

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 24, 2015 Session

IN RE JOSEPH E., ET AL.¹

**Appeal from the Circuit Court for Davidson County
No. 12D133 Philip E. Smith, Judge**

No. M2014-00138-COA-R3-JV – Filed September 23, 2015

Mother and Father were divorced in 2009; the final divorce decree incorporated a permanent parenting plan designating Mother as primary parent. On May 17, 2010, Mother filed a petition in Davidson County Juvenile Court to have two of the parties' children declared dependent and neglected based on Father's alleged physical abuse of the children in two incidents in Davidson County on May 12. At the time of the incidents neither party nor the children were residents of Davidson County. Following a hearing in Juvenile Court, a trial *de novo* was held in Circuit Court; the court held that the evidence did not support a finding that the children were dependent and neglected and dismissed the petition. Mother appeals, asserting that the court erred in limiting proof to the events which occurred in Davidson County and in excluding the testimony of certain expert witnesses; Mother also argues that the evidence supports a finding that the children were dependent and neglected. Determining that the court did not abuse its discretion in the admission of evidence and that the evidence does not clearly and convincingly show that the children were dependent and neglected, we affirm the dismissal of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Cynthia A. Cheatham, Manchester, Tennessee, for the appellant, Kristina L. E.

David G. Ridings, Nashville, Tennessee, for the appellee, Robert M. E.

¹ This Court has a policy of protecting the identity of children in dependent and neglect cases by initializing the last names of the parties.

OPINION

I. FACTS AND PROCEDURAL POSTURE

Kristina L. E. (“Mother”), at times pertinent hereto a resident of Sumner County, and Robert M. E. (“Father”), also a resident of Sumner County, were divorced May 4, 2009 in Sumner County; the parties are the parents of two girls and two boys. The final decree of divorce incorporated a permanent parenting plan wherein Mother was designated primary residential parent and Father was awarded visitation with the children every other weekend and every Wednesday from the time school ended until 8:00 p.m. This appeal involves the two boys, Joseph and Robert.

On May 17, 2010, Mother filed a petition in the Juvenile Court for Davidson County entitled “Petition for Exclusive Custody, to Suspend Visitation and for Emergency Order/Restraining Order,” alleging that Joseph and Robert were dependent and neglected children as defined in Tenn. Code Ann. § 37-1-102(b)(12)(B), (F), and (G), and seeking to have Father’s parenting time suspended; she sought to be awarded “absolute care, custody, and control of the minor children, with the authority to consent to any and all necessary medical treatment.” Mother alleged that Father had “a history of not being able to control his anger and has admitted that he has some very serious anger management problems,” and that Father had not complied with the parenting plan requirements that he attend counseling and not have guns, knives, hunting bows, or weapons in the presence of the children. Mother also made allegations regarding incidents occurring in Davidson County during the children’s visit with Father on May 12. Specifically, she alleged that Father hit Joseph with a menu at Chili’s restaurant; that while in Centennial Park, Father locked Robert in Father’s car against his will; that when Robert placed his leg outside the vehicle, Father struck Robert with keys in his hand, leaving a puncture wound on Robert’s leg; and that Father refused to give Robert anything to stop the bleeding.

A hearing was held on January 10, January 12, May 26, and October 10, 2011. The court entered an order on November 7 holding that the evidence did not support a finding that the children were dependent and neglected as a result of the incidents at Chili’s and in Centennial Park; the order went further and summarized the “contentious litigation” between the parties beginning with the entry of the divorce decree and concluded that the children were dependent and neglected within the meaning of Tenn. Code Ann. §37-1-102(b)(12)(F) “due to the manipulative behavior of both parents in desperate attempts to gain control over the children and the past three years of litigation.” The court ordered that Father’s visitation with the boys be suspended pending “a further court order where proof should be presented from a counselor for the Father and the boys which would recommend how any visitation should be set between them.” Citing Tenn. Code Ann. §37-1-103(d), the court ordered that the case be transferred to the Sumner County Juvenile Court, as neither party resided in Davidson County.

On November 8, 2011, Father filed a notice appealing the judgment to the Circuit Court of Sumner County. Mother subsequently filed a motion in the Davidson County Juvenile Court requesting “a de novo hearing [of the Juvenile Court’s decision] by the Judge of the Fourth Circuit Court for Davidson County, as an appeal.” On January 11, 2012, the Juvenile Court, citing Tenn. Code Ann. § 37-1-159, ordered that the appeal “be returned to Davidson County for an Appeal De Novo in the Circuit Court.” On April 15, 2013, Father filed a pleading in the Davidson County Circuit Court entitled “Motion to Transfer to Sumner County Circuit Court or in the Alternative to Set for Trial,” which the court denied on June 7, 2013; the court did not explain the legal or factual basis of the denial of the transfer request.² Trial was held in Fourth Circuit Court of Davidson County on November 26 and 27, 2013; the court made an oral ruling on December 9, 2013, and on January 30, 2014, entered an order stating that it “cannot find that the alleged acts of abuse occurred in the way described” and dismissing the petition.

