

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000920-MR

OKIE JEWEL STAMBAUGH  
AND MINIARD STAMBAUGH

APPELLANTS

v. APPEAL FROM JOHNSON CIRCUIT COURT  
HONORABLE JAMES A. KNIGHT, JUDGE  
ACTION NO. 97-CI-00018

KEITH SIMMONS; ADDIE SIMMONS;  
JOHN RAY KEETON; TAMMY LYNN  
STAMBAUGH; TAMARA MCKENZIE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: EMBERTON, McANULTY AND SCHRODER, JUDGES.

McANULTY, JUDGE: This appeal concerns the custody of a minor child, known as J.K. The trial court ordered that the child be removed from the home of the great grandparents and placed with her maternal grandmother. The great-grandparents appeal, arguing that insufficient evidence existed to warrant the removal of the child from their home. We disagree and therefore affirm.

The procedural history of this case is somewhat confusing. In October of 1993, the Cabinet filed a Juvenile Petition regarding J.K. in the Johnson District Court, pursuant

to KRS 610.010. The petition was based on the allegations that J.K.'s mother was abusing alcohol and drugs and neglecting her two daughters, J.K. and T.K. A similar action had been filed concerning T.K. The district court found that there were reasonable grounds to believe that J.K. was "in danger of imminent death or serious physical injury . . . and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child." The district court removed J.K. from her mother's care and awarded temporary custody to Okie Stambaugh, J.K.'s maternal great grandmother.

The maternal grandmother, Tamara McKenzie entered an appearance in the action and expressed her desire to have custody of J.K. and her sister, T.K. After a hearing, the district court declined to alter the custodial arrangement but did permit visitation for Tamara. Subsequently, Tamara filed a motion to remove the case to circuit court and join with a pending action concerning the custody of T.K., J.K.'s sister. The district court granted the removal, apparently invoking the concurrent jurisdiction of the circuit court, as provided in KRS 620.027. Tamara and the Stambaughs both filed motions to intervene in the circuit court action concerning T.K. The Johnson Circuit Court granted these motions.

In February of 1997 the Cabinet filed a Juvenile Petition in the Johnson District Court, this time alleging that J.K. was being neglected in the home of Okie and Miniard Stambaugh. Specifically, the Cabinet was concerned with violence

between Okie Stambaugh and her granddaughter Misty Smith. On March 17, 1997, the district court entered an agreed order that Okie Stambaugh would continue custody of J.K., that Okie, Misty and J.K. would attend counseling, and that domestic violence in the home would cease.

According to an order of the circuit court, in May of 1997, the Cabinet notified the circuit court of circumstances which the Cabinet believed seriously endangered the emotional and physical health of J.K. The domestic relations commissioner held a status conference on May 6, 1997. The conference became an evidentiary hearing and the commissioner heard testimony from four individuals. Thereafter, he found that Okie and Misty were not cooperating with the counseling, in that they denied there was any violence in the home. The commissioner also found that the Cabinet had received a report from a teacher's aide, Linda Faye Wright, concerning an episode she witnessed between Okie, Misty and J.K. Ms. Wright testified that she observed Misty slapping and kicking Okie Stambaugh and pulling and jerking J.K. The commissioner specifically stated that he found testimony of Okie and Misty that there was no violence in the home, not to be credible. The commissioner ordered that J.K. be temporarily relocated to the home of Tamara McKenzie.

The Stambaughs filed exceptions to the commissioner's order, alleging that the commissioner had conducted a hearing without jurisdiction to do so, that the commissioner referred to evidence he received outside of the hearing and that the evidence did not support a finding that J.K. was endangered. The trial

court entered an order summarily sustaining the exceptions, without any discussion, and ordering that J.K. be returned to the custody of Okie.

The commissioner then held a final hearing on July 14, 1998. The parties submitted testimony and a representative of the Cabinet also testified. The commissioner filed his report and recommendations on December 29, 1998. At that time, he recommended that Tamara McKenzie be given custody of J.K. The Stambaughs filed exceptions to the report. The trial court denied the exceptions and adopted the report. This appeal followed.

