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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000789-ME

S.H. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NOS. 08-J-505616, 08-J-505617 AND 08-J-505619

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; AND S.H., C.H., AND J.H.,
CHILDREN APPELLEES

<u>OPINION</u>
<u>AFFIRMING</u>

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND LAMBERT, JUDGES.

CLAYTON, JUDGE: S.H. appeals the judgment of the Jefferson Circuit Court

that found his daughter, C.H.,[1] had been abused and that her siblings, S.H. and J.H., were at risk of abuse. S.H. is the children's father. For the following reasons, we affirm.

S.H. and K.B., the children's mother, were divorced in March 2009. Since that time, the children have lived with their mother who has sole custody of them. In addition, S.H. has periodic supervised visitation with the children, which typically occurs in eight-hour blocks of time. The procedure for the supervised visitation is that the person who is supervising the visitation picks up the children and takes them to their father. Typically, S.H., the children, and the adult who is supervising visitation, spend the next eight hours at a home or at outings, which take place in restaurants or parks or similar settings.

The original proceedings, from which this complaint emanated, began in September 2008 in Jefferson Circuit Court (hereinafter "family court") after the Cabinet for Health and Family Services (hereinafter "Cabinet") received a report of abuse concerning the children. Subsequently, the Cabinet filed a three-page Juvenile Dependency, Neglect and Child Abuse Petition in family court. The petition contained allegations about a pattern of physical abuse and threats of violence by S.H. toward his children and K.B. In the petition, the children recounted multiple acts of physical abuse and expressed fear that S.H. would kill

[1] Pursuant to the policy of this court, in order to protect the privacy of minor children we refer to them only by their initials.

their mother. K.B. confirmed that S.H. had threatened to kill her. Additionally, the report included information that S.H. owned forty to fifty guns.

At that time, the family court ordered intervention for the family, which included counseling and treatment. On April 17, 2009, an order was entered that informally adjusted the three pending actions in the case. The family court, based on the parties' agreement to follow the court's conditions, directed, among other things, that the children remain in the sole custody of their mother, K.B.; that everyone in the family attend counseling; and that the father have therapeutic visitation supervised by Matt Veroff. Thereafter, on July 1, 2009, the Cabinet informed the family court of its intent to close the case.

This action is based on the Cabinet's filing new Juvenile Dependency, Neglect, and Abuse Petitions with respect to each of the children, entered on March 17, 2010. In pertinent part, each of the petitions states the following allegations:

> On or about 1/25/10, CHFS received report alleging physical abuse to 8yr old [C.H.]. Report states that above-named child has a bruise that is reddish/yellow in color on her right arm near armpit which child reported occurred from her father grabbing her arm. On 1/25/10, SW interviewed child at Chenoweth Elementary. Affiant did observe child to have bruise on right arm and photos were taken; furthermore, findings were consistent with previously mentioned report. Child told SW that she had visited w/NF [S.H.] on 1/23/10 at a restaurant. Child told SW that during the visit, NF pulled her arm trying to get her to hug him. Child told affiant that her siblings also saw NF grab her arm, but they didn't say anything because they were distracted by NF's cell phone. . . . Child told

SW that she is scared of NF and that she does not want to visit.

In the petition, the Cabinet social worker concluded that "CHFS has concerns for the child's safety due to [the Father's] prior history of domestic violence and alleged report of physical abuse."

On November 18, 2010, the family court held a hearing regarding the allegations of abuse. At the hearing, the following individuals testified: Velva Poole, the Cabinet social worker; C.H.; Todd Geddes, who supervised the visit; and S.H.

Velva Poole testified that she interviewed C.H. following the Cabinet's receiving a child abuse report. C.H. told Ms. Poole that she and her siblings were at a restaurant with her father during a supervised visitation. C.H. stated that her father grabbed her by the arm, causing a bruise which was still visible during Ms. Poole's interview. Ms. Poole also interviewed S.H., C.H.'s sister, on that day. S.H. confirmed that her father had grabbed her sister during the visit. Later, Ms. Poole interviewed J.H., C.H.'s brother, who informed Ms. Poole that he saw his father pulling on C.H.'s arm, that he was scared during the visit, and that C.H. cried.

The family court judge interviewed C.H. *in camera*. C.H's guardian *ad litem* was present during the interview, with the Cabinet's attorney and S.H. and S.H.'s counsel watching the interview on a video monitor in the court room. Further, S.H. and the Cabinet's attorney were provided an opportunity to ask C.H.

questions by submitting them to the judge during the interview. After acknowledging to the judge that she understood the difference between telling the truth and telling a lie, she assured the judge she would tell the truth. C.H. explained that during a supervised visitation, her father grabbed her by the arm and asked her the reason she did not hug him. Afterwards, C.H. said that she told her mother and the school counselor about the incident. She clearly identified photos of the injury and said that she did not receive the injury from her dance activities.

