

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002525-ME

J.H.

APPELLANT

v. APPEAL FROM OLDHAM FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NOS. 06-J-00178; 06-J-00179; 06-J-00180; 06-J-00181

COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH AND FAMILY SERVICES; M.H.;
M.E.; R.M.; J.G.; J.G.; H.H.; B.E.; N.M.; and Z.M.

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: J.H. appeals from orders of the Oldham Family Court determining that her child H.H. was an abused and neglected child and that her children B.E., N.M., and Z.M. were neglected children. The orders further granted the motion of

¹ Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

the Cabinet for Health and Family Services (Cabinet) that the children be removed from J.H.'s care and placed in its custody. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

H.H., born January 19, 2006; B.E., born April 20, 2001; N.M., born December 3, 1998; and Z.M., born January 11, 1997, are the children of J.H.

On August 27, 2006, H.H., then the age of seven months, was presented at LaGrange Hospital in LaGrange, Kentucky. The examining physician determined that the child had suffered a broken leg. J.H. and the children gave two explanations for the fracture. The first explanation was that one of the older children accidentally dropped the child. The second explanation was that one of the older children fell on the child. J.H. admitted that she was not supervising the children when the incident, whichever version is correct (if either), occurred. J.H. stated that she first realized that H.H. was injured the next day when she was changing the child's diaper, heard her leg pop, and the child began exhibiting signs of distress.

Based upon the nature of the injury and the explanations given therefore by J.H. and the older children, the hospital referred the matter to the Cabinet for Health and Family Services. H.H. was later transferred to Kosair Children's Hospital for a forensic evaluation of the injury. The forensic physicians determined that the broken leg injury was inconsistent with the explanations given by J.H. and the children. The forensic physicians determined that “[b]ased upon medical certainty the injury is considered

inflicted.” The physicians also identified what was suspected to be a prior fracture in H.H.'s right leg, as well as a possible skull fracture.

On August 29, 2006, Cabinet social worker Victoria Case-Kemper, who was assigned to the case, filed a Juvenile, Dependency, Neglect and Abuse Petition in Oldham Circuit Court alleging abuse of H.H. based upon the broken leg and other possible prior injuries. A separate petition filed the same day alleged that the other three children were neglected children based upon statements made by N.M. and Z.M. that they were periodically left alone (once or twice a week) when J.H. goes shopping. The petitions alleged that the children were at immediate risk of serious physical injury if left in custody of the mother. Based upon the petition, emergency custody orders were entered authorizing placement of the four children in the emergency custody of the Cabinet.

A temporary removal hearing was held on August 30, 2006, following which the children were placed in the temporary custody of the Cabinet.

An adjudication hearing was held on October 5, 2006, following which the family court determined that H.H. was an abused child based upon the fracture, and that the other three children were neglected children based upon their being left alone unsupervised by an adult.² The family court further determined that the children should remain in the custody of the Cabinet, and that J.H. should be limited to supervised visitations with the children. On October 20, 2006, J.H. filed a motion requesting

² Though it would appear that H.H. would have similarly have been left unsupervised by an adult, the family court did not make a finding that she was a neglected child.

additional findings in support of the court's decision; requesting that the court reconsider its decision; and requesting that the scheduled dispositional hearing be continued. The court subsequently denied these requests.

On November 6, 2006, a dispositional hearing was held, following which the family court determined that the children's placement with the Cabinet should be continued. This appeal followed.

HEARSAY/SUFFICIENCY OF EVIDENCE

First, J.H. contends that the trial court erred in removing the children because its decision was based upon hearsay testimony alone. She alleges, in substance, that the only evidence of abuse to H.H. was the testimony and evidence given by social worker Case-Kemper, which merely recited hearsay information she had gleaned from medical personnel and medical records, and that the only evidence of neglect of the other children was Case-Kemper's hearsay repetition of statements given by the older children to the effect that they were left alone on occasions when J.H. went shopping.

The issue is properly preserved for our review. At the outset of Case-Kemper's testimony, as the social worker began quoting the out-of-court statements of the medical personnel and the older children, J.H.'s counsel objected. The family court overruled her initial objections and stated that to avoid further interruptions, it would recognize her objections to the hearsay statements testified to by Case-Kemper as ongoing.