The Stambaughs frame the issues on appeal as follows. First, they assert that the commissioner improperly relied on evidence not before him, specifically the testimony of the teacher's aide who witnessed an abusive incident. Second, they contend that the commissioner erred in his recommendations in that there was insufficient evidence to support a change in custody. Third, they argue that the trial court erred in adopting the recommendations of the commissioner.

At the outset we note that this action is governed by Chapter 620, which pertains to the dependency, neglect and abuse of children. The legislature has provided a procedure by which the Cabinet can initiate proceedings where it suspects that a child is being neglected or abused. KRS 620.070. The district court then holds a temporary removal hearing. KRS 620.080. If the court finds there are reasonable grounds, it enters a temporary custody order, as it did in this case. KRS 620.090.

The grounds for the first argument are essentially that the evidence concerning what Linda Faye Wright, the teacher's aide, witnessed and reported to the Cabinet was not properly before the commissioner. The evidence came in at the first hearing on May 6, 1997. The Stambaughs contend that the trial court later determined that the commissioner had not followed proper procedure in holding the hearing, therefore the evidence entered in that hearing could not be relied upon by the commissioner. The Stambaughs insist that in order for the commissioner to rely on this evidence, the testimony had to be introduced at the final hearing.

The record does not specifically reflect that the trial court concluded that the first hearing was not properly held. The trial court sustained the Stambaugh's objections and ordered that the child be returned to them. The court did not provide a reason for its decisions. Nevertheless, we may assume that the trial court determined the hearing was procedurally improper inasmuch as the trial court subsequently adopted the second report of the commissioner based on the same evidence.

Having so determined, we agree that the commissioner erred in considering Ms. Wright's testimony. Due to the procedural irregularity of the first hearing, the parties were not sufficiently on notice of what would occur during this hearing. The commissioner referred to it as a status conference which generally does not entail the taking of testimony. What was deemed a status conference erupted into a full blown evidentiary hearing and there is no indication in the record that

the parties were prepared to address the accusations of Ms. Wright. Because this hearing was improper, it was error for the commissioner to rely on evidence introduced during the first hearing and not reintroduced at the second hearing.

The legislature has granted broad discretion to the courts on evidentiary matters concerning the abuse and neglect of children. For example, the district court may allow hearsay evidence in a temporary removal hearing under KRS 620.080. KRS 620.080(2). However, we believe that the parties must be afforded a reasonable opportunity to refute this testimony. We are of the opinion that in this case, the commissioner deprived the parties of this opportunity. Accordingly, the commissioner erred in considering the testimony of Ms. Wright when she did not testify at the second hearing.

Having so determined the remaining question is whether the commissioner's recommendation is supported by sufficient evidence, absent the testimony of Ms. Wright. The commissioner's findings and conclusions as to J.K. are as follows:

The Intervening Petitioners, Okie Jewel Stambaugh and Miniard Stambaugh, have been the subject of ongoing Cabinet for Families and Children investigations and intervention since the time the minor child, [J.K.], was placed in their custody. Specifically, Misty Smith, the granddaughter of Okie Jewell Stambaugh and Miniard Stambaugh, lives with the Stambaughs. Ms. Smith is twenty-four (24) years old, and suffers from diabetes, heart problems, and a nervous condition. The Cabinet for Families and Children is genuinely concerned with the relationship between Ms. Smith and Okie Stambaugh. Specifically, the Cabinet has received reports regarding domestic violence inflicted upon Okie Stambaugh by Misty Smith. On May 1, 1997, Linda Faye Wright, a teacher's aide

with the Paintville city schools, reported an act of domestic violence she had witnessed involving Misty Smith and Okie Stambaugh. Ms. Wright testified she observed Misty Smith slapping and kicking Okie Stambaugh and pulling and jerking the minor child, [J.K.]. Both Misty Smith and Okie Stambaugh have denied these allegations, but the Court finds the testimony of the uninterested third party, Linda Faye Wright, to be credible. The Cabinet for Families and Children has expressed a genuine concern for the safety of the minor child if the child should remain in the home of the Intervening Petitioners, Okie Stambaugh and Miniard Stambaugh. Specifically, Cabinet employee, Karen Endicott, testified she has interviewed the minor child, [J.K.], and the child has a genuine fear for living with the Stambaughs. This situation is further complicated by the fact that Okie Jewell Stambaugh and Misty Smith deny any domestic violence occurs in the home and will not seek counseling from Mountain Comprehensive Care Center as previously ORDERED by the Johnson District Court. Based upon the information conveyed by the Cabinet, both Misty Smith and Okie Stambaugh deny any problems exist and thus do not believe they need counseling.

