

RENDERED: December 3, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002431-MR

L.B.

CROSS-APPELLANT¹

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NOS. 02-CI-00488, 02-J-00182-001,
02-J-00182-002, 02-J-00182-003, 02-J-00182-004

COMMONWEALTH OF KENTUCKY, CABINET
FOR FAMILIES AND CHILDREN; B.S.;
S.S.; AND K.L. F/K/A K.S.

CROSS-APPELLEE

OPINION
AFFIRMING IN PART
AND
REVERSING AND REMANDING IN PART

** **

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

VANMETER, JUDGE: This matter involves a child who was committed to the Cabinet for Families and Children (CFC) by the Johnson Family Court based on four separate neglect and dependency petitions, filed in the interest of the child, involving the

¹ The child's mother, K.L. F/K/A K.S., filed a pro se direct appeal in No. 2004-CA-002409-MR. That appeal was dismissed by a panel of this court on July 16, 2004, after the mother failed to either file a brief or respond to this court's show cause order.

child's parents and the child's paternal grandmother/agreed physical custodian, L.B. The mother appealed and L.B. cross-appealed, but the mother's direct appeal was dismissed for failure to file an appellate brief. On cross-appeal we affirm as to one of the two petitions filed involving L.B., but we reverse and remand as to the other.

The child was born in 1998. It is undisputed that the child's father committed multiple acts of domestic violence against the child's mother, with some acts being committed in the child's presence. It also is undisputed that when the parents divorced in Indiana in March 2002, they acted to avoid the possible termination of their parental rights by providing in their marital settlement agreement that L.B., who resided in Paintsville, would have physical custody and guardianship of the child. The agreement further provided that the parents each would have "reasonable visitation" with the child.

On November 21, 2002, CFC filed three dependency or neglect petitions involving L.B. and both parents in Johnson District Court Nos. 02-J-00182-001, -002 and -003. No. 02-J-00182-001, pertaining to L.B., alleged that the child was neglected in that she was "at risk of harm due to [L.B.'s] failure to protect and failure to seek counseling for the child. The child was exposed to a sexual perpetrator [father]. The

child was also exposed to ongoing domestic violence, substance abuse and criminal involvement."

On the following day L.B., without mentioning the pending district court proceedings, filed Civil Action No. 02-CI-00488 in the Johnson Circuit Court, seeking both ex parte temporary custody and permanent custody of the child. L.B. alleged that an Indiana court previously had removed the child from the mother's care due to neglect, that the child previously had been abused by the mother, and that criminal child abuse charges were pending against the mother in Indiana. L.B. also alleged that the child had been awarded to her by the Indiana court due to the mother's abuse, but that the mother "somehow got the child back through" an emergency protective order in Johnson County. The Johnson Circuit Court granted L.B.'s motion for ex parte relief and awarded her temporary custody of the child, noting that its order superceded "any and all previous Orders and/or EP0's/DVO's issued by District Courts of this state." On November 25 the court amended its order to prohibit L.B. from allowing the child to be in the father's presence.

CFC then sought to intervene in the circuit court action, requesting that the action be either dismissed or consolidated with the pending juvenile district court proceedings. The circuit court granted CFC's motion to intervene, and it transferred to the pending district court

action “[a]ll issues relative to dependency, neglect, and abuse” in No. 02-CI-00488.

Although somewhat unclear, apparently the circuit court retained jurisdiction over certain portions of No. 02-CI-00488, as in December 2002 that court ordered L.B. to show cause why she should not be held in contempt of court for failing to abide by the court’s previous orders “relative to the minor child being in the presence of” the father. The mother then intervened and sought custody of the child. Subsequently a fourth petition, No. 02-J-00182-004, was filed on January 29, 2003, alleging that the child was dependent because L.B. “failed to protect the minor child based upon her failure to obtain necessary counseling and allowing minor child to have contact with” her father.

Once the family court became operational in Johnson County, that court assumed jurisdiction over No. 02-J-00182, and the child was ordered to remain in CFC’s custody. A comprehensive evaluation report was prepared on CFC’s behalf by a University of Kentucky evaluator and was filed in the record in June 2003. Other reports filed in the record included a CFC family case plan and a home evaluation of the mother’s Indiana residence.

