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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000431-DGE

T.C. APPELLANT

ON DISCRETIONARY REVIEW
FROM WHITLEY CIRCUIT COURT
v. HONORABLE PAUL WINCHESTER, JUDGE
ACTION NO. 18-XX-00002

M.E.; M.D.C., A MINOR CHILD, BY AND THROUGH HIS GUARDIAN AD LITEM, KIMBERLY FROST; AND COMMONWEALTH OF KENTUCKY, DEPARTMENT OF COMMUNITY BASED SERVICES, BY AND THROUGH THE WHITLEY COUNTY ATTORNEY APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND LAMBERT, JUDGES.

ACREE, JUDGE: This Court granted discretionary review after the Whitley Circuit Court affirmed the district court's judgment that Father (T.C.) abused Son (M.D.C.). After a thorough review, we conclude the district court's procedure

leading to the removal order is fraught with error and the removal order lacks the support of substantial evidence; therefore, we reverse and remand this case to the district court with instructions to dismiss.

BACKGROUND

There is no family court in Whitley County and so this case did not benefit from the "holistic approach to families (the one-family one-judge idea)" of Kentucky's family court system. In fact, before this case reached the Court of Appeals, no less than six judges were involved with this family.[1] The record certified to this Court included only the district court juvenile case,[2] and the record on appeal to the circuit court from that district court case.[3] However, much more is involved. The juvenile case refers to and relies upon the dissolution action ending the marriage of Father and Mother,[4] and to two domestic violence cases that were opened,[5] all of which involve the same three people – Father, Mother, and Son.

[1] In the circuit court, Judges Dan Ballou, Robert Costanzo, Jeffrey Burdette, and Paul Winchester presided at various times. In district court, Judges Fred White and Cathy Prewitt presided.

[2] Whitley District Court No. 17-J-50204-001 (Juvenile Case, or "J" case).

[3] Whitley Circuit Court No. 18-XX-00002 (Circuit Court Appeal).

[4] Whitley Circuit Court No. 15-CI-00638 (Divorce Proceeding).

[5] Whitley District Court No. 17-D-50096-001 (First Domestic Abuse Case, or first "D" case) and Whitley District Court No. 18-D-50001-001 (Second Domestic Abuse Case, or second "D" case).

Understanding the full sequence of events requires an understanding of the proceedings in all these actions. To the extent necessary, this Court has examined those actions. We do not refer to those proceedings for their evidentiary value, but only to describe the sequence of events that would have been known to an individual jurist under the "one-family one-judge" concept to which our system aspires, had it existed in Whitley County at the time.[6]

According to their divorce decree, Mother and Father had been married nearly five years when they separated in November of 2014. When the decree was entered in June of 2016, Father was 40 years old, Mother was 38 years old, and Son was still just two years old. The court awarded joint custody to Father and Mother, with Mother designated as the primary residential parent. (Divorce Proceeding, Decree of Dissolution of Marriage, June 8, 2016). Following the divorce, Father relocated to Tennessee where he worked.

[6] "Under KRE 201, . . . it may be appropriate to notice court records for the occurrence and timing of matters reflected in them—the holding of a hearing, say, or the filing of a pleading . . . ." *Rogers v. Commonwealth*, 366 S.W.3d 446, 451 (Ky. 2012). "However, 'judicial notice should be used cautiously on appeal . . . .' [*Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 264 (Ky. App. 2005)] (internal citation omitted). 'A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet.' *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004) (citation omitted)." *Travelers Indemnity Company v. Armstrong*, 565 S.W.3d 550, 561 (Ky. 2018). After identifying from the internet certain documents filed of record with the appropriate clerk's office in Whitley County, this Court obtained copies of those documents from those clerks, through this Court's own clerk's office.

In addition to alternating Thanksgiving and Christmas holiday visits, Father was awarded parenting time of two weeks each summer until Son reached the age of five years old. Beginning the summer following Son's fifth birthday (*i.e.*, the summer of 2019), Father was to have parenting time for "the entire summer." Mother did not work, and Father paid monthly child support, provided medical insurance, and paid all unreimbursed medical expenses.[7] (*Id.*).

As the time approached for Father's first two-week visitation in the summer of 2017, he filed several motions. In mid-April 2017, Father moved the court to order Mother to allow "for telephonic/electronic contact" with Son by means of "FaceTime, Skype, etc." (*Id.*, Motion, April 18, 2017). Before that motion could be heard, Father filed a motion for Mother to disclose Son's location from March through June of 2017, and another motion asking the court to impose upon the parties "Rules for Visitation" that mirrored the local court rule's "Guidelines for Visitation" appended to its Model Time-Sharing/Visitation Schedule and Rules for Visitation, R34JC[8] 703, Appx. C. (*Id.*, Motions, May 15, 2017). Father also filed a notice of his preferred period of two weeks to visit with Son. (*Id.*, Notice, May 15, 2017). He also moved the court to establish a location

[7] Father's 2016 federal tax return shows his adjusted gross income as $26,625. (Divorce Proceeding, Supplement to Motion to Recompute Child Support, Exhibit, May 15, 2017).

[8] Rules of the 34th Judicial Circuit.

midway between the parties' respective residences where Father could receive custody of Son from Mother for his two-week visit. (*Id.*, Motion, June 2, 2017). Mother initiated little or no post-decree activity in the Divorce Proceeding. The parties resolved these issues by agreed order. (*Id.*, Order, June 9, 2017).

Some additional activity occurred in the divorce case from the summer until September 25, 2017, but it is of no consequence to the case now before this Court. For the next 18 months, there was no activity in the Divorce Proceeding, notwithstanding Mother's counsel's representation to the contrary (as addressed below in discussing the December 18, 2017 removal hearing).

Son visited with Father in Tennessee over the four-day Thanksgiving holiday in 2017. Just before Father and Son prepared to drive north to return Son to Mother in Kentucky, Son injured his arm. It happened while Father and Son were playing at the home of Father's mother.[9] While running and jumping together, Son lost his balance and Father grabbed his arm to prevent a fall. When he did, Father heard "a little pop"; Son began to cry, and Father looked at Son's arm. A nurse was present and visiting with them at the time. They "looked him over" more than once, but Father saw no visible trauma. When it came time to get

[9] As explained in more detail below, the only evidence in this case regarding the cause of Son's injury was Father's sworn testimony. No other evidence – no medical records, no DCBS records, no other sworn testimony – was ever presented to the court in the "J" case. The only DCBS record found during this Court's examination of the various cases is the one-page DCBS Prevention Plan dated December 5, 2017, one day after the district court denied Mother's petition in the first "D" case; however, it was filed in the second "D" case.

in the car for the return to Kentucky, Father carefully dressed Son in his jacket, put him in his vehicle, and let Son play games on Father's cell phone. Father gave Son Children's Tylenol and a drink and made the trip without incident. (Video Record (VR) 5/21/2018 at 1:22:30-1:29:00).

When Father and Son arrived at the exchange point, Father noticed Son favoring his arm. He told Mother what had happened and asked her if she thought they should take Son to the hospital to have his arm checked. Mother said no, but that she would take him home, give him ibuprofen, and try to schedule a doctor's appointment the next day. (*Id.*).