The Cabinet for Families and Children has interviewed the Intervening Petitioner, Tamara McKenzie, on two (2) occasions, and based upon the report filed on July 30, 1998, the Cabinet for Families and Children is satisfied the Intervening Petitioner, Tamara McKenzie, has the necessary facilities and ability to provide the appropriate care for the child or children.

The Court finds domestic violence is a problem in the home of Okie Stambaugh in that Misty Smith is abusive to Okie Stambaugh and the minor child, but Okie Stambaugh denies this abuse. Additionally, Okie Stambaugh will not cooperate in counseling with Misty Smith to rectify this problem, and this domestic violence has now spilled into the life of the minor child, [J.K.]. This domestic violence clearly presents a serious endangerment to the child's physical and emotional health and well being. Accordingly, the Court can not, in good conscience, permit the minor child, [J.K.], to remain in the home of Okie Stambaugh.

It is important to note, as did the commissioner, that Ms. Wright's report was not the first occasion the Cabinet had reason to investigate the home environment at the Stambaugh's. Rather, the Cabinet filed a petition regarding J.K. on February 24, 1997. This petition stated "that the above named child is being neglected due to the continuous explosive violence between her great grandmother, Okie Stambaugh, and Ms. Misty Smith. It is worker's belief that the violence occurs daily. Furthermore, Ms. Smith suffers from a mental illness which is not being treated. Ms. Stambaugh, along with Ms. Smith, have instilled into [J.K.] that Ms. Smith is her biological mother. Ms. Smith also believes that [J.K.] is her child." The agreed order of the district court to cease violence and seek counseling resulted from this petition. This all occurred prior to any report or testimony by Ms. Wright. In other words, the record reflects that the Cabinet's concerns preceded the report or testimony of Ms. Wright.

Moreover, Karen Endicott testified as a representative of the Cabinet that she had concerns regarding violence occurring in the Stambaugh home. She was concerned not only with the violence between Misty and Okie Stambaugh, but also between Okie and Miniard Stambaugh as relayed to her by J.K. Apparently, J.K. advised Ms. Endicott of several episodes of physical violence, including one in which the kitchen table was knocked over. J.K. told her that she was afraid in the Stambaugh home. Ms. Endicott also cited Okie and Misty's unwillingness to attend counseling as previously ordered by the district court, or to develop a "safety



plan" as requested by the Cabinet. There was further testimony concerning mental problems suffered by Misty and her belief that J.K. is her biological daughter. In addition, the commissioner had at his disposal the Cabinet's report, filed with the trial court, which outlined a substantiated report of abuse and neglect of J.K. commenced in March of 1996.

KRS 620.023 lists the evidence to be considered in determining the best interests of the child in making these decisions. Included in this list are acts of abuse or neglect as defined in KRS 600.020(1) and a finding of domestic violence or abuse, whether or not it occurs in the presence of the child. KRS 620.023(1)(b) and (d). The findings of fact of a commissioner, to the extent they are adopted by the trial court, will not be disturbed on appeal unless clearly erroneous. Greater Cincinnati Marine Service, Inc. v. City of Ludlow, Ky., 602 S.W.2d 427 (1980). In our opinion, the evidence before the commissioner supported a finding, absent Ms. Wright's testimony, that it is in J.K.'s best interest to remove her from a home in which domestic violence occurs in front of her and causes the child to be fearful. The commissioner did not err in this conclusion.

The trial court has broad discretion with respect to the use it makes of reports and recommendations of commissioners. Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997). Accordingly, we similarly find no error on the part of the trial court.

The order of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEES

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