

RENDERED: JULY 19, 2024; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2024-CA-0245-ME

A.S.

APPELLANT

v. APPEAL FROM BULLITT FAMILY COURT
HONORABLE MONICA K. MEREDITH, JUDGE
ACTION NO. 22-J-00273-001

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

APPELLEES

AND

NO. 2024-CA-0247-ME

A.S.

APPELLANT

v. APPEAL FROM BULLITT FAMILY COURT
HONORABLE MONICA K. MEREDITH, JUDGE
ACTION NO. 22-J-00274-001

M.R.; J.M.; M.M.; COMMONWEALTH
OF KENTUCKY, CABINET FOR

HEALTH AND FAMILY SERVICES;
AND E.J.A., A MINOR CHILD

APPELLEES

AND

NO. 2024-CA-0250-ME

A.S.

APPELLANT

v. APPEAL FROM BULLITT FAMILY COURT
HONORABLE MONICA K. MEREDITH, JUDGE
ACTION NO. 22-J-00275-001

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

APPELLEES

AND

NO. 2024-CA-0251-ME

A.S.

APPELLANT

v. APPEAL FROM BULLITT FAMILY COURT
HONORABLE MONICA K. MEREDITH, JUDGE
ACTION NO. 22-J-00276-001

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

APPELLEES

OPINION
REVERSING AND REMANDING

** **

BEFORE: CALDWELL, COMBS, AND EASTON, JUDGES.

EASTON, JUDGE: The Appellant, A.S., challenges a finding of neglect by the Bullitt Family Court in a DNA¹ case regarding H.R., E.A., J.R., and H.M. (hereafter “Children”). These appeals have been consolidated, and we address all four cases in this Opinion. After review, we reverse and remand the Orders of the Bullitt Family Court with direction to dismiss the petitions against A.S.

FACTUAL AND PROCEDURAL HISTORY

The initial petition in this DNA case filed in October 2022 involved four children and four adults. The adults were the Children’s mother (“Mother”), the father of the two youngest children (“Father”), his brother (“Uncle”), and Appellant (“A.S.”), who was in a relationship with Uncle. All parties involved lived in the same residence, which was the home of A.S. and Uncle.

The initial petition alleged that Mother had been arrested and charged for assaulting one of the Children. When the Cabinet for Health and Family Services (“Cabinet”) filed the petition, they named all four adults in the household as parties responsible for the abuse or neglect of the Children. Despite the family

¹ Acronym for Dependency, Neglect, and Abuse.

court's determination that the initial petition was deficient in its factual allegations, it granted the Cabinet's request for removal of the Children at the initial temporary removal hearing.

The Cabinet subsequently filed an amended DNA petition, which again contained allegations against the four adults. In addition to the original allegations regarding Mother, it also contained allegations against Uncle and A.S. Specifically, one of the Children had told a Cabinet worker that he did not feel safe in the home because A.S. and Uncle would hit the Children.

At the second temporary removal hearing, the family court continued placement out of the home. Because Father resided with A.S. and Uncle, he would be unable to abide by any no-contact order between them and the Children. Such a no-contact order was in fact entered by the family court at this hearing, but Mother and Father were granted supervised visits at the Cabinet office.

In February 2023, the case was scheduled for adjudication. Mother appeared with counsel, and she agreed to stipulate to neglect. She had entered a guilty plea to Assault 4th in the criminal action. Due to this guilty plea, the family court would not accept any stipulation that did not include a finding of abuse. It was at this hearing that the Commonwealth requested to dismiss the petition against Father, Uncle, and A.S. The Commonwealth indicated the Children did not make any allegations against these parties in their forensic interviews, and thus

there was insufficient evidence against these parties. The family court again stated it would not dismiss anything until it heard some testimony. The adjudication hearing was rescheduled to a later date.

Approximately one month later, the case was heard again. The Commonwealth again stated that it was not pursuing charges against Uncle and A.S., and the request was made for the petition against them to be dismissed. The Children's Guardian *ad Litem* ("GAL") did not agree to this, because he had not yet been provided with a copy of the forensic interview. The family court again reiterated that it would not dismiss the petition due to the allegations made in the amended petition. There was clearly tension between the assistant county attorney and the family court judge at this hearing.

