

RENDERED: FEBRUARY 24, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001387-ME

K.G.

APPELLANT

v.

APPEAL FROM CLARK FAMILY COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 09-J-00449

COMMONWEALTH OF KENTUCKY;
N.G., A CHILD; Z.G., FATHER; CABINET
FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
A.F.-C; AND H.L.

APPELLEES

AND

NO. 2011-CA-001388-ME

K.G.

APPELLANT

v.

APPEAL FROM CLARK FAMILY COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 10-J-00216

COMMONWEALTH OF KENTUCKY;
A.G., A CHILD; Z.G., FATHER; A.F.-C;
H.L.; AND CABINET FOR HEALTH AND

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, KELLER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: K.G., mother, appeals the orders of the Clark Family Court finding that her son, N.G., born in 2004, was an abused and neglected child and his younger sister, A.G., born in 2006, was at risk of abuse. Z.G. is the children's father. For the reasons stated, we affirm.

On May 28, 2010, the Cabinet for Health and Family Services filed juvenile dependency, neglect, and abuse petitions against mother for abuse and neglect of N.G. and A.G. The petitions contained allegations that mother had slapped N.G. on the face, hit N.G. on the buttocks with a belt, left a small bruise under N.G.'s eye, and forced N.G. to sit in an attic as a form of discipline. At a hearing, the Cabinet and mother reached an agreement that the petitions would be dismissed if there were no new problems with her children.

On August 31, 2010, the Cabinet filed a second set of juvenile dependency, neglect, and abuse petitions against mother arising from bruising on N.G.'s upper right arm allegedly cause by mother's hand. At the November 4, 2010, pretrial conference, the family court ordered opposing counsel to exchange witness lists at least ten days before the hearing. The family court further ordered

that any person not listed on a party's witness list would not be permitted to testify unless the non-complying party could show good cause. The Cabinet did not provide mother a witness list until the day before the hearing.

On March 11, 2001, the family court conducted a hearing wherein extensive testimony was given regarding the allegations of abuse and neglect. F.L. and D.L., husband and wife, testified that mother lived in their home from February 2010 until July 2010. F.L. testified that he contacted the Cabinet after mother admitted that she put N.G. in the attic. He testified that the attic was unsafe for children because a portion of the attic floor was faulty, and that his family stored glass and other hazardous material in the attic. He further testified that the weather was warm on the day mother placed N.G. in the attic and that the attic was significantly hotter than the rest of the house.

D.L. testified that she was awakened one night by the sound of yelling emanating from the attic located above her bedroom. She testified that the yelling continued for a period of ten to fifteen minutes. She further testified that the attic was filled with junk and was unsafe for a child of N.G.'s age. She also testified that it was a hot day when mother placed N.G. in the attic.

April Frost-Crowe, a Cabinet social worker, testified that she visited mother's residence and interviewed mother. She testified that the attic was "extremely hot" on the day that she visited and that she considered the attic unsafe for a child of N.G.'s age. She testified that mother admitted to placing N.G. alone

in the attic and telling him that spiders would get him. However, she testified that mother informed her that she placed N.G. in the attic for only two minutes.

Frost-Crowe testified that mother admitted she slapped N.G. on the face. She further testified that mother admitted to striking N.G. on the buttocks with a belt for failing to retrieve a razor for her while she was in the bathtub. She testified that N.G. had a small mark under his eye, which mother told her was from N.G. busting a blood vessel due to excessive crying. She further testified that mother admitted to placing N.G. in the attic on multiple occasions.

Alicia Burbage, a Cabinet social worker, testified that she investigated the allegation giving rise to the petition filed on August 31, 2010. She testified that mother admitted to grabbing N.G.'s upper arm to force him to stand in the corner. She further testified that mother admitted that N.G. informed her that her grabbing hurt him but that she continued grabbing him after his complaint. However, she testified that mother stated she did not know what caused N.G.'s arm bruise.

Holly Lovings, a Cabinet social worker, testified that she was contacted by the Clark County Sheriff's Office about possible child abuse. She testified that she then met with N.G., A.G., and the children's father and took photographs of what appeared to be bruises on the children. She testified that A.G.'s bruises were old but that N.G.'s bruise was in the shape of four stripes and a circle. The photographs taken by Lovings were admitted into the record.

Mother testified that she slapped N.G. on the face but did not remember when this occurred. She testified that slapping a child's face was

inappropriate corporal punishment. Mother testified that she put N.G. in the attic and turned off the lights to punish him but testified that N.G. was in the attic for only two minutes. However, she testified that she checked on N.G. every thirty seconds because she worried about him. She testified that the children played in the attic, the attic was safe and not hot when she put N.G. in the attic. She testified that she told N.G. that spiders in the attic would get him but that this statement was fine because she was with N.G. when she made the remark.

