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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000775-ME

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 19-J-00340-001

H. K., THE JUVENILE'S LEGAL MOTHER AND CUSTODIAN; AND R.K., A CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL,[1] AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: The Commonwealth of Kentucky appeals from the Kenton Family Court's April 30, 2019 summary dismissal of a dependency, neglect and abuse (DNA) petition filed due to excessive absenteeism from school

[1] Judge C. Shea Nickell dissented in this opinion prior to being sworn in as a Justice with the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

by a kindergartener on the basis that the facts presented did not meet the statutory requirements for abuse or neglect. We affirm. There can be no educational neglect of a child for excessive absenteeism who is not required by law to attend school.

On April 22, 2019, Covington School District Pupil Personnel Compliance Director Ray Finke filed a DNA petition and affidavit in the Kenton Family Court. Finke alleged that R.K. (child) was neglected or abused by H.K. (mother) on the following grounds:

> [Child] is in kindergarten at [a public elementary school]. She has just begun receiving Special Education Services and is taking medication for ADHD. Her attendance is poor as she has missed 21.5 days of school, sixteen unexcused. Her academic performance is well below expectations and is being exacerbated by her attendance.

According to the information provided on the petition, child was enrolled in kindergarten as a five-year-old and her absences occurred before she turned six.

At the initial court appearance, the Commonwealth read the contents of the petition into the record and defense counsel moved for dismissal, asserting that mother had been working with the school district to resolve the matter. The family court inquired of a worker from the Cabinet for Health and Family Services (Cabinet) whether an active case existed regarding the parties. The worker indicated the Cabinet had not opened an active case but, instead, referred child and mother back to the school to receive services, indicating "it was a resource thing."

Over the Commonwealth's objection, the family court dismissed the petition, finding it did not meet the *prima facie* burden for abuse or neglect, noting same on the docket sheet.

The Commonwealth argues that the family court erred in summarily dismissing its neglect action where it made a *prima facie* case for educational neglect based on excessive absences. We disagree.

Kentucky Revised Statutes (KRS) 600.020(1)(a)8. includes in its definition of an "[a]bused or neglected child" one "whose health or welfare is harmed or threatened with harm when" a parent or guardian "[d]oes not provide the child with adequate . . . *education* . . . necessary for the child's well-being." (Emphasis added). *See M.C. v. Commonwealth*, 347 S.W.3d 471, 472-73 (Ky.App. 2011) (determining that a parent allowing a child to have excessive school absences can constitute educational neglect).

Pursuant to our education laws, "[b]eginning with the 2017-2018 school year, any child who is six (6) years of age, or who may become six (6) years of age by August 1, shall attend public school[.]" KRS 158.030(2). A child who is five years of age by August 1, "*may* enter a primary school program[.]" *Id*. (Emphasis added). This gives parents of a five-year-old the discretion to decide whether the child will attend.

Child was only five years old when she was enrolled in kindergarten and incurred the absences which provided the basis for the temporary removal petition. Pursuant to KRS 158.030(2), her enrollment and attendance was optional.

While KRS 159.010(1)(a) requires that parents of "any child who has entered the primary school program . . . shall send the child to a regular public day school for the full term that the public school of the district in which the child resides is in session[,]"[2] because it was not initially mandatory, it cannot be educational neglect to fail to send a five-year-old to kindergarten every day when an identically situated five-year-old is not sent to school, nor required to be sent. *See In re B.B.*, 2019 VT 12, ¶ 10, 208 A.3d 244, 248-49 (Vt. 2019) (finding that risk of harm for educational neglect could not be demonstrated for a preschooler and kindergartener who were not required by law to attend school; even if they would have benefitted from attending and qualified for individual education plans, these services were voluntary).

The General Assembly recognizes that there is a difference between children who are mandatorily required to attend school at age six and children who may optionally attend school at age five. While a six-year-old child may be a

[2] According to the regulations, the voluntary enrollment of a five-year-old becomes irrevocable after the first two school calendar months. 704 Kentucky Administrative Regulations (KAR) 5:060 § 1.

truant for missing school, a five-year-old cannot be a truant. KRS 159.150(1) provides: "Any student who has attained the age of six (6) years, but has not reached his or her eighteenth birthday, who has been absent from school without valid excuse for three (3) or more days, or tardy without valid excuse on three (3) or more days, is a truant." KRS 159.150(3) further provides: "Any student who has been reported as a truant two (2) or more times is an habitual truant."

