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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000736-ME

M.K.[1] APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 16-J-00759-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES
AND THE MINOR CHILD N. L. APPELLEES

AND NO. 2017-CA-000737-ME

M. K. APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 16-J-00760-001

[1] Pursuant to the policy of this Court, to protect the privacy of minor children, we refer to the parties in dependency, neglect and abuse cases only by their initials.

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES
AND THE MINOR CHILD E. L. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: M.K. appeals from two dispositional orders of the Fayette Family Court following a trial on dependency, neglect and abuse ("DNA") petitions filed regarding his fiancée's minor children. We affirm.

J.L. is the biological mother of N.L. and E.L.,[2] both of whom were fathered by different men. M.K. is engaged to marry J.L., but he is not the father of either child and asserts no legal claim to the children. The Cabinet for Health and Family Services ("Cabinet") became involved with the family when it received a report from E.L.'s daycare of bruising on E.L.'s face which appeared consistent with abuse.[3] The Cabinet investigated and ultimately filed DNA petitions on May 27, 2016, alleging E.L. was a physically abused child and N.L. was a neglected child.[4] Prior to an adjudication hearing being conducted, the Cabinet filed a second petition alleging N.L. was now an abused child and J.L. had permitted contact

[2] At the commencement of these actions, N.L. was seven years old and E.L. was two years old.

[3] M.K. would subsequently be criminally charged with assault in the fourth degree, Kentucky Revised Statutes (KRS) 508.030, in relation to the incident. The criminal charge was later dismissed.

[4] The petitions named both J.L. and M.K. as parties. J.L. did not file an appeal and no arguments are advanced on her behalf.

between the children and M.K. in violation of the Cabinet's prevention plan prohibiting such contact. Based on the filing of the second petition, the children were removed from J.L.'s care and placed with their maternal grandmother.

A two-day dispositional hearing was conducted at which the Cabinet presented testimony from the daycare worker and director who were present on the day E.L.'s bruising was discovered; the maternal grandmother; the social workers who investigated each of the petitions; a friend of J.L.'s with knowledge of her ongoing contact with M.K.; and N.L., including pre-recorded interviews given contemporaneously with the alleged abusive event. Both J.L. and M.K. testified in their own defense, denied the allegations in the petitions, and offered alternative factual narratives to explain E.L.'s bruising. After hearing the testimony, the trial court concluded E.L. was an abused child, N.L. was at risk of being abused, and J.L.'s actions in remaining in a relationship with M.K. placed the children at a significant ongoing risk of harm providing sufficient basis for removing the children from her care. On March 27, 2017, the family court entered dispositional orders finding continuing to live in J.L. and M.K.'s home was contrary to the children's best interests, adopted the Cabinet's DNA Disposition Report and accompanying recommendation with one minor exception, ordered M.K. and J.L. to work their respective case plans, and placed the children in the custody of the maternal grandparents. M.K. timely appealed.

Before this Court, M.K. challenges the family court's factual findings, alleging they are not supported by substantial evidence. He contends the family

court failed to determine the truth or falsity of the allegations in the petitions based on the evidence of record, instead relying on insufficient and unpersuasive proof. To the contrary, he argues the evidence presented on his behalf was substantial, far outweighed that presented by the Cabinet, and should have been relied upon by the family court to reject the allegations contained in the petitions.

A family court has broad discretion to determine whether a child is abused or neglected. *R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36, 38 (Ky. App. 1998). "[T]he findings of the [family] court will not be disturbed unless there exists no substantial evidence in the record to support its findings." *Id.* Substantial evidence is that which is sufficient to induce conviction in the mind of a reasonable person. *See Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002), *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). The family court's legal conclusions are reviewed *de novo*. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003). It must be remembered that:

> [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 . . . will not be disturbed absent an abuse of discretion.

L.D. v. J.H., 350 S.W.3d 828, 830 (Ky. App. 2011) (citation omitted). No allegation is advanced that the trial court utilized an incorrect legal standard and our review reveals no impropriety in this regard.

We have reviewed the record and conclude substantial evidence exists to support the family court's findings and ultimate conclusion M.K.'s conduct met the statutory definition of abuse. The testimonial and documentary evidence offered at the adjudication hearing demonstrated M.K. struck E.L. with sufficient force to leave a hand-shaped bruise on the side of her face, clearly indicative of abuse. While M.K. presented contrary evidence, the existence of conflicting evidence does not alter the degree of deference we must show the trial court. *See Frances v. Frances*, 266 S.W.3d 754, 758-59 (Ky. 2008); *see also Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). That the family court did not find M.K.'s evidence more persuasive did not constitute clear error.

We further conclude substantial evidence supported the trial court's conclusion M.K. and J.L. continued to have contact following the filing of the first petition and the accompanying prevention plans despite explicit direction not to do so. An eyewitness testified to seeing them together and text messages from J.L. herself were introduced indicating the contact occurred. Again, M.K.'s self-serving testimony to the contrary does not change the substantial nature of the evidence adduced by the Cabinet. We discern no clear error.

For the foregoing reasons, the judgments of the Fayette Family Court are AFFIRMED.

ALL CONCUR.

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