

RENDERED: October 8, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002607-MR

D.H., IN THE INTEREST OF R.D.H.¹

APPELLANT

v. APPEAL FROM JOHNSON FAMILY COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 02-J-00165

P.H.; AND
CABINET FOR FAMILIES AND CHILDREN

APPELLEES

AND NO. 2003-CA-002608-MR

D.H., IN THE INTEREST OF B.L.H.

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¹ The parties will be referred to by their initials to protect the interests of the minor children.

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; AND EMBERTON, SENIOR JUDGE.²

JOHNSON, JUDGE: D.H. brings this consolidated appeal from several orders entered by the Family Court Division of the Johnson Circuit Court, which, inter alia, found her children, B.L.H. and R.D.H., to be neglected and awarded permanent custody of the children to their paternal grandmother, P.H. Having concluded that the family court's determination that B.L.H. and R.D.H. were neglected is supported by a preponderance of the evidence and that the family court did not abuse its discretion in awarding custody of the children to P.H., we affirm.

D.H. and K.H. were married and their marriage produced two children, B.L.H., who was born on July 2, 2001, and R.D.H., who was born on July 24, 2002. On October 28, 2002, a social worker with the Cabinet for Families and Children discovered drug paraphernalia in the residence of D.H. and K.H. during a routine visit. On November 6, 2002, separate dependency, neglect, and abuse petitions were filed in the interest of B.L.H. and R.D.H. in the Johnson District Court. On November 27, 2002, the district court entered an order requiring D.H. and

² Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

K.H. to complete a substance abuse counseling program and to submit to random drug testing.

In February 2003 D.H. tested positive for marijuana use. On May 5, 2003, Jessica Franklin, a social worker with the Cabinet, while investigating a report of domestic violence, found the children locked in a bedroom. On the same date, separate dependency, neglect, and abuse petitions were filed in the Family Court Division of the Johnson Circuit Court.³ In sum, the petitions alleged that B.L.H. and R.D.H. were "exposed to ongoing drug use by the parents" and that they were "at risk of harm." Based on the allegations contained in the petitions, the family court entered emergency custody orders placing the children in the custody of P.H.⁴ A temporary removal hearing was held on May 8, 2003, and the family court entered separate orders granting temporary custody of the children to P.H.⁵

On June 3, 2003, the Cabinet filed a family case plan with the family court. Pursuant to the case plan, D.H. and K.H. each agreed, inter alia, to complete a substance abuse assessment and to submit to random drug screening. On June 16,

³ Family courts and district courts have concurrent jurisdiction over dependency, neglect, and abuse proceedings initiated under Kentucky Revised Statutes (KRS) 620.010, et seq. See KRS 23A.100 and KRS 610.010.

⁴ See KRS 620.060.

⁵ See KRS 620.080 and 620.090. P.H. resides with her boyfriend in Lawrence County, Kentucky.

2003, the family court held an adjudicatory hearing.⁶ Franklin testified at the hearing that she was contacted by the police at approximately 5:30 a.m. on May 5, 2003, and informed that a domestic violence incident had occurred at the residence of D.H. and K.H. Franklin stated that she proceeded to the residence, where she found B.L.H. and R.D.H. locked in a bedroom. Franklin further testified that D.H.'s hand was bandaged. Franklin claimed that D.H. told her that she cut her hand on the door of the house. Franklin also stated that she believed D.H. and K.H. permitted overnight guests to stay at their residence on various occasions.

In addition, Angela Porter, who is also employed by the Cabinet, testified that D.H. tested positive for marijuana use in February 2003. Porter further testified that D.H. and K.H. had failed to comply with the family case plan. More specifically, Porter stated that D.H. and K.H. had failed to make themselves available for drug screens and that D.H. had only attended one of her scheduled substance abuse counseling sessions. P.H., the paternal grandmother, also testified at the hearing. P.H. stated that K.H., her son, had informed her, as recently as January 2003, that he had a drug problem.

