RENDERED: SEPTEMBER 29, 2017; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001763-ME

R.S. AND A.S. APPELLANTS

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 15-J-00102

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

AND NO. 2016-CA-001764-ME

R.S. AND A.S. APPELLANTS

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 15-J-00139

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

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; DIXON, AND NICKELL, JUDGES.

NICKELL, JUDGE: R.S.[1] (father) and his wife, A.S. (mother) (collectively parents), challenge two disposition orders entered by the Clark Circuit Court, Family Division,[2] allowing their two biological sons—born in 2012 and 2015—to remain in the family home, but requiring all of father's contact with them to be supervised. As proof their sons are not at risk of harm for neglect due to father having pled guilty more than a decade ago to two sex crimes committed upon his

[1] Pursuant to Court policy, the parties and minor children are identified by initials only.

[2] One case was opened for each of the two children in the trial court. The same attorney represented both parents in both cases. Parents appealed to this Court, filing separate but nearly identical briefs. This Court granted their motion to consolidate, to which no response was filed.

We are at a disadvantage in reviewing this appeal. This action began with the Cabinet for Health and Family Services (CHFS) filing two juvenile dependency, neglect or abuse (DNA) petitions in the trial court where an Assistant County Attorney handled the case. CHFS filed no pleadings, but appeared and spoke at each court event and signed off on three pages of joint stipulations along with counsel for the parents and the children's guardian *ad litem* (GAL). To be fair, in the nineteen months this case was pending in the trial court, parent's counsel filed little inviting a response—a motion to submit a psychosexual evaluation; a motion to alter, amend or vacate the adjudication orders, with supporting memorandum; and notices of appeal. Although served with the Briefs for Appellants in this Court, no responsive brief was filed. Therefore, we have no formal statement of the CHFS position in this case of first impression. Under Kentucky Rules of Civil Procedure (CR) 76.12(8)(c), since no Brief for Appellee was filed, we may:

> (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Additionally, parents are non-compliant with CR 76.12(4)(c)(v). There is no statement in the argument portion of their briefs explaining where and how the issue was preserved for our review. Despite these flaws, the question posed is serious and capable of repetition, prompting us to undertake review.

underage half-brother, parents emphasize a recent psychosexual assessment placing father in the "low risk" category to re-offend—the lowest statutory category recognized. Upon review of the record and the parent's briefs, we reverse and remand for an order consistent with this Opinion.

No witnesses were ever sworn in this case; no testimony was ever heard. The uncontested facts were recited in twenty-five joint stipulations reached by the parents and CHFS which we now summarize.

In Clark County in 2003, while an eighteen-year-old high school student, father performed upon and received oral sex from his twelve-year-old half-brother. In 2006 in Montgomery County, at the age of twenty-one, father performed upon and received oral sex from the same half-brother, who was then fifteen years of age.

As a result of the second act, in February 2007, father pled guilty to third-degree sodomy in Montgomery County for which he received no jail time. As part of court-ordered probation, he was to complete the sex offender treatment program (SOTP) and children under eighteen years of age were prohibited from living with him. As a result of the first act, in March 2007, father pled guilty to first-degree sexual abuse in Clark County, again receiving no jail time. As part of court-ordered probation, he was to live outside Clark County, have no contact with his victim, have no contact with minors unless supervised by a responsible adult,

and complete SOTP. Father is designated a lifetime registrant on Kentucky's Sex Offender Registry.[3]

Father entered SOTP on June 14, 2007. He was terminated from the program on August 10, 2009, after allowing a family with two young boys to live with him more than one week. On October 6, 2009, father pled guilty to violating probation in the Clark County case.

Father re-entered SOTP on March 23, 2010, being discharged on or about April 2, 2011, when his probation formally ended. While in SOTP, father completed only the first of three phases entitled Assessment and Orientation. His discharge summary contained these three probation/parole conditions:

> no contact with children unless approved by probation/parole officer; no residing with children without permission by probation/parole officer; and polygraph.

According to the discharge summary, father had been placed with special needs individuals due to literacy and maturity deficits; he scored in the low/moderate category for re-offending based upon the "Static 99" risk assessment;[4] and, he satisfactorily completed a maintenance polygraph exam on February 24, 2011. On

[3] Kentucky's Sex Offender Registration Act (SORA) is codified at Kentucky Revised Statutes, (KRS) 17.500 *et. seq*. A person convicted of a sex crime, having previously been convicted of a felony against a minor, must register for life. KRS 17.520(2)(a)(3)(a).

