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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000361-MR

W.B., AN ADULT CITIZEN
OF JEFFERSON COUNTY,
KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 09-CI-003970

COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH AND FAMILY SERVICES; and
DEPARTMENT FOR COMMUNITY BASED
SERVICES, A KENTUCKY ADMINISTRATIVE
AGENCY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

[1] Senior Judge Sheila R. Issac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

MOORE, JUDGE: On December 8, 2008, the Department for Community Based Services (DCBS)[2] requested that the Cabinet for Health and Family Services substantiate an allegation that W.B., an adult citizen of Jefferson County, Kentucky, had committed sexual abuse of a minor in his custody or control. A "substantiated allegation" carries with it no criminal penalties and merely indicates a finding by the Cabinet that it is more likely than not that the accused abused or neglected a child. *See* 922 Kentucky Administrative Regulations (KAR) 1:330 Section 1(11). However, if the Cabinet affirms that an allegation is substantiated by a preponderance of the evidence, then the accused's name is filed on a central registry of individuals for whom abuse allegations have been substantiated, and remains on that registry for a minimum of seven years. *See generally* 922 KAR 1:470.[3]

Per 922 KAR 1:480 Section 3, the Cabinet notified W.B. of the allegation, his right to a hearing before the Cabinet to contest whether the allegation should be substantiated, and of his right to receive a written, final decision. *See* 922 KAR 1:330 Section 9(2). W.B. timely requested an administrative hearing before the Cabinet, but also filed a separate action in

[2] When an allegation of child abuse or neglect is made, an investigation is undertaken by the Cabinet for Health and Family Services, pursuant to the provisions of the Kentucky Unified Juvenile Code, Kentucky Revised Statutes (KRS) Chapters 600 through 645. The Department for Community Based Services (DCBS) is a particular unit within the Cabinet that conducts child abuse, neglect, and dependency investigations. It was created in 1998 in an effort to regionalize child protective services, and it maintains offices in each county within Kentucky.

[3] Kentucky adopted these procedures for the purpose of implementing the Child Abuse Prevention and Treatment Act (CAPTA), 42 United States Code §§ 5101 through 5116.

Jefferson Circuit Court for a declaration of his rights. The administrative matter was subsequently held in abeyance, and has remained so to date, pending the resolution of the declaratory action. W.B.'s declaratory action is the subject of this appeal.

In his declaratory action, W.B. challenged the constitutionality of the several statutes and regulations providing for how the Cabinet substantiates allegations of child abuse and how an accused may contest and appeal that substantiation.[4] W.B. asserted that the United States and Kentucky Constitutions both recognize and protect his interest in his reputation; that having his name placed on Kentucky's registry of substantiated child abusers would affect that interest; and that procedural due process entitled him, at the administrative level, to have a jury decide whether the allegation of child abuse was substantiated by a preponderance of evidence.

W.B. also raised other procedural due process grounds. W.B. argued that 1) the applicable law and procedures relating to how the Cabinet substantiates child abuse allegations impermissibly shift the burden of proof to him; 2) the results of those proceedings could impact criminal or civil proceedings that might be filed in the future; 3) the applicable procedures denied him certain videotapes of the interviews that DCBS conducted with the minor child and others which it used as a basis to substantiate the alleged abuse; 4) the procedure denied him the right to have the child evaluated in an effort to test the credibility of the child's

[4] Specifically, W.B. challenges the constitutionality of KRS 13B.150(2)(c); 922 KAR 1:330 Sections 9 and 10; 922 KAR 1:470; and 922 KAR 1:480.

accusations; 5) the procedure violated the Separation of Powers doctrine by allowing a circuit court to uphold the final administrative determination upon a finding that it was based on "substantial evidence" as opposed to a "preponderance of the evidence"; and that 6) the procedure was otherwise arbitrary and capricious.

In its own review of this matter, the Jefferson Circuit Court upheld the constitutionality of the statutes, regulations, and appellate procedures in question, and, in a January 25, 2010 order, the circuit court dismissed W.B.'s action pursuant to Kentucky Rule(s) of Civil Procedure (CR) 12.02(f). W.B. appealed to this Court, reasserting each of his prior arguments. After careful review of the statutes and regulations at issue in this matter, we reach the same conclusions as the circuit court and affirm.

