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Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0570-ME

CABINET FOR HEALTH AND FAMILY SERVICES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 21-J-502621-001

JEFFERSON COUNTY ATTORNEY'S OFFICE; C.B.; D.B.; AND E.B., A MINOR CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; CALDWELL AND GOODWINE, JUDGES.

CALDWELL, JUDGE: In 2020, our Supreme Court held that indigent parents named as respondents in dependency, neglect, and abuse (DNA) cases have a constitutional right to state funds to retain an expert in cases involving "complex issues of medical or psychiatric evidence . . . ." *Cabinet for Health & Family*

Services v. K.S., 610 S.W.3d 205, 215 (Ky. 2020). This appeal asks whether the Cabinet for Health and Family Services (the Cabinet) may properly appeal from an order requiring it to pay expert witness fees to indigent parents in a DNA action. We conclude that this interlocutory appeal is proper based upon the public's interest in zealously ensuring that taxpayer funds are spent only when necessary and the inefficacy of the Cabinet appealing after the DNA petition is resolved. We also discern no abuse of discretion in granting these Parents' motion.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

In October 2020, one-year-old E.B. (Child) was taken to the hospital after rolling off a couch and hitting his head on the floor. Hospital personnel noticed bruising around Child's ears. The Cabinet was alerted. Over four months later, the Cabinet filed a DNA petition, naming D.B. and C.B., Child's parents (Parents), as respondents. The petition noted that two physicians consulted by the Cabinet had stated that Child's ear bruising was "diagnostic of inflicted child physical abuse." Record (R.) at 2.

Parents assert that Child's bruising stems from a medical condition, not inflicted abuse.[1] Parents, via retained counsel, asked the court to order the

[1] Specifically, Parents assert Child has von Willebrand disease. The Centers for Disease Control and Prevention (CDC) defines von Willebrand disease as "a blood disorder in which the blood does not clot properly." *Von Willebrand Disease*, CDC, https://www.cdc.gov/ncbddd/vwd/facts.html (last visited Dec. 16, 2022). The CDC notes that people who have von Willebrand disease "might experience easy bruising that . . . [o]ccurs with very little or no trauma or injury[.]" *Id.*

Cabinet to provide funds so Parents could retain an expert. The gist of Parents' argument is that the Cabinet consulted experts before filing the DNA petition, so they were entitled to hire an expert to rebut the petition's allegations. However, Parents' motion did not specify what type of expert (pediatrician, hematologist, nurse, *etc*.) they wished to retain. Parents did not then submit affidavits of indigency, but their motion asserted that Mother was not employed, and Father worked at Walmart, earning $19 per hour, and they did not own a home or have assets they could sell to get funds to retain an expert.

The family court held a hearing via videoconference on Parents' motion, at which no witnesses testified. Afterwards, the court tersely granted Parents' motion. In its entirety, the relevant portion of the ruling was: "The ct. finds the parents are indigent, and the request is reasonable & necessary." The Cabinet filed a motion to alter, amend, or vacate, asserting Parents' motion was fatally flawed because it did not discuss the type of expert they wished to retain and inadequately showed Parents to be indigent. The Cabinet also argued that the family court's findings were inadequate.

After Parents submitted their response, the family court held a videoconference hearing on the Cabinet's motion to vacate. Again, no witnesses testified. During the hearing, Parents' counsel remarked that the expert they wished to retain was board certified in hematology, though the expert's identity

was not disclosed. The family court then issued a terse order which purported to grant the Cabinet's motion, but that order did not substantively change the conclusion that Parents were entitled to state funds to retain an expert. In its entirety, the relevant portion of the new order provided:

> Given the child was found to have bruising and the cause of the bruising is at issue (disorder or inflicted); and because the petition relied upon expert opinion[s], the ct. finds the use of an expert is necessary. The amount, $10,000, is a reasonable amount given $10,000 is the cap; additionally the amount is reasonable given what is generally charged.

After the hearing, as directed by the court in response to the Cabinet's request, Parents each submitted an affidavit of indigency. The affidavits were consistent with Parents' motion regarding Father's salary ($19 per hour) and Mother not being employed outside the home. The affidavits further stated that Parents owned two vehicles with a combined value of roughly $5,000 but did not own any real property and had less than $20 in their bank account(s). In early May 2022, the family court signed orders finding Parents to each be indigent. The Cabinet soon thereafter filed this expedited appeal.

