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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001411-ME

M.R., FATHER

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 09-J-00367

CABINET FOR HEALTH AND
FAMILY SERVICES, DEPARTMENT
FOR COMMUNITY BASED SERVICES;
N.R., A CHILD; AND M.D.F., MOTHER

APPELLEES

AND

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CABINET FOR HEALTH AND
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OPINION
AFFIRMING

** ** *

BEFORE: DIXON, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: M.R., Father, appeals the Bullitt Circuit Court’s June 25, 2013 order finding his children, N.R., abused, and, M.B.R., at risk of abuse. After careful review of the record, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 21, 2011, the foster parents of N.R. reported that the child had a hand-shaped bruise on her bottom after returning from an unsupervised weekend visit with Father. At the time, N.R. was four years old and M.B.R. was ten years old. The Cabinet for Health and Family Services (the Cabinet) conducted an investigation and filed a dependency, neglect, and abuse petition on behalf of the children stating the following:

N.R. returned from an unsupervised visit with [Father] on 11/21/11 with a large, purple, handprint [sic] bruise on the left side of her bottom. [Cabinet] worker has consulted with the forensic department at the University of Louisville and has shared pictures with them. The forensic department feels that the mark on her bottom is “diagnostic” of an inflicted [sic] injury and that [M.B.R.] would also be at risk. Worker interviewed N.R. on 11/22/11 and she told this worker that [Father] “hit” her on the bottom and that she cried very hard. She stated that her “Nanna” [Father’s mother, who lives next door to Father] gave her a bath on Sunday, 11/20/11, observed the bruise and did not contact [the Cabinet] or do anything to protect her.

The Cabinet also filed an emergency custody order for the purpose of halting visitation with Father and Paternal Grandparents.¹ The children were already in the custody of the Cabinet and had been since 2009 after Father filed a petition against Mother alleging neglect. It is not clear from the record how or why the children ended up in the Cabinet's custody instead of with Father at the time. However, Father has had regular visitation with the children.

On November 30, 2011, a temporary removal hearing was held. The Cabinet requested and the court granted the continued suspension of visitation between the children, Father, and Paternal Grandparents until the pending investigations regarding N.R.'s injuries were completed. Father's counsel was present for the hearing, but Father was not. At the start of the hearing, Father's counsel argued that Father's due process rights had been violated because the hearing was not held within seventy-two hours of the issuance of an emergency custody order pursuant to KRS 620.080, and additionally, that Father had not been served with a copy of the petition and a summons to appear in court on that day. The court determined that because the children were not in Father's custody and a summons had been issued and sent, Father was afforded all of the process that he was due. Also, the court determined that the Cabinet had ten days from the date the petition was filed to have a hearing in accordance with KRS 620.080(1)(b). The court then proceeded with the temporary removal hearing, and accordingly suspended further contact between the children, Father, and Grandparents. Father

¹ Father's visitation with the children was granted in the discretion of the Cabinet. Grandparents visitation was granted in action 10-CI-01811.

was served with the petition and summons on December 6, 2011. The next proceeding for the case was scheduled for January 4, 2012.

The record then refers to a motion on appeal, and the status of the case was periodically reviewed until a decision was returned.² On September 19, 2012, the Bullitt Circuit Court set the matter for an adjudication hearing on December 5, 2012.

At the adjudication hearing, the Cabinet called several relevant witnesses. First, Sarah Pridemore, the ongoing social worker for this case as well as the investigative worker in regard to the allegations against Father, testified to the circumstances under which the bruise on N.R.'s bottom was discovered and reported.

Ms. Pridemore testified that she received a telephone call from Phil Hedrick on the evening of Monday, November 21, 2011. Mr. Hedrick was N.R.'s foster father at the time of the bruising incident. Mr. Hedrick informed Ms. Pridemore that N.R. had a large, purple bruise on the left side of her bottom that resembled a hand print. The bruise was discovered when N.R. was being given a bath. N.R. had been picked up on that previous Friday from daycare by Father and spent the weekend with him. N.R. was dropped off at daycare at approximately 8:00 a.m. on Monday morning. The child was picked up from daycare by her foster mother on

² Father and Grandparents filed a petition for a writ of mandamus with the Court of Appeals requesting that the order discontinuing Father's contact with the children be stricken, that all information regarding Grandparents be stricken and that the Cabinet be ordered to turn over information to the proper authorities for investigation. The Court of Appeals denied the petition and the Supreme Court affirmed the denial in an unpublished opinion. *Rigney v. Bartholomew*, 2012 WL 3637218 (Ky. August 23, 2012).

Monday afternoon. Ms. Pridemore instructed Mr. Hedrick to take a photograph of the bruise. The next day, Ms. Pridemore met with N.R. and examined her. She also took pictures of the bruise with her i-phone and sent the pictures to the University of Louisville School of Medicine, Department of Pediatric Forensic Medicine.