STANDARD OF LAW

The subject of our review is the trial court's decision to dismiss W.B.'s action pursuant to CR 12.02(f) – that is, failure to state a claim. In that respect,

> [i]t is well established that a court should not dismiss an action for failure to state a claim unless the pleading party appears not to be entitled to relief under any set of facts which could be proven in support of his claim. In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. Therefore, the question is purely a matter of law. Accordingly, the trial court's decision will be reviewed *de novo*.

Morgan v. Bird, 289 S.W.3d 222, 226 (Ky. App. 2009) (internal citations and quotations omitted).

ANALYSIS

I. Due process, in this context, does not require a jury trial.

We turn first to the question of what process is due when a citizen seeks to challenge the inclusion of his or her name on Kentucky's Central Registry list of "substantiated" child abusers. The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Likewise, Section 2 of the Kentucky Constitution is generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures. *Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997). The exact contours of due process cannot be defined. What it commands depends upon the specific facts presented. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961); *Hannah v. Larche*, 363 U.S. 420, 442, 80 S. Ct. 1502, 1514, 4 L. Ed. 2d 1307 (1960); *O'Dea*, 939 S.W.2d at 358-9.

Generally speaking, "due process" requirements which govern the proceedings of an agency that makes binding legal determinations directly affecting legal rights do not apply to agency proceedings which are purely investigatory in nature. *See Hannah v. Larche*, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960). However, if a government agency publicly disseminates findings which adversely affect the subject of an investigation, the agency may be

required as a matter of due process to establish procedures by which the investigatory findings may be challenged. *See Jenkins v. McKeithen*, 395 U.S. 411, 425-31, 89 S. Ct. 1843, 1850-54, 23 L. Ed. 2d 404 (1969); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). In assessing whether such administrative procedures are constitutionally sufficient, our inquiry must follow the three-pronged test stated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), and adopted by our Supreme Court in *Division of Driver Licensing v. Bergmann*, 740 S.W.2d 948, 951 (Ky. 1987). That test requires consideration of (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335, 96 S. Ct. at 903.

Kentucky jurisprudence has yet to address the adequacy of the process that the Cabinet affords to accused child abusers when it decides whether to place their names on Kentucky's central registry. But, several of our sister states have scrutinized similar registry schemes within the context of both state and federal due process guarantees. A telling example of where procedures surrounding one such registry scheme were found to provide insufficient due process, per *Mathews*, is *Matter of Allegations of Sexual Abuse at East Park High School*, 314 N. J. Super. 149, 714 A.2d 339 (1998).

Beginning with the first prong of the *Mathews* test, the Court in *East Park* analyzed the stigma or injury to a person's private reputational interest under these circumstances. It determined that the various statutory public notice requirements that attached to New Jersey's central registry of substantiated child abusers produced "the kind of reputational injury which equates with stigma, warranting a due process hearing under the state constitution, and, coupled with impairment to privacy interests, under the federal constitution . . . ." *Id*. at 162. In particular, the Court noted that New Jersey law compelled prospective child-care employers to check the central registry and prohibited those employers from hiring the people it listed. *Id*. at 163. Thus, the Court in *East Park* identified the inclusion of a citizen's name in the Central Registry as a protectable, reputational liberty interest under the first *Mathews* prong. *Id*. at 162-63.

Next, the Court considered the second *Mathews* prong and ruled that simply affording an accused the right to submit a sworn statement was "inadequate to test the charges because the outcome depended upon a credibility evaluation of [the accused] and the witnesses against her, who she was not allowed to cross-examine." *Id*. at 164.

Finally, with regard to the third *Mathews* prong, the Court recognized that the government has a significant interest in keeping child abusers out of the ranks of child-care workers. But, the Court added that the government should also have a significant interest in "not stigmatizing the innocent and foreclosing them from employment and other opportunities." *Id*. at 165. As such, the Court

concluded that "a trial type process which subjects the allegations made to rigorous testing" is appropriate in such circumstances and "its cost must be borne by the public in a constitutionally governed society." *Id*. at 165-66.

