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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001341-ME

S.T.[1] APPELLANT

v.

APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 04-J-00615

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN;
D.C., THE NATURAL FATHER OF M.E.T.;
AND THE GUARDIAN AD LITEM FOR M.E.T. APPELLEES

OPINION
AFFIRMING IN PART; REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.[2]

JOHNSON, JUDGE: S.T. has appealed from the May 26, 2005, order of the Hardin Family Court which suspended her supervised visitation with her minor child, M.E.T. Having concluded that the family court's determination of neglect was proper and not

[1] Individuals will be referred to by their initials to protect the interests of the minor child.

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

prejudiced by any ex parte communication, but that the family court abused its discretion in suspending S.T.'s supervised visitation with M.E.T., we affirm in part, reverse in part and remand.

S.T. is the biological mother of M.E.T., who was born on August 26, 2004, and D.C.[3] is her biological father. The parties were never married, but cohabited together with D.C.'s natural child, M.C., who died as the result of shaken baby syndrome in May 2004. S.T. has been indicted in Fayette County, Kentucky, for the murder of M.C., and is currently out of jail on a conditional bond awaiting trial.

On August 26, 2004, Lauren Wells, a social worker with the Cabinet for Families and Children (the Cabinet), filed a juvenile dependency, neglect, and abuse petition in the family court, alleging that M.E.T. was at risk of serious physical harm.[4] Wells also signed an affidavit for an emergency custody order which asserted the same allegations. Based on the testimony of Wells, the Hardin Family Court entered an emergency

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[3] D.C.'s paternity was established through D.N.A. testing.

[4] Wells alleged that S.T. was currently being investigated by Lexington Crimes Against Children for the homicide of another child, M.C., while under her care. This incident occurred in May 2004. Dr. Betty Spivack, a forensic pediatrician with the Kentucky Medical Examiner's office, reported that S.T. would be a danger to any child she supervised at that time. S.T.'s other child, A, age 2, was currently in the custody of her father due to the current investigation. The petition originally did not indicate a specific ground for removal; however, the Commonwealth was allowed to amend the petition to specifically allege neglect. S.T. was served with a summons on August 27, 2004.

custody order on August 27, 2004, removing M.E.T. from S.T.'s custody, and placing her in the custody of the Cabinet. The family court specifically found that M.E.T. was in danger of eminent death or serious physical injury, and her continued presence in S.T.'s home would be contrary to her welfare and best interests. A temporary removal hearing was held on August 30, 2004.[5] The family court found probable cause to remove M.E.T. from S.T.'s custody based on the written report of Dr. Spivack, indicating that M.C. had died from brain injuries as the result of being a shaken baby and it was her opinion that M.E.T. might suffer the same harm if left in S.T.'s care.[6] The family court ruled that M.E.T's temporary custody would remain with the Cabinet,[7] with S.T. and D.C. having visitation at the Cabinet's discretion.[8]

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[5] See Graham and Keller, Kentucky Practice § 6.15 (2003) (stating that "[t]he temporary removal hearing statute's substantive standard strikes the balance between parental rights and child protection by erring on the side of child protection. . . . The focus of a temporary removal hearing is the possibility of harm to the child rather than a determination of the truth or falsity of the dependency, neglect, or abuse petition's allegations"). See also KRS 620.080(2) (noting that the burden of proof is the same as at the adjudication hearing, i.e., preponderance of the evidence; however, at a temporary removal hearing, hearsay testimony is allowed for good cause).

[6] The family court was unsure whether Dr. Spivack interviewed S.T. However, Dr. Spivack specifically stated in her report that "[s]imilarly situated infants and toddlers are at significant risk of abusive head trauma, once an initial child has been abused in this manner. . . . I consider it a matter of high risk for [S.T.] to provide care to any young child."

[7] The family court also ordered that S.T. and D.C. complete parenting classes, that home studies be conducted, and that all parties fully cooperate with the Cabinet. Both S.T. and D.C. completed the parenting classes.

