

RENDERED: JANUARY 26, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001011-ME

C.B.

APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 16-J-00350-001

CABINET FOR HEALTH AND FAMILY
SERVICES, COMMONWEALTH OF
KENTUCKY; C.R., A MINOR CHILD;
C.R., MOTHER OF MINOR CHILD;
AND C.R., CUSTODIAL PARTY

APPELLEES

OPINION
REVERSING

** **

BEFORE: ACREE, D. LAMBERT, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: C.B. (the Father) appeals the Clark Circuit Court's finding that his minor child C.R. (the Child) was neglected or abused by the Father.

We reverse.

The Father and the Mother (also named C.R.) lived together but never married. In June 2016, during the Mother's pregnancy with the Child, the Father voluntarily entered a suboxone clinic (Beall Recovery Center). On his intake forms, the Father admitted using street drugs as recently as the day before. The Mother had substance abuse issues as well.

The Child was born later that summer. She tested positive for suboxone and had several other drug-related health issues. The Cabinet for Health and Family Services (the Cabinet) placed the Child with the maternal Grandmother (whose initials are also C.R.). The Parents submitted to a case plan in which, among other things, they were to complete drug counseling and submit to random drug screenings. A petition seeking to adjudge the Child dependent, neglected or abused was filed by the Cabinet on November 29, 2016.

Meanwhile the Father had continued with his case plan and had secured employment. He began working two full-time jobs. The Child remained in the care of her maternal Grandmother. The Father enjoyed supervised visitation, although it had been ordered that he was entitled to unsupervised visitation. However, the Grandmother would not allow him to have unsupervised visits with the Child. The Father completed parenting classes and an anger and aggression assessment, all to the Cabinet's satisfaction. In the Cabinet's dispositional report,

upon which the circuit court relied, there were no further recommendations of actions for the Father to complete.

Prior to the commencement of the hearing, the Cabinet requested that its petition against the Mother be continued for two weeks with the intent that it be dismissed for her. The circuit court granted this request, and evidence was then presented against the Father. The Cabinet proffered one witness, namely, the social worker involved in the investigation of the allegations pertaining to the Father. The witness introduced the Father's certified records from Beall Recovery Center as well as Web-certified records of the Father's drug screens. The witness testified to some inconsistencies in the drug screen results, particularly that the Father tested positive for a non-prescribed medication on screenings administered by the Cabinet (whereas the prescription drug in question was not present in the Father's near-contemporaneous screenings performed by the Beall Recovery Center). The witness further testified about the Father's termination of parental rights seven years prior to children not related to this allegation.

The Father testified on his own behalf, chiefly about his recovery efforts. He admitted that he was a struggling addict and that he had improperly stretched a prescription for suboxone, but he explained that, as a recent hire for his two full-time jobs, he was unable to attend all his appointments at the clinic. The Father stated that he had gotten back on track with the schedule and that he had

completed all objectives on his case plan with the Cabinet. The Father stated that he had not used street drugs since prior to his treatment at Beall Recovery Center in June 2016.

At the conclusion of the hearing, the circuit court found that the Child was neglected by the Father based on the allegations in the Cabinet's petition. Specifically, the circuit court held that the Cabinet had sustained its burden of proving its petition by a preponderance of the evidence. The Court found that the Father had "significant long-term substance abuse issues that have been largely unaddressed for a period of time." The Court stated on the record that it was "absolutely uncontested" that the Father had recent use of heroin, Percocet, and suboxone "off the street." Although the Court commended the Father for taking some steps to correct the problem, it cautioned the Father not to "be in denial about this."

At the disposition hearing held the following month, the Cabinet's witness repeated its intention to reunite the Mother with the Child (as well as with the Mother's older child who was also in the Grandmother's custody). There was also testimony that the Grandmother was resisting visitation with the Father, but the circuit court stated that, "if the Father is appropriate, sober, and working on his case plan, he is entitled to time-sharing pending the outcome of this litigation."

The Father appeals from the disposition order as well as the orders following the prior hearings held in Clark Circuit Court.

The Father first argues that the evidence against him was insufficient to demonstrate risk of harm of neglect by the statutory threshold, enunciated in Kentucky Revised Statute (KRS) 620.100(3):

The adjudication shall determine the truth or falsity of the allegations in the complaint. The burden of proof shall be upon the complainant, and a determination of dependency, neglect, and abuse shall be made by a **preponderance of the evidence**. The Kentucky Rules of Civil Procedure shall apply.

(Emphasis ours.)

“The trial court's findings regarding the weight and credibility of the evidence shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. On the other hand, the trial court's application of the law to those facts is subject to de novo review.” *K.H. v. Cabinet for Health & Family Servs.*, 358 S.W.3d 29, 30–31 (Ky. App. 2011) (citation omitted). Here the Cabinet alleged, and the circuit court found, that the Father’s history with the Cabinet (albeit seven years prior) and more recent history of substance abuse (several months prior) placed the Child at risk of harm. The Father contends that the Cabinet’s evidence was speculative at best. We agree.

“[T]he risk of harm must be more than a mere theoretical possibility, but an actual and reasonable potential for harm.” *K.H., supra* at 32. There is no

allegation that the Father has ever engaged in any neglectful act directed toward the Child, merely that his substance abuse in the past put the newborn Child at risk of physical harm. There was no dispute that the Father had completed the case plan to the Cabinet's satisfaction. Given the tentative nature of the Cabinet's allegations, we hold that the burden of proof was not met, and the circuit court erred in finding otherwise. KRS 620.100(3); CR 52.01; *K.H., supra*.

The Father secondly argues that it was impossible for the Cabinet to prove neglect because he had never exercised custodial control or supervision over the Child. We begin by citing the statute upon which the allegations were based, namely, KRS 600.020(1)(a):

(1) "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 alcohol and other drug abuse 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. 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) of the most recent twenty-two (22) months[.]

(Emphasis ours.)

Because he never experienced so much as unsupervised visitation much less actual custody of the Child, the Father contends that there was insufficient evidence to demonstrate that the Child was ever placed at “risk of harm” by the Father, but was more akin to the “unproven, potential risk of harm” allegations found in *K.H.*, *supra* at 32. We agree with the Father in this regard, and we find even more troubling the disparate treatment received by the Mother – against whom the Cabinet moved to dismiss the allegations – in spite of the fact

that she had placed the Child in actual, physical harm by substance abuse while pregnant with the Child. *See, e.g., W.A. v. Com. Cabinet for Health & Family Servs.*, 275 S.W.3d 214 (Ky. App. 2008).

Accordingly, the orders of the Clark Circuit Court finding the Child to be neglected are reversed insofar as they apply to the Father.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE
COMMONWEALTH OF
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