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Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0804-ME

K.Z.J.

APPELLANT

v. APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE JENNIFER R. DUSING, JUDGE
ACTION NO. 23-J-00009-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; C.J., AN
INFANT; AND K.J., MOTHER

APPELLEES

AND

NO. 2023-CA-0806-ME

K.Z.J.

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v. APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE JENNIFER R. DUSING, JUDGE
ACTION NO. 23-J-00010-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; K.J., MOTHER;
AND T.J., AN INFANT

APPELLEES

OPINION
AFFIRMING IN APPEAL NO.
2023-CA-0804-ME AND
VACATING AND REMANDING IN
APPEAL NO. 2023-CA-0806-ME

** ** * * * * *

BEFORE: CETRULO, COMBS, AND EASTON, JUDGES.

COMBS, JUDGE: The Appellant, K.Z.J. (Father), and the Appellee, K.J.

(Mother), are the parents of two minor children, C.J., a daughter born in 2011; and T.J., a son, born in 2019. The matter now before us arises out of two dependency, neglect, or abuse (DNA) petitions filed in the interest of each child on February 22, 2023, in Gallatin Circuit Court. At the time of the incidents alleged in the petitions, Father and Mother were going through a divorce and were living apart but sharing custody of their two children.

The DNA petition filed in the interest of C.J. in Case No. 23-J-00009-001 alleges as follows:

On 2/16/23 CHFS recieved [*sic*] a report of sexual abuse in regard to the above named child. A forensic interview was held on 2/21/23. During that interview the above named child disclosed an incident in which her father watched her take a shower. She also disclosed an incident in which she fell asleep in her fathers [*sic*] bed after he brought her milk. She reported that when she woke up her shorts and underwear were off and her vaginal area was burning. She stated that she found her shorts on her fathers [*sic*] side of the bed. The above named child also reported an incident in which she and

her dad was [*sic*] watching a movie and her [*sic*] reached his arm around her shoulders and cupped her breast.

The DNA petition filed in interest of T.J. in Case No. 23-J-00010-001 alleges that the “child is at an increased risk of harm due to allegations of sexual abuse by his father in regard to his sibling.”

On February 24, 2023, the trial court entered temporary removal orders “with agreed temporary custody [of both children] to Mom at this time.”

On May 10, 2023, the trial court conducted an adjudication hearing. We have reviewed the recorded proceeding. C.J., who was 11 years of age at that time, testified in chambers regarding the incidents alleged in the DNA petition.

Father testified. He served in the Navy for 18 years and was medically retired due to a back injury. No one ever talked to him about the allegations. In the fall of 2022, Father, the two children (when they were with him), Jessica Bedford (father’s girlfriend), and her son were living in the house together. Father denied that the incidents alleged in the petitions had occurred. Father testified about a text message he received from C.J. in late November 2022 in which she asked to come to his house because she missed him. Father also testified about communications with Mother over C.J.’s lying to both of them (regarding an unrelated matter). Father called Jessica Bedford, his girlfriend, as a witness. Ms. Bedford had lived with him during the time in question -- along with

her thirteen-year-old son. She testified that no one had ever talked to her or her son about the allegations.

On May 10, 2023, the trial court entered Adjudication Orders. Based upon the written findings set forth in its May 10, 2023, docket sheet, the court made a finding of abuse by Father as to C.J. It also made a finding of abuse by Father as to T.J. based upon “a risk” of sexual abuse.

In summarizing C.J.’s testimony, the court essentially repeated the allegations contained in the petition: that C.J. testified to an incident in the fall of 2022 when Father watched her while she was taking a shower. C.J. testified about another incident after that in November. She had fallen asleep while watching a movie with Father in his bed. She had taken Melatonin as usual. C.J. woke up the next morning without her shorts which were on the floor on Father’s side of the bed. C.J. felt a burning/stabbing pain in her vagina which lasted about three hours. The court further found that C.J. testified that in late December 2022, when she was lying on a couch watching a movie with Father, he had his arm around her and cupped her breast with his hand for approximately five minutes. The court also made findings regarding Father’s testimony that none of the alleged incidents had occurred. The court concluded as follows:

This Court find’s [C.J.’s] testimony credible. This Ct finds it has been proven by a prep of evid that the alleges in the Petition are true and makes a finding of abuse by

[Father] re: [C.J.] by committing an act of sexual abuse
and re: [T.J.] by creating a risk of sexual abuse.