By order entered on September 7, 2004, the family court found that M.E.T. was at risk of harm, as S.T. was under investigation for the homicide of another child. By a preponderance of the evidence, the family court found that there were reasonable grounds to believe that it would be contrary to M.E.T.'s welfare to be returned to S.T.'s custody, because she could be neglected or abused, and that while reasonable efforts were made to prevent M.E.T.'s removal from her home, there were no less restrictive alternatives available at that time.[9] The family court further found based on Wells's testimony that S.T. was unable or unwilling to protect M.E.T.[10]

On September 22, 2004, S.T. filed a motion asking the family court to return M.E.T. to her, or in the alternative, to increase her visitation with M.E.T. On October 28, 2004, D.C. filed a motion requesting the family court to discontinue S.T.'s visitation with M.E.T. until the neglect proceedings were concluded. D.C. argued that discontinuing visitation between M.E.T. and S.T. would be proper to protect the safety and well-

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[8] M.E.T. was placed by the Cabinet with D.C., and S.T. was allowed supervised visitation every Monday with M.E.T. from 9:00 a.m. to 10:00 a.m. at the Cabinet's office.

[9] See KRS 620.090.

[10] The family court made specific findings in support of continued removal of M.E.T. by stating that "[o]pinion of Dr. Spivack that [M.E.T.] is in danger of harm by [S.T.] since older child [M.C.] died by shaken baby syndrome and brain injuries. High risk of harm. [S.T.] being investigated for homicide."

being of M.E.T.[11] Another motion to discontinue visitation was filed by D.C. and the Cabinet on November 8, 2004, stating the same grounds as D.C.'s earlier motion. D.C. filed an affidavit along with this motion stating his personal knowledge of the allegations set out in the motion. The family court entered an order on December 13, 2004, stating that a "Cabinet worker shall be physically present during visitation and the paternal grandmother shall be present during visitation to be arranged at [the] discretion of [the Cabinet] regarding date and time."

S.T. was indicted by a Fayette County grand jury in December 2004 for the murder of M.C.[12] D.C. filed a third motion to discontinue visitation on December 29, 2004, based on the murder indictment against S.T., stating that her continual harassment of D.C.'s mother, H.C., and her recent outbursts directed at H.C. during the supervised visits "demonstrated a severe disregard for the well-being of [M.E.T.]." On January 4, 2005, S.T. filed a motion accompanied by an affidavit from her mother, C.P., requesting that C.P. be allowed unsupervised

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[11] D.C. asserted the following in his motion: (1) that S.T. was under investigation for homicide; (2) that S.T.'s current supervised visitation did not provide for the "constant and consistent safekeeping and well[-]being and life" of M.E.T.; (3) that "due to current and recent publicity [S.T.'s] involvement in the homicide of [M.C.] and [S.T.'s] mental and emotional instability as observed by both Hardin County and Fayette County Social Service Workers [S.T.'s] self-control is questionable at best with the life of [M.E.T.] at risk"; and (4) that the Fayette Family Court recently limited visitation by S.T. with her other minor child due to the investigation regarding the suspected homicide.

[12] S.T. was briefly incarcerated before being released on bond. The criminal case is proceeding, but no trial date has been set.

weekly visitation with M.E.T. The family court entered an order on January 25, 2005, which denied D.C.'s motion to discontinue visitation, denied S.T.'s motion for unsupervised visits for C.P., and reiterated that a Cabinet worker was to be physically present during S.T.'s visitations with M.E.T.

On January 26, 2005, an adjudication hearing was held. S.T. stipulated that, based on proposed witness testimony, M.E.T. would more than likely be found to be a neglected child. The family court entered an order on February 4, 2005, and, based on that stipulation, made a finding by a preponderance of the evidence that M.E.T. was a neglected child as alleged in the Cabinet's petition.[13] The case was set for a disposition hearing and M.E.T. remained in the custody of D.C. pending the outcome of the disposition.[14] S.T.'s visitation with M.E.T. continued to be at the discretion of the Cabinet, and supervised by the Cabinet with a Cabinet worker present at all times. The family court allowed D.C. and H.C. to be present at S.T.'s visitations with M.E.T., if they desired.

A disposition hearing was held on March 2, 2005. By order entered on March 5, 2005, the family court ordered that

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[13] The family court found that reasonable efforts were made to prevent M.E.T.'s removal from S.T.'s home. M.E.T.'s best interests required the family court to change her custody because continuation in S.T.'s home was contrary to M.E.T.'s welfare and there were no less restrictive alternatives.

