

RENDERED: OCTOBER 4, 2024; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2024-CA-0079-ME

G.B.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LAURA P. RUSSELL, JUDGE
ACTION NO. 22-J-502986-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; A.S.; AND S.B.,
A MINOR CHILD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON, CHIEF JUDGE; EASTON AND KAREM, JUDGES.

THOMPSON, CHIEF JUDGE: G.B. (“Father”),¹ *pro se*, appeals from orders of the circuit court which found that he had neglected his child. We find no error and affirm.

¹ As this case concerns the neglect of a minor child, we will not use the parties’ names in order to protect the privacy of the child.

FACTS AND PROCEDURAL HISTORY

The child at issue was born in January of 2022. A.S., the mother of the child, was arrested on April 21, 2022, due to reckless driving and suspected driving under the influence. The child was with Mother at the time of the arrest. Father was eventually called to the scene to collect the child. Father then called Catina Lewis to babysit the child. Ms. Lewis then became the primary caretaker for the child. Ms. Lewis claimed that Father abandoned the child in her care, but Father claimed that Ms. Lewis was simply a babysitter who would sometimes have to care for the child for long periods of time due to his work.

A dependency, neglect, or abuse petition was filed against Father in August of 2022. The petition alleged Father had abandoned the child in Ms. Lewis's care, had only visited the child three times since April, and was alleged to leave the child alone in order to sell drugs. The court initially ordered the child to be returned to Father, however, Father later failed a drug test. At that point, the court awarded Ms. Lewis temporary custody.

A hearing on the petition was held in July of 2023. Multiple people testified during the hearing, including Father, Ms. Lewis, and a Cabinet social worker. The social worker and Ms. Lewis testified that Father left the child with Ms. Lewis and provided little to no support for the child and had little contact with the child. The social worker also testified that she was unable to contact Father

during her investigation. Father testified that Ms. Lewis was always intended to be a temporary babysitter.

After the hearing, the court entered an order and held that Father had neglected the child by leaving the child with Ms. Lewis and not providing any meaningful financial or material support. The court ordered Father to have no contact with the child until he can pass a drug screening. Father then made a motion to alter, amend, or vacate the order. The court denied the motion and stated that it weighed the evidence presented and the credibility of the witnesses and found that there was a preponderance of the evidence supporting the conclusion that Father neglected the child. This appeal followed.

STANDARD OF REVIEW

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. Whether or not the findings are clearly erroneous depends on whether there is substantial evidence in the record to support them. 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*].

L.D. v. J.H., 350 S.W.3d 828, 829-30 (Ky. App. 2011) (citations omitted).

Since 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. Abuse of discretion implies that 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.

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

ANALYSIS

Father's first argument on appeal is that the Cabinet's investigation and neglect petition were flawed because some of the information in the petition was false and he was not interviewed during the investigation. As to Father not being interviewed prior to the petition being filed, the Cabinet attempted to contact Father via mail and phone, but was unsuccessful. In addition, we acknowledge that some of the allegations contained in the petition were contradicted during the hearing in this case. These issues are not grounds to reverse the court's judgment. Father was represented by counsel and able to present his evidence to the court. Any alleged flaws in the investigation and petition are irrelevant. What is relevant is whether the court had substantial evidence to support its finding of neglect.²

² This issue will be discussed later in the Opinion.

Father's next argument is that the prosecutor in this case committed misconduct when she failed to dismiss the case when it was discovered some evidence in the petition was false. This argument is based on the statement in the petition that Father would leave the child home alone to go out and sell drugs. The social worker testified that this information came from Ms. Lewis. Father argues that Ms. Lewis stated during the hearing that she did not give the social worker this information. Father claims that when Ms. Lewis made this statement, the prosecutor should have dismissed the neglect petition.

Father cites to the part of the video record of the hearing where Ms. Lewis supposedly made the statement that she did not tell the social worker that Father was selling drugs. We have watched the hearing from July of 2023, and specifically noted the section of the hearing cited by Father; however, we are unable to find Ms. Lewis's alleged statement. Even if we were to assume Ms. Lewis made the statement, it was up to the judge to weigh the evidence and determine the credibility of the witnesses. There was no error.

That brings us to the next argument on appeal. Father argues that there was insufficient evidence to support a finding that he neglected the child.

Kentucky Revised Statutes (KRS) 600.020(1) states in relevant part:

“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:

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 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;
4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age 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;
7. Abandons or exploits the child;
8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being when financially able to do so or offered financial or other means to do so. A parent or other person exercising custodial control or supervision of the child legitimately practicing the

person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;

9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) cumulative months out of forty-eight (48) months; or

10. Commits or allows female genital mutilation as defined in KRS 508.125 to be committed[.]

Here, the trial court heard testimony from the social worker and Ms. Lewis that Father gave Ms. Lewis the child in April of 2022 and had little contact with the child thereafter. Testimony also indicated that from April of 2022 to July of 2023, Father provided Ms. Lewis with around \$100 and some milk. This was the extent of Father's financial and material provisions for the child for over a year. This evidence meets the definition of neglect pursuant to KRS 600.020(1)(a)4., KRS 600.020(1)(a)7., and KRS 600.020(1)(a)8. The trial court found Ms. Lewis's testimony more credible than that of the Father. Her testimony was substantial evidence to support the trial court's judgment. The trial court did not err in holding that Father neglected the child.

Father's last argument on appeal is that the trial court erred in denying his motion to alter, amend, or vacate. Orders denying motions to alter, amend, or vacate are not reviewable by this court.

[E]ven if we agreed the denial of the [Kentucky Rules of Civil Procedure (CR)] 59.05 motion to vacate was erroneous, we could not provide a remedy for the simple reason that we do not have jurisdiction over the trial court's denial of a CR 59.05 motion. Orders denying motions to alter, amend, or vacate pursuant to CR 59.05 are interlocutory and not appealable.

Turner v. Turner, 672 S.W.3d 43, 49-50 (Ky. App. 2023) (internal quotation marks and citations omitted). We will reiterate, however, that the trial court had sufficient evidence to support its conclusion that Father neglected the child by not providing any substantial financial or material care for the child in over a year.

CONCLUSION

Based on the foregoing, we affirm the judgment of the trial court. There was substantial evidence to conclude Father neglected his child and the court's findings of fact were not clearly erroneous. While Father may not be satisfied with the outcome, there were no errors in the case which would warrant reversing the judgment of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

G.B., *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE
COMMONWEALTH OF
KENTUCKY, CABINET FOR
HEALTH AND FAMILY
SERVICES:

Russell Coleman
Attorney General of Kentucky

Michael J. O'Connell
Jefferson County Attorney

David A. Sexton
Special Assistant Attorney General
Assistant Jefferson County Attorney
Louisville, Kentucky