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# Commonwealth of Kentucky

# Court of Appeals

NO. 2023-CA-0393-ME

A.M. APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JENNIFER R. DUSING, JUDGE
ACTION NO. 22-J-00429-001

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
J.M.; L.M.; AND S.M., A MINOR
CHILD APPELLEES

AND

NO. 2023-CA-0394-ME

A.M. APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JENNIFER R. DUSING, JUDGE
ACTION NO. 22-J-00430-001

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
J.M.; AND L.M., A MINOR CHILD APPELLEES

AND

NO. 2023-CA-0395-ME

A.M. APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JENNIFER R. DUSING, JUDGE
ACTION NO. 22-J-00431-001

CABINET FOR HEALTH AND
FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY;
J.M.; AND M.M., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND JONES, JUDGES.

JONES, JUDGE: This consolidated appeal arises out of a series of Dependency, Neglect, and Abuse ("DNA") actions filed in the family court division of Boone Circuit Court ("family court"). As part of the underlying proceedings, the family court determined that A.M. sexually abused his oldest daughter, S.M., and that his younger daughters, L.M. and M.M., were at risk of similar abuse. On appeal, A.M. asserts that the family court abused its discretion and violated his due process

rights when it allowed S.M. to testify in chambers without his counsel physically present. A.M. further argues the family court's conclusion that L.M. and M.M. were at risk of being abused is not supported by substantial evidence.

Having reviewed the record and being otherwise sufficiently advised, we affirm the family court.

## I. BACKGROUND

In late 2022, when S.M. was approximately sixteen years old, she told her mother that A.M. had been sexually abusing her during his parenting time.[1] According to S.M., A.M. began abusing her when she was eight or nine. She stated that A.M. would come to her bedroom, which she shared with her two younger sisters, and touch her vagina with his fingers or perform oral sex on her. Over time, the abuse progressed to full-blown rape. S.M. indicated that A.M. first raped her in the basement of his home. Later, he began picking her up from her mother's house under the guise of taking her shopping but would instead take her to a local park where he would rape her in the back of his SUV.

After S.M. told her mother about the abuse, the two went to the police. S.M. worked with local law enforcement to further the investigation, including participating in a series of recorded phone calls with A.M. While A.M. never outright admitted raping S.M. during the phone calls, he also never denied

[1] S.M. lived primarily with her mother. However, she had overnight visitation with A.M.

her numerous assertions that he had sex with her and implored her not to tell her mother.

A.M. was subsequently arrested and criminally charged with multiple counts of rape, sodomy, and incest. Around the same time, the Cabinet for Health and Family Services ("Cabinet") filed DNA petitions on behalf of S.M. and her two younger sisters, L.M. and M.M.[2]

Following a temporary removal hearing, the family court set the matter for an adjudication hearing to be held on February 2, 2023.[3] Prior to the hearing, the Boone County Attorney requested that S.M. not be compelled to testify about the alleged abuse in open court. The family court agreed and entered a written order on January 5, 2023, providing that S.M. would be allowed to testify in chambers with only her guardian *ad litem* ("GAL") present in the room. Counsel would be permitted to submit written questions ahead of time, which S.M. would be asked in chambers. A.M.'s counsel filed a written motion to reconsider the January 5th order arguing that A.M. had a right to be in the room, though out of sight and sound of S.M., and that his counsel should be allowed to question S.M. directly.

[2] L.M. and M.M. are S.M.'s younger, half-sisters. At the time of the events, they resided with A.M. and their mother, while S.M. resided with her mother.

[3]The children's respective mothers were awarded temporary sole custody of them. A.M. was ordered not to have contact with any of the children.

In a four-page written order entered on January 30, 2023, the family court denied A.M.'s motion to reconsider. First, the family court noted that the Confrontation Clause did not apply to DNA proceedings, and therefore, A.M. did not have a right to be present in the same room as S.M. when she testified. Next, it determined that there was a compelling need to allow S.M. to testify in chambers. The family court explained that "[b]ecause [A.M.] is the alleged perpetrator of the abuse, his presence during [S.M.'s] testimony could foreseeably increase the likelihood that [S.M.] could experience serious emotional distress when describing such acts of abuse, which could render [her] unable to reasonably communicate." Lastly, the family court concluded that KRS[4] 421.350(2) allowed it the discretion "regarding the manner of [S.M.'s] testimony, the location of the examination, and the persons permitted in the room during such testimony" and that her testimony would be taken in chambers with only "the Judge and [S.M.'s] GAL present with the testimony being televised via close circuit equipment in the courtroom and allowing all other attorneys to submit written questions to be posed to [S.M.] during the examination."