Ms. Pridemore spoke with Father about the bruise, and Father originally stated that N.R. fell on a fireplace while attending a birthday party that weekend. According to Ms. Pridemore, Father was then out of contact with the Cabinet until February 2012. Father later stated that he had no idea how N.R. received the bruise. Ms. Pridemore further testified that she interviewed the director at N.R.'s daycare and requested any incident reports, of which there were none; and she also spoke with N.R.'s teachers in her classroom, but they did not have anything to report. On November 23, 2011, Ms. Pridemore filed a dependency, neglect, and abuse petition alleging abuse of N.R. by Father and risk of abuse of M.B.R.

Mr. Hedrick testified telephonically. He testified that he was a foster parent to N.R. from approximately June 2011 through February 2012. He stated he contacted Ms. Pridemore when he and his wife noticed a bruise on N.R.'s bottom while she was getting a bath after spending the weekend with Father. Mr. Hedrick confirmed that the bruise was the size of an adult hand and purple. He testified that he and his wife never used corporal punishment, and they never struck or spanked N.R. Mr. Hedrick did not notice any bruising before N.R. went to daycare

on Friday. He stated that she did not complain about being sore or in pain and that N.R. later told Mrs. Hedrick that she had fallen.

The Cabinet's final witness was Jerri Harlan, a forensic nurse at the University of Louisville. Ms. Harlan has a Bachelor's degree in Nursing and has been a pediatric nurse since 1996. She stated that she has been a forensic nurse for two and one-half years and works on approximately two hundred cases per year. Ms. Harlan testified that she is currently working toward her certification for forensic nursing, and the certification requires certain activities, including testimony, and a test. She testified that most of the training is on the job, in the hospital setting, but that there is one week of training each year out of state. She testified that all of the cases are always discussed with and worked on with a medical doctor. Based on this testimony of Ms. Harlan's education and experience, the court qualified Ms. Harlan as an expert witness.

Ms. Harlan testified that she received photographs of the bruising on N.R.'s bottom from Ms. Pridemore. She confirmed in court that the photographs taken by Ms. Pridemore were the ones that she received to examine on November 22, 2011. Ms. Harlan also testified that she knew there were conflicting accounts of whether the child was struck or had fallen. She testified that she did not physically examine the child and that she did not think she needed to see the child. Ms. Harlan testified that it was routine to make a diagnosis based off of photographs because she provided a consultant service. Also, she stated it was similar to a radiologist reviewing an x-ray. She stated that the linear contusions across the child's bottom

would be painful and that the contusions were consistent with being hit with an open hand or flexible object, such as a belt, at a high velocity and able to conform to the contours of the child's bottom.

Father did not testify on his own behalf. The only two witnesses Father called were N.R.'s Grandmother and Father's Brother. Their testimony related to whether or not Grandmother had given N.R. a bath on Sunday evening, November 20, 2011. Grandmother testified that either she or Father gave N.R. her baths when she was in their care, but that she had worked on that particular Sunday and then had gone Christmas shopping with Father's Brother that evening. It was Grandmother's testimony that if she did give the child a bath that weekend it would have been on Saturday. Brother testified that he and Grandmother went shopping on a Sunday evening near the end of November, but he could not remember the exact date.

The Cabinet recalled Ms. Pridemore in order to testify as to what N.R. told her about her Grandmother giving her a bath on Sunday to impeach Grandmother. Father's counsel objected to this testimony, but the Cabinet argued and the court agreed that under KRE³ 801A(1) the testimony was permissible.

The court determined that Father had bruised N.R. on the weekend that the child was with him and found the child to be abused and M.B.R. to be at risk of abuse. The court noted that Father chose not to testify or discount any of the evidence proffered by the Cabinet. The court also determined that Grandmother

³ Kentucky Rule of Evidence

had seen the bruise on the child, but failed to report it, so she was found to neglect the child.⁴ The court entered an order with these findings on June 25, 2013. It is from this order that Father appeals.

STANDARD OF REVIEW

“The trial court has broad discretion in determining whether a child fits within the abused and neglected category[.]” *C.R.G. v. Cabinet for Health and Family Servs.*, 297 S.W.3d 914, 916 (Ky. App. 2009). “Findings 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.” Kentucky Rules of Civil Procedure (CR) 52.01.

ANALYSIS

We must note at the outset of our analysis that none of the appellees in this case have filed a brief. Pursuant to CR 76.12(8)(c), “if the appellee’s brief has not been filed within the time allowed, the court may: (i) accept the appellant’s statement of the facts and issues as correct; (ii) reverse the judgment if appellant’s brief reasonably appears to sustain such action; or (iii) regard the appellee’s failure as a confession of error and reverse the judgment without considering the merits of the case.” The decision to impose such penalties is within this Court’s discretion. Given the nature of this case, we decline to do so. Accordingly, we proceed with our review.

