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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001091-ME

N.S.

APPELLANT

v. APPEAL FROM PENDLETON FAMILY COURT
HONORABLE HEATHER FRYMAN, JUDGE
ACTION NO. 16-J-00008-001

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

APPELLEES

AND

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CABINET FOR HEALTH AND FAMILY
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APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, MAZE AND NICKELL, JUDGES.

ACREE, JUDGE: N.S. (Father) appeals from the Pendleton Family Court's June 6, 2016 disposition order which incorporated its May 11, 2016 adjudication order wherein the family court made factual findings and determined Father abused or neglected his son and daughter. We affirm.

Father is the natural parent of two children: E.S., born October 10, 2011 (Son), and J.S., born December 12, 2012 (daughter). E.S. is a special needs child. The Cabinet for Health and Family Services became involved with the family in April of 2012 in response to allegations that Father was punching E.S. in the stomach. The Cabinet again investigated in January 2013 when emergency room personnel diagnosed E.S. with a left tibia spiral fracture.

Then, in December 2015, the Cabinet received a referral alleging: that Father was excessively disciplining E.S., causing him physical harm; that Father was verbally berating E.S. over toileting accidents; that Father yelled, used profanity, and threw things at the children; and Father and A.W., the children's biological mother (Mother), were constantly fighting, arguing, and yelling in front of the children, exposing them to potential domestic violence. The referral further alleged that, two months earlier, Father whipped E.S. so hard it left marks on E.S's back, and that Father kept E.S. out of school to avoid Cabinet involvement.

The Cabinet investigated. Father informed workers he suffered from untreated bipolar disorder. The Cabinet found Father's behavior to be erratic and his level of cooperation fluctuating and unpredictable. The Cabinet also discovered that Father had been involved in two prior physical-abuse investigations involving two non-related children in Grant County.

The Cabinet's investigation revealed a pattern of E.S. missing school after a toileting accident at school. On January 13, 2016, E.S. had a toileting accident at school; he was absent from school the next day. The Cabinet conducted a home visit on January 14, 2016, to ensure E.S.'s welfare, but Father refused to allow workers to check either child for injury and ordered Cabinet workers to leave his home.

During a well-child check that same day, the children's primary care physician discovered bruising on both children that caused her concern; the physician referred the children to the emergency room at Cincinnati Children's Hospital for further evaluation. That evaluation revealed numerous bruises on the children's shins, knees, thighs, and backs. Specifically, examination of E.S. revealed: "three oval brown bruises on right shin; three on lower lateral leg/shin; right distal third of right forearm with a blue/purple 1cm by 0.5cm; partially found area of ecchymosis; multiple maculopapular lesions, on right lateral thigh and left thigh, in pubis region, few on chest and upper arms." Examination of J.S. revealed: "3 oval brown bruises on right shin and a smaller one on her knee; left shin with 2 small oval brown bruises; left lateral thigh with brown/yellow

patterned loop mark approximately 10 cm in length; lower back with a horizontal red mark 7.5cm in width 3cm in height.” The children disclosed that Father spanked them with pants down.

On January 14, 2016, the Cabinet filed juvenile dependency, neglect or abuse (DNA) petitions, alleging the children were abused and/or at risk of harm for physical and emotional abuse. The next day, at a temporary removal hearing, the family court awarded temporary custody of the children to their maternal grandmother.

The family court scheduled an adjudication hearing for March 31, 2016. The Commonwealth moved to continue the hearing due to the unavailability of two witnesses, and the late receipt of medical records; the family court granted that motion. Father then orally moved to exclude all testimony and records that were not timely disclosed through pre-hearing discovery. The family court denied Father’s motion, finding its ancillary decision to continue the adjudication hearing cured any discovery defect.

The family court conducted an adjudication hearing on May 11, 2016. Melanie Hyden, a social worker with the Cabinet, described her investigatory steps, including collateral interviews with family members, E.S.’s teacher, and a neighbor, and unannounced home visits. During one visit, Hyden observed the door knob to the children’s bedroom was turned backwards with the lock to the outside. Hyden also noticed bruises on the children, but initially thought them normal for the children’s ages and activity levels. She developed a safety plan,

requiring Father to be supervised with the children; Mother's sister agreed to provide supervision. Hyden described Father's hostility toward her during the announced home visit on January 14, 2016, and his refusal to allow workers to check the children for injury. Hyden accompanied the children to Cincinnati Children's Hospital and personally observed the children's bruises.

E.S.'s teacher testified next. Teacher stated E.S. had several toileting accidents at the beginning of the 2015-2016 school year. She observed a pattern of E.S. missing school the day after an accident. She also testified E.S. often acted out in the fall of 2015, including striking her once in the stomach. Teacher declined to characterize E.S.'s play as rough, and remarked on the significant improvement in his behavior since his removal from the family home in January 2016. In her words, E.S. was "almost a whole different kid."

Linda Colson, a neighbor who resides in the duplex adjoining Father's, also testified. Colson testified that, on almost a daily basis, Father would become loud and verbally abusive toward the children. On more than one occasion she heard Father refer to E.S. as a "f***ing idiot." Father recently informed Colson he was struggling to potty train E.S.; he often lost his temper with E.S. because of his frequent accidents; and he was afraid he would lose control. Father also admitted he had recently struck and bruised E.S., and then kept him home from school because the Cabinet had been involved previously when E.S. broke his leg and Father feared additional Cabinet involvement. Colson also described heated and extremely loud arguments between Mother and Father that often spilled

out into the yard. Colson described Father's temperament as short and aggressive with frequent yelling.