⁶ See KRS 620.100. D.H. and K.H. were represented by counsel at the adjudicatory hearing. In addition, the children were represented by a guardian ad litem.

D.H. refuted the allegations of neglect and abuse. She insisted that the children were locked in their bedroom for their own safety. D.H. explained that B.L.H. had a habit of waking up in the middle of the night and wandering around the house and that she was concerned that he might hurt himself during one of these late night walks. D.H. further maintained that she had taken and passed several drug tests since February 2003. D.H. was unable, however, to produce any documentation supporting this assertion. D.H. further insisted that she was attempting to complete a substance abuse program but that she was experiencing difficulties obtaining transportation to and from her scheduled appointments. K.H. testified that he was also attempting to complete a substance abuse program, however, he acknowledged that he had failed to schedule any appointments. K.H. denied that any acts of domestic violence occurred in the presence of the children and he claimed the drug paraphernalia that was found in his residence belonged to a friend that was visiting.

On June 17, 2003, the family court entered an adjudication hearing order. In sum, the family court found the children to be neglected and ordered that they remain in P.H.'s custody. On July 15, 2003, the Cabinet filed a report with the court recommending, inter alia, that B.L.H. and R.D.H. remain in

P.H.'s custody.⁷ On July 23, 2003, the family court entered a disposition hearing order adopting the Cabinet's recommendations. The court found that D.H. and K.H. had "failed to work sufficiently for reunification of [the] children."

On September 10, 2003, the Cabinet filed a report with the court recommending that P.H. be granted permanent custody of the children. On September 15, 2003, the family court held a dispositional review hearing. The Cabinet contended that D.H. and K.H. had failed to show any progress and it requested that P.H. be granted permanent custody of the children. Once again, D.H. insisted that she was attempting to complete a substance abuse program.⁸ D.H.'s mother, E.C., testified that D.H. and K.H. were now residing with her.⁹ E.C. stated that she would make sure that D.H. and K.H. had transportation to and from their counseling sessions. The family court ordered D.H. and K.H. to attend counseling and to continue working with the Cabinet towards a reunification plan.

On October 31, 2003, the Cabinet filed a case progress report with the court recommending that P.H. be granted permanent custody of the children. In sum, the Cabinet

⁷ The Cabinet further recommended that D.H. and K.H. obtain counseling and that they submit to random drug screening.

⁸ D.H. claimed she was having scheduling difficulties.

⁹ It appears that D.H. and K.H. were evicted from their residence in September 2003.

contended that D.H. and K.H. had failed to comply with the family case plan that was filed on June 3, 2003. The progress report indicated that D.H. had attended counseling on a sporadic basis and that she had missed several scheduled appointments. The report further indicated that K.H. was no longer residing with D.H. and that K.H. had made no attempts to cooperate with the Cabinet. In closing, the Cabinet requested that it be "released from providing reasonable efforts to reunify [B.L.H. and R.D.H.] with their biological parents[.]"

On November 3, 2003, the family court held a permanency hearing.¹⁰ On November 7, 2003, the family court entered an order granting permanent custody of the children to P.H.¹¹ In sum, the family court found that "it would be contrary to the welfare and best interests of the child[ren] to return [] to parental custody" and that it was in their best interests "that permanent custody be granted to [P.H.]" The family court noted that D.H. and K.H. had "failed to make sufficient progress to regain custody of [their children]" and it released the Cabinet from further reunification efforts. On November 13, 2003, the family court entered a permanency hearing order

¹⁰ See KRS 610.125.

¹¹ See KRS 620.027.

consistent with the order it had entered on November 7, 2003. This appeal followed.¹²

D.H. raises two issues on appeal.¹³ She contends the evidence introduced at the adjudication hearing was insufficient to support the family court's determination that B.L.H. and R.D.H. were neglected and that the family court's decision to award permanent custody of the children to P.H. was an abuse of discretion.¹⁴ We disagree with both of these assertions.