⁴ Grandmother died shortly after the hearing. Accordingly, the court dismissed the portion of the petition as it related to her.

On appeal, Father argues that (1) the trial court violated his constitutional rights and KRS 620.100(2) when it found abuse because he did not testify or deny he had hit N.R.; (2) the trial court acted contrary to the rules of evidence in allowing a person to testify as an expert who was not qualified as an expert; and (3) the trial court acted arbitrarily and capriciously in denying Father's constitutional right of procedural due process by not following any of the statutorily stated procedures under KRS Chapter 620. We address each of these arguments in turn.

Father argues first that he has a fundamental right to raise his children, and the trial court abused this right by ruling against him for not testifying or denying the abuse allegations. KRS 620.100(2) states "if the court determines that further proceedings are required [as a result of a temporary removal hearing], the court also shall advise the child and his parent or other person exercising custodial control or supervision that they have a right to not incriminate themselves and a right to a full adjudicatory hearing at which they may confront and cross examine all adverse witnesses, present evidence on their own behalf and to an appeal."

The trial court did acknowledge and noted in its order that Father did not testify at the adjudicatory hearing. However, this was observed upon the conclusion of the hearing and presentation of evidence by the Cabinet. Father's argument ignores the fact that he did not present any evidence on his own behalf to rebut or discount the Cabinet's proof of the allegations. Additionally, we note that

the statute Father cites as being violated also confers the right to present evidence on his own behalf, which Father chose not to do.

At an adjudication hearing, “[t]he 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.” KRS 620.100(3). Therefore, the burden is on the Cabinet to provide the court with evidence sufficient to show that N.R. was more likely than not abused by Father and that M.B.R. was more likely than not at risk of abuse by Father. It established this through the testimony of Sarah Pridemore, Phil Hedrick, and Jerri Harlan. Ms. Pridemore demonstrated that she was well aware of the circumstances and had kept thorough documentation of the events leading to the hearing. Mr. Hedrick’s testimony was consistent with the information provided by Ms. Pridemore. Also, there was a letter in the record provided by the University of Louisville School of Medicine, Department of Forensic Medicine consistent with and further supporting the testimony of Ms. Harlan. Additionally, there are numerous Court Appointed Special Advocates (CASA) reports filed in the record of this case since the time the petition was filed that kept the court informed of the status of the children and Father throughout the course of the proceedings.

Father offered only the testimony of N.R.’s Grandmother and his Brother, and their testimony related entirely to the neglect allegation against Grandmother. Father did not provide the court with any evidence to defend himself or to refute the evidence put on by the Cabinet. Therefore, the trial court’s finding of abuse

was reasonable and did not violate Father's constitutional rights or KRS

620.100(2).

Father's second argument is that the trial court acted contrary to the rules of evidence in allowing a person to testify as an expert who was not qualified as an expert, specifically Jerri Harlan. "KRE 702 vests the trial court with broad discretion to determine whether a witness is qualified to express an opinion in a matter which requires expert knowledge, skill, experience, training, or education." *R.C. v. Commonwealth*, 101 S.W.3d 897, 901 (Ky. App. 2002). The court asked Ms. Harlan several questions relating to her education, experience, and training in the area of pediatric forensic medicine. Ms. Harlan has a Bachelor's degree in Nursing and had been a registered pediatric nurse since 1996. She had been a forensic nurse working in pediatric medicine for two and one-half years, and she further stated that she worked on approximately two hundred cases, more or less, per year. Ms. Harlan testified that most of the training was on the job in a hospital setting accompanied by a medical doctor. She testified that a doctor always worked with a nurse on every case. Ms. Harlan testified that she was not certified as a forensic nurse, but was working on her certification, which required a certain number of hours of various experiences and passing a test. Based on this testimony, the court qualified Ms. Harlan as an expert and permitted her to testify about how the bruise was likely inflicted on N.R. Accordingly, the court's decision to qualify Ms. Harlan as an expert based on her training, education, and experience was not an abuse of its broad discretion.

Father further argues that the fact that the diagnosis of the injury as an inflicted one was based off of digital photographs makes the evidence unreliable. However, Ms. Harlan testified that the photographs which were used to make the diagnosis were the photographs taken and provided to her by Ms. Pridemore. Furthermore, Ms. Harlan testified that it was common and routine procedure to make a diagnosis based off of photographs because her type of work is a consultant service. She stated that patients are usually only seen if they are in the hospital for treatment. Ms. Harlan compared a picture review diagnosis as similar to a radiologist examining an x-ray. Therefore, it was reasonable for the court to determine the photographs and the diagnosis based off of the photographs was reliable.

