

RENDERED: AUGUST 20, 2021; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-0298-ME

L.G.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 17-J-504406-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; G.M.; H.M.;
J.M.; AND JEFFERSON COUNTY
ATTORNEY

APPELLEES

AND

NO. 2020-CA-0299-ME

L.G.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 17-J-504406-002

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; G.M.; H.M.;

J.M.; AND JEFFERSON COUNTY
ATTORNEY

APPELLEES

AND

NO. 2020-CA-0578-ME

L.G.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 17-J-504406-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; G.M.; H.M.;
J.M.; AND JEFFERSON COUNTY
ATTORNEY

APPELLEES

AND

NO. 2020-CA-0579-ME

L.G.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 17-J-504406-002

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND

FAMILY SERVICES; G.M.; H.M.;
J.M.; AND JEFFERSON COUNTY
ATTORNEY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, JONES, AND McNEILL, JUDGES.

JONES, JUDGE: L.G. (“Mother”) appeals from the decision of the Jefferson Family Court, which, based on the family court’s finding of abuse, ordered that H.M. (“Child”) be placed in J.M.’s (“Father”) custody and that Mother have only limited, supervised visits with Child. This case began in November 2017 when a Cabinet for Health and Family Services (the “Cabinet”) social worker filed a Dependency, Abuse, or Neglect (“DNA”) petition in Jefferson Family Court asserting that Father had been sexually abusing Child. In January 2019, a different social worker filed a separate DNA petition in Jefferson Family Court asserting that Mother had been emotionally injuring Child by interfering with Child’s counseling relationships and possibly inducing Child to manufacture sexual abuse allegations against Father. The Cabinet pursued these two petitions in tandem and proceeded to trial. The family court found that the petition of sexual abuse by Father was unsubstantiated and that Mother had emotionally abused her son by harming his relationship with his father.

Mother appealed the family court's determination. After a thorough review, we reverse and remand the judgment of the Jefferson Family Court.

I. BACKGROUND AND PROCEDURAL HISTORY

Mother and Father married in July 2004, and Child was born in February 2007. They divorced in 2009 when Child was just two years old. Mother and Father shared equal custody until April of 2012, when five-year-old Child made his first report of sexual abuse by Father.

Child's report came shortly after the parties had a dispute over parenting time. According to Father, Mother told him he would not get Child over Derby weekend, even if she "had to call [Child Protective Services ('CPS')]."

Father received a call from CPS shortly thereafter. The Cabinet investigated Child's report but ultimately found it to be unsubstantiated, although Child never recanted his allegations. In June 2012, Mother filed a petition for a Domestic Violence Protective Order (hereafter "EPO/DVO") against Father on behalf of Child shortly after another dispute over parenting time. Later that month, CPS received an additional report from Mother alleging that Father had threatened to harm Child.

In October 2012, Father moved to modify parenting time. One week later, CPS received a third report that Father sexually abused Child and an anomaly

had been discovered on Child's penis.¹ Mother again petitioned for an EPO/DVO against Father on behalf of Child. Eventually, the June and October petitions of abuse were also found to be unsubstantiated, and all restrictions on Father's contact with Child were lifted. Father and Child went through reunification therapy, and in 2014, the court reestablished an equal parenting schedule between the parties.

Child's most recent allegation of sexual abuse by Father came in 2017. This report came shortly after Father communicated to Mother via email that he did not want Child to play football the following school year. Child had been participating in a program at his school intended to teach children about appropriate and inappropriate contact between adults and children. Following the program, Child disclosed to his stepfather, Mother's husband, that Father had been sexually assaulting him for years.² Child testified in his interview with CPS social worker Chris Hogan that the most recent occurrence of sexual abuse was about one month prior. This time, CPS substantiated the allegations against Father and initiated this DNA action, Case No. 17-J-504406-001, based upon alleged abuse of Child and risk of abuse to his two half-siblings.³

¹ The anomaly was later determined to be a cyst.

² Child's reports of specific dates of the abuse and relevant details are inconsistent at best. Travel documents and testimony from Father and Child's stepmother establish that Father was not alone with Child in 2017 even though Child alleged that his stepmother was out of town.

