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Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1459-ME

C.M. AND B.M. APPELLANTS

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE STEPHANIE J. PERLOW, JUDGE
ACTION NO. 21-J-00164-001

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

AND

NO. 2023-CA-1460-ME

B.M. AND C.M. APPELLANTS

APPEAL FROM CALLOWAY CIRCUIT COURT
v. HONORABLE STEPHANIE J. PERLOW, JUDGE
ACTION NO. 21-J-00164-003

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND

FAMILY SERVICES AND S.M., A MINOR CHILD — APPELLEES

AND

NO. 2023-CA-1461-ME

C.M. AND B.M. — APPELLANTS

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE STEPHANIE J. PERLOW, JUDGE
ACTION NO. 21-J-00165-001

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

AND

NO. 2023-CA-1462-ME

B.M. AND C.M. — APPELLANTS

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE STEPHANIE J. PERLOW, JUDGE
ACTION NO. 21-J-00165-003

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

AND

NO. 2023-CA-1463-ME

C.M. AND B.M. APPELLANTS

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE STEPHANIE J. PERLOW, JUDGE
ACTION NO. 21-J-00166-001

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

AND

NO. 2023-CA-1464-ME

B.M. AND C.M. APPELLANTS

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE STEPHANIE J. PERLOW, JUDGE
ACTION NO. 21-J-00166-003

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

AND

NO. 2023-CA-1465-ME

C.M. AND B.M. APPELLANTS

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE STEPHANIE J. PERLOW, JUDGE
ACTION NO. 21-J-00167-001

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

AND

NO. 2023-CA-1466-ME

B.M. AND C.M. APPELLANTS

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE STEPHANIE J. PERLOW, JUDGE
ACTION NO. 21-J-00167-003

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ECKERLE, GOODWINE, AND MCNEILL, JUDGES.

GOODWINE, JUDGE: C.M. ("Father") and B.M. ("Mother") appeal the Calloway Circuit Court, Family Division's August 3, 2023 disposition orders and the November 13, 2023 orders denying their motions under CR[1] 59.01 and CR 59.05.[2] After careful review, we affirm.

BACKGROUND

Mother and Father are parents to three biological children, all with the initials S.M., and one adoptive child, M.M., who is a biological cousin of the other children. In August 2021, M.M. disclosed to a counselor at her school that she had been sexually abused by Father. After receiving the allegation, the Cabinet for Health and Family Services ("Cabinet") initiated an investigation. As part of the investigation, the Cabinet presented Mother and Father with a safety plan which required, in part, that Father move out of the family home and have no contact with the children during the pendency of the investigation. Mother and Father both agreed to and signed the safety plan. Father then moved out of the family home.

[1] Kentucky Rules of Civil Procedure.

[2] Mother and Father separately appealed from orders in each of the four cases. By order of this Court, they were made joint appellants and the eight appeals were consolidated pursuant to Kentucky Rules of Appellate Procedure ("RAP") 2(F)(1)-(2).

On November 22, 2021, the Cabinet filed non-removal dependency, neglect, or abuse ("DNA") petitions on behalf of the children alleging concerns that the parents were not following the safety plan. The family court denied the Cabinet's request for emergency custody orders ("ECO") but set the matter for a hearing on November 29, 2021. After the hearing, the family court removed Father's custody of the children and ordered him "not to be in the home or around any of the children including the adopted child until further court orders." Record ("R.") at 8.[3] The children remained in Mother's custody.

On December 2, 2021, the Cabinet filed DNA petitions against Mother alleging neglect. Based on the petitions, the family court granted an ECO, removing the children from Mother's custody and placing them in the Cabinet's custody. After a temporary removal hearing, the children remained in the Cabinet's temporary custody.

An adjudication hearing was held on July 7, 2022. On behalf of the Cabinet, the family court heard testimony from Dr. Kim Hall, who completed a forensic examination of M.M.; Jeffery Combs, who completed a forensic interview

[3] Citations are to the record in No. 21-J-00164-001. Two petitions were filed on behalf of each of the four children, meaning there are eight separate records on appeal. The set of four cases regarding the allegations against Father are identified by family court trailer number one ("001") and all are substantially the same. The set of four cases regarding the allegations against Mother are identified by family court trailer number three ("003") and are all substantially the same. For clarity and consistency, we will refer to the records in No. 21-J-00164 throughout this Opinion and will identify the trailer number as necessary.

with M.M.; and M.M., *in camera*. The parents testified on their own behalf and presented testimony from three other witnesses, including S.D., Mother's cousin.

