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Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-0281-ME

S.S. APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 19-J-00219-002

S.K. AND R.G.F., A MINOR CHILD APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: S.S.[1] ("Appellant") appeals from an order of the McCracken Circuit Court finding her child R.G.F. (hereinafter "Child") to be abused and neglected, and placing Child in the custody of her maternal grandmother S.K. ("Appellee"). Appellant argues that the circuit court improperly

[1] This action involves a minor child; as such, we will use only the initials of the parties.

took judicial notice of testimony in another case without giving any notice; that Appellant did not create or allow to be created circumstances of abuse or neglect as defined in Kentucky Revised Statutes ("KRS") 600.020; and, that the circuit court failed to use a lesser restrictive alternative to placement. For the reasons addressed below, we conclude that the record does not support a finding of abuse and neglect; therefore, we reverse the order on appeal.

FACTS AND PROCEDURAL HISTORY

On December 3, 2019, Appellee filed a petition in McCracken Circuit Court seeking the emergency custody of Child. Child was 19 months old at the time of the petition. In support of the petition, Appellee asserted that Appellant was homeless; that Appellant and Child had previously lived in the home of a registered sex offender; and that Appellant's boyfriend, Jason Oldham ("Oldham"), was recently arrested on the charge of domestic violence. The circuit court conducted a temporary removal hearing on December 13, 2019, and Appellee was granted emergency custody of Child.

An adjudication hearing was conducted on January 9, 2020, where Appellant testified that she lived in public housing. She stated that Oldham stayed with her occasionally, and that she had gotten back together with him after picking him up at jail where he had been incarcerated on an assault charge. Appellant testified that prior to receiving public housing, she and Child stayed at the home of

Tracy Cannon ("Cannon"), whose husband allegedly was facing child molestation charges at that time. Appellant further stated that she had taken Child to the hospital while they were staying at the Cannon residence, after seeing a new rash in the child's diaper area. Appellant was concerned that Child had been sexually abused. Upon examination, Child did not exhibit any signs of sexual abuse. Appellee, Oldham, and his former wife also testified.

The circuit court then made oral findings that Child was abused or neglected. On January 14, 2020, the court rendered a docket sheet from adjudication hearing and order adjudication hearing. A disposition hearing was conducted on January 17, 2020, where the court noted the recommendation of the Cabinet for Health and Family Services ("the Cabinet") that Child be returned to the custody of Appellant. The court was not persuaded by the recommendation, and continued Child's removal.

Thereafter, Appellant moved to alter, amend or vacate the court's written findings in the docket sheet from adjudication hearing. The court then entered a *nunc pro tunc* amended docket order on February 21, 2020, in which it documented the testimony of Appellant, Appellee, Oldham, and Ashley Cunningham, the mother of Oldham's children. The court then concluded as follows:

> Pursuant to KRS 620.100, the Court finds, by a preponderance of the evidence, that the child is at risk of

harm if left in mother's care. The Court finds that all of the above testimony influenced this finding and the Court takes judicial notice of the findings in the -001 case, which is of record in this case file, and took place just weeks before this new Petition was filed. In that case the Court did not remove the child, with hesitation. At that time the mother had moved more than a dozen times and admitted that she was not in a place to care for her child earlier in the year, but the child had fortunately been in the care of the grandmother during that time. The Court noted in the findings of mother's mental health diagnoses. The Court did not remove the child based upon the mother's assurances that she had obtained a stable and long term residence and that she was in a stable and long term relationship. Since the hearing in the -001 case, which was just heard in September 2019, the mother has moved four more times. Sadly, this time, . . . [the child] was forced to tag along and move from one place to another repeatedly. She is now testifying that yet another man is the child's father figure. The man she is currently choosing for the child to consider her father has a very extensive criminal history, including a multitude of domestic violence/assault charges. [Appellant] . . . defends her choices of who she leaves the child with and defends her decision to be with Jason over . . . [the child].

