

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

L. B. (In Re: T.P.), :  
Petitioner :  
 :  
v. : No. 828 C.D. 2009  
 :  
Department of Public Welfare, : Submitted: October 2, 2009  
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: January 5, 2010

L. B. petitions for review of the final order of the Department of Public Welfare (DPW) upholding the November 12, 2008, order of the Bureau of Hearings and Appeals (BHA) denying L.B.’s appeal from an indicated report of child abuse filed with the ChildLine Registry<sup>1</sup> by the Lehigh County Children and

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<sup>1</sup> The ChildLine Registry operates a statewide system for receiving reports of suspected child abuse, referring reports for investigation and for maintaining reports. Section 6332 of the Child Protective Services Law (Law), 23 Pa. C.S. §6332. A report of the suspected child abuse may be either “indicated,” “founded,” or “unfounded.” Sections 6337 and 6338 of the Law, 23 Pa. C.S. §6337; 6338. In the case of “indicated” or “founded,” reports, the information is placed in the statewide central register. Section 6338(a) of the Law, 23 Pa. C.S. §6338(a). Notice of the determination must be given to the perpetrators of the child abuse indicating their ability to obtain employment in child-care facilities may be adversely affected. Id.

Youth Services (CYS) naming L.B. as a perpetrator of sexual child abuse.<sup>2</sup> We affirm.

CYS received an oral report of suspected child abuse on January 10, 2007. CYC investigated the matter and in March 2007, it filed an indicated report of child abuse listing L.B. as a perpetrator of sexual child abuse to T.P., the subject child. By letter dated June 4, 2007, L.B. appealed his listing in the ChildLine Registry and requested that his expunction appeal proceed to an administrative law hearing. The requested hearing took place before an administrative law judge (ALJ) on February 20, 2008, and May 19, 2008. CYC presented the testimony of the subject child, T.P., as well as the testimony of two CYC caseworkers: (1) Marsha Evans; and (2) Karen Hallman. L.B. testified on his own behalf and presented the testimony of his mother, D.B., and his brother, E.B. Based on the evidence presented, the ALJ made the following findings of fact.

The subject child, T.P., is a female born on January 21, 1992. T.P. was 14 years old at the time of the alleged abuse and 16 years old at the time of the hearing before the ALJ. The alleged abuse occurred during the spring and summer of 2006.

L.B., born on April 3, 1984, was 22 years old at the time of the alleged abuse and 24 years old as of the May 19, 2008, hearing. To L.B. dating is a social relationship between a boyfriend and girlfriend that includes sexual intercourse. When L.B. was 17 years old, he began a three to four year sexual relationship with a 14 year old girl, who subsequently alleged that L.B. fathered

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<sup>2</sup> CYC intervened in this matter on May 26, 2009, and filed a brief in opposition to L.B.'s appeal on August 14, 2009. DPW was precluded by this Court from filing a brief in this matter by order of September 24, 2009.

her child. L.B. was found to be sterile when the paternity of his ex-girlfriend's child was tested.

During the summer of 2006, T.P.'s father was dating L.B.'s mother, D.B. D.B. generally stayed at T.P.'s father's home.

D.B.'s home was a place where L.B.'s friends were permitted to visit, play video games, and sleep over at will without D.B. specifically knowing who was present. L.B., his brothers, and their friends spent much of their time at D.B.'s home on the second floor playing video games late into the night, but sometimes they played the X-Box game system located in the living room on the first floor. While at D.B.'s home, T.P. was flirtatious with the males.

As of May 2006, L.B. was eight years older than T.P. Starting in May 2006, L.B. supervised T.P. when she visited and subsequently lived in D.B.'s home while T.P. attended summer school from mid-July through August 2006. D.B. commented to T.P. that L.B. and T.P. had a close brother-sister relationship and warned L.B. not to have intimate contact with T.P.

L.B. sent T.P. an email dated May 22, 2006, wherein he stated that he wanted to continue kissing T.P. as well as date and make love to her. The email also stated the he was unable to have children. On May 22, 2006, L.B. admitted to T.P. during a telephone conversation that he sent her the May 22, 2006, email.

As the summer progressed in 2006, T.P.'s relationship with L.B. changed from platonic to sexual. L.B. admitted during his CYS interview that he unlocked the bathroom door to enter while T.P. showered. On the dates when L.B. entered the bathroom while T.P. showered, he observed T.P. naked in the shower and occasionally reached into the shower to touch T.P.'s breasts and buttocks.

T.P. usually slept in the basement in D.B.'s bedroom, but sometimes slept over-night on the first floor living room couch. During the period of alleged

abuse, L.B. usually slept in the living room with his brother E.B., but sometimes L.B. slept in his own bedroom on the second floor.

During the summer of 2006, T.P. and L.B. had consensual sexual intercourse on the living room couch and less frequently in L.B.'s second floor bedroom. L.B. usually wore a condom while having sexual intercourse with T.P. even though he is sterile. T.P. stopped L.B. when he attempted to have anal sex with her. T.P. was credible that she hid her relationship with L.B. from others to avoid injuring her father's relationship with L.B.'s mother, D.B.