Mother testified that she struck N.G. with a belt. With respect to the allegation in the August 31, 2010 petitions, she testified that she grabbed N.G.'s upper arm to force him to stand in the corner when he would not do it on his own. However, she testified that N.G. had no bruise on his arm when he left her home to go to his father's residence and that she did not know what caused the bruising.

After the hearing and other proceedings, the family court issued findings of fact and conclusions of law and an order finding that N.G. was an abused and neglected child. The family court further found that mother's actions regarding N.G. indicate A.G. was at risk of also being harmed by mother. The family court noted mother's admission to slapping N.G. on the face, and mother placing N.G. in a hot and unsafe attic as a form of discipline. The family court further found that mother caused the significant bruising on N.G.'s upper arm by grabbing him. Based on this conduct, the family court ruled that mother's acts constituted abuse. This appeal follows.

Mother's first contention in both her appeals is that the family court's findings of fact are not supported by substantial evidence. She highlights several examples where the family court's findings do not comport with the record. She contends that the family court incorrectly found that multiple witnesses testified about the size of the attic when only mother testified about the size of the attic. She argues that the family court's findings that mother admitted to having custody of N.G. the day before father took N.G. to the sheriff's office was incorrect. Thus, she contends that the family court's findings of fact must be reversed if it relied on any of these findings, which mother presumes it did, in deciding this case.

When a family court sits without a jury, its findings of fact will not be set aside unless they are clearly erroneous. *Sebastian–Voor Properties, LLC v. Lexington–Fayette Urban County Government*, 265 S.W.3d 190, 195 (Ky. 2008). A factual finding is clearly erroneous if it is not supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is evidence that a reasonable mind would accept as sufficient to support a belief. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

The family court's decision does not materially rely on any of the issues that mother highlighted in her brief. As we will discuss later, the family court's decision was based on the mother's conduct toward the child rather than the size of the attic or when mother exchanged custody of N.G. with father. Despite mother's contention, we have reviewed the entire record and conclude that the family court's material findings of fact are supported by substantial evidence.

Mother's second contention in both her appeals is that the family court failed to properly conduct judicial proceedings in recognition of her rights. She argues that she requested a hearing on November 4, 2010, but that the family court delayed the hearing until March 11, 2011. Because the petitions against her were filed in May and August of 2010, she argues that she was denied a prompt hearing pursuant to KRS 600.010(2)(g). She further contends that the family court erred by not enforcing its order regarding the exchange of witness lists.

KRS 600.010(2)(g) provides the following:

It shall further be the policy of this Commonwealth to provide judicial procedures in which rights and interests of all parties, including the parents and victims, are recognized and all parties are assured prompt and fair hearings. Unless otherwise provided, such protections belong to the child individually and may not be waived by any other party.

It has long been established that courts have broad discretion when setting their trial calendar. *Borderland Coal Co. v. Burchett*, 237 S.W. 663, 665 (Ky. 1922).

Although mother argues that her right to a prompt hearing was violated, the record establishes that the Cabinet and mother agreed to dismiss the May 2010 petition on the condition that mother commit no future acts of abuse. Clearly, mother cannot claim a violation of rights when she agreed to the delay in a manner where she obtained a benefit. Rather, the issue is whether the hearing was held promptly after the filing of the August 31, 2010, petitions.

On November 4, 2010, it was determined that an adjudication was needed to resolve the child abuse allegations. The Cabinet informed the family

court that its important witness, Frost-Crowe, would be unavailable in January and February 2011 due to personal reasons. The family court then scheduled the hearing for March 11, 2011. This record shows that the family court worked with the parties to administer justice fairly and promptly. Based on the facts, we conclude that the family court did not abuse its discretion because its decision was not unfair or unreasonable. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky.App. 2001).

We further reject mother's contention that the family court erred by permitting the Cabinet to call witnesses despite its failure to provide mother a witness list at least ten days before the hearing. In this case, the Cabinet provided mother a witness list the day before the hearing. At the hearing, mother objected to the Cabinet's witnesses, arguing a violation of the court order. After the Cabinet apologized for the mistake, the family court indicated that it would grant a continuance to permit mother to prepare for the Cabinet's witnesses.

Mother responded that the only proper action would be to conduct the hearing and exclude all of the Cabinet's witnesses. The family court then stated that any possible prejudice would be cured by granting a continuance. The Cabinet offered to dismiss the case without prejudice and to re-file it. Mother objected to the granting of a continuance and the dismissal of the case without prejudice. The family court then held the hearing and admitted the Cabinet's witnesses.

Mother concedes that she had reason to believe that Frost-Crowe and Burbage would be called as witnesses because they signed the dependency and

neglect petitions. However, mother contends that she could not have anticipated F.L., D.L., and Lovings would be called as witnesses. Because of these three witnesses, mother argues that she was not afforded her right to a fair hearing.