Next, Todd Geddes, the person supervising the visit, and S.H. testified. Mr. Geddes stated that he was with S.H. and the children the entire time at the restaurant and did not see S.H. grab C.H.'s arm. Mr. Geddes also stated that he did not observe C.H. complain or cry about S.H.'s grabbing her. But Mr. Geddes did observe C.H. and S.H. scuffling over who got to play with S.H.'s cell phone. He opined that this scuffling was a common occurrence between them. And Geddes noted that it was he who intervened during the scuffle. Additionally, Mr. Geddes said that he never saw S.H. display any inappropriate anger or physical contact during the visit. Next, S.H. testified and confirmed Mr. Geddes's statements and denied grabbing C.H.'s arm.

At the conclusion of the hearing, the Cabinet asked that the family court find abuse with respect to C.H. and risk of abuse for the other two children. S.H., however, asked that the petitions be dismissed. Family court entered its order on April 5, 2011, wherein it stated:

> The Court finds that it has been established by a preponderance of the evidence that the child [C.H.] was abused in that father grabbed her by the arm causing serious bruising. There is a history of domestic violence with father. The child's siblings were placed at risk of abuse. The children have reported abuse to the therapist and have expressed fear of their father. Treatment service to remain in effect.

It is from this order that S.H. now appeals.

S.H. maintains that the family court erroneously determined that S.H. had abused C.H. because the allegations of abuse do not meet the statutory definitions of "abused and neglected child" found in Kentucky Revised Statutes (KRS) 600.020(1) and "physical injury" found in KRS 600.020(45); that the family court's determination of abuse against C.H. was contrary to the substantial weight of the evidence; that the family court's determination that S.H. and J.H. were at risk of future abuse was contrary to the substantial weight of the evidence; and finally, that the family court erroneously prohibited S.H's counsel from being present during the *in camera* questioning of C.H. Whereas the Cabinet argues that S.H. failed to demonstrate that the family court's finding was clearly erroneous in determining that C.H. was abused and that S.H. and J.H. were at risk of abuse; that the evidence was sufficient for such a determination; and that the family court did not err in its *in camera* questioning of C.H.

Family courts have "a great deal of discretion to determine whether [a] child fits within the abused or neglected category[.]" *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). Furthermore, a family

court’s factual findings are reviewed under the clearly erroneous standard. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). On appeal, we may not reverse the trial court unless its decision was clearly erroneous. *C.R.G. v. Cabinet for Health and Family Services*, 297 S.W.3d 914, 916 (Ky. App. 2009). “Clearly erroneous” does not mean absent contradicted proof. Instead, the “clearly erroneous” standard “requires that there be proof of a probative and substantive nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people.” *Id*. Therefore, if the findings of fact are supported by the appropriate standard of evidence and the correct law is applied, a family court's decision will not be disturbed, absent an abuse of discretion. Keeping that standard in mind, we turn to the situation in the instant case.

Now, we examine S.H.’s contention that the family court erroneously determined that S.H. had abused C.H. First, he maintains that the Cabinet’s allegations on their face do not satisfy the statutory definition of “abused and neglected” child and that the March 2010 petitions were deficient on their face. The rationale for his argument is that the allegations therein did not satisfy the statutory definition for an “abused and neglected child” in KRS 600.020(1) or “physical injury” found in KRS 600.020(45). He, therefore, argues that the petitions themselves should have been dismissed.

In order for an appellate court to address an issue, it must be shown that the issue has been properly preserved for review. Clearly, “[a]n appellate court must be able to tell what the trial court had before it to consider, and what it

did consider, before the trial court can be either affirmed or reversed." *Fischer v. Fischer*, 348 S.W.3d 582, 589 (Ky. 2011). Since this initial argument was not presented to the family court and, hence, not properly preserved, we will not consider it for the first time on appeal.

Next, we will address S.H.'s contention that the family court's determinations were contrary to the substantial weight of the evidence. Pursuant to KRS 620.100(3), the Cabinet, as the complaining party, bears the burden of proof, "and a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence." In domestic violence cases, a preponderance of the evidence requires that the fact-finder believe that the evidence is sufficient to show that the petitioner is more likely than not a victim of domestic violence. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). Because the evidence necessary in a dependency, neglect, and abuse case is also based on a preponderance of the evidence standard, in the instant case, the Cabinet must provide the family court with evidence *sufficient* to show that C.H. was more likely than not a victim of child abuse and that her siblings were more likely than not at risk of child abuse. And, we note that the burden of proof in a dependency, neglect, and abuse case is less demanding than the burden of proof required in a termination of parental rights case because termination cases require a "clear and convincing evidence" standard. *See* KRS 625.090.

An abused child is defined KRS 600.020(1)(a) and (b) as:

> [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[.]

S.H. argues that the family court's determination concerning abuse and risk of abuse were contrary to the substantial weight of the evidence.

Here, the family court based its finding of abuse on KRS 600.020(1)(a) and ascertained that C.H., S.H., and J.H.'s welfare was harmed or threatened with harm when S.H., during his supervised visitation with his children, inflicted a serious bruise on C.H.'s upper arm by other than accidental means. As an aside, we are not convinced by S.H.'s argument that the infliction of the bruise was accidental. The children's testimony indicates that S.H. purposely grabbed C.H.'s upper arm.

