

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001514-ME

K. B.

APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE HEATHER FRYMAN, JUDGE
ACTION NO. 15-J-00031-001

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY,
A. H. (A CHILD)

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND J. LAMBERT,
JUDGES.

KRAMER, CHIEF JUDGE: K. B., (hereinafter “Mother”) appeals from the
Harrison Family Court, wherein the court adjudicated A. H.¹ (hereinafter “Child”)

¹ We note that at some places in the record, Child is also referred to as “X. H.”

to be neglected or abused pursuant to KRS² 620.120.³ Upon the Cabinet's confession of error, we must reverse.

The factual and procedural history leading up to this appeal are convoluted, span several years, numerous actions, and at least two different family courts and judges. Child has been in the middle of a nasty power struggle in a custody dispute wherein historically the parents have shown a propensity to refuse to co-parent, at Child's emotional expense. It should suffice to say that the record in this matter reveals that Mother and Father have squarely put their own personal bickering ahead of the best interests of Child, and he appears to have suffered greatly over the past several years due to it. A review of the dispositional hearing shows that at the time it was held several months ago, the family court believed Father had made efforts toward rectifying his past issues, but Mother still greatly lagged behind in her own efforts.⁴ In an effort to not display any more than necessary of what Child has been subjected to and given the Cabinet's confession of error, we will pare down this case to only what is necessary to resolve the appeal.

We first note that this is another case wherein the Cabinet has unfortunately not filed an appellee brief. Pursuant to KRS 194A.1010 (2), "The Cabinet is the primary state agency responsible for leadership in protecting and

² Kentucky Revised Statute.

³ J. H. (hereinafter "Father") is not a party to this appeal. Father stipulated to dependency.

⁴ To be certain, these statements are just observations, not holdings, from this Court in a case in which the family court judge is dealing with a most difficult family.

promoting the well-being of Kentuckians through the delivery of quality human services. Recognizing that children are the Commonwealth's greatest natural resource and that individuals and their families are the most critical component of a strong society....," this Court issued a show cause order to counsel for the Cabinet and ordered counsel to appear to address whether the Court should view the failure to file a brief as a confession pursuant to Kentucky Rules of Civil Procedure 76.12(8)(c).⁵ In all due candor to the Court, counsel for the Cabinet did in fact state in his written "COMMONWEALTH RESPONSE TO SHOW CAUSE ORDER" that he agreed with Mother's appeal as follows:

I agree with the Appellant that the Court made an error: the Harrison Family Court made a finding of emotional abuse that is not supported by evidence. We did not have a Qualified Mental Health Professional testify as to the emotional abuse at adjudication. There were several other sections of the abuse and neglect statute that WERE supported by the evidence, but that particular one was not. I did not oppose trial counsel's motion to alter, amend or vacate and objection [sic] was made contemporaneous to the ruling.

This Court has reviewed the record in this matter and concludes that we must agree with the Cabinet's confession of error. At the final disposition, the family court made a finding that Child had suffered an emotional injury, to wit:

⁵ Three options are available to a reviewing court when an appellee has elected not to file a brief. CR 76.12(8)(c) provides as follows:

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

“The parents have caused emotional harm due to the constant fighting and manipulation.”

Pursuant to KRS 600.020 (25),

“Emotional injury” means an injury to the mental or psychological capacity or emotional stability of a child as evidenced by a substantial and observable impairment in the child’s ability to function within a normal range of performance and behavior with due regard to his or her age, development, culture, and environment as testified to by a qualified mental health professional[.]”

As noted *supra*, counsel for the Cabinet agrees with Mother that the family court could not have made a statutory finding of emotional abuse at the dispositional hearing because a qualified mental health professional⁶ did not

⁶ Pursuant to KRS 600.020(50), “Qualified mental health professional” means:

- (a) A physician licensed under the laws of Kentucky to practice medicine or osteopathy, or a medical officer of the government of the United States while engaged in the performance of official duties;
- (b) A psychiatrist licensed under the laws of Kentucky to practice medicine or osteopathy, or a medical officer of the government of the United States while engaged in the practice of official duties, and who is certified or eligible to apply for certification by the American Board of Psychiatry and Neurology, Inc.;
- (c) A psychologist with the health service provider designation, a psychological practitioner, a certified psychologist, or a psychological associate licensed under the provisions of KRS Chapter 319;
- (d) A licensed registered nurse with a master’s degree in psychiatric nursing from an accredited institution and two (2) years of clinical experience with mentally ill persons, or a licensed registered nurse with a bachelor’s degree in nursing from an accredited institution who is certified as a psychiatric and mental health nurse by the American Nurses Association and who has three (3) years of inpatient or outpatient clinical experience in psychiatric nursing and who is currently employed by a hospital or forensic psychiatric facility licensed by the Commonwealth or a psychiatric unit of a general hospital or a regional comprehensive care center;
- (e) A licensed clinical social worker licensed under the provisions of KRS 335.100, or a certified social worker licensed under the provisions of KRS 335.080 with three (3) years of inpatient or outpatient clinical experience in psychiatric social work and currently employed by a hospital or forensic psychiatric facility licensed by the Commonwealth or a psychiatric unit of a general hospital or a regional comprehensive care center;
- (f) A marriage and family therapist licensed under the provisions of KRS 335.300 to 335.399 with three (3) years of inpatient or outpatient clinical experience in psychiatric mental health practice and currently employed by a hospital or forensic psychiatric facility licensed by the Commonwealth, a psychiatric unit of a general hospital, or a regional comprehensive care center;

provide testimony of emotional injury. Given this confession of error and the Court's review of the record, we are compelled to agree and must reverse. We do note that given the family court's familiarity with this troubled family, a glance of the record regarding this family's history would certainly lead one to conclude that Child *appears* to have suffered emotionally from the parents' actions.

Nonetheless, that is not the statutory requirement; consequently, given that there was not the necessary testimony regarding emotional injury from a qualified mental health professional, we must reverse the family court's dispositional order of emotional injury. Based on this holding and the reversal of the family court's decision, we deem Mother's remaining arguments on appeal as moot.

For the foregoing reasons, the order of the Harrison Family Court finding Child as abused or neglected, in regard to the petition filed against Mother, is hereby reversed.

ALL CONCUR

or

(g) A professional counselor credentialed under the provisions of KRS 335.500 to 335.599 with three (3) years of inpatient or outpatient clinical experience in psychiatric mental health practice and currently employed by a hospital or forensic facility licensed by the Commonwealth, a psychiatric unit of a general hospital, or a regional comprehensive care center[.]

BRIEF FOR APPELLANT:

Christopher Harrell
Louisville, Kentucky

BRIEF FOR APPELLEES:

None filed