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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001713-ME

E.M., MOTHER

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT  
v. HONORABLE CATHERINE RICE HOLDERFIELD, JUDGE  
ACTION NO. 03-J-00029-003

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND  
FAMILY SERVICES; AND  
M.B., THE MINOR CHILD

APPELLEES

AND

NO. 2013-CA-001714-ME

E.M., MOTHER

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APPEAL FROM WARREN CIRCUIT COURT  
v. HONORABLE CATHERINE RICE HOLDERFIELD, JUDGE  
ACTION NO. 03-J-00030-003

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND  
FAMILY SERVICES; AND  
S.B., THE MINOR CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, NICKELL, AND VANMETER, JUDGES.

COMBS, JUDGE: E.M. appeals orders from the Warren Circuit Court which found that her two minor children were neglected pursuant to Kentucky Revised Statute[s] (KRS) 600.020. E.M. argues that the finding of neglect was not based on substantial evidence, that she was prejudiced by the participation of her former defense attorney as counsel for the Cabinet for Health and Family Services, and that dismissal of the Cabinet’s removal petition was required under KRS 620.050(1). The relief that she seeks is essentially a reversal of the finding of neglect on her part. After our review, we affirm.

E.M. is the mother of two daughters, M.B., who was born in 1996, and S.B., who was born in 1997. S.B. reported to E.M. that she had been sexually abused by her stepfather. E.M. contacted the Cabinet and the Kentucky State Police. She told KSP Detective Laura Isenberg that she knew her child was telling the truth about the sexual abuse allegations, stating that “I know in my gut that it’s true.” E.M. arranged to have a previous domestic violence order (DVO) against the stepfather reinstated, resigned from her job in Bowling Green, and fled with her two daughters to Louisville in early December 2012. They resided with a cousin, and E.M. enrolled the children in school in Louisville. Cabinet social worker Monica Hines described the mother as very distraught, anxious, and scared for

herself and her daughters. Hines advised E.M. not to talk to her daughter about the sexual abuse allegations.

Hines tried to assist E.M. by finding space for her and the children at shelters in Somerset, Owensboro, and Louisville. E.M. did not want to go to the shelters, and instead she remained with her cousin in Louisville. Hines also tried to schedule a Child Advocacy Center interview with the daughter who had made the abuse allegations. There was some difficulty scheduling the interview because of the holidays, but ultimately it was set for January 3, 2013, in Jefferson County.

Detective Isenberg and Matt Holden, another Cabinet social worker, both advised E.M. that the children could not be around the stepfather until the investigation was completed.

On December 28, 2012, E.M. informed Holden that she was moving back to Bowling Green with the children and that she was reuniting with the stepfather. She admitted that she had spoken with her daughter about the abuse allegations and that she now believed the daughter had lied. She told Holden that things were not happening fast enough for her and that the Cabinet needed to go ahead and close its case. Holden explained that the children could not have contact with the stepfather nor could they be brought back to the residence with him until the investigation was complete. He also advised her that if either of these prohibited activities occurred, the Cabinet would petition the court. The mother reiterated that her daughter was a liar and that she would believe her husband over her daughter.

On January 3, 2013, E.M. took her daughter to the Child Advocacy Center as she had been directed, but a medical exam could not be performed because they were two hours late. The mother listed her address at the Child Advocacy Center as the one in Bowling Green where the stepfather resided. She again stated that she was returning to that address and that her daughter was a liar. Holden and Detective Isenberg again told her that she was not allowed to return to the residence with the minor children while the investigation was pending. E.M. told the detective that the sexual abuse allegations were not true and that her daughter told her she had made the allegations because she was angry with the stepfather. E.M. made it clear to the social worker and the detective that she had nowhere to go other than the residence where the stepfather lived.

On January 4, 2013, the Cabinet successfully petitioned the Warren Circuit Court for emergency custody of the children on the ground of neglect. The trial court held an adjudication hearing on July 12, 2013. On September 3, 2013, the trial court entered substantially similar orders for both children. The orders recited that the children, having been found to be neglected by a preponderance of the evidence, would continue to remain in the temporary custody of the Cabinet pending disposition of the matter. On October 2, 2013, E.M. filed notices of appeal from these orders.

Following the disposition hearing, the trial court entered orders on October 4, 2013, stating that the children would remain committed to the Cabinet, that they would remain in therapy, that E.M. was entitled to unsupervised visitation at the

discretion of the Cabinet, that there was to be no contact with the stepfather, and that all parties would comply with the Cabinet's case plan. The order noted that efforts were being made to transition the children back to the mother's custody. On December 12, 2013, the trial court entered orders returning the children to the home. On March 20, 2014, the Cabinet reported to the trial court that the family had been successfully reunified and that it no longer required the services of the Cabinet. It asked permission to close the case. The trial court entered an order to that effect on March 28, 2014.

The first issue on appeal is whether the Cabinet presented sufficient evidence to establish that E.M. neglected S.B. and M.B. Under KRS 620.100(3), the Commonwealth bears the burden of proving dependency, neglect, or abuse of a child by a preponderance of the evidence. The trial court's findings regarding the weight and credibility of the evidence shall not be set aside unless clearly erroneous. Kentucky Rule[s] of Civil Procedure (CR) 52.01. 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 may not be disturbed -- absent an abuse of discretion. *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005).