Mother appeals, asserting that the Circuit Court erred in limiting testimony relating to the alleged abuse of the children to the incidents that occurred in Davidson County and in refusing to consider the testimony of two witnesses she offered as experts; Mother also contends that the evidence preponderates against the court’s holding that the children are not dependent and neglected.

II. ANALYSIS

Our consideration of the issues presented is guided by the statutes applicable to dependency and neglect proceedings. Tenn. Code Ann. § 37-1-103 gives the Juvenile Court exclusive original jurisdiction in proceedings where children are alleged to be dependent and neglected. Tenn. Code Ann. § 37-1-103(d)(1) gives a court temporary jurisdiction to issue temporary orders “on behalf of a child present or residing in that county”; § 37-1-103(d)(2) allows that a court only has temporary jurisdiction in dependent and neglect proceedings “when the court determines it is necessary to protect the best interest of that child by action of that court.” Hearings in dependent and neglect proceedings are conducted in accordance with Tenn. R. Juv. P. 27(b):

Hearings in juvenile matters shall be conducted in two separate phases, the adjudicatory hearing, and the dispositional hearing, which may be continuous. The court shall first conduct an adjudicatory hearing to determine if the allegations of the petition are sustained. If the allegations of the petition are not sustained the petition shall be dismissed. If the allegations of the petition are sustained, the court may proceed immediately

² Tenn. Code Ann. § 37-1-112(a) provides for the transfer of cases from the county in which a proceeding has been commenced to the county of residence of a child on motion by a party or on the court’s own motion. Mother’s petition alleged that “there is currently a custody petition involving the minor children pending in Sumner County. . . .” The nature of the referenced proceeding is not apparent from the record.

or at a later hearing to the dispositional phase of the proceeding. Pending disposition, the court may enter such order of protection and assistance as the court deems necessary under the circumstances, in the best interest of the child and for the protection of the public.

Pursuant to Tenn. Code Ann. § 37-1-159(a) an appeal from the juvenile court in such a proceeding is to the circuit court, where the case is to be tried *de novo*.

A. LIMITATION OF EVIDENCE TO ACTS WHICH OCCURRED IN DAVIDSON COUNTY

The witnesses who testified at the hearing were: Mother; Father; Joseph; Robert; Dr. Stacy Williams; Dr. Jay Woodman; Mark Wynn, a retired detective with the Metropolitan Police Department; Dr. Philip Kaplan; and Joseph Farrar.³ In addition to testimony related to the events in Davidson County on May 12, 2010, Mother sought to introduce evidence through several of the witnesses that the children had been exposed to acts of domestic violence which occurred in other places and at other times, as well as evidence of Father's erratic behavior; the court stated at numerous occasions that it was limiting the scope of testimony to "what the children told [the witnesses] and what [the children] have said in response to any questions" regarding the Davidson County incidents.⁴ Mother contends that the trial court should have considered the history of abuse and evidence of events that took place outside of Davidson County in determining whether the children were, in fact, dependent and neglected.

Generally, questions concerning the admissibility of evidence rest within the sound discretion of the trial court, and this Court will not interfere with the exercise of this discretion in the absence of a clear showing of abuse appearing on the face of the record. *State v. Van Tran*, 864 S.W.2d 465, 477 (Tenn. 1993); *State v. Harris*, 839 S.W.2d 54, 73 (Tenn. 1992). An abuse of discretion occurs when the trial court applies an incorrect legal standard or reaches a conclusion that is "illogical or unreasonable and causes an injustice to the party complaining." *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006) (citing *Howell v. State*, 185 S.W.3d 319, 337 (Tenn. 2006)). "[D]iscretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be

³ Dr. Stacy Williams is a medical doctor who testified by deposition to her treatment of Robert E. following the Davidson County events. Dr. Jay Woodman is a therapist who testified to his therapeutic sessions with the children following the May 12, 2010 incidents. Mark Wynn testified to his conversations with the children following the May 12, 2010 events. Dr. Kaplan is a clinical psychologist who testified as to interviews and testing he performed on the children. Joseph Farrar is the maternal grandfather of the children, and testified to his interaction with the children following the May 12, 2010 events and his knowledge of Robert's injury.