The adjudication hearing was held on February 2, 2023. When S.M. was called to testify, the family court followed the procedures set out in its prior written order. All counsel, including A.M.'s counsel, were permitted to submit

[4] Kentucky Revised Statutes.

written questions for S.M. to the family court. The judge, S.M., and the GAL then retired to chambers where S.M. was asked the questions previously submitted by counsel. The testimony was broadcast to the parties remaining in the courtroom, which included A.M. and his counsel. After the first round of questions, counsel for the parties were permitted to submit a second round of written follow-up questions.

In addition to S.M.'s testimony, the family court also reviewed the recorded phone calls between S.M. and A.M. A.M. was called to testify but invoked his right not to incriminate himself and refused to answer any questions. After the hearing, the family court entered detailed written findings of fact and conclusions of law along with separate adjudication orders.

As to S.M., the family court stated:

> The Court finds [S.M.'s] detailed testimony of sexual abuse perpetrated on her by [A.M.] to be credible. The child's testimony, along with the recordings of the controlled phone calls between the child and [A.M.] on November 9, 2022, prove by a preponderance of the evidence that [A.M.] committed acts of sexual abuse upon the child. Therefore, this Court finds that the minor child is an abused or neglected child as defined in KRS 600.020(1)(a)(5) in that [A.M.], the child's father, committed acts of sexual abuse upon the child, [S.M.].

2/14/2023 Order at 6. The family court then determined that A.M.'s abuse of S.M. placed his other two daughters, L.M. and M.M., at a risk of abuse pursuant to KRS

600.020(1)(a)6. Final disposition orders were entered on March 1, 2023, after which A.M. initiated these appeals.

## II. ANALYSIS

### *A. S.M.'s Testimony*

On appeal, A.M. asserts that the family court erred when it allowed S.M. to testify in chambers without his counsel present. Specifically, A.M. asserts: (1) that the family court erred when it determined that there was a compelling need for S.M. to testify in chambers; (2) that pursuant to KRS 421.350(2) his counsel had a statutory right to be present during the questioning; and (3) the way S.M. was questioned violated A.M.'s due process rights.

We begin with KRS 421.350. It provides:

> (1) This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.155, 529.030 to 529.050, 529.070, 529.100, 529.110, 530.020, 530.060, 530.064(1)(a), 531.310, 531.320, 531.370, or any specified in KRS 439.3401 and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection.
>
> (2) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court

and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(3) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by subsection (3) of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

(a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

(b) The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(c) Each voice on the recording is identified; and

> (d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.
>
> (4) If the court orders the testimony of a child to be taken under subsection (2) or (3) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken, but shall be subject to being recalled during the course of the trial to give additional testimony under the same circumstances as with any other recalled witness, provided that the additional testimony is given utilizing the provisions of subsection (2) or (3) of this section.
>
> (5) For the purpose of subsections (2) and (3) of this section, "compelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

KRS 421.350.

Our first task is to determine whether the statute is applicable to this proceeding since S.M. was sixteen when she testified. In *Danner v. Commonwealth*, 963 S.W.2d 632, 633 (Ky. 1998), the Court was called upon to determine "whether the age provisions of KRS 421.350 refer to the age of the victim when the crime was committed or when the testimony is given." After concluding that the statutory language was ambiguous, the Court held that the "legislative intent is to protect child victims twelve and under when the crimes were committed against them and who remain children at the time of trial." *Id.*

Therefore, even though S.M. was sixteen at the time she testified, the statute still applies because much of the abuse occurred when she was under twelve. *Id.*

The inquiry, however, does not end with age. Regardless of the child's age, the family court must still determine that there is a "compelling need" for the child to testify outside the courtroom. Compelling need is defined as "the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence." KRS 421.350(5). In evaluating the existence of a compelling need, the family court should consider: the age and demeanor of the child witness, the nature of the offense, and the likely impact of testimony in court or facing the defendant as well as the time which has elapsed from the crime to the date of trial. *Danner*, 963 S.W.2d at 634.