³ Mr. Hogan did not review any documentation regarding Child's prior allegations but admitted that he contacted Mother's counsel prior to substantiating the allegations of abuse against Father.

On November 22, 2017, the Cabinet filed a DNA petition in Jefferson Family Court, alleging sexual abuse of Child by Father. The family court ordered Child to attend therapy and permitted Father to have weekly supervised visitation with Child.

In March 2018, Kaleigh Thoma took over from Chris Hogan as the Cabinet social worker on Child's case. Thoma's reports to the family court noted a breakdown in the relationship between Child and his then-current counselor, Leanne Gardner. Gardner had been court-appointed as Child's therapist in 2014. Gardner testified that she and Child had a comfortable therapeutic relationship up until the most recent allegations arose, when Child began saying that he "hates" Gardner and does not "feel safe" with her. Record of Case No. 17-J-504406-001 ("R1.") at 32, 43. Consequently, Mother took Child back to Family & Children's Place, where Child had previously received court-ordered counseling, although she did not seek approval from the court to do so. Only afterward did Mother move the family court to replace Gardner as Child's counselor. As a result, the Cabinet filed a contempt motion against Mother through the County Attorney regarding the unapproved visits to Family & Children's Place.

At the contempt hearing, the Cabinet moved the family court to order a mental health evaluation of Child, seeking to inquire whether Child was being emotionally abused by either of his parents. Subsequently, the family court

ordered Child to have a mental health evaluation with Dr. Kathryn Berlá. As Dr. Berlá testified at trial, the evaluation request she received was not common – she had never before received a pre-DNA petition request from the Cabinet to evaluate whether a parent’s behavior had had a negative impact on a child’s mental health. Dr. Berlá issued her report, concluding that she believed Mother had emotionally abused Child through her interference with Child’s therapeutic relationships and his relationship with his father. CPS substantiated emotional abuse on behalf of Mother and subsequently filed Case No. 17-J-504406-002 against Mother on behalf of Child.

Before trial, Mother moved to strike Dr. Berlá and exclude her opinions pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Mother argued that Dr. Berlá’s expert opinion was based on unreliable evidence because Dr. Berlá had failed to generate alternative hypotheses to explain Child’s strained relationship with Father and had interviewed only Mother, Father, Child, and Child’s various therapists rather than neutral, collateral individuals such as Child’s teachers, coaches, stepparents, or babysitters. The family court did not rule on that motion until after trial, ultimately denying it.

The trial on *both* petitions was conducted over the course of three separate partial days and one full day from June 2019 through September 2019.

The family court heard testimony from the following witnesses: Father; Mother; Child; social workers Chris Hogan and Kayleigh Thoma; stepparents Galadriel and Tim; visitation supervisor Carletta Kilgore; Child's homeroom teacher Suzanne Noland; and psychology professionals Dr. Kathryn Berlá, Dr. Stephanie Tabashneck, and Dr. Karen Eisenmenger. The family court also took judicial notice of prior orders in related actions involving this family and admitted into evidence numerous exhibits, including reports from Dr. Berlá, Dr. Tabashneck, and Dr. Eisenmenger as well as records from Leanne Gardner, MA. Mother also presented testimony from Dr. Ginger Crumbo, the psychologist recommended by Dr. Berlá who had most recently been treating Child.

At trial, Father denied abusing Child in any way, asserting that each of the sexual abuse allegations was triggered by a parenting dispute with Mother. He testified that he believes Mother supports, even encourages, Child to lie and manipulate people to get what he wants. Father described instances in which Child lied so that he could attend football games and solar eclipse viewings with Mother during Father's parenting time, as well as misleading stories about his stepfather, Tim. Father asserted his belief that Child lies to please Mother and maintain peace with her. Father also testified that Mother referred to him as a pedophile and made other similar comments in front of Child and Child's schoolteachers.

Mother testified at trial, denying Father's allegations that she influenced Child to lie. She maintained that she believes Father sexually abused Child and that no professional will ever be able to convince her otherwise. She denied undermining Child's therapeutic relationships or calling Father a pedophile in front of others although several individuals testified to the contrary. Mother testified that she did not trust Gardner to be Child's therapist because Child did not feel like Gardner believed his allegations of sexual abuse by Father.

