

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

B. B. In Re: C. B.,	:	
Petitioner	:	
	:	
v.	:	No. 1214 C.D. 2009
	:	SUBMITTED: November 20, 2009
Department of Public Welfare,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE DAN PELLEGRINI, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: March 22, 2010

B.B. petitions for review of the final order of the Secretary of the Department of Public Welfare (DPW) that upheld, after reconsideration, the decision of the Bureau of Hearings and Appeals (Bureau) denying B.B.'s request for expungement of the indicated report of child abuse filed by the Somerset County Children and Youth Services (CYS). B.B. argues that CYC failed to prove that she caused "a serious mental injury" to her son.

On April 19, 2007, CYC filed an indicated report of child abuse against B.B., alleging that she caused a serious mental injury to her son, C.B., who was born in March 1994. The term "child abuse" is defined to include "[a]n act or failure to act by a perpetrator which causes nonaccidental serious mental injury to ... a child under 18 years of age." Section 6303(b)(1)(ii) of the Child Protective Services Law (Law), *as amended*, 23 Pa. C.S. § 6303(b)(1)(ii). Section 6303(a) of

the Law defines a "serious mental injury" as:

A psychological condition, as diagnosed by a physician or licensed psychologist, including the refusal of appropriate treatment, that:

(1) renders a child *chronically and severely* anxious, agitated, depressed, socially withdrawn, psychotic or in reasonable fear that the child's life or safety is threatened; or

(2) seriously interferes with a child's ability to accomplish *age-appropriate developmental and social tasks*. [Emphasis added.]

In the indicated child abuse report, CYS described C.B.'s injury as follows: "Child was coming to school crying every day, child was fearful of going home to mother because she yelled at him; mother searches child's room for drugs, tells child she hates him." Exhibit C-1 at 1; Reproduced Record (R.R.) at 1a. CYS further stated in the indicated report: C.B. "reported mother told him she hated him, called him evil, made him stay in his room for extensive periods of time because she believed he was lying and yelled at him constantly. Child stated this made him upset and fearful, which caused him to be upset at school." *Id.* at 2; R.R. at 2a. B.B. requested that the indicated report be expunged, alleging that it was inaccurate and was being maintained in a manner inconsistent with the Law.¹ At hearings before the Administrative Law Judge (ALJ), CYS and B.B. presented the following evidence regarding the events leading to the filing of the indicated

¹ An indicated report is a child abuse report filed when an investigation by the county agency or DPW determines that substantial evidence of the alleged abuse exists. Section 6303(a) of the Law; 53 Pa. Code § 3490.4. An indicated report may be based on available medical evidence, the child protective service investigation and the perpetrator's admission of abuse. *Id.* Any person named in an indicated report as a perpetrator of child abuse may ask the Secretary of DPW "to amend or expunge an indicated report on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with" the Law. Section 6341(a)(2) of the Law, *as amended*, 23 Pa. C.S. § 6341(a)(2).

report.

B.B. and C.B.'s father, G.B., were separated in April 2006 following B.B.'s hospitalization for a physical illness and her release from the hospital. B.B. and G.B. have since been involved in bitter divorce, child custody and protection from abuse proceedings. In 2006, the court granted B.B.'s request for a protection from abuse order against G.B. Upon his parents' separation, C.B. lived with B.B. and visited G.B. on weekends.

On October 12, 2006, C.B.'s teacher sent C.B., who was a sixth grader, to the school guidance counselor, Fredric Schminsky, because he had been crying in the classroom at the beginning of each day. C.B. told Schminsky that during frequent verbal encounters with him, B.B. said, "I hate you," "You are an evil child," and "I don't know how I could ever have given birth to you." Schminsky's Confidential Report to CYS (Exhibit C-4) at 1; R.R. at 16a. C.B. stated that he was upset about B.B.'s treatment of him and afraid of her and felt that she did not love him and kept him from his father "because she gets money and gets back at his father through him." *Id.* C.B. further stated that B.B. grounded him for calling his father everyday and kept him in his room most of the time for weeks and that she told him that she would beat herself up or pay someone to beat her up and then accuse him of doing it.

