

RENDERED: FEBRUARY 9, 2024; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0936-ME

K.B.

APPELLANT

v.

APPEAL FROM CLARK FAMILY COURT
HONORABLE NORA SHEPHERD, JUDGE
ACTION NO. 23-J-00070-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; AND K.B.-W., A CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EASTON, KAREM, AND TAYLOR, JUDGES.

EASTON, JUDGE: The Appellant, K.B., challenges the Clark Family Court's finding of abuse in a DNA¹ case involving K.B.'s minor daughter (hereafter

¹ Acronym for dependency, neglect, and abuse.

“Child”), now 16 years old. We affirm the Clark Family Court.²

FACTUAL AND PROCEDURAL HISTORY

K.B. is the biological mother of Child, who was 15 years old when the DNA petition was filed by the Cabinet for Health and Family Services (“Cabinet”). Child’s father is deceased. The Cabinet filed its petition in March 2023, alleging physical abuse of Child by K.B. Prior to the filing of the petition, K.B. had been arrested and charged with Fourth-Degree Assault due to the same incident. A jury trial in May 2023 resulted in a verdict of not guilty.

The Adjudication Hearing in the separate juvenile action was held in July 2023. Several witnesses testified, including two Winchester police officers, a school nurse, the Cabinet investigator, K.B., and K.B.’s boyfriend. Much of the evidence presented by the responding police officer was through his body cam footage.

On the evening of March 12, 2023, K.B. called the Winchester Police Department to make a report of an out-of-control minor, her Child. When the police responded, K.B. and Child had been in an argument. K.B. told the

² The Notice of Appeal refers only to the Adjudication Order entered in July of 2023. This Order was not appealable. *J.E. v. Cabinet for Health and Family Services*, 553 S.W.3d 850 (Ky. App. 2018). Even so, we note the parties presented this case as an appeal after the subsequent final and appealable Order entered in August of 2023. This error was correctable under the current Rules of Appellate Procedure, and the appeal of the later Order would still have been timely. As an appeal of the adjudication findings supporting the later Order was permissible, we have proceeded with the appeal, but we caution counsel on the correct designation of an appealable order in a notice of appeal.

responding officer that the argument was over a cell phone. She explained that Child had been grounded from use of the phone, but she allowed Child to take it with her for the weekend while Child was visiting her grandmother.

Child had just returned home, and the argument started almost immediately when Child refused to give the phone to K.B. Throughout the video shown to the family court, K.B. can be seen and heard screaming and cursing at Child. Child was crying. The officer indicated he would not get in the middle of the argument over the phone, but he advised Child to listen to her mother and that the two should separate to calm down. The officer left.

Approximately an hour later, the police received another call to the residence. This time, a neighbor made the report. The same officer, along with a second officer, responded again. Upon arrival, K.B.'s adult son was also present. Child reported to the officers that K.B. grabbed her, threw her down, hit her in the face while she was on the floor, and attempted to take the phone from underneath her shirt. K.B. said Child fell when K.B. tried to take the phone out of Child's pocket. Again, Child is seen crying while K.B. is screaming and swearing. The officer did not notice any visible injuries on Child.

The officers told K.B. and Child that they needed to work something out, if just for the night, because the police had already responded twice to the residence. Everyone agreed that Child would go to her brother's home for the

evening, provided she went to school the following day. No arrests were made at this time.

At school the next day, Child reported to the school nurse. The nurse testified to the conversation she had with Child. Child informed her she had been in an altercation with her mother over the weekend. The nurse witnessed bruising on her arms as well as a small bruise under her right eye. She did not see any scratches on Child's arms. She also recalled bruising to only one of Child's eyes. Child complained of back discomfort. Child also informed the nurse that she had injuries and bruising on her chest around her bra line, but the nurse did not get visual confirmation of this as Child did not feel comfortable showing her. The nurse then made a report to the Cabinet.