In this case, the family court determined that there was a compelling need stating:

> In the case at bar, the child's testimony may be of a highly sensitive nature due to the underlying allegations of sexual abuse. It is alleged that the child was forensically interviewed and made disclosures of sexual abuse spanning many years of her life. Because [A.M.] is the alleged perpetrator of the abuse, his presence during the child's testimony could foreseeably increase the likelihood that the child could experience serious emotional distress when describing such abuse, which could make the child unable to reasonably communicate.

1/30/2023 Order at 3.

A.M. first asserts that the family court abused its discretion in finding a compelling need based only on the unsworn, nonexpert statement of Nathaniel Young, the assistant Commonwealth Attorney prosecuting the DNA case, and without the benefit of any expert or eyewitness testimony. Our Supreme Court rejected a similar argument in *Danner*.

> Appellant argues that the trial court's determination of compelling need was based on an insufficient expertise in analyzing the controlling factors, because "[o]ne judge, one man alone, unqualified in behavioral sciences, made the determination, *without additional facts or opinions, that the alleged victim could not testify in open court*." *Contrary to appellant's view, decisions such as this fall precisely within the judicial role*. The trial court did not abuse its discretion in this case, and based its determination of compelling need on appropriate factors.

*Danner*, 63 S.W.2d at 635 (emphasis added).

S.M. alleged that A.M., her own father, sexually abused and raped her multiple times over a seven-to-eight-year period. It took years for S.M. to work up the courage to report the abuse to her mother. Certainly, based on the nature of the allegations, the length of the abuse, and its proximity to the hearing, the family court acted within its discretion in finding that S.M.'s testimony might be impeded if she were required to take the stand and look directly at A.M. while testifying. Therefore, we hold that in the context of these DNA cases, additional, formal proof was not necessary for the family court to find a compelling need.

Next, we must consider whether the procedures utilized by the family court violated either A.M.'s statutory or due process rights. As a preliminary matter, we note that DNA actions are civil in nature. KRS 620.100(3) ("The adjudication shall determine the truth or falsity of the allegations in the complaint. The burden of proof shall be upon the complainant, and a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence. The Kentucky Rules of Civil Procedure shall apply."). This is important because the Confrontation Clause of the Sixth Amendment does not apply to civil cases, even those that involve parental rights. *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 345 (Ky. 2006). Of course, this does not mean that parties in such cases are without rights.

It is well-established that a parent's right to custody of his or her children is a protected liberty interest. *Cabinet for Health & Family Services v. K.S.*, 610 S.W.3d 205, 212 (Ky. 2020). The "principles of due process . . . dictate that the Commonwealth must provide fair procedures when it seeks to deprive a citizen of a liberty interest." *Id.* The foundational principle of procedural due process is "fundamental fairness." *Id.* at 214. Assessing fundamental fairness is a fact intensive process. *Id.* "[C]ourts must appraise the value of specific procedures in light of the particular facts of the case." *Id.*

To determine whether fundamental fairness necessitates certain procedural protections, we look to the analytical framework set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *K.S.*, 610 S.W.3d at 215. "*Matthews* requires the balancing of three factors: (1) the private interest at stake; (2) the government's interest in administrative efficiency; and (3) whether the additional procedures sought will increase the accuracy of fact-finding and reduce the risk of erroneous deprivation." *Id.*

Even though DNA proceedings cannot cut off a parent's rights to his children, they can substantially interfere with the parent-child relationship insomuch as they often result in children being temporarily removed from their parent's care. This is "a significant deprivation of liberty." *Id.* Therefore, in this case, we must be cognizant that the private interest at stake is of monumental importance. However, the government also has a strong interest in efficient proceedings. "The efficient operation of child-welfare proceedings serves the government's interest in assuring the best interests of children in addition to guarding the Commonwealth's coffers." *Id.*

"Given the relative strength of the private and public interests, the final *Matthews* factor – the impact of additional procedures on accurate fact-finding – proves determinative." *Id.* In this case, we are dealing with a lay witness, a child, who alleged her father sexually abused her, and we must

determine whether the family court's decision to exclude A.M.'s counsel from the room where the child was being questioned resulted in a fundamentally unfair process. In other words, did the exclusion of A.M.'s counsel decrease the accuracy of fact-finding and increase the risk of erroneous deprivation. We hold that it did not. While A.M.'s counsel would have preferred to be able to question S.M. personally, we cannot conclude, in the context of this case, that live examination would have increased the accuracy of the family court's fact finding.

