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Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-1188-ME

C.L.

APPELLANT

v. APPEAL FROM LEWIS FAMILY COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 21-J-00003-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; B.H., A MINOR;
AND COMMONWEALTH OF
KENTUCKY, OFFICE OF LEWIS
COUNTY ATTORNEY

APPELLEES

AND

NO. 2021-CA-1192-ME

C.L.

APPELLANT

v. APPEAL FROM LEWIS FAMILY COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 21-J-00002-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY,
OFFICE OF LEWIS COUNTY
ATTORNEY; AND L.L., A MINOR

APPELLEES

AND

NO. 2021-CA-1194-ME

C.L.

APPELLANT

v. APPEAL FROM LEWIS FAMILY COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 21-J-00004-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; A.L., A MINOR;
AND COMMONWEALTH OF
KENTUCKY, OFFICE OF LEWIS
COUNTY ATTORNEY

APPELLEES

AND

NO. 2021-CA-1197-ME

C.L.

APPELLANT

v. APPEAL FROM LEWIS FAMILY COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 21-J-00005-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES;
COMMONWEALTH OF KENTUCKY,
OFFICE OF LEWIS COUNTY
ATTORNEY; AND K.L., A MINOR

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; CALDWELL AND K. THOMPSON,
JUDGES.

THOMPSON, K., JUDGE: C.L. (mother) appeals following dispositions in these dependency, neglect, and abuse (DNA) actions. She challenges the adjudications in which she was found to have abused or neglected L.L., K.L., A.L., and B.H. (collectively the children) on the basis that there was insufficient evidence before the family court to conclude that the children were abused or neglected due to lack of parental care or were at risk of abuse or neglect based on her making false reports, use of alcohol, or her “mental health issues.” Mother also argues that the children should have been interviewed *in camera*. We vacate and remand because we agree with mother that there was insufficient evidence to conclude the children were abused or neglected.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has four children: L.L., a girl, born in April 2008; K.L., a girl, born in June 2010; A.L., a boy, born in June 2012; and B.H., a boy, born in April 2017. Mother was divorced from the father of the three oldest children, with that father having subsequently died, and B.H.'s father is C.H. Mother came to the attention of the Cabinet for Health and Family Services (the Cabinet) in association with mother making a report to law enforcement on January 22, 2021, that she believed K.L. was sexually abused by mother's ex-boyfriend R.S. In the course of mother's subsequent interactions with law enforcement, the Cabinet, and a children's advocacy center over the next few days, professionals raised concerns that mother might be intoxicated or have mental health issues.

Without any concrete proof of any impairment by mother and only unverified reports, this escalated to the Cabinet deciding on January 27, 2021, that the children should go to stay with their maternal grandmother for the night. Without any warning that she, herself, was under investigation, an officer and a social worker confronted mother outside her children's school, ordered that she step out of her vehicle, and told her of this plan. The announcement of this decision to mother resulted in mother becoming irate. The situation escalated with mother becoming violent and ultimately being placed under arrest.

On January 29, 2021, the Cabinet filed DNA petitions alleging that the children were abused or neglected and seeking emergency custody. Social worker Michelle Howard detailed incidents and reports between January 23, 2021 and January 27, 2021, that made her concerned with “mother’s mental health and possible substance abuse at this time which place the children at risk of harm.” Howard’s allegations included outside reports, mother’s refusal to voluntarily complete a mental health and substance abuse assessment, mother’s “very erratic behavior” during a phone call with a forensic interviewer at the Buffalo Trace Children’s Advocacy Center (BTCAC), and mother becoming “very combative with law enforcement and [Tasha Craft]” resulting in her arrest after she assaulted and spit at Craft and kicked at law enforcement.

The family court entered emergency orders granting custody of the children to the maternal grandmother, finding as to each child: “The child is in danger of imminent death or serious physical injury or is being sexually abused.”

After the family court held a temporary removal hearing, on February 1, 2021, the family court found that mother was arrested for assault on a police officer and ordered her to undergo a psychological evaluation and submit to random drug screens. On May 13, 2021, the family court changed the children’s placement from the grandmother to mother’s cousin, A.W. The family court

ordered mother undergo a psychological assessment with Dr. Ebbers and then later set this order aside.

