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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001099-ME
AND
NO. 2004-CA-001789-ME

K.H. AND R.H. APPELLANTS

APPEALS FROM FLOYD CIRCUIT COURT
v. HONORABLE JULIE PAXTON, JUDGE
ACTION NOS. 03-J-00279; 03-J-00280; 03-J-00281;
03-J-00282; 03-J-00283; 03-J-00298 AND 04-J-00015

COMMONWEALTH OF KENTUCKY, CABINET
FOR FAMILIES AND CHILDREN;
DEPARTMENT OF PROTECTION
AND PERMANENCY;
C.M.H., A MINOR CHILD;
R.A.H., A MINOR CHILD;
J.C.H., A MINOR CHILD;
J.P.H., A MINOR CHILD;
K.R.H., A MINOR CHILD;
C.A.H., A MINOR CHILD;
J.T.H., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF, MINTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: These are consolidated appeals from seven orders granting permanent custody of the appellants' seven

children to the Cabinet for Families and Children ("CFC")[1], suspending visitation by the parents, and granting the CFC's request to change its goal for the children from reunification with the family to adoption. Appellants argue that the trial court's findings of fact were inadequate and that there was insufficient evidence to support its rulings. We adjudge that the family court's findings of fact were sufficient to meet the requirements of CR 52.01, and its decision was supported by substantial evidence. Hence, we affirm.

Because of the complicated nature of this case, the number of children involved (7), the different counties the case has been in, and the fact that the CFC has been working with this family for several years, the facts of this case are best presented by the following chronology[2]:

October 12, 1994 – Appellants K.H. and R.H. get married in Grant County, Kentucky.

December 7, 1994 – R. H. is indicted by the Grant Circuit Court for second-degree assault, fourth-degree assault, and persistent felony offender in the second degree for kicking K.H. and

[1] Also referred to in the record as the Department of Protection and Permanency ("DPP").

[2] Upon motion of appellants, appellee's brief was stricken from the record because it was not timely filed. Thus, pursuant to CR 76.12 (8)(c)(i), this Court will accept the appellants' statement of facts and issues. We would note that the facts as presented in the Court's chronology are undisputed. It is the family court's decision to give permanent custody to the Cabinet based on these facts that is at issue.

throwing a knife at her foot. K.H. was pregnant at the time of the assaults.

January 4, 1995 – R.H. pleads guilty to two counts of fourth-degree assault for which he receives two twelve-month sentences, conditionally discharged.

January 19, 1995 – Motion to revoke R.H.'s conditional discharge filed because R.H. failed to attend required counseling.

February 15, 1995 – Daughter C.M.H. born to appellants.

August 2, 1996 – Daughter K.R.H. born to appellants.

September 4, 1998 – Daughter J.C.H. born to appellants.

November 3, 1999 - Juvenile emergency custody orders entered in the Martin District Court giving custody of C.M.H., K.R.H., and J.C.H. to the CFC. Removal ordered due to K.H.'s arrest on a bench warrant issued because she allowed R.H. back in the house after he padlocked K.H. and the children in the family's trailer and left them for two days.

January 18, 2000 – The Martin District Juvenile Court orders the case transferred to Johnson County District Court since the family has moved to Johnson County.

February 28, 2000 – Daughter J.P.H. born to appellants.

February 29, 2000 – Order entered in the Johnson District Juvenile Court returning the children home. Court notes that parents have attended counseling and have done everything the court has asked of them.

June 2000 – K.H. obtains DVO against R.H. based on allegations of domestic violence.

July 10, 2000 – K.H. drops the DVO and reunites with R.H.

July 21, 2000 – Juvenile emergency custody order entered removing all four children because of evidence of physical abuse and neglect as to J.C.H. - bruises on her arms and legs, black eye, other abrasions, and the child was dirty – and as to C.M.H. - black eye, bruising around her neck/shoulder area consistent with choking, abrasion of the neck area, scratch marks, her buttocks was red and peeling, and the child was dirty. Notation on the petition stated that C.M.H. had one other black eye less than a month prior.

July 21, 2000 – Examination of K.R.H. at the Paul B. Hall Medical Center reveals choke marks around neck, several abrasions, bloody nose, soft tissue swelling and contusion of the eye area, and severe rash due to uncleanliness.