B.B. informed the school that C.B. could contact his father only on weekends. She called the police when G.B. appeared at C.B.'s sport events and band concerts. In January and February 2007, C.B. was crying again in the classroom three or four times a week. On February 23, 2007, C.B. was very upset because B.B. told him that the school recorded his phone calls to his father and that she was paying people to search his locker for drugs and journals. B.B. also told

C.B. about G.B.'s sexual history and sick relationship with C.B. On February 28, 2007, Schminsky called CYS' caseworker, Beverly Kerrigan, who interviewed C.B. the same day and determined that he was experiencing emotional and social problems at school, which interfered with his life and affected his school work, and that his condition was caused by a parent's action or inaction. On February 28, 2007, CYS removed C.B. from B.B.'s custody and placed him first in his paternal grandmother's custody and then in G.B.'s custody. B.B. denied C.B.'s allegations and told Kerrigan that she searched C.B.'s room for drugs and took the phone from him to prevent him from calling his father.

CYS referred C.B. to James Cochran, M.A., a licensed psychologist, for a psychological evaluation. Cochran interviewed C.B. and performed psychological tests on March 20, 2007. At that time, C.B. told Cochran that B.B. yelled at him constantly, called him a liar and evil and stated that she hated him. C.B. further told Cochran that B.B. would put the blame on him when she did something wrong. C.B. stated that "[s]ometimes he would have a good week and then sometimes the following week would be horrible." ALJ's Adjudication, Finding of Fact No. 35. C.B. "clearly indicated his preference for living with his father" and stated that his grades suffered "a little bit." Cochran's March 20, 2007 Report (Exhibit C-3) at 8; R.R. at 13a.

C.B.'s background information suggested to Cochran that he had bonded closely with G.B. and that his distress primarily stems from his mother's "episodic but quite frequent verbal rages." Exhibit C-3 at 9; R.R. at 14a. The test results showed that C.B. was vulnerable to impulsive and angry behavior and verbal aggression and had relationship difficulties, anger, anxiety, insecurity and low self-esteem. Cochran diagnosed C.B. as experiencing "emotional abuse from

his mother resulting in ... Adjustment Disorder with Mixed Disturbance of Emotions and Conduct." *Id.* Cochran noted that C.B. "quickly recovered" from the condition after he moved to his paternal grandmother's house. *Id.* Cochran further noted that "the possibility still exists that [C.B.'s paternal grandmother and G.B.] have at times encouraged [C.B.] to distance himself emotionally from his mother, perhaps even to denigrate her" and that during the "stormy verbal encounters with [B.B.]," C.B. "might have inflicted verbal hurts on [her] that she found difficult to manage." *Id.*

Cochran also interviewed G.B. and performed psychological tests. Cochran found that G.B. suffered from "adjustment disorder with anxiety" as a result of the stress from marital and financial problems and his concern about his son. Cochran's April 4, 2007 Report (Exhibit A-1) at 7; R.R. at 25a. On April 10, 2007, Cochran interviewed B.B. and issued a report, concluding:

The content of this meeting suggested that one or more persons in the ... family had omitted or altered reports of events especially regarding marital distress. When emotional issues reach such a high pitch as they apparently had in that family, truthfulness tends to suffer. I suspect that either parent has, or both parents have, failed to provide me with pertinent information or distorted events. I cannot know who has been more truthful. Nonetheless, my conclusions regarding [C.B.'s] mental abuse remain unchanged, resting on other sources of information, including what [C.B.] himself told me as well as the reports ... from staff at his school.

Cochran's April 10, 2007 Report (Exhibit A-2) at 3; R.R. at 28a.

B.B. testified that she and C.B. were very close and that she had him stay in his room only once. B.B. presented the testimony of Susan Blackburn Reich, who is the current juvenile court consultant for the Pennsylvania Juvenile Court Judges' Commission and the former director of the Somerset County

Probation and Youth Services. Reich testified that in order to find a serious mental injury, there must be a "[v]ery serious emotional trauma to the child," which is "chronic" and "severe" and that the context of the child abuse allegation must be also examined. June 17, 2008 Hearing, Notes of Testimony (N.T.) at 157-58; R.R. at 120a-21a.

B.B. also presented the report and testimony of Mark King, Ph.D., a licensed psychologist who performed a psychological evaluation of B.B. in August 2007 pursuant to an order of the Court of Common Pleas of Somerset County, Family Division. Dr. King opined that B.B. suffered from physical and emotional illnesses but was not in any way dangerous to C.B. Dr. King was critical of CYS for disallowing contact between B.B. and C.B. for a long period of time. He recommended that B.B. and C.B. be reunited in a therapist's office twice a week.