The family court conducted an adjudication hearing on July 15, 2021. The Cabinet presented testimony by Lewis County social worker Howard, Kentucky State Trooper Curtis Ingram, Mason County social worker and special investigator Tasha Craft, and BTCAC executive director and social worker Hope Burns. Social worker Jessica Duvall, who conducted a drug and alcohol and mental health assessment of mother, and also met with mother in a counseling capacity, was excluded as a witness because there was no clear understanding demonstrated that mother had waived the patient-provider privilege.

Howard testified she was the ongoing worker for the Cabinet in this case and first became involved on January 23, 2021, when she accompanied Ingram to investigate a report of possible sexual abuse and to interview K.L. Howard testified that mother told her she suspected the sexual abuse a week or two prior but did not report it then because she did not think anyone would believe her. Howard stated that during the interview K.L. confirmed the abuse took place as to two perpetrators (R.S. and M.M.), writing down on paper what had happened in regard to her former step-father, M.M. Howard confirmed that it was appropriate for mother to report her concerns.

Howard explained she then implemented a prevention plan in which mother agreed that the children would have no contact with R.S. or M.M. and that she would keep the children safe. Howard stated that as far as she knew, mother complied with the safety plan in keeping the children away from the perpetrators but did not comply as she would not sign a release for an evaluation from Dr. Ebbers and had not completed a substance abuse and mental health evaluation. However, Howard admitted that the family court had retracted the requirement that mother be evaluated by Dr. Ebbers and mother did complete a substance abuse and mental health evaluation with Duvall in March.

Howard testified that mother had twenty to thirty drug tests and none of them tested positive for drugs, and only two tested positive for alcohol.

Howard testified that the children consistently requested that they be allowed to go home to mother each time she talked with them and the children did not feel unsafe with mother. Howard confirmed that mother had previously taken the children to counseling and mother had disclosed to Howard that she had past history of sexual trauma herself.

Howard testified that on January 25, 2021, she again spoke with mother as she was scheduling a child advocacy center interview for K.L., and at that time asked if mother would be willing to take a substance abuse and mental health assessment based upon concerns that she and others had.

Howard stated she was concerned that mother's mental health could pose a risk to the children and reported that during their conversations mother seemed to zone in and out, talked in circles and would get off track, was erratic, had trouble staying on topic, and talked very fast. Howard thought mother was paranoid as she seemed to think that everyone was against her, felt that no one from their community wanted to help her, believed her ex-boyfriend was driving past her home and going into her home when she was not there, and believed her ex-boyfriend was getting information about the case from Howard's coworker. Howard agreed she was not a mental health professional and not competent to diagnose mother with any mental illness but explained that the children had not been returned to mother because Howard still had concerns about mother's mental health.

Howard testified she asked mother about an anonymous report that mother had confronted C.H. with a gun when he came to pick up their child, B.H. According to Howard, mother explained that C.H. was very late, was angry, and would not leave when she asked him to leave, so she got her gun.

Howard also testified about a report that mother went to a hotel with her children for three days (from January 25-27, 2021) and expressed concern that mother would do this, rather than choosing to stay in her home or with grandmother. Howard also reported that when the children were placed with their

grandmother, mother contacted Howard numerous times and accused Howard of allowing grandmother to abuse the children.

Trooper Ingram testified he came to mother's residence on the evening of January 22, 2021, to investigate mother's report that K.L. had been sexually abused by mother's ex-boyfriend R.S. He explained that when he arrived mother was not yet there but arrived within five minutes having been driven by a friend to get a pizza. Mother apologized for drinking due to the stress that the sexual abuse allegations had caused her but indicated that the children were not present. According to Ingram, although he could smell alcohol on her, she appeared coherent, but seemed distracted and would talk above him and around his questions. He did not think she was extremely intoxicated, but she was slurring her speech a bit.

According to Ingram, mother explained that K.L. had initially denied that any sexual abuse had occurred, but mother believed that it had based upon K.L.'s demeanor of acting "weird" or "funny" with her eyes getting "big" and finding a piece of toilet paper in the bathroom trashcan that had blood on it. Ingram explained that when he recounted to mother his understanding that the children had all denied the abuse occurred, and that mother was the only one who believed it had, mother became distraught, cursed at him, and stated that if he was

not going to help, he should get out of her house. Ingram explained he was caught off guard by mother's sudden shift.