Child testified in the family court's chambers, testifying to his allegations that Father sexually abused him when Child's stepmother was travelling or out with friends. Child reported that Father would threaten to take his things or that he would not let Child see his half-siblings again if Child reported the abuse. Child could provide no further detail about the instances of abuse other than that they were identical every time. Child was also asked to recount a conversation he had had with Gardner during which Child asked, "What would happen if someone told a lie?" Although Child claimed he asked this because he wanted to know what would happen to Father if Father told a lie, Gardner's report indicated that Child followed this question with another: "What would happen if the person was a kid?" Child was not able to explain what he meant by this question.

Gardner then testified at trial. In addition to describing her therapeutic relationship with Child, she stated that Child often told her that he did not like when Mother questions him about Father. Child reported to her that if he does not tell Mother what goes on in Father's home, she takes things away. Gardner testified that Child first discussed the alleged sexual abuse with her in October 2017, describing his manner as "lack[ing] affect" and "flat." R1. at 369. She noted that Child was unable to provide any detail regarding the abuse, which she explained was unusual for a victim of sexual abuse, and that Child used atypically clinical terms for a child sex abuse victim. According to Gardner, her therapeutic relationship with Child deteriorated rapidly following a confrontation with Mother during which Gardner detailed her doubts as to the veracity of Child's allegations.

At the request of the Cabinet, Dr. Karen Eisenmenger performed a psychological evaluation of Mother, after which she concluded Mother suffers from a maladaptive personality disorder. Specifically, Dr. Eisenmenger's diagnostic impression was that Mother exhibited a histrionic personality disorder with compulsive traits. Dr. Eisenmenger's report indicated that individuals with

scores similar to Mother's can be skillful at manipulation and crave affection and stimulation.⁴

Dr. Berlá, a board-certified psychologist, also testified at trial, explaining her opinion that Mother had interfered with Child's therapeutic relationships and refused to comply with Child's various treatment recommendations from a variety of treatment providers. According to Dr. Berlá, several of Child's former therapists reported that Mother had contaminated their therapeutic relationships with Child. She observed that Mother appears to systematically work to remove professionals who do not agree with her, like Gardner, from Child's case. Dr. Berlá testified that two separate treatment providers reported that they had concerns that Mother was coaching Child to make false allegations against Father, recounting reports that Mother had often recorded and interviewed Child regarding the alleged abuse even after being advised to stop. Dr. Berlá testified that children learn what behaviors please their parents and, either consciously or subconsciously, attempt to repeat those behaviors, and continued allegations of abuse are Child's attempts to please his mother. Dr. Berlá explained that this kind of learned behavior constitutes an emotional injury even if

⁴ The Court assigned Dr. Eisenmenger's report limited value because it was not clear from the report that Dr. Eisenmenger understood the allegation that Mother was influencing Child to make false allegations against Father. Rather, Dr. Eisenmenger appeared to believe the sole basis of concern was Mother's disclosing her breast cancer diagnosis to Child and seemed to rely on the fact that CPS had substantiated the sexual abuse claim against Father.

Mother did not have to overtly ask Child to lie. She opined that Mother seemed unable to accept any other outcome other than Father having severely limited or no contact with Child, and, if Mother did not achieve that result, she would continue to cause Child distress.

On December 18, 2019, the family court rendered its incredibly thorough twenty-six-page Findings of Fact and Conclusions of Law. The family court found the petition of sexual abuse against Father to be unsubstantiated; however, it also found that Mother had emotionally abused Child, relying greatly upon Dr. Berlá's opinion. The family court explained:

[Father's] assertions that [Mother] influenced [Child] to make false allegations anytime [sic] there was a dispute between them, or in this case, when [Father] did not support the child playing football was supported by credible evidence; both documentation and testimony supported the coinciding of allegations and parenting issues. [Father's] testimony regarding the issue of opportunity was supported not only by his flight information, but also by his wife. His testimony regarding the timing of the allegations and co-parenting and/or parent-child issues was confirmed by [Mother's] and Tim's testimony also.