[4] A "Static 99" risk assessment is used to predict sex crime re-offense. Father was assessed in April 2011 following discharge from SOTP upon termination of probation. At that time, he was categorized as low/moderate risk. When father was re-evaluated in 2016, a CHFS requirement, it was assumed since father had not re-offended in the last five years, he was probably still at low risk to re-offend.

June 29, 2011, he pled guilty in Clark District Court to criminal attempt—failure to register as a sex offender.[5]

Father met mother in March 2011, telling her of his criminal record soon after they met. Father and mother married in March 2012. Their first son, E.S., was born in July 2012. A second son, K.S., was born in April 2015.

CHFS filed a petition on behalf of E.S. on April 30, 2015, alleging he is "at risk of harm" due to father's "past history of sexual offenses and placement on the sex offender registry." A petition concerning K.S. was filed on May 8, 2015, alleging he is "at risk of harm" because father "resides in the home and is a registered sex offender." Both petitions alleged mother is aware of father's convictions for sex crimes and his status as a registered sex offender.

CHFS's interest in this family resulted entirely from father being on the sex offender registry. No new illegal activity has been alleged. Precisely how CHFS became aware of the family is unclear from the record.

Father is now more than thirty years old. He and mother live together with their two boys. Both have cooperated with CHFS. Mother's parents live across the street. The CHFS prevention plan in effect throughout this litigation requires all contact between father and sons to be supervised.[6]

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[5] KRS 17.510.

[6] The prevention plan also required father to be evaluated. Dr. Connor, a psychiatrist identified by CHFS as an approved provider, assessed father as "low risk" on March 30, 2016. His report was distributed to counsel immediately before court convened on April 14, 2016, but was not discussed that day.

In June 2015, mother completed the Adult-Adolescent Parenting Inventory. On a ten-point scale, with "ten" being the best, she scored an "eight" on Appropriate Expectations; a "seven" on both Empathy and Values Related to Corporal Punishment; a "five" on Power and Independence; and a "four" on Family Roles. Scores of eight to ten are considered "low risk" for abuse and neglect; scores of four to seven are within the normal range indicating a "moderate risk"; and scores of one to three are considered "high risk." Four of mother's scores fell within the normal range. As a result of her assessment, it was recommended mother attend sex offender classes with father—if he were required to repeat them. Alternatively, she should participate in two or three psychoeducational sessions with a certified sexual offender counselor focusing on warning signs of sexual abuse in children and safety techniques for families with children.

The joint stipulations outlined above were finally entered into the record on April 14, 2016. That day, counsel argued their interpretations of the stipulated facts to Judge Jeffrey M. Walson. Counsel for parents characterized the question as whether a convicted sex offender may raise his own children. In support of his request for dismissal of the petitions he argued: no proof exists of any statutory factor listed in KRS 600.020(1); the petitions were based entirely on father's prior convictions for sex crimes requiring him to be listed on the sex offender registry; parents have complied with the CHFS prevention plan since

January 2015; during those eighteen months, nothing improper has happened; and, at the end of SOTP in 2011, father was deemed "low risk" for re-offending.

CHFS saw things differently, maintaining the two boys are at risk of harm as alleged in the petitions because: the only criminals required to register are sex offenders—not arsonists, not thieves, not even murderers; father's crimes were unique because as an adult he twice preyed upon an underage male family member; and, while no one can predict the future, past performance strongly suggests future behavior. The Commonwealth argued father's conduct indicates a strong potential to re-offend because he has twice demonstrated an unwillingness or inability to follow rules by violating the terms of probation.

While the Commonwealth's comments focused mainly on father, mother was taken to task for choosing him as her mate and starting a family with a known lifetime registered sex offender. In light of father's history, the Commonwealth argued mother is the person who must protect the two boys—a difficult task because she scored lowest on the parenting assessment in "Family Roles" and "Power and Independence." The Commonwealth concluded by noting under KRS 600.020 a mere *risk or threat* of harm is sufficient to find neglect.

The GAL reported both boys are fine and safe "now." She expressed concern about the boys as they age and turn twelve and fifteen—the ages of father's half-brother when he sodomized and sexually abused him. The GAL was curious as to why father had completed only one of three phases of SOTP—something that was never explained. Father's failure to register as a sex offender

—also unexplained—likewise troubled her. The GAL stated mother is watching the children closely now, and must continue to do so.

Court convened again on July 21, 2016. The primary focus this time was Dr. Connor's report which concluded father was still at "low risk" to victimize, especially his own children. CHFS criticized the report as being based largely on father's self-reporting, containing multiple internal contradictions, and lack of a current "Static 99" risk assessment—Dr. Connor simply adopted the 2011 result and assumed father was still "low risk" because he had incurred no new charges since the first assessment.