The children's maternal grandmother also testified. Grandmother, too, expressed concern about the backward lock on the children's door. She testified the children are rough and frequently would push, hit, and bite. Grandmother described E.S. as uncoordinated and difficult to handle with frequent meltdowns. She had never observed atypical bruising or injuries on the children. However, Grandmother admitted Father once spanked E.S. three times because he refused to go to sleep; noted Father was aggressive and she has seen him cross the line a few times; and commented it had "been a long while since [she] saw any physical abuse." She testified when E.S. had a toileting accident at school he would shut down and appear scared when confronted by Father.

Finally, the children's maternal aunt testified. Aunt stated she had provided supervision in the home since late December 2015. During that time, she did not observe Father or Mother physically strike or raise their voices toward the children, and observed no fighting between Father and Mother. Aunt testified the children are rough and active, and bruise normally.

After considering the evidence, the family court concluded the Cabinet had proven that Father and Mother had created or allowed to be created a risk of physical or emotional injury to the children by other than accidental means. The family court found Colson's testimony particularly persuasive, and commented that Grandmother's description of Father corroborated Colson's

testimony that Father was overly physically aggressive, verbally abusive, and would lose control with the children. The family court discounted Aunt's testimony that there was no fighting in the home as unpersuasive and inconsistent with all the other evidence presented at the hearing. The court was also persuaded by the numerous bruises found on the children that were in different states of healing in different shapes and sizes found on different parts of their bodies.

At a disposition hearing on June 6, 2016, the family court awarded joint custody of the children to Mother and Grandmother, and adopted the Cabinet's recommendation that Father successfully complete: anger management classes; a parenting assessment that includes a comprehensive psychological assessment; and parenting classes.

Father timely appealed. Father's counsel, citing *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), filed an appellant's brief indicating he could find no meritorious issues to raise on Father's behalf, and requested that this Court independently review the record to ensure the trial proceedings were free from prejudicial error.

In *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), this Court adopted and applied the procedures identified in *Anders, supra*, to appeals from orders terminating parental rights wherein counsel is unable to identify any non-frivolous grounds to appeal. *A.C.*, 362 S.W.3d at 364. Those procedures require counsel to first engage in a thorough and good faith review of the record. *Id.* "If counsel finds his [client's] case to be wholly

frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.” *Id.* (quoting *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400).

A.C. only addressed termination cases. It did not extend *Anders* procedures to other areas of family law. However, we observed in *A.C.* that KRS¹ 625.080(3) entitles indigent parents to the benefits of counsel during the entire course of the termination proceedings, including the underlying DNA matter, and any appeal. *A.C.*, 362 S.W.3d at 366. We adopted *Anders* procedures in termination cases to strike a fair balance between an indigent parent’s statutory right to counsel, and appointed counsel’s obligation to the court not to file a frivolous appeal. *Id.* at 367, 369.

KRS 620.100, like KRS 625.080, similarly provides for the appointment of counsel to an indigent parent facing a DNA petition. Court-appointed counsel in DNA matters is likewise obligated to see the case through any matter-of-right appeal, if so desired by his or her client, and faces the same ethical dilemma as appointed counsel in termination matters; that is, there is the same potential for conflict between counsel’s obligation to deal forthrightly with this court and counsel’s obligation to protect the indigent parent’s statutory right to counsel on appeal.

¹ Kentucky Revised Statutes.

We think Father’s counsel’s use of an *Anders*-style brief appropriate in this case. Counsel complied with the mandates of *A.C.* and *Anders*.² As directed by *A.C.*, we have also carefully examined the record, and agree with counsel that no grounds exist that would warrant disturbing the family court’s orders finding Father abused or neglected the children.

The family court has broad discretion to determine whether a child is abused or neglected. *R. C. R. v. Commonwealth Cab’t for Human Res.*, 988 S.W.2d 36, 38 (Ky. App. 1998). “[T]he findings of the [family] court will not be disturbed unless there exists no substantial evidence in the record to support its findings.” *Id.* The family court’s legal conclusions are reviewed *de novo*. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003). It must be remembered that:

[s]ince 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 . . . will not be disturbed absent an abuse of discretion.

L.D. v. J.H., 350 S.W.3d 828, 830 (Ky. App. 2011) (citation omitted).

KRS 600.020 defines an abused or neglected child, in part, “as a child whose health or welfare is harmed or threatened with harm when: (a) his or her parent . . . 2. Creates or allows to be created a risk of physical or emotional injury

² As required by *A.C.*, counsel certified that he furnished Father with a copy of the brief and informed Father of his right to file a *pro se* brief raising any issues he deemed meritorious. 362 S.W.3d at 371. Father chose not to file a *pro se* brief.

as defined in this section to the child by other than accidental means[.]” KRS 600.020(1)(a)(2). Substantial evidence exists in this record to support the family court’s findings and ultimate conclusion that Father’s conduct met the statutory definition of abuse or neglect. The testimonial and documentary evidence offered at the adjudication hearing demonstrated Father was physically aggressive and verbally abusive toward the children, particularly E.S. Father admitted as much to Colson and Grandmother confirmed Father had, at times, crossed “over the line.” Colson testified Father verbally berated the children regularly and called E.S. foul names. Both children exhibited significant physical bruising concerning enough that their primary care physician referred them to Cincinnati Children’s Hospital’s emergency department. E.S.’s teacher described the remarkable improvement in E.S.’s demeanor and behavior since being removed from Father’s care.

The family court’s conclusion that Father created or allowed to be created the risk of physical or emotional injury is fully supported by the record. We decline to disturb it. Accordingly, we affirm the orders of the Pendleton Family Court.

ALL CONCUR.

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