Other examples of child abuse registry schemes that have been held to provide insufficient procedural due process include *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Lee TT. v. Dowling*, 87 N.Y.2d 699, 664 N.E.2d 1243, 642 N.Y.S.2d 181 (1996) (finding due process violated because burden of proof in substantiating allegations was not placed on investigating agency); *Richardson v. Chevrefils*, 131 N.H. 227, 552 A.2d 89 (1988); *Wilson v. State Dept. of Human Services*, 969 P.2d 770 (Colo. App. 1998) (finding due process violated because no notice was given to suspected abuser); *Cavarretta v. DCFS*, 277 Ill. App. 3d 16, 660 N.E.2d 250, 214 Ill. Dec. 59 (1996) (finding due process implicated by 598-day delay in completing appeals process); and *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399 (Mo. 2007) (due process violated because law provided no adjudicatory hearing prior to listing accused's name on registry).

Kentucky's registry scheme contains some of the same regulatory and statutory notice requirements at issue in New Jersey's registry in *East Park*, which the Court in *East Park* deemed to impair a protected liberty interest and trigger a measure of due process per the first prong of *Mathews*. For example, Kentucky law also requires child-care providers to regularly check the central registry at issue in this matter and prohibits those providers from hiring individuals listed in it

(*see* 922 KAR 1:300 Section 3(6)(f)). And, being listed in the central registry is cause for the revocation of a license to operate a child-care facility (*see* 922 KAR 1:305 Section 7(1)(c)). Furthermore, with regard to the third *Mathews* prong, it can certainly be said that Kentucky has a significant interest in keeping child abusers out of the ranks of child-care workers, as well as a significant interest in not stigmatizing the innocent and foreclosing them from employment and other opportunities.

However, unlike the teacher in *East Park*, Kentucky law provided W.B. with fair notice, and entitles W.B. to a trial-type hearing which subjects the allegations made to rigorous testing *prior* to listing his name in the central registry. *See, e.g.*, 922 KAR 1:480 Sections 2 and 3; *compare Jamison*, 218 S.W.3d 399 (due process violated because no such pre-deprivation hearing offered). At the trial-type hearing, W.B. will have the right to adduce evidence, be represented by counsel, confront any witnesses testifying against him, present conflicting evidence, and challenge or refute the allegations. *See, e.g.*, 922 KAR 1:480 Section 6. Moreover, the ALJ (administrative law judge) in the separate (and currently abated) administrative matter has already ruled inadmissible any reference to the alleged victim's videotaped, forensic interview, unless W.B. chooses to make such a reference. At the conclusion of those proceedings, W.B. will receive a written decision, which he may appeal. Furthermore, unlike *Valmonte,* 18 F.3d 992, and *Dowling*, 87 N.Y.2d 699, the investigating agency, and

not W.B., will have the burden of proof in the pending trial-type hearing.[5] There is also no reason to believe that W.B. will face a protracted delay in completing the appeals process, as in *Cavarretta,* 277 Ill. App. 3d 16. In short, even if we were to assume that W.B. has a protected liberty interest in this matter, the procedures that Kentucky already has in place, codified in our statutes and regulations, have been widely recognized as providing adequate due process.[6]

We are left, then, with the crux of W.B.'s argument: he believes that he is also entitled to the additional safeguard of a jury trial at the administrative level. W.B. supports this argument with no authority, save an inference he draws

[5] KRS 13B.090(7) provides that "In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action[,]" and that "The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record." As DCBS and the Cabinet describe in their brief, DCBS is proposing that the agency, the Cabinet, take action – that is, adopt DCBS's initial investigative findings and place W.B.'s name in the central registry. Therefore, the burden of proof is not upon W.B. in this matter. Incidentally, this fact disposes of W.B.'s next contention – that is, the Cabinet's administrative procedures impermissibly shift the burden of proof onto him, rather than the investigating agency.

[6] Even the judicial body that authored *East Park* would likely agree that Kentucky's system provides adequate due process. New Jersey's Superior Court recently revisited that opinion in *New Jersey Div. of Youth and Family Services v. S.O.*, 2009 WL 187684, No. 5039-05, 2009 N.J. Super. Unpub., at *9 (App. Div. January 28, 2009), and found no due process violation because, similar to Kentucky's procedure, the accused

> was provided with fair notice; the ability to be present at the hearing; the right to adduce evidence, the right to be represented by counsel, the right to confront the witnesses who testified against him; and a written decision. In addition, although S.O. lacked the opportunity to cross-examine his daughter with regard to the child's out-of-court statements, he was able to present presumably limitless conflicting evidence in the form of documents, reports, expert witnesses or personal testimony, to challenge and refute the child's allegations. Further, no findings were made by the ALJ in this case based solely upon the child's out-of-court statements.

from *Maggard v. Com., Bd. of Examiners of Psychology*, 282 S.W.3d 301, 305 (Ky. 2008). There, our Supreme Court stated: "Indeed, there is no entitlement to a jury trial in an administrative proceeding where the right in question is created by statute." Quoting *Maggard*, W.B. reasons that if the right in question is not created by statute, but is actually a liberty interest created by Kentucky's constitution or the federal constitution, he should be entitled to a jury trial in an administrative proceeding.