“In the final analysis, the question of whether one party has put another at an unfair disadvantage through pretrial nondisclosures must be addressed to the sound discretion of the [family] court.” *Collins v. Galbraith*, 494 S.W.2d 527, 530 (Ky. 1973). Courts must look to whether there was evidence of bad faith by the non-disclosing party and prejudice on the complaining party. *Id.*

After reviewing this case, the family court tried earnestly to resolve this matter by granting a continuance. While the mother contends that a continuance could not be granted absent a finding of good cause, the Cabinet’s counsel informed the family court that the order was placed in a file and inadvertently overlooked. Additionally, mother lived with F.L. and D.L. when the incident occurred giving rise to the first set of petitions. In fact, F.L. testified that mother was upset with him for calling the Cabinet because she thought that F.L. should have approached her about the incident before calling the authorities.

With respect to Lovings, her testimony merely concerned her observing the bruising on the children and taking the children’s photographs. The investigation of N.G.’s bruise was conducted by Burbage who signed the petitions. Further, mother and her counsel were shown the photographs taken by Lovings during her interview with Burbage. Therefore, we conclude that the family court’s

admission of the Cabinet's witnesses was not an abuse of discretion because it did not create an unfair disadvantage to mother and did not constitute bad faith.

Mother's third contention in both of her appeals is that the family court erred by finding that N.G. was an abused or neglected child. She contends that there was no proof that N.G. was physically injured by her conduct. She further argues that there was no evidence to establish where the bruise on N.G.'s upper right arm originated. She contends that her involvement in bruising N.G.'s arm amounts to no more than speculation by the Cabinet and the family court.

A family court has broad discretion to determine whether a child is designated as abused or neglected. *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky.App. 1977). We observe that a family court's findings of fact shall not be set aside unless clearly erroneous, and it must be given the opportunity to determine the credibility of the witnesses. CR 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which constitutes evidence that is sufficiently probative to induce belief in the mind of a reasonable person. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003).

Pursuant to KRS 600.020, an "abused or neglected child" is defined, in pertinent part, as the following:

(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; ...

(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[.]

Additionally, KRS 600.020(45) provides that “[p]hysical injury” means substantial physical pain or any impairment of physical condition.”

Regarding the May 2010 petition, mother admitted to slapping N.G. on the face, striking him with a belt, and putting him in an attic without lights. The homeowners where the incident occurred testified that the attic was unsafe for children. Portions of the attic contained flooring with little support where a person could simply fall through the floor. Mother further told N.G. that spiders in the attic would get him. While mother contends that her actions did not create physical injury or the risk of physical injury, we believe the family court’s findings of fact support its conclusion that N.G. was an abused child.

Regarding the August 2010 petition, mother admitted to grabbing N.G.’s upper right arm and holding him in the corner. She testified that she held

his arm as N.G. jerked away and informed her that his arm hurt. Witnesses testified that a substantial bruise was on his upper right arm in the shape of a hand. While mother argues that there was no evidence to explain the origin of the bruise, the family court could properly infer that mother's grabbing of N.G. caused the injury. *Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970) (circumstantial evidence may be used to reasonably infer the existence of a fact). Therefore, the family court's finding that N.G. was an abused child was not erroneous.

Regarding the May and August 2010 petitions, we conclude that the family court did not err by finding that A.G. was abused. The family court heard evidence of the mother's conduct toward N.G. and her minimization of her conduct. The family court heard testimony that mother yelled at N.G., placed N.G. in a dark and unsafe attic, slapped N.G. on his face, left a significant bruise on N.G.'s arm, and told N.G. that spiders would get him. Based on these facts, we conclude that the family court did not err by finding that mother's conduct created or allowed to be created a risk of physical injury to A.G.

Mother's fourth contention in both her briefs is that the family court's dispositional order was erroneous, because she argues that there were no facts or findings to support the continuation of the children in the custody of their father. She argues that the family court granted her unsupervised visitation with both of the children and, thus, continued removal was not necessary to protect the children.

KRS 620.140(1)(c) provides that a family court can remove a child to the custody of an adult relative, but the family court must determine that

“reasonable efforts have been made by the court or the cabinet to prevent or eliminate the need for removal and that continuation in the home would be contrary to the welfare of the child[.]” The placement of a child in a dependency, neglect, and abuse proceeding is within the broad discretion of the family court. *J.M. v. Com., Cabinet For Health and Family Services*, 325 S.W.3d 901, 903 (Ky.App. 2010).

The family court issued dispositional orders regarding N.G. and A.G. placing the children in the physical custody of their father. Before the petitions were filed in this case, mother and father alternated physical custody of the two children every week. However, the family court’s order provided that it was contrary to the children’s welfare to return to mother’s home. The family court further found that reasonable efforts were made to prevent the children’s removal from mother’s home. While mother contends that her award of unsupervised visitation proves that it is safe for the children to return home, we believe that the visitation is just one important step in the direction of family reunification. KRS 620.130(2). Accordingly, in light of mother’s past conduct, we conclude that the family court’s dispositional orders were not erroneous.

For the foregoing reasons, the orders of the Clark Family Court are affirmed.

ALL CONCUR.

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