RENDERED: OCTOBER 19, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000122-ME

K.S. APPELLANT

v.

APPEAL FROM CARTER FAMILY COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 15-CI-00184

B.S. APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: K.S. has appealed from the Carter Family Court's findings of fact, conclusions of law, and order entered December 14, 2017, granting B.S.'s motion to reestablish visitation with their minor daughter as well as from the January 10, 2018, order denying her motion to alter, amend, or vacate that order. We vacate and remand.

K.S. (the Mother) and B.S. (the Father) are the biological parents of K.S. (the Child), who was born in August 2011.[1] The Mother and the Father were married in 2011 in Grayson, Kentucky, and they separated in late May of 2015. The Mother filed a petition to dissolve the marriage on June 10, 2015, in which she sought sole custody of the Child and child support. Simultaneously, she filed a verified motion for temporary relief seeking sole custody, child support, and possession of the marital residence. She stated that the Father was under investigation by the Cabinet for Health and Family Services (the Cabinet) for sexually abusing the Child. An agreed order was entered in July 2015 stating that the Mother would have temporary custody of the Child and that no visitation would take place pending further order of the court, among other rulings. Two weeks later, the Father filed a motion for visitation, stating that the May 27, 2015, prevention plan by the Cabinet's Department for Community Based Services (DCBS) worker specifically stated he could visit the child at the DCBS office. At the time of the filing of the motion, the Cabinet had not yet filed a petition related to the abuse allegation. In response, the Mother stated that the Cabinet filed a Dependency, Neglect, or Abuse (DNA) Petition[2] against the Father seeking

[1] Because this case involves the sexual abuse of a child, we shall not refer to the parties or child by name but instead shall first use initials and then refer to them as the Mother, the Father, and the Child to protect their privacy.

[2] 15-J-00131-001.

removal of the Child on July 15, 2015, making his motion moot. The family court denied the Father's motion by order entered later that month and took judicial notice of the juvenile action. We note that the same judge presided over both the underlying dissolution action and the juvenile action.

In the juvenile action, the family court entered an amended adjudication order on November 16, 2015, addressing the abuse allegations against the Father. The court found as follows: "The Court finds the petition as true as the child disclosed that her father 'spanked' her vagina; the child exhibited fear of the father, the physical exam reveals non-specific notch in child's hymen; and the Court finds a risk of harm to the child if returned to the care of the father." The court found that the Child had been abused or neglected by the Father pursuant to Kentucky Revised Statutes (KRS) 600.020(1), that the father "[c]reated or allowed to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child[,]" and that there was "a continuing risk of harm of sexual abuse if returned to the father." And while reasonable efforts were being made to reunify the family, it was in the best interests of the Child to change custody. The Father appealed this ruling, which this Court affirmed in an opinion rendered September 30, 2016.

By agreed order entered January 15, 2016, the family court dissolved the parties' marriage via a *Putnam v. Fanning*[3] decree. The court granted the Mother sole legal custody of the Child, noting that this was in the Child's best interests but permitting the Father to file a motion if he were to be successful on his appeal of the companion juvenile action. Likewise, no visitation would be permitted pending a ruling in the juvenile action. The parties negotiated a resolution of the remaining issues prior to a final hearing and moved to enter an agreed order to that effect. The court entered the agreed order on March 30, 2016, which concluded the dissolution proceedings.

In December 2016, the Father moved the court to order visitation with the Child, stating it would be in her best interests and that the agreed order related to temporary custody was unconscionable. The Mother objected to the motion, stating that the Child's therapist stated that such would be harmful to the Child. She asserted that it would not be in the Child's best interests to either reestablish visitation or subject the Child to another therapist. The court scheduled a final hearing on the motion for October 20, 2017.

This Court has reviewed the entirety of the final hearing, including the testimony of the Child's therapist, Jennifer Williams, concerning the harm reintroducing the Child to the Father would have on her well-being, as well as the

[3] 495 S.W.2d 175 (Ky. 1973).

deposition testimony of Dr. Edward Connor. On December 14, 2017, the family court entered its amended findings of fact, conclusions of law, and order granting the motion to reestablish visitation.[4] In its findings, the court specifically stated:

> The Court **did not** find that sexual abuse occurred in Case No. 15-J-00131-001. The final order in that action resulted in an order stating "The Court finds the petition as true as the child disclosed that her father 'spanked' her vagina; the child exhibited fear of the father, the physical exam reveals non-specific notch in child's hymen; and the Court finds a risk of harm to the child if returned to the care of the father[.]"