In April 2023, the Commonwealth moved to again amend the DNA petition to include new allegations of neglect based on the infliction of emotional injury or risk of infliction of emotional injury. These allegations arose based on the Children's diagnoses of Post-Traumatic Stress Disorder ("PTSD"), which had been made by their treating counselor. The counselor claimed the Children's PTSD was due to multiple factors in the home, including domestic violence, a chaotic home life and lack of structure and boundaries, and exposure to violent movies. The family court granted the Commonwealth's motion to amend, and a new adjudication hearing was scheduled.

In September 2023, the parties moved to enter stipulations. Mother agreed to stipulate for risk of neglect. A.S. and Uncle agreed to stipulate that the court could have made a finding for risk of emotional abuse, and they would be informally adjusted. They agreed to not be in a caretaking role of Children for a period of one year. The family court stated it wanted to review these written stipulations and agreements before it would decide whether to accept the agreements.

One week later, the case was heard again. The family court rejected the stipulations of the parties. The court stated it would not accept Mother's stipulation to anything less than abuse, due to her guilty plea to the criminal charge of Assault 4th. The court stated the criminal case had a higher burden of proof than the DNA action, and the court could not get around Mother's guilty plea to allow her to stipulate to something less than abuse.

While the Commonwealth and the Cabinet agreed that informal adjustment was an appropriate resolution for Uncle and A.S., the GAL and the family court did not agree. The GAL simply stated that he "has some concerns." The family court stated its duty was to determine what was in the best interest of the Children. The court was concerned that the living arrangement of the parties was the same as it was when the case began, with all parties and Children residing together. The court felt it was not in the best interest of the Children to have the

enforcement of the agreement rely on Mother, who pled guilty to assaulting one of the Children, or the Children themselves. The family court said the options were that the parties all stipulate to abuse or set the case for a hearing. The parties requested a hearing. There again appeared to be animosity between the assistant county attorney and the family court judge.

Two weeks later, the adjudication hearing was finally held. The Commonwealth entered a certified copy of Mother's plea agreement in the criminal action into evidence, and it then rested its case. It called no witnesses or put forth any other evidence.

Mother testified. She stated the morning of the incident, she and A.S. were getting Children ready for school. Father and Uncle were not present. Mother stated she, A.S., and the Children were in the kitchen, along with the family's dog and new cat. The dog was bothering the cat, so Mother picked up a pill bottle² from the table and threw it at the dog to make him stop. In that short timeframe, one of the Children came around the table, and the pill bottle hit her on the forehead. Mother testified it was an accident. The Child did not cry, but she did have a red mark and later a small bruise.

² We were unable to determine from the record whether the pill bottle was the typical brown plastic prescription bottle or something else or whether the bottle was full or empty or in between.

Mother's counsel also called A.S. to testify. A.S. confirmed Mother's testimony. A.S. had walked into the kitchen shortly before Mother picked up and threw the pill bottle. The family court stated at the conclusion of the hearing that the matter would be taken under submission.

A standardized form adjudication order was entered on December 13, 2023. The family court added specific written findings of abuse as to Mother and risk of abuse or neglect as to A.S. It made no findings against Father or Uncle.

The family court determined the Child who was hit was under A.S.'s direct supervision at the time the incident occurred. The court wrote "[t]he Court finds that the Commonwealth has met its burden of proof by a preponderance of the evidence for a finding of neglect against AS for her failure to act to protect the child or to report the incident for the protection of the minor child. Additionally, the [c]ourt finds that the remaining three (3) children were also at risk for neglect due to AS's failure to act to protect [child] when she was an eyewitness to the actions of [Mother]."

A disposition hearing took place in January 2024. A.S. was ordered to have no contact with Children, and no reunification or case plan was entered. The family court determined the Cabinet did not have an obligation to provide a plan to A.S., as she was not a parent or family member of the Children.

A.S. then filed this appeal. Mother did not appeal. A.S. makes two allegations of error. First, she claims the family court abused its discretion in its finding that she neglected the Children because its findings were clearly erroneous. She also argues the family court violated the separation of powers doctrine when it refused to dismiss the petition against her when the Commonwealth did not wish to pursue it further.