Ingram stated that the next day he returned with Howard and interviewed mother and K.L. at maternal grandmother's residence. Ingram testified that grandmother and mother's sister said K.L. told them nothing had happened. However, when Ingram interviewed K.L., she told him the sexual abuse reported by mother had occurred and also made written allegations of a separate incident of sexual abuse against a different individual. Ingram acknowledged that K.L. did not appear fearful of mother or about being at mother's home and did not blame mother for the sexual abuse.

Ingram testified mother acted appropriately by reporting the sexual abuse. He explained that after K.L.'s report, he opened up a case, interviewed the alleged perpetrators, and K.L. was sent to be interviewed at a child advocacy center. Ingram noted that the sexual abuse case was still ongoing and not closed, and that it would be up to the Commonwealth's Attorney to decide whether to present the case to the grand jury.

Craft testified that on January 27, 2021, she was called to the children's school to assist with the Mason County Sheriff's investigation of an anonymous report they had received that mother and her paramour had gotten into a fight and mother was staying with the children at a hotel, drinking alcohol, had

mental health issues, and was paranoid. Craft testified that when mother arrived (with B.H. asleep in the back seat of the car), mother was asked to step out and Craft set about trying to negotiate a safety plan that the children would go to their grandmother's home for the night and told mother that she could go with them if she was not impaired. Craft stated she did not know what she would do if mother did not agree to the plan.

According to Craft, mother told her she would have to arrest mother before they would take her children away and lunged at Craft. Craft stated the deputy interfered and then mother fought the deputy while using profanity. Craft explained that when mother asked why Craft was removing the children and Craft tried to explain that she was not, mother spit at her, and mother was ultimately arrested. Craft testified that based on mother's erratic behavior, she feared mother was under the influence and did not understand why mother reacted the way she did.

Craft stated she interviewed the children but kept her interviews short once she found out about the sexual abuse investigation that had already been started in Lewis County. She explained that K.L. told her about the investigation and voluntarily disclosed to her about the sexual abuse. According to Craft, when asked about the report she had received, all three children told her that mother and R.S. had gotten into an altercation when mother thought R.S. had put a knot on

B.H.'s head and mother had been drinking, and they were at the hotel because R.S. was in their home. A.L. stated he was afraid when mother drank and was afraid she would get really drunk. K.L. stated that mother and R.S. drank alcohol.

Craft testified that mother recognized her from a 2020 investigation into whether K.L. and another victim were sexually abused by a teacher, and K.L. also remembered her from that prior investigation.

Burns testified that on January 23, 2021, mother telephoned the BTCAC and spoke with her about the sexual abuse allegations concerning K.L. and mother's frustration that no one was believing her. Burns expressed concern that mother was anxious and angry, spoke over her and in incomplete sentences, and worried about the tone of mother's voice and the way she was speaking. Burns explained she feared that mother herself and the children were in possible danger and believed that mother needed to be assessed to see if she was under the influence, possibly needing therapy or mental health counseling. Burns explained that when she asked mother if she was under the influence of drugs or alcohol that mother became irate. Burns admitted to raising her voice as well.

Burns stated she believed mother was paranoid based on mother having previously called the office earlier and telling another advocate that mother was afraid her phone was tapped and had left the police department in Maysville because she worried someone would overhear her. Burns was also concerned

when she overheard mother questioning K.L. about the abuse. Burns reported that mother stated K.L. had been abused multiple times, no one believed mother that the sexual abuse had occurred, and that, instead, everyone thought she was coaching K.L. about the sexual abuse. However, Burns admitted that it would be natural for a parent to be anxious, stressed, and nervous when dealing with an abuse situation.

Burns testified that on January 25, 2021, mother called the BTCAC again to schedule a forensic interview for K.L. and apparently did not realize at first that it was Burns on the phone. According to Burns, when mother realized she was speaking to Burns, mother became angry that Burns had previously accused her of being under the influence of drugs and refused to allow her daughter to be interviewed there. Burns explained she would provide a referral to a different children's advocacy center.

Burns testified that based on the two phone calls she was concerned that mother suffers from mental health issues and, therefore, contacted the Cabinet after each phone call to report her concerns about mother's mental health and possible substance abuse. When asked why she was concerned, Burns explained that mother's thoughts were rapid and incomplete, she was not able to stop and listen, and she was excessively wordy. Burns was concerned with mother's safety and the safety of the children and did not think she should be alone with the

children. Burns explained she thought that mother needed a mental health assessment.