When the hearing ended, Judge Walson took the matter under advisement, noting at least one glaring inconsistency in the report—a statement that father "identifies himself strictly as heterosexual," when he had clearly pled guilty to having two homosexual encounters with his younger half-brother. On August 4, 2016, Judge Walson handwrote the following ruling on the docket sheet:

> Based on prior history and even favorable, albeit inconsistent, evaluation that still labels Father at "low (some) risk" the Court finds children to be at risk of harm. Mitigating factors may be relevant at Disposition, to be held 9-22-16.

Using standard form AOC-DNA-4, the trial court checked boxes finding allegations in the petition had been proved by a preponderance of the evidence; the boys were neglected or abused under KRS 600.020(1) because their parents "created or allowed to be created a risk of physical or emotional injury by other than accidental means[,]" and "created or allowed to be created a risk that an act of

sexual abuse, sexual exploitation, or prostitution will be committed upon the child[;]" and finally, CHFS made reasonable efforts to avoid removing the children from the home. A disposition hearing was scheduled for late September.

Parents moved to alter, amend or vacate the ruling, arguing "mere existence of a prior conviction is insufficient for a finding of neglect." The one-page memorandum filed in support of the motion cited no case law or statutes; it merely highlighted some of the joint stipulations. Following Judge Walson's retirement, the motion was heard by Judge Robert G. Johnson. After taking the case under submission, he denied the motion, noting "parents argue no law and present no new facts" except Dr. Connor's report deeming father to be at "lowest risk possible." Judge Johnson took issue with Dr. Connor's evaluation writing:

> In looking at that report at page 4 under CRIMINAL HISTORY, Dr. Conner (sic) reports that criminal history as, "The only offense [father] reports is the sex offense when he was 18 years old." Further, under FAMILY HISTORY on the same page, the last sentence states, "[Father] has two half-brothers and as noted above, did sexually abuse one of his half-brothers when the boy was 12 years old and [father] was 18." The Court further notes that on the same page, prior to these other statements, Dr. Conner (sic) mentions the second offense when [father] was 21 years old and the same half-brother was 15 years old. However, these are inconsistent and the Court is unable to determine which facts Dr. Conner (sic) used to reach his final conclusion.
>
> The court further finds that the children in this case are in danger of abuse as the father has shown on at least two occasions that he will not follow the guidelines as he violated his probation by living with minors and failed to follow the registry requirements of a sex offender.

> Furthermore, the Court cannot ignore that the sex crimes committed by the father were against his blood relative.

On November 17, 2016, a disposition hearing occurred with Judge Nora J. Shepherd presiding. She deemed the CHFS recommendations appropriate and adopted them in full. Parents appeal the disposition orders.

ANALYSIS

One might expect the question of whether a registered sex offender may raise his own sons to arise in the context of a petition for termination of parental rights where CHFS is seeking to remove children from a family home. That is not the scenario we review. CHFS has not asked to separate the children from their parents nor from their father. It asks only that all contact between the two young boys and their father be supervised.

Since this action was tried without a jury, we apply CR 52.01. The trial court must find specific facts, state separate legal conclusions and reach an appropriate judgment. We will set aside the trial court's findings of fact only if they are "clearly erroneous"—meaning the factual findings are wholly unsupported by the record. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

We recognize trial courts have wide discretion in deciding whether a child is "neglected." *Id.* Three separate trial judges have independently reviewed

this case. Each found the request put forth by CHFS to be reasonable and justified under the circumstances. We disagree.

In addressing the case as a whole, it appears shortcuts were taken and the case was not practiced in a traditional manner. The only objection voiced by parents throughout this entire matter is to the ultimate result. Only one statute, KRS 600.020(1), was cited in the trial court, and it was not mentioned until the tenth court date. No case was cited until this appeal.

First, we refresh all involved on the rationale and requirements for the adjudication hearing described in KRS 620.100(2).

> A full adjudicatory hearing is necessary to determine whether abuse or neglect has in fact occurred. The adjudicatory hearing precedes any dispositional hearing and has an entirely different purpose from that later hearing. At the adjudicatory stage the state must prove the factual basis for its claim to intervene in the parent-child relationship. The focus of that hearing is proof of the state's accusations against the parent rather than the child's best interest. At the full adjudicatory hearing both the child and the parents must be represented by counsel. A full adjudicatory hearing is a trial, at which the parents may confront and cross-examine all witnesses against them, and at which they have a right to avoid self-incrimination. In the adjudicatory stage, lawyers for the parents and the child should assure that the state proves it[s] case. The judge must serve as a neutral fact-finder.
>
> Although the statute does not specifically so state, one may infer that there are at least two important differences in the adjudicatory hearing and the temporary removal hearing. First, hearsay may not be admissible at the adjudicatory hearing. While hearsay is specifically permitted by KRS 620.080, KRS 620.100(2) not only omits any mention of hearsay's admissibility but also provides specific confrontation rights for the parties.