The court went on to discuss the witnesses who testified at the hearing:

> 13. The child's therapist [at Hope's Place], Jennifer Williams, fears that generalized harm or re-traumatization of the child may occur if the father is reintroduced into the child's life. Ms. Williams believes that the child should not see her father until such time [as] she can make an informed decision on her own sometime in or after her teenage years.
>
> 14. The child does not associate the absence of her father with the abuse that this Court found to have occurred. Instead, the child is of the understanding that her father went to work one day and never returned.
>
> 15. The child has, according to notes of the session of Ms. Williams with the child, expressed a desire to see her father.
>
> 16. Dr. Edward Connor is a licensed psychologist. He recommended a generalized reunification plan to implement between the parties, a reunification therapist, the child's therapist, and a number of other individuals.

[4] The court's first order, entered November 8, 2017, was vacated on the Mother's motion.

> 17. Dr. Connor states that, based upon development theory, children without both a mother and father can have psychological difficulties, gender identification issues, attachment issues, and relationship issues including their relationship with the present parent.
>
> 18. [The Father] has a number of healthy relationships with minor children including his girlfriend's fourteen year old daughter and his infant niece. [The Father] routinely cares for children without supervision and there have been no issues or concerns with same by the children or their parents.

The court concluded that based upon the testimony, "the child would [not] be harmed by visiting with her father, but could be harmed by the absence of a relationship with her father." The court set up a modified reunification plan loosely based upon Dr. Connor's recommendation, noting that the Child had expressed a desire to see the Father, that the implementation of a reunification therapist would create an undue expense for the parties, and that the Child's therapist declined to be involved with the process. The court set up an incremental series of supervised visitations as Dr. Connor suggested, with the visits moving to unsupervised ones after six months. Family members would be supervising the visits. The family court specifically found that visitation as it ordered "does not present a risk of harm to the minor child."

The Mother moved the court to alter, amend, or vacate its order, arguing that the order was not in the Child's best interests and placed her at a

serious risk of harm or injury based upon the testimony at the hearing, to which the Father objected. The family court denied the Mother's motion on January 10, 2018, finding its ruling to be in the Child's best interests, and this advanced appeal now follows.[5]

An appellate court may set aside a lower court's findings made pursuant to Kentucky Rules of Civil Procedure (CR) 52.01 "only if those findings are clearly erroneous." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). To determine whether such findings are clearly erroneous, the reviewing court must decide whether the findings are supported by substantial evidence:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its]

[5] The Mother sought emergency and intermediate relief from this Court while the matter was pending on appeal, seeking a stay of the December 14, 2017, order. By order entered April 18, 2018, a three-judge panel of this Court granted her motion for intermediate relief in part: "Pending a final decision in this appeal, Father's visitation with Child shall be sight and sound supervised by an individual approved by the family court, and Father shall not have overnight visitation."

> reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted). "[W]ith regard to custody matters, 'the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion.'" *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010) (citing *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982)).

For her first argument, the Mother argues that, based upon the law of the case doctrine, the family court could not disregard the prior finding in the juvenile action that the Father had sexually abused the Child.

> It is an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been. Perhaps no court has been as consistent as this court in strictly adhering to the doctrine. We have made no express exception where it appeared the issues and facts were substantially the same on subsequent trials and appeals. We have an unbroken line of innumerable cases. However, some of our opinions in which the rule was not applied reflect the straining of the court to find the evidence was different.
>
> The law of the case rule is a salutory rule, grounded on convenience, experience and reason. It has been often said that it would be intolerable if matters once litigated and determined finally could be relitigated between the same parties, for otherwise litigation would be interminable and a judgment supposed to finally settle the rights of the parties would be only a starting point for

> new litigation. *Thompson v. Louisville Banking Co.*, Ky., 55 S.W. 1080, 21 Ky.Law Rep. 1611.

Union Light, Heat & Power Co. v. Blackwell's Adm'r, 291 S.W.2d 539, 542 (Ky. 1956). This presents a question of law, which we shall review *de novo*. *See Hamilton-Smith v. Commonwealth*, 285 S.W.3d 307, 308 (Ky. App. 2009).

The Father contends that the law of the case doctrine does not apply in this case, as the juvenile and civil actions are separate matters. He cites to this Court's opinion of *Cabinet for Health and Family Services v. J.T.G.*, 301 S.W.3d 35 (Ky. App. 2009), in support of his argument. In *J.T.G.*, we recognized that, "by its very definition, the law of the case doctrine only applies to cases that have first been appealed and then remanded back to the trial court." *Id*. at 40. However, *J.T.G.* addressed a different factual scenario where a case had been transferred from one family court to another family court after the paternal uncle had been granted permanent custody, and the uncle sought and received an order regarding the payment of childcare costs by the Cabinet in the original county after it had been transferred that he then moved the subsequent court to enforce. On appeal, this Court held that the family court should not have enforced the order because it was void *ab initio* and, even if it had not been void, the law of the case doctrine would not have applied because it was an order from the trial court level rather than the appellate level. *Id*.