Upon the conclusion of the Cabinet's proof, mother moved to dismiss the petition on the grounds that the Cabinet failed to carry its burden of showing that the children were at risk of abuse or neglect. Mother requested that the family court interview the children *in camera*. That motion was denied, and mother did not put on any additional proof. She renewed her motion to dismiss, which was denied.

The family court explained its decision as follows:

What I see in this particular case is that [mother] for whatever reason has made – you know I'm the judge in domestic violence court too and I can't just ignore all that stuff that comes before. This is the third allegation that [mother] has made in regards to [K.L.] being sexually abused by three different people in fourteen months span. The domestic violence case was filed in October of '19. This report was in January '21, so in fourteen months [mother] for some reason thinks that [K.L.] has been sexually abused by three different men on three different occasions, and none of them have been substantiated by anyone other than after, I don't know, [K.L.] had been talked to regarding these or whatever, but I've never been presented with any physical proof that anything's been happening to these kids. As we stand right now, I mean, I have testimony that [K.L.] initially said that nothing happened.

I think that what we have here – and maybe mom has a drinking problem, maybe not. I know that one child said that they were scared when mom and [R.S.] drank.

But my concern here is [mother's] mental state. And I think the proof is, that she is suffering from some sort of mental condition in regards to believing that [K.L.] is constantly being sexually abused by men. And these, the way she acted towards the police and workers, that's just not, in this court's view, normal reactions to somebody who you've called to help and that may not give you the answer you want to hear.

So, I'm going to enter a finding of risk of harm to these children and because I just think that until this lady gets some kind of help in dealing with whatever, whatever she's going through, that these children are going to continue to be subjected to this same type of behavior, that they've been subjected to by their mother. And, again, this has nothing to do with whether or not this woman loves her children. And maybe because she loves her children she's experiencing whatever mental conditions, I don't know, I'm not trained in that, and I don't express any kind of opinions in regards to that. But based upon what I've heard today by a preponderance of the evidence, I find that the Commonwealth has proved that the children are under risk of harm and I'm going to enter a finding to that effect.

In the written orders entered following the adjudication hearing on July 15, 2021, the family court specifically found: "Mother makes false allegations as to sexual abuse of one child (3 times in 14 months) – Also, mother drinks + children are afraid when this happens with [R.S.] (boyfriend). Mother['s] actions demonstrate mental health issues. Risk of harm for children."

The family court determined that abuse or neglect was proven by a preponderance of the evidence by check-marking the following grounds:
"Continuously or repeatedly failed or refused to provide essential parental care and

protection for the child, considering the age of the child” and “[d]id not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child’s well-being[.]”

Oddly enough, the family court did not mark “[c]reated or allowed to be created a risk of physical or emotional injury by other than accidental means[.]” However, we believe its handwritten findings were sufficient to indicate such a ground.

The family court concluded that the facts supported removal, it was in the best interest of the children that they be removed, that continuation in their home was contrary to their welfare, and that reasonable efforts were made to keep them in their home. The family court also ordered mother to submit to a psychological evaluation with Dr. Ebbers.

On July 26, 2021, mother filed a motion to reconsider/alter, amend, or vacate. The family court denied this motion on August 12, 2021.

On September 9, 2021, following a dispositional hearing, the family court determined that continued removal and placement with A.W. was in the children’s best interest. Mother appealed after the disposition, to challenge the findings in the adjudication.

STANDARD OF REVIEW

Juvenile DNA proceedings require distinct hearings for an adjudication and a disposition. Kentucky Revised Statutes (KRS) 620.100(2), (4). *See* KRS 610.080 (same but not specific to DNA proceedings). During the adjudication, the family court determines the truth or falsity of the allegations in the petition, with the Cabinet bearing the burden of proving dependency, abuse, or neglect by a preponderance of the evidence. KRS 620.100(3). Next comes the disposition in which the family court determines what action shall be taken. KRS 620.100(4). “[A] disposition order, not an adjudication order, is the final and appealable order with regard to a decision of whether a child is dependent, neglected, or abused.” *J.E. v. Cabinet for Health and Family Services*, 553 S.W.3d 850, 852 (Ky. App. 2018).