The Court finds [Mother's] testimony not credible. Her testimony denying she called [Father] a pedophile in [Child's] presence was directly contradicted by Ms. Gardner, Ms. Kilgore, and [Father]. The Court finds the identical testimony of three individuals, two of whom are neutral, non-parties to the case, outweighs the testimony of [Mother]. The Court found the observations by witnesses Carletta Kilgore and Leanne Gardner of [Mother] making statements in the child's presence that

[Father] was a pedophile to be telling. If she made those statements in the presence of the child with professionals present (and the Court believes she did), what might she be saying in a private setting with [Child] and how might those have influenced [Child] over the course of his young life?

The Court also calls into question the accuracy of [Mother's] testimony regarding her effect on [Child's] past therapeutic relationships. Though [Mother] denies interfering with [Child's] therapy, the Court notes testimony from Ms. Gardner and Dr. Berlá indicate [sic] otherwise. It is also noted that [Mother] changed the child's therapist despite a Court Order, and without leave of Court.

Further, [Mother] denied coaching [Child] in any way. However, the Court's own observations of [Child] were that he was influenced by his mother. The experts observed in his early reporting he was aware of things a child his age would not have knowledge of unless these things were relayed to him. The Court notes that regardless of the evidence put in front of her, such as travel logs and the testimony of psychological professionals, [Mother] does not sway from her position. In assessing [Mother's] credibility, the Court not only considered its own observations, but also the input from the psychological professionals involved with this family and the past Court determinations.

The court found the testimony of Tim Golden confirmed the timing of the allegation arising just as [Father] made it known he did not want [Child] to play football next year. The Court believes Tim was a pawn used by [Child] to try to manipulate the situation to get his way and be able to play football.

The Court also believes the child's teacher, Suzanne Noland, was used as a pawn by [Child]. [Child] is old enough, and has, unfortunately, been exposed to the

methods and schemes of [Mother] long enough, to have learned how to get attention and manipulate situations to his liking. The Court believes [Child] used the “Speak Up, Be Safe” campaign to start the allegations all over again as this conflict over football was inevitably brewing.

...

With regard to [Child’s] testimony, the Court did not find his allegations of sexual abuse against his father to be credible. There was substantial inconsistency in [Child’s] reports with regard to when the abuse happened and how often. According to Mr. Hogan, [Child] reported to Tim the abuse occurred 182 days prior but then to Mr. Hogan [Child] reported the occurrence one month prior. In testimony, the Court understood [Child] to state that the abuse had never stopped but occurred regularly over the years. Yet, when pressed for detail [Child offered little]. He said the abuse was the same every time. Curiously, if his allegation is that all the past allegations were true, he did not mention any of the fantastical detail documented in [Mother’s] past EPO/DVO petitions such as his father wearing a fish mask during the abuse and there being a “pictureman” in the room who took pictures of him naked.

The Court was concerned by [Child’s] response to questions regarding his conversation about children telling lies with Leanne Gardner. The Court did not find this explanation credible and believes the question to be telling of the child’s internal struggle with the false allegations he had made.

The Court also found the timing of the allegations to be telling.

...

The Court placed great weight in [sic] the testimony of Leanne Gardner, MA, and Dr. Berlá. Both expressed concerns that [Child's] discussions of the alleged sexual abuse were without affect, lacking in detail, and rote, each of which caused them to question the veracity of the allegations. In her time with [Child], Leanne Gardner did not suspect [Child] to be an abused child. [Child] never mentioned abuse to Ms. Gardner until 2017, nearly three years into his therapy. The Court found Ms. Gardner's testimony regarding [Child's] affect and language usage in comparison to a typical abuse victim to be important. Further, the Court found the questions [Child] posed to Ms. Gardner about his treatment and cost, to be very telling on the boundaries between he [sic] and [Mother]. All of these inconsistencies and inabilities were testified to by the experts in this case as uncommon for a child who had actually been sexually abused.

The Court also placed great weight on Dr. Berlá's testimony and Report. Dr. Berlá's Report encompassed vast amounts of information upon which this Court has relied but could not possibly cite in total. As noted above, the Court weighed Dr. Berlá's qualifications and testimony against that of Dr. Tabashneck and determined Dr. Berlá's testimony to be credible and her expertise reliable. The Court agrees with her conclusions that [Mother's] behavior was damaging to the child. The evidence that [Mother] interfered with the child's therapeutic relationships, either directly or indirectly coached [Child], and simply refused to accept the multiple conclusions that [Father] has not harmed [Child] is undeniable. [Mother's] inability to control her emotions and unwillingness to allow [Child] to form his own opinion of [Father] has substantially harmed the child's relationship with his father and this is no doubt emotional harm.