[14] The family court ordered a home study of D.C.'s residence and ordered D.C. to follow all of the Cabinet's recommendations. The Cabinet filed its home evaluation report on March 1, 2005, recommending that M.E.T.'s placement continue with D.C.

M.E.T. remain in D.C.'s home, as it was found not to be contrary to her best interests. The family court found reasonable efforts were made to prevent M.E.T.'s removal from S.T.'s home, and no less restrictive alternatives were available. At the hearing, the Cabinet indicated that it was willing to continue to supervise S.T.'s visitation with M.E.T. However, D.C. objected to S.T. having any visitation with M.E.T. Following a lengthy hearing in which D.C., H.C., Wells, and C.P. testified solely on the issue of visitation, the family court suspended S.T.'s visitation with M.E.T., unless D.C. agreed to allow the visitation. S.T. filed a motion on March 14, 2005, asking the family court to order that all ex parte communications filed of record be excluded. On March 15, 2005, S.T. filed a motion to alter, amend, or vacate the order suspending her visitation rights, but the family court denied the motion on May 26, 2005, stating visitation would be harmful to M.E.T. The docket sheet from the hearing on the motion to alter, amend, or vacate reflects that the family court sustained S.T.'s motion to exclude ex parte communications. This appeal followed.

S.T. claims that the family court erred in finding that M.E.T. was a neglected child under KRS 600.020, in suspending S.T.'s supervised visitation and in limiting her visitation to the discretion of D.C., and by referring to and considering ex parte communications during the disposition

hearing. Our review of these issues requires us to determine whether the factual findings of the family court are clearly erroneous.[15] A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person.[16] Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court.[17] If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion.[18] Abuse of discretion implies that the family court's decision is unreasonable or unfair.[19] Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have made a different decision, but whether the findings of the family court are

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[15] Kentucky Rules of Civil Procedure (CR) 52.01; Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

[16] Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003).

[17] Reichle, 719 S.W.2d at 444.

[18] Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982); Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002).

[19] Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994).

clearly erroneous, whether it applied the correct law, or whether it abused its discretion.[20]

We find no merit to S.T.'s argument that the family court erred in finding M.E.T. to be a neglected child as defined in KRS 600.020. The family court has broad discretion in determining whether a child is abused or neglected, as defined in the Kentucky statutes.[21] S.T. argues that there was no proof that M.E.T. had actually been harmed by S.T., but rather the family court only found a "risk of harm" because S.T. was under investigation for the homicide of another child. She accuses the family court of "leapfrogging" to find neglect, based on the death of M.C.[22] However, S.T. does not deny that she stipulated at the adjudication hearing on January 26, 2005, that the testimony to be presented, including the expert testimony of Dr. Spivack, would support the allegations contained in the

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[20] Sherfey, 74 S.W.3d at 782-83.

[21] R.C.R. v. Commonwealth, Cabinet for Human Resources, 988 S.W.2d 36, 38 (Ky.App. 1999).

[22] In making this argument, S.T. cites the case of J.H. v. Commonwealth, Cabinet for Human Resources, 767 S.W.2d 330, 334 (Ky.App. 1988) which prohibited the Commonwealth from "taking its evidence and inferentially leapfrogging from child to child in its efforts to remove them from their natural parents." The appellees have argued that J.H. should be severely limited because of the change in the statutory law defining a neglected or abused child, since the case was published almost 20 years ago, specifically, that J.H. did not discuss the risk of harm, but such may be considered in neglect and abuse cases, pursuant to current Kentucky statutes. S.T.'s stipulation in this case makes the determination of the application of J.H. moot.

Cabinet's petition for neglect. It was after S.T.'s stipulation that the family court made its finding of neglect.

KRS 600.020(1) defines an abused or neglected child as follows:

> [A] child whose health or welfare is harmed or <u>threatened</u> with harm when his parent, guardian, or other person exercising custodial control or supervision of the child [emphasis added]:
>
> (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
>
> (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 . . . .;
>
> (d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child; . . .
>
> (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. . . .