The Court now find that removal of the child, hopefully for a short time, is necessary and there are no less restrictive alternatives to removal. The Court finds that the mother does not show good insight about the people she allows the child to be around and these choices/people place the child at risk. The Court's concern is also heightened by the fact that the mother has, probably more than any other parent ever seen by the Court, utilized the resources in the community. The Court recalled in the -001 hearing the mother providing stacks and stacks of documentation from community partners about the classes, services, and benefits she uses on a regular basis. The Court's concern is that even after

> receiving nearly all the resources our community has to offer, she continues to lack the stability and sound decision making that . . . [the child] deserves and will keep her safe. The Court recognizes that it will be very difficult to develop a case plan that will verify improvement and a decrease in the risk to the child, since the mother has completed what a normal case plan looks like and the community resources have essentially been tapped . . . and yet the child is still at risk. The Court is concerned that the mother has moved almost 20 times in the last year alone and the Court doesn't find, but wonders if the mother's mental health could be a contributing factor.
>
> The Court ORDERS the Cabinet to take whatever actions are necessary to request a CATS evaluation as soon as possible, with the special circumstance being that the mother essentially completed a case plan prior to the Court's involvement and removal of the child. This type of thorough assessment can provide an insight into the mother that will enable the Court to help her keep her children.
>
> Even though the Court did not receive any documentation about the mother's mental health other than her testimony that she receives services and medication (Buspar) at Four Rivers, the Court suspects her mental health contributes to her chronic transiency and dependency in some way. The Court doesn't have all the answers or information at this time, but is committed to helping find out what those might be and helping the mother keep her family together. The Court greatly desires . . . [mother] to raise her own children and the Court is committed to helping identify the problems and find solutions. The Court does not believe that poverty is the cause of the issues.

This appeal followed.

ARGUMENTS AND ANALYSIS

Appellant maintains that insufficient evidence was presented at the January 9, 2020 adjudication hearing to support a finding that Child was abused or neglected by Appellant as set out in KRS 600.020(1). She first contends that the circuit court improperly took judicial notice of findings made in a separate proceeding, and that it was unfair to consider these findings without notice to the parties.

The proceeding to which Appellant directs our attention is 19-J-00219-001, which was a prior dependency, abuse, and neglect action involving the same parties and child. In that proceeding, Appellant stipulated as to dependency. Thereafter, that file was subsumed in the present record with the file number ending with -002. Inasmuch as the first proceeding was incorporated into the present case, and as Appellant stipulated to dependency in 19-J-00219-001, we find no basis for concluding that the circuit court was required to apprise the parties of its intent to take judicial notice nor that the taking of notice was improper. "[I]t is a well-established principle that a trial court may take judicial notice of its own records and rulings, and of all matter[s] patent on the face of such records, including all prior proceedings in the same case." *M.A.B. v. Commonwealth, Cabinet for Health & Family Services*, 456 S.W.3d 407, 412 (Ky. App. 2015) (citations omitted). We find no error on this issue.

Appellant goes on to argue that no persuasive evidence was presented upon which the circuit court could make a finding of abuse or neglect as set out in KRS 600.020. She directs our attention to each element of KRS 600.020 in serial fashion, arguing that she did not create a risk of physical or emotional injury, did not continuously or repeatedly fail to provide essential care and protection, and so on. Appellant notes that no medical or mental health records were produced by Appellee; that no evidence was presented by any party that Child was physically or emotionally injured in any way; and, that no testimony was given as to any domestic violence as between Appellant and her boyfriend. She asserts that the circuit court's findings are little more than inference and conjecture, with no objective evidence to support a finding of abuse and neglect. In response, Appellee argues that the circuit court may properly make inferences from the testimony; that Appellant's boyfriend and father of her youngest child has an extensive criminal record; and that Appellant has moved her residence several times.