A week and a day later, on December 4, 2017, Mother completed a form petition seeking an Emergency Protective Order against Father. (Record (R.) at 4-7). The petition initiated the First Domestic Abuse Case, or first "D" case (17-D-50096-001). The allegations in the petition were consistent with Father's subsequent testimony that he told Mother about how the injury occurred. (R. at 4).[10] Mother alleged Son was crying more than Father later testified. She also alleged that Son said Father was angry with him about putting on his jacket, but that Father told Son he was not angry. (*Id.*).

[10] "[Father] said just before we left we was playing and jumping to see who could jump the highest and [Son] fell[;] he said he probably just pulled it a little." (First Domestic Abuse Case, Petition Allegations, December 4, 2017, initiating Juvenile Case, R. at 4).

The petition indicated Mother was successful in arranging a visit to a doctor, just as Father testified was their plan. There are no medical records in the certified record on appeal (or the two "D" cases); therefore, we do not know the date of any examination that may have occurred during the eight days preceding Mother's filing of the petition. However, Mother's allegations indicate that Son's arm was x-rayed, and the initial diagnosis was not a fracture, but a dislocated elbow. It was not until the next morning that a radiologist called Mother and told her there was a fracture and recommended taking Son to a specialist. (R. at 5).[11]

Mother's petition for the EPO was adjudicated by Whitley District Judge Cathy Prewitt on the same date Mother filed it. The judge ruled as follows: "EPO . . . Denied because . . . Fails to state an immediate and present danger of domestic violence and abuse." (R. at 7). That was the end of the first "D" case.

Notwithstanding finding no danger of abuse in the first "D" case, the judge wrote in the margin of the order denying the EPO: "Refer to DCBS[12] – set for Juv Ct 12-18-17 1pm." (*Id.*). Obedient to the judge's instruction, the clerk's office created a new district court file, initiating a new action against Father, which is the Juvenile Case, 17-J-50204-001, the "J" case. The clerk's notes in that Case

[11] "They did xrays [sic] and said his elbow was dislocated and then the next morning the hospital called and said the radiologist said it was fractured and to take him to see a [sic] orthopedic surgeon so I did and they put a cast on his arm." (First Domestic Abuse Case, Petition Allegations, December 4, 2017, initiating Juvenile Case, R. at 5).

[12] Department for Community Based Services of the Cabinet for Health and Family Services.

History say the initiating document is the Order Denying the EPO in the first "D" case. The clerk faxed that order denying the EPO to DCBS with no explanation that, in fact, it was the initiating document in a "J" case. The clerk's office then scheduled a "temporary removal hearing" for December 18, 2017.

Apparently because the court denied the EPO, Father was never served with the petition in the first "D" case. At least there is nothing in the record indicating service. Furthermore, the record shows that Father was never served with summons in the "J" case. Consequently, he did not appear at the December 18, 2017 temporary removal hearing, which proceeded without him, as follows:

> Court: I received a request for an EPO and it was not done timely[13] but I did make the referral to the Cabinet just based on those allegations. So [addressing DCBS representative] what were you able to learn?
>
> DCBS:[14] I received a report on December 5th. I did have contact with the child at Mom's residence. No concerns there. Um. We – I got the medical records from Corbin hospital and the [Kentucky State] Trooper that was called at – to the hospital at that time – um – he, the perpetrator lives in – a – Tennessee.
>
> Court: Now is that the Father?
>
> DCBS: Yes. Yeah. The Father lives in Tennessee. And I've not spoke with him yet, and the KSP has forwarded his

[13] The district court does not, and this Court cannot, explain the meaning of the phrase that the EPO petition was "not done timely."

[14] The investigating representative from DCBS was Robbie Gambrel who also appeared at the April 2, 2018 hearing.

information down there to their sheriff's offices and I haven't been in contact with them to see what – what they're doing.

Court: Okay. So, what is your recommendation at this time?

DCBS: I know the child is with Mom. The next court-ordered visit with Dad is not until the summer. Mom has spoken with her attorney to stop all contact – phone, visits – pending this investigation as well as anything else that there is [garbled] as far as custody.

M's Counsel:[15] That's correct, your honor.

Court: [To Mother's counsel] Have you filed in circuit then?

M's Counsel: Yes.

Court: So, there was a divorce or a custody order in circuit?

M's Counsel: Yes.

Court: And now you've gone back in that one? To modify?

M's Counsel: Yes. We filed a motion to halt visitation.[16]

Court: Okay. Why don't I just do a cooperation order here then that Mom will cooperate with the Cabinet in any investigation that, that may be had. And are you [addressing Mother's counsel] requesting a no-contact [order] at this time with that?

M's Counsel: Yes.

[15] Mother's counsel.

[16] As noted earlier, Mother's counsel's representation that there was a pending motion to halt visitation in the Divorce Proceeding is not borne out by the record in that case. The Case History in the Divorce Proceeding shows no activity between September 25, 2017 and March 26, 2019.

Court: [Addressing Mother directly] Part of your cooperation is the child shall have no contact with Dad.

Mother: Absolutely.

Court: And Dad is – what's his name?

[Father identified by first and last name through colloquy with Mother directly]

Court: [Addressing Mother's counsel] Okay. When do you anticipate that you'll have an order from circuit on visitation?

M's Counsel: I would hope early January, your honor.

Court: Why don't we revisit this in March. That'll give them plenty of time. March 5 [2018] at 1:00 [p.m.] March 5 at 1:00.

[Hearing ends]

(VR 12/18/2017 at 12:58:22-1:00:40).

With Father absent from this temporary removal hearing, and the Cabinet having been unable to contact him, the court ordered Mother to cooperate with the Cabinet and, as part of that cooperation, to prohibit contact between Father and Son. The no-contact order had the same effect on Father's relationship with Son as an order of temporary removal. The judge prepared and signed an order to that effect but there is no clerk's stamp or clerk's distribution certificate

indicating a copy was sent to Father.[17] In fact, nothing indicates the court or court clerk knew Father's address until Mother filed the second "D" case on December 29, 2017.

The court also clearly relied on Mother's counsel's representation that there was a pending motion in circuit court that would modify visitation. That is expressly why the judge scheduled the next hearing in the "J" case for several months later rather than more immediately.[18] But if counsel's representation to the district court was true, it is not reflected in the Case History or physical record of the Divorce Proceeding.

Nothing in the record indicates that Father was aware in December 2017 of any of these proceedings against him, or that a court authorized Mother to prohibit him from even speaking with his Son over the Christmas holidays. However, we do know from Mother's allegations in her petition for an EPO in the Second Domestic Abuse Case, *i.e.*, the second "D" case (18-D-50001-001), in late December, that Father tried to talk with Son by calling Mother's cell phone. Whether Mother informed Father then of the no-contact order is unknown, but she

[17] The clerk's notation in the Case History in the "J" case does indicate "NOE [notice of entry] to All Counsel of Record and Parties Not Represented by Counsel." However, as noted, there is no address for Father in the record until months later.