After reviewing Cochran's report, Dr. King subsequently issued a supplemental report, disagreeing with Cochran's evaluation of C.B. Dr. King pointed out that Cochran did not consider the context of the child abuse allegations, involving the parents' "very ugly" custody dispute. Dr. King's February 4, 2008 Report (Exhibit A-6) at 2; R.R. at 56a. Dr. King found that G.B. and C.B. engaged in improper communications, which resulted in a parental alienation and encouraged C.B. to take sides in the custody dispute. Dr. King further noted that "there are quite a number of things about the mother that [C.B.] was saying angrily that actually are normal parenting behavior." Exhibit A-6 at 3; R.R. at 57a. Dr. King observed that C.B. had no complaints of emotional distress just three weeks after the alleged occurrence of abuse and did not receive any mental health services.

The ALJ accepted C.B.'s testimony as credible and consistent with his

revelations to Schminskey, Kerrigan and Cochran, and found the testimony of CYS' other witnesses credible. Accepting Cochran's finding that C.B.'s distress primarily stemmed from B.B.'s episodic but frequent verbal rages, the ALJ concluded:

What child, or adult for that matter, would not be seriously agitated and anxious when told by their [sic] mother that they [sic] are evil, that they [sic] are hated, and that the mother cannot believe she gave birth to such a child? And what child wouldn't be anxious when the mother has a car accident and blames it on him? What child wouldn't be depressed when his mother is telling him he is being recorded, searched or accused of beating her when he is trying to maintain contact with his father? When a child of 14 testifies directly that he felt like an animal in a cage and that his mother told him he was an evil child and she could not believe she gave birth to him, and repeats these allegations verbatim to three different persons over a protracted period, it is clear that that child comes very easily ... as one who has been mentally abused. That abuse rendered the child chronically and severely anxious, agitated, depressed, and in reasonable fear of his safety.

ALJ's Adjudication at 11-12. The ALJ recommended that B.B.'s appeal from the indicated report and request for expungement be denied. The Bureau adopted the ALJ's adjudication in its entirety, and the Secretary of DPW upheld the Bureau's decision. B.B. appealed, and CYS intervened in the appeal.

In an expungement proceeding, the county agency has the burden of establishing by substantial evidence that the conduct of the person named in the indicated report as the perpetrator constitutes child abuse. 55 Pa. Code § 3490.106a.(g); *A.O. v. Dep't of Pub. Welfare*, 838 A.2d 35 (Pa. Cmwlth. 2003). Substantial evidence is "[e]vidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion."

Section 6303(a) of the Law; 53 Pa. Code § 3490.4. The Bureau is the ultimate fact-finder in an expungement proceeding. *D.T. v. Dep't of Pub. Welfare*, 873 A.2d 850 (Pa. Cmwlth. 2005).

To fall within the definition of a serious mental injury in Section 6303(a) of the Law, C.B.'s condition diagnosed by Cochran must have rendered him to suffer a chronic² and severe psychological condition, placed him in reasonable fear that his life or safety was threatened, or seriously interfered with his ability to accomplish developmental and social tasks appropriate for his age. B.B. argues that the evidence accepted by the ALJ and the Bureau satisfies none of these elements of serious mental injury. After careful review of the evidence, we must agree.

C.B., who was fourteen years old at the time of the hearings, testified as follows on direct examination:

Q. And what would you tell him [Schminskey]?

A. I would tell him what me and my mom were arguing about, and like just stuff that's been happening and why I would want to go live with my dad.

Q. Okay. So you're living with your mom and you're not happy with that?

A. Correct.

Q. Tell the Judge why you really weren't happy with that situation.

A. Because she would always say that I was an evil child. She would say I can't believe I gave birth to such an evil child

² The term "chronic" is defined as "marked by long duration, by frequent recurrence over a long time, and often by slowly progressing seriousness." Webster's Third New International Dictionary 402 (2002). The term also refers "to a health-related state, lasting a long time." Stedman's Medical Dictionary 348 (27th ed. 2000).

Q. Would she tell you these things pretty constantly?

A. A few times, yeah. And like she would say ... that she hated living with me.

Q. This bothered you?

A. Yes. Well, yeah, it's going to bother any kid when their [sic] mom says that to him.

Q. Did it affect you in school?

A. A little bit, yeah, because I would go to school crying.

Q. Okay. Did it affect --- did you see an effect on your schoolwork, for example?

A. Not really, because when I was at school ... I took my mind off it because I was around friends and stuff.

June 17, 2008 Hearing, N.T. at 104-5; R.R. at 107a. C.B. further testified that he did not like it when B.B. searched his book bag and forced him to stay in his room, that he "felt like being an animal in a cage" or "a prisoner" and that she expected him to receive A's in grades and became really mad when he received a C in spelling. *Id.* at 119, 123; R.R. at 111a-12a.