July 24, 2000 – Juvenile emergency custody order entered because of neglect and continued domestic violence – R.H. hit K.H. while she was holding J.P.H. and J.P.H. had severe case of ringworm under her neck.

August 2000 – C.M.H. and K.R.H. make allegations of sexual abuse against K.H. and R.H. Physical examination of C.M.H. on October 27, 2000 reveals small V-shaped cleft in the posterior hymen.

Physical examination of C.M.H. on November 17, 2000 reveals normal hymenal edge.

September 20, 2000 – Order entered returning children to K.H. on the condition that R.H. stay out of the home. On that same date, K.H. and R.H. flee with the four children to Florida.

October 6, 2000 – K.H. and the children located in Florida with R.H. in the house. Juvenile emergency custody orders entered removing the four children because of leaving the jurisdiction of Kentucky with the children, allowing R.H. in the house, and not following the safety plan for the children.

December 1, 2000 – Court orders that R.H. have no contact with foster parents.

January 1, 2001 – Report of CFC documenting R.H.'s threats against social workers if he didn't get his kids back.[3]

January 5, 2001 – Visitation by K.H. allowed, but R.H. ordered not to be present.

January 29, 2001 – Son R.A.H. born to the appellants.

February 6, 2001 – CFC report stating that K.H. allowed C.M.H. to talk on the telephone with R.H. during visitation. Report also states that R.H. threatened to blow up CFC workers and their building.

[3] The parties in the present case stipulated to the admission of all reports filed in the case.

February 7, 2001 – Pursuant to an adjudication hearing on February 2, 2001, court orders that children remain out of the home based on the following findings: physical abuse has occurred (choking and black eye); domestic violence has occurred in home; and act of sexual abuse has occurred (no finding as to the perpetrator). Court orders that R.H. not be in Johnson County except for the two Thursdays a month he has supervised visitation.

March 30, 2001 – Johnson Family Court denies CFC's motion to suspend all reasonable efforts toward reunification.

June 5, 2001 – CFC report noting that a restraining order had been obtained against R.H. barring him from contact with CFC workers and that R.H. was serving 90 days in jail for terroristic threatening. CFC worker also noted during one of her visits that K.H. had a black eye.

July 2001 – K.H. attends three counseling sessions at Mountain Comprehensive Care Center.

December 14, 2001 – CFC report that R.H. threatened one of the children's caretakers.

December 18, 2001 – K.H. gets supervised visitation once a week.

April 22, 2002 – Dissolution decree divorcing K.H. and R.H. entered.

April 29, 2002 – K.H. files motion to have children returned to her.

May 7, 2002 – Court allows children to return home with K.H. on condition that the children continue in counseling and that R.H. be kept out of the house. (Subsequently, children do not continue counseling per the order.)

September 17, 2002 – Son C.A.H. born to appellants.

October 2002 – Motion by K.H. to relocate with the children to Florida.

December 16, 2002 – Emergency custody orders entered removing all six children because R.H. was present in the house under the influence of alcohol and because neglect was substantiated based on K.H. threatening to kill herself in front of one of the children, fleeing with the children, and the children being improperly clothed for the weather. Court also makes finding that C.M.H. was at risk of harm and exposed to sexual abuse. R.H. is arrested for being in the house with K.H. in violation of an earlier DVO requiring him to stay away from K.H. He is also charged with resisting arrest, disorderly conduct, and terroristic threatening for threatening to kill CFC workers.

December 23, 2002 – K.H. signs a prevention plan with the CFC agreeing that she would honor the DVO against R.H.

January 31, 2003 – CFC report indicates that K.H. is going to counseling and has a positive attitude during visitation. However, K.H. continues to violate court orders by living with

R.H. CFC again requests that it be released from reasonable efforts with R.H. toward reunification.

February 14, 2003 – Temporary custody order entered based on the following: C.M.H. at risk of harm and exposed to sexual abuse; R.H. and K.H. found in violation of the DVO; and neglect substantiated against K.H. for threatening to kill herself in front of the children. At the adjudication hearing, K.H. admits neglect. The court suspends R.H.'s supervised visitation and gives temporary custody of all six children to the maternal aunt, L.M.