Because a five-year-old cannot be a truant, any court action regarding child's attendance can only be pursued as a neglect action.[3] However, because it is

[3] This has the unfortunate unintended consequence that the additional mechanisms to keep a truancy case out of the court system do not apply to an educational neglect case. If a status offense, which includes habitual truancy, KRS 600.020(65)(a)3, is alleged against a child, there are a number of procedures in place to help remedy the situation by getting the child and the child's family needed services and avoiding court proceedings. KRS 630.010(2) provides that as to status offenders "[i]t shall be declared to be the policy of this Commonwealth that all its efforts and resources be directed at involving the child and the family in remedying the problem for which they have been referred[.]" These resources include documenting what interventions have been attempted and the involvement of a court-designated worker (CDW) and the involvement of the family accountability, intervention, and response (FAIR) team. KRS 159.140(1)(c), (d), (e) and (f) require the director of pupil personnel or an assistant to find out about the home conditions of the habitual truant and acquaint those in the home with the advantages of school, find out the causes of irregular attendance and truancy through documented contact with the custodian, "seek the elimination of these causes[,]" secure enrollment and attendance, and attempt to visit the homes of students "reported to be in need of books, clothing, or parental care[.]" KRS 159.140(3) provides that "[i]n 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 and may, after consultation with the [CDW], refer the case to the [FAIR] team." KRS 630.050 mandates a conference with the CDW and requires under (2) that the CDW "shall make reasonable efforts to refer the child and his family to [a public or private social service] agency before referring the matter to court[.]" KRS 610.030 sets out actions a CDW can take including (5) that "[t]he preliminary intake inquiry shall include the administration of an evidence-based screening tool and, if appropriate and available, a validated risk and needs assessment, in order to identify whether the child and his or her family are in need of services and the level of intervention needed" and (6)(a) that "[u]pon the completion of the preliminary intake inquiry, the [CDW]

optional to send a five-year-old to school, mother could not educationally neglect child because child was only five years old when she was excessively absent.

While it may be prudent for child to be enrolled in school, attend faithfully and obtain the maximum educational services such enrollment and attendance allows, mother could not educationally neglect child when child's school enrollment in the first place was not compulsory but optional. A parent who wants her child to attend school before it is compulsory should be lauded for seeking out education for her child and given assistance where needed to fulfill such a goal, not charged with neglect if the child's attendance is less than stellar.

This does not mean that school personnel should ignore when a child of any age has attendance problems. School attendance problems are often a symptom of a larger problem and merit investigation and intervention as mandated by statute even when the child is too young to be required to attend school or to be classified as a truant. KRS 159.140 provides in relevant part:

> (1) The director of pupil personnel, or an assistant appointed under KRS 159.080, shall:
>
> . . .
>
> (d) Ascertain the causes of irregular attendance . . . through documented contact with the custodian of

may . . . [i]f the complaint alleges a status offense, determine that no further action be taken subject to review by the [FAIR] team[.]" KRS 630.060(2) states that "[n]o complaint shall be received by the [CDW] alleging habitual truancy unless an adequate assessment of the child has been performed pursuant to KRS 159.140(1)(c), (d), and (f), unless it can be shown that the assessment could not be performed due to the child's failure to participate."

> the student, and seek the elimination of these causes;
>
> (e) . . . keep all enrolled students in reasonably regular attendance; [and]
>
> (f) Attempt to visit the homes of students who are reported to be in need of books, clothing, or parental care[.]

It is troubling that a DNA action was initiated when there was no indication that Finke or anyone else fulfilled any of the duties owed to child pursuant to KRS 159.140(1). Although a DNA petition could not properly be brought for educational neglect of child due to her age, we are concerned that DNA petitions are being pursued for educational neglect as a work-around for the statutorily mandated processes that must take place before a truancy petition may be filed. While KRS 630.060(2) requires compliance with KRS 159.140(1)(c), (d) and (f) for there to be subject matter jurisdiction over a delinquency petition for truancy, *T.D. v. Commonwealth*, 165 S.W.3d 480, 482-83 (Ky.App. 2005), and other statutory interventions are inapplicable if a DNA petition is being pursued rather than a delinquency petition, this does not mean that the director of personnel should be able to ignore the applicable provisions of KRS 159.140(1) and take no mandated action if a DNA petition for educational neglect is pursued instead. At a DNA hearing instituted by school district personnel based on educational neglect, it must be established that the director of personnel or designee has complied with

the statutory duties designed to remedy attendance problems before the matter proceeds any further. Providing support for the family, rather than immediately turning to the court system to request that child be removed from her home to make sure she attends school, is a more appropriate and efficacious use of limited resources. The court system should be the last resort for attendance problems or truancy.

Parents have a "fundamental, basic, and constitutional right to raise, care for, and control their own children." *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010). A finding of neglect for failure to educate a child who is below mandatory school age "would be to sanction state intrusion into the personal relationship between parent and child to an intolerable degree and would impermissibly impair the normal prerogatives of parenthood." *Doe v. G. D.*, 146 N.J. Super. 419, 431, 370 A.2d 27, 33 (App. Div. 1976), *affirmed by Doe v. Downey*, 74 N.J. 196, 377 A.2d 626 (1977).

