RENDERED: SEPTEMBER 30, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000641-ME
AND
NO. 2005-CA-000643-ME

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEALS FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NOS. 04-J-00213-001 & 00-J-00273-003

M.R.[1] — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.[2]

ROSENBLUM, SENIOR JUDGE: The Commonwealth of Kentucky (Commonwealth) brings this appeal from an adjudication of the Barren Circuit Court, sitting without a jury, finding J.D., a minor; and B.R., a minor, not neglected.[3] We affirm.

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[1] In order to protect the privacy of the children, we will use initials to identify the parents and the children.

[2] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

[3] Kentucky Revised Statutes Chapter 620.

As both parties accept the family court's statement of the facts contained in the February 28, 2005, opinion and order denying the Commonwealth's Motion to Amend, Alter or Vacate Judgment and Motion for New Trial, we therefore adopt them as follows:

> Concerning [B.R.] (an infant {whose date of birth is September 21, 1993} who resides with his mother, RESPONDENT [M.R.]), . . . on August 5, 2004, on behalf of the Kentucky Cabinet for Health and Family Services Mrs. Connie Meadows filed a petition alleging that RESPONDENT [M.R.] is responsible for having neglected such child in that on August 3, 2004,
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> > child called 911 to report that his mother had left the residence leaving he and his 2 month old brother home alone. Police responded to home and mother was away from home for at least 30 minutes. . . .
>
> Mrs. Meadows also filed a petition on August 5, 2004, concerning [J.D.] (an infant {whose date of birth is June 2, 2004} who also resides with his mother, RESPONDENT [M.R.]), . . . alleging that RESPONDENT [M.R.] is responsible for having neglected such child in that on August 3, 2004,
>
> > child was left at home alone w/ {with} 10 y.o. {year-old} brother. Parents were arguing and fighting and both left. . . .
>
> The foregoing allegations aver *prima facie* claims that each child is an "abused or neglected child" as defined by KRS 600.020 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:

. . . .

(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;

* * * *

(h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being.

* * * *

After a temporary removal hearing (pursuant to KRS 620.080) in which the court removed each child from RESPONDENT's home, eventually the court set an adjudication hearing for February 1, 2005. On that date the court conducted its adjudication hearing pursuant to the following provisions of KRS 620.100:

(3) The adjudication shall 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. The Kentucky Rules of Civil Procedure shall apply.

At the adjudication hearing the court denied RESPONDENT's motion to dismiss made at the close of PETITIONER COMMONWEALTH's evidence-in-chief. Thereafter RESPONDENT put on her evidence-in-chief in which she testified on direct examination that on August 3, 2004, she and her paramour, [John D.], were at RESPONDENT's home along with their son, [J.D.], and RESPONDENT's older son, [B.R.], along with [John D's] niece, Portia, and someone named Jonathan, when

RESPONDENT and her paramour, [John D.], argued to the extent that RESPONDENT decided to leave home for a period of time to allow agitated emotions to subside. Specifically, RESPONDENT testified on direct examination as follows:

> Q: When you left, who was present in the home?
> A: [B.R.], [J.D.], [John D.], Jonathan, and Portia. . . .

Later, also on direct examination, RESPONDENT testified as follows:

> Q: And what was your expectation when you left as far as the children being taken care of?
> A: I believed that [John D.] was there with the children; that I would only be gone for just a very short time.
> Q: And how long were you gone?
> A: I'm going to guess it was maybe 15, 20 minutes; not long.

RESPONDENT's testimony was credible. The court therefore could *not* find that PETITIONER COMMONWEALTH had proven by a preponderance of the evidence, in the case of [B.R.], that RESPONDENT [M.R.] ". . . had left the residence leaving . . . [the child] and his 2 month old brother home alone," . . . or in the case of [J.D.], that RESPONDENT [M.R.] had left the "child . . . at home alone [with ten {10} year-old brother [B.R.] . . ."

Accordingly, following closing arguments of counsel, in each of the above styled (sic) actions the court made its Adjudication Hearing Order (entered February 1, 2005) in which the court returned each child to RESPONDENT to the home of removal, each child ". . . having been found NOT to be dependent, neglected or abused. . ." Each Adjudication Hearing Order further provided that "(t)he allegations contained in the petition have not been proven by a preponderance of the evidence. . . " See, for example, KRS 620.100(3).

Footnotes omitted. This appeal followed.

Before us, the Commonwealth argues that the family court's decision was inconsistent with the weight of the evidence produced at the adjudication hearing, and that the family court abused its discretion in considering extraneous evidence. We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01, and legal issues *de novo.* Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky.App. 2001). As we conclude that the findings of the family court are supported by substantial evidence and are not an abuse of discretion, and that the court correctly applied the law, we affirm.

The Commonwealth initially argues that it met its burden of proof with regard to the issue of neglect. While conceding that contradictory testimony was presented on the issue of whether M.R. left both minors B.R. and J.D. at home alone, the Commonwealth contends that the family court erred in believing M.R.'s testimony over the testimony of the two police officers.