February 25, 2003 – CFC progress report for the court states that K.H. is not making progress on her individual objectives under the plan. K.H. would not give the CFC her address or her phone number and the CFC was unable to locate her. It is suspected that she is again living with R.H. in violation of the DVO.

March 2003 – K.H. and R.H. get remarried.

April 28, 2003 – K.H. alleges violation of the DVO based on incident wherein R.H. hit and threatened her on April 23, 2003.

September 25, 2003 – K.H. and R.H. sign up for and attend parenting class.

September 2003 – L.M. contacts CFC and asked that the children be removed from her care because of K.H.'s threats and conduct during visitation. Also, CFC progress report shows that there

has been no progress in the family/individual objectives in the case plan. The report states, “Ms. H. has been unable to demonstrate that she can provide appropriate supervision of the children, as she continues to maintain a relationship with Mr. H. and the children remain in out of home placement due to this fact.”

October 2, 2003 – Case is transferred from Johnson County to the Floyd Family Court because K.H. and R.H. now residing in Floyd County. Floyd Family Court enters a temporary removal order finding that the children were dependent as a result of disruption of relative placement. CFC report dated October 2, 2003 notes that a special judge had recently been appointed on the case in Johnson County due to threats made by Mr. and Mrs. H. against the sitting judge and her having to recuse because of the threats.

October 6, 2003 – CFC progress report shows no progress on family and individual objectives of case plan.

November 14, 2003 – CFC report stating that R.H. and K.H. are attending various counseling programs and continuing with parenting classes. Report goes on to state that it is suspected that R.H. and K.H. are living together and that CFC is not making home visits because of past threats made by R.H. against CFC staff. CFC requests a permanency hearing in the case.

November 19, 2003 – Court enters orders finding the children dependent and continues placement with the CFC.

December 15, 2003 – CFC again requests a permanency hearing to review the case, noting that the children have been in the CFC's custody for a long time – placed with relatives and then put back in foster care. There is also a notation that the sexual abuse charges against R.H. had been dismissed because the Department for Community-Based Services failed to provide documentation requested by the court.

January 19, 2004 – Son J.T.H. born to appellants.

January 21, 2004 – J.T.H. removed from parents.

January 30, 2004 – Final report by CFC requesting termination of reunification efforts, termination of visitation, and change of goal to adoption.

January 30, 2004 and February 3, 2004 – Permanency/disposition hearing held. At the conclusion of the hearing, the judge announces her ruling committing the six oldest children to the permanent custody of the CFC and granting the CFC's request to change the goal from reunification to adoption.

February 3, 2004 – Court makes finding of dependency as to J.T.H.

February 4, 2004 – Court enters written orders committing all seven of the children to the CFC, suspending visitation of the

six oldest children by K.H. and R.H., and changing the CFC's goal to adoption.

February 24, 2004 – R.H. and K.H. file separate notices of appeal from the order of February 4, 2004.

Appellants first argue that the trial court erred in failing to make specific findings of fact supporting its decision to permanently remove the children and change the goal to adoption. Appellants maintain that specific findings were required under CR 52.01 which provides in pertinent part:

> In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon . . .

The written findings of fact made by the trial court were identical as to the six oldest children and stated as follows:

> Court finds in best interest of child that permanent custody be given to DPP. Child has been out of the home for 13 months since last removal. Last removal was 4th removal based upon records available to court. Cabinet has made reasonable efforts to reunify this family throughout the history of this case. Cabinet is hereby released from those efforts. Cabinet's request to change goal to adoption is granted. Case dismissed.

Appellants did not file a motion for more specific findings as required by CR 52.04. See Cherry v. Cherry, 634 S.W.2d 423 (Ky. 1982). Appellants maintain that they were not

required to file such a motion pursuant to Hollon v. Hollon, 623 S.W.2d 898 (Ky. 1981). From our review of the matter, even if the issue was preserved for appellate review, we believe the lower court's written findings along with the verbal findings were sufficient to support its ruling. The family court made the following verbal findings on the record at the conclusion of the permanency hearing on February 3, 2004:

> This is such a troublesome case from the get go. There's records I don't even have from Martin County. I do not even know what happened in Martin County. My review shows in December of 99 that the children were to be continued to be removed, so that already in December of 99 the children had been removed. Let's see, where am I? That's when [C.M.H.] was about over four and a half. Four of the children have not even been born yet - the last removal, which was the fourth in my records, four removals since December 99. Let's see, one child had not yet been born. C.A.H. was three months old. These children have been out of the home since 99 – since December of 99, just counting December – for almost 30 months, 30 months. That is two and a half years. These children have grown up outside of your home. There has been lots of talk said how reasonable efforts haven't been made with Mr. H. and I disagree. I think, number one, every time an action got started and was working to get complete, another one, something else happened, usually from Mr. H. Usually because you couldn't keep him away. You wouldn't keep him away. I don't know which it is. I think he is a very controlling person. I told you at [J.T.H.]'s hearing I think you are a classic victim. You have been pregnant since you were 16 years old. If that is not the ultimate control to keep a woman pregnant

the entire time. Children were conceived and born while your other children were removed. You've not had time to have an independent thought of your own. Mr. H. has never complied with one court order. The longest period of time that they were home is when Mr. Bailey was working with you. Mr. H. was not to be in the home. Mr. Bailey even testified that Mr. H. was violating court orders at that time. You all have never cared to comply with court orders ever, ever in the history of all of these cases. I wasn't in all of these cases. I wasn't there for all of them. All I have is the records. All I have is the orders, and I'm looking at court orders of things that happened. I am looking at when you got your children back in 2000 and you talked about this and I asked you about this. Mr. H. was not to be around and the first thing you did was you and Mr. H. took the children and went to Florida. And still not accepting responsibility and, like we talked about with the preacher, presenting yourself in the best light. You told him that you all tried to leave and go start a new life, but that social services tracked you down and made you come back. Well they did, because those children were still their responsibility. They were still trying to keep those children safe and you wouldn't. You're still young. You were young when all this started. You were way too young. But that doesn't do anything to the fact that these children need a safe stable home in which to grow up. And growing up in a home and to be removed from that home more than four times, four times in less than four years, is not a safe home and it's not a stable home. You won't keep them safe. You won't do what people ask you to do. . . . Mr. H. won't do it, and there were reasonable efforts made by Delbert. Delbert was your friend. Delbert tried to work with both of you all, and what happened here in December – violation of the Domestic Violence Order – there is no respect here

> for anything or anybody. There is no desire here to keep your children safe. There is no desire here to follow the orders to keep your children safe. There is none whatsoever. And the pattern that you have established does not indicate that there is any chance that this is ever going to change. These children need to have some permanency. They need to have stability. They need to know where they are going to be without promises being made to them that are broken, without, without having that fear of what's going to happen next. I don't have any choice. I don't have any choice just looking at this record. I don't have any choice. You love them, but you can't protect them and you won't protect them. . . . You can't do it and I can't let these children grow up this way.
>
> I find it is in their best interest that they have permanent custody be given to the department. They have been out of the home 13 months since just the last removal. The last removal was the fourth. The Cabinet has made reasonable efforts. The Cabinet is released from those efforts. The Cabinet's request for permanent goal of adoption has been granted. These cases are dismissed.
>
> In regards to [J.T.H.], I find him neglected based on your history of domestic violence, based upon your failure to do anything to create any kind of safe environment for your other children - your history in this case. The statute called KRS 610.127(7), where the Cabinet is not required to make any further efforts. Those are circumstances that make continuation or implementation of reasonable efforts to prevent or reunite the family inconsistent with the best interests of the child. Custody of [J.T.H.] is given to the Department.

In Skelton v. Roberts, 673 S.W.2d 733 (Ky.App. 1984), this Court held that verbal findings dictated into the record were not sufficient to meet the requirements of CR 52.01.