⁴ In this regard, Mother sought to introduce testimony from Joseph Farrar, as well as Mark Wynn and Dr. Philip Kaplan. Mother does not take specific issue on appeal with the limitation of the grandfather's testimony; we shall discuss the testimony of Mark Wynn and Dr. Kaplan, for which offers of proof were made, later in this opinion.

guided by sound legal principles.” Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 58 (2000) (citations and internal quotation marks omitted).

The emergency nature of the petition gave the court temporary jurisdiction to address matters which occurred in Davidson County on May 12, 2010. *See* Tenn. Code Ann. § 37-1-103(d)(2). The focus was narrow and, in the exercise of its discretion, the court narrowed the evidence to that having to do with the events that took place in Davidson County on May 12, 2010; such limitation was consistent and in accordance with the limits of jurisdiction conferred by the statute. While evidence of Father’s behavior and acts of domestic violence allegedly committed elsewhere may have given context to the events of May 12, it was not direct evidence of what took place in Davidson County on that date. The court did not abuse its discretion in limiting the issues and proof.⁵

With the foregoing in mind, we proceed to address the other issues presented.

B. TESTIMONY OF DR. KAPLAN AND MARK WYNN

Mother raises several concerns regarding the testimony of Mark Wynn and Dr. Kaplan. Specifically, Mother takes issue with the following: the exclusion of “Dr. Kaplan’s testimony about the significance of some of [Father]’s behaviors and Mr. Wynn’s testimony about the danger posed by [Father] to his children”; a statement made by the court which Mother contends mischaracterized their testimony; and the court’s statement that it gave Dr. Kaplan’s testimony little weight.

Mark Wynn was called by Mother to testify and was recognized by the court as a domestic violence expert. Dr. Kaplan is a clinical psychologist who examined the children on June 1 and June 2, 2013. Both had talked with the children after May 12, 2010 and the Court limited the testimony of each to their conversations with the children relative to the events in Davidson County on May 12, 2010. The following statement by the court in response to Mother’s counsel during the examination of Mr. Wynn gives the basis of the court’s limitation of the testimony of both witnesses:

Well, I mean first of all – I mean, you know, you can voir dire him. I’ve already found that his testimony, one, regarding any sort of history of domestic violence between the children and [Father] or [Mother] will not substantially assist me in determining the facts regarding these two incidents, whether they occurred or not. It’s purely a situation of where –

⁵ Neither party raises jurisdiction as an issue, and we do not pass on whether Tenn. Code Ann. § 37-1-159 required the Circuit Court to exercise jurisdiction under the circumstances presented.

did these two acts occur as Robbie said, or did they occur as [Father] said? The prior history of this whole case is not relevant. I know you think it is, but it's not relevant, okay? Once we get through that, if we go to a dispositional phase, his testimony is relevant to disposition and how they view things, why they're where they are right now, but we're in the adjudication phase. It is simply not relevant, therefore – I mean it doesn't substantially assist me in any way, which is a requirement under the rule. So what I would prefer you to do is ask him about what the boys said, and if you want to make an offer of proof, I'll step off and let you make that offer of proof.

Tenn. R. Evid. 702 allows a person who is qualified as an expert to give opinion testimony “[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue.” That such testimony substantially assist the trier of fact is a threshold requirement and reflects the weight that is to be given to the expert's testimony. See *McDaniel v. CSX Trans., Inc.*, 955 S.W.2d 257, 264 (Tenn. 1997); *Primm v. Wickes Lumber Co.*, 845 S.W.2d 768, 770 (Tenn. Ct. App. 1992). [Q]uestions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. *McDaniel*, 955 S.W.2d at 263 (citing *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993)). On review, we do not substitute our judgment for that of the trial court but, rather, determine whether the court abused its discretion in excluding the testimony. *Hunter v. Ura*, 163 S.W.3d 686, 703 (Tenn. 2005).

At the time of the court's ruling excluding the testimony, the case was in the adjudicatory phase, with the sole issue being whether the incidents occurred as the boys testified or as Father testified; as noted by the court, this was an entirely factual determination. The boys and Father were the only witnesses who were present when the events took place and their testimony conflicted. In seeking to resolve the conflict in testimony it was appropriate for the court to allow testimony as to what the boys told Mark Wynn and Dr. Kaplan relative to the events; in this fashion, their testimony could reinforce or undermine the boys' testimony. However, inasmuch as Mark Wynn and Dr. Kaplan were not actual witnesses to the events, any opinions they might offer within their areas of expertise would not be relevant to the specific issue before the court at that time and, as the court stated, would not assist it in making the factual determination.⁶ We find no abuse of discretion in excluding their expert testimony.