In August 2006, L.B. told T.P. that he used her mouth for oral sex while she slept after she took migraine medicine. T.P. did not recall performing oral sex on L.B. on the night he gave her migraine medication as she was asleep during the alleged incident.

In late August 2006, T.P. ended her sexual relationship with L.B., but remained in contact with him through September 2006, when T.P.'s mother accused them of having a non-platonic relationship. In October 2006, T.P.'s father and L.B.'s mother stopped dating. By November 2006, T.P. had a new boyfriend to whom she disclosed her past conduct with L.B. and the new boyfriend urged T.P. to tell her father. Through Christmas 2006, T.P. denied dating L.B. when questioned by her mother and L.B.'s mother. On February 12, 2007, T.P. was interviewed by Marsha Evans, a CYS caseworker.

The ALJ stated that this case came down to an issue of credibility. The ALJ found the testimony of T.P., Marsha Evans, D.B., and E.B. credible. The ALJ found the testimony of Karen Hallman credible regarding her telephone conversation with L.B. on February 7, 2007. The ALJ found the testimony of L.B. not credible regarding the May 22, 2006, email or the nature of his relationship with T.P. in 2006. Accordingly, the ALJ concluded that CYS presented substantial

evidence that L.B. had a consensual sexual relationship with T.P.; therefore, CYS demonstrated by substantial evidence that L.B. was properly listed as a perpetrator of sexual child abuse in an indicated report of child abuse.

The ALJ concluded that L.B.'s actions of touching T.P.'s breasts, vaginal area, and buttocks, having sexual intercourse with T.P., and watching T.P. shower while acting as her caregiver in this matter all fit the definition of child abuse.<sup>3</sup> The ALJ concluded further that CYS failed to demonstrate that L.B. had nonconsensual oral sex or anal sex with T.P.

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<sup>3</sup> The ALJ found specifically as follows:

Child abuse occurs when there has been a “sexual abuse or sexual exploitation of a child under 18 years of age[.]” 55 Pa. Code § 3490.4. Per 23 Pa.C.S.[] §6303(i)(C), sexual abuse or exploitation to a child by a perpetrator occurs, as applicable in this matter, when there has been a statutory sexual assault as defined by 18 Pa.C.S.[] § 3122.1, sexual assault as defined by 18 Pa.C.S.[] § 3124.1, aggravated sexual assault as defined by 18 Pa.C.S.[] § 3125(a)(8), and indecent assault as defined by § 3126(a)(8). L.B. meets the definition of a perpetrator as he acted in a caregiver role for T.P. during the summer of 2006 while T.P. visited and lived at his home. 55 Pa.Code § 3490.4. During this period, L.B. was eight (8) years older than T.P., T.P. was 14 years old and L.B. was 22 years old, L.B. and T.P. were unmarried, and L.B. and T.P. had a sexual relationship that included touching T.P.'s breasts, vaginal area, and buttocks, observing T.P. shower, and having sexual intercourse. L.B.'s touching of T.P.'s breasts, vaginal area, and buttocks was indecent assault. 18 Pa.C.S.[] §§ 3101, 3126(a)(8). L.B. having sexual intercourse with T.P. was statutory sexual assault, sexual assault, and aggravated indecent assault. 18 Pa.C.S.[] 3122.1, 3124.1, 3125(a)(8). Furthermore, I find that L.B. watching T.P. shower was sexual exploitation as its purpose was to gratify his and/or T.P.'s sexual desire being there was no health or safety reason for L.B. to enter the bathroom to observe T.P. naked and he attempted to touch her breasts and touched her buttocks while she showered. 55 Pa.Code § 3490.4. Each of these separate

*(Continued....)*

Accordingly, the ALJ recommended that L.B.'s appeal be denied. By order of November 12, 2008, the BHA adopted the ALJ's recommendation in its entirety.<sup>4</sup> Herein, L.B. raises the issue of whether the report of an indicated abuse of T.P. by L.B. should be expunged because CY failed to establish by substantial evidence that the indicated report is accurate.

Initially, we note that our scope of review of a denial to expunge an indicated report of sexual abuse of a child is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. K.J. v. Department of Public Welfare, 767 A.2d 609 (Pa. Cmwlth.), petition for allowance of appeal denied, 567 Pa. 750, 788 A.2d 381 (2001).

The county agency has the burden of proof in an expungement case and the critical issue to be determined is whether or not the indicated report is accurate. A.O. v. Department of Public Welfare, 838 A.2d 35 (Pa. Cmwlth. 2003). The county agency must establish by substantial evidence that the indicated report<sup>5</sup>

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actions by L.B. falls within the definition of child abuse in the [Law] and Department regulation[s].

<sup>4</sup> By order of December 22, 2008, DPW granted L.B.'s request for reconsideration of the BHA's November 12, 2008, order. By final order of April 6, 2009, DPW ordered that the November 12, 2008, order be upheld for the reasons stated by the BHA. This appeal followed.