However, unlike the facts in Skelton, wherein the trial court made no written findings of fact, the lower court in the present case did make the bare bones findings of fact in writing. The court made a written finding that it was in the best interest of the children that permanent custody be given to the CFC (KRS 620.023), specifically noting that the children had been out of the home for 13 months and that it was their fourth removal. The court also made the specific written finding that the CFC had made reasonable efforts to reunify the family throughout the history of the case, as required by KRS 620.140(1)(c). Further, the court completed form AOC-DNA-5 in which it indicated that: 1) the court had received a predispositional investigation report from the CFC; 2) the children's best interests required removal; 3) continuation in the home was contrary to the welfare of the children; 4) reasonable efforts had been made to prevent the children's removal form the home; 5) there were no less restrictive alternatives to returning the children to the home; and 6) for commitment under KRS 620.140, the children need protection. Those findings were supplemented by the above detailed verbal findings made at the conclusion of the hearing. Taken together, the lower court's written and verbal findings were more than sufficient for a full review of the court's decision.

Appellants next argue that the trial court's decision granting permanent custody to the CFC and changing the goal to adoption was clearly erroneous. Pursuant to KRS 620.023(1), the court shall consider the following factors in making a custody decision of a child based on dependency, neglect or abuse:

> (a) Mental illness as defined in KRS 202A.011 or mental retardation as defined in KRS 202B.010 of the parent, as attested to by a qualified mental health professional, which renders the parent unable to care for the immediate and ongoing needs of the child;
> (b) Acts of abuse or neglect as defined in KRS 600.020 toward any child;
> (c) Alcohol and other drug abuse, as defined in KRS 222.005, that results in an incapacity by the parent or caretaker to provide essential care and protection for the child;
> (d) A finding of domestic violence and abuse as defined in KRS 403.720, whether or not committed in the presence of the child;
> (e) Any other crime committed by a parent which results in the death or permanent physical or mental disability of a member of that parent's family or household; and
> (f) The existence of any guardianship or conservatorship of the parent pursuant to a determination of disability or partial disability as made under KRS 387.500 to 387.770 and 387.990.

KRS 620.100(3) 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." Additionally, KRS 610.125(4) requires the CFC to

present evidence concerning the care and progress of the child in all dispositional review hearings, including the following:

(a) The length of time the child has been committed to the Department of Juvenile Justice or the cabinet;

(b) The number, location, and date for each placement during the total period of the child's commitment;

(c) A description of the services and assistance provided to the parent or arranged by the Department of Juvenile Justice or the cabinet since the last case permanency plan or case progress report, and the results achieved;

(d) A description of the efforts and progress of the child's parent since the last case permanency plan and case progress report, including the number and dates of parental visits and the extent, quality, and frequency of the parent's communication with the child;

(e) The familial and institutional barriers to:

1. Returning the child to the home;

2. Ending the commitment of the child to the Department of Juvenile Justice or the cabinet; and

3. Delivery of appropriate services needed by the child;

(f) Recommendations of services needed to make the transition from out-of-home care to independent living for children who have reached the age of sixteen (16) years;

(g) An evaluation of the child's current placement and services provided to the child;

(h) Recommendations for necessary services required to terminate the commitment of the child to the cabinet, to return the child home, or to facilitate another permanent placement; and

(i) Recommendations as to the permanency goal for the child.

The trial court is the finder of fact in a dependency, neglect or abuse action and resulting 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. CR 52.02; V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420 (Ky.App. 1986). Findings of fact are deemed clearly erroneous only if there exists no substantial evidence in the record to support them. Yates v. Wilson, 339 S.W.2d 458 (Ky. 1960).

Stacey Cook, the current social worker on the case since the parents moved to Floyd County, testified at the permanency hearing. She stated that R.H. and K.H. had completed all the counseling/parenting class requirements in the current case plan and that they interacted appropriately with the children during visitations. Cook did admit that R.H. would appear to whisper things in the children's ears during visitation, but that she could not hear what was being said. Although Cook testified that the parents had complied with the current case plan, Cook stated that CFC was nevertheless seeking to terminate reunification efforts and change the goal to adoption because of the history of the case – the fact that the children had been removed four times, the children had been out

of the home most recently for over twelve months, and the past physical abuse and neglect of the children.

Delbert Bailey, the parent's social worker when they resided in Johnson County, testified that he had problems with R.H. when he first was assigned the case, but that he eventually got along with him. Bailey testified that after initially encountering some resistance from the parents, they were ultimately 100% cooperative with him. On cross-examination, however, Bailey stated that the parents did not always comply with the treatment plan. Bailey admitted that there were occasions when he made visits to the parent's home when R.H. was under court order to not be in the home, and R.H. was there.

