

RENDERED: AUGUST 31, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NOS. 2017-CA-001141-ME & 2017-CA-001142-ME

S.R.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE SQUIRE WILLIAMS III, JUDGE  
ACTION NOS. 16-J-00243-001 & 16-J-00244-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; SMALLWOOD AND TAYLOR,  
JUDGES.

CLAYTON, JUDGE: S.R. (Mother) brings this appeal from orders of the Franklin Family Court finding her minor daughter R.R. was an abused child pursuant to Kentucky Revised Statutes (KRS) 600.020(1)(a)(1) and ordering R.R. and her minor sister, L.R., to remain in the custody of the Cabinet for Health and Family Services (Cabinet). We affirm.

Mother has two minor daughters, L.R. and R.R., who at the time of the temporary removal hearing were one year old and six weeks old, respectively. Mother is married to J.R., who is the father of the children (Father). The family lived in the converted attic area of a home they shared with five other adults: Mother's grandmother and her boyfriend; Mother's mother; Mother's sister and her boyfriend; and the sister's three children. Mother was not employed outside the home and looked after the two children while Father was at work as an assistant manager at Pizza Hut. Mother and Father remained in the attic area with their children most of the time and rarely mingled with the other members of the household. The relatives downstairs occasionally watched R.R. while Mother did laundry or other chores, but they did so jointly and were not alone with R.R.

On October 19, 2016, Mother and Father left R.R. in the care of Mother's grandmother and sister while they went to Walmart with L.R. to order a cake to celebrate her first birthday. The women noticed that R.R. was not holding her right leg in a normal position and appeared to be in pain. They immediately texted Mother at Walmart to tell her that something was wrong with the baby. Mother and Father returned home and took R.R. to the Frankfort Regional Medical Center, where she was diagnosed with a femur fracture. She was then taken to the University of Kentucky Children's Hospital Emergency Department and was found to have, in addition to the right femur fracture, multiple other unexplained fractures consistent with non-accidental trauma.

On October 21, 2016, the Cabinet filed neglect or abuse petitions against Mother and Father on behalf of R.R. and L.R. The children were placed in the emergency custody of the Cabinet. Following a hearing on October 24, 2016, the family court upheld the temporary removal.

An adjudication hearing was held on March 27, 2017. The main witness for the Cabinet was Dr. Christina Howard, Assistant Professor of Pediatrics and Child Abuse Pediatrician at the UK Healthcare Department of Pediatrics, Division of Pediatric Forensic Medicine. Dr. Howard's evaluation of R.R. found that the infant had nine different injuries that were at different stages of healing. These included fractures to her right femur, right tibia, right distal radius, right proximal 3<sup>rd</sup> phalanx, right proximal 5<sup>th</sup> phalanx, right 5<sup>th</sup> rib fracture with concern for right 4<sup>th</sup> rib fracture, left femur and left tibia.

Dr. Howard's written report stated in part:

[T]he types of fractures seen on [R.R.] are highly specific for non-accidental trauma. Her rib fractures are posterior/lateral rib fractures and they are typically caused by violent squeezing of the chest. Metaphysical fractures which are present about her right ankle (distal tibia) and bilateral wrists (distal radius) are caused by a shearing force applied across a joint and imply twisting, yanking, or flailing (such as seen with violent shaking of a baby) of an extremity. They are also highly specific for abuse. Fractures to the hand also have a strong association with abuse in infancy and are seen as the hand is grabbed and strenuously manipulated.

The requested laboratory studies to date were unremarkable and there is no evidence in her x-rays and her labs of an underlying medical condition which would result in excessive fractures. **Based on current**

**information and if the few remaining lab results are negative, her injuries are consistent with non-accidental trauma and we have grave concern for R.R. or any other child, were they returned to the environment in which these injuries occurred.**

(Emphasis in original.)

Dr. Howard testified that R.R. at six weeks of age was not yet mobile when the injuries occurred. She explained that the injuries to the child's right wrist and knee were caused by force directly across the bone, while the injuries to her left femur and tibia were linear, likely caused by a twist or pull. She testified that the rib fracture is highly specific of abuse, usually sustained from rough treatment, and that the child's injuries were not accidental. Dr. Howard also testified that R.R.'s nine injuries were in different stages of healing. She explained that, in general, a fracture with no signs of healing is usually less than 7 to 10 days old (such as R.R.'s right femur fracture and rib fracture) and a fracture with signs of healing with either subperiosteal new bone formation or callus is typically more than 10 to 14 days old.

The family court heard testimony from Mother and Father, who denied knowing who had inflicted the fractures on R.R. Members of Mother's family also denied knowing who had inflicted the injuries and testified that they were never alone with the child. The social worker who investigated the case testified that no one in the household admitted to inflicting the injuries, or to knowing who had done so. The children's pediatrician, Dr. Bradley Chase, who had previously examined the children and found no evidence of bone fractures,

described Mother and Father as caring, competent parents who complied with all recommendations for the medical care for both their daughters.