⁶ In a lengthy conference prior to the introduction of proof, the court and counsel discussed, *inter alia*, the expected testimony of Mark Wynn and Dr. Kaplan; in the course of that conference the court was advised that the witnesses were expected to testify about matters other than the events which occurred in Davidson County on May 12, 2010.

After the court heard the testimony of Mr. Wynn and Dr. Kaplan, Mother made an offer of proof as to each witness outside the presence of the court; we have reviewed each offer. Mr. Wynn's testimony pertained to his assessment of whether the children's safety was a serious concern and the relevant history one would need in order to determine whether Father should have been arrested and charged with assault based on the Davidson County allegations. Dr. Kaplan addressed the significance of Father's behaviors and mental anguish experienced by the children based on a history of incidents involving Father. Neither testified as having any direct knowledge of the events of May 12, 2010. In the absence of such testimony, we find no error in the court's determination that the testimony would not substantially assist in resolving the issue before the court and find no abuse of discretion in excluding the proof.

Without citing to the record, Mother asserts that the court "incorrectly characterized" the proposed expert testimony of Dr. Kaplan and Mark Wynn as "testimony intended to bolster the children's credibility." Upon our review of the record, we have found a statement the court made in the course of making its oral ruling that the three witnesses would be "bolstering the boys' testimony by statements of belief in their testimony." The court's statement is made in the course of explaining why the testimony would not substantially assist the court in resolving the factual issue before it, as required by Tenn. R. Evid. 702. Viewed in this context, we find no impropriety in nor do we draw a negative inference from the court's statement.

We find no merit to Mother's argument that the court's decision to afford little weight to Dr. Kaplan's testimony is "wholly without support from anything in the record." In the course of its oral ruling the court stated that Dr. Kaplan's testimony regarding the Davidson County events contained details that were not mentioned by any of the other fact witnesses and was "problematic"; the court concluded that Dr. Kaplan was "simply confused" and, because of the confusion, the court would give "very little weight to his testimony." We have reviewed Dr. Kaplan's testimony and note that it contains details not discussed by any of the other witnesses; thus there is a factual basis in the record for the court's statement in that regard.

C. DISMISSAL OF THE PETITION

Mother also asserts that, contrary to the trial court's ruling, the evidence supports a finding that the children were dependent and neglected as defined by Tenn. Code Ann. § 37-1-102(b)(12)(B), (F), and (G).⁷

The trial court correctly stated that it "must determine whether the alleged acts of abuse occurred in the manner described by the victims." In both its oral ruling and the

⁷ Mother fails to make citations to the record to support her argument.

written order, the court recounted the testimony of each witness and stated the weight given to each; finding that there were inconsistencies in Robert and Joseph’s testimony, the court determined that neither “testified in a credible manner.”⁸ The court found Father to be “the most believable” and afforded “much greater weight to his testimony than to the two boys.”

Mother acknowledges that she had the burden of proving that the children were dependent and neglected by clear and convincing evidence, *see* Tenn. Code Ann. § 37-1-129(c). Clear and convincing evidence “is evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn.” *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992)). Consistent with this burden, the court stated in its ruling that it was incumbent upon Mother “to establish the burden of proof by clear and convincing evidence” and that she failed to do so.

We give great deference to the court’s determinations on matters of witness credibility. *Frazier v. Frazier*, No. W2007-00039-COA-R3-CV, 2007 WL 2416098, *2 (Tenn. Ct. App. Aug. 27, 2007) (citing *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999)). “[T]he trial court observes the witnesses as they testify” and is therefore “in the best position to assess witness credibility.” *Id.* Thus, “we will not reevaluate a trial judge’s credibility determinations unless they are contradicted by clear and convincing evidence.” *Id.* This deference is particularly appropriate in a case such as this, where the testimony on determinative factual issues is conflicting.

The court based its decision that the evidence did not support a finding that the children were dependent and neglected on its assessment of the credibility of the witnesses; the evidence does not preponderate against the court’s assessment of the witnesses’ credibility. Moreover, clear and convincing evidence does not establish that the children were dependent and neglected as a result of the events which occurred in Davidson County on May 12, 2010.

For the foregoing reasons, the judgment of the trial court is affirmed.

RICHARD H. DINKINS, JUDGE

⁸ We have reviewed the children’s testimony and agree that it contains inconsistencies.