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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2017-CA-000422-ME

R. L.

APPELLANT

v. APPEAL FROM KENTON FAMILY COURT  
HONORABLE CHRISTOPHER J. MEHLING, JUDGE  
ACTION NO. 16-J-01364-001

CABINET FOR HEALTH AND  
FAMILY SERVICES, COMMONWEALTH  
OF KENTUCKY; AND  
B. P. L., A MINOR CHILD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: R. L. (father) appeals from a juvenile dependency, neglect or abuse (DNA) disposition issued by the Kenton Family Court on February 21, 2017. Father was adjudicated to have neglected B. L. (daughter).

Father and S. C. (mother) were married for five years. During the marriage, mother's daughter, K. C. (stepdaughter), lived with them. Daughter was born during the marriage.

After father and mother divorced, father and mother shared custody of daughter. Daughter lived with mother and father had timesharing on the weekends. Stepdaughter often accompanied daughter to stepfather's house. After stepdaughter told mother she saw a video on father's phone of father masturbating while saying stepdaughter's name, mother filed a DNA petition and sought an Emergency Protective Order (EPO) and Domestic Violence Order (DVO) regarding stepdaughter, and filed a DNA petition seeking emergency custody of daughter.

At the temporary removal hearing, which was combined with the EPO hearing, the family court seized father's cell phone, daughter was placed in the temporary custody of mother and father was denied any visitation. An EPO was granted regarding stepdaughter.

The contents of father's phone were not examined. None of the parties wanted to delay the adjudication hearing to await a court-ordered forensic examination.

The evidence at the combined adjudication and DVO hearing consisted solely of stepdaughter's and mother's testimony and a card stepdaughter

made for father. By agreement, father and mother were not present and did not observe stepdaughter's testimony.

Stepdaughter, age thirteen, lived with father between the ages of five and ten and thought of father as her father. She regularly saw father after the divorce. She would go to his house with daughter to spend time with their friends that lived across the street from him and occasionally spent the night.

Father exposed himself to stepdaughter, daughter (age nine) and sometimes their friends at least ten times by either wearing loose shorts without underwear or leaving his khaki shorts unzipped while not wearing underwear. He would sit on the couch with his legs propped up where she could see his penis and testicles hanging out of his clothing. Stepdaughter originally thought this behavior was unintentional. However, the behavior made her uncomfortable and she, her sister and her friends used the code word "Cheeto" to describe what they were seeing.

When stepdaughter complained to mother, mother talked with father and the behavior stopped for a while. While the behavior was stopped, stepdaughter made some jokes about father exposing himself, including making him a card joking about his testicles, and told him about the code word. When father resumed the behavior, stepdaughter was very uncomfortable because she knew father was aware of what he was doing.

Father allowed stepdaughter, daughter and sometimes their friends to use his phone and gave them the code to access it. They used the phone to get online, take pictures and post to Instagram. One evening, after father again exposed himself by wearing shorts without underwear with his feet propped up, stepdaughter felt suspicious and when she saw father's phone in the bathroom, she decided to look at the pictures on his "camera roll" file. Two years earlier she found a video in that file of father masturbating while sitting on the couch in his home and she wanted to check if he had anything like that again on his phone. She found a similar video which showed him masturbating on the couch while saying her name repeatedly and saying he wanted her "on his dick." This was the same couch she regularly sat on with him. She also found on his Safari browser that he searched "I had a dream I had sex with my stepdaughter." She was scared and cried. She told her mother a few days later.

Although mother was suspicious about what father could have done to stepdaughter or daughter while they were spending the night at his house, stepdaughter testified that father never touched her or daughter inappropriately.

At the conclusion of the adjudication trial, the family court granted a directed verdict in father's favor as to the DNA case and DVO case regarding stepdaughter because she was no longer father's stepdaughter and any relationship they had was a result of mother's consent. However, the family court found

daughter was neglected because father's behavior created a risk to daughter and ordered that father continue to have no contact with daughter. The family court also ordered father's phone returned.

At the disposition hearing, the family court reviewed father's psychological and psychosexual evaluation, which concluded he was a low risk to sexually offend and there were no "red flags" in his overall profile. The GAL told the family court that although mother and stepdaughter had done a good job protecting daughter from what had occurred, daughter knew there was a reason why she and stepdaughter were not seeing father anymore and she did not want to see father. The family court denied father's motion for supervised visitation and continued daughter in mother's temporary custody. The family court ordered that reunification could begin once daughter's therapist determined it was appropriate.

Father argues that the evidence was insufficient to find he neglected daughter where stepdaughter's testimony was so unbelievable and unsupported that it could not reasonably be relied upon and evidence from the phone was not used at the adjudication. He also argued neglect could not be substantiated where daughter never saw any inappropriate video on his phone and he could not cause a risk of harm to her based on what he had dreamed.