An "abused or neglected child" is defined by KRS 600.020, which provides, in pertinent part, 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;¹⁵

¹² On December 23, 2003, D.H. filed a motion requesting visitation rights with B.L.H. and R.D.H., which was granted.

¹³ K.H. is not a party to this appeal. In her brief, D.H. contends she is currently estranged from her husband.

¹⁴ In their briefs, the parties fail to correctly state our standard of review.

¹⁵ "Physical injury" is defined by KRS 600.020(44) as "substantial physical pain or any impairment of physical condition[.]" "Emotional injury" is defined by KRS 600.020 (24) as "an injury to the mental or psychological capacity or emotional stability of a child as evidenced by a substantial and observable impairment in the child's ability to function within a normal range of performance and behavior with due regard to his age, development, culture, and environment as testified to by a qualified mental health professional[.]"

- (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[.]

KRS 620.100(3) further provides that "[t]he 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."¹⁶

As previously discussed, Franklin testified at the adjudication hearing that she was contacted by the police and informed that a domestic violence incident had occurred at the residence of D.H. and K.H. Franklin further testified that she found B.L.H. and R.D.H. locked in a bedroom when she visited the residence and she stated that she believed D.H. and K.H. permitted overnight guests to stay at their residence on various occasions. In addition, Porter testified that D.H. tested positive for marijuana use in February 2003, and there was evidence indicating that a social worker with the Cabinet found

¹⁶ We note that this case does not involve an appeal from an order terminating parental rights. The distinction is significant as the Legislature has chosen to impose the more demanding "clear and convincing evidence" standard in termination of parental rights proceedings. See KRS 625.090.

drug paraphernalia in the residence during a routine visit in October 2002. Moreover, P.H. testified that K.H. had informed her, as recently as January 2003, that he had a drug problem.

It is well-established that the trial court is the finder of fact in a custody determination, and the court's determination as to the credibility of the witnesses, and the best interests of the child, will not be disturbed unless clearly erroneous.¹⁷ We conclude that the evidence introduced at the adjudication hearing was sufficient under the preponderance of the evidence standard to support the family court's determination that B.L.H. and R.D.H. were neglected as defined by KRS 600.020(1).¹⁸

D.H. also appears to contend that the family court's decision to award permanent custody of the children to P.H. was an abuse of discretion.¹⁹ We disagree. "After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an

¹⁷ Kentucky Rules of Civil Procedure (CR) 52.01. See also Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777, 782 (2002).

¹⁸ The Cabinet contends that D.H. failed to preserve her insufficiency of the evidence argument with respect to the family court's determination that B.L.H. and R.D.H. were neglected by way of a motion "for a directed verdict or some other peremptory instruction at the adjudication hearing." Given our conclusion that the family court's determination that B.L.H. and R.D.H. were neglected is supported by a preponderance of the evidence, we see no need to address this issue.

¹⁹ D.H.'s brief actually refers to the clearly erroneous standard of review.

abuse of discretion.”²⁰ “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.”²¹

As previously discussed, the family court determined that “it would be contrary to the welfare and best interests of the child[ren] to return [] to parental custody” and that it was in their best interests “that permanent custody be granted to [P.H.]” In addition, the family court found that D.H. and K.H. had “failed to make sufficient progress to regain custody of [their children].” The record clearly indicates that D.H. made little or no effort to comply with the family case plan entered on June 3, 2003. Had D.H. taken a more proactive role in attempting to regain custody of her children, the family court’s custody determination may very well have been different. Unfortunately, this was not the case. Consequently, we cannot conclude that the family court abused its discretion by awarding permanent custody of B.L.H. and R.D.H. to P.H.

Based upon the foregoing reasons, the orders of the Family Court Division of the Johnson Circuit Court are affirmed.

ALL CONCUR.

²⁰ Sherfey, 74 S.W.3d at 782-83.

²¹ Id. at 783 (quoting Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994)).

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