[18] In fact, the March 5, 2018 hearing date had to be continued until April because the judge was out of town.

certainly appears to have complied with her role regarding the no-contact order not to let Father speak with his Son. This is clear from Mother's next EPO petition.

Mother's petition in the second "D" case included the following allegations:

> [Mother] was issued a no contact order between [Son] and [Father] due to [Father] breaking and dislocating [Son's] arm during [Father's] 4-day visit with [Son]. DCBS investigated and cleared [Mother] of any fault and placed fault on [Father] and issued a no contact order between [Son] and [Father]. There was a court hearing on 18 December in which [Mother] was cleared of any wrongdoing by Judge Cathy Prewitt and issued a no contact order between [Son] and [Father] and case is set for review for 5 Mar 2018. [Father] has continued to text and call to harass [Mother] demanding contact with Son or else a "ruckus" would be raised to [Mother] until [Father] is allowed access to his Son. [Mother] has ignored all contact for fears for her safety.

(Second Domestic Abuse Case, Petition/Motion for Order of Protection, signed December 29, 2017, entered January 2, 2018). Whitley District Judge Fred White granted this petition, entered an EPO, and set the case for a hearing on January 8, 2018. (*Id.*). A copy of the EPO and notice of the January 8, 2018 hearing was sent to Father.

Docket sheet entries from the second "D" case indicate that Mother and Father appeared before Judge White on January 8, 2018. Neither party was then represented by counsel and there is no indication in the record before this Court that any evidence or testimony was taken. The only action taken appears to

have been transferring the case to Judge Prewitt where there was already an ongoing "J" case.

However, we know from the certified record now before this Court (including video of the hearings), that Mother misrepresented in her petition in the second "D" case that "DCBS investigated . . . and placed fault on [Father] . . . ." (*Id.*). We know that a DCBS worker said during the December 18, 2017 hearing that no one at DCBS had yet contacted Father, much less "placed fault" on Father for Son's injury. Furthermore, as shown in the video of the April hearing in this "J" case (transcribed below), by the end of February 2018, DCBS had concluded there was no substantiation for the allegation that Father had abused Son.

After Judge White transferred the second "D" case to the other division of district court, Judge Prewitt heard the case on the domestic docket on February 5, 2018. (Second Domestic Abuse Case, Docket Sheet, January 8, 2018). According to the docket sheet in the second "D" case, Father appeared, as did Mother and her attorney. (*Id.*, Docket Sheet, February 5, 2018). Again, we have no record of any proof being taken. Judge Prewitt told Father to get his own attorney, ordered that the no-contact order from the "J" case remain in place, and continued the second "D" case until April 2, 2018, because that was the next date the court was scheduled to hear the "J" case.[19]

[19] *See*, *supra*, footnote 18.

On April 2, 2018, the second "D" case and the "J" case were heard together. Father and Mother and Mother's attorney appeared. The district court opened the hearing by stating it was set for a "review." (VR 4/2/2018 at 1:08:53). DCBS informed the district court it completed its investigation, could not substantiate the allegations of abuse, and would not be opening a case. (*Id.* at 1:09:26-28). That is, the case did not meet the Cabinet's intake criteria. This was unacceptable to the court which then said the hearing was "a temporary removal hearing." In full, the hearing went as follows:

> Court: We are here to review – made this referral to the Cabinet based on an EPO [referring to the first "D" case] and I also have an EPO file as 18-D-50001 [second "D" case] and that, I believe, is still in effect, the best I can remember. Let me just confirm that. [Examines file] That does appear to be still in effect. So – Cabinet.
>
> DCBS: We completed our investigation and it was approved on February 27 [2018] and we unsubstantiated the findings.
>
> Court: Okay. Well, we're here basically at this point for a temporary removal hearing. I had made the referral to the Cabinet due to the violence alleged in the EPO. So, what are your recommendations today for a temporary removal hearing?
>
> DCBS: Umm, I'm sorry, I thought that there was a temporary removal hearing the first time that we came, um.
>
> Court: No, I have not removed. We did a cooperation order with the mother.

DCBS: Okay, okay, umm, I know that there was a, um, CI motion made in court[20] and, umm, I know that there's a no contact order, umm, I mean, I guess I would just recommend, um, that they follow any existing court orders and, um, cooperate with the – with the court in regards to the custody.

Court: Okay, lets back up. Have you case planned with mom?

DCBS: No, no we're not opening a case–

Court: I'm ordering you to. I'm ordering you to.

M's Counsel: There is a case plan signed.

Court: Okay. Do you have a copy of that?

M's Counsel: Yes, I do.

Court: May I see it?

M's Counsel: Yes. [Approaches bench]

Court: Okay. Here is a case plan.

[Court reads aloud but not verbatim]

Agrees the child will have no contact with the father [Father named here] until further advised by DCBS, agrees to follow court orders, agrees to attend all scheduled medical appointments related to child's injury, agrees to attend court,

[20] This reference to the "CI motion made in court" can only be to Mother's counsel's representation to the district court at the December 18, 2017 hearing that a motion to modify custody and/or visitation had been filed in the Divorce Proceeding and a ruling was anticipated in "early January."

cooperate and contact worker with any questions or concerns.[21] [Addressing DCBS worker] And what is your name, ma'am?

DCBS: My name is Robbie Gambrel and I believe what you're reading is a Prevention Plan . . .

Court: Yes ma'am. It is.

DCBS: . . . which is different.

Court: Yes ma'am.

DCBS: That is what we do during an investigation, um, and we have not negotiated a case plan with Mom or Dad.

Court: At this point, that's why we're here. So you need to sit down with Mom – and Dad, if Dad is interested in having contact with the child –

Father: Yes.

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[21] The document Judge Prewitt calls a "case plan" is, in fact, a "Prevention Plan" as the DCBS representative quickly pointed out, and it is clearly marked as such on the document itself. The document was not made a part of the record in the "J" case and is filed only in the second "D" case on the date of this hearing, April 2, 2018. Judge Prewitt does not read the entirety of the Prevention Plan into the record which is dated December 5, 2017 and more completely states Mother's agreement during the DCBS investigation that she:

> Agrees the child will have no contact with the father [Father named here] until further advised by DCBS or the Court.
> Agrees to follow court orders related to changes in custody and visitation.
> Agrees to attend all scheduled medical appointments related to child's injury.
> Agrees to attend the 12-18-17 court date at 1:00pm-Whitley District Court in Corbin.
> Will cooperate with DCBS investigation.
> Will contact worker with any questions or concerns.

It is signed by Mother and DCBS worker Robbie Gambrel, SSC, and dated 12-5-17.

Court: – and you need to sit down with them and case plan with both of them as to what they have to do. Right now, there is just a cooperation and a no-contact with Dad due to the allegations in the EPO petition.

DCBS: Okay, and in order for us to open a case to negotiate a case plan we have to have a finding of substantiation or a family in need of service.

Court: Okay, I'm – I'm telling you, ma'am, there is a family in need of services here.

DCBS: Okay.