The family court concluded that the Cabinet had proved by a preponderance of the evidence that R.R. is an abused child due to her parents inflicting or allowing to be inflicted upon her physical injury by other than accidental means. The court also ruled that L.R. should be removed because her sibling R.R. had suffered severe injuries in the home. The children were ordered to remain in the temporary custody of the Cabinet. This appeal by Mother followed. Father has not appealed.

Our standard of review requires us to show deference to a finding of abuse or neglect by the family court:

A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

*Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007).

“Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.” *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (quoting *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005)).

KRS 600.020 defines an abused or neglected child as:

[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:

1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
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[.]

Mother argues that there was insufficient evidence to support the family court's conclusion that she had inflicted or allowed to be inflicted injury upon R.R. because the Cabinet did not call any witnesses to testify how the injuries were inflicted nor did the Cabinet identify the specific perpetrator. She summarizes the evidence in her favor, pointing out that she testified consistently that neither she, her husband or her family members committed the abuse; she did not use alcohol or drugs; the Commonwealth did not introduce any criminal history to rebut her testimony; Dr. Chase and Dr. Howard testified that an infant with a broken bone may not exhibit any sort of swelling, bruising or other signs; and Dr. Howard could not state exactly when the abuse occurred. She contends that her

grandmother and aunt could have inflicted the injuries while she and father were at the Walmart.

On the other hand, evidence was adduced that Mother and Father were the primary caregivers for the children. The children were rarely looked after by other members of the household, and on those occasions, others were present. The uncontested medical testimony of Dr. Howard was that the child was suffering from numerous fractures which were inflicted on more than one occasion. She testified that the fractures were not accidental, occurred at different times, and that some were very specific for use of excessive force. Furthermore, the child's injuries were only discovered because the grandmother and aunt reported the leg injury, which seems unlikely conduct if they were the perpetrators. Circumstantial evidence may be used to infer the existence of a fact. *Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970). As the fact-finder, the family court is entitled to draw reasonable inferences from the evidence. *K.H. v. Cabinet for Health and Family Servs.*, 358 S.W.3d 29, 32, (Ky. App. 2011). Under these circumstances, the identity of the actual perpetrator is not the key. *Commonwealth, Cabinet for Health & Family Servs. ex rel M.H. v. R.H.*, 199 S.W.3d 201, 204 (Ky. App. 2006). Rather, the fact that someone in the household was able to inflict multiple serious injuries over a lengthy period on an infant whose primary contact was indisputably with Mother and Father was sufficient to support the finding that Mother had either inflicted the injuries herself or created or allowed the risk to occur.

Next, Mother argues that the family court misinterpreted and misapplied KRS 600.020(1)(a)(1) as a statute of strict liability that did not require a showing of intent. She urges us to extrapolate an intent element from the criminal context which would require the trial court to make a specific finding that Mother intended to leave R.R. in the care of dangerous people, and that she cannot be held “liable” if she did not have any actual or implicit knowledge that someone was committing abuse against R.R. KRS Chapter 620 is not primarily concerned with determining criminal culpability. Its purpose is preventative, protective and remedial rather than punitive. KRS 620.010 specifically states the legislative purpose of the chapter is to protect and preserve a child’s fundamental right to be free from physical as well as other types of injury. It is further recognizes “that upon some occasions, in order to protect and preserve the rights and needs of children, it is necessary to remove a child from his or her parents.” KRS 620.010. The Kentucky Supreme Court has held that “KRS 620.010 creates an affirmative duty for the parent of a child to prevent such physical injury which would result in an assault on that child.” *Lane v. Commonwealth*, 956 S.W.2d 874, 875 (Ky. 1997). The protective purpose of the statute is further reinforced by the fact that the Cabinet’s burden of proof in showing that a child has been abused is a preponderance of the evidence, unlike the criminal standard of beyond a reasonable doubt. KRS 620.100(3).

Mother contrasts the facts of her case with those of *Cabinet for Health & Family Servs. v. A.G.G.*, 190 S.W.3d 338 (Ky. 2006), in which the



natural parents disobeyed a court order to avoid taking their children to the home of their uncles who were both suspected sex offenders, and either ignored or failed to notice that one of the children was being sexually abused. *Id.* at 342.

Mother argues that there was no evidence that she knew she was leaving R.R. in a dangerous situation. Mother's argument ignores the fact that the family court left open the possibility that Mother herself was the perpetrator of the abuse. The family court found that R.R. was cared for almost exclusively by Father and Mother, and very minimally by others. R.R. had no other caregivers outside the household. The child's injuries were inflicted on different occasions, weeks apart. The child's injuries were only tended to after being discovered by the grandmother and aunt who immediately contacted Mother and Father. Even in the criminal context, circumstantial evidence of abuse is sufficient to overcome a motion for a directed verdict. *Acosta v. Commonwealth*, 391 S.W.3d 809, 817 (Ky. 2013). In this context, the family court's findings are supported by substantial evidence, and its conclusion that R.R. was an abused child was based on sound legal principles fully in keeping with KRS Chapter 620 and consequently not an abuse of discretion.

For the foregoing reasons, the Franklin Family Court orders finding R.R. to be an abused child and directing R.R. and her sister, L.R., to remain in the custody of the Cabinet are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark R. Brengelman  
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BRIEF FOR APPELLEE:

Rick Sparks  
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