

RENDERED: JANUARY 20, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-002011-ME

R.R.

APPELLANT

v.

APPEAL FROM HENDERSON FAMILY COURT  
HONORABLE SHEILA N. FARRIS, JUDGE  
ACTION NO. 10-J-00410 AND 10-J-00410-001

CABINET FOR HEALTH AND FAMILY  
SERVICES, COMMONWEALTH OF  
KENTUCKY; AND J.R., A CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KELLER, THOMPSON AND WINE,<sup>1</sup> JUDGES.

WINE, JUDGE: R.R. (“father”) appeals from an order of the Henderson Family Court finding that he neglected his daughter. Because we conclude that the trial court’s finding of neglect was not clearly erroneous, we affirm.

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<sup>1</sup> Judge Thomas B. Wine authored this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

A juvenile dependency, neglect, and abuse petition was filed against father alleging that on January 25, 2010, he spanked his seventeen-year-old daughter leaving bruises and that in the past, he imposed similar discipline. The petition further alleged that father engaged in controlling behavior and refused to cooperate in an anger management assessment.

At a hearing, evidence was introduced concerning the daughter's relationship with her father, her twin fifteen-year-old sisters, and her mother. The testimony indicated that daughter had emotional instability and had been violent toward her siblings, father and mother. As a result, she had been placed on medication.

Daughter testified that father was controlling and restricted her activities and her friends. She described instances when father would get angry and commit acts of domestic violence upon her that began when she was twelve or thirteen. She described two specific instances when her father became angry.

On January 24, 2010, father and daughter had an argument and an altercation occurred. When the police arrived, daughter admitted that she bit and hit her father and stated that her father did not strike her. Daughter pled guilty to fourth-degree assault and was placed in a juvenile work program.

The following day, father and daughter again had an argument while at the marital residence. Father's parents and the twins were present. Mother was in the home but was in another room when she heard the argument and called police. The officers who arrived at the scene testified that father admitted to

spanking daughter, however, the officers did not observe any bruises or marks on daughter at that time. The officers left the residence without arresting father.

A court liaison for the Henderson County Schools testified that due to their parents' divorce in 2010, the three minor children were in the family transition program. Because of the acrimony between the children, daughter was in a separate class from her siblings.

The social worker involved with the family interviewed the family and found father to be uncooperative. Although father admitted to spanking daughter on January 25, 2010, he refused to attend an anger management assessment. At the hearing, father again admitted to spanking daughter on that date, but denied that it caused bruising. Daughter's siblings testified that father had not abused daughter but admitted that father included spanking as a form of punishment.

A settlement agreement reached by the parties in their pending dissolution of marriage action provided that daughter reside with mother. Pursuant to the agreement, the twins resided with father.

After hearing the evidence, the family court found that on January 24, 2010, a physical altercation occurred involving father and daughter and that on January 25, 2010, father spanked daughter. Additionally, the family court found as follows:

8. [Father] treats [daughter] differently than [the twins]. The twins have labeled [daughter] as having a "poor behavior." The behaviors which [the twins] attribute to

[daughter] are the same behaviors which [daughter] and [mother] attribute to [father]. These include: throwing items, hitting walls, destruction of property and yelling at someone with whom they do not agree.

9. The behaviors of [father] described by [daughter] and [mother] were echoed in the behaviors described by Tracy Sturgill when she attempted an investigative interview at the home. Two friends of [daughter] testified to having seen bruises on [daughter], which [daughter] advised were inflicted by [father].

10. A child is a neglected child when a parent creates or allows there to be created physical or a risk of physical injury, by other than accidental means. [Father's] behavior of spanking or striking [daughter] and leaving bruises as a result of those behaviors creates a risk of physical injury.

The court further found that corporal punishment used when a parent is “angry or is used as means of embarrassment as well as discipline, is not appropriate.”

Kentucky Revised Statutes (KRS) 600.020(1) defines an abused or neglected child 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;

(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 as defined in KRS 222.005;

(d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

(e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

(f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;

(g) Abandons or exploits 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. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or

(i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months;

Emotional injury is defined in KRS 600.020(24) as follows:

‘Emotional injury’ means 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[.]

Physical injury is defined in subsection (45) of the statute as “substantial physical pain or any impairment of physical condition[.]”

The family court found that father spanked daughter while in a state of anger, resulting in bruises. Although the family court did not find that father abused daughter, the finding of neglect was based on the finding that he inflicted physical punishment upon daughter, creating a risk of physical injury. After a review of the record, we affirm the Henderson Circuit Court.

KRS 620.100(3) provides that a family court must find a complaint of neglect true by a preponderance of the evidence following a dependency, neglect, and abuse adjudication hearing. The burden to prove neglect lies with the complainant. *Id.* In determining whether a child has been neglected, the trial court has broad discretion. *R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36, 38 (Ky. App. 1998).

