

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Westmoreland County Children's Bureau,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2522 C.D. 2009
	:	SUBMITTED: May 28, 2010
Department of Public Welfare,	:	
Respondent	:	

**BEFORE:** HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED:** July 29, 2010

The Westmorland County Children's Bureau (Bureau) petitions for review of the order of the Department of Public Welfare (Department) that adopted the recommendation of the Administrative Law Judge (ALJ) and expunged two reports of child abuse filed against M.V., who was accused of the sexual abuse of M.Z.<sup>1</sup> The Bureau challenges the Department's conclusion that M.V. cannot be considered a perpetrator of child abuse because he does not fit the statutory definition of a person responsible for the child's welfare. We affirm in part and reverse in part.

The facts of this case, as found by the ALJ, are not in dispute. In

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<sup>1</sup> M.V. had the opportunity to intervene in this appeal, but declined to do so.

October 2006, M.Z., who was 13 at the time, planned to go to a haunted house with two other girls, A.O. and N.V., the daughter of M.V. M.V. had agreed to transport them for the evening, and M.Z.'s mother dropped her off at a Burger King, where she was to be picked up by M.V. M.V. arrived with A.O. (N.V. had decided to stay home) and the three of them proceeded to the haunted house. On the way back from the haunted house, a sleepover at M.V.'s house was proposed. M.Z. and A.O. both called their parents, and, lying, told them they would be spending the night at each other's houses, when in fact they would be staying at M.V.'s house. Also on the ride home, M.V. provided beer to both M.Z. and A.O. After arriving home, and after N.V. fell asleep, M.Z. and A.O. snuck into M.V.'s bedroom, where he provided them with more beer, and underneath the covers of the bed, touched M.Z.'s vaginal area with his fingers. Then, after A.O. left the room, M.V. laid on top of M.Z., tried to kiss her, and asked if she wanted him to perform oral sex on her. M.Z. rolled away from him and left the room.

The Bureau received two complaints of child abuse based on these events. The first alleged sexual abuse of M.Z. by M.V., and the second alleged that M.V. had committed physical abuse by providing M.Z. alcohol to the point of intoxication. The Bureau filed an indicated report of abuse in response to each complaint, and the filing of these reports caused M.V.'s name to appear on the ChildLine Registry. Within the required time, M.V. requested that the reports be expunged. The Department held an administrative hearing, at which the ALJ found the above-recounted facts. The ALJ concluded that there was not substantial evidence to conclude that the beer M.V. provided to M.Z. made her intoxicated to the point that would qualify as physical abuse. The ALJ also found that there was substantial evidence that M.V. made inappropriate sexual advances to and had

inappropriate sexual contact with M.Z., but found that, because M.V. was not a “person responsible for the child’s welfare” under 23 Pa. C.S. § 6303(a), he could not be considered a perpetrator of child abuse under that statute. Therefore, the ALJ recommended that both reports be expunged. This recommendation was adopted by the Department, and the Bureau appealed to this court.

Those found to be perpetrators of child abuse in a founded or indicated report are included in a statewide registry, and are restricted in their ability to find employment in child care facilities. 23 Pa. C.S. § 6338. A perpetrator is defined as a “person who has committed child abuse and is a parent of a child, a person responsible for the welfare of a child, an individual residing in the same home as a child or a paramour of a child’s parent.” 23 Pa. C.S. § 6303(a). In this case, it is undisputed that M.V. committed child abuse, and that he is not the parent of a child, an individual residing in the same home as a child or a paramour of a child’s parent. Therefore the question of whether M.V. is a perpetrator under the statute is dependent on whether he is a person responsible for the welfare of a child. The statute defines “person responsible for the child’s welfare” as

[a] person who provides permanent or temporary care, supervision, mental health diagnosis or treatment, training or control of a child in lieu of parental care, supervision and control. The term does not include a person who is employed by or provides services or programs in any public or private school, intermediate unit or area vocational-technical school.