...

In his January 30, 2014 Order out of the circuit case, Judge Jerry Bowles noted that [Mother's] statements regarding her anxiety about not having [Child] with her, when he is at [Father's], concerned the Court that [Mother] used [Child] to meet her needs.

“These statements are concerning to the Court that [Mother] is using the child to meet her needs, which negatively impacts the minor child and his ability to develop in a healthy parent child relationship.”

Judge Bowles, now five years ago, noted that [Mother's] behaviors would and were going to harm [Child]. Further, the Court has considered past conclusions and Report to the same effect by Dr. Sally Brenzel. This Court has considered the history of repeated false allegations and now finds emotional abuse has occurred.

Throughout this case, the GAL, Hon. Kathleen Snyder, has been a fierce advocate for [Child]. The Court does not believe she “tainted” this case as alleged by [Mother], but rather that she has been the staunchest of advocates for her client's best interest. She is the only professional who has been on the case since the initial allegations in 2012. The Court has given great weight to the Report she filed with the Court October 10, 2019, and her arguments on behalf of [Child].

...

Pursuant to KRS^[5] 600.020(26), this Court finds by preponderance of the evidence that [Mother] has emotionally injured [Child], and that, by doing so, she has seriously endangered [Child's] emotional stability.

R1. at 377-82.

⁵ Kentucky Revised Statutes.

The family court separately ordered that Child be removed immediately from Mother's care and custody and limited Mother's contact with Child to therapeutic, supervised contact only. Mother is currently allowed only one-hour, supervised visits with Child once a week.

Mother moved to alter, amend, or vacate all of the family court's December 18, 2019, orders. In January 2020, the family court entered its dispositional DNA order regarding Mother, which was made final and incorporated the court's earlier order and rulings, although the motions to alter, amend, or vacate remained pending. Mother appealed from the dispositions.

On March 25, 2020, the family court entered two orders, one of which denied Mother's motion to alter, amend, or vacate the findings of fact and conclusions of law. The other March 25 order slightly modified the family court's December 18, 2019, order regarding Mother's *Daubert* challenge. Mother again appealed from the now-final rulings.⁶

II. ANALYSIS

Although Mother alleges several issues on appeal, we find only one to be dispositive: whether the family court's finding of emotional abuse was

⁶ Father moved to dismiss Mother's appeals because the family court's March 25, 2020, orders were designated only Case No. 17-J-504406-002 (regarding Mother), not Case No. 17-J-504406-001 (regarding Father). On September 3, 2020, the family court entered an order clarifying and incorporating all rulings for both cases. The Kentucky Court of Appeals denied Father's motion to dismiss Mother's appeals in October 2020. Mother subsequently moved the family court to supplement the record to contain these proceedings, and thereafter this appeal followed.

supported by substantial evidence. Because we find that the family court abused its discretion in determining that Child is an abused child, we need not address Mother's remaining issues⁷ on appeal.

“Although a [DNA] action does not terminate parental rights, it is an interference with the parental relationship and often a precursor to the permanent termination of parental rights.” *Z.T. v. M.T.*, 258 S.W.3d 31, 34 (Ky. App. 2008).

“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents[.]” *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599 (1982) (citations and footnotes omitted). “The parents must, therefore, be afforded the same fundamentally fair procedures.” *Z.T.*, 258 S.W.3d at 34.

Even so, a family court's findings of fact in a DNA action “shall not be set aside unless clearly erroneous[.]” CR⁸ 52.01.

A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. Since the family court is in the best position to evaluate

⁷ Mother presented three other issues on appeal: (1) whether the family court erred in failing to strike Dr. Berlá's testimony; (2) whether the family court abused its discretion in directing that Child be removed from Mother's care and custody and limited only to visits supervised by Child's therapist and approved therapeutic visits; and (3) whether the family court erred in permitting Father's counsel to conduct Dr. Berlá's direct examination rather than the County Attorney.

