

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000850-ME

M.D., MOTHER

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 06-J-00744

D.B., FATHER; COMMONWEALTH
OF KENTUCKY; B.E.B., A CHILD; AND
CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEES

AND

NO. 2007-CA-000851-ME

M.D., MOTHER

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 06-J-00746

D.B., FATHER; COMMONWEALTH
OF KENTUCKY; K.B., A CHILD; AND
CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEES

AND

NO. 2007-CA-000852-ME

M.D., MOTHER

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 06-J-00748

B.D., GRANDPARENT; D.D.,
GRANDPARENT; COMMONWEALTH OF
KENTUCKY; K.B.D., A CHILD; AND
CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR AND THOMPSON, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

THOMPSON, JUDGE: M.D. (mother) appeals from three orders of the Hardin Circuit Court finding her guilty of neglecting her three children, K.B.(daughter), B.E.B., and K.B.D. For the reasons stated herein, we affirm.

On November 30, 2006, Kentucky State Trooper Peter Binkley was dispatched to the residence of mother and E.B., who is the mother's husband (husband), where domestic violence had been reported by husband. After arriving and investigating, Trooper Binkley placed mother under arrest for assaulting her husband.

On December 6, 2006, Christy Riley, a social worker employed by the Cabinet for Health and Family Services (Cabinet), filed a dependency, neglect, and abuse petition on behalf of mother's three minor children alleging that mother had neglected her children.

On December 13, 2006, a temporary removal hearing was conducted wherein the mother stipulated that reasonable grounds existed to believe that her

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

children would be neglected if returned to her custody. Ordering the temporary removal of the children, the family court placed daughter and B.E.B. in the custody of their father, D.B. K.B.D. was placed in the custody of his maternal grandparents, R.R. and A.R.

The family court further ordered that no party could consume alcohol while in the physical presence of the children, mother was to follow all recommendations of the Cabinet, and that mother was permitted only supervised visitation with the children. All parties agreed to abide by the court's order.

Less than a month later, an emergency hearing was conducted regarding the maternal grandparents' custody of K.B.D. At the hearing, Riley testified that K.B.D.'s maternal grandparents had failed to supervise mother's visitation with K.B.D. and that the maternal grandmother stated that the Cabinet was "expecting too much from her."

Further, the maternal grandparents had permitted the mother to take K.B.D. to see a movie which culminated in the two staying overnight in a hotel with mother's husband. At the conclusion of the hearing, and after finding that reasonable efforts were made to prevent the child's removal, the family court placed K.B.D. in the custody of his paternal grandparents, B.D. and D.D.

On March 28, 2007, at the beginning of the neglect adjudication, mother moved the court to appoint a special prosecutor because she believed that a conflict of interest existed in her case. Because the First Assistant County Attorney in Hardin County was J.B.P., the maternal niece of B.D., who was an interested party with custody of K.B.D., mother contended that the entire county attorney's office should be

prohibited from participating in the case. After finding that J.B.P. had not entered an appearance in the case and that she had no immediate family relationship with a party, the family court denied mother's motion.

Thereafter, Riley testified that on November 30, 2006, she went to mother's house and observed mother's intoxicated husband who had sustained numerous cuts to his upper body. She further testified she observed all three children at the residence and relocated them to a safe place to stay that night.

Riley further testified that she went inside the home and observed trash scattered in the house, numerous alcohol containers in the kitchen sink, several rooms in disarray, and animal feces and urine stains on the carpet. The photographs of the interior of mother's residence, taken by Riley on the night of the domestic dispute, were then admitted into the record.

Describing her communications with mother during the period following her arrest, Riley testified mother confessed to her that she drank two beers prior to picking up her teenage daughter from school on Nov. 30, 2006. She further testified that mother admitted to consuming more alcohol between picking up daughter and picking up B.E.B. from school later the same day. At the conclusion of Riley's testimony, mother's hand-written statement made to Riley was admitted into evidence.

In the hand-written statement, mother admitted to having a physical altercation with her husband although she stated that he was the aggressor and her actions were in self-defense.

Trooper Binkley then testified that he observed a bruised husband after arriving at mother's residence. He further testified that he observed the three children in

the residence, and discovered mother, naked from the waist down, passed out in bed. After two attempts to wake her failed, mother's teenage daughter assisted in waking her and getting her dressed. Brinkley testified that mother had a strong odor of alcohol about her person and needed assistance to walk to the patrol car following her arrest for fourth-degree assault.