> Second, at a full adjudicatory hearing the state must prove the truth of its allegations made in the complaint. Thus, the state's burden at the adjudicatory hearing is somewhat higher than at the temporary hearing. The difference in the difficulty of proof may not always be very significant because the definitions of neglect and abuse include threats of serious harm as well as actual harm.

Louise E. Graham & James E. Keller, 15 Kentucky Practice (Domestic Relations Law) § 6:19. In future cases, the statutory framework must be followed.

Second, the Commonwealth may structure its case as it sees fit, but it may win the day only if its case is based on competent evidence and the Commonwealth carries its burden by a preponderance of the evidence. *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998); KRS 620.100(2). Achieving a preponderance of the evidence in a case alleging neglect requires proof sufficiently showing harm—or risk or threat of harm—is more likely to occur than not. *Ashley v. Ashley*, 520 S.W.3d 400, 404 (Ky. App. 2017); *Guenther v. Guenther*, 379 S.W.3d 796, 802 (Ky. App. 2012).

Here, the Commonwealth chose to base its entire case on twenty-five joint stipulations. Normally, stipulations are perfectly acceptable and save valuable time by moving cases forward. *United States v. Anderson*, 503 F.2d 420, 422 (6th Cir. 1974). The stipulations in this case, however, were woefully inadequate. They documented only father's past crimes—for which he had already pled guilty and been punished. They did nothing to prove actual harm or establish

a threat or risk of sexual harm to E.S. and K.S.—the subject children—to support a finding of neglect. The Commonwealth simply did not sustain its burden.

Furthermore, it does not appear the purpose of the joint stipulations was to streamline the court process. The Commonwealth had no incentive to keep development of the stipulations on track since as early as June 4, 2015, the court had already ordered "father to have no unsupervised contact" with his sons—thus, the Commonwealth had achieved its perpetual goal little more than a month into this litigation that would linger in the trial court for a total of 582 days. In the order entered on June 4, 2015, the trial court noted the parents' denial of the neglect allegation, but made no findings of fact. In that same order, the trial court required all of father's contact with his sons to be supervised based solely on a verbal request by the GAL due to a recommendation she read in the CHFS prevention plan—a copy of which does not appear in the record. In the future, the Commonwealth may prevail only by proving its case by a preponderance of the evidence.

Third, the real lesson of this case is this: a finding of neglect cannot be sustained solely on a child living with a biological parent who is a registered sex offender. Thus, the petitions filed by CHFS in this case were flawed from the start. There must be some showing of actual harm or risk/threat of harm to the subject child. Proving father previously preyed upon a boy who was twelve and then again when the same victim was fifteen, does not establish father will prey upon his own sons who are both under the age of five. We appreciate the government's desire to

be proactive and prevent something from happening, rather than reacting after it happens. Under the facts of this case, however, *feeling* or *fearing* something may happen is simply too attenuated to allow an intrusion into the parent-child relationship. Under the trial court's ruling, father could never drop off his children on the way to work or pick them up on the way home.

While we do not attempt to create an exhaustive or exclusive list of facts to use in future cases to support a finding of neglect, a few items to consider are: an allegation of a new sex crime;[7] an allegation a parent has sexually preyed upon his/her own child;[8] or, an opinion from an expert that a parent's risk level of re-offending has increased[9]—some indication of a shift in risk assessment since placement on the registry. Whether those items support a finding of neglect in any given case will depend upon the facts of that particular case both in terms of the allegation and the proof mustered by the Commonwealth.

We are cited no Kentucky law holding a registered sex offender is prohibited from raising his or her own child without supervision, nor that being a sex offender automatically permits the government to become a constant party to the parent-child relationship wherein the father has not recommitted for over ten years before his sons were born and wherein there are no new allegations. Nor has

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[7] *In re Hannah U.*, 97 A.D.3d 908, 909, 948 N.Y.S.2d 704 (2012).

[8] *See In re Christopher C.,* 73 A.D.3d 1349, 1351, 900 N.Y.S.2d 795, 796–97 (2010).

[9] *See In re Dependency of S.M.H.,* 115 P.3d 990, 997 (Wash. App. 2005).

our own research unearthed such a case. However, a New York case is highly instructive and we adopt its approach today.