The trial court found that the children were neglected under subsections (1)(a)(2) and (6) of KRS 600.020, which define an "abused or neglected child" as "a child whose health or welfare is harmed or threatened with harm when . . . [h]is or her parent, . . .

2. 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;

6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child[.]

KRS 600.020.

The trial court found that E.M. had already created a risk of harm when she spoke to her daughter about the abuse allegations and when she unilaterally decided -- without the help of the professionals involved in the investigation -- that the allegations were not true. The court observed as follows:

[L]ogically, if the parent does not believe or no longer believes the initial allegations of a child, with professionals knowing that many children recant after disclosing such allegations, there is a risk of harm to the children as the parent is not likely to protect a child from someone from whom they do not believe the child needs protection.

The trial court concluded that the mother created a risk of harm by ignoring the Cabinet's recommendations regarding the sexual abuse allegations and by stating to those involved in the investigation that her intention was to return to the Bowling Green residence -- even though she had refused other options and services offered by the Cabinet.

E.M. argues that she went to extraordinary lengths to protect her children by removing them to Louisville, enrolling them in school there, and reinstating the DVO against the stepfather. She claims that rather than offering resources and assisting her, the Cabinet chose to allege neglect and to remove the children from

her care based on unsubstantiated allegations. She argues that the Cabinet “inferred” that she would violate the DVO and take the daughters to their stepfather and also “inferred” that the daughter’s allegations of abuse were true -- even though she later recanted.

But the Cabinet’s inferences were not unfounded. E.M.’s initial, adamant belief that her daughter was telling the truth lent credence to her daughter’s allegations -- especially when coupled with her actions in moving to Louisville with her children and reinstating the DVO against the stepfather. The trial court was concerned that E.M.’s subsequent change of heart would lead her to allow the daughters to be around the stepfather -- even though allegations of possible criminal conduct had not yet been thoroughly investigated. That concern was well founded upon evidence in the record and was not the result of mere speculation. Furthermore, at the hearing, substantial evidence was presented from the Cabinet’s witnesses that they tried to obtain services for E.M. but that she insisted upon returning to the home of the stepfather with the children. Substantial evidence also supported the trial court’s determination that the children were neglected because their mother’s decision to return to the stepfather’s home presented a real risk of exposing them to injury or to sexual abuse.

Next, E.M. argues that she suffered prejudice because the Cabinet was represented by an attorney who had previously represented her in criminal proceedings. The trial court held a hearing regarding the potential conflict of interest. E.M. testified that the attorney, who was then working as a public

defender, had represented her in the “early 2000s” on a methamphetamine charge. She claimed that she gave the attorney details of her life at that time, but now, she claimed, he was “ripping her apart.” She was unable to specify what these personal details were, what prejudice stemmed from his current representation of the Cabinet, or what there was in her criminal case history that was confidential.

The attorney explained to the trial court that he had been appointed to represent E.M. on a stolen property charge, that he was able to obtain her release on a surety bond, and that he then ended the representation because he was moving to the Commonwealth Attorney’s office. The trial court offered E.M.’s current counsel more time to present more proof, but he declined to do so. E.M. claims that the attorney’s “specialized and confidential” knowledge of her history was prejudicial and that had it not been for this knowledge, either the case might not have been prosecuted by the Commonwealth or it might have been resolved in a different manner.

The Kentucky Supreme Court Rules (SCR) provide in part that “[a] lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . use information relating to the representation to the disadvantage of the former client.” SCR 3.130(1.9)(c). The focus of the conflict examination must be the *nature of the relationship* between the lawyer and client.

The trial court must examine the depth to which the attorney/client relationship was established. An appointed counsel whose contact with his client has been brief and perfunctory without an exchange of confidential information in the form of planning trial strategy, or



discussions of potential witnesses to be called on the defendant's behalf, or avenues of investigation to be undertaken by defense counsel would not be considered to have had personal and substantial participation.

*Whitaker v. Commonwealth*, 895 S.W.2d 953, 956 (Ky. 1995). In this case, there was no evidence that the relationship between E.M. and the attorney was anything other than "brief and perfunctory." Consequently, the trial court did not err in finding that there was no conflict of interest that would justify removing the Cabinet's attorney from the case.

Finally, E.M. argues that the terms of KRS 620.050 required the Cabinet's petition to be dismissed. That statute grants civil and criminal immunity to anyone reporting suspected child abuse, neglect, or dependency -- provided that the reporter is acting upon reasonable cause and in good faith. *Norton Hospitals, Inc. v. Peyton*, 381 S.W.3d 286, 290 (Ky. 2012).

The pertinent section of the statute provides:

Anyone acting upon reasonable cause in the making of a report or acting under KRS 620.030 to 620.050 in good faith shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report or action. However, any person who knowingly makes a false report and does so with malice shall be guilty of a Class A misdemeanor.

KRS 620.050(1).

E.M. contends that the Cabinet violated the statute when it pursued a neglect action and the children were removed from her care after she made a good faith

report of the abuse allegations. However, E.M. was not subjected to civil or criminal liability as a result of her initial report of the abuse allegations. The Cabinet's petition was based on her *later* actions in refusing to follow the Cabinet's directives and in expressing her intent to return with the children to the stepfather's residence. Therefore, the statute is not applicable.

We affirm the orders of the Warren Circuit Court finding that M.B. and S.B. were neglected.

ALL CONCUR.

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