The out-of-court statements of the medical personnel and older children repeated by Case-Kemper during the course of her testimony was inadmissible hearsay. The rule has been thoroughly established that social workers have no special status or prerogatives in this area. “There is no recognized exception to the hearsay rule for social workers or the results of their investigations.” *Souder v. Commonwealth*, 719 S.W.2d 730, 734 (Ky. 1986); *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954 (Ky. 1997). Further, we note that KRS³ 620.080(2) specifically provides that hearsay testimony is allowed for good cause at a temporary removal hearing.⁴ By negative implication, this relaxation in evidentiary standards does not carry-over to an adjudication hearing.

Thus we agree with J.H. Case-Kemper's unrestrained recitation at the adjudication hearing of the out-of-court statements of medical personnel and the older children was inadmissible hearsay not covered by any exception to the hearsay rule.⁵ *See*

KRE Article VIII.

³ Kentucky Revised Statutes.

⁴ Hearsay testimony is allowed for good cause in a temporary removal hearing because “[t]he focus of a temporary removal hearing is the possibility of harm to the child rather than a determination of the truth or falsity of the dependency, neglect, or abuse petition's allegations”. *See* Graham and Keller, Kentucky Practice § 6.15 (2003).

⁵ In support of Case-Kemper's recitation of statements made by medical personnel the Cabinet cites us to KRE 803(4), which provides for an exception for “[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.” However, this exception “applies only to statements made by the one actually seeking or receiving medical treatment.” *Field v. Trigg County Hosp., Inc.*, 386 F.3d 729, 36 (6th Circ. 2004). In this case, that would be the seven-month old infant H.H. Thus, the rule is not applicable to statements made by medical personnel.

However, in *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky.App. 1998), a termination action, this court stated “if the quality and substantiality of competent evidence to support termination is abundantly sufficient, the admission of hearsay evidence is nonprejudicial error.” The rule is apropos to a removal action. Accordingly, we next review the competent evidence supporting removal for a determination of whether the evidence was sufficient to support the family court's decision.

As a preliminary matter, we note that this case was tried before the family court without a jury. As such, the family court heard the evidence and entered its findings of fact and conclusions of law. On review, such “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” See CR⁶ 52.01. Further, Kentucky law has long recognized that “[t]he trial court has broad discretion in determining whether the child fits within the abused or neglected category” and whether the abuse or neglect warrants removal. See *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 38 (Ky.App. 1999), citing *Department of Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky.App. 1977). The burden of proof at the adjudicatory hearing upon a removal petition shall be upon the complainant, and a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence. KRS 620.100(3).

⁶ Kentucky Rules of Civil Procedure.

KRS 600.020 provides the statutory definition of an abused and neglected child. The statute provides, in relevant part, as follows:

(1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:

(a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section⁷ by other than accidental means;

(b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to a child by other than accidental means;

(c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;

. . . .

(h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. . . .

(i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months.

Based upon the foregoing definitions, we now consider whether there is sufficient competent, non-hearsay, evidence to support the family court's finding that

H.H. is an abused child. Upon disregarding the inadmissible hearsay evidence presented

⁷ "Physical injury" means substantial physical pain or any impairment of physical condition. KRS 600.020(44).

at the adjudicatory hearing, we nevertheless conclude that there is. The forensic report, from which Case-Kemper testified extensively, and which was admitted into evidence, is captioned “Clinical Forensic Medicine Examination.” The report presents the results of the examination conducted by the Kosair Hospital's forensic physicians, and concludes with the following summarization:⁸

[H.H.] has sustained a mid-shaft transversely oriented femur fracture with the history provided by the natural mother of the 7 year old sibling falling with H.H. and of “feeling a pop” while changing her diaper that morning. The mechanism necessary to cause this type of fracture in a young infant is the result of indirect forces, as the leg is grabbed and forcefully manipulated or as the infant is being swung, slammed or thrown (Klienman 1998). An infant with an injury such as this would be immediately symptomatic and tearful and the discomfort would be apparent to the caregiver. Based upon the medical certainty the injury is considered inflicted.

The conclusions of the forensic physicians, as stated in the medical record, disclose that the cause of the injury to H.H. is inconsistent with the explanations given by J.H. and the children. Moreover, the physicians concluded that the “injury is considered as inflicted.” As noted above, an abused child is defined as a child whose parent “[i]nflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means[.]” KRS 620.020(1)(a). While J.H. presented evidence to the effect that the injury was accidental, her explanation was

⁸ Upon the record before us, this evidence was properly admitted at the adjudication hearing. It is now well settled that the medical record of a patient in a hospital is admissible in evidence under the regular business entries exception to the hearsay rule. *Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122, 123 (Ky. 1991) (citing *Buckler v. Commonwealth*, 541 S.W.2d 935 (Ky. 1976)). J.H. does not challenge the authentication of the medical record, and we will consider the record as properly admitted for purposes of our review.

contradicted by the forensic physicians, who concluded that the injury was consistent with an injury caused by “indirect forces, as the leg is grabbed and forcefully manipulated or as the infant is being swung, slammed or thrown[.]”