On October 14, 2003, the court entered adjudication orders as to all four petitions, finding in each instance that

the child was neglected and should remain in CFC's temporary custody. As to L.B., in No. 02-J-00182-001 the court found that she had "failed to protect the child." In No. 02-J-00182-004, which was filed after the circuit court entered its order prohibiting L.B. from allowing the child to be in the father's presence, the court found that L.B. had "failed to protect the minor child based upon her failure to obtain necessary counseling and allowing minor child to have contact with" the father.

On November 12, 2003, the court entered disposition orders as to each of the four petitions, in each instance committing the child to CFC, adopting "the recommendations of [CFC] numbers 1-6 as orders of the Court," and releasing CFC "from any further efforts of reunification." More specifically as to L.B., in No. 02-J-00182-001 the court found that she had "failed to make progress towards providing the Court proof that she will prevent contact with [the father], protect her from harm and obtain necessary counseling." In No. 02-J-00182-004 the court found that L.B. had "failed to make sufficient progress in showing that she will prevent" contact between the father and the child.

The mother appealed and L.B. cross-appealed from the court's orders. The mother's pro se appeal was dismissed after she failed to either file a brief or respond to this court's

show cause order. Thus, only L.B.'s cross-appeal remains active. As Nos. 02-J-00182-002 and -003 pertained to the parents rather than to L.B., orders entered as to those two petitions are not directly before us on appeal and will not further be discussed.

First, we address L.B.'s contention that the trial court erred by denying her motions for either a directed verdict or dismissal of the claims against her. We agree as to No. 02-J-00182-004, but we disagree as to No. 02-J-00182-001.

As noted above, No. 02-J-00182-004 was filed after the court ordered L.B. not to allow the child to be in the father's presence. The adjudication order entered in that action found that L.B. neglected and failed to protect the child because she did not "obtain necessary counseling" and she allowed the child "to have contact with" the father. Although there certainly is evidence that the child needed intensive counseling and there are indications that L.B. was so advised by Indiana authorities, it is undisputed that L.B. was not specifically ordered by any court to obtain such counseling. Moreover, the child's mother testified regarding the lengthy delays involved in scheduling psychiatric appointments in the Johnson County area, and L.B. testified that two or three counseling appointments were scheduled but cancelled by the counseling providers. Although it is clear that in accordance with the terms of the marital

settlement agreement approved by the Indiana court L.B. permitted the child to visit with the father before the Johnson Circuit Court prohibited such visits, there was little or no probative evidence, as opposed to mere allegations or inadmissible hearsay, adduced to show that the child continued to visit with her father after the court directed L.B. not to allow such visits. Clearly, the evidence was insufficient to support the court's finding that the child was neglected for the reasons set out in No. 02-J-00182-004, and the trial court erred by failing to dismiss or enter a directed verdict as to that matter.

We do not agree, however, that the court erred by failing to dismiss or direct a verdict as to No. 02-J-00182-001, which was filed before the circuit court entered an order prohibiting L.B. from allowing the child to visit with the father. L.B. admitted below that she was aware of the domestic violence inflicted by her son upon the child's mother, and it was undisputed that the marital settlement agreement terms regarding custody were reached in order to avoid a possible termination of the parents' rights by an Indiana court. Despite this knowledge, L.B. allowed the parents extensive, minimally supervised² visitation with the child in Kentucky. Under these

² L.B. indicated at trial that she permitted the child to return to the parents, and that she monitored the situation and visited with the child and parents "on a regular basis."

circumstances, we cannot say that the evidence was insufficient or that the trial court erred by finding that L.B. "failed to protect the child" while the child was in her custody, or that the evidence was insufficient to support that finding. CR 52.03.

Moreover, we are not persuaded by L.B.'s assertion that the adjudication order in No. 02-J-00182-001 should be set aside as defective. It is true that the order, set out on AOC Form DNA-4, contains the above finding as to neglect, followed by form language that:

The Court concludes, based on the foregoing specific findings of fact, the above-named child ☐ is ☐ is not: ☐ dependent ☐ neglected ☐ abused.

