

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000956-ME

D.L.W., A CHILD UNDER EIGHTEEN

APPELLANT

v. APPEAL FROM ALLEN FAMILY COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 03-J-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: KELLER, NICKELL AND STUMBO, JUDGES.

KELLER, JUDGE: D.L.W. appeals from the family court's finding that she is a juvenile status offender and habitual truant. On appeal, D.L.W. argues that the family court lacked jurisdiction because the Director of Pupil Personnel of the Allen County Board of Education, Jim Young (Young), failed to follow the procedures in Kentucky Revised Statute(s) (KRS) 159.140 before initiating legal action against her. For the following reasons, we vacate and remand.

FACTS

On November 17, 2009, Young sent official notice to D.L.W.'s parent that D.L.W. had accumulated excessive unexcused absences. On December 22, 2009, Young signed a Juvenile Complaint/Petition alleging that D.L.W. had missed fifteen days of school from August 19, 2009, through December 22, 2009. Young also alleged that "efforts made by the school have not helped to eliminate [D.L.W.'s] irregular attendance." The court designated worker, Crystal Adwell (Adwell), completed a "Preliminary Inquiry Formal/Informal Processing Criteria and Recommendations" form on April 14, 2010. On that form, Adwell indicated that she conducted a preliminary inquiry on December 30, 2009, with D.L.W., her mother, and Jeffery Vannoman.¹ Apparently as a result of that investigation, Adwell concluded that diversion had been unsuccessful and that informal processing would not be appropriate. On April 15, 2010, Young's complaint, Adwell's preliminary inquiry form, the November 17, 2009 official notice, and D.L.W.'s attendance records were filed in family court.

On April 20, 2010, the court explained D.L.W.'s rights to her, appointed an attorney to represent her, and scheduled an adjudicatory hearing for May 4, 2010. At that hearing, Young testified that he filed a complaint against D.L.W. because she had missed fifteen days of school, had been tardy once, and had been suspended six days from August 5, 2009, through December 18, 2009. Young believes that, because of D.L.W.'s absences, the school issued a letter to her

¹ We note that the Preliminary Inquiry form completed by Adwell indicates that Jeffery Vannoman is D.L.W.'s stepfather. However, during an evidentiary hearing, D.L.W. identified Mr. Vannoman as her fiancé.

mother after D.L.W. missed three days of school and issued a second letter after she missed six days of school. Those letters are not in the record.

On or about November 9, 2009, Young's office sent D.L.W. a letter inviting her to join the truancy diversion program (the Diversion Program). The Diversion Program consists of representatives from the court, the sheriff's office, social services, and the school system, and is designed to work with students and their families to determine why the students have absences and what can be done to prevent those absences. Participation in the program is voluntary and students generally attend ten meetings, which take place in the morning before the start of the school day.

Young testified that he believes that D.L.W. attended only one meeting of the Diversion Program. However, he had no documentation to support that testimony, and he was uncertain when the meeting took place. Furthermore, although Young was aware of the requirements of KRS 157.140, he admitted that he did not know about the condition of D.L.W.'s home; that he had not made any efforts to acquaint D.L.W.'s school with her home conditions; that he had not made any efforts to acquaint D.L.W. and her mother with the advantages of the school; and that he not ascertained the causes for D.L.W.'s irregular attendance. Finally, Young testified that he believed that by inviting D.L.W. to participate in the Diversion Program, he had fulfilled all of his statutory duties before filing the truancy complaint/petition.

Following Young's testimony, D.L.W. moved for dismissal arguing that the school system had not met the requirements of KRS 159.140. The court denied D.L.W.'s motion, holding that the Diversion Program, along with the letters sent by Young and/or the school, were sufficient to comply with the requirements of KRS 159.140. Furthermore, the court noted that the truancy petition was not filed with the court until after D.L.W. failed to attend the Diversion Program. The court then adjudicated D.L.W. a truant and scheduled a disposition hearing for May 18, 2010.

At the disposition hearing, Adwell testified that all participants in the Diversion Program sign an interagency confidentiality agreement. Because of that agreement, she testified that she could not share any information regarding D.L.W.'s participation in that program. D.L.W. then argued that any testimony regarding the Diversion Program by Young was in violation of that agreement and moved that his testimony be stricken from the record. The court denied the motion because D.L.W. did not object when the testimony was given. Nevertheless, the court noted it would have ordered Young to testify had an objection been raised. The court then ordered D.L.W. to attend all school sessions, to maintain passing grades, to obey her mother, to refrain from drug and alcohol use, and to graduate from high school. This appeal followed.

