

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002351-ME

A.G. AND K.G.

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 04-CI-00687

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES, DEPARTMENT FOR
COMMUNITY BASED SERVICES

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

KELLER, JUDGE: A.G. and K.G. have appealed from the decision of the Franklin Circuit Court denying their administrative appeal from the Cabinet for Families and Children's substantiated finding of neglect of their infant daughter, H.G. We affirm.

A.G. and K.G. are the parents of H.G., who was born on October 3, 2001,

in the state of Indiana. A.G. works as a commercial truck driver and as an Evangelist

¹ Senior Judge Daniel T. Guidugli, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

preacher. K.G. is a college graduate and worked in the past as a teacher. In May 2002, A.G. and K.G. took H.G. to see Indiana physician Dr. Tim White for her 6-month well-baby visit. Dr. White noted that H.G. weighed 7 lbs. 12 oz. at birth, and weighed 13 lbs. 5 oz. at the May check-up. He also noted that H.G. was not supporting her weight. He diagnosed her as hypotonic, meaning that she was a floppy baby, and attributed her condition to nutrition or some other source. Dr. White referred H.G. to the First Steps program and the health department. The parents did not comply with Dr. White's referrals and then failed to show up for H.G.'s 9-month well-baby visit scheduled for June 20, 2002.

One week after they failed to appear for their scheduled appointment, Dr. White filed a Preliminary Report of Alleged Child Abuse or Neglect with the Boone County Division of Family and Children in Indiana. In the report, Dr. White stated that he was worried about H.G.'s neurological examination and had been unable to obtain follow-up with her, noting that she was undernourished at her initial visit and that she needed a medical work-up to determine why she had low muscle tone. The agency investigation revealed that H.G. had not been immunized. Following a hearing on July 5, 2002, the Boone Juvenile Court entered an order authorizing the Division of Family and Children to take custody of H.G., finding that it was necessary to protect the child as her parents were not meeting her medical needs. Indiana authorities apparently went to pick up H.G. that day from her parents, who refused to allow them to take her without a court order. After the authorities left, the family immediately moved out of their Indiana

residence and briefly went to Michigan before settling in Owensboro, Kentucky in late August 2002.

Almost one year later, the Owensboro Police Department received notification from Indiana authorities alerting them that H.G. was a missing child and that she was living with her non-custodial parents in Kentucky. On the morning of June 26, 2003, the police, along with a Cabinet social services clinician, Mendy Neal, went to A.G. and K.G.'s home to remove H.G. After several hours, H.G. was removed and placed in the Cabinet's custody. Neal noted that H.G., who was then twenty-months old, was frail and had orange-colored skin. Neal took H.G. to the Owensboro Medical Health System emergency room, where she was examined by Dr. Dwyer. She weighed 19 lbs. 3 oz. and was diagnosed with hypotonia and betakeratenosis (orange skin). A pediatric nursing admission assessment completed that day indicated that there was no evidence of abuse or neglect. Dr. Dwyer recommended follow up with Kosair Pediatrics.

Immediately following the emergency room medical examination, Neal placed H.G. with foster parents. The foster mother's journal detailed H.G.'s stay with them, including her meals and increasing appetite, as well as the increase in her strength and in her ability to walk and to support herself. The foster mother followed up on H.G.'s medical care with Dr. Holmes, a pediatric neurologist. He examined her on July 7, 2003, for possible developmental delay with hypotonia and ordered testing to rule out any treatable problems causing her condition. The studies all came back negative. H.G. began treatment with Dr. Donald Neel, a pediatrician, on July 8, 2003. Dr. Neel took a

lengthy history, including that H.G. was with foster parents for allegedly failing to thrive; that she had not received any immunizations; that she had been breastfed since birth and that the only additional food she ate was fruit, vegetables and cottage cheese; that she was not walking on her own; and that she had been making improvements in her development while in foster care. Dr. Neel diagnosed H.G. as underweight, probably due to a poor diet, and stated that developmental delay was likely due to poor nutrition. Dr. Neel continued to follow up with H.G., checking her weight on a regular basis. Based on Dr. Neel's records, it appears that H.G. gained almost two pounds over a period of approximately five weeks. In mid-August, Dr. Neel stated that H.G. could be returned to her parents' home with stipulations that she attend biweekly visits with Dr. Michael Yeiser and that her parents attend weekly meetings with a nutritionist as well as allow for home visits from a CASA worker. After H.G. was returned on August 15, 2003, A.G. and K.G. followed these stipulations and H.G. continued to improve.

On September 18, 2003, the Cabinet, through Mendy Neal, notified A.G. and K.G. by letter that the June 26, 2003, report of neglect had been substantiated. Specifically, the letter stated: "Based on statements from interviews conducted and collateral documentation from community partners, neglect will be substantiated. [H.G.] was found to be 'hypertonic', (sic) by Dr. Holmes and was found to be 'underweight possibly due to poor diet, developmentally delayed likely due to poor nutrition, no immunizations' by Dr. Neel." A.G. and K.G. timely challenged the finding and requested an administrative hearing. An administrative hearing was held over two days on January

27 and February 27, 2004, during which several witnesses testified and documentary evidence, including photographs of H.G., was filed. The Hearing Officer entered his Recommended Order on March 29, 2004. After noting that greater weight would be given to testimony relating to events prior to August 15, 2003, the Hearing Officer recommended upholding the Cabinet's finding of substantiated neglect. In so recommending, the Hearing Officer stated, in pertinent part, as follows:

There was evidence that [H.G.] improved markedly as her nutrition improved. Dr. Holmes noted significant improvement in [H.G.] over a one-month period from July 07 until August 04 (Exhibit 2). Although the Hearing Officer would like to believe the parents' actions were unintentional, it is difficult to overlook their disregard for [H.G.]'s health. They took [H.G.] from Indiana to prevent the state from taking custody of her. During the time they had been in Kentucky, they did not take [H.G.] to a doctor or start her immunizations. [H.G.] weighed 7 lb. 12 oz. at birth and she weighed 19 lb. 3 oz. at 20 months. Dr. Neel testified a child should triple their birth weight in their first year and [H.G.] had not done so at 20 months. There was sufficient evidence to support that the Indiana doctor's concerns for six-month-old [H.G.]'s health were still concerns for the Kentucky physicians who examined her 14 months later. The evidence and testimony was sufficient to make a reasonable person believe that [H.G.] was neglected by her parents, [A.G.] and [K.G.].

A.G. and K.G. timely filed exceptions to the Hearing Officer's Recommended Order.

However, the Cabinet approved the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order in its Final Order entered April 25, 2004.

A.G. and K.G. sought judicial review of the Cabinet's Final Order by filing a Petition with the Franklin Circuit Court pursuant to KRS Chapter 13B. Following

briefing and oral argument, the circuit court denied the appeal, holding that the Cabinet's decision was based upon substantial evidence, including statements in medical records that H.G. may be developmentally delayed due to poor nutrition, the parents' failure to cooperate with Indiana authorities, as well as the parents' failure to take H.G. to a pediatrician after they left Indiana. This appeal followed.

In their brief, A.G. and K.G. assert that there is no evidence of neglect as defined by KRS 600.020(1) and that the Hearing Officer failed to address or consider all of the relevant evidence. The Cabinet, on the other hand, argues that its Final Order was not arbitrary, in that it acted within its statutory powers, afforded due process to the parents, and based its actions upon substantial evidence.

STANDARD OF REVIEW

The former Court of Appeals defined the scope of judicial review for administrative actions in *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964). Such review, the Court held, “is concerned with the question of *arbitrariness*.” *Id.* at 456. (Emphasis in original.) In determining whether an action was arbitrary, the reviewing court must decide: 1) whether the agency's action was in excess of the powers granted to it; 2) whether there was a lack of procedural due process; and 3) whether the action was supported by substantial evidence. *Id.* Substantial evidence is defined as “that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.” *Bowling v. Natural Res. & Env'tl. Prot. Cabinet*, 891 S.W.2d 406,

409 (Ky.App. 1994). The reviewing court may not substitute its judgment as to the weight to be afforded to the evidence, *Burch v. Taylor Drug Store, Inc.*, 965 S.W.2d 830, 834 (Ky.App. 1998), as “the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it.” *Bowling*, 891 S.W.2d at 409-10. If the agency's decision is supported by substantial evidence, the reviewing court “is then limited to determining whether the [agency] applied the correct rule of law.” *Burch*, 965 S.W.2d at 834. If the correct rule of law was indeed applied, the agency's decision must be upheld. *Bowling*, 891 S.W.2d at 410. There is no dispute that the Cabinet was acting within its statutory authority and that A.G. and K.G. were afforded sufficient due process. Therefore, we shall concentrate on the third ground; namely, whether the Cabinet's action in substantiating neglect was supported by substantial evidence. We hold that it was, and therefore affirm.

ANALYSIS

The sole issue in this appeal addresses whether H.G. was a neglected child as of June 26, 2003. An abused or neglected child is defined by KRS 600.020 as:

(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 section 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 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;

(d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

(e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

(f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;

(g) Abandons or exploits the child;

(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. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child; or

(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[.]

“Needs of the child” is defined as “necessary food, clothing, health, shelter, and education[.]” KRS 600.020(38).

In asserting that H.G. was not neglected, A.G. and K.G. rely upon the emergency room records indicating that there was no evidence of neglect or abuse, or that she was malnourished. They also argue that the hypotonia diagnosis does not demonstrate neglect and that the Hearing Officer improperly cited their failure to have H.G. immunized. Finally, A.G. and K.G. assert that the Hearing Officer failed to address or misstated relevant evidence. The Cabinet argues that evidence of neglect was established under KRS 600.020(1)(b), (d), and (h). These sections relate to the parents' ability to provide the proper care and protection for their child. The Cabinet states that A.G. and K.G.'s actions put H.G. at risk of harm, as they failed to meet her nutritional and medical needs, which in turn caused delays in her developmental and physical growth. In support, the Cabinet cites the medical records of evidence as well as the foster mother's journal detailing the change in H.G.'s diet and her improvements during her stay in foster care.

At the outset, we agree with the Hearing Officer's decision in the Recommended Order to afford more weight to the evidence detailing H.G.'s condition up to August 15, 2003, when she was returned to her parents. What happened to H.G. after she was returned has no bearing on her neglect status as of June 26, 2003, although it does appear that A.G. and K.G. certainly acted in H.G.'s best interest in cooperating with agency representatives by following their recommendations as to diet and nutrition. However, based upon the medical evidence of record and H.G.'s obvious physical improvement over the course of her stay in foster care and upon her return to her parents,

it is clear that A.G. and K.G. were not adequately caring for H.G.'s physical and nutritional needs prior to her removal. This in no way means that A.G. and K.G. were bad parents, but that they simply needed some professional guidance regarding H.G.'s nutritional needs to properly care for her. Accordingly, we hold that there is substantial evidence of record to support the Cabinet's finding that H.G. was neglected as of June 26, 2003.

For the foregoing reasons, we affirm the opinion of the Franklin Circuit Court.

ALL CONCUR.

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