The formalities of filing a dependency, neglect, or abuse action are outlined in KRS 620.070. All juvenile proceedings "shall consist of two (2) distinct hearings, an

adjudication and a disposition . . . ."[23] In a dependency, neglect, or abuse case, "[t]he adjudication shall determine the truth or falsity of the allegations in the petition[.]"[24] "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."[25] The adjudication, which determines whether a child has in fact been neglected or abused is considered a trial and the parties have a right to appeal.[26]

In this instance, S.T., in stipulating to the evidence to be submitted by the Cabinet, waived any claim that it was inadmissible. A stipulation has been defined as "an agreement, admission, or other concession made in a judicial proceeding by the parties or their attorneys" [footnote omitted].[27] When a party stipulates to the contents of documents and that it is unnecessary for the authors of the documents to testify at trial concerning the documents, the documents are admissible into evidence.[28] S.T. offered no evidence to dispute Dr. Spivack's report, and therefore the family court's finding of neglect is

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[23] KRS 610.080.

[24] KRS 610.080(1); see also KRS 620.100(3).

[25] KRS 620.100(3).

[26] KRS 620.100(2); see also KRS 610.060(1)(a) (noting that both the child and his or her parents have a right to counsel at such hearings).

[27] 83 C.J.S. Stipulations § 2 (Supp. 2005).

[28] Tamme v. Commonwealth, 973 S.W.2d 13, 35 (Ky. 1998) (cert. denied 525 U.S. 1153, 199 S.Ct. 1056, 143 L.Ed.2d 61 (1999).

supported by substantial evidence and cannot be viewed as clearly erroneous.[29]

S.T. next argues that the family court erred in discontinuing her visitation with M.E.T., except as allowed by D.C. After the family court makes a determination by a preponderance of the evidence[30] that a minor child is dependant due to neglect and abuse, it will hold a separate hearing to determine the temporary removal of the child pursuant to KRS 620.080. In determining the temporary custody of a child found to be dependant, neglected, or abused, the family court shall make its determination based on the best interests of the child.[31] In determining custody in such a situation, the family

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[29] Sherfey, 74 S.W.3d at 782.

[30] KRS 620.100(3).

[31] See KRS 620.023 which states as follows:

> (1) Evidence of the following circumstances if relevant shall be considered by the court in all proceedings conducted pursuant to KRS Chapter 620 in which the court is required to render decisions in the best interest of the child:
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> (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

court, as a district court, "shall utilize the provisions of KRS Chapter 403[32] relating to child custody and visitation."[33]

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provide essential care and protection for the child;

(d) A finding of domestic violence and abuse as defined in KRS 403.270, 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.

(2) In determining the best interest of the child, the court may consider the effectiveness of rehabilitative efforts made by the parent or caretaker intended to address circumstances in this section.

[32] KRS 403.270(2) states as follows:

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
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> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
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> (b) The wishes of the child as to his custodian;
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> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
>
> (d) The child's adjustment to his home, school, and community;
>
> (e) The mental and physical health of all individuals involved;
>
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

Prior to the order being entered on March 5, 2005, visitation was within the discretion of the Cabinet, and S.T. was having supervised visitation with M.E.T. for one hour every week. None of the witnesses at the disposition hearing presented any evidence of danger caused by S.T.'s supervised visitations with M.E.T.[34] In fact, Wells specifically testified that the Cabinet's regional supervisors supported continuation of the visitation between S.T. and M.E.T., and Wells testified that the Cabinet would be willing to continue to aid in the supervision process after it closed its case. Aside from the pending murder allegations against S.T., there is no testimony of record, other than personal spats between D.C.'s family and S.T., to indicate there were further concerns regarding S.T.'s supervised visitation with M.E.T.[35] This case does not involve

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(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

[33] KRS 620.027.

[34] Those who testified included D.C., Wells, H.C., and C.P. S.T. did not testify.

[35] Testimony at the hearing including the following: (1) H.C. testified that S.T. gave her "bad looks" during visitation and that she was afraid S.T.

conflicting evidence from which the family court had to choose.[36] Despite any evidence that S.T.'s visitation with M.E.T. was not in M.E.T.'s best interests, or would seriously endanger her, the family court ruled from the bench after the disposition hearing, and stated that because of the volatile situation between the adults, S.T.'s visitation with M.E.T. would be discretionary with D.C. The family court did not mandate this visitation, but rather stated the following:

> This is a very difficult for me to try and decide on visitation. It is my understanding that the allegations against [S.T.] are that she did not necessarily contribute directly to the death of [M.C], but that she may have somehow allowed it, or contributed to it in that fashion, although not directly causing it. Because of that, and because of the fact that people are innocent until proven guilty, I have wanted to try to give [S.T.] an opportunity to see [M.E.T.] and have that contact, but have it supervised to where I was convinced that [M.E.T] would be safe. I have heard testimony, that although [S.T.] has not done anything directly that has caused the Cabinet alarm and concern, I have heard enough testimony that I think that this is such a volatile situation, it is just a powder keg ready to explode. Although I do

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would harm M.E.T. "to get back at H.C.'s family"; (2) D.C. testified that he did not see S.T. do anything physically during the visits that concerned him and in fact he brought in his laptop computer during the visits and worked while he was there; (3) Wells testified that she recalled hearing S.T. tell H.C. to stop staring at her, but that she never felt there was a need to stop the visits; she was further willing to continue supervising the visits even after the Cabinet closed its case; and (4) C.P. testified that she attended all visits and found no reason to believe that S.T. would harm M.E.T. during the visits.

[36] Gates v. Gates, 412 S.W.2d 223, 225 (Ky. 1967).

not want adults to get hurt, my primary focus is the safety of this child. Because the fact that there is so much volatility here, I feel like, although very regretfully so, that I am going to have to suspend [S.T.'s] visitation. I don't like doing that, I don't like it really at all, because I would like for you [S.T.] to have an opportunity to be with your child [M.E.T.], and if you [S.T.] are successful on your criminal case, you would not have lost that opportunity to be with your child [M.E.T.]. But, with [D.C.] being awarded custody of . . . I don't think it is appropriate, under the circumstances, to continue to have the Cabinet be in the same room and supervise this with all this hostility and volatility. My concern is that at some point in time some adult, and I am not pointing my finger at any one adult, because I think there is enough animosity, its so thick you can cut it with a knife, and I can understand that . . . and . . . truly I do understand that. I would probably feel the very same way if it was my child. . . . I am not saying that that is necessarily inappropriate emotions under the circumstances. I do try to think in terms of the mother if she is acquitted of this, it is going to be very unfortunate for her. I have tried very hard to give her as much meaningful visitation as I could, given the circumstances. But, my better judgment tells me it's not in the best interests of the child [M.E.T.] for the situation to continue. So, . . . I am going to not require the Cabinet to supervise visits anymore. I will grant visitation, but only as agreed upon by the father [D.C.]. Basically, that may mean no visitation, I realize that for [S.T.]. But, that is the best that I am going to do at time being. In the event that [S.T.'s] circumstances should change and she is acquitted, then maybe slowly she can be reintroduced into this child's [M.E.T.'s] life with supervision, because there is

> always going to be this lingering concern that acquittal doesn't mean innocence. I am sorry to say that, but I am sure that is going to be their position. But maybe, slowly we can reacquaint, if [S.T. is] acquitted . . ., but because it is just so volatile, I think it is in the best interests of your baby [M.E.T.] for this to be suspended. I am very truly sorry for you but, I am sorry for all your circumstances, for the death of [M.C.]. I am sorry for you that you had to endure this and your family. It is a very sad thing to have to deal with, and I have a great deal of sympathy for everybody involved in this case. . . . I will allow visitation but its only going to be by agreement with what is consented to by the father [D.C.]. The [family] court realistically knows that is probably not going to be any.

"[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health."[37] The burden of proving that visitation with a parent would "seriously endanger" the child is on the "one who would deny visitation."[38] We see neither indication that this burden was met, nor that such a finding was made. We are not unmindful that our review of this issue is limited to the determination of the family court's mistake of law or its application.[39] However, not only was there no substantial evidence to warrant denial of

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[37] KRS 403.320(3).

[38] Smith v. Smith, 869 S.W.2d 55, 56 (Ky.App. 1994).

[39] McCormick v. Lewis, 328 S.W.2d 415, 417 (Ky. 1959).

court-ordered visitation, albeit supervised, but the record is completely void of any facts that indicate that supervised visitation was contrary to M.E.T.'s best interests or put her in serious danger.