On cross-examination, Cochran explained his diagnosis that C.B. suffered from adjustment disorder with mixed disturbance of emotions:

Q. This diagnosis, every time you see this diagnosis, do you always have an emotional abuse?

A. No, it'd be unusual.

Q. It would be unusual. And if I recall your testimony, you would be looking for some sort of inability for the child to accomplish age appropriate skills?

A. Yes. There'd be some disability that the child would experience.

....

Q. *What can this child not do in normal life that a 12, 13 or 14 year old can do?*

....

A. *I don't think I can answer that in a specific way.*

Q. Okay.

....

A. *Yeah, I don't have a specific example.*

....

Q. *Okay. Can you tell me, then, whether his condition is chronic?*

....

A. *No, the diagnosis tends to be transient of the disturbance of the mixed --- I'm sorry. His diagnosis, as a rule, is transient. If it becomes chronic, it becomes a different diagnosis.*

Q. Okay. Did he have friends?

....

A. I gathered from him that he did.

Q. And that is appropriate for and socially appropriate for a child of his age?

A. That's right.

June 17, 2008 Hearing, N.T. at 58-60; R.R. at 96a (emphasis added). On redirect examination, Cochran further explained:

Q. Okay. And you described his condition as transient?

A. Yes.

Q. And just what does that mean?

A. If you take away the stress that someone is experiencing that causes an adjustment disorder, they can recover pretty quickly. The diagnosis allows for that, that's what I mean by transient. ...

Q. So if he's not living with his mother, he would not exhibit the same symptoms?

A. It could happen.

Id. at 73-74; R.R. at 99a-100a.

We do not condone B.B.'s use of abusive language to C.B. even during heated arguments. Indeed, we have no quarrel with CYS's removal of C.B.

from B.B.'s custody in light of her abusive behavior, which undoubtedly *could* lead to chronic psychological problems. However, her abusive verbal behavior alone is insufficient to establish that she actually *did cause* a serious mental injury to C.B. As Cochran conceded, C.B.'s psychological condition was transient, not chronic as required by Section 6303(a) of the Law. C.B. did not receive treatment for his condition and quickly recovered from it once he started living with his paternal grandmother and father. The evidence also fails to demonstrate that his condition severely interfered with his developmental and social tasks appropriate for his age. Although B.B. told Dr. Cochran that his grades suffered "a little bit," he testified that his schoolwork was "not really" affected while he was in B.B.'s custody; he continued to participate in many sport and music activities and "regularly attend[ed] the youth group" events. R.R. at 10a, 13a and 107a. CYS did not allege, and nothing in the record suggests, that B.B.'s conduct placed him in reasonable fear that his life or safety was threatened.

In *Luzerne County Children and Youth Services v. Department of Public Welfare*, 550 A.2d 604 (Pa. Cmwlth. 1988), this Court concluded that child abuse did not occur under similar circumstances. In that case, the county agency filed an indicated report of child abuse against the stepmother for causing a serious mental injury to her eight-year-old stepson, who had been hospitalized for psychiatric treatment. The treating psychiatrist testified that the stepson felt a strong aversion to his stepmother who attempted to impose greater discipline and supervision over him. The psychiatrist further testified that the stepmother was more responsible for their bad relationship and that returning the child to the home of his father and stepmother would place the child at a risk of serious mental injury. The child's natural mother testified that the child did not have behavioral

problems after he came to live with her. The Court found the evidence insufficient to prove child abuse. The Court reasoned:

The evidence presented demonstrates *only* that [the child] had a strong aversion to [his stepmother] based upon [her] mere presence in the home and her attempts to impose more discipline and supervision upon [him]. ... While we are aware that returning [the child] to the home of [his father and stepmother] may have placed [him] at a risk of serious mental injury and further deterioration, this alone is not substantial evidence that [the stepmother] was the perpetrator of child abuse against [the child].

Id. at 606-7 (emphasis in original).

As in *Luzerne County*, the evidence presented by CYS is insufficient to establish that B.B.'s conduct, however hurtful and inappropriate, caused a serious mental injury to C.B., as defined by the Law. Because the record establishes that CYS failed to meet its burden of proving that B.B. was the perpetrator of child abuse, she is entitled to have the indicated report expunged pursuant to Section 6341 of the Law, *as amended*, 23 Pa. C.S. § 6341. Accordingly, the final order of the Secretary of DPW is reversed.

BONNIE BRIGANCE LEADBETTER,
President Judge