⁸ Kentucky Rules of Civil Procedure.

the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court.

B.C. v. B.T., 182 S.W.3d 213, 219-20 (Ky. App. 2005) (citations omitted).

KRS 600.020(1)(a)1. defines an abused and neglected child as:

a child whose health or welfare is harmed or threatened with harm when . . . [h]is or her parent, guardian . . . [i]nflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means[.]

Section 26 of KRS 600.020 defines “emotional injury” as:

an injury to the mental or psychological capacity or emotional stability of a child *as evidenced by a substantial and observable impairment in the child’s ability to function within a normal range of performance and behavior* with due regard to his or her age, development, culture, and environment as testified to by a qualified mental health professional[.]

(Emphasis added.)

Accordingly, to make a finding of emotional abuse, there must be evidence of a “substantial and observable impairment in the child’s ability to function” inflicted by the parent. KRS 600.020(26). Kentucky courts look to concrete, not inconsequential signs of impairment when evaluating a child for emotional injury, such as psychological diagnoses, a decline in school performance, or other physical manifestations of distress. *See M.B. v. D.W.*, 236 S.W.3d 31 (Ky. App. 2007) (affirming a finding of emotional injury where the

child at issue suffered depression, suicidal ideation, a decline in academic performance, and physical stomach pain as the result of her parent undergoing gender reassignment without forewarning or preparation).

In *B.E.K. v. Cabinet for Health and Family Services*, 487 S.W.3d 457, 467 (Ky. App. 2016), our Court affirmed a termination of parental rights based on a finding of substantial evidence that the mother had inflicted emotional injury on child as defined by KRS 600.020(26). In that case, the child was initially removed from mother's custody due to concerns stemming from the mother's mental health issues. *Id.* at 459. Less than a month after being returned to mother's custody, the mother informed her social worker that she intended to give her child away because the child was inconsolable, refused to eat food or sleep, and was eating non-food items. *Id.* The child's foster parents reported she displayed extreme behavior following her visits to mother, including head-banging so severe it required plastic surgery, and the child was eventually diagnosed with Reactive Attachment Disorder by a psychological practitioner. *Id.* The practitioner further reported that the child "displayed signs of being approach avoidant, had poor social interaction, and other fear-based symptoms." *Id.* A psychological evaluation indicated that Mother's inability to connect with [the child] and her inconsistent behavior in parenting" had most likely caused the child's behavioral issues. *Id.* Based on this evidence, our Court specifically concluded that the family court's

finding of emotional injury pursuant to KRS 600.020(26) was not “devoid of all factual support.” *Id.* at 465.

In the case at issue, the family court placed great weight on Dr. Berlá’s testimony and Report. Dr. Berlá focused at length on Mother’s actions and potential personality disorder, opining that Mother interfered with Child’s therapeutic relationships and either explicitly or implicitly coached Child to falsely accuse his father of sexual abuse. She additionally noted Mother’s inability to control her emotions in front of Child and her refusal to allow Child to form a relationship with Father free from Mother’s influence. However, Dr. Berlá did not conduct a psychological evaluation of Child and find him to be clinically impaired as a result of Mother’s actions. The Cabinet did not present evidence to show that Child demonstrated impairment in his school performance or psychological growth or that he was suffering from any physical ailments as a result of Mother’s alleged emotional abuse.

Instead, to meet its burden, the Cabinet presented evidence that Child felt guilty about fabricating the abuse and was distressed by the idea that he could get in trouble for lying as demonstrated by his questions to Gardner. The Cabinet also posited that Mother’s actions undermined Child’s relationship with Father. We cannot agree that, within the context of this DNA proceeding, the Cabinet’s evidence was sufficient to establish Child suffers from a “substantial and

observable impairment in [his] ability to function within a normal range of performance and behavior[.]” KRS 600.020(26).

Assuming Dr. Berlá’s Report and testimony are qualified, we can only say that Dr. Berlá testified to conclusory “emotional harm” as opposed to the concrete and substantial impaired functioning required by KRS 600.020(26). In fact, Dr. Crumbo, Child’s current therapist, testified that Child was functioning fairly well, enjoyed various activities, and demonstrated average to above-average performance in school. All in all, she saw no signs of emotional abuse and considered him a normal child for his age and circumstances. And, while a risk of harm can be sufficient in certain cases, Dr. Berlá did not testify the potential emotional harm would be such that Child would not be able to function within a normal range of performance and behavior as required by the statute.