23 Pa. C.S. § 6303(a). There is little case law about the meaning of the phrase “person responsible for the welfare of a child” in Section 6303(a). This court considered the phrase in *Pennsylvania State Education Association v. Department of Public Welfare*, and found that a person responsible for the welfare of a child “customarily provides such matters as housing, clothing, furnishings, income and

medical care.” 449 A.2d 89, 92 (Pa. Cmwlth. 1982). However, this holding is no longer good law for two reasons. First, *Pennsylvania State Education Association* was decided when the phrase at issue was undefined in the statute. A subsequent amendment inserted the definition quoted above, which is considerably broader. See Act of Dec. 16, 1994, P.L. 1292. Secondly, *Pennsylvania State Education Association* was criticized by our Supreme Court in *Commonwealth v. Gerstner*, which interpreted the phrase at issue, as it appears in a separate statute, 42 Pa. C.S. § 5554(3), to apply to “any individual who is entrusted with custody and control of the child during a parent’s absence.” 540 Pa. 116, 128, 656 A.2d 108, 114 (1995). For these reasons, we conclude that *Pennsylvania State Education Association* is no longer good law, and proceed based on the plain language of the definition included in the statute.

The ALJ concluded that M.V. was not a person responsible for M.Z.’s welfare, because at the time the abuse occurred, M.Z.’s parents were under the mistaken impression that M.Z. was staying at A.O.’s house. The ALJ concluded that M.V. was responsible for M.Z. early in the evening in question, as M.Z.’s parents dropped her off with the expectation that M.V. would be bringing her and her friends to the haunted house. According to the ALJ, however, that responsibility ended when M.Z. called her parents and untruthfully told them that she would be spending the night at A.O.’s house, because, under *Gerstner*, M.Z. was no longer “entrusted with custody and control” of M.V. 540 Pa. at 128, 656 A.2d at 114.

We find this conclusion to be in error. There was no reason for the ALJ to use the *Gerstner* definition of the phrase at issue, which is an interpretation of a different statutory provision, when the statute at issue, 23 Pa. C.S. § 6303(a),

provides a definition in its text.<sup>2</sup> Under the statutory definition, it is clear that M.V. was a person responsible for the welfare of a child at the time the abuse occurred, because he was providing “temporary care, supervision [and] control of a child in lieu of parental care, supervision and control” by transporting M.Z. to and from the haunted house, and providing her with a place to stay in his house. 23 Pa. C.S. § 6303(a). Under the statutory definition, there is no requirement that a person responsible have been “entrusted” with this responsibility, so the deception of M.Z.’s parents as to her whereabouts is not relevant.<sup>3</sup>

For this reason, we find the ALJ and the Department erred in finding that M.V. was not a person responsible for the welfare of a child, and that M.V. is, therefore, properly classified as a perpetrator of abuse. On appeal, the Bureau did not challenge the ALJ’s factual conclusion that no physical abuse occurred, so we affirm the Department’s decision to expunge the physical abuse report. However, because the ALJ did find that sexual abuse took place, and we find that M.V. is properly classified as a perpetrator, we reverse the Department’s decision to expunge the sexual abuse report.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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<sup>2</sup> Applying the *Gerstner* definition to 23 Pa. C.S. § 6303(a) is clearly incorrect because it yields results inconsistent with the pertinent statutory definition in several important instances. Not only does the *Gerstner* definition include an “entrustment” requirement not present in § 6303(a), it also was found, in the *Gerstner* case itself, to encompass school teachers, a result explicitly forbidden by § 6303(a). See 540 Pa. 116, 656 A.2d 108.

<sup>3</sup> Moreover, M.V. was originally entrusted with the care of M.Z. by her parents, and we believe this trust should be construed to continue so long as she remained continuously under M.V.’s care and control, regardless of her parents’ erroneous belief as to her actual whereabouts at the time of the abuse.