During M.M.'s testimony, the parents attempted to introduce photographs of a cellphone screen they claim show conversations M.M. had with other individuals via the Snapchat messaging application ("Snapchat"). M.M. admitted to having had a Snapchat account at some time in the past. When asked by the parents' counsel whether she had ever communicated with a specific person on Snapchat, M.M. said she had not. Without showing M.M. the photographs, counsel abandoned his attempt to enter them as evidence. At that time, counsel acknowledged the photographs showed no "screen name" and only showed the messages sent to other individuals. Video Record ("V.R.") 7/7/2022 at 11:29:22-35. It is unclear if, and in what manner, the recipients of the messages are identified in the photographs.

After failing to authenticate the Snapchat photographs through M.M.'s testimony, counsel attempted to introduce the same exhibits through S.D.'s testimony. S.D. testified the children, including M.M., visited her during the summer of 2021. She owns a cellphone which she allowed the children to use. All of the children had access to the cellphone. During one such visit, S.D. claimed to have seen M.M. using the cellphone to access Snapchat. She did not testify to observing the contents of any message M.M. may have sent or received while she

was using the cellphone. She did not see M.M. type any messages or to whom those messages were sent. S.D. was not a party to any of the messages. Before leaving, M.M. returned the cellphone to S.D. After the children left, S.D. accessed Snapchat and, using another cellphone, took pictures of messages she found therein. S.D. confirmed the photographs did not show a username or otherwise identify the owner of the account. During her testimony, it remained unclear to whom the messages were sent.

Upon the Cabinet's objection, the family court ruled S.D. had not properly authenticated the photographs and denied their entry into the record. The court found it could not admit the photographs "based on what this witness is telling me, that she cannot verify that she witnessed [M.M.] type those words, literally word for word[.]" *Id*. at 1:51:36-52. The court also noted that M.M. was not identified as the sender of the messages on the photographs.

Later in the hearing, M.M. was recalled to testify to the authenticity of the photographs. She was shown the nineteen pages of photographs. Upon questioning from the parents' counsel, M.M. denied that the photographs showed her Snapchat conversations with friends. She denied any knowledge of the conversations, indicating she had never seen them before and had no idea from

where they came. Counsel again abandoned his attempt to enter the photographs in the record.[4]

In its adjudication orders, the court found the children had been neglected or abused because parents had "[c]reated or allowed to be created a risk of physical or emotional injury by other than accidental means" and "[c]reated or allowed to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child[.]" R. at 35.

As to Father, the court found each child "is at risk of harm of sexual abuse if left in the father's care." *Id*. at 34. Father acknowledged he had contact with the children in violation of the safety plan. In its orders, the family court found M.M.'s testimony "credible, reliable, and compelling." *Id*. at 39. The court found M.M. testified that Father "touched her in her private areas" and "put his private part inside her private part" on more than one occasion. *Id*. at 38. These incidents occurred over several years until Father left the home under the terms of the safety plan. M.M. was afraid to scream during the incidents. The incidents occurred in M.M.'s bedroom in the family home. She did not disclose the abuse to Mother.

[4] Because the parents were unsuccessful in authenticating the photographs, we cannot review them. The parents claim the Snapchat conversations were meant to be used to impeach M.M.'s credibility because they contained untruthful statements. There is no indication the alleged dishonest statements related to the allegations M.M. made against Father.

As to Mother, the court found each child "is at risk of sexual abuse if left in the mother's care by allowing the child to be around the father while pending sexual abuse allegations of the child were being investigated." R. at 78.[5] In its findings, the family court cited Mother's own testimony in finding she allowed Father to be around the children at a Thanksgiving dinner during the pendency of the investigation. She also allowed him to be around their three biological children during a family trip to Horse Cave, Kentucky around the same time. She acknowledged Father's contact with the children was in violation of the safety plan to which she had agreed. Mother thought it was "okay" for the children to have contact with Father and admitted to failing to consider whether the children's mental health could have been impacted by such contact. *Id.* at 83. Mother also allowed Father to come to the home on at least one occasion during the pendency of the investigation. Based on the testimony of Mother, Father, and M.M., the court found Mother "failed to protect" the children. *Id*. at 84.