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).

³ Kentucky Revised Statutes.

The separation of powers doctrine is addressed in Kentucky's constitution. *See Hoskins v. Maricle*, 150 S.W.3d 1, 11 (Ky. 2004). We review application of a constitutional provision *de novo*. *Maupin v. Commonwealth*, 542 S.W.3d 926, 928 (Ky. 2018).

ANALYSIS

This case presents a disturbing set of circumstances indicative of some territorial posturing which thankfully is rarely seen by an appellate court. The Appellee brief, filed by the Bullitt County Attorney's Office, agrees with A.S. that the family court's orders were an abuse of discretion. The Bullitt County Attorney's Office joins A.S. in both the argument that the family court erred in ignoring its prosecutorial discretion in presenting cases and that there was no evidence to support a finding of neglect against A.S. We will address the separation of powers argument first.

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

KY. CONST. § 27.

No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

KY. CONST. § 28.

The county attorney and those in its office are officers of the executive branch. *See Gibson v. Commonwealth*, 291 S.W.3d 686, 689-90 (Ky. 2009). Likewise, the Cabinet's powers are within the executive branch. *See T.C. v. Cabinet for Health and Family Services*, 652 S.W.3d 670, 678 (Ky. App. 2022). Pursuant to KRS 69.210, the prosecution of cases in juvenile court is the responsibility of the county attorney.

(2) (a) The county attorney shall attend to the prosecution in the juvenile session of the District Court of all proceedings held pursuant to petitions filed under KRS Chapter 610 and over which the juvenile session of the District Court has jurisdiction pursuant to KRS Chapter 610.

(b) Notwithstanding paragraph (a) of this subsection, the attorneys for the Cabinet for Health and Family Services may attend to the prosecution of any case under KRS Chapter 620 upon written notice to the county attorney and judge of the District Court or family division of the Circuit Court.

KRS 69.210.

It naturally follows, then, that the Cabinet and the County Attorney's Office are those invested with the power to prosecute DNA cases in family court. In this case, neither the Cabinet nor the Bullitt County Attorney's Office wanted to pursue abuse or neglect charges against any party other than Mother, despite the allegations in the petition and amended petition. They reasonably based this

decision on evaluation of evidence (or lack thereof) actually gathered during the course of the case.

The filing of an action in court necessarily connects the divide between the executive and judicial branches. Once a petition has been filed and the case has proceeded in the family court, the family court is not required to go along with the county attorney's recommendations without question. "[A] court, once having obtained jurisdiction of a cause of action, has, as an incidental to its constitutional grant of power, inherent power to do all things reasonably necessary to the administration of justice in the case before it." *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984). Kentucky's highest court has determined that requiring leave of court to dismiss a case is not a violation of the separation of powers doctrine. *See Hoskins, supra*, at 11-19.

We draw from analogy to *Hoskins*. The constitutional check and balance between prosecutors and courts is represented in first acknowledging that the prosecutor is "presumptively the best judge of whether a pending prosecution should be terminated." *Hoskins, supra*, at 20. "The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed *unless clearly contrary to manifest public interest.*" *Id.* (emphasis in the original; citation omitted).

The Bullitt Family Court did not approach this situation with any such deference. It demanded that the case continue on its terms. We do not fault the family court for a healthy level of misgiving or even distrust of the prosecutor's decision when dealing with the potential danger to children addressed in DNA cases. Even so, the decision to dismiss should be made as directed in *Hoskins* with a hearing only to evaluate whether dismissal is clearly contrary to manifest public interest.

No such hearing took place here. The *Hoskins* process would have allowed the family court to examine the reasons for the requested dismissal and even express disagreement with them, but that cannot be confused with the high bar placed on the court's authority to essentially demand the continued prosecution of a case. We would have been hard pressed to agree with the exercise of discretion to make the prosecution proceed in the circumstances of this case. Ultimately, we cannot fully evaluate any abuse of discretion because the *Hoskins* process was not followed. We must then evaluate what actually happened.

This brings us to the other contention of error. A.S. argues the family court abused its discretion in finding A.S. neglected the Children as the findings of fact to support that finding were clearly erroneous. KRS 600.020 outlines what constitutes an "abused or neglected child." The portions of KRS 600.020(1)

relevant to the family court's findings in this action define 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:

...