Juvenile DNA proceedings require distinct hearings for an adjudication and a disposition. Kentucky Revised Statutes (KRS) 610.080.

During the adjudication, the family court determines the truth or falsity of the allegations in the petition. KRS 610.080(1); KRS 620.100(3). In the adjudication, “[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). “The disposition shall determine the action to be taken by the court on behalf of the child and his parent[.]” KRS 620.100(4).

Pursuant to KRS 600.020 a child can be found to be neglected based on a parent placing that child at risk of neglect:

(1) “Abused or neglected child” means a child whose health or welfare is harmed or threatened with harm when:

(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

...

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[.]

Therefore, if one child is neglected, the statutory language of KRS 600.020(1) permits the court to find that another child is neglected because a parent negligently creates or allows to be created a risk of neglect. *See Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky.App. 2008) (applying this reasoning to a finding of abuse).

The family court has broad discretion to determine whether a child is abused or neglected. *R. C. R. v. Commonwealth Cabinet for Human Res.*, 988 S.W.2d 36, 38 (Ky.App. 1998).

This Court's standard of review of a family court's award of child custody in a dependency, abuse and neglect action is limited to whether the factual findings of the lower court are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. If the findings are clearly erroneous depends on whether there is substantial evidence in the record to support them.

*L.D. v. J.H.*, 350 S.W.3d 828, 829–30 (Ky.App. 2011). “[T]he findings of the [family] court will not be disturbed unless there exists no substantial evidence in the record to support its findings.” *R. C. R.*, 988 S.W.2d at 38.

If the findings are supported by substantial evidence, then appellate review is limited to whether the facts support the legal conclusions made by the finder of fact. The legal conclusions are reviewed de novo. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky.App. 2003). If the factual findings are not clearly erroneous and the legal conclusions are correct, the only remaining question on appeal is whether the trial court abused its discretion in applying the law to the facts. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky.App. 2005). Finally,

[s]ince the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. 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 will not be disturbed absent an abuse of discretion.

*L.D.*, 350 S.W.3d at 830 (quoting *B.C.*, 182 S.W.3d at 219).

Having reviewed stepdaughter's testimony there is nothing to suggest her testimony is unbelievable and unsupported such that it could not be reasonably relied. The family court noted that stepdaughter's testimony was consistent with mother's testimony because they both reported that stepdaughter told her friends about what she saw on father's phone and discussed the code word for father exposing himself. The family court was entitled to find this testimony credible and believable, and act accordingly.

Neglect could properly be substantiated even if daughter was not harmed because she did not see father's video. Pursuant to KRS 600.020, a child can be found to be neglected based on a parent placing that child at risk of neglect through risking the child's emotional injury. The family court was concerned that because father documented having inappropriate fantasies about stepdaughter and exposed himself to her that daughter could be at risk from father. Father risked daughter's emotional injury by allowing her access to his phone and passcode, knowing that it contained a video of him masturbating and calling out stepdaughter's name. If daughter had seen the video, this could cause emotional injury. Father also risked daughter's emotional injury by exposing himself to her. Father was not found to have neglected daughter based on his own dreams or



personal thoughts, but based on his actions of putting inappropriate material on a device that daughter had access to and exposing himself.

Accordingly, we affirm the Kenton Family Court's disposition which finalized the adjudication order finding daughter was neglected by father.

TAYLOR, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS AND FILES SEPARATE

OPINION.

JOHNSON, JUDGE, CONCURRING: I concur with the majority that the father's actions constitute neglect. However, father's actions go beyond just emotional injury as defined under KRS 600.020(1)(a)(2). The record demonstrates that the father's actions in regards to both K.C. and B.L. also satisfy the requirements of KRS 600.020(1)(a)(6) and KRS 600.020(61). Under the standards of KRS 600.020(1) an abused or neglected child is one whose health or welfare is harmed when her parent, guardian, or person in a position of authority or special trust creates or allows to be created a risk that an act of sexual abuse will be committed upon the child. In KRS 600.020(61) sexual abuse is defined as including a person having supervision of the child who uses or allows the use of the child for the purpose of sexual stimulation of the perpetrator.

In this case, the record supports that R.L. not only intentionally exposed himself multiple times to K.C. and B.L., but also recorded video on his

phone of himself masturbating while saying K.C.'s name. A video which K.C. ultimately saw.

Given these facts, I believe that father's actions constitute neglect under several statutes and are not limited to just the standard of KRS 600.020(1)(a)(2). I concur with the majority that the family court had more than substantial evidence on which to find neglect.

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