

In re E.C.
271 Ga.App. 133, 609 S.E.2d 381
Ga.App.,2004.
Dec 16, 2004 (Approx. 4 pages)

Court of Appeals of Georgia.

In the Interest of E.C. et al., children.

No. A04A2320.

Dec. 16, 2004.

Background: County Department of Family and Children Services (DFCS) alleged that two children were deprived. The Juvenile Court, Richmond County, Kernaghan, J., found the children to be deprived and transferred custody of the children to various family members. Mother appealed.

Holding: The Court of Appeals, **Ruffin**, P.J., held that evidence was insufficient to support the trial court's finding that mother's children were deprived.

Reversed.

West Headnotes

[1] KeyCite Notes

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(F) Review

211k248 Review

211k250 k. Presumptions. **Most Cited Cases**

211 Infants **KeyCite Notes**

211VIII Dependent, Neglected, and Delinquent Children

211VIII(F) Review

211k248 Review

211k252 k. Questions of Law and Fact. **Most Cited Cases**

On appeal from a finding that a child is deprived, the Court of Appeals reviews the evidence in the light most favorable to the juvenile court's judgment to determine whether any rational trier of fact could have found by clear and convincing evidence that the child was deprived.

[2] KeyCite Notes

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(C) Evidence

211k175 Weight and Sufficiency

211k179 k. Deprivation, Neglect, or Abuse. **Most Cited Cases**

Evidence was insufficient to support the trial court's finding that mother's children were deprived; the county department of family and children services (DFCS) did not call or cross-examine a single witness at the deprivation hearing, there was no competent, nonhearsay evidence admitted that supported the finding that mother's partner verbally abused her in front of the children or that there was domestic violence between mother and her partner, DFCS failed to show how mother's use of marijuana "on occasion" was relevant to the deprivation finding, and there was no evidence that the children had been harmed by mother's lesbian relationship with her partner. **West's Ga.Code Ann. § 15-11-56.**

[3] KeyCite Notes

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k931 Findings of Court or Referee

30k931(6) k. Incompetent Evidence Disregarded. **Most Cited Cases**

During a nonjury trial, it is presumed that the court is able to sift the wheat from the chaff and select only the legal evidence.

[4] KeyCite Notes

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)3 Findings of Court

30k1010 Sufficiency of Evidence in Support

30k1010.2 k. Total Failure of Proof. **Most Cited Cases**

The Court of Appeals will reverse the trial court only where there is no legal evidence to support the trial court's ruling.

382 *137 Elizabeth Littrell, **Gerald Weber, ACLU of Georgia, Margaret Garrett, American Civil Liberties Union, **Jean Kutner**, Kutner & Bloom, Atlanta, for Appellant.

William Joy, Shalen Nelson, Senior Assistant Attorneys General, **John Claeys**, Augusta, Charissa Ruel, Assistant Attorney General, Thurbert Baker, Attorney General, for Appellee.

*133 **RUFFIN**, Presiding Judge.

The Richmond County Department of Family and Children Services (DFCS) alleged that E.C. and S.C., minor children in their mother's custody, were deprived. Following a hearing, the juvenile court issued an order entitled "Order Transferring Custody" in which it found the children deprived and awarded custody of the children to various family members. The mother appeals, arguing that insufficient evidence supported the juvenile court's finding of deprivation. The mother also argues that the juvenile court lacked jurisdiction. For reasons that follow, we reverse.

[1] 1. "On appeal from a finding that a child is deprived, we review the evidence in the light most favorable to the juvenile court's judgment to determine whether any rational trier of fact could have found by clear and convincing evidence that the child was deprived." **[FN1]** Viewed in this light, the evidence shows that the mother has a son, E.C., age six, and a daughter, S.C., age four, by two different men. The son was fathered by Curtis Colter, **[FN2]** who is married to Crystal Colter. In August 2003, shortly after Colter's paternity was established, Crystal contacted DFCS, stating that she and "other family members [were] very concerned about the children's home life." According to an affidavit prepared by a DFCS case manager, Melvin Ransom, the mother is in a lesbian relationship with Angela Martin. Crystal also informed DFCS that the mother "ha[d] broken down to two different childcare providers about ... being beaten by [Martin]" and that the mother had attempted suicide.