Although the trial court checked the box marked "neglected," it failed to check whether the child "is" or "is not" neglected. However, a review of the order as a whole clearly indicates that the court intended to find that the child "is" neglected, and that the failure to check the appropriate box constituted nothing more than a clerical error which could be corrected at any time. See CR 60.01. Further, since L.B. failed to bring to the trial court's attention either this issue or her contention that the court's findings were not sufficiently specific, the court's final judgment in No. 02-J-00182-001 is not subject to reversal or remand based on the court's failure to make a

finding on an essential issue of fact. See CR 52.04; *Eiland v. Ferrell*, Ky., 937 S.W.2d 713, 716 (1997).

Next, L.B. contends that the trial court erred by admitting certain testimony which should have been excluded as hearsay. More particularly, L.B. complains that although the court previously had found the four-year-old child incompetent to testify, the court permitted a CHR social worker to repeat statements made by the child regarding her father's abuse of her mother, regarding her contacts with her father, and regarding her failure to receive counseling. L.B. also asserts that the court erred by permitting the social worker to testify about her conversation with an Indiana psychologist who had dealt with the parties, and about the conclusions she drew after reviewing various documents which were not admitted into evidence.

We agree that the court erred by permitting the social worker to testify regarding the child's statements. See *Prater v. Cabinet for Human Resources*, Ky., 954 S.W.2d 954 (1997). However, such statements constituted cumulative evidence and amounted to harmless error in these circumstances since L.B. and the child's mother testified, and no one denied, that the child witnessed her parents' domestic violence, that she visited with her father after entering L.B.'s care, and that she received no counseling while in L.B.'s care. Although we also agree that the court erred by admitting the social worker's hearsay

testimony regarding her conversations with a nontestifying Indiana psychologist and her review of various documents which were not admitted into evidence, that testimony was not prejudicial to L.B. since the events addressed by No. 02-J-00182-001 occurred in Kentucky after the Indiana psychologist's involvement with the family ended. Moreover, the hearsay evidence regarding the psychologist's comments was cumulative and nonprejudicial since the child's mother testified in some detail regarding the child's psychological issues. As the decision in No. 02-J-00182-001 was not based on inadmissible evidence, and substantial probative evidence supported the court's findings, the admission of the incompetent evidence constituted nonprejudicial error. *Prater*, 954 S.W.2d at 959; *M.P.S. v. Cabinet for Human Resources*, Ky. App., 979 S.W.2d 114 (1998).

Finally, we are not persuaded by L.B.'s contention that the trial court erred by admitting hearsay testimony during the disposition hearing. KRS 620.023 sets out a broad range of evidence which is to be considered by a trial court in all dependency, neglect and abuse cases "in which the court is required to render decisions in the best interest of the child." Further, KRS 610.110(1) and (2) provide that in determining a disposition to be imposed "on behalf of, and in the best interest of" a juvenile status or public offender,

all information helpful in making a proper disposition, including oral and written reports, shall be received by the court . . . and relied upon to the extent of their probative value, provided that the parties or their counsel shall be afforded an opportunity to examine and controvert the reports.

Finally, KRE 1101(d)(5) provides that the Kentucky Rules of Evidence are not applicable to "sentencing by a judge."

The disposition hearing conducted below did not amount to a "sentencing," and it did not concern a juvenile status or public offender adjudication. However, just as the burden of proof applicable to the guilt phase of a criminal proceeding is greater than the burden of proof applicable to a juvenile dependency, neglect or abuse proceeding, the evidentiary rules applicable to the sentencing phase of a criminal or juvenile public offender proceeding are at least as stringent as those applicable to the disposition stage of a dependency, neglect or abuse proceeding. Since hearsay would have been admissible during a criminal disposition hearing, we conclude that it was admissible during the neglect disposition hearing below, and that the trial court did not err by overruling L.B.'s objections. Moreover, although L.B. asserts that the trial court's disposition failed to make specific findings regarding the child's best interests, again the court's judgment may not be reversed on that ground since L.B. failed to bring the matter

to the trial court's attention. CR 52.04. Further, since No. 02-J-00182-004 is being reversed for the reasons stated above, we need not address L.B.'s additional complaint regarding the disposition order entered as to that action.

The court's order in No. 02-J-00182-001 is affirmed. The court's order in No. 02-J-00182-004 is reversed and remanded for dismissal of the underlying petition.

ALL CONCUR.

BRIEF FOR CROSS-APPELLANT:

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