It is true that when protected liberty interests are at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews*, 424 U.S. 319, 333, 96 S.Ct. 893, 902. Nevertheless, even the United States Supreme Court has recognized that liberty interests do not necessarily require an opportunity for an adjudicatory hearing. *See Mathews*, 424 U.S. at 332-49, 96 S. Ct. at 901-10. Nor, for that matter, does a liberty interest mandate a jury trial. *See, e.g.*, *Washington v. Harper,* 494 U.S. 210, 233, 110 S. Ct. 1028, 1042-1043, 108 L. Ed. 2d 178 (1990) (procedural due process does not require a full judicial hearing to protect prisoners who possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs; administrative review using medical decisionmakers satisfies due process); *Vitek v. Jones*, 445 U.S. 480, 496, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552 (1980) (prisoners facing involuntary transfer to mental hospital for involuntary psychiatric treatment are threatened with immediate deprivation of liberty interests and are entitled to notice and hearing but

"independent decisionmaker conducting the transfer hearing need not come from outside the prison or hospital administration"); *McKeiver v. Pennsylvania*, 403 U.S. 528, 547, 91 S. Ct. 1976, 1987, 29 L. Ed. 2d 647 (1971) ("a jury is not a necessary part even of every criminal process that is fair and equitable").

Moreover, in a proceeding for child abuse, child neglect, or the temporary or permanent termination of parental rights, the factual issues are typically resolved by a judge, in keeping with the traditionally equitable nature of juvenile proceedings. The Seventh Amendment to the United States Constitution does not guarantee a right to jury trial in such cases, because it preserves the right only in common-law actions. The same is true in Kentucky. *See, e.g., Mays v. Department for Human Resources*, 656 S.W.2d 252 (Ky. App. 1983).

W.B. also questions the Cabinet's ability to remain impartial in its review of DCBS's substantiation in this matter. Due process requires an impartial decision maker, *see, e.g., Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S. Ct. 1011, 1022, 25 L. Ed. 2d 287 (1970), but it also presumes the honesty and impartiality of decision makers in the absence of a contrary showing. *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 55, 95 S. Ct. 1456, 1468, 43 L. Ed. 2d 712 (1975). Here, because there is no suggestion or showing that a hearing officer employed by the Cabinet is incapable of deciding the issue fairly, there is no need for any other decision maker.

In sum, W.B. has not carried his burden or cited authority establishing that procedural due process under the Fourteenth Amendment to the United States

Constitution, or under the Kentucky Constitution, compels a jury trial whenever a person's personal liberty interest is at stake, even if a protected liberty interest does exist in this matter. Furthermore, we decline W.B.'s invitation to imply such a right from *Maggard*, 282 S.W.3d 301. Both state and federal courts have found procedures identical to those utilized here—procedures which do not include the additional safeguard of an administrative jury trial—to be constitutionally sufficient. And, while adding a jury might enhance the procedural due process safeguards for the benefit of a private interest, the resulting delay in the proceedings would impede the Commonwealth's efforts to protect children. W.B.'s rights are amply protected in the statutory scheme. We find that the procedure W.B. will be afforded at the administrative level provides the process he would be due, even if he did assert a protectable liberty interest under the circumstances of this case.

II. W.B.'s remaining due process arguments

W.B.'s remaining due process arguments are either without merit or not proper for our review. Nevertheless, we will briefly address them.

As to W.B.'s argument that the relevant statutes and regulations in this matter impermissibly shift the burden of proof to him, rather than the investigating agency, he is mistaken. *See supra*, note 5.