STANDARD OF REVIEW

D.L.W. argues that the family court acted outside its jurisdiction.

That issue involves a question of law, which we review *de novo*. *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

ANALYSIS

KRS 630.060(2) provides that

[n]o complaint shall be received by the court designated worker alleging habitual truancy unless an adequate assessment of the child has been performed pursuant to KRS 159.104(c), (d), and (f), unless it can be shown that the assessment could not be performed due to the child's failure to participate.

KRS 159.140 provides that

(1) The director of pupil personnel, or an assistant appointed under KRS 159.080, shall:

.....

(c) Acquaint the school with the home conditions of the student, and the home with the work and advantages of the school;

(d) Ascertain causes of irregular attendance and truancy, and seek the elimination of these causes;

.....

(3) In any action brought to enforce compulsory attendance laws, the director of pupil personnel or an assistant shall document the home conditions of the student and the intervention strategies attempted.

Because KRS 630.060(2) "requires compliance before a complaint may be received, the legislature intended to make these requirements a matter of subject matter jurisdiction." *T.D. v. Commonwealth*, 165 S.W.3d 480, 482 (Ky. App.

2005). Therefore, if a director of pupil personnel does not comply with the requirements of KRS 159.140 before presenting a complaint to the court designated worker, the family court does not have jurisdiction.

D.L.W. argues that Young did not comply with the requirements of KRS 159.140 before filing his complaint/petition with the court designated worker. As noted by D.L.W., the only documentation Young provided was a copy of the final notice and D.L.W.'s attendance records. He did not provide any documentation specifically setting forth what contact, other than the final notice, he or a designated assistant had made with D.L.W.'s mother to ascertain the causes for D.L.W.'s truancy. He did not provide any documentation setting forth how he sought to eliminate those causes or any documentation regarding D.L.W.'s home conditions.

The Commonwealth notes Young's testimony that he satisfied the requirements of KRS 159.140(1) by inviting D.L.W. to participate in the Diversion Program. According to the Commonwealth, "[t]here is no reason to assume that . . . [Young] could not complete his statutory requirements through participation in the [Diversion Program]." The Commonwealth may be correct that the court could assume that Young completed his statutory requirements through referral of D.L.W. to the Diversion Program. However, the court could as easily assume that he did not. Young has the burden of proving that he performed the assessment required by KRS 159.140. He cannot simply ask the court to assume

that he did so. Because Young failed to prove that he complied, the court had no jurisdiction to make any assumptions or to even hear this matter.

The Commonwealth also argues that, because D.L.W. did not fully participate in the Diversion Program, Young was absolved from taking any further action after referring her to the program. Again, we disagree. KRS 159.140 requires Young, as the director of pupil personnel, to make an assessment of the student and of the condition of her home and to acquaint the student's school with that condition. The statute does not state that a diversion program must, or even may, make that assessment. Furthermore, there is no proof that anyone in the Diversion Program attempted to perform the required assessment or if any such attempt was successful in whole or in part. Therefore, even if Young could foist his statutory assessment responsibilities onto the Diversion Program, he would still have the responsibility of proving that the assessment took place or was attempted. This he failed to do. Absent proof that the assessment required under KRS 159.140(1) took place or an explanation for why it did not take place, the family court had no jurisdiction to hear this matter.

Finally, we note, as did another panel of this Court, that Young's attempt to shift his duties as a member of the executive branch to the Diversion Program, which is run by the judicial branch, may well run afoul of the separation of powers clause of the Kentucky Constitution. *See C.F.C. v. Commonwealth*, 2010 WL 4026099 (Ky. App. 2010) (2010-CA-000573).

CONCLUSION

For the foregoing reasons, we vacate the family court's order adjudicating D.L.W. a juvenile status offender and habitual truant and remand for entry of an order dismissing the complaint alleging habitual truancy.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gail Robinson
Frankfort, Kentucky

The Court notes substitution of
Counsel:
Rebecca Hobbs
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

William P. Hagenbuch, Jr.,
Special Assistant Attorney General
Scottsville, Kentucky