ANALYSIS

A. Issues Presented and Standard of Review

The first issue we must determine is whether an order requiring the Cabinet to pay for Parents' expert is one of the rare situations where an

interlocutory appeal is proper. The parties have not cited, nor have we independently located, any precedent which answers that question. Because determining whether an interlocutory appeal may be taken presents a question of law, our review is *de novo*. *Baker v. Fields*, 543 S.W.3d 575, 577 (Ky. 2018). If we conclude this interlocutory appeal is permissible, we then use the deferential abuse of discretion to review the trial court's funding order. *K.S.*, 610 S.W.3d at 217. A court abuses its discretion when it issues a decision which is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

B. The Collateral Order Doctrine's Requirements

"Generally, appeals may only be made from final judgments . . . ." *Baker*, 543 S.W.3d at 577. Here, it is undisputed that the order at issue is not a final judgment as it does not resolve all the issues among all of the parties, nor does it contain the requisite finality language by which an interlocutory order may be converted to a final and appealable judgment.[2] "But in rare cases, Kentucky affords a party the opportunity to appeal certain issues in a case before final

[2] *See* Kentucky Rules of Civil Procedure (CR) 54.01 ("A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02.") and CR 54.02(1) (providing that an interlocutory order may be designated as final "only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties . . . is interlocutory . . .").

judgment has been issued, termed an interlocutory appeal." *Baker*, 543 S.W.3d at 577. The question of apparent first impression before us is whether this is one of those rare cases. Specifically, does this appeal fall within the scope of the collateral order doctrine?

The *collateral order doctrine* is defined as "[a] doctrine allowing appeal from an interlocutory order that conclusively determines an issue wholly separate from the merits of the action and effectively unreviewable on appeal from a final judgment." BLACK'S LAW DICTIONARY (11th ed. 2019). Our Supreme Court first recognized the collateral order doctrine in 2009, "though not explicitly by name . . . ." *Childers v. Albright*, 636 S.W.3d 523, 526 (Ky. 2021) (citing *Breathitt Cnty. Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009)).

For the collateral order doctrine to apply, three criteria must be satisfied: "the challenged interlocutory order must (1) conclusively decide an important issue separate from the merits of the case; (2) be effectively unreviewable following final judgment; and (3) involve a substantial public interest that would be imperiled absent an immediate appeal." *Childers*, 636 S.W.3d at 527 (internal quotation marks and citation omitted). Our Supreme Court places "emphasis on the third element of the test, i.e., that the interlocutory order involves a substantial public – not personal – interest that would be imperiled without an immediate appeal." *Id.* at 528.

Our Supreme Court has stressed that the doctrine "is limited in scope" and applies "only in 'rare cases.'" *Maggard v. Kinney*, 576 S.W.3d 559, 566 (Ky. 2019) (quoting *Baker*, 543 S.W.3d at 577).[3] We lack jurisdiction over this appeal if the collateral order doctrine does not apply. *Sheets v. Ford Motor Company*, 626 S.W.3d 594, 600 (Ky. 2021).

C. The Collateral Order Doctrine Is Appropriate Here

The first prong of the collateral order doctrine test is whether the challenged order "conclusively decide[d] an important issue separate from the merits of the case . . . ." *Childers*, 636 S.W.3d at 527 (citation omitted). The order at issue conclusively resolved Parents' request for state funding. And that issue is undoubtedly important. When a DNA petition involves "complex issues of medical or psychiatric evidence, consultation with a medical expert strengthens the ability of counsel to understand the evidence and to cross-examine the experts put on by the Cabinet. In these cases, lack of availability of a witness with specialized knowledge increases the risk that a parent may suffer an erroneous deprivation." *K.S.*, 610 S.W.3d at 215. But providing funds to Parents for an expert would not

[3] Our Supreme Court "has generally limited interlocutory jurisdiction to sovereign, governmental and official immunity claims." *Maggard*, 576 S.W.3d at 566 n.8. Immunity is not at issue here. However, we do not perceive our Supreme Court as having strictly limited the collateral order doctrine's applicability *only* to cases involving immunity. Although rare, the doctrine could apply to other types of cases, so long as the tripartite test is satisfied. In sum, we will analyze whether the collateral order doctrine should apply here on the merits instead of summarily holding that it cannot merely because immunity is not at issue.

resolve the merits of the underlying DNA petition. Thus, the first prong is satisfied here.