As to W.B.'s argument that the results of the administrative proceedings before the Cabinet could impact criminal or civil proceedings that might be filed in the future, we note that those proceedings have yet to occur, and

no other action - criminal or civil - has actually been filed. "An actual controversy for purposes of the declaratory judgment statute [KRS 418.040] requires a controversy over present rights, duties and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion." *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991) (citing *Dravo v. Loberty Nat'l Bank & Trust Co.*, 267 S.W.2d 95 (Ky. 1954). As such, this contention is not properly before us.

As to W.B.'s argument that the procedure denies him certain videotapes of the interviews that DCBS conducted with the minor child and others which it used to substantiate the abuse, W.B. supports this argument with no authority; moreover, W.B. is mistaken. W.B. is entitled to review these recorded interviews if "so authorized by a court order." *See* KRS 620.050(6)(a)(3); *see also* KRS 620.050(10)(a)(2) (allowing the Commonwealth's or county attorney prosecuting the case to make one copy of an interview of a child recorded at a children's advocacy center for the defendant's counsel.) W.B. has not even alleged that he has sought a court order. If DCBS introduces these interviews into evidence during the administrative appeal to prove its case to the Cabinet, this Court sees no statutory provision that would prevent the interviews from being part of W.B.'s appeal to a circuit court.

As to W.B.'s argument that the procedure denies him the right to have the child evaluated in an effort to test the credibility of the child's accusations, this argument must also fail. To begin, W.B. fails to challenge the constitutionality of

any particular statute or regulation as a basis for this argument, and he again presents no supporting authority. Moreover, while his argument necessarily implicates his right to confront witnesses against him, per the Confrontation Clause of the Sixth Amendment to the United States Constitution, his argument ignores that the protection of the Sixth Amendment applies to criminal prosecutions. It does not apply to civil matters, such as this, involving statements made by a child relating to an incident of abuse. *See Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 342-7 (Ky. 2006).

W.B.'s next argument necessarily focuses upon KRS 13B.150(2)(c), which allows a circuit court to uphold the final administrative determination in this matter upon a finding that it was based upon "substantial evidence" as opposed to a "preponderance of the evidence." The gist of W.B.'s argument is that to be constitutional under the Separation of Powers Doctrine, any appeal to the circuit court must allow for a review broader than that required by KRS 13B.150(2)(c).

As an aside, the concept of "substantial evidence" is sufficiently flexible to take account of the impact of the finding or judgment the evidence is offered to support, and puts teeth in the notion that the record must be evaluated by looking not only at what supports the conclusion the Cabinet reached, but also at what detracts from that conclusion. Evidence is not "substantial" simply because it is admissible at a fair hearing by statute or regulation. Rather, it is "substantial" because it is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas v.*

Golightly, 976 S.W.2d 409, 414 (Ky. 1998). And, as one court succinctly stated, "that flexible approach is an appropriate tool to use in insuring that both the investigation and the hearing are societal instruments for determining the truth, not simply devices for insuring that labels stick." *Minnehan v. Dept. of Social Services*, 1999 WL 706653, No. 98-4687, Mass. Super. Ct. Unpub., at *14 (August 14, 1999).

That said, the order of the Jefferson Circuit Court effectively addressed W.B.'s argument on this point:

> [W]hile W.B. does at least cite some case law in support of this argument, he does not cite *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964), nor any of its progeny, *e.g., Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591 (Ky. App. 1990), all of which stand for the irrefutable proposition that the substantial evidence standard, now codified at KRS 13B.150(2)(c), is the well-established, deferential standard of review of agency action by the judicial branch. This deferential standard of review is based on the Separation of Powers Doctrine, which prohibits the legislature from imposing on the judiciary non-judicial functions like administrative determinations. *American Beauty Homes*, 379 S.W.2d at 453. Neither is there a basis for arguing that the legislature has improperly delegated a judicial function to an administrative agency. Here it is the Cabinet for Health and Family Services' function to ascertain the facts and administer the law. Judicial review is available and there is no usurpation of judicial power. *Kentucky Comm'n on Human Rights v. Fraser*, [625 S.W.2d 852, 855 (Ky. 1981)]. Contrary to W.B.'s assertions, then, KRS 13B.150(2)(c) is constitutional in every respect.

As to W.B.'s final argument - that the entire regulatory and statutory process is otherwise arbitrary and capricious - this appears to be a catchall allegation based upon the other more specific constitutional challenges he has raised. Having rejected those specific challenges, we reject this general one.

CONCLUSION

For these reasons, the January 25, 2010 order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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