Counsel was able to prepare an examination, which was used to question S.M., and both A.M. and his counsel were able to see and hear S.M. answer the questions via a closed-circuit television. At no time were A.M. and his counsel unable to communicate with one another or unable to see S.M. After the first round of questioning, the family court allowed A.M.'s counsel to submit a second, follow-up round of questions. All in all, the family court's process provided A.M. with a sufficient opportunity to cross-examine S.M. and to contest the credibility and reliability of her testimony. *See May v. Harrison*, 559 S.W.3d 789, 791 (Ky. 2018) ("[Appellant] concedes that the judge returned to the courtroom during the in-camera interview and permitted her counsel to submit questions for [the child witness] on two separate occasions. Therefore, [Appellant]

was permitted an opportunity to question the witness.").[5] The DNA proceeding was fundamentally fair and did not violate A.M.'s procedural due process rights.

However, A.M. argues that even if the family court's procedures did not violate his due process rights, the family court violated KRS 421.350(2) when it excluded his counsel from the room. A.M. argues that because this statute explicitly states that "[o]nly the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony" the family court was obligated to allow his counsel to be present in the room and question S.M.

We would agree with A.M. *if* the statute said *shall be present*. But it does not; it says *may be present.* "'May' is permissive." KRS 446.010(26); *Cabinet for Health and Family Services ex rel. Child Support Enf't v. B.N.T.*, 651 S.W.3d 745, 750 (Ky. 2022) ("'May,' of course, is permissive, whereas 'shall' is mandatory."). Thus, the family court correctly determined that it had the discretion to exclude counsel from the room where S.M. was being questioned so long as its

[5] While we are not bound by unpublished opinions, we note that this Court recently held that a mother's due process rights were not violated during a DNA proceeding where counsel were excluded from the room where the child was questioned but allowed to observe the proceeding and submit written questions. *J.F.-A. v. Cabinet for Health and Family Services*, No. 2023-CA-0648-ME, 2024 WL 56916, at *2 (Ky. App. Jan. 5, 2024) ("Mother and M.N. were allowed to view the interview out of sight of Child and submit questions before the close of the testimony. Appellants were provided adequate due process.").

procedures did not violate A.M.'s procedural due process rights, which we have determined they did not.

### *B. The Family Court's Conclusions Regarding L.M. & M.M.*

A.M.'s next assignment of error is that the family court should have dismissed the petitions against him as related to L.M. and M.M. because there was no evidence submitted that he had sexually abused them.

> Pursuant to KRS 600.020(1):
>
> "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:
>
> . . .
>
> 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[.]

*Id.*

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).

While there was no direct testimony that A.M. abused L.M. and M.M., S.M. testified that A.M. abused her in the family home, and sometimes in the same room, where L.M. and M.M. were present. Based on S.M.'s testimony, the family court certainly had a factual basis from which it could conclude that A.M. placed L.M. and M.M. at risk of being abused or harmed themselves, either through witnessing the abuse of their sister or potentially being future victims

themselves. *See B.B. v. Cabinet for Health and Family Services*, 635 S.W.3d 802, 810 (Ky. 2021) ("The trial court properly relied upon [the testimony of abused child's therapist], in conjunction with other testimony, to find by a preponderance of the evidence that acts of sexual abuse were committed upon the Child when she was in Father's care and custody, and *that her siblings were also at risk of sexual abuse*.") (emphasis added); *Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky. App. 2008) ("The father points out that only M.T. was found to be abused, yet he was ordered to have no contact with M.T. and the remaining three children. . . . [However], [t]he statute, as written, permits the court's finding where a risk of abuse exists and does not require actual abuse prior to the child's removal from the home or limitation on the contact with an abusive parent.").

## III. CONCLUSION

For the foregoing reasons, we affirm the orders of the Boone Circuit Court.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
|---|---|
| Marvin A. Knorr III<br>Covington, Kentucky | Nathaniel Young<br>Burlington, Kentucky |