RENDERED: DECEMBER 19, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001080-ME

T.R. APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE MATTHEW B. HALL, JUDGE
ACTION NO. 04-J-00453

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY; C.R., BY AND THROUGH
HER GUARDIAN AD LITEM,
KIMBERLY STAPLES APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, T.R., appeals from the Hardin Family Court's finding of medical neglect in this dependency, neglect and abuse action. Finding no error, we affirm.

T.R. is the mother of C.R., a twelve-year-old minor. C.R. suffers from nephritic syndrome which results in the buildup of protein in her kidneys. C.R.'s condition requires daily monitoring of the protein levels in her urine, a restricted diet, and a regimen of prescription drugs. In November 2007, C.R. was hospitalized at Kosair Children's Hospital in Louisville for two days. Upon discharge, T.R. was instructed to schedule a follow-up visit for C.R. in one week. After two months passed without a follow-up visit, one of C.R.'s treating kidney specialists, Dr. McKinney, contacted the Cabinet for Health and Family Services to report T.R.'s failure to comply with the discharge instructions. Apparently, a visit was then scheduled by Lynda Kay Srna, a social worker with the Cabinet. However, T.R. failed to show up for the appointment.

On February 11, 2008, the Cabinet filed a Juvenile Dependency, Neglect and Abuse petition against T.R. in the Hardin Family Court. Following a hearing, the family court made a finding of neglect based upon T.R.'s failure to schedule a follow-up appointment for C.R. for over eleven weeks. The court's disposition allowed C.R. to remain in T.R.'s custody so long as T.R. agreed to cooperate with the doctors and the Cabinet. T.R. thereafter appealed to this Court.

T.R. argues on appeal that the family court erred in admitting a report by Dr. McKinney outlining his suspected neglect. Initially, the court sustained T.R.'s hearsay objection, noting that it would allow the Cabinet's social worker, Lynda Kay Srna, to testify about the report for the limited purpose of showing why the Cabinet opened the case, but adding that "[w]hatever Dr. McKinney might

have said will have to be proved by another manner." However, later in the hearing, the court ruled that because Dr. McKinney had a duty under Kentucky Revised Statutes (KRS) 620.030 to report suspected neglect, the report was not hearsay.

T.R. argues that because Dr. McKinney was not present at the hearing, the contents of his report were inadmissible hearsay. T.R. analogizes this case to the fact scenario presented in *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954 (Ky. 1997), wherein our Supreme Court held that hearsay statements in a social worker's investigative reports were inadmissible. Moreover, T.R. claims that the admission of the report was prejudicial because it was the only evidence offered by the Cabinet.

No question exists that a doctor has a statutory duty to report any suspected neglect or abuse. KRS 620.030. And pursuant to subsection (2) of the statute, a doctor is required to make a written report detailing the identity of the child, the nature and extent of the alleged neglect or abuse, the identity of the person allegedly responsible, as well as any other pertinent information. However, whether a doctor's written report made pursuant to KRS 620.030 is admissible is not specifically addressed by *Prater, supra,* and may indeed be a matter of first impression. Nevertheless, we need not reach such issue because Dr. McKinney's report herein was not offered to prove the truth of its contents, but rather to show why the Cabinet opened an investigation.

Contrary to T.R.'s assertion, Dr. McKinney's report was not the only evidence presented in this case. Ms. Srna testified concerning the history of T.R.'s ongoing issue of medical neglect concerning C.R. In fact, there had been three prior referrals, and two substantiated neglect actions for the same problem. In addition, T.R. herself testified and admitted that she had a history of missing C.R.'s doctors' appointments, and that she had even permitted C.R. to self-medicate.

We find compelling the family judge's comments during the hearing. The court noted that it considered the Cabinet's case unpersuasive until T.R. testified. Per her own testimony, T.R. acknowledged that she was to schedule a follow-up appointment within one week of C.R.'s discharge from the hospital. T.R. claimed that she did not make the follow-up appointment because her insurance had lapsed, but that she had maintained telephonic contact with C.R.'s family physician. However, the court determined that T.R.'s insurance did not actually lapse until December 31, 2007, some six weeks after C.R. was already overdue for her appointment. The family court further remarked that T.R.'s act of permitting an eleven-year-old to self-medicate a potentially deadly medical condition was "irresponsible at least – maybe criminal."

The family court has a great deal of discretion in determining whether a child fits within the abused or neglected category. *Department for Human Resources v. Moore*, 552 S.W.2d 672, 675 (Ky. App. 1977). A reviewing Court is not permitted to substitute its judgment for that of the lower court unless its

findings are clearly erroneous. *Reichle v. Reichle,* 719 S.W.2d 442, 444 (Ky. 1986). Factual findings are not clearly erroneous if they are supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964).

Contrary to T.R.'s assertions, the record is replete with substantial evidence to support the family court's findings. The record is clear that T.R. has had a history of neglecting to provide proper medical care for C.R. We agree with the family court that T.R.'s testimony was sufficient to establish that she again failed to follow proper medical instructions despite prior court orders directing her to do so.

Accordingly, we affirm the Hardin Family Court's finding of medical neglect against Appellant, T.R.

VANMETER, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS: I respectfully dissent. To analyze the admissibility of the letter from Dr. McKenney, we must first look to the issues to be adjudicated.

A review of the petition in this matter reveals allegations that, post-hospitalization of C.R., T.R. failed to bring C.R. to medical visits and was non-compliant with C.R.'s medication needs. The petition does reference a history of prior occurrences but states they were the subject of other court actions and, thus, not the subject of this action.

History would obviously be useful to the judge at disposition, but of little avail to the Commonwealth in proving a missed appointment in this one instance. Therefore, as to the admission of the history to prove current neglect, I respectfully dissent.

Now we must examine the evidence at trial. First, we must look to see if the admission of the letter to prove a missed appointment and the details thereof is error. T.R. testified to the fact that she missed an appointment. Thus, the letter when used as evidence of a missed appointment was repetitive of the testimony of T.R. and, thus, harmless error.

Second, we must look to the remaining content of the letter. Therein is expressed the opinion of Dr. McKenney as to the effect of the missed appointment. While Dr. McKenney was under a statutory duty to report dependency or neglect to the cabinet,[1] I know of no evidentiary rule that would allow admission of the letter, which is obvious hearsay, based upon the statutory duty to report set forth in Kentucky Rules of Evidence (KRE) 803. The letter may have been properly introduced as a business record or medical record, but there was neither foundation nor certification of same in this instance, and no medical expert to testify. Thus, admission under either of these hearsay exceptions fails.

Lastly, we must determine if the fact that an appointment was missed is, in and of itself, medical neglect. I respectfully submit that without a medical opinion as to the effects of the missed appointment that the evidence before the

[1] KRS 620.030(1).

trial court was insufficient to find neglect. I would vacate the judgment of the court and remand for additional proceedings consistent herewith.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Sherry Keith Kelley Elizabethtown, Kentucky	No Brief for Appellee