The Kentucky Supreme Court recently considered whether emotional harm and the risk thereof were sufficient to satisfy KRS 600.020(26) in *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915 (Ky. 2021). In *M.C.*, it was undisputed that the father drank, sometimes to excess, around his children against the Cabinet’s recommendations. Our Supreme Court acknowledged that Father’s drinking caused some distress in his teenage children, but ultimately concluded that the Cabinet had failed to establish that Father’s drinking caused or created an actual risk of severe emotional harm to the children. It held:

Regarding emotional injury, there was evidence that S.C. would become upset by M.C.'s drinking and they would have verbal arguments. But there was no suggestion that she "suffered an injury to [her] mental or psychological capacity or emotional stability [as evidenced] by a substantial and observable impairment of [her] ability to function."

Id. at 925.

In so holding, the Court expressed concern about the Cabinet overreaching to the extent that a mere disagreement with its parenting recommendations could give rise to a finding of abuse or neglect by a parent.

[t]he Cabinet's position opens the door to a potentially wide-reaching intrusion by the state into the parent-child relationship. **If the Cabinet can show that [the mother] neglected her children merely by refusing to follow the Cabinet's recommendations, then it could also seek to enforce other views about proper parenting in a similar manner . . .** when the Cabinet seeks to compel a parent to comply with its directives, the courts must be vigilant to protect against overreaching of that authority. **It is not enough for the Cabinet to show that [the mother] would be well-advised to agree to the terms of the Aftercare Plan.** The applicable statutory definition requires a finding that [the mother] created or allowed to be created a risk that an act of sexual abuse will be committed upon the children.

Id. at 926 (emphasis in original) (quoting *K.H. v. Cabinet for Health and Family Services*, 358 S.W.3d 29, 29 (Ky. App. 2011)).

We cannot disagree with the trial court that Mother's behavior may have some negative impact on Child and is not in his best interest. However, while

a family court can consider best interest in the context of a custody dispute, best interest is not the standard in a DNA proceeding. Failure to exemplify “model parent[ing]” does not equate to abuse. *See Cabinet for Health and Fam. Servs. v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014). A DNA determination like the one conducted in this case is ultimately the first step in a termination of parental rights proceeding. *See Cabinet for Health and Fam. Servs. v. H.L.O.*, 621 S.W.3d 452, 462 (Ky. 2021). “While the state has a compelling interest to protect its youngest citizens, state intervention into the family with the result of permanently severing the relationship between parent and child must be done with utmost caution. It is a very serious matter.” *M.E.C. v. Commonwealth, Cabinet for Health and Fam. Servs.*, 254 S.W.3d 846, 850 (Ky. App. 2008).

While Mother’s behavior and actions are grounds for concern, the Cabinet has not presented evidence that Child suffered or is at risk of suffering an impaired “ability to function within a normal range of performance and behavior” as a result of Mother’s actions. Accordingly, we find that the family court’s finding of emotional abuse was clearly erroneous, and we reverse the judgment finding Mother emotionally abused or neglected Child. However, nothing in this Opinion should be construed as holding or expressing an opinion that the family court could not consider the same evidence in the context of a motion for sole

custody and/or limited timesharing or visitation in the context of a best-interest analysis.

III. CONCLUSION

In light of the foregoing, we reverse the judgment of the Jefferson Family Court and remand for further proceedings not inconsistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John H. Helmers, Jr.
Louisville, Kentucky

Kevin C. Burke
Jamie K. Neal
Louisville, Kentucky

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY:

Daniel Cameron
Attorney General of Kentucky

Michael J. O'Connell
Jefferson County Attorney

David A. Sexton
Special Assistant Attorney General
Louisville, Kentucky

GUARDIAN *AD LITEM*'S BRIEF FOR APPELLEE CHILD:

Kathleen Serey Snyder
Louisville, Kentucky

BRIEF FOR APPELLEE J.M.:
William D. Tingley
Fort Mitchell, Kentucky