Thereafter, the Cabinet filed a dispositional report which referenced a forensic sexual assault exam of M.M. which was completed in June 2022. Mother and Father filed motions for a new trial and to vacate the judgments of neglect because they did not have knowledge of the exam prior to the adjudication. The court granted a hearing on the newly disclosed evidence. At the hearing, the court

[5] Citation to the record in No. 21-J-00164-003.

heard from both the physician who performed the exam, Dr. Whitaker, and the parents' rebuttal expert witness, Dr. Boerner. Based on the evidence, the family court found the evidence was

> not of a decisive nature that, with reasonable certainty it would have changed this [c]ourt's [o]rder that [] all four (4) children were neglected or abused by both [Father] and [Mother] because they each created or allowed to be created a risk of physical or emotional injury by other than accidental means and they both created or allowed to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child[ren].

R. at 205-06.[6] The trial court then denied the parents' motion for a new trial.

At disposition, the family court committed the children to the Cabinet's custody. The court then denied the parents' renewed motions for a new trial and to vacate the judgments.

These appeals followed.

STANDARD OF REVIEW

In DNA cases, it is the Cabinet's burden to prove it is more likely than not that the subject-children were neglected or abused. *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915, 921 (Ky. 2021) (footnote omitted). We will not set aside a family court's findings of fact unless they are clearly erroneous. *Id*.

[6] Citation to the record in No. 21-J-00164-001.

(footnote omitted). "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." *Id*. (footnote omitted). Absent an abuse of discretion, we will not disturb a family court's decision where its findings are supported by substantial evidence, and it applied the correct law. *Id*. (footnote omitted).

The family court is responsible for determining the admissibility of evidence under KRE[7] 901. *Kays v. Commonwealth*, 505 S.W.3d 260, 270 (Ky. App. 2016) (citation omitted). We review a court's decisions regarding admission of evidence for abuse of discretion. *Id*. at 269 (citation omitted). A court abuses its discretion only when its ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. (citation omitted).

ANALYSIS

On appeal, Mother and Father argue: (1) the family court's findings of neglect against Mother are clearly erroneous because they are not supported by substantial evidence; and (2) the court abused its discretion by declining to admit the Snapchat photographs to impeach M.M.'s credibility.

First, the family court's findings of neglect against Mother are supported by substantial evidence in the record. In DNA cases, the family court enjoys "broad discretion in its determination of whether a child is dependent,

[7] Kentucky Rules of Evidence.

neglected, or abused." *Cabinet for Health and Family Services on behalf of C.R. v. C.B.*, 556 S.W.3d 568, 573 (Ky. 2018) (citation omitted). Relevant to the parents' argument, an "abused or neglected child" is defined to include one whose parent

> 2. **[c]reates 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; [or]
>
> . . .
>
> 6. **[c]reates or allows to be created a risk** that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child[.]

KRS 600.020(1)(a) (emphasis added). When the family court makes a finding of "risk of harm," the Cabinet must have proven "more than a mere theoretical possibility, but an actual and reasonable potential for harm." *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915, 926 (Ky. 2021) (citation omitted). Such a finding cannot be speculatively based upon "multiple levels of inference[.]" *K.H. v. Cabinet for Health and Family Services*, 358 S.W.3d 29, 32 (Ky. App. 2011) (citation omitted). However, the statute allows for findings of risk of harm so that the court does not have to find actual abuse occurred before intervening to limit contact or remove custody from an abusive parent. *C.B.*, 556 S.W.3d at 576 (citation omitted).

Mother argues these matters are comparable to the facts in *K.H.*, 358 S.W.3d 29, wherein K.H. and A.H. were the parents of two minor children. K.H.'s

minor cousin claimed A.H. sexually abused her, which led to an investigation by the Cabinet. *Id*. at 29-30. K.H. and A.H. did not have custody of the cousin, nor did she reside with them. K.H. signed a prevention plan, which required she not leave their two children alone with A.H. *Id*. at 30. After completion of the investigation and substantiation of the allegation, K.H. refused to sign an aftercare plan with the same requirement, which led the Cabinet to file neglect petitions against her on the children's behalf. *Id*. At adjudication, the family court did not allow the cousin to testify, but relied on the testimony of a guidance counselor, a law enforcement officer, and a social worker. *Id*. The court found a risk of harm to the children solely because K.H. did not agree to the Cabinet's aftercare plan. *Id*.