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;

...

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

The family court heard little testimony during the adjudication hearing. The County Attorney's Office presented a certified copy of Mother's guilty plea to Assault 4th in its case against her. It did not, however, present any additional evidence against any other party. Mother and A.S. testified on Mother's

behalf. Their testimony was consistent; Mother threw a pill bottle at the family dog, and it accidentally hit one of the Children in the head. The Child did not cry, but she did have a red mark, and a small bruise formed later.

Father also testified briefly. He was not present when the incident occurred. When he returned from work in the afternoon, Mother was “going back to jail” and the Children were crying.

The family court made a finding that A.S. had neglected the Children based on her being in a supervisory role of the Children, failing to protect the Children, and not reporting the incident. Based on the evidence presented at the adjudication hearing, these findings are clearly erroneous.

The following paragraph in the family court’s adjudication order sheds light as to the real basis for its findings:

The Court has considerable concerns as to the action, or lack thereof, of the Commonwealth to prosecute this case.* Based upon the Commonwealth’s own filings, there are direct references to counsellors for the children; school representatives with knowledge of the family history/dynamics; Dr. Seth Prose [sic] who has made PTSD diagnoses for the children; and the children themselves who were not called to testify as to any of the allegations contained in any of the three petitions (original and two amended) filed in 001 or 002.

*The Commonwealth requested six (6) hours to present this case but dedicated less than one to its actual case in chief.

From early on in this case, there was clearly a disagreement between

the Bullitt County Attorney's Office and the family court about how to prosecute the case. But while the family court may require its consent to dismiss a case once it has been brought before it, it is solely the prerogative of the county attorney's office to actually prosecute a case. *See Flynt v. Commonwealth*, 105 S.W.3d 415, 424-25 (Ky. 2003). Even after a court conducts a *Hoskins* evaluation and decides not to dismiss, the Commonwealth can decline to present evidence. If that had happened, the court could express its concerns on the record about that decision and even consider other actions to lead to proper review of that decision by others. In any event, the court is limited to the evidence properly presented and may not rely on suppositions about what might have been presented. For example, unsworn allegations in pleadings are not evidence. *T.C. v. M.E.*, 603 S.W.3d 663, 684 (Ky. App. 2020).

All sworn testimony presented at the adjudication hearing indicates what occurred was accidental.⁴ The statute itself indicates that to be an abused or neglected child, the person exercising custodial control must create or allow to be created a risk of physical or emotional injury to the child *by other than accidental means*. KRS 600.020(1)(a)2.

⁴ This does not mean that the conviction for Assault 4th is inconsistent. This crime includes not only intentional conduct but also wanton and even reckless behavior in some circumstances.

There was no testimony presented that this was anything other than an isolated incident, so it is unsupported to conclude that A.S. “continuously or repeatedly” failed to provide protection to the child. The family court faulted A.S. with not reporting the injury, yet the court agreed that A.S. “considered the child without injury.”⁵ The only testimony presented was that the Child did not cry and did not initially appear to be injured after being hit with the pill bottle, even though a small mark and bruise appeared later. There was nothing to the contrary for the family court to consider.

“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). While the family court has the ability and discretion to weigh competing evidence and believe one witness over another, it is not permitted to ignore the only evidence presented and create its own narrative from non-evidentiary materials. *See M.C. v. Cabinet for Health & Fam. Servs.*, *supra*, at 928. Because there was

⁵ Adjudication Order, December 13, 2023, Page 8.

not substantial evidence to support the family court's findings, they were clearly erroneous.

CONCLUSION

The family court proceeded without necessary evaluation of the county attorney's motions to dismiss. The family court did not have substantial evidence on which to base its finding of neglect against A.S. Therefore, we reverse the Bullitt Family Court's orders and remand with directions to dismiss the petitions against A.S.

ALL CONCUR.

BRIEF FOR APPELLANT:

Monica Shahayda
Shepherdsville, Kentucky

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

Tammy R. Baker
Bullitt County Attorney

James D. Winchell
Assistant Bullitt County Attorney
Shepherdsville, Kentucky