Pursuant to KRS 600.020(1), a child can be defined as abused or neglected based on a variety of actions a parent does or does not take, including inflicting a physical or emotional injury upon a child (as in KRS 600.020(1)(a)1.) or creating a risk of physical or emotional injury upon a child (as in KRS 600.020(1)(a)2.). The grounds the family court found involved the similar provisions about failing to provide essential and adequate parenting care pursuant to KRS 600.020(1)(a)3. and KRS 600.020(1)(a)8.

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. Whether or not 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).

I. Lack of Parenting Care Was Not Established by Substantial Evidence

We first consider whether there was substantial evidence to support the grounds for abuse or neglect that the family court checked in the form orders: “Continuously or repeatedly failed or refused to provide essential parental care and protection for the child, considering the age of the child” and “[d]id not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child’s well-being[.]”

As occurred in *K.D.H. v. Cabinet for Health and Family Services*, 630 S.W.3d 729, 736-37 (Ky. App. 2021), and *M.E.C. v. Commonwealth, Cabinet for Health and Family Services*, 254 S.W.3d 846, 854 (Ky. App. 2008), we do not believe the Cabinet presented substantial evidence that the children were abused or neglected. None of the witnesses pointed to any failures in mother’s care for the children that would support abuse or neglect on these grounds.

Just as in *K.D.H.* and *M.E.C.*, the record lacked any evidence that mother subjected the children to any direct physical or emotional abuse or failed to attend to their physical needs as would be required to satisfy these grounds. Additionally, there was absolutely no evidence presented by the witnesses that mother was not appropriately protective of the children or did not respond

appropriately by reporting her suspicions that K.L. was sexually abused, except perhaps not reporting them sooner.

II. Risk to the Children Was Not Established by Substantial Evidence

We next proceed to examining whether the family court had before it substantial evidence to establish risk of abuse or neglect based on the three enumerated grounds it raised: false allegations, alcohol use, and mental health issues. To establish abuse or neglect through risk of harm, “‘the risk of harm must be more than a mere theoretical possibility,’ it must be ‘an actual and reasonable potential for harm.’” *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915, 923 (Ky. 2021) (quoting *K.H. v. Cabinet for Health and Family Services*, 358 S.W.3d 29, 32 (Ky. App. 2011)). A risk of harm cannot be established through inferences upon inferences, as that is nothing but speculation. *K.H.*, 358 S.W. at 32. Here, it is speculative that even if these three grounds were established, they could establish an actual and reasonable potential for harm to the children.

While all of the Cabinet’s witnesses point to concerns about mother having a problem with drugs or alcohol, or having mental health issues, most of this testimony was impermissibly vague. While there is an indication that mother seems to react in a manner that is not “typical” and overreacts to any perceived criticism, and seemed paranoid, very little testimony connected mother’s behavior to any potential impact on the children. The witnesses had no way of knowing

what actual conduct by mother's ex-boyfriend R.S. may have sparked mother's fears that they dismissed as paranoid. The witnesses lacked any personal knowledge about whether R.S. indeed entered mother's home without permission. However, the children consistently reported to Craft that they stayed in the motel because R.S. was in their home.

A. False Reports

Mother argues that there was insufficient evidence of false reports by mother, arguing it was improper for the family court to take judicial notice of a domestic violence case, the Cabinet petition did not accuse mother of making false reports or connect the allegations of sexual abuse to abuse or neglect of the children, and the evidence presented simply did not support the family court's conclusion. Mother also argues that the family court did not seem to understand the difference between a false report and an unsubstantiated report, citing KRS 519.040.

We have a situation where a mother made a report about suspected sexual abuse of her ten-year-old child. We note that mother had a mandatory duty to make a report pursuant to KRS 620.030 if she knew or had reasonable cause to believe K.L. was being abused. K.L. subsequently confirmed that two persons had indeed sexually abused her (to two different social workers and a police officer), but it appears that mother's reactions during this stressful time prompted the

Cabinet to make mother the target of the Cabinet's response. Importantly, none of the witnesses testified that they did not believe K.L. or that they had any reason to suspect her disclosures were fabricated. Additionally, Ingram testified the investigation into these allegations was still ongoing. Therefore, there was no final conclusion as to whether the sexual abuse was substantiated or unsubstantiated, or whether charges would be pursued against these men.

