another social worker with the Kentucky Cabinet who was familiar with the case, Rebecca Brooks, explained that in June 2014,

before the maternal grandfather relocated from Kentucky to Missouri, he had applied for temporary custody of the children. He subsequently withdrew his request because his employment and housing were unstable due to his move to Missouri. Ms. Brooks further stated that the Missouri Cabinet would have to conduct a home evaluation of maternal grandfather and approve the placement. However, there was concern over the relative placement and Mother having access to the children.

On October 7, 2015, the family court heard the Cabinet's motion regarding completion of the Interstate Compact evaluation. The Missouri Cabinet had approved the maternal grandfather (and step-grandmother) for relative placement. Again, the Kentucky Cabinet objected to the relative placement on grounds that Mother would have access to the children; the Cabinet asked the court to wait to rule on the issue until the adjudication hearing. The court ordered the *guardian ad litem* (GAL) to interview the maternal grandfather and submit a report.

The adjudication hearing was held two weeks later on October 21, 2015. Brittany Yates, the investigative worker for the Kentucky Cabinet, testified that she responded to Mother's and Father's home after receiving a report of suspected child abuse. Ms. Yates testified that when she arrived at the home, she found Mother caring for six children on her own.<sup>3</sup> Mother explained that she was

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<sup>3</sup> There were three other adults living in the home, including Father. In all, there were four adults and seven children. Mother and Father were living with Father's sister, her boyfriend, and Father's sister's three minor children as well as two children of Father's from a previous relationship, in addition to B.W. and C.W.

on maternity leave, and cared for her own children, as well as nieces and nephews, while Father was at work. When Father was not at work, he was home with Mother and the children. Mother told Ms. Yates that no one took care of C.W. and B.W. other than Mother and Father. Ms. Yates testified that she observed bruising on C.W. Mother stated that the bruising was caused by C.W.'s fifteen-month old brother, B.W., who Mother alleged was in a biting and pinching stage and was jealous of the baby.

Ms. Brooks, who accompanied Ms. Yates to the home on March 13, 2014, also testified to these facts. Ms. Brooks also had gone to the hospital where C.W. was first examined. She later notified Father of the situation and met him at the home to remove B.W. and place the child in foster care.

The Cabinet also introduced the deposition of Dr. Melissa Currie taken on April 14, 2015. She is a child abuse pediatrician and medical director and chief of Kosair Charities Division of Pediatric Forensic Medicine. Dr. Currie reviewed all of C.W.'s x-rays and medical records accruing since his birth, and completed a Pediatric Forensic Consult Report. The report was submitted into the court record. It details all twenty-one fractures the newborn was found to have sustained, including four fractures to the right leg, four fractures to the left leg, three fractures to the right arm, five fractures to the left arm, three rib fractures on the left side, and two fractures at the base of the child's skull. All of the fractures were estimated, as of the dates of the examination in March 2014, to be two days to two weeks old.

Dr. Currie testified to each of the fractures in detail, explaining their type and the types of action or impact that would have to occur to cause the various injuries. Dr. Currie further explained that C.W. was at risk of long-term consequences due to the specific type of fracture sustained in the child's left ankle.

In addition to the fractures, Dr. Currie also testified that C.W. presented with "cauliflower ear," which she explained is caused by significant and direct blunt force trauma to the area. She stated that the condition has to be treated surgically or else it has the potential to result in permanent deformity in the ear.

After reviewing C.W.'s medical records and x-rays, Dr. Currie definitively concluded that C.W. was the victim of inflicted physical abuse. The Forensic Consult Report stated:

The constellation of findings, multiple occult fractures, acute and healing; bruising to facial cheek, submental space and ear (requiring surgical drainage of accumulated blood) is definitively diagnostic for inflicted child abuse. There are no underlying medical issues in this patient that could provide an alternative explanation for these findings. It is completely implausible that a 15-month old sibling inflicted these injuries. These injuries are amongst the most severe fractures in such a young infant that have ever been evaluated by our program.