The Cabinet filed dispositional reports recommending that temporary custody continue with Mother. On June 28, 2023, the trial court conducted a disposition hearing and directed the “Parties to follow CHFS Recs.” as reflected in its June 28, 2023, calendar Order.

Father now appeals. He argues: (1) that the trial court’s findings of fact and conclusions of law are not supported by substantial evidence and that they are, therefore, clearly erroneous; and (2) that the evidence is insufficient to support a finding of sexual abuse.

KRS¹ Chapter 620 governs Dependency, Neglect, and Abuse. In relevant part, KRS 600.020 provides that:

(1) “Abused or neglected child” means a child whose health or welfare is harmed or threatened with harm when:

(a) His or her parent . . .

. . .

5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation,

¹ Kentucky Revised Statutes.

or prostitution will be committed upon the child[.]

The definition of sexual abuse is set forth in KRS 600.020(61) as follows:

“Sexual abuse” includes but is not necessarily limited to any contacts or interactions in which the parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person having custodial control or supervision of the child or responsibility for his or her welfare, uses or allows, permits, or encourages the use of the child for the purposes of the sexual stimulation of the perpetrator or another person[.]

The purpose of the adjudication hearing is to “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.” KRS 620.100(3). We note the considerable breadth of discretion accorded to a trial court in DNA matters:

In a DNA action, the trial court has a great deal of discretion in determining whether the child is dependent, neglected, or abused. Under CR 52.01, a trial court’s finding of fact shall not be set aside unless clearly erroneous

Additionally, the trial court, as the finder of fact, has the responsibility to judge the credibility of all testimony, and may choose to believe or disbelieve any part of the evidence presented to it. If a trial court’s findings of fact are supported by substantial evidence and the correct law is applied, the appellate court will not disturb the decision unless an abuse of discretion has occurred.

B.B. v. Cabinet for Health and Family Services, 635 S.W.3d 802, 807-08 (Ky. 2021) (cleaned up).

Father argues that C.J.’s uncorroborated testimony does not constitute substantial evidence that she was subjected to sexual abuse. We cannot agree. The evidence was conflicting. However, as was its prerogative, the court found C.J.’s testimony to be credible. Where, as here, “the testimony before the trial court is conflicting . . . we may not substitute our decision in place of the judgment made by the trial court.” *Truman v. Lillard*, 404 S.W.3d 863, 868-69 (Ky. App. 2012).

Next, Father argues that there is insufficient evidence of sexual abuse. He contends that even if the trial court believed C.J., her testimony “cannot be extrapolated to support a finding that Father sexually abused her” because there is no evidence that whatever was alleged to have occurred was for the purpose of Father’s sexual stimulation as required by KRS 600.020(61). However, under the circumstances, we are compelled to defer to the trial court even though we might have decided otherwise had we been the fact-finder. “As the fact-finder, the trial court was entitled to draw reasonable inferences from the evidence.” *K.H. v. Cabinet for Health and Family Services*, 358 S.W.3d 29, 32 (Ky. App. 2011). Accordingly, with respect to C.J., in Appeal No. 2023-CA-0804-ME, we affirm the Orders of the Gallatin Circuit Court in Case No. 23-J-00009-001.

With respect to T.J., Father notes that there is no evidence “relative to anything, other than, perhaps, that he exists.” Indeed, the only mention of T.J. in the trial court’s May 10, 2023, docket sheet findings (besides the fact that Mother and Father are his parents) is at paragraph 8, where the court “makes a finding of abuse by [Father] . . . re: [T.J.] by creating a risk of sexual abuse.” That finding simply recites some of the statutory language in KRS 600.020(1)(a)6. unsubstantiated by any evidence whatsoever.

To establish abuse or neglect through risk of harm, the risk of harm must be more than a mere theoretical possibility, it must be an actual and reasonable potential for harm. A risk of harm cannot be established through inferences upon inferences, as that is nothing but speculation.

C.L. v. Cabinet for Health and Family Services, 653 S.W.3d 599, 609 (Ky. App. 2022) (cleaned up).

After careful review, we conclude that the trial court’s finding of abuse by Father based upon “a risk” of sexual abuse as to T.J. is not supported by any evidence -- much less evidence of a substantial nature. Therefore, it is clearly erroneous. Accordingly, with respect to T.J. in Appeal No. 2023-CA-0806-ME, we vacate the adjudication and disposition Orders of the Gallatin Circuit Court in case No. 23-J-00010-001 and remand with direction to dismiss the petition.

ALL CONCUR.

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