However, without any kind of support from the witnesses' testimony, the family court made extensive oral pronouncements which focused almost exclusively on the court's conclusion that mother's mental condition resulted in her making false claims that K.L. was being sexually abused and that for this reason all the children were abused or neglected. Such a conclusion required multiple inferences that were at odds with the testimony presented during the adjudication hearing.

The family court's vague reference to what occurred in a prior domestic violence case was not the proper subject of judicial notice. Kentucky Rule of Evidence (KRE) 201(b) specifies in relevant part:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) Generally known within . . . in a nonjury matter, the county in which the venue of the action is fixed; or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

While “it is a well-established principle that a trial court may take judicial notice of its own records and rulings, and of all matter patent on the face of such records,” *M.A.B. v. Commonwealth Cabinet for Health and Family Services*, 456 S.W.3d 407, 412 (Ky. App. 2015), it was unclear whether the family court was referencing written findings made in its own records, testimony (and if so, by whom), or perhaps just the family court’s general recollection of the proceedings. Whatever the family court took notice of, it was not of record in this DNA case, so we cannot review it. Therefore, without any clarification on this matter, it was inappropriate for the family court to make a ruling based on a previous domestic violence case.

We emphasize that taking judicial notice of testimony in an unrelated proceeding is particularly problematic as it is not necessarily undisputed and is not subject to cross-examination by the present parties. *See Lage v. Esterle*, 591 S.W.3d 416, 422-23 (Ky. App. 2019) (explaining problems with this kind of “judicial notice” and reversing on this basis). Additionally, the family court never informed the parties of its intent to take judicial notice of the domestic violence proceedings until the court orally announced its decision. Under these circumstances, given the lack of appropriate notice, mother could not present any evidence to counter whatever material the family court was relying upon. We additionally believe it was unlikely that whatever occurred in that domestic

violence case conclusively established that mother makes false reports of sexual abuse.

It is troubling that the family court seemed to believe that because there was no physical evidence, there were accusations against multiple men, and that K.L. initially denied that the sexual abuse occurred, that this necessarily means that sexual abuse did not take place and the reports of it were fabricated by mother and K.L. A lack of physical evidence is not synonymous with reports of sexual abuse being fabrications. A lack of physical evidence does not mean that nothing happened.

Unfortunately, sexual abuse of girls may be much more common than we would like to believe. See KIMBERLY A. CRNICH, *Redressing the Undressing: A Primer on the Representation of Adult Survivors of Childhood Sexual Abuse*, 14 WOMEN'S RTS. L. REP. 65, 66 (1992) (citing statistics stating "6% to 62% of female children . . . have been victims of sexual abuse" and that the rate of "molestation may be as high as one in every three girls"). Given such frequency, it is an unfortunate truth that one child may be molested by more than one perpetrator in a short period of time.

Additionally, an initial denial by a child does not mean that sexual abuse did not take place. "Some studies suggest that the majority (approximately 75 percent) of children who eventually disclose sexual abuse previously denied

that the abuse occurred.” SARAH F. SHELTON, *Evaluating the Evaluation: Reliance Upon Mental Health Assessments in Cases of Alleged Child Sexual Abuse*, 15 NEV. L.J. 566, 579 (2015).

But whether or not K.L. was sexually abused was not a matter truly before the family court. The Cabinet never alleged in its petition or intimated during the adjudicatory proceeding that K.L. and her siblings were subject to abuse or neglect based on mother making false allegations that K.L. was sexually abused or causing K.L. to make false reports of sexual abuse. There was also no testimony provided to support such an inference, other than Ingram expressing confusion about how mother became convinced that K.L. was sexually abused where K.L. initially denied that such abuse took place. Whatever doubts there may have been about how mother became sufficiently convinced that K.L. was sexually abused by R.S. that she felt the need to report it, this ultimately does not matter as Ingram and Howard testified that K.L. subsequently confirmed to them herself that she was sexually abused by two men and made a detailed disclosure about an incident of sexual abuse by her former step-father. Therefore, to the extent that abuse or neglect was found based on the family court’s finding that “Mother makes false allegations as to sexual abuse of one child (3 times in 14 months)[,]” it is not supported by the evidence.