Within a few hours, the Cabinet investigator arrived at the school. She witnessed bruises on Child's eyes and scratch marks on her arms, chest, and stomach. The investigator testified as to her conversation with Child. Child was visibly afraid, and she said she did not want to go home. She further told the investigator this was not the first time there had been violence in the home. The investigator made a report of child abuse to the police department and filed the DNA petition. Child initially went with her older brother, but was then placed with her maternal uncle, where she has been residing since.

A detective with the Winchester Police Department testified he interviewed K.B. about the incident. K.B. acknowledged the altercation. She told him Child slid to the ground when she tried to take the cell phone from her. K.B. conceded that she hit Child on the back of her head, pulled her hair, and hit her on the front of her body in the attempt to retrieve the phone. Child's injuries were consistent with her statements. The detective then arrested K.B. and charged her with Fourth-Degree Assault. The detective did not speak with Child or personally observe her injuries. His knowledge of her injuries was through the Cabinet investigator.

K.B.'s boyfriend testified on her behalf. They have been in an on-again-off-again relationship for about ten years. He thought K.B.'s relationship with Child is "hot and cold." Altercations between them happen regularly, but he has never witnessed it become physical. He concedes he was not present in the home on March 12, 2023.

K.B. testified on her own behalf. She explained that Child had been "grounded" from her phone about four days before this incident occurred, but K.B. allowed Child to take the phone with her to her grandmother's house. When Child returned, K.B. asked for the phone back, and Child refused. K.B. claimed Child shoved her, which was why she initially called the police.

After the police responded the first time and had left, Child still refused to give the phone to K.B. Another argument ensued, and it escalated to the point where K.B. attempted to physically take the phone from Child. K.B. acknowledged Child was on the floor, and she was trying to remove the phone from Child's bra, which is where Child put it to keep it out of K.B.'s reach. K.B. denied sitting on Child or pulling her hair. She testified she did hit Child in the head, in response to Child biting her.

K.B. testified as to Child's mental health history. Child has been hospitalized for her mental health on multiple occasions. Child had been in therapy and was prescribed medication, but Child was not taking the medication. K.B. did not want to file an "out of control" case on Child, but she had reached her limit. K.B. said Child has been violent towards both her and her son on several occasions. She and Child have altercations about once or twice a month. Throughout her testimony, K.B. insisted her actions were appropriate as discipline. K.B. believes it was her right to take the phone away from Child by physical force.

Upon completion of the testimony, the family court ruled that the Commonwealth had proven the allegations in the petition by a preponderance of the evidence, and it made a finding of both physical abuse and risk of physical abuse and neglect. The family court further stated it was clear that this was a family in crisis and in desperate need of services.

At the subsequent disposition hearing, K.B. expressed her desire for the family court to grant permanent custody of Child to the uncle with whom she had been staying, as K.B. did not wish to work a case plan. The family court adopted the recommendations of the Cabinet. The court stated that, while it hopes K.B. changes her mind, it will grant permanent custody and close the case.

This appeal follows. K.B. argues the family court's findings were not properly supported by the evidence. She claims the only witness who was present the day of the incident reported no injuries, while the other witnesses had inconsistent or contradictory testimony. She further claims the court erred in not making specific findings.

STANDARD OF REVIEW

A family court's findings of fact in a DNA action shall not be set aside unless clearly erroneous. 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. If the family court's findings of fact were supported by substantial evidence, and it applied the correct law, its decision will not be disturbed absent an abuse of discretion. An abuse of discretion occurs when the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

M.C. v. Cabinet for Health & Fam. Servs., 614 S.W.3d 915, 921 (Ky.

2021) (internal quotation marks and citations omitted). A determination of dependency, neglect, and abuse shall be made based upon a preponderance of the evidence. KRS³ 620.100(3). The prior determination of not guilty to related criminal charges is not controlling, as guilt would require proof beyond a reasonable doubt, which is a different standard of proof in a proceeding designed to serve a different purpose.