Court: That's why I made this referral. These are serious allegations.

DCBS: And, and, the allegations were taken by centralized intake–

Court: Ma'am, I really don't care what centralized intake said, and I'm on the record saying that. I see a child at risk and I would not be doing my job if I don't refer to you to work with this family. That's simple.

DCBS: If we can, um, get a new court order today, um, because I'm going to have to send that back through–

Court: This is what I'm going to do. I'm gonna give temporary custody to mom, no contact with dad and I am ordering DCBS to pay for dad's–and [addressing Father] I'm not sure what you need because they have not case planned with you– but it will be substance abuse assessment, mental health assessment, parenting assessment.

Father: Can I have –

Court:	[Addressing Father] And I'm going to appoint a lawyer for you. We are going to take baby steps, I'm going to appoint a lawyer for you. Your next court date you'll have a lawyer.
GAL:[22]	Need any anger management, domestic violence because of allegations?
Court:	Yes, I'm on a roll here, anger management, domestic violence –
Father:	I think the mother needs that too.
Court:	– and classes. And, I'll also order that for mom, but it doesn't necessarily mean she needs everything, or he needs everything that I am listing. Okay, so you are representing her, Mr. Dixon, correct? And Kim Frost for the child. And, for dad, Jeremy Bryant.
Father:	Your honor, can I ask, what, what is so–
Court:	It's the basis, the EPO is the basis for this, sir.
	[Father's address is confirmed and the hearing ends]

(VR 4/02/2018 at 1:11:49-1:13:47).

To be clear, Judge Prewitt denied Mother's first petition for an EPO and Judge White never took evidence regarding Mother's second petition for an EPO. The Cabinet investigated and found no substantiation for opening a case file.

[22] Guardian Ad Litem. Kim Frost was not yet appointed by the court as Son's GAL but was in attendance and participated.

There was nothing in the record at this point in the proceedings except Mother's representation in her second petition for an EPO – a representation contradicted by the record as it then existed – that DCBS had faulted Father for breaking and dislocating Son's arm. No sworn testimony had been taken during the removal hearing; no evidence had been admitted. And yet, based on Mother's allegations alone, the district judge dismissed DCBS's work in the case, ordered Son removed from Father, granted sole custody to Mother, and made the following findings of fact:

> A referral was made to DCBS due to a petition for order of Protection filed by the mother on behalf of the child. The child had been with the father. The father became angry with the child because he would not put on his jacket. The father then pulled the child's arm and the child fell. The father then dragged him across the carpet by his arm. The mother sought medical treatment and the child was diagnosed with a broken arm.
>
> On April 2, 2018, DCBS worker Robbie Gambrel stated that central intake said the case did not meet criteria. DCBS was ordered to case plan with the parents because the court found that the child was at risk of abuse due to the above allegations.

(R. at 36).

A month and a half later, on May 21, 2018, Judge Prewitt conducted an adjudication in the "J" case. For the first time, Father was represented by counsel. The hearing proceeded as follows:

Court: Alright. And we're here for adjudication. Cabinet?

DCBS:[23] [Appearing confused] That was [garbled] I think [garbled] completed the investigation just to open the case for services, then we passed it on to ongoing.

Court: Okay. We're here for adjudication.

[Court then read the two-paragraph findings of fact set out above which the district judge stated expressly was based solely on the allegations in the EPO petition and not evidence.]

"A referral was made to DCBS due to a petition for order of Protection filed by the mother on behalf of the child. The child had been with the father. The father became angry with the child because he would not put on his jacket. The father then pulled the child's arm and the child fell. The father then dragged him across the carpet by his arm. The mother sought medical treatment and the child was diagnosed with a broken arm.

On April 2, 2018, DCBS worker Robbie Gambrel stated that central intake said the case did not meet criteria. DCBS was ordered to case plan with the parents because the court found that the child was at risk of abuse due to the above allegations."

Okay. So, based on that, I'm finding abuse. Any questions anybody?

F's Counsel:[24] Well, judge. The Dad did want the opportunity to speak. I would like to swear him in.

Court: Raise your right hand, sir.

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[23] This DCBS representative is not identified but is not Robbie Gambrel who appeared previously.

[24] Father's counsel.

[Father is sworn in to testify, identifies himself, and states his address]

F's Counsel: Are you the father of [Son]?

Father: Yes, I am.

F's Counsel: Did you hear the allegations that the judge read against you?

Father: Yes.

F's Counsel: Do you agree with those allegations?

Father: No.

F's Counsel: In your words, will you tell the court what happened?

Father: The day that we were, that this happened, me and [Son] were playing in the bedroom. And he had some "light-up" shoes on, little Skechers that lit up. And he was running back and forth, and he was telling Daddy how fast he could run. And then he started to jump. I told him, "Now you show Daddy how high you can jump." And as we were jumping, he wanted me to jump with him. So, I stood up and I was jumping with him. We held on to each other's hands and we were jumping together and we had – we had been doing it for a while and we were having fun doing it. Well, in the middle of that, and one time I don't really know exactly what happened because as I went to jump, [Son] went to fall down so I went to hold him back up and when I did I heard a little pop in his arm. So he started crying. I set him down. We looked him over. Took him in to my Mom's front room. Set him in the chair. We looked him over again. I did not see anything that said to me that there was an injury outside of just what popped. And, so, where [Son] gets the whole jacket thing is, at that time, I told [Son] in order to leave we had to put

his jacket on and he didn't want to put the jacket on. But I told him we would be very careful putting it on. So, me and the witness that was there, that was there when the whole thing happened, me and her were able to get his jacket on and get him out the house and get him in the car. Now I made the decision to not take him only because, er, take him to the emergency room only because of what's happened in the past between me and his mother and knowing how she is if –

M's Counsel: I'm going to object. The past regarding them two had nothing to do with what happened in the incident that the original order for the referral was made. I mean – out of fear of what the mother has, um, not take the child to the hospital.

Court: I could probably go either way on that. At this point I'm going to grant your objection so let's limit it to the incidents that are alleged.

Father: Okay. I'm –

F's Counsel: Let me stop. Were you all jumping on the bed, or on a trampoline?

Father: No, we were on the floor. We were jumping on the – just like we would be standing here. We were holding hands and we both were just jumping up and down. And when, during that time, again, I don't know if I – I don't know if he ran into my feet or if he just lost his balance, he went to fall down and I went to try to grab him to pull him back up. And that's when the arm made the little pop sound.

F's Counsel: Was that the only time you pulled on his arm?

Father: Yes.

F's Counsel: Did you drag him across the carpet?

Father: No, I did not. Not at all.

F's Counsel: Okay. Now, I'm sorry, did you say you took him to medical treatment or did somebody else take him?

Father: No. No, no, no. The reason that I didn't is because of what, I can't –

F's Counsel: Okay.

Father: But, when I got to Corbin, to drop him off, I told the mother, I told his mother what happened, told her how it happened, and then asked her if she would like to take him, if she thought that we should take him to the hospital and have him checked out, and let's go ahead and take him. She said no, I'm going to take him home, give him some ibuprofen and I'll try to get him a doctor's appointment the next day.