[FN1.](#) (Punctuation omitted.) **[In the Interest of E.M., 264 Ga.App. 277, 278, 590 S.E.2d 241 \(2003\).](#)**

[FN2.](#) The daughter was fathered by Robert Sessoms.

According to Ransom's affidavit, he contacted E.C., who told him that his mother and Martin smoked marijuana in the house. With respect to the allegations of violence, E.C. told Ransom that his mother and Martin argued, but that he had not seen Martin hit his mother. Ransom's affidavit showed that DFCS also spoke with several others regarding allegations of physical violence in the home.

As a result of the allegations, the mother was required to sign a safety plan in which she agreed the children would have no contact *134 with Martin. The plan was signed on August 29, 2003. That night, the mother was supposed to work at a restaurant where she was a waitress. Because Martin normally provided child care, the mother stayed home. The next night, August 30, the mother asked her sister to watch the children. Apparently, the sister was unable to keep the children **383 the entire time, and she took them to the home of Martin's mother. Later that night, DFCS learned that Martin was at her mother's house while the children were present, and it removed the children from the home.

On September 2, 2003, the juvenile court conducted a detention hearing. Based upon the alleged violation of the safety plan, the children were taken into DFCS custody. The juvenile court also appointed a guardian ad litem, Al Yarbrough, to investigate the allegations of deprivation.

[DFCS subsequently filed a deprivation petition, and the juvenile court conducted a hearing.](#)

[FN3] At the beginning of the hearing, the mother's lawyer requested that the children be placed in the mother's custody, and the juvenile court responded, DFCS "says I can't do that." The

hearing then began, but DFCS called no witnesses. However, Colter's attorney called witnesses to testify regarding the Colters' fitness to serve as E.C.'s custodial family. The attorney also called a witness who testified that the children's maternal grandparents would be able to care for the children.

FN3. The hearing began on November 24, 2003, and was continued to December 15, 2003.

The mother's attorney then called witnesses, including both Yarbrough, the guardian ad litem, and Priscilla Germany, the current DFCS case worker. In his report, Yarbrough wrote that his "investigation found little solid evidence for [the] allegations" of domestic violence. And Germany testified that the mother "has been working on her case plan" and had done everything DFCS had requested. Although the mother had yet to complete a drug assessment and treatment plan, the delay was caused by DFCS rather than any reticence on the part of the mother. When asked for her recommendation, Germany said that she thought the children could be returned to their mother and that DFCS would continue to monitor the case for six months.

Following the hearing, the juvenile court found the children to be deprived, and it awarded custody of E.C. to his biological father and custody of S.C. to her maternal grandparents. On appeal, the mother argues that insufficient evidence supports the juvenile court's finding of deprivation. We agree.

[2] At the outset, we note that DFCS neither called nor cross-examined a single witness during the deprivation hearing. Thus, *135 DFCS must rely primarily on the report and affidavit prepared by Ransom to support the deprivation finding. Pursuant to **OCGA § 15-11-56**, in a custody matter or dispositional proceeding, "all information helpful in determining the questions presented, including oral and written reports, may be received by the court and relied upon to the extent of its *probative* value even though not otherwise competent in the hearing on the petition."

[FN4] Apparently, DFCS believes that this Code section permits the court to consider hearsay contained in the report and affidavit in making its finding. However, it is well settled that hearsay lacks probative value, even if unobjected to. **[FN5]** Thus, to the extent reports contain hearsay, the juvenile court must disregard it. **[FN6]**

FN4. (Emphasis added.)

FN5. See *In the Interest of B.W.*, 268 Ga.App. 862, 863, 602 S.E.2d 869 (2004); *In the Interest of C.G.*, 261 Ga.App. 814(1), 584 S.E.2d 33 (2003); *In the Interest of C.A.*, 249 Ga.App. 280, 282(2), 548 S.E.2d 37 (2001).

FN6. See *In the Interest of O.J.*, 257 Ga.App. 1, 4(2), 570 S.E.2d 79 (2002) ("To the degree any such [reports] contained hearsay, the

courts are presumed to have disregarded it.' "); *In the Interest of J.C.*, 242 Ga. 737, 740-741(3), 251 S.E.2d 299 (1978).