Father additionally makes an argument regarding the recall testimony of Ms. Pridemore as to what N.R. said to Ms. Pridemore in her investigation about her Grandmother giving her a bath, seeing the bruise, but failing to do anything about it, which the court permitted under KRE 801A(1). However, we decline to address this argument because it pertains to the testimony and portion of the petition relating to N.R.'s Grandmother who is now deceased and all determinations involving Grandmother have been dismissed.

Father's final argument on appeal is that the trial court acted arbitrarily and capriciously in denying Father's constitutional right of procedural due process by not following any of the statutorily stated procedures under KRS Chapter 620. We disagree.

First, Father contends that the trial court violated his due process rights by failing to appoint counsel throughout all of the proceedings. However, Father then refers to the temporary removal hearing in 2009 in which the children were taken from his custody. The hearing was held in relation to the petition of neglect he filed against Mother of the children and stated that the issue was never appealed because he was never appointed counsel. The petition filed by Father against Mother in 2009 and the issues associated with it were never before this Court and are not currently before it. Therefore, we are unable to address this argument.

Next, Father argues that there was no statutory ground for filing the emergency custody order in November 2011 because the Cabinet already had custody of the children. It is clear from the order entered in the record that the Cabinet filed the emergency custody order to immediately suspend visitation between the children, Father, and Paternal Grandparents because the Cabinet had reasonable grounds to believe that Father had inflicted physical injury upon N.R. by other than accidental means. This was supported by Ms. Pridemore's affidavit as to the circumstances under which the bruise was discovered, reported, and initially investigated. Even though the children were already in the custody of the Cabinet, the court's actions relate to the best interests of the children and are supported by the procedure outlined in KRS 620.060.⁵

⁵ The portion of KRS 620.060 titled Emergency Custody Orders relevant to this discussion states: (1) The court for the county where the child is present may issue an ex parte emergency custody order when it appears to the court that removal is in the best interest of the child and that there are reasonable grounds to believe, as supported by affidavit or by recorded sworn testimony, that one (1) or more of the following conditions exist and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child:

Father next asserts that a temporary removal hearing was held on November 30, 2011, and his due process rights were violated because he was not served with a summons and petition until December 6, 2011. At this point in time, the children had been in the custody of the Cabinet since some time in 2009, and an emergency custody order was entered on November 23, 2011, restricting contact between the children and Father, which prevented Father from seeing the children over the Thanksgiving holiday weekend. The Cabinet stated at the hearing that it had been in contact with Father just days before the scheduled hearing, but that he was out of town.

We disagree that Father's due process rights were violated because KRS 620.070(2) provides "[a]fter a petition has been filed, the clerk of the court shall issue, and the sheriff or other authorized agent shall serve, a copy of the petition and a summons to the parent or other person exercising custodial control or supervision, unless their identity or location is unknown, in which case the petition and summons shall be served on the nearest known adult relative." Mother was served on November 29, 2011, and appeared with counsel at the hearing. Father's

(a) The child is in danger of imminent death or serious physical injury or is being sexually abused;

(b) The parent has repeatedly inflicted or allowed to be inflicted by other than accidental means physical injury or emotional injury. This condition shall not include reasonable and ordinary discipline recognized in the community where the child lives, as long as reasonable and ordinary discipline does not result in abuse or neglect as defined in KRS 600.020(1); or

(c) The child is in immediate danger due to the parent's failure or refusal to provide for the safety or needs of the child.

counsel was also present for the November 30, 2011 hearing. Furthermore, “[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.” *B.C. v. B.T.*, 182 S.W.3d 213, 217 (Ky. App. 2005) (quoting 15 Graham & Keller, *Kentucky Practice* § 6.15 (2003)). Neither parent had custody of the children since 2009, and a parent, Mother, was served in accordance with KRS 620.070(2) and appeared for the temporary removal hearing. Additionally, the temporary removal hearing did not determine the truth or falsity of the abuse allegations or who was responsible for the alleged abuse. Therefore, Father’s procedural due process rights were not violated.

Father’s final contentions regarding the trial court’s failure to follow KRS Chapter 620 procedures include that the trial court erred because it did not question Father on whether he could afford counsel, and the trial court erred by filing an emergency custody order and having a temporary removal hearing and adjudication hearing without a proper petition before it. However, a dependency, neglect, and abuse petition was filed on November 23, 2011, and it appears from the record that Father had counsel from that time and maintains that same counsel through this appeal. These arguments are without merit.

CONCLUSION

Based on the foregoing, the order of the Bullitt Circuit Court is **AFFIRMED**.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jean Kelley Cunningham
Shelbyville, Kentucky

BRIEF FOR APPELLEES:

No brief filed.