In re Afton C., 17 N.Y.3d 1, 950 N.E.2d 101 (2011), chronicles the life of a father of five children ages four to fourteen. Father pled guilty to second-degree rape, third-degree patronizing a prostitute, and engaging in sexual intercourse with a person less than fifteen years of age. Released after serving one year in prison, he was classified as a sex offender but was never ordered to attend SOTP and returned home to live with his wife and children. Neglect petitions were filed alleging father was an untreated sex offender and mother failed to protect the children from father. The social worker who filed the petitions testified he had no evidence of any sexually inappropriate conduct between father and his children, he had interviewed no victims in the case, and he had no details of father's prior conviction. The trial court found the children were neglected by father because his mere presence in the family home—as a convicted sex offender—created a substantial risk of harm. Mother was found to have neglected the children by failing to inquire into the details of father's illegal conduct—content to know only the crimes to which he had pled guilty—and to trust he posed no harm to their children because he had never engaged in conduct that endangered them. On appeal, the finding of neglect was reversed because a designated sex offender merely residing in the family home was insufficient to support a finding of neglect without proof of actual danger to the subject children. *Id.,* 17 N.Y.3d at 9, 950 N.E.2d at 104. Because father's presence in the home—by itself—did not

endanger the children, mother allowing father to reside in the home did not make her a bad parent. *Id.,* 17 N.Y.3d at 9, 950 N.E.2d at 105.

Afton "reject[ed] any presumption that an untreated sex offender residing with his or her children is a neglectful parent." *Afton* further noted being classified a sex offender for purposes of the Registry is wholly separate[10] from whether an offender satisfies the parental neglect standard. *Id.,* 17 N.Y.3d at 10, 950 N.E.2d at 106. In *Afton,* the Cabinet proved only: a prior conviction for a sex crime; classification as a sex offender; failure to enter SOTP; and, residence in the family home. Establishing these four items did not prove father posed actual harm or risk of harm to his own children or that he had breached his minimum duty of parental care. Because father's presence in the family home was not shown to pose harm or risk of harm to his children, mother was not shown to have neglected her children by allowing father to return to the family home.

Afton also recognized:

> No doubt there are circumstances in which the facts underlying a sex offense are sufficient to prove neglect. Where, for example, sex offenders are convicted of abusing young relatives or other children in their care, their crimes may be evidence enough (*see e.g. Matter of Christopher C. [Joshua C.]*, 73 A.D.3d 1349, 1351, 900 N.Y.S.2d 795 [3d Dept.2010]; *Matter of Shaun X.*, 300 A.D.2d at 772–773, 751 N.Y.S.2d 631). Our conclusion

[10] "[L]ikelihood of a repeat offense—which is all SORA purports to measure—is not directly relevant to whether the children are in imminent danger. While DSS could have introduced evidence from the plea and SORA proceedings, it did not do so, and the SORA designation alone is not dispositive." *Afton,* 17 N.Y.3d at 11, 950 N.E.2d at 106. The above language is similar to the warning that appeared on father's discharge summary in the present case, "The above report should not be interpreted as an indicator/predictor of future behavior or propensity to reoffend."

> here might also be different if respondent had refused sex offender treatment after being directed to participate in it, or if other evidence showed that such treatment was necessary. In all cases, however, [the government] must meet its statutory burden. It failed to do so here.

Afton, 17 N.Y.3d at 11, 950 N.E.2d at 106.

The stipulations filed in this case track the proof developed in *Afton.* Father twice pled guilty to sex crimes; was assessed a "low risk" sex offender and required to register for life; completed only the first of three phases of SOTP; and, is living in the family home with his wife and two sons. For our purposes, those four items are the relevant extent of three pages of joint stipulations. Applying the logic of *Afton,* the Commonwealth did not meet its burden of proving by a preponderance of the evidence that E.S. and K.S. have been neglected or are at risk for neglect solely because they live with their father, a registered sex offender.

As presented, father has done nothing to harm his sons, nor has the sparse record demonstrated he has demonstrated a proclivity to harm them. He and his wife have cooperated with CHFS and during eighteen months of scrutiny nothing happened. On the record developed by the Commonwealth, there is no basis for the government to further interfere in the rights of mother and father to rear their two sons.

The Commonwealth having failed to prove the allegations stated in the petitions by a preponderance of the evidence, and the trial court erroneously finding otherwise, pursuant to CR 52.01 we reverse and remand for denial of the petitions and dismissal of the proceedings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Dodd Dixon
Winchester, Kentucky

BRIEF FOR APPELLEE:

No brief filed.