There is social history indicating interpersonal violence in the home, which is a significant risk factor for child abuse and neglect. No medical cause for [C.W.'s] injuries was identified during his hospitalization and subsequent review of his medical records. That no caregiver has come forward to provide any plausible explanation for [C.W.'s] injuries is highly concerning for his family's willingness and/or ability to protect him from future harm. We would have grave concerns for

any child to be placed in or remain in the environment in which [C.W.'s] injuries were sustained.

(Commonwealth's Exhibit 2).

The report also noted that B.W. had a skeletal survey performed in April 2014 as a part of the investigation. The findings indicated that B.W. had a healed clavicular fracture; however, none of his medical records documented the etiology of the fracture.

Based on this evidence, the family court concluded that Mother and Father either inflicted or allowed to be inflicted on C.W. physical abuse other than by accidental means; additionally, the court found Mother and Father created or allowed to be created a risk of physical injury other than by accidental means as to both C.W. and B.W. Consequently, C.W. and B.W. were adjudicated as "abused or neglected" as defined in KRS 600.020(1).

The family court then considered the issue regarding the relative placement for the children. The relative seeking custody was the children's maternal grandfather and his spouse, Charles and Catina West. Mr. West testified that once he and his wife became settled in their new home in Missouri and saw that the children had been in foster care for fifteen months, they decided to request custody again in May 2015. They were concerned the children would be adopted given the length of time they had resided in foster care. So, Mother moved the court to consider the Wests' home for a relative placement. The Wests visited with the children in May 2015, June 2015, and three times in October 2015.

The GAL submitted the report that the family court had requested prior to the adjudication. However, the court expressed concern over considerable discrepancies between what the Wests advised the GAL prior to the hearing and what they testified to in court. The GAL expressed the same concern after hearing the Wests' testimony in court as well. As an example, the court pointed out that the Wests told the GAL they wished their information remain confidential because they did not want Mother and Father knowing their home address, and requested that all visits be conducted at a social services facility in a different town than where they lived. Yet, during the hearing, the Wests testified that they had no issue with supervised visitation between Mother and Father and children in their home. Additionally, Mother knew the Wests' home address in Missouri because she listed it in her motion seeking the placement. This was of interest to the family court as the notable objection to the change in placement related to Mother's access to the children.

Furthermore, the court recognized that the Wests had only recently obtained residential stability in Missouri, and they had disappeared from the lives of these young children for over one year. The court was also troubled by the distance a Missouri placement would create between the children, on the one hand, and those charged with supervising and adjudicating their care since removal from Mother's and Father's home, the Kentucky Cabinet workers and the court, respectively.

Also, the foster mother testified regarding her bond with the children. She has cared for them since they were removed; they know her as "mom." At the time



of the adjudication, B.W. was two years old and C.W. was twenty months old. Her concern about a change in their placement was further disruption and instability and its effect on the children. After hearing all the testimony, the court concluded that it was in the best interest of the children to remain committed to the Cabinet in their current foster home. Father now appeals.

In reviewing the decision of the family court, this Court must keep in mind that family courts have broad discretion in deciding whether a child fits within the “abused or neglected” category as defined by KRS 600.020(1). *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). “An abuse of discretion occurs when a ‘trial judge’s decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’” *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (citation omitted). Where the sufficiency of the evidence is challenged on appeal, we may only reverse if the family court’s findings of facts are clearly erroneous. *Cabinet for Health & Family Servs. v. I.W.*, 338 S.W.3d 295, 299 (Ky. App. 2010).

First, Father contends that the Cabinet did not present sufficient evidence that he abused or neglected C.W. and B.W. He contends there is no evidence that he had any knowledge or reason to know of any abuse or neglect of his children. Father asserts that C.W. was seen by a doctor three times since he was discharged

from the hospital<sup>4</sup> before the Cabinet was involved. He claimed that if medical professionals did not recognize any signs of abuse, how was he to know?