> "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:
> >
> > > 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;

3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child, including but not limited to parental incapacity due to a substance use disorder as defined in KRS 222.005;

4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

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;

7. Abandons or exploits the child;

8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical

> treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;
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> 9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) cumulative months out of forty-eight (48) months; or
>
> 10. Commits or allows female genital mutilation as defined in KRS 508.125 to be committed . . . .

KRS 600.020(1). The burden of proof rests with the complainant, and a determination of dependency, neglect, and abuse must be supported by a preponderance of the evidence. KRS 620.100(3). The circuit court has a great deal of discretion in determining whether a child is abused or neglected as set out in KRS 600.020(1). *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977). "While the state has a compelling interest to protect its youngest citizens, state intervention into the family between parent and child must be done with utmost caution. It is a very serious matter." *K.H. v. Cabinet for Health and Family Services*, 358 S.W.3d 29, 31 (Ky. App. 2011) (citations omitted).

Our standard of review is a determination of whether the circuit court's findings are supported by substantial evidence. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. 1998) (citation omitted). We will not disturb the circuit court's findings if they are supported by substantial evidence of record. *Id*. The question for our consideration, then, is whether substantial evidence supports the circuit court's finding that Child is abused or neglected based on the factors set out in KRS 600.020(1).

While Child's current upbringing is unquestionably far from ideal, there is no direct evidence nor reasonable inference that Appellant allowed Child to be inflicted with physical or emotional injury (KRS 600.020(1)(a)1. and 2.); engaged in a pattern of conduct rendering her incapable of caring for the immediate or ongoing needs of the child (KRS 600.020(1)(a)3.); continuously or repeatedly failed to provide essential parental care and protection for the child (KRS 600.020(1)(a)4.); nor, committed or allowed to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child (KRS 600.020(1)(a)5.). Further, no evidence of record demonstrates that Appellant created a risk of sexual abuse, sexual exploitation, or prostitution (KRS 600.020(1)(a)6.);[2] abandoned or exploited Child (KRS 600.020(1)(a)7.); failed to provide Child with adequate care, supervision, food, clothing, shelter, and

[2] Child no longer lives in the home of a registered sex offender.

education (KRS 600.020(1)(a)8.); failed to make sufficient progress toward identified goals as set forth in the court-approved case plan (KRS 600.020(1)(a)9.); nor, allowed female genital mutilation to be committed upon Child (KRS 600.020(1)(a)10.).

The record demonstrates that Appellant changed residences frequently, made poor choices about those with whom she associates, and chose a boyfriend with a lengthy criminal history. While there was an inference that Appellant had a history of mental illness, no evidence on the matter was adduced, no medical records were tendered, and no medical professionals testified. In contrast, the circuit court noted that Appellant "completed what a normal case plan looks like," and has, "probably more than any other parent ever seen by the Court," utilized community resources, classes, services and benefits aimed at improving her parenting and life skills. Further, at the time of this appeal, Appellant had publicly-funded Section 8 housing,[3] and the Cabinet recommended that Child remain with Appellant.[4]

CONCLUSION

The circuit court sought to fashion the best available remedy in the midst of a difficult situation and expressly stated its desire to identify the problems

[3] Section 8 of the Housing Act of 1937 (42 U.S.C. § 1437f).

[4] Record on Appeal at p. 51.

affecting Appellant and Child, to find workable solutions, and to hasten the return of Child to Appellant. These are laudable objectives, which comport with the public policy underlying KRS Chapter 600. Nevertheless, we are constrained by the statutory language, which requires specific findings to support a determination of abuse and neglect. While we acknowledge the circuit court's wide discretion in drawing such conclusions, *Moore*, *supra*, having closely examined the record and the law we conclude that the facts do not constitute substantial evidence in support of a finding of abuse and neglect. We hold as moot Appellant's argument that the circuit court improperly failed to apply less restrictive alternatives. Accordingly, we reverse the order on appeal.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ashley Wiggins White
Paducah, Kentucky

BRIEF FOR APPELLEE S.K.:

David L. Hargrove
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