The oldest daughter, C.M.H., who was almost nine years old at the time of the hearing, testified by closed circuit television. She testified that she had lied in the past about being sexually abused and that was why she was not living at home with her parents. She stated that she very much wanted to go home. C.M.H. testified that she saw her parents fight and recalled a specific incident when her father threw a plate while her mother was holding a baby. She stated that when they would fight it would make her sad and she would go to her room. When asked if she remembered an incident where her mother had choked her, C.M.H. responded that her mother told her that she had not choked her but was just shaking her. C.M.H. also testified that

her father would hide on the roof when Delbert Bailey would visit their house.

The next oldest daughter, K.R.H., who was seven years old at the time, also testified via closed circuit television. Just prior to her testimony, she expressed concern to the judge that her mom and dad would hear her testimony. She next asked the judge if she had gotten her papers. The papers she was referring to were two letters that K.R.H. had written two days prior to the hearing which were admitted into evidence. The first letter stated as follows:

> Thay bib nasty stuff to me and thay touched my Privets Thay did not take care of me thay Let me Get hert every where thay don't care if you tell thay will beat me with a Belt if i go home
> Thay Say you try your Best to take me away
> Judge Send this Lette to all the Sochel workers

The second letter stated:

> to Tim [K.R.H.'s Guardian Ad Litem]
> Please Let only Stacey no what i told you
> Pleas tell
> From [K.R.H.]

K.R.H. read the above letters as part of her testimony and confirmed that she had written them on her own without the help or persuasion of anyone else. K.R.H. stated that the reason she wrote the letters was to tell what her parents did to her. She went on to state that her father and mother would beat

her with a belt if she told anything. She said one time she told one of their secrets and they yelled at her and told her they would throw her in the road and not let her do anything. K.R.H. testified that she did not want to go home and if she went home, they would do the same stuff she wrote down. She stated that her parents told her to try not to tell the truth about what they did because social workers just try to take children away. She confirmed that her parents whisper things in her ear when they hug her during visits. K.R.H. stated that she saw her parents fight a lot and that it made her scared. When asked what she saw when her parents fought, K.R.H. responded, "I saw everything." K.R.H. testified that her parents did not love her because if they did, they would not have done those things to her. She stated that her father had told her he did not love her. K.R.H. also described how her father would hide on the roof when Delbert Bailey would visit.

As to the allegations of sexual abuse, K.R.H. testified that it made her sad when her privates got touched. She further stated that C.M.H. did nasty stuff to her and touched her on her privates at the foster homes. K.R.H. said that C.M.H. learned the bad stuff from her parents and she was just like them.

During her testimony, K.H. admitted that the children were exposed to domestic violence in the past and that she had

allowed R.H. in the house when she was under court order to not let him around the children. She stated, however, that R.H. has changed and has not committed an act of domestic violence in two years. As for the EPO she took out on R.H. in April of 2003, K.H. claimed that she had lied about the incident because she had been forced by her caseworker at the time to obtain the EPO to get her children back. K.H. testified that she and R.H. are now Christians and go to church regularly. K.H. denied committing any acts of physical or sexual abuse against the children.

R.H. admitted that he had committed acts of domestic violence against K.H. in the past. He testified, however, that he has changed and now realizes how bad it is for children to witness such behavior. R.H. maintained that he had not committed an act of domestic violence in two years. R.H. testified that he had been in a treatment program for domestic violence offenders for twenty weeks and was working to complete the program. R.H. stated that he is now a Christian and attends church regularly. R.H. testified that he does not work, but receives SSI because he suffers from severe depression and anxiety.

Pastor Tim Nelson testified that he met R.H. three years ago in jail when he was doing a ministry there and R.H. was in jail for threatening to blow up the county building.

According to Pastor Nelson, R.H. approached him asking for help. Nelson stated that R.H. has admitted committing acts of domestic violence in the past and that the whole time he has known R.H., he has never caught him in a lie. Nelson stated that in the last six months, R.H. and K.H. have attended every service at his church. In observing R.H. and K.H. during visitation with their infant son J.T.H., Pastor Nelson testified that they were loving and excellent with the child. Nelson opined that if given the opportunity, the couple would be good parents to their children.