F's Counsel: Was that immediately right after?

Father: That was an hour – that was from the time it took me, after it happened, to drive up here.

F's Counsel: Nothing further judge.

Court: What do you mean to drive up here from where?

Father: Knoxville. I live in Seymour, yes ma'am.

Court: Okay. Other questions?

M's Counsel: Was [Son] crying from the trip from Seymour to, uh, Kentucky?

Father: No. Actually, I actually got him to stop crying for most of the trip. He may have whimpered a little bit, but – no. Because he actually had my phone and was watching his videos and had a Sippee cup of, I think it was chocolate milk I got him, if I'm not mistaken. I

still have the, uh, I still have the Children's Tylenol bottle in my car that I had bought him, too, on the way up here. And, no, I did get him to stop crying, uh. He didn't really start to – in the car he didn't really favor the arm until we got him out of the car. Then, that's when I noticed he was favoring that arm, but, again, it was. The only thing I'm guilty of is not taking him to the hospital immediately, that's it. Everything else, there was no dragging him. There was no pulling on his arm. I would never do that. I have three other grown children and never had nothing like this ever happen, ever.

Court: Anything else?

M's Counsel: But you did hear a pop?

Father: Yes, I did.

M's Counsel: Okay. And you're not a licensed medical professional?

Father: No, I am not. No.

M's Counsel: And neither is anyone in your home a licensed medical professional?

Father: The witness that was there was a nurse.

M's Counsel: They here?

Father: No.

M's Counsel: Okay. Reserve questioning.

GAL: You testified that when you all were getting ready to leave, that you wanted to put his jacket on. That he did not want to put the jacket on, and you told him you'd be careful of his arm.

Father: Um-hmm [affirmative]

GAL: So, evidently, he was complaining about his arm or he wouldn't have said that.

Father: He was, he was but the thing is –

GAL: [Interrupting] That's all I asked.

Court: Anything else of this witness?

M's Counsel: No ma'am.

Court: Would you all want to call any other witnesses?

M's Counsel: No, your honor.

Court: Finding of physical abuse on Dad. [Then addressing DCBS] Okay, what had Dad done on case planning-wise?

DCBS: I did receive a message from Dad and I've not had any contact with him yet. He's leaving a [garbled] but I didn't understand what the form was. But, uh, we're going to case plan today.

F's Counsel: Judge, if I may. He's handed me – I know he's a, he's a [military] vet[eran]. He's handed me from [garbled] Center. Looks like he's done a questionnaire, a health questionnaire analyzing anxiety, looks like a character and assessment he's completed.

Court: So, he's just doing those on his own?

F's Counsel: I believe so.

Court: Okay. Good.

Father: I'll do anything.

Court: At this point, there'll still be no contact. You'll need to meet with her [points to DCBS worker] to complete your case plan. Do you want a separate hearing, or do you want to waive?

F's Counsel: Judge, I think we'll need a separate hearing.

Court: Sure. While we're here, let's take up the EPO also. It is presently set to expire June 29. So, we can go about this two ways. I'm glad we have lawyers on both sides. We can either have the EPO hearing right now based on basically the testimony I've already heard, and I will grant it, or we can just go with the "J" case with a no-contact [order]. However, you all want to do it.

M's Counsel: She said she's good with the "J" case with no contact.

Court: Okay. Alright. So, we will go ahead then and dismiss the 18-D-, that's the domestic case – [50001]-001. Dismiss that. [Judge reciting as she writes; the statement that follows is not found in any of the record on appeal] "By request of petitioner and cross-reference." [Addressing court clerk] How do I cross-reference that without the "J" case being made public? Just cross-reference the existence of another no-contact?

Court Clerk: Yes. [Garbled].

Court: Okay. That'll take care of that one. And you want a separate hearing? How about, uh, we can do July 2 or July 16?

F's Counsel: July 2, judge.

M's Counsel: Yes, your honor. That's fine.

Court: July 2 at 1:00 p.m. Thank you all.

F's Counsel: Judge, [Father] asked me to ask for at least some form of visitation at this point. I understand there's no contact, but he is taking some active measures on a case plan.

Court: Once he sits down and talks to the social worker, then we can look at that. But at this point no.

M's Counsel: I did want to make the court aware that there was a – there is a circuit court order in which he formerly lived in New York. He has not moved to modify that. The only visitation per the circuit court order is summer visitation, two weeks in the summer.

Father: That was – actually that was – we did have a thing going on to have that changed and that was what was going on in Pikeville or Pineville, was to have that modified. It wasn't – I had tried to get that changed. And I will still be trying to get that changed.

Court: Okay. Just get your reminders and we'll see you back July 2.

(VR 5/21/2018 at 1:21:43-1:32:27).

The district court dismissed the second "D" case, leaving nothing except the "J" case. The court then completed and entered in that case a form "Order – Adjudication Hearing" reaffirming its April 2018 order awarding temporary sole custody to Mother and prohibiting any contact between Father and Son. The order said other options short of removal from Father's influence were pursued, but nothing short of removal was appropriate.

On June 19, 2018, in accordance with KRS[25] 620.155, Father appealed from the district court to the Whitley Circuit Court as a matter of right in the manner provided in the Kentucky Rules of Civil Procedure.

Notwithstanding the appeal to circuit court, on July 2, 2018, the district court repeated the findings of fact from the May 21, 2018 "Order – Adjudication Hearing" on the form "Order – Disposition Hearing." We will examine these removal orders in greater detail in the analysis.

The circuit court, upon review of the appeal, affirmed the district court in a three-page "Findings of Fact, Conclusions of Law, and Judgment." Father moved this Court for discretionary review and we granted that motion. We now review the district court's orders as though on direct appeal.

STANDARD OF REVIEW

This Court provided a thorough explanation of the standard of review in dependency, abuse and neglect actions in *L.D. v. J.H.*, which says:

> This Court's standard of review of a . . . court's award of child custody in a dependency, abuse and neglect action is limited to whether the factual findings of the lower court are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. Whether or not the findings are clearly erroneous depends on whether there is substantial evidence in the record to support them. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). If the findings are supported by substantial evidence, then

[25] Kentucky Revised Statutes.

> appellate review is limited to whether the facts support the legal conclusions made by the finder of fact. The legal conclusions are reviewed de novo. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003). If the factual findings are not clearly erroneous and the legal conclusions are correct, the only remaining question on appeal is whether the trial court abused its discretion in applying the law to the facts. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). Finally, "[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 regarding custody will not be disturbed absent an abuse of discretion." *Id.*

350 S.W.3d 828, 829-30 (Ky. App. 2011) (internal indentation removed).

ANALYSIS

This case is an anomaly, or so this Court hopes. It was flawed from its inception and, then, throughout.

We are not unmindful of the district court's belief that it was duty bound to make a referral to the Cabinet or DCBS. In *Commonwealth, Cabinet for Health and Family Services v. Garber*, this Court explained that "KRS 620.030(1) obligates individuals, including the family [or district] court, to report the dependency, neglect or abuse of a child." 340 S.W.3d 588, 590 (Ky. App. 2011) (citing *Fugate v. Fugate*, 896 S.W.2d 621, 623 (Ky. App. 1995)). But that is where the court's duty ended.