The apparent problems between D.C.'s family and S.T., should not affect M.E.T. in a supervised visitation setting. The family court stated that if S.T. is acquitted of the murder charges, or the charges are dismissed, that S.T. could petition the family court to establish visitation.[40] This indicates that the basis of the denial of visitation was based on the indictment, not on any other risk of danger to M.E.T. Further, it is evident from the record, and acknowledged by the family court, that, due to the animosity between D.C's family and S.T., leaving her visitation with M.E.T. at the discretion of D.C. was the same as granting S.T. no visitation at all.[41] The family court could have taken less restrictive measures, considering the lack of proof to support that supervised visitations with S.T. would seriously endanger M.E.T.

This Court appreciates the seriousness of the charges against S.T. However, the threat of these charges was present at the time of entry of the emergency custody order on August 27,

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[40] See Richie v. Richie, 596 S.W.2d 32, 34 (Ky.App. 1980) (citing KRS 403.320(2)).

[41] The family court also provided in its findings that both D.C. and H.C. could attend S.T.'s visitations with M.E.T. if they chose to do so.

2004. We regret that the family court's order does not set out specific findings for the denial of supervised visitation, except as allowed by D.C. However, S.T. failed to request amended or additional findings pursuant to CR 52.02.[42] Thus, we are constrained from remanding this order to the family court for additional findings of fact.[43] However, we do not find that D.C. met his burden by a preponderance of the evidence, and reverse that part of the family court's March 5, 2005, order denying court-ordered visitation, as the family court abused its discretion by failing to make a finding that such visitation would seriously endanger M.E.T.

S.T.'s final argument pertains to a letter written by H.C. to the family court. At the disposition hearing on March 2, 2005, the family court informed the parties of the contents of the letter, dated January 13, 2005.[44] S.T.'s attorney objected at the hearing, describing the letter as an ex parte

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[42] When a party fails to make a CR 52.02 request for additional findings, CR 52.04 provides that:

> A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

[43] Eiland v. Ferrell, 937 S.W.2d 713, 716 (Ky. 1997) (citing Cherry, 634 S.W.2d at 423).

[44] In the letter, H.C. discussed why visitation between S.T. and M.E.T. should be terminated.

communication to the family court, which was not certified to all parties. D.C.'s counsel argued that a copy of the letter was given to all parties at the adjudication hearing on January 26, 2005. However, S.T. denies that it was distributed at the hearing. The trial court took a recess after S.T.'s objection to the letter to allow all parties time to review the letter.

It was determined during the recess that the letter had been submitted to the family court through the circuit clerk's office and that, while D.C.'s attorney stated a copy had been sent to S.T.'s attorney's mailbox, S.T.'s attorney denied receiving a copy of the letter. Because the family court was unsure whether the letter was entered into the record as an exhibit or an ex parte communication, it had copies of the letter distributed to all parties. Subsequently, H.C. testified at the hearing as to her purpose in sending the letter to the family court, and S.T.'s counsel had an opportunity to examine her. Later in the hearing, the trial court, during Wells's testimony, asked her if she knew whether the contents of H.C.'s letter was true.[45] Wells testified that she had no knowledge as to the veracity of H.C.'s statements in the letter. S.T.'s attorney had an opportunity to cross-examine Wells.

S.T. argues that H.C.'s letter to the family court was an ex parte communication, that its use at the hearing was not

[45] S.T. placed her objection on the record.

harmless error, and that, pursuant to CR 61.01,[46] it substantially affected S.T.'s rights. The appellees argue that even if the letter was an ex parte communication, the error was cured when H.C. testified to its contents under oath, and S.T. had an opportunity to cross-examine her. Further, they argue that S.T. had an opportunity to submit her own evidence to refute any harm caused by the letter. The appellees also argue that the letter is more akin to hearsay, which is permissible at dispositional hearings of this nature.[47] Regardless of the nature of the letter, H.C., its author, was present at the hearing for direct and cross-examination, and, thus, we see no prejudice the letter might have caused. Further, as stated earlier, the family court noted in the record that it sustained S.T.'s motion to exclude all ex parte communications from its consideration in ruling in this case.

For the foregoing reasons, the order of the Hardin Family Court is affirmed in part and reversed in part, and this

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[46] CR 61.01 states that: "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

[47] KRS 610.110(2) provides as follows:

> At the disposition, all information helpful in making a proper disposition, including oral and written reports, shall be received by the court in compliance with sub-section (1) of this section and relied upon to the extent of their probative value, provided the parties or their counsel shall be afforded an opportunity to examine and controvert the reports.

matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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