On appeal, this Court cautioned that the Cabinet's argument that refusal to sign an aftercare plan alone proved neglect could lead to "wide-reaching intrusion by the state into the parent-child relationship." *Id*. at 31. Although the cousin's allegation was substantiated by the Cabinet, such decisions are not binding on the courts. *Id*. at 32. The Court found that, to meet its burden, the Cabinet was required to prove K.H.'s refusal to sign the aftercare plan exposed her children to a risk of harm from A.H. *Id*. The Court's decision with regard to K.H. relied heavily on the Cabinet's failure to prove A.H. had committed or attempted to commit acts of sexual abuse against his own children. *Id*. This fact combined with

the Court's conclusion that there was "no allegation that K.H. has done anything improper in the care of her own children" amounted to a finding that the family court's conclusion was "too attenuated" to be affirmed. *Id*. at 33.

This matter is easily distinguishable from *K.H.* on several grounds. While we share the *K.H.* Court's caution regarding state overreach into the parent-child relationship, such overreach did not occur here. First, unlike in *K.H.*, the allegations of sexual abuse against Father were made by one of his own children who is the subject of one of the underlying petitions. He abused her over the course of several years in their family home, sometimes in the same room as one of the other children. Unlike the cousin in *K.H.*, this matter did not rely on the Cabinet's substantiation of an allegation. M.M. testified to specific acts of abuse by Father and the family court found her testimony credible, reliable, and compelling.[8] Relying on M.M.'s testimony, it was not unreasonable for the family court to infer that Father's long history of sexual abuse of M.M. would create a risk of harm for all of the children.

In addition to Father's abuse of one of his own children, the Cabinet also proved Mother failed to protect the children. Unlike in *K.H.*, the Cabinet's

[8] It is within the family court's "exclusive province" to decide the credibility of witness testimony. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). Considering M.M.'s credible testimony, the parents' argument that "[t]he requirement by the Cabinet that [Father] leave his home and have no contact with his children was an egregious overreach and abuse of authority by the Cabinet," is entirely unconvincing. Appellants' brief at 11.

allegation was not that Mother refused to sign the safety plan. It is uncontroverted that she willingly agreed to the plan, including the requirement she not allow contact between Father and the children. Mother acknowledged that she was informed of the allegations her child made against Father. She then knowingly allowed him to have contact with all the children, including allowing prolonged, overnight contact with three of the children during the trip to Horse Cave. When asked about these decisions, Mother expressed no concern for M.M.'s well-being. She testified that she thought the children's contact with Father was "okay." The family court's finding of neglect is not based solely on Mother's failure to comply with the requirements of the safety plan, but on how those violations could impact the children. Her actions indicate a lack of protective capacity. Evidence of Mother's improper care for her children and Father's sexual abuse of one of his children created an actual and reasonable potential for harm for all the children.

Furthermore, the parents allege several facts which they claim justify Mother's violation of the safety plan. These include: (1) at the time of the Thanksgiving dinner, the Cabinet had been investigating M.M.'s allegations and the safety plan had been in place for three months; (2) there was a crowd at the dinner; (3) M.M. acted "normally" at the dinner; and (4) at the time of the dinner and the trip to Horse Cave, there were no court orders restricting Father's contact with the children. Even if these assertions are true, they are irrelevant. As the

Supreme Court of Kentucky reminded parents in *M.C.*, 614 S.W.3d at 929, they are not "free to ignore or refuse to follow their agreed upon case plans with the Cabinet." Furthermore, none of the above-listed facts make the family court's finding against Mother clearly erroneous.

Finally, the parents argue the Cabinet presented insufficient evidence of "physical or emotional injury" to sustain the family court's finding against Mother under KRS 600.020(1)(a)2. They argue the contact Mother allowed Father to have with the children at the Thanksgiving dinner and on the trip to Horse Cave does not rise to the level of creating a risk of such injuries. However, the parents ignore the physical and emotional injuries suffered by M.M. which necessitated the restrictions on Father's contact with the children in the first place. While the Cabinet may not have presented evidence of a specific injury suffered by any of the children as a result of the contact, Mother's actions, which she undertook with knowledge of M.M.'s allegations, put the children at risk of such an injury. The family court is not required to wait for each child to suffer an actual injury before intervening to protect them. *See Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky. App. 2008).