Juvenile case was improperly initiated

To initiate a dependency, neglect, or abuse action there must be an initiating petition. *See* KRS 620.070(1). The statute authorizes "the filing of a petition by any *interested person* in the juvenile session of the District Court." *Id.* (emphasis added). Interested persons are parents, guardians, family members, or DCBS – not judges presiding in a neutral court system. The district court is not an interested party, and that should go without saying. A court must be and remain "a *disinterested* adjudicating body . . . ." *Boyd & Usher Transport v. Southern Tank Lines, Inc.*, 320 S.W.2d 120, 123 (Ky. 1959) (emphasis added). By that, of course, we do not mean an uninterested tribunal, but disinterested in the sense that the court has no stake – financial, emotional, or otherwise – in the outcome of the case before it. "If it would appear to a reasonable person that a judge has . . . an interest in the litigation then an appearance of partiality is created . . . ." *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467, 472 (Ky. 2010) (citation and internal quotation marks omitted).

A court simply does not qualify under KRS 620.070(1) as an interested party that can initiate a dependency, neglect, or abuse action. The district judge here erred to the point of manifest injustice by using an order denying an EPO petition to initiate a removal case (the "J" case under review) in the juvenile division of her own court.

Similarly, a simple reading of KRS 620.130(1) demonstrates the same idea, but from a different perspective. That statute tells the district court what to do "when the court is petitioned to remove . . . a child from the custody of his parent . . . ." Here, the district court effectively petitioned itself – that is, the district court filed the initiating document in 17-J-50204-001.

Court violated separation of powers by ordering Cabinet how to proceed

To be sure, referring a matter to DCBS is not a problem at all. However, when a court goes further under such circumstances – and this court went much further, even to the point of usurping the Cabinet's executive function – the reviewing court cannot allow its rulings to stand. We have so held in the past.

In *Garber*, *supra*, the Cabinet argued "that once it has received a report of suspected dependency, neglect, or abuse, it alone [that is, the Cabinet alone,] has the executive function of determining whether such report merits an investigation or an assessment of family needs." 340 S.W.3d at 590. This Court agreed and pointed out the respective roles of the court and the Cabinet (and its subdivisions such as DCBS), saying:

> We agree with the Cabinet that the family court exceeded its jurisdiction in ordering an investigation. . . . KRS 620.040 assigns responsibilities for action including investigation and establishes time frames. KRS 620.040(1)(b) directs the Cabinet to undertake a risk analysis to determine if an investigation or an assessment of family needs is warranted.

Id. In the case under review, the Cabinet through its DCBS representative said, "[W]e're not opening a case–." And when the district court responded by saying, "I'm ordering you to[,]" the court overstepped its bounds.

Here, the Cabinet performed its executive function. It investigated and found no substantiation for Mother's claims that Father abused their Son. When the district court ordered the Cabinet to open a case and further assess the family needs, it violated the separation of powers doctrine. As this Court said:

> By ordering an investigation, the family court usurped the Cabinet's executive function of determining the necessity of an investigation and, if so warranted, initiating the investigation. Section 28 of the Kentucky Constitution precludes the family court from exercising the Cabinet's executive powers.

Id. Like the family court in *Garber*, the district court in the case now under review usurped the Cabinet's authority to the benefit of Mother who presented nothing in this case except two unsworn petitions in two different EPO cases.

Unsworn representations of Mother and her counsel are not supported by record

We reiterate that the district court denied Mother's first petition for an EPO after finding no immediate and present danger of abuse. However, we also acknowledge that the district court (Judge White) did enter an EPO in the second "D" case. However, Judge White granted the emergency order based on Mother's false statement that "DCBS investigated and . . . placed fault on [Father] . . . ." Although the DCBS representative never gave sworn testimony, the record clearly

demonstrates that Mother misrepresented the work of DCBS and its conclusions. When the "J" case became the lead case, subsuming that "D" case, it incorporated Mother's misrepresentation which became the court's reason for finding abuse.

But Mother was not the only one to misrepresent a fact to the court. At the December 18, 2017 hearing, Mother's counsel plainly represented that, in the parties' divorce action in Whitley Circuit Court, "We filed a motion to halt visitation," and counsel said he hoped for a ruling by early January. The district court relied on that representation, but the record in the Divorce Proceeding shows no such motion was ever filed.

Not only did the district court rely on that representation as being truthful, so did the DCBS representative. When pressured by the court, the DCBS representative said, "I know that there was a, um, CI motion made in [circuit] court," and said, "I guess I would just recommend, um, that they follow any existing court orders . . . in regards to the custody." Such misrepresentations made worse an already adulterated set of judicial proceedings.

Court acted outside its particular case jurisdiction making orders voidable

We find all of Father's arguments persuasive, some of which we have addressed above in our own way.[26] For example, we agree that the district court

[26] Those arguments are: (1) the finding of abuse is unsupported by substantial evidence; (2) it was error to find the child was abused at all; (3) the district court's application of the law to the facts is erroneous; (4) the district court acted outside its jurisdiction by ordering an investigation;

lacked jurisdiction. We would say, however, that the court did not lack subject matter jurisdiction, but did lack particular case jurisdiction.[27] Particular case jurisdiction generally requires the existence of "specific so-called 'jurisdictional facts' . . . defined as '[a] fact that must exist for a court to properly exercise its jurisdiction over a case, party, or thing.'" *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 430 (Ky. App. 2008) (citation omitted). In a case such as the one under review, there must be a statutorily authorized complainant. There was not one in this case.

"[I]f the case involves allegations of dependency, neglect, or abuse," as this case does, "no emergency removal or temporary custody orders shall be effective unless the provisions of KRS Chapter 620 are followed." KRS

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(5) the district court erred by prohibiting contact with Father during the pendency of the "J" case; and (6) the district court's orders are void *ab initio* because it lacked subject matter jurisdiction.

[27] Subject matter jurisdiction and particular case jurisdiction are related. However, as this Court has said:

> [T]hey are different in that the former concerns a more broad, general class; whereas, particular case jurisdiction focuses on a more limited or narrow fact-specific situation. *See, e.g., Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970) (stating that subject matter jurisdiction refers to a court's authority over "this *kind* of case" as opposed to "this case"); *Commonwealth v. Griffin*, 942 S.W.2d 289, 291 (Ky. 1997) (stating subject matter jurisdiction refers to a class of cases as opposed to particular case jurisdiction which refers to a court's authority over a specific case); *Gordon v. NKC Hospitals, Inc.*, 887 S.W.2d 360, 362 (Ky. 1994); *Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001).

Hisle v. Lexington-Fayette Urban County Government, 258 S.W.3d 422, 429 (Ky. App. 2008) (footnote omitted).

610.010(9). Chapter 620 requires the complainant in a "J" case to be an interested party, not the disinterested district court (as described above). Nevertheless, the district court proceeded despite lacking this jurisdictional fact and, thereby, lacking particular case jurisdiction.