B. Alcohol Use

Mother argues that the family court's findings regarding her drinking were equivocal and based on hearsay, but that even if a parent has a substance use disorder, that does not necessarily mean that the parent is thereby rendered unable to properly care for children. We agree. There was insufficient evidence for the family court to conclude that mother's alcohol use caused a risk of abuse or neglect to the children.

While there was evidence to support a finding that mother drinks alcohol, this is hardly in and of itself, without anything more, grounds for finding abuse or neglect. Alcohol is legal and parents are not required to be abstinent just because they are parents.

While hearsay testimony from a witness relating what one child said indicated that this child was afraid when mother drank with her former boyfriend, there was not enough detail given with this to know why this caused fear or if the fear was associated with any risk of harm. While abuse or neglect can be found pursuant to KRS 600.020(1)(a)3. based on a parent "[e]ngag[ing] 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[,]" this was not one of the grounds the family court indicated was established.

Pursuant to KRS 620.023(1)(c), family courts in considering the best interests of children shall consider if relevant whether the parent has a “[s]ubstance use disorder, as defined in KRS 222.005, that results in an incapacity by the parent or caretaker to provide essential care and protection for the child[.]” KRS 222.005(12) defines a “substance use disorder” as:

a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems. Criteria for substance use disorder are in the most current edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders[.]

Simply put, there was no evidence mother has a substance use disorder associated with her use of alcohol. There was absolutely no evidence that mother was addicted to alcohol, she was ever drunk around the children, she was asked not to drink alcohol, her alcohol use rendered her unable to care for her children, or that her drinking caused a risk that she would be unable to care for her children.

Compare with Cabinet for Health and Family Services on behalf of C.R. v. C.B., 556 S.W.3d 568, 576 (Ky. 2018) (finding risk of harm based upon parent’s admitted prior history of drug abuse, failure to appropriately take suboxone as prescribed, and missed and positive drug tests). Indeed, the family court equivocated in its oral explanation of its decision on whether or not mother had a drinking problem, which would appear to indicate this was not proven by the

Cabinet by a preponderance of the evidence, much less that the Cabinet proved this conduct impacted the children.

At most, all the information the Cabinet had before it was mother's acknowledgment to Ingram that she had been drinking (when the children were not around), the children acknowledging when asked that their mother drank alcohol, and anonymous reports to the Cabinet that mother was intoxicated. Anonymous reports that have not been verified in any respect are not entitled to any weight. There was also no indication that the two tests out of twenty or thirty that were positive for alcohol revealed an elevated blood alcohol level, rather than just the presence of alcohol, or that by drinking mother violated any court orders. Without more, this evidence does not demonstrate risk of abuse or neglect.

C. Mental Health Issues

As to mother's "mental health issues," mother argues that whatever these were, the evidence could not establish risk of abuse or neglect. Mother notes that mental illness is not mentioned in the statutory list of neglectful or abusive behavior. She acknowledges that while mental illness is listed as a consideration for determining the best interest of the child pursuant to KRS 620.023(1)(a), she denies that it has ever been established that she has a mental illness, and if she did, that it rendered her unable to care for her children's immediate and ongoing needs.

She notes that the “[n]eeds of the child” are defined in KRS 600.020(41) as consisting of “necessary food, clothing, health, shelter, and education[.]”

Mother is correct that in considering the best interests of the children, pursuant to KRS 620.023(1)(a) family courts are to consider “[m]ental illness as defined in KRS 202A.011 . . . of the parent, *as attested to by a qualified mental health professional*, which renders the parent unable to care for the immediate and ongoing needs of the child” with KRS 202A.011(9) defining a “[m]entally ill person” as:

a person with *substantially impaired capacity* to use self-control, judgment, or discretion in the conduct of the person’s affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors[.]

(Emphasis added.)

The Cabinet witnesses indicated that their greatest concern was mother’s mental health. However, each of the witnesses acknowledged that they were not competent to make any kind of diagnosis about mother’s mental health. At most, all of them could only testify about their own observations.

Did they observe things that gave them pause? Certainly. Were these observations which generated vague suspicions that something was “off” sufficient

to conclude that there was a risk that the children would thereby be neglected or abused? No.