Upon review, we consider a trial court’s finding of neglect under the clearly erroneous standard. *C.R.G. v. Cabinet for Health and Family Services*, 297 S.W.3d 914, 916 (Ky. App. 2009). Thus, we will not reverse such a finding unless clearly erroneous. *Id.* Factual findings are not clearly erroneous if supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Substantial evidence is evidence that a reasonable mind would find sufficient to support a conclusion. *Id.* Despite the fact that a reviewing court might have found differently in the same circumstances, an appellate court cannot substitute its

judgment for that of the trial court with regard to the credibility and weight of the evidence. *New v. Commonwealth*, 156 S.W.3d 769, 773 (Ky. App. 2005).

Being mindful of the standard of review in this case and the great deference we must give to the family court regarding its finding of neglect, we affirm the court's finding. Admittedly, reasonable persons may disagree as to the appropriateness of using corporal punishment to discipline a child seventeen years of age. In addition, we recognize that the failure of the Cabinet to file a dependency, abuse and neglect petition for six months may have affected the strength of the Commonwealth's case or the ability of the father to defend against the allegations. However, neither of these goes to the decision of the trial court in finding, by a preponderance of the evidence, that there was neglect.

Although not specifically cited in the trial court's findings of fact, a finding of neglect was made under KRS 600.020(1)(b). KRS 600.020(1)(b) states that an abused or neglected child is one whose custodian has created, or who has allowed "to be created[,] a risk of physical or emotional injury . . . by other than accidental means[.]"

The trial court did not find the spanking on January 25, 2010, to be severe enough to qualify as a "physical injury" under KRS 600.020(45). This finding was consistent with the Cabinet's finding that there was no evidence of bruising on that date. However, the risk of physical injury existed. Testimony during the hearing by daughter and mother revealed that, while the bruises were not yet apparent immediately after the spanking, bruising did appear some time

thereafter. We must defer to discretion of the trial judge in determining the validity of such testimony, even in the light of the absence of physical evidence to the contrary immediately thereafter. Indeed, determinations as to credibility and weight of the evidence are soundly within the trial court's broad discretion.

Kentucky Rules of Criminal Procedure (RCr) 9.78; *A.D.B. v. Commonwealth, Cabinet for Health and Family Services*, 205 S.W.3d 255, 262 (Ky. App. 2006).

Thus, it was the trial court's prerogative to believe daughter and mother's testimony.

Here, the trial court found that disciplining out of anger created a risk of physical injury. The testimony of various witnesses substantiated that father frequently reacted inappropriately when disciplining daughter. Further, testimony indicated that daughter had bruises in the days after the spanking, despite the fact that there were no bruises immediately apparent to officers and the Cabinet. These findings were sufficient to support the trial court's decision of neglect under KRS 600.020(1)(b).

For the foregoing reasons, we affirm the order of the Henderson Circuit Court.

KELLER, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.



THOMPSON, JUDGE, DISSENTING: Although mindful that our standard of review requires that we give great deference to the family court in determining whether a child is neglected, I respectfully dissent.

First, I point out the distinction between abuse and neglect. KRS 600.020(1)(a) and (b) refer to abuse while subsections (c) thru (h) address the facts that must be established to support a finding of neglect. Thus, even if there was substantial evidence that father inflicted physical or emotional injury upon daughter, to be consistent with the facts, the family court could have only properly found that he abused daughter. Moreover, after a thorough review of the record, including the hearing, I do not believe there was sufficient evidence for a finding of abuse.

The evidence reveals that father and daughter have a strained relationship and father admitted that on January 25, 2010, he spanked daughter. However, the police officers called to the scene testified that they did not observe any bruising on daughter immediately after the incident and left the residence without arresting father. There was no physical evidence presented that father's spanking resulted in bruising or that father's conduct caused daughter to suffer an emotional injury.

The evidence did demonstrate that daughter has resentment toward father's attempts to control her behavior and that father does not approve of daughter's pre-adult lifestyle. Further, there was evidence that daughter and her siblings have a confrontational relationship caused, in part, by the pending

dissolution of father's and mother's marriage. It is noteworthy that that the two younger siblings reside with father and had not witnessed any bruising on daughter caused by father's discipline. Further, while certainly not conclusive as to daughter's motives, I cannot ignore that the abuse and neglect petition was not filed until six months after father spanked daughter, when there was no possibility of documenting any physical injury.

Although daughter's age and relationship with father undoubtedly render it inadvisable that they reside in the same household, under the terms of father and mother's separation agreement, she is to reside with mother. The court's intervention at this time is futile and without evidentiary support. I would reverse.

BRIEF FOR APPELLANT:

Amealia R. Zachary  
Dixon, Kentucky

BRIEF FOR APPELLEE:

Wm. Clint Prow  
Special Prosecutor  
Dixon, Kentucky