Particular case jurisdiction can be waived by a party who fails to object early enough in the proceedings. *Basin Energy Co. v. Howard*, 447 S.W.3d 179, 184-85 (Ky. App. 2014) ("parties can waive particular-case jurisdiction . . . if not timely asserted"). The consequence is that "if a court . . . acts within its general jurisdiction, but outside its particular-case jurisdiction, its acts are voidable [if the error is preserved], but not void." *Id.* at 187. What does it look like for a district court to act so far outside its particular case jurisdiction that it justifies reversing the voidable ruling in the absence of preservation, *i.e.*, because it is manifestly unjust? We believe it looks a lot like the case before this Court now.

And what does it feel like to a party? A party summoned to court and who chooses, or has no choice but, to proceed without legal counsel, depends upon the jurist, and rightly so, to properly apply the laws in a disinterested and competent manner. For the court, that means assuring itself, and for the benefit of the parties before it, that all the jurisdictional facts are present. The reality is, that does not always happen – it is one of the reasons for appellate review. But review requires preservation of error unless the error is so manifestly unjust as to authorize

the reviewing court to forgive the failure to preserve the error. This is a particular problem when a party is not represented by counsel – a common circumstance in family law cases of all types.

Even if an unrepresented party innately senses a disproportionality in the weight of the justice system bearing upon him, it is quite unlikely he knows what to do about it – that is, he likely does not know how or when to object to a court acting outside its particular case jurisdiction. Here, Father's sense of that unjust weight is palpable to anyone watching videos of the hearings he attended.

However, we will not set aside this case for lack of a jurisdictional fact and lack of particular case jurisdiction. There are other bases that provide more than sufficient reason to reverse this case.

Father was deprived of the due process protections mandated by KRS 620.100

Set aside for the moment that, on this record, in all the hearings the court conducted, no one gave sworn testimony with one exception – Father. Analysis of the district court's temporary removal order starts with the order itself.

According to the order, "The Court . . . finds and concludes the rights provided in KRS 620.100 have been extended to [Father] . . . , and all due process rights have been observed . . . ." So, what does KRS 620.100 say? Among other things, the statute says: "The burden of proof shall be upon the complainant . . . ." KRS 620.100(3).

We have already thoroughly discussed the first problem here. The district court's December 4, 2017 Order Denying EPO initiated this case. That makes the district court the complainant. That bungled the case from the beginning. However, even if we generously engage in the fiction that either Mother brought this case or the Cabinet did, we can say with full confidence that no one carried the burden of proof.

Mother was never placed under oath and offered nothing into evidence. Why? We do not know. Perhaps it is because the district court was moving forward against Father successfully on the strength of Mother's mere allegations in two petitions for an EPO, and that was enough to satisfy Mother. But as discussed earlier, at least one of those allegations – "DCBS investigated and . . . placed fault on [Father]" – was demonstrably false.

KRS 620.100 also says, "The adjudication shall determine the truth or falsity of the allegations in the complaint." KRS 620.100(3). The district court took Mother's allegations in the second "D" case, including the false one, at face value, disregarding the court's statutory duty to determine the truth of those allegations and disregarding the statutory placement of the burden of proof on the complainant. And, whoever the complainant may have been, we know who it was not. It was not Father.

Only after the district court had decided for Mother, and ruled in her favor, did it allow Father to present evidence. This disregarded the protections of the statute and the rules of procedure regarding burden of proof and improperly shifted that burden to Father. *Id.* ("The Kentucky Rules of Civil Procedure shall apply."); CR 43.01(2) ("The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side."). Father's burden was to change the district judge's mind on a ruling she already expressed. He failed to carry that misplaced burden.

In accordance with Chapter 620, the complainant is required to present evidence to prove the allegations that Father's conduct justified state interference with his constitutional right to parent – a right reaffirmed in the Divorce Proceeding when Father was awarded joint custody with Mother. The district court flipped that statutory procedure on its head by first deciding the case in favor of Mother before Father presented anything, effectively and improperly shifting the burden of proof to Father to win back his parental right by proving a negative, that he did not abuse his Son. CR 43.01(1) ("The party holding the affirmative of an issue must produce the evidence to prove it.").

These statutes and rules establish what process Father was due. Deviating from them deprived Father of that due process. The process due here establishes that the party charged does not bear the burden of persuading the

tribunal, and it is a violation of due process to shift that burden to the charged party. *See Commonwealth v. Collins*, 821 S.W.2d 488, 490-91 (Ky. 1991) ("[S]hift[ing] the burden of proof from the Commonwealth to the defendant . . . would be a violation of the due process clause of the United States Constitution . . . ." (citations omitted)). That is how the district court violated Father's due process rights.

Complainant failed to satisfy burden of proof

Can it be said that *any* party satisfied the burden of proving Father abused Son? No, not on this record. If DCBS was the complainant and bore the burden of proof, it woefully failed. But DCBS did nothing wrong here. It is fairer to say DCBS, not believing abuse occurred, made no attempt to carry the burden. No DCBS worker ever said anything under oath and, although DCBS apparently had Son's medical records, those records were never admitted. The district court did not even ask to see them. Consequently, and ironically, there is no proof even that Son had a broken arm. Again, there is only Mother's allegation.[28] No one presented evidence of that important fact.

[28] "For good cause, the court may allow hearsay evidence" in a removal hearing. KRS 620.080(2). However, the obvious prerequisite to hearsay is direct testimony. There was no direct testimony regarding the fact that Son's arm was broken. Although the DCBS worker said she obtained the medical records, she never testified, nor did she confirm while speaking while not under oath, as to what those records said. If Mother had testified, she might have been allowed to present hearsay evidence of the broken arm. But she never gave sworn testimony.

And though no DCBS worker ever testified under oath, DCBS did represent, to an obviously exasperated district court, that DCBS had investigated the case, found no substantiation for an allegation that Father abused Son, and elected not to initiate a case. That was before the district court ordered the executive agency to do so.

Worst of all, the district court expressly cited Mother's *allegations* as the evidence that sustained the burden of proof (whoever may have borne it) against Father. This Court should not have to repeat, again – but we will – that "[p]leadings are not evidence." *Cary v. Pulaski County Fiscal Court*, 420 S.W.3d 500, 509 (Ky. App. 2013) (citing *Educational Training Systems, Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003)). That goes doubly for false allegations, especially when the court's own records show them to be false.

We also note that, in replying to Father's brief, Mother said Father had more than enough opportunity to present evidence to contradict the allegations and to cross-examine Mother. That is a straw-man argument. As we discussed, statutory due process did not require Father to disprove Mother's allegations. Father bore no burden here because the burden even of going forward with evidence never shifted to him. CR 43.01. Mother chose never to testify and, consequently, saying Father did not cross-examine her is disingenuous. She

presented no testimony, so there was nothing for Father to impeach by cross-examination.