Finally, the family court did not abuse its discretion by refusing to admit the Snapchat photographs. "Tangible evidence such as photographs and writings must be authenticated to be admissible." *Brafman v. Commonwealth*, 612 S.W.3d 850, 866 (Ky. 2020) (citing KRE 901). The burden of authentication is

"slight, requiring only a *prima facie* showing." *Kays*, 505 S.W.3d at 270 (internal quotation marks and citation omitted). The proponent of the evidence must be able to prove the item "is a true and accurate reflection of what it is purported to be." *Brafman*, 612 S.W.3d at 866 (footnote omitted). In the present environment wherein there are countless ways to communicate through cellphones and other devices, courts must be mindful that "the susceptibility of cellular messages and screenshots to quick fabrication and alteration requires a more discerning eye from the trial court and more than mere assertions by a lay witness" regarding their origin. *Id*. at 867-68.[9]

Authentication of evidence such as text messages and social media messages relies on the personal knowledge of the witness. For example, the Supreme Court in *Brafman*, cites to *Wilson v. Commonwealth*, No. 2014-SC-000392-MR, 2015 WL 5655524 (Ky. Sep. 24, 2015), wherein

> two witnesses with personal knowledge of the defendant's phone number testified that they used that number to contact him. The texts from that number also referred to the sender himself by the defendant's distinctive aliases, "mario" and "pharo." Significantly, the text messages also referred to the shooting in question, implicating the sender directly. Thus, the phone number was connected by testimony to the

[9] As the family court alluded to during the adjudication, this is especially concerning with regard to an app like Snapchat which is designed to allow individuals to communicate through messages which are meant to "disappear" soon after they are viewed by the recipient.

> defendant and the messages themselves [] evidently linked the sender to the crime.

Id. at 866-67. In *Kays*, 505 S.W.3d at 269, the Commonwealth introduced messages from Facebook, text messages, and messages from an app called Viber sent or received by the defendant. Each of the hundreds of messages was properly authenticated by a witness who was personally involved in the conversation. *Id*. Conversely, in *Brafman*, 612 S.W.3d at 867, the Supreme Court found the trial court abused its discretion by admitting text messages where the Commonwealth laid no foundation as to the defendant's connection to the phone number from which the messages were sent, there were no timestamps or dates on the messages, and nothing contextualized the messages to link them to the defendant's charges. The Supreme Court reached this conclusion even though the messages were introduced through the testimony of the defendant's ex-boyfriend who testified she sent them to him. *Id*. at 866.

Herein, the parents argue S.D. properly authenticated the photographs because she observed M.M. using Snapchat one day in the summer of 2021. M.M. was using a cellphone owned by S.D., which she allowed all the children to use when they visited her. On the day in question, M.M. gave S.D. the cell phone as she left S.D.'s home. Without explaining what prompted her actions, S.D. testified she immediately opened Snapchat and, using another cell phone, took photographs of every conversation in the app.

The parents' argument fails because S.D. lacked the necessary personal knowledge of the contents of the photographs to authenticate them. She was unable to recall the date on which she took the photographs. While she could testify to being the photographer, she was neither the sender nor the recipient of any of the messages. She did not identify any person to whom the messages were sent. She claimed M.M. was the sender, but the photographs do not show a username or any other identifier for the account's owner. Without such identifying information, the court could not confirm the messages were in any way associated with M.M. Furthermore, as found by the family court, S.D. did not observe the contents of any of the messages when M.M. was allegedly creating them. We also do not know the context of the messages to discern whether they were related to the circumstances of the underlying actions.[10] Considering S.D.'s lack of personal knowledge of the contents of the photographs, the family court did not abuse its discretion by denying their admission.

CONCLUSION

Based on the foregoing, we AFFIRM the orders of the Calloway Circuit Court, Family Division.

ALL CONCUR.

[10] The parents broadly argue the messages would have proven M.M's "propensity for being untruthful." A party may attack a witness' credibility through evidence of untruthfulness. KRE 608(a). However, the context of messages is relevant to their authentication and admissibility.

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