[3] [4] "[D]uring a nonjury trial, it is presumed that the court is able to sift the wheat from the chaff and select only the legal evidence. We will reverse the trial court only where there is no legal evidence to support the trial court's ruling." [FN7] Here, we are unable to make such a presumption because it is clear from the juvenile court's order that it premised its ruling, in large part, on hearsay. [FN8] The court based its deprivation finding **384 upon the following: (1) Ransom's conclusion that Martin physically abused the mother in the presence of the children; (2) the report from family members that there was domestic violence between the mother and Martin; (3) the fact that the mother had admitted to "us[ing] marijuana in the past on a regular basis;" (4) the mother's failure to submit to a drug screen within 24 hours; and (5) the fact that the mother is engaged in a lesbian relationship.

[FN7. (Punctuation omitted.) *In the Interest of T.D.B.*, 266 Ga.App. 434, 442(4), 597 S.E.2d 537 (2004).

[FN8. See *In the Interest of C.D.E.*, 248 Ga.App. 756, 764-765(2),

546 S.E.2d 837 (2001).

The first two reasons cited for the deprivation--the alleged domestic abuse-- are supported only by hearsay contained in Ransom's report and affidavit. At the hearings, DFCS did not ask a *single question* of any witness regarding allegations of abuse, and no witness gave competent testimony about such abuse. The evidence required to support a finding of deprivation must be not only clear and convincing, but also competent. [FN9] As there is no competent evidence to support this factual finding, it must be discounted.

[FN9. See *In the Interest of E.M.*, supra.

*136 Similarly, there is no competent evidence that the mother smoked marijuana on a regular basis. Although the mother told Ransom that she had smoked marijuana "on occasion," DFCS never sought further clarification of the issue. And "on occasion" and "on a regular basis" are not necessarily synonymous. Moreover, DFCS completely failed to establish how this conduct was relevant to a finding of deprivation. [FN10]

[FN10. See *In the Interest of C.D.E.*, supra at 767, 546 S.E.2d 837 ("The issue in a

deprivation hearing involving a transfer of custody ... is

not whether the parent has committed illegal acts, but whether there is 'intentional or unintentional misconduct resulting in the abuse or neglect of the child or ... what is tantamount to physical or mental incapability to care for the child.' ").

Although the juvenile court found that the mother had failed to timely obtain a drug test, there is no evidence to support this finding. Rather, Germany testified that the mother had done everything asked of her and that the only reason the drug test had not been performed was because it had not been scheduled by DFCS. And the mother cannot be held accountable for DFCS' failure to schedule the test.

Thus, the only remaining basis for the juvenile court's ruling is the fact the mother is involved in a lesbian relationship. However, deprivation focuses on the "needs of the child regardless of parental fault." **[FN11]** As this Court recently noted,

FN11. See *In the Interest of E.M., supra*.

to authorize a loss of temporary custody by a child's parent[], on the basis of deprivation, the deprivation must be shown to have resulted from unfitness on the part of the parent, that is, either intentional or unintentional misconduct resulting in the abuse or neglect of the child or by what is tantamount to physical or mental incapability to care for the child. **[FN12]**

FN12. (Punctuation omitted.) *In the Interest of C.D.E., supra at 760-761(1), 546 S.E.2d 837.*

Assuming that the mother's relationship with Martin should factor into the juvenile court's analysis, it should not be a determining factor unless it is shown that the children have been or might be harmed in some manner by their mother's lifestyle. **[FN13]** Here, DFCS made no effort whatsoever to demonstrate that the children are deprived, much less that such deprivation results from the mother's lifestyle. Given the lack of evidence that the children are deprived, *137 the juvenile court erred in removing the children from their mother's custody. **[FN14]**

FN13. See *In the Interest of R.E.W., 220 Ga.App. 861, 863, 471 S.E.2d 6 (1996)* (father's homosexuality did not merit restrictive visitation absent evidence that child was exposed to father's conduct in a manner that is harmful).

FN14. See *In the Interest of E.M., supra at 281, 590 S.E.2d 241;*

In the Interest of C.D.E., supra at 761-762, 766-767, 546 S.E.2d 837.

2. In view of our holding in Division 1, we need not address the mother's remaining enumeration of error.

Judgment reversed.

ELDRIDGE and **ADAMS**, JJ., concur.

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