When it comes to testimony, it is true that the district court as factfinder did not have to believe what Father said under oath. However, given that it was the district court's duty to dismiss the case in the absence of actual evidence to sustain the allegations, there should have been no need for Father to have said anything at all. But, before Father said a word, the district court had prejudged the case, stating, "I'm finding abuse. Any questions anybody?" Only then did the district court yield to Father's request to present his side of the story, under oath.

After Father testified, the district court even invited proof from Mother to sustain her allegations, asking Mother's counsel, "Would you all want to call any other witnesses?" But counsel declined to take that opportunity to cure the defect of an utter absence of proof of abuse.

None of the specific findings is sustained by substantial evidence

Now, we will examine some of the district court's more crucial specific findings, simply to demonstrate more clearly that none of them is supported by the only evidence in the case, Father's testimony.

> FINDING: " . . . [T]he above-named child is . . . neglected or abused as defined in KRS 600.020(1): as follows: . . . His . . . parent . . . inflicted or allowed to be inflicted upon the child

> physical or emotional injury *by other than accidental means* . . . . "

The only evidence in this case is that whatever injury Son suffered was accidental. No testimony or other evidence refuted Father's explanation under oath as to how the injury occurred. Father and Son were playing, and an accident happened as it will on occasion. Father did not attempt to hide the injury from Mother who, herself, alleged he told her about it. This factual finding that the injury was not accidental is not sustained by the proof.

> FINDING: "[Father c]ontinuously and repeatedly failed or refused to provide essential parental care and protection for the child, considering the age of the child . . . . Did not provide the child with adequate care, supervision, . . . or medical care necessary for the child's well-being . . . ."

We will assume, for the sake of the district court's finding, that "continuously and repeatedly" means during the one-hour drive to meet with Mother, at which time Father and Mother discussed how to proceed.

As a consequence of the parties' divorce decree, on the date of Son's injury, Mother and Father enjoyed joint custody. "In joint custody, each parent has full legal custody of the child, but they must share decision-making and physical possession of the child." *Mullins v. Picklesimer*, 317 S.W.3d 569, 579 (Ky. 2010) (citations omitted). They were supposed to act in concert for Son's well-being. Father testified that Son was in no distress during the trip and Mother never

presented evidence to the contrary. And when Father tried to explain how Mother reacted previously when he acted independently, the district court disallowed it.

The only evidence admitted was Father's testimony that, in the presence of a nurse, he examined Son's arm and saw no obvious injury. He gave Children's Tylenol to his Son and consoled the boy. He returned Son to Mother in about an hour after the injury occurred and discussed the need for more immediate medical care. Mother declined.

Furthermore, if any inferences are to be drawn from Mother's petition, it is that, like Father, she did not take her Son immediately to the hospital either. And we can also infer the reason for that. Even medical professionals who had taken x-rays could not tell Son's arm was broken until a radiologist examined the records the following day and called Mother. (*See* footnote 11, *supra*).

The evidence available to the district court did not sustain a finding that Father "[d]id not provide the child with adequate care." Quite the opposite, Father's care cannot be said to be inappropriate based on the proof. If Father's failure was that he did not immediately take his Son to the emergency room, then Mother shares in that very same failure.

> FINDING: "The father became angry with the child because he would not put on his jacket. The father then pulled the child's arm and the child fell. The father then dragged him across the carpet by his arm."

There was no evidence that Father became angry with Son; there was only Father's testimony that he did not become angry. No evidence contradicted that. Additionally, there was no evidence to support the implication that Father's anger manifested in rough treatment of Son. Even this sequence of events as indicated in the ruling is unsustainable by the evidence because the injury occurred before Son put on his jacket, not afterward. There was only Father's testimony that from the moment he heard "a little pop" while they were playing, Father was concerned. He respected Son's expression of pain, provided appropriate affection, care, and over-the-counter medicine, and treated his Son's arm gingerly as he dressed him in his jacket. He acted as a father, a mother, or any mature adult would act in those circumstances.

FINDING: "Reasonable efforts were made to prevent the child's removal from the home."

There is no evidence whatsoever of any effort to prevent Son's removal from Father's home. The district court rejected the DCBS investigation and conclusion that the allegations of abuse could not be substantiated. The district court rejected the DCBS decision not to open a case and not to case plan. That is, DCBS and the Cabinet were not going to initiate an action in the juvenile session of the district court. So, the district court, *sua sponte*, took it upon itself to continue pursuing the case without the Cabinet's cooperation.

The Cabinet, through DCBS, undertook all the reasonable efforts it deemed necessary and declined to pursue further action. The district court refused to entertain the notion that DCBS had done all that was necessary to accomplish removal of Son from Father's home. The finding that all reasonable efforts short of removal were made is a manifestly unreasonable and erroneous finding.

> FINDING: "There are no less restrictive alternatives than removal from the home due to the following (*Please be specific and provide detailed information/circumstances relating to the child and why there are no less restrictive alternatives when the child is removed.*): See above." [Emphasis in original form]

As with most of the findings addressed here, much of this one is already pre-printed on the form order provided by the Administrative Office of the Courts. All that the district court added in this finding were the words "See above." That does not comply with the requirement on the form.

The form, in conformity with KRS 620.140(1)(c), imposes upon the district court a burden – a very necessary burden – that before an order of complete, no-contact removal can be entered, the district court must set forth "specific" and "detailed information" why no lesser dispositional alternative will do. KRS 620.140(1)(c) ("Before any child is . . . placed out of his or her home . . . , the court shall determine that reasonable efforts have been made by the court or the cabinet to prevent or eliminate the need for removal and that continuation in the home would be contrary to the welfare of the child."). The district court failed

in this regard. It simply entered a conclusory ruling: "Finding of physical abuse on dad. Dad shall have no contact with the child." In addition to there being no evidence to support this result, the district court failed to justify why this was the only result the court considered and refused to entertain a lesser alternative.

When Father's counsel urged the district court to consider "at least some form of visitation" such as supervised visitation for example, or to allow telephonic or electronic (texting) contact, the district court rejected it with no explanation. That does not meet the requirements of KRS 620.140.

This kind of drastic order should only be entered when the district court can justify it as the last desperate hope of a judicial system that recognizes, protects, and sanctifies the constitutional right of a father or mother to parent his or her child. As our Supreme Court recently said:

> [A] parent's right to raise his or her child is a fundamental Constitutional right. And any process designed to take that right away should be fair and safeguard that right to the greatest extent possible.

Meinders v. Middleton, 572 S.W.3d 52, 59 (Ky. 2019). This case does not represent that kind of last desperate hope scenario. Far from it.

SUMMARY

There is no substantial evidence supporting any of the findings of fact, or the removal itself, in the adjudication order or the disposition order. For the foregoing reasons, these orders are reversed, and the case remanded to the district

court with instructions to dismiss the case (Whitley District Court No. 17-J-50204-001).

ALL CONCUR.

BRIEFS FOR APPELLANT:

Amanda Hill
Corbin, Kentucky

BRIEF FOR APPELLEE M.E.:

Eric M. Dixon
Williamsburg, Kentucky

NO BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY, DEPARTMENT OF COMMUNITY BASED SERVICES

NO BRIEF FOR APPELLEE M.D.C.