It should be obvious that many parents may have mental health issues. According to government statistics provided by the National Institute for Mental Health, Mental Illness, “[n]early one in five U.S. adults live with a mental illness (52.9 million in 2020).” <https://www.nimh.nih.gov/health/statistics/mental-illness/> (last visited Sep. 2, 2022). While of course these vary in how serious they may be, it is evident that having a mental illness or having “mental health issues” does not, in and of itself, mean that parents put their children at risk of abuse or neglect. Instead, as set out in our statutes, a mental illness which substantially impairs that parent and renders the parent “unable to care for the immediate and ongoing needs of the child” must be properly diagnosed by a mental health professional. None of these requirements were established through the Cabinet’s evidence. Therefore, the family court’s finding that mother had “mental health issues” was essentially meaningless as it did not establish any risk to the children. However, we wish to emphasize that it would likely benefit both mother and the children for mother to seek appropriate mental health services and counseling for herself.

Given the lack of substantial evidence to support any of the family court’s findings that the children were abused or neglected by mother, reversal is warranted.

III. Interviewing the Children

As to mother's argument that the family court erred in refusing to interview the children in chambers, this argument was inadequately preserved as mother failed to offer any proof about their anticipated testimony as required by KRE 103(a)(2). *See Holland v. Commonwealth*, 466 S.W.3d 493, 501 (Ky. 2015) (explaining why this offer of proof as to anticipated testimony is required to preserve an objection). However, we briefly address this issue to provide future guidance should mother ask for the children to testify in a future proceeding.

While *Addison v. Addison*, 463 S.W.3d 755, 763-64 (Ky. 2015), could be argued as providing that the family court did not have to interview the children, we do not believe that *Addison* resolves the issue. In *Addison*, the Court distinguished two situations concerning testimony offered by children. While the Court confirmed that generally a competent child should not be prohibited from testifying as an eyewitness simply due to her young age, the Court held that there was no requirement that young children be required to testify in a dispute involving child custody or parenting time, concluding that in the latter situation courts had the discretion to determine whether such testimony (*in camera* or in open court) should be allowed. *Id.*

We note that *Addison* was generally interpreting KRS 403.290(1) which provides in relevant part: "The court may interview the child in chambers to

ascertain the child’s wishes as to his custodian and as to visitation.” KRS 403.290(1) is of course contained within Chapter 403 which governs dissolution of marriage and child custody, rather than Chapter 620 which governs DNA actions. While the *Addison* Court also referenced a party’s argument that KRE 611(a)(3) applied (which provides “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: . . . [p]rotect witnesses from harassment or undue embarrassment”), this ground was not considered independently from KRS 403.290(1).¹

CONCLUSION

There is no substantial evidence supporting the Lewis Family Court’s findings of fact in the adjudication orders that the children were abused or neglected; thus, there is no justification for the children’s continued removal from mother’s care in the adjudication and disposition orders. Therefore, we vacate the

¹ While in *B.S. v. Cabinet for Health and Family Services*, No. 2017-CA-000109-ME, 2018 WL 6266779, at *3 (Ky. App. Nov. 30, 2018) (unpublished), a termination case, our Court cited *Addison* for the proposition that “[w]hether or not to interview the children was within the sound discretion of the family court, which is granted wide latitude in exercising that discretion[.]” the Court had already determined: the parent who wished to call the children to testify suggested (rather than asked) for the children to be interviewed *in camera*, backed away from all children being interviewed and did not adequately preserve the anticipated evidence of the one child, which appeared would be irrelevant in any event, and the Court further indicated the testimony of the children would add nothing given the extensive evidence about what had occurred. While *B.S.* can be cited pursuant to CR 76.28(4)(c), as there are no published opinions adequately addressing whether DNA or termination cases should be treated the same as custody dispute cases between parents with the court being granted the same discretion to determine whether children should testify despite KRS 403.290(1) not applying, we do not believe *B.S.* is controlling as it does not squarely address this issue.

family court's adjudication and disposition orders entered against mother and remand for dismissal.

However, we do not know what has occurred in the interim and whether new additional evidence may make the Cabinet believe that it can now establish that mother is presently unfit to care for the children. Therefore, the children shall be returned to the custody and care of mother within ten days of this Opinion becoming final, unless the Cabinet files new petitions seeking emergency custody, and the family court makes appropriate findings that the children are in danger warranting continued removal within that time.

ALL CONCUR.

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