Finally, Martha Roberts, a licensed professional clinical counselor who ran the domestic violence offenders group R.H. was attending, testified that R.H. had been attending the group sessions since October of 2003. She stated that he participates very well and is attentive during the sessions. Roberts noted a tremendous change in his attitude since he had been attending the sessions – he now listens, relates his problems and feelings, has better control of his temper, and has a better attitude toward women.

The family court based its decision to cease reunification efforts and give permanent custody to the CFC primarily on R.H.’s repeated acts of domestic violence and K.H.’s failure to protect the children by continuously violating court orders and allowing R.H. back in the house with the

children. The parents argue that the family court's decision was not supported by sufficient evidence when the evidence established that both R.H. and K.H. had complied with everything in the current case plan. Notwithstanding the parents' compliance with the current treatment plan, we believe the family court's decision was supported by substantial evidence.

The family court was specifically required to consider incidents of domestic violence, whether or not committed in the presence of the children, pursuant to KRS 620.023(1)(d). Likewise, the court was to consider acts of abuse or neglect toward any child. KRS 620.023(1)(b). KRS 600.020(1)(b) defines "abused or neglected child" as a child whose parent "creates or allows to be created a risk of physical or emotional injury" to the child. Both R.H. and K.H. admitted that R.H. perpetrated multiple acts of domestic violence against K.H. and that the children often witnessed these acts. In our view, allowing a child to witness domestic violence unquestionably creates a risk of emotional injury to the child. Unfortunately, the testimony of C.M.H. and K.R.H. in this case confirms this fact.

As to the appellants' claim that R.H. is a changed man who now attends church and has not committed an act of domestic violence in two years, we would point to the EPO obtained by K.H. against R.H. in April of 2003, only nine months prior to the hearing in this case. While K.H. conveniently testified

that she perjured herself to obtain the EPO to get her children back, the family court was not required to believe that testimony. R.H. and K.H. have a long and storied history of domestic violence, dating back to 1994. Not only was R.H. a persistent domestic violence perpetrator, he also, as noted by the family court, repeatedly and defiantly violated the EPOs and treatment plans by coming back into the house with the children. Likewise, K.H. violated the EPOs and treatment plans by allowing R.H. back in the house. We would also note R.H.'s pattern of threatening various people involved in this case – CFC workers, foster parents, and a judge.

R.H. only recently decided to address his problem when faced with the imminent possibility of permanently losing his children, in October of 2003, four months prior to the permanency hearing. We applaud R.H.'s efforts to address his problem if they are indeed sincere, but at this point they are too little too late. KRS 610.125(4)(a) and (b) require the CFC to present evidence regarding how long the children have been out of the home and committed to the CFC. The three oldest children have been out of the home for a total of over four years. C.A.H., who was fifteen months old at the time of the hearing, has been out of the home for all but three months of his life. The three oldest children have been removed from the home four times. The most recent removal has been for over

twelve months. As recognized by the family court, the children have essentially grown up outside the parents' home. While KRS 610.125(4)(c) and (d) require the court to consider the services offered by the CFC, the results achieved, and the efforts and progress of the parents since the last case plan, the court is not required to retain the goal of reunification simply because the parents comply with the most recent treatment plan, when there is a long history of noncompliance and the children have been out of the home for a significant length of time. The children need and have the right to permanency and stability. KRS 620.010; KRS 620.230.

Although the family court did not base its decision in this case on physical abuse of the children, we would point out that the evidence of the physical abuse of C.M.H. and K.R.H. likewise supported the court's decision. KRS 620.023(1)(b). A child is deemed abused or neglected if the parent inflicts physical injury or allows to be created a risk of physical injury upon the child. KRS 600.020(1)(a) and (b). KRS 600.020(44) defines "physical injury" as "substantial physical pain or any impairment of physical condition". The hospital records from July of 2000 describe choke marks on K.R.H., and a black eye and choke marks on C.M.H. This evidence coupled with the letters and testimony of K.R.H. - they beat her with a belt and let her get hurt everywhere – was substantial evidence that

the parents caused physical injury to the children or allowed the children to be physically injured.

For the reasons stated above, the orders of the Floyd Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEES:
Stephen L. Marshall Lexington, Kentucky	Janice Faye Porter Campton, Kentucky