M.R. testified that John D., John D.'s thirteen-year old niece, Portia, and a "Jonathan D.," were visiting B.R., J.D., and her in her home. After an argument with John D., M.R. left the residence as a "time-out" in order to cool off. When

she left, ten-year old B.R. was in his bedroom; two-month old J.D. was in a car seat in John D.'s car; John D. was in the residence; and Portia was in the car with J.D. with the car running and the air conditioner on. M.R. believed when she left that John D. would take care of the children for the short period of time she anticipated being gone. She returned fifteen to twenty minutes later.

Glasgow Police Sergeant Tony Morgan arrived first on the scene, six minutes after B.R.'s 911 call. He testified that B.R. answered the door. The baby, J.D., was in the back bedroom lying on a twin bed propped up on a pillow with a bottle or a toy. B.R. and J.D. were the only ones in the residence. M.R. returned home approximately twenty-four minutes later, and related two different versions of what happened after she and John D. argued. One version had her leaving the residence with John D. remaining at home; a second version had John D. leaving in a car with her following in a car. Additionally, Glasgow Police Officer Darrell Smith arrived after Sergeant Morgan. His involvement, however, was limited to speaking to Sergeant Morgan and transferring M.R. to jail. He indicated that all he heard was M.R. state that she and someone had gotten in an argument and that she had left in order to cool off.

At the conclusion of the hearing the court stated that it did not like lying in any form, but given that M.R. either

lied to Sergeant Morgan or to the court, the court chose to believe that M.R. lied to Sergeant Morgan and told the truth to the court. Thus, the court found credible M.R.'s testimony that M.R. left the residence for a "time out" after the argument, leaving John D. to care for the children. The court found that M.R.'s version told to Sergeant Morgan, that she left *after* John D., was related as to not jeopardize John D.'s chances of getting temporary custody of J.D.

As stated in R.C.R. v. Commonwealth Cabinet for Human Resources, 988 S.W.2d 36, 39 (Ky.App. 1998), "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court," citing Wells v. Wells, 412 S.W.2d 568, 571 (Ky. 1967). Further, Hunter v. Hunter, 127 S.W.3d 656, 659 (Ky.App. 2003) provides:

> Under CR 52.01, in an action tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . . A factual finding is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. Golightly, 976 S.W.2d at 414; Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777, 782 (2002).

Giving due regard to the family court to judge the credibility of M.R., and the substantial evidence in the form of M.R.'s testimony that John D. and his thirteen year-old niece were present when M.R. left the residence, the court's findings were not clearly erroneous. We thus decline to disturb the court's factual finding that M.R. left B.R. and J.D. in the care of John D.

The Commonwealth next argues that the family court abused its discretion by considering extraneous evidence, specifically that when considering the credibility of ten-year old B.R.'s testimony during the adjudication hearing, the court made reference to B.R. being "caught in the middle" because of the court's knowledge of a "child custody case involving these parties." With regard to this matter, in denying the Commonwealth's CR 59.05 motion the family court stated:

> (I)t is the opinion of the court that the authority controlling judicial notice is KRE 201, "Judicial Notice of Adjudicative Facts," rather than the authorities which PETITIONER COMMONWEALTH cited (Maynard v. Allen, 276 Ky. 485, 124 S.W.2d 765 (1939) and Jones v. Bell, 304 Ky. 827, 202 S.W.2d 641 (1947)). ". . . (P)rior Kentucky precedents have been rather stingy, limiting judicial notice of court records to those in the same court involving the same parties and issues, or records in the current proceedings. *See*, *e.g*. Maynard v. Allen, 124 S.W.2d 765 (Ky. 1939); Jones v. Bell, 202 S.W.2d 641 (Ky. 1947). KRE 201 should encourage a more liberal view." R. UNDERWOOD & G. WEISSENBERGER, KENTUCKY

> EVIDENCE COURTROOM MANUAL 43-44 (2004-2005 ed.).
>
> Presently this court has on its docket Civil Action Number 04-CI-00660, styled [E.R.] v. [M.R.], being a custody action concerning the child, [B.R.]. [footnote omitted]. It is inevitable that what a family court judge hears about a family in one action will supplement what that same family court judge hears about the family in a related, though separate, action. Indeed, that circumstance was encouraged in the use of the slogan, "One Family, One Judge, One Court," to promote the adoption of the Family Court Constitutional Amendment in 2002.
>
> The court emphatically did *not* ". . . [decide] this matter on evidence beyond the immediate record and on evidence beyond the reach of the parties on this case," although admittedly information from the custody action certainly enhanced the court's understanding of the situation facing this family. Even without any information from the custody action, however, the testimony of RESPONDENT [M.R.] at the adjudication hearing was sufficient to support the court's finding and decision. The court's decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. There was no abuse of discretion.

On the record at the adjudication hearing the court made it clear that it found that the Commonwealth had failed to carry its burden with regard to the neglect of B.R. and J.D. based on M.R.'s testimony that she left the residence for a few minutes in order to cool off after an argument with John D., and that John D. was present at the residence with B.R. and J.D. when she left. Although the Commonwealth contends that the family court

erroneously considered extrajudicial information from the child custody case, we need not reach that argument because, according to the record, the court supported its decision solely on M.R.'s testimony and, as indicated above, said testimony provided substantial evidence to support the findings of fact by the court. We decline thus to disturb the findings of the family court.

For the foregoing reasons, the adjudication of the Barren Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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