As the only witness for the defense, Vicky Hatmaker, a family friend, testified that she gave daughter a ride home from school every day during the final part of the 2006 calendar year.

At the conclusion of the hearing, the family court determined that mother had neglected all three of her children. Specifically, the family court stated that mother had committed an act of domestic violence in the physical presence of the three children; mother had placed her daughter in a highly inappropriate position of preparing her partially nude, intoxicated mother for arrest; mother was unable to supervise her children due to incapacitation; and that the unsanitary conditions of the home placed the children in a hazardous environment. This appeal follows.

Mother contends that the family court erred by finding by a preponderance of evidence that her three children were neglected as defined by KRS 600.020(1). Specifically, mother contends that the family court's determination was clearly erroneous because it was unsupported by substantial evidence. She contends that the Commonwealth's evidence was unreliable and insufficient to support the court's findings of neglect in her case. We disagree.

KRS 600.020(1) defines an abused or neglected child as follows:

'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:

...

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

(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....

In order to find child neglect, KRS 620.100(3) provides that a family court must find the complaint of neglect true by a preponderance of the evidence following a dependency, neglect, and abuse adjudication hearing. The burden to prove child neglect lies with the complainant. *Id.*

In determining whether a child has been neglected, the trial court has broad discretion in deciding whether a child fits within the abused or neglected category as defined by KRS 600.020(1). *R.C.R. v. Com. Cabinet For Human Resources*, 988 S.W.2d 36, 38 (Ky.App. 1998).

We review the family court's factual findings under the clearly erroneous standard. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Factual findings are not clearly erroneous if supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence that a reasonable mind would find sufficient to support a conclusion. *Id.* Despite the fact that a reviewing court would

have found differently, an appellate court cannot substitute its judgment for that of the trial court with regard to the credibility and weight of the evidence. *New v.*

Commonwealth, 156 S.W.3d 769, 773 (Ky.App. 2005).

Mother contends that the family court could not have found that she committed domestic violence against her husband in the presence of her children. Mother contends that there was no testimony from any witness with personal knowledge that she committed such an act in her children's presence. We disagree.

The mother's own written statement admits that she and her husband engaged in a violent physical altercation. Riley's and Binkley's testimony corroborated mother's statement as they observed a battered husband shortly after the domestic dispute.

Mother's contention regarding the family court's finding that the children were present during the domestic altercation must fail as well. When Trooper Binkley arrived, he observed the children looking out of windows and a door within the house. Additionally, mother's written statement revealed that she had driven two of her children home several hours before the domestic dispute and that the third child was already present at the residence.

While no testimony directly placed the children in the residence at the time of the physical altercation, circumstantial evidence is sufficient to support a factual finding if it permits reasonable minds to believe in the veracity of the finding. *Brewer v. Commonwealth*, 206 S.W.3d 313, 318 (Ky. 2006). Here, the family court, as finder of fact, properly used circumstantial evidence to find that the children were present during the domestic dispute. *Dillingham v. Commonwealth*, 995 S.W.2d 377, 380 (Ky. 1999).

Accordingly, based on the entire record below, we conclude that the family court's factual findings are supported by substantial evidence, and the court correctly applied the applicable law to find that the children were neglected as defined by KRS 600.020(1).

Mother next contends that the family court erred by denying her motion to prohibit the Hardin County Attorney's office from participating in the case and for the appointment of a special prosecutor. She contends that the First Assistant County Attorney's familial connection to this case rendered the entire prosecutor's office incapable of participating in the custody case due to the serious conflict of interest. We disagree.

KRS 15.733(2)(a) provides that a prosecuting attorney must disqualify herself from a proceeding in which she or her spouse, or a member of her immediate family either individually or as a fiduciary is a party in the proceeding. Under the statute, J.B.P. did not have to disqualify herself outside a showing of actual prejudice which has not been demonstrated. Moreover, the "mere possibility of the appearance of impropriety" is inadequate to disqualify the entire staff of a prosecutor's office from proceeding in a case. *Summit v. Mudd*, 679 S.W.2d 225, 225-226 (Ky. 1984).

For the foregoing reasons, the three orders of the Hardin Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Caleb T. Bland
Elizabethtown, Kentucky

BRIEF FOR APPELLEES:

Philip Moore
Assistant County Attorney
Elizabethtown, Kentucky

Micah Shirts
Elizabethtown, Kentucky