The situation is different in the present case. The dissolution and juvenile actions proceeded simultaneously, and the same judge presided over both matters. As detailed above, the court made the following findings in the amended order entered November 16, 2015: "The Court finds the petition as true as the child disclosed that her father 'spanked' her vagina; the child exhibited fear of the father, the physical exam reveals non-specific notch in child's hymen; and the Court finds a risk of harm to the child if returned to the care of the father[,]" that the father "[c]reated or allowed to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child[,]" and that there was "a continuing risk of harm of sexual abuse if returned to the father." The Father appealed the ruling to this Court (Appeal No. 2015-CA-001809-ME), wherein a panel of this Court reviewed whether the excited utterance exception to the hearsay rule applied (the Court found no abuse of discretion on that issue) and whether the court's "finding that Father sexually abused K.S." was supported by substantial evidence. This Court provided an extensive background of the allegation by the Cabinet that the Child had been sexually abused, including the circumstances alleged in the DNA petition. The Court summarized the testimony at the DNA hearing, including that of the Mother and of a medical doctor who has a subspecialty in performing pediatric sexual abuse examinations. In considering the sufficiency of the evidence, the Court held:

> Our sole inquiry here is whether sufficient evidence exists in the record to support the trial court's finding of abuse pursuant to KRS 600.020(1). The definition of an abused or neglected child includes "a child whose health and welfare is harmed or threatened with harm when . . . his parent . . . commits . . . an act of sexual abuse . . . upon the child." KRS 600.020(1)(a)(5).
>
> Father's argument regarding the sufficiency of the evidence, centers around the fact that Dr. Miller's physical examination was inconclusive with respect to past sexual abuse. There is no statutory requirement that a finding of sexual abuse must be supported by conclusive medical evidence. In fact, our Supreme Court has recognized in criminal sex abuse cases that even "the testimony of a single witness is enough to support a conviction." *King v. Commonwealth*, 472 S.W.3d 523, 526 (Ky. 2015).
>
> In this case, the evidence when considered as a whole was certainly sufficient to support the trial court's findings and conclusions. K.S.'s mother testified about K.S.'s seemingly irrational fear of Father, K.S.'s statements to mother suggested that Father touched her vagina inappropriately, Dr. Miller's physical examination revealed a notch in K.S.'s hymen, and Dr. Miller concluded that K.S.'s behavior was consistent with having been sexually abused.
>
> Considering the totality of the evidence, we cannot conclude that the court's findings were clearly erroneous or constituted an abuse of discretion. Substantial evidence supports the trial court's findings that Father sexually abused K.S., and therefore, its ultimate conclusion that K.S. was an abused child as defined by KRS 600.020.

B.S.S. v. Cabinet for Health and Family Services, 2016 WL 5497005, at *4 (2015-CA-001809-ME) (Ky. App. Sept. 30, 2016).

Beyond question, this Court reviewed the family court's finding that the Father had sexually abused the child, not merely that he had abused her or that there was a risk of future sexual abuse. And the Father certainly argued on appeal that evidence did not support the family court's finding that he had sexually abused the Child. For the family court – in the civil proceeding – to state that it had not found in the juvenile proceeding that the Father had sexually abused the Child and use that finding to justify an award of visitation, despite its finding in the juvenile action that the allegations in the DNA petition were true, is simply incorrect. Whether or not the law of the case doctrine applies in this case, we hold that the family court's finding in the civil action that it did not make a finding of sexual abuse in the juvenile action is clear error.

Next, the Mother argues that the court abused its discretion by ignoring the expert opinions and permitting the Father to visit with the Child. KRS 403.320 provides for both visitation and the modification of visitation:

> (1) A parent not granted custody of the child and not awarded shared parenting time under the presumption specified in KRS 403.270(2), 403.280(2), or 403.340(6) is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.
>
> . . . .

> (3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

See also Hornback v. Hornback, 636 S.W.2d 24, 26 (Ky. App. 1982) ("a 'best interests' of the child standard is required when a judgment is sought to be modified."). Pursuant to the parties' agreed order entered by the court, the Father was not permitted to visit with the Child, which infers that visitation would have seriously endangered the Child's physical, mental, moral, or emotional health. Therefore, the family court must apply the best interests standard in determining whether to modify visitation in this instance.