In light of the medical evidence, the family court's determination that H.H. is an abused child is supported by competent evidence presented at the adjudication hearing. We accordingly will not disturb its finding of abuse.

We also conclude that the family court's conclusion that the three older children are neglected children is supported by competent evidence. We first note that the record discloses that this was the fifth referral to the Cabinet concerning J.H. and her care for her children. While the prior referrals were unsubstantiated, an outcome of those referrals was that the children were not to be left alone without adult supervision. By J.H.'s own statement, on the occasion in which H.H. was allegedly injured by being dropped or fallen upon by one of the older children, she was outside the residence and the children were unsupervised by an adult. KRS 600.020(1)(h) provides that a neglected child is a child who fails to receive adequate care and supervision. In combination with the substantiated instance of abuse which resulted in a leg fracture to H.H., the prior admonishment to J.H. that the children should not be left alone without adult supervision, and J.H.'s admission that she had left the children unattended on the night of August 26, 2006, we find no error in the family court's determination that the three older children were neglected on the basis of inadequate supervision.

DENIAL OF THE RIGHT TO CONFRONT WITNESSES

Next, J.H. contends that her due process rights were violated because she was not afforded the opportunity to cross-examine all adverse witnesses because all evidence offered was in the form of hearsay. J.H. does not identify the specific witnesses she was denied the opportunity to cross-examine; however, presumably she refers to the medical personnel who conducted the forensic examination of H.H. and the children who reported that they were left alone when J.H. went shopping.

We disagree with J.H.'s contention that she was denied the right to cross-examine any witness. J.H. cites us to no ruling of the court which limited her in cross-examining any witness at the adjudicatory hearing, nor any ruling which prevented her from seeking to call any witness for purposes of examination on any issue relevant to the proceedings. Due process includes, at a minimum, reasonable notice and a meaningful opportunity to be heard. *See Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970); *Abul-Ela v. Kentucky Bd. of Medical Licensure*, 217 S.W.3d 246, 251 (Ky.App. 2006). We believe J.H. was afforded those rights in the proceedings below.

Moreover, as previously noted, upon disregarding the hearsay statements offered by the social worker, there was nevertheless competent evidence to support the family court's removal decision.

DENIAL OF RIGHT TO TESTIFY

Next, J.H. contends that the family court erred when it denied her the opportunity to testify at the October 5, 2006, adjudication hearing despite her request to do so.

At the conclusion of the Cabinet's case J.H.'s counsel sought to call her to the stand. The family court stated that it "was not going to do that at this time," apparently on the basis of lack of time allocated for the hearing. Upon further discussion, the family court stated to the effect that it would "reserve" on the issue.⁹

This issue is unpreserved for our review because J.H. failed to place her proposed testimony in the record by avowal. "[W]ithout an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial." *Bayless v. Boyer*, 80 S.W.3d 439, 447 (Ky. 2005) (quoting *Cain v. Commonwealth*, 554 S.W.2d 369 (Ky. 1977)). Moreover J.H. does not, before us, identify what her testimony would have been or how such testimony would have been of consequence to the family court's decision. As such we will not review this issue on the merits.

FAILURE TO MAKE ADEQUATE FINDINGS

Finally, citing CR 52.01, J.H. contends that the family court erred by failing to make sufficient findings of fact in support of its determination that the children had

⁹ Though it appears that at the time of the hearing J.H. was under criminal investigation for the injuries sustained by H.H., and despite suggestions to the contrary, J.H. did not invoke her Fifth Amendment right not to testify.

been abused and/or neglected and its determination that the children should be removed from her custody.

The Adjudication Hearing Orders entered by the family court utilized the pre-printed AOC order forms. The family court checked boxes on the forms indicating its findings that the children were abused and/or neglected and that reasonable efforts had been made to prevent the children's removal from the home. In addition, the court made handwritten findings on the H.H. order that "child suffered femur fracture while in mother's care which was determined inflicted," and handwritten findings to the effect that the children had been left unsupervised on the other three orders. Hence, the essential findings necessary to support the removal of the children were made. As such, we will not disturb the family court's decision on the basis of its failure to make sufficient findings in support of its determinations.

CONCLUSION

For the foregoing reasons the orders of the Oldham Family Court are affirmed.

ALL CONCUR.

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