In addition, S.H.'s argument that the injury did not meet the threshold of KRS 600.020(45), that is "'[p]hysical injury' means substantial physical pain or any impairment of physical condition[,]" is also without merit. Mere parsing of the definition shows that a severe bruise is an "impairment of [a] physical condition." Additionally, we are not persuaded by S.H.'s use of the criminal code for illumination of the topic. This case is civil and about child abuse. References to

criminal assault in the criminal code are not helpful. Furthermore, the family court judge's determination, pursuant to KRS 600.020(1), that the child was abused was not shown by S.H. to be clearly erroneous. The child was bruised.

S.H. claims that because the children gave different stories to the investigating social worker, their stories lack credibility and weight. But, although the children's versions are not exact, each child recounted that S.H. had grabbed C.H.'s arm. S.H. also says that C.H.'s *in camera* testimony has little credibility or weight. But, other than noting that she did not claim any physical pain, he merely gives opinions, not reasons, for this claim.

In addition, S.H. points out that Geddes and his testimony disputed the children's testimony. It is important to remember that "clearly erroneous" does not require an absence of contradicted proof. The trier of fact is given the task of ascertaining the credibility of the witnesses. While Mr. Geddes and S.H. may have seen things differently, this factor alone does not diminish the children's testimony.

In these cases, however, the family court has the opportunity to observe the witnesses and make decisions regarding credibility. In other words, the family court judge is the finder of fact and we rely on the judge's ability to determine the credibility of the witnesses. Bolstering the family court's findings is the information on the record concerning S.H.'s history of domestic violence and the children's fear of S.H. In sum, S.H. has not shown that the family court's finding that C.H. was abused and that S.H. and J.H. were at risk of abuse was

clearly erroneous, and we believe that the family court did not err in making such a determination.

Next, S.H. claims that the family court erroneously prohibited his counsel from being present during the *in camera* interview of C.H. S.H. observes that under KRS 610.070, he and his counsel are allowed to be present at the hearing, which they were. But, S.H. states that nothing in KRS Chapter 600 to 645, the Kentucky Civil Rules or the Jefferson Family Court Rules addresses the process for an *in camera* interview of a child and, thus, each family court creates its own ad hoc rules for such an interview. S.H. claims that this is contrary to Kentucky law. He asserted that face-to-face confrontation of adverse witnesses is the best means of examination of witnesses. Further, since the case relied on C.H.'s credibility, father's counsel's exclusion from the interview was arbitrary and reversible error.

In fact, Kentucky courts have held, in a case involving the termination of parental rights, that "the Sixth Amendment does not apply to civil cases." *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 345 (Ky. 2006). In that same case, however, the Kentucky Supreme Court recognized that, although the confrontation clause does not apply to civil cases, the due process clause does apply, and requires that cross-examination is fair, reliable and trustworthy. *Id*.

The process used by the family court was as follows: the family court judge interviewed C.H. in chambers with C.H.'s guardian *ad litem* also present.

Meanwhile, the Assistant County Attorney, S.H., and S.H.'s counsel viewed the *in camera* proceedings by way of video monitor. Additionally, they were allowed to submit written questions for C.H. during the *in camera* questioning. We believe that the process used by the family court was fair, reliable, and trustworthy.

Additionally, S.H. contends that Kentucky's constitution grants exclusive authority to the Kentucky Supreme Court to set the rules of practice in Kentucky courts, and that because the process used by the family court herein has not been established in a court rule, it is not valid. This contention ignores the difference between a court's rules and a court's discretion during trial. Indeed, Kentucky courts control the determination about the mode and order of the examination of witnesses. *See* Kentucky Rules of Evidence (KRE) 611(a). More specifically, "[w]hen the trial court acts as the trier of fact, the extent of examination of witnesses by the presiding judge is left to the trial judge's discretion." *Bowling v. Commonwealth,* 80 S.W.3d 405, 419 (Ky. 2002).

Lastly, as stated in *Transit Authority of River City v. Montgomery*, 836 S.W.2d. 413, 416 (Ky. 1992), a trial judge "is vested with a large discretion in the conduct of the trial of causes and an appellate court will not interpose to control the exercise of such discretion by a court of original jurisdiction, unless there has been an abuse or a most unwise exercise thereof." In addition, it was well within the court's authority to conduct the trial proceedings and determine the reception of evidence in the case. Thus, we hold that the family court's *in camera* interview was not an abuse of its discretion.

To conclude, after reviewing the record, we conclude that a preponderance of the evidence existed to support the family court's finding that C.H. was abused and that her siblings were at risk of abuse. Further, we hold that the family court did not abuse its discretion when it conducted an *in camera* interview of C.H. Thus, the order of the Jefferson Family Court is affirmed.

DIXON, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS BUT DOES NOT FILE SEPARATE OPINION.

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