The family court considered the Father's motion for visitation through a lens that did not include the history of sexual abuse when it found that the Child would not be harmed by visitation with the Father but would be harmed if she did not have a relationship with him. Therefore, the court did not address at all any of the experts' testimony concerning what type of damage the Child might experience by imposing visitation with a parent who has sexually abused her. This history of sexual abuse must be considered in determining the best interests of the Child, and the family court's failure to do so constitutes an abuse of its discretion. Likewise, the court fashioned its own reunification plan that did not include any professional

support as recommended by Dr. Connor. Therefore, we must vacate the family court's order granting visitation. On remand, the family court must consider the Father's motion in light of the finding of sexual abuse in the juvenile action.

Finally, we need not address the Mother's last argument because we have not considered any facts outside of the record in reviewing the issues on appeal.

For the foregoing reasons, the findings of fact, conclusions of law, and order of the Carter Family Court is vacated, and this matter is remanded for further proceedings in accordance with this opinion.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I believe the family court acted well within its discretion when it awarded visitation.

While the majority avoids deciding whether the law-of-the-case doctrine precluded the family court from making a finding contrary to its finding in the dependency, neglect and abuse case and one affirmed by this Court in *B.S.S. v. Cabinet for Health & Family Servs.*, 2015-CA-001809-ME, 2016 WL 5497005 (Ky.App. 2016) (unpublished), it suggests that it does. I submit that the doctrine cannot apply because the dependency, neglect and abuse action and the visitation

action are separate and distinct, and because the finding of sexual abuse in the juvenile action was a finding of fact and not a question of law. *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). For those same reasons, I would affirm the family court.

In Kentucky, dependency, neglect, and abuse claims asserted under Kentucky's Juvenile Code and common custody and visitation cases brought pursuant to KRS Chapter 403 are separate and distinct actions. As stated in *S.R. v. J.N.*, 307 S.W.3d 631, 637 (Ky.App. 2010):

> The purpose of the dependency, neglect, and abuse statutes is to provide for the health, safety, and overall wellbeing of the child. KRS 620.010. It is not to determine custody rights which belong to the parents. A dependency, neglect or abuse adjudication hearing is simply not the appropriate forum for rehashing custody issues.

In dependency, neglect and abuse actions, "[t]he custody rights of parents, while important, are not the trial court's priority[.]" *C.K. v. Cabinet for Health & Family Servs.*, 529 S.W.3d 786, 790 (Ky.App. 2017).

In contrast, where custody or visitation rights are adjudicated under KRS Chapter 403, the rights of the parent are significantly more important than in dependency, neglect and abuse actions. The family court may modify a visitation order if modification would serve the best interest of the child. KRS 403.320(3). However, the family court cannot "restrict a parent's visitation rights unless it finds

that the visitation would endanger seriously the child's physical, mental, moral, or emotional health." *Id*.

Because a dependency, neglect and abuse action and one brought under KRS Chapter 403 are separate and distinct actions, a hearing held in a dependency, neglect and abuse action cannot serve as the basis for later findings in an action brought pursuant to KRS Chapter 403. *S.E.A. v. R.J.G.*, 470 S.W.3d 739, 743 (Ky. App. 2015). Yet, the majority holds that the family court was bound by its prior findings in the dependency, abuse and neglect action.

It is true that the same judge presided over the dependency, neglect and abuse action and the visitation action. That is the desired result of the "one-judge-one family" policy on which our family court system is based. However, as discussed in *S.R.*, 307 S.W.3d at 638, the "one-judge-one family" approach is not without the potential problem that a family court judge may bring impressions and conclusions from prior proceedings into that currently before the court. Here, the family court avoided that pitfall by examining the evidence anew and in light of standards set forth in KRS Chapter 403. Instead of this being clear error, I believe it to be no error at all.

It does not matter whether the family court's statement that it did not find sexual abuse occurred in the juvenile case is correct or incorrect. This is a different case with different evidence. What matters is whether the family court

abused its discretion when it awarded visitation. I submit it did not. The family court considered the testimony of the witnesses and concluded that supervised visitation gradually increased to unsupervised visitation was in the child's best interest and would not seriously endanger the child's physical, mental, moral or emotional health.

I would affirm.

BRIEFS FOR APPELLANT:

Tracy D. Frye
Russell, Kentucky

BRIEF FOR APPELLEE:

W. Jeffrey Scott
Whitley Hill Bailey
Grayson, Kentucky