<sup>5</sup> An "indicated report" is defined as:

A child abuse report made pursuant to this chapter if an investigation by the county agency or the Department of Public Welfare determines that substantial evidence of the alleged abuse exists based on any of the following:

- (1) Available medical evidence.
- (2) The child protective service investigation.
- (3) An admission of the acts of abuse by the perpetrator.

*(Continued....)*

is accurate. Bucks County Children and Youth Social Services Agency v. Department of Public Welfare, 808 A.2d 990 (Pa. Cmwlth. 2002). Substantial evidence, for purposes of child abuse expunction proceedings, is defined in Section 6303(a) of the Law, as "[e]vidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion." 23 Pa.C.S. §6303(a). In determining whether substantial evidence exists to support a finding of fact this Court is to give to the party in whose favor the appealed decision was rendered the benefit of all inferences that can logically and reasonably be drawn from the evidence. B.J.K. v. Department of Public Welfare, 773 A.2d 1271, 1276 (Pa. Cmwlth. 2001).

The BHA is the ultimate fact finder in expungement proceedings, with the authority to make credibility determinations. See J.B. v. Department of Public Welfare, 824 A.2d 342, 344 (Pa. Cmwlth.), petition for allowance of appeal denied, 575 Pa. 689, 834 A.2d 1144 (2003). Determinations as to credibility and evidentiary weight will not be disturbed on appeal absent an abuse of discretion. D.T. v. Department of Public Welfare, 873 A.2d 850 (Pa. Cmwlth. 2005).

"Child abuse" is defined in the Law as "[a]n act or failure to act by a perpetrator which causes nonaccidental serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age." Section 6303(b) of the Law, 23 Pa.C.S. §6303(b). Sexual abuse or exploitation is defined as, *inter alia*, "[t]he employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another individual to engage in sexually explicit conduct." Section 6303(a) of the Law, 23 Pa.C.S. §6303(a). "Child" is defined in the regulations as "[a] person under 18 years of age." 55 Pa. Code §3490.4.

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Section 6303(a) of the Law, 23 Pa.C.S. §6303(a).

The Law defines “perpetrator” 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.” Section 6303(a) of the Law, 23 Pa.C.S. §6303(a). The Law defines “person responsible for the child’s welfare”, in pertinent part, 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.” Id.

Herein, L.B. does not dispute that he falls within the definition of perpetrator as he was responsible for T.P.’s welfare during the summer of 2006 when she resided in the home he shared with his mother, D.B. L.B. argues that T.P.’s testimony was unsupported with any cold hard facts, verifiable observations or corroboration of any allegations of the acts of sexual abuse. L.B. contends that no acts of any sexual nature were observed by any other residents or guests in the home in which there were multiple constant inhabitants and frequent visitors. L.B. argues that T.P.’s accounts are the statements of a disillusioned, precocious, self-defined, self-serving victim who is not to be believed. L.B. contends that the ALJ revised and reshaped the evidence to find that the CYS record was accurate or sustained by substantial evidence. L.B. argues further that no one in this case has offered any particulars or verification that the incidents alleged by T.P. are not the product of rampant fabrication. L.B. contends further that T.P. has lodged the baseless allegations of a sexual relationship in order to get back at him for failing to compensate T.P. for cleaning his mother’s home as agreed. In short, L.B. contends that T.P.’s testimony should have been rejected as not credible because there was no evidence corroborating her accusations.



As we have stated previously herein, determinations as to credibility and evidentiary weight will not be disturbed on appeal absent an abuse of discretion. D.T. The ALJ's adjudication, which was adopted in its entirety by the BHA, thoroughly explains in detail why T.P.'s testimony was found more credible than L.B.'s. As such, we conclude that the BHA did not abuse its discretion by accepting T.P.'s testimony as credible and rejecting that of L.B. Moreover, contrary to L.B.'s contentions, T.P.'s testimony is corroborated by the May 22, 2006, email from L.B. to T.P., which clearly shows that L.B. wished to engage in an intimate relationship with T.P. L.B. indicates in the email that he already gives T.P. kisses, and that he wanted to, *inter alia*: (1) date T.P.; (2) make love to T.P.; (3) take a shower with T.P.; and (4) hook up with T.P. See Reproduced Record (R.R.) - Exhibit C-2.<sup>6</sup> T.P.'s testimony is further corroborated by L.B.'s statements during his CYS interview wherein he stated that he thought T.P. was interested in him and his admission that he went into the bathroom while T.P. showered. See R.R. - Transcript of February 20, 2008 Hearing at 128-131.

Accordingly, the final order of the DPW is affirmed.

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JAMES R. KELLEY, Senior Judge

Judge Simpson concurs in the result only.

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<sup>6</sup> We note that L.B. has failed to paginate the reproduced record in accordance with Pa.R.A.P. 2173, which mandates that the pages of a reproduced record be numbered separately in Arabic figures followed by a small a, thus 1a, 2a, 3a, etc.