Accordingly, the family court acted properly in determining that the Commonwealth could not establish a *prima facie* case for educational neglect and dismissing the case.

LAMBERT, JUDGE, CONCURS.

NICKELL, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

NICKELL, JUDGE, DISSENTING: Respectfully, I dissent because I believe the majority's reasoning is contrary to the law.

While I agree with the majority that school enrollment for a five-year-old is discretionary, I part ways with the assertion attendance following enrollment is optional. The majority's position ignores the plain statutory language of KRS 159.010(1)(a).

Although the majority correctly recites the mandatory attendance language contained in KRS 159.010(1)(a), it then holds the statute does not apply in this situation because school enrollment for five-year-olds is not required. While it is true mother did not have to enroll child in school, once she did so–and the decision became irrevocable by operation of 704 KAR 5:060 § 1–the provisions of KRS 159.010(1)(a) apply. That statute plainly mandates a parent "*shall*" send a child who has entered the primary school program to school on each day school is in session. *Id*. (emphasis added).

> KRS 446.080(4) states that "[a]ll words and phrases shall be construed according to the common and approved usage of language . . . ." "In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command and . . . must be given a compulsory meaning." "If the words of the statute are plain and unambiguous, the statute must be applied to those terms without resort to any construction or interpretation." Shall means shall.

Bevin v. Commonwealth ex rel. Beshear, 563 S.W.3d 74, 89 (Ky. 2018) (quoting *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 795-96 (Ky. 2003)).

Here, child was enrolled in and had entered the primary school program; sufficient time had elapsed for mother's decision to become irrevocable. Thus, child was required to attend school. The majority incorrectly equates child to "identically situated" children of the same age who are not required to attend school. A five-year-old who has never been enrolled in school cannot, by definition, be "identically situated" to a five-year-old who has been enrolled and entered the primary school program.

The majority's reliance on *In re B.B.* is inapposite as Vermont law, unlike KRS 158.030(2), does not permit voluntary enrollment of a five-year-old. Nor does Vermont law contain a provision similar to KRS 159.010(1)(a) regarding compulsory attendance of children who have entered a primary school program. Rather, Vermont requires mandatory attendance of children aged six through sixteen. 16 Vermont Statutes Annotated §1121. Vermont does not require enrollment in kindergarten. Thus, the holding in *In re B.B.* is inapplicable to the issues raised in this Kentucky appeal.

The majority proceeds to require expenditure of a school district's limited resources to monitor and resolve attendance problems relating to an absent

child it has already determined to have no attendance obligation. As such, the majority's holdings are internally inconsistent.

For these reasons, I believe excessive absenteeism of a child properly enrolled in the primary school program, regardless of age, can serve as the basis of an educational neglect petition. Here, mother chose to enroll her five-year-old child in school. Upon making this choice, mother was required to comply with the clear legislative mandate to ensure her child was present on each day school was in session. Nowhere in the educational statutes of this Commonwealth do I find support for the majority's resolution. Contrary to the majority's holding, no mechanism exempts mother from application of KRS 159.010(1)(a).

> "The seminal duty of a court in construing a statute is to effectuate the intent of the legislature." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002) (*citing Commonwealth v. Harrelson*, 14 S.W.3d 541 (Ky. 2000)). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005) (*citing Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979)). Thus, we are "to ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed." *Stopher v. Conliffe*, 170 S.W.3d 307, 309 (Ky. 2005), *overruled on other grounds by Hodge v. Coleman*, 244 S.W.3d 102 (Ky. 2008).

Hall v. Hosp. Resources, Inc., 276 S.W.3d 775, 784 (Ky. 2008). "In construing statutes, we are 'not at liberty to add or subtract from the legislative enactment or

interpret it at variance from the language used.'" *Kentucky Employees Retirement System v. Seven Counties Services, Inc.*, 580 S.W.3d 530, 539 (Ky. 2019) (quoting *Johnson v. Branch Banking & Tr. Co.*, 313 S.W.3d 557, 559 (Ky. 2010)).

As noted by the majority, the legislature enacted different rules for five-year-old children in relation to discretionary enrollment and truancy matters. While the General Assembly could have easily carved out an exception to the mandatory attendance statute for five-year-old enrollees, it did not. I am convinced the majority has ignored the unequivocal mandatory statutory language enacted by the legislature and its construction of the statutory provisions leads to an absurd result. *See Commonwealth v. Reynolds*, 136 S.W.3d 442, 445 (Ky. 2004). I would reverse the trial court's dismissal of the petition herein and remand for further proceedings.

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