ANALYSIS

KRS 600.020 is the controlling statute defining the terms in the Unified Juvenile Code. KRS 600.020(1) defines an “abused or neglected child” as

[A] child whose health or welfare is harmed or threatened with harm when:

(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
3. Engages in a pattern of conduct that renders the parent incapable of caring for the

³ Kentucky Revised Statutes.

immediate and ongoing needs of the child, including but limited to parental incapacity due to a substance use disorder as defined in KRS 222.005;

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

K.B. first contends the family court's findings were not supported by the evidence presented at the adjudication hearing. She argues that because some of the testimony regarding Child's injuries was inconsistent, it should be disregarded. We disagree.

While the responding officer did not notice any visible injury on Child, two additional witnesses who saw Child the following day did observe injuries – a combination of bruising, scratches, or knots on Child's head. Nothing more than common experience is necessary to know that visible signs of injury, such as bruises, may take time to manifest. Both of those witnesses testified that Child told them her injuries stemmed from the altercation the day before.

Independent of any testimony regarding the visibility of injuries, the investigating detective testified K.B. stated in her interview that she hit Child on the back of her head and was hitting the front of her body to take the phone from her. K.B. admitted on the witness stand that she forcefully attempted to reach into Child's bra to retrieve a cell phone and that she hit Child on the back of the head.

She insisted that if she pulled Child's hair, it was accidental while trying to get the phone. These admissions alone are sufficient to support the family court's finding of abuse.

In addition to the testimony surrounding any physical injuries on Child, the family court was able to view the demeanor and behavior of K.B. and Child on the night of the altercation through the body cam footage of the responding officer. This video showed K.B. in a rage, screaming and cursing at Child while Child was crying. The family court described K.B.'s demeanor in the video as "unhinged."

The family court made several findings in its Adjudication Order. The family court found by a preponderance of the evidence that KRS 600.020(1)(a)1.-4. applied to the facts of this case. Subsections 1 and 2 allow findings for either a physical or an emotional injury. These terms are also defined in KRS 600.020. A "physical injury" is "substantial physical pain or any impairment of physical condition[.]" KRS 600.020(49). An "emotional injury" means "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[.]" KRS 600.020(26).

Regardless of whether any bruising or scratches were visible on Child the evening of the incident, two witnesses testified to Child informing them of pain she was experiencing after the altercation. It is certainly not unreasonable to believe Child had pain the day after a physical altercation where she was on the ground struggling with her mother. The investigative worker testified Child had knots on her head that the worker was able to feel. The family court accepted this testimony.

“A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.” *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007).

The family court also made a finding of “risk of physical or emotional injury.” “The 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.” *Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky. App. 2008). Based on the testimony of Child’s past mental health struggles, her lack of compliance with her medication prescription, and the hostile

environment the family court clearly witnessed in the video, it was not clearly erroneous for the court to find a risk of physical or emotional injury.

K.B. also takes issue with the lack of specific findings in the family court's final order. It is especially important for family courts to make specific written factual findings in cases involving children. *Anderson v. Johnson*, 350 S.W.3d 453, 459 (Ky. 2011). Still, we believe the family court's findings in this case were sufficient.

The family court completed form AOC-DNA-4, Order-Adjudication Hearing, and checked multiple boxes listed under 3(C): Findings of Fact and Conclusions of Law. This section of the form essentially recites the factors outlined in KRS 600.020(1)(a)1.-10. Additional findings were handwritten on the docket sheet from the adjudication hearing, which state the family court's conclusion that the petition has been proven by a preponderance of the evidence. There are also "oral findings incorporated herein." While any one notation might be considered insufficient on its own, when combined with all other written findings and incorporated oral findings, they are adequate. In summary, the family court wrote, "Mom's attempt to discipline child by taking phone went off the rails and result[ed] in physical abuse of child by Mom."

CONCLUSION

The findings of the family court are not clearly erroneous, and its findings support an adjudication of abuse. For the foregoing reasons, the Dispositional Order of the Clark Family Court based upon the findings in the Adjudication Order is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian N. Thomas
Winchester, Kentucky

BRIEF FOR APPELLEE:

William D. Elkins
Winchester, Kentucky