In accordance with KRS 600.020(1), 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: 1. *Inflicts or allows to be inflicted* upon the child physical or emotional injury as defined in this section by other than accidental means; 2. *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[.]” KRS 600.020(1) (emphasis added). The statute permits a finding that a parent has abused or neglected their child when he or she has allowed harm to be inflicted on a child or has created a risk that the child will be the victim of physical injury. Significantly, “[t]he identity of the perpetrator of the abuse is not material to that finding.” *Commonwealth, Cabinet for Health & Family Services ex rel. M.H. v. R.H.*, 199 S.W.3d 201, 204 (Ky. App. 2006), as modified (Aug. 18, 2006). The burden of such a showing rests with the complainant and must be proven by a preponderance of the evidence. KRS 620.100(3). “[T]he risk of harm must be more than a mere theoretical possibility, but an actual and reasonable potential for harm.” *K.H. v. Cabinet for Health and Family Servs.*, 358 S.W.3d 29, 32 (Ky. App. 2011).

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<sup>4</sup> C.W. was discharged from the hospital on February 25, 2014. He was seen for a well-child visit on February 28, 2014. C.W. was taken to the emergency room on March 5, 2014, for swelling in his left foot and ankle. Mother stated that the area was still swollen after an IV was removed in the hospital. C.W. was seen again at the hospital on March 11, 2014.

The evidence at the adjudication demonstrated that Mother and Father were the only caregivers for C.W. and B.W. The court found that no other adult was responsible for the supervision and care of the children. Yet, neither Mother nor Father provided any plausible explanation for C.W.'s substantial injuries. There was a history of violence between Mother and Father. Also, there was no medical cause for the injuries the child suffered. The medical report and testimony of Dr. Currie definitively concluded that C.W. was physically abused. No dispute exists regarding the facts upon which the family court based its decision. As the fact-finder, the family court is entitled to draw reasonable inferences from the evidence. *Id.* Given the tender ages of the children and the severity of C.W.'s injuries, the established evidence of record is sufficient to support the family court's conclusion that Father either inflicted or allowed to be inflicted physical abuse or created or allowed to be created a risk of physical injury to C.W. and B.W. Accordingly, we find no error.

Father next argues that the family court's denial of the relative placement was clearly erroneous as it was against the wishes of the parents. We disagree.

KRS 620.090 requires the Cabinet to consider any known and qualified relatives when considering where to place children, but the statute does not mandate that the Cabinet choose a relative placement over other options. *P.W. v. Cabinet for Health and Family Services*, 417 S.W.3d 758, 761 (Ky. App. 2013) (citing *Baker v. Webb*, 127 S.W.3d 622, 625 (Ky. 2004)). The placement of a child in a dependency, neglect, and abuse proceeding is within the broad discretion of

the family court. *J.M. v. Com., Cabinet For Health and Family Servs.*, 325 S.W.3d 901, 903 (Ky. App. 2010).

The family court was made aware that the Wests' home was approved by the Missouri Cabinet for placement. However, the court also took into account: the discrepancies in the Wests' testimony and the information reported to the GAL; the fact that the Wests had only recently become residentially stable in Missouri; the distance of the placement from the court's jurisdiction and the Kentucky Cabinet workers supervision; and the fact that the Wests had disappeared from the children's lives for over one year and had only visited a few times in the recent months preceding the adjudication hearing. The children's foster mother also testified that the children were stable and safe in her home and bonded to her and her husband. The children had been in the care of the same foster family since they were removed from Mother and Father in March 2014.

After considering all of these circumstances, including the substantial injuries sustained by C.W., the family court determined that moving the children to a new placement simply because the proposed new custodian is a relative was outweighed by the best interests of the children. Based on the foregoing, we discern no abuse of discretion in the family court's denial of the relative placement of the children.

Consequently, the October 22, 2015 adjudication order, including the order regarding placement of the children, and the November 6, 2015 disposition order of the Union Circuit Court are affirmed.

ALL CONCUR.

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