Similarly, the second prong is also satisfied. The Cabinet's challenge is precisely the type of now-or-never situation for which the collateral order doctrine was designed. In plain English, if the Cabinet cannot appeal now – before it provides funds to Parents – it cannot meaningfully ever appeal because there is no practical method for it to seek to "claw back" those funds after the DNA petition is resolved. Parents assert that the Cabinet could appeal the funding issue after the DNA petition is resolved. Perhaps. But there would be little practical good in such an appeal. Even if the Cabinet were to prevail in a post-judgment appeal, the parties have not cited (nor have we independently located) a viable mechanism for the Cabinet to recoup the funds it has already provided. In sum, this type of decision can *only* be meaningfully challenged via an interlocutory appeal.

We now turn to the most crucial factor – whether "the interlocutory order involves a substantial public – not personal – interest that would be imperiled without an immediate appeal." *Childers*, 636 S.W.3d at 528. One crucial factor to determine whether a sufficient public interest exists is whether the decision involves a governmental entity since "when no governmental entity or official is a party to the case and there is no concern with preserving the efficiency of

government, it is unlikely" that the collateral doctrine properly applies. *Sheets*, 626 S.W.3d at 599 (internal quotation marks and citations omitted). Here, the order directly involves a governmental agency.

It is beyond question that the taxpayers of Kentucky have a compelling interest in ensuring that public funds are spent only for proper purposes. And the Cabinet itself has a "legitimate" interest in making sure that it "expend[s] its resources in as prudent a manner as possible." *K.S.*, 610 S.W.3d at 215. In short, "public coffers [are] placed at risk" by the decision, *Sheets*, 626 S.W.3d at 600, especially since those public coffers cannot realistically be refilled at a later date. In short, we conclude this case "involve[s] a substantial public interest that would be imperiled absent an immediate appeal." *Id.* at 599.

This case satisfies all three criteria for proper application of the collateral order doctrine. Accordingly, we conclude that the Cabinet may file an interlocutory appeal from an order which requires it to provide public funds to indigent parents for retention of an expert in DNA proceedings.[4]

[4] Because the inverse fact pattern is not before us, we express no binding opinion about whether an indigent parent has a similar right to file an interlocutory appeal from an order denying a request for state funds. On the one hand, it would seem fair for parents to enjoy the same rights as the Cabinet since "[t]he rule of law should, in the interest of justice and fairness, cut both ways since 'what is sauce for the goose is sauce for the gander.'" *Borders Self-Storage & Rentals, LLC v. Transportation Cabinet, Department of Highways*, 636 S.W.3d 452, 456 (Ky. 2021). Moreover, parents have a strong interest in the custody and care of their children. *K.S.*, 610 S.W.3d at 212.

D. Examining the Order at Issue

Having determined that the Cabinet's appeal is permissible, we now address the Cabinet's arguments that the order fails to comply with several requirements laid out by our Supreme Court in *K.S.* We disagree.

Our Supreme Court held in *K.S.* that parents in DNA proceedings have, "under certain circumstances," a constitutional right to "reasonably necessary expert assistance." *K.S.*, 610 S.W.3d at 211. Because the Cabinet and all parents each have relatively equal strong interests in the outcome of DNA proceedings, the "determinative" factor in assessing whether public funds should be given to parents to respond to DNA petitions is "the impact of additional procedures on accurate fact-finding" since "a parent's ability to understand and rebut medical testimony may be vital . . . [i]n cases presenting complex issues of medical or psychiatric evidence . . . ." *Id.* at 215.

Specifically, the Court explained that when ruling on a motion by indigent parents for funds to retain an expert in a DNA proceeding a court "must consider (1) whether the request was pleaded with specificity; (2) whether the funding is reasonably necessary; and (3) whether due process weighs in favor of appointing an expert. The purpose behind this heightened showing is to filter out fishing expeditions from cases presenting legitimate due process concerns." *Id.* at 216 (internal quotation marks and citations omitted).

To make an adequate request:

> a parent must show in specific terms that medical or other expert testimony or assistance is likely to play a significant role in the adjudication of dependency, neglect, and abuse. In doing so, the parent must demonstrate how an expert would help her case. The request must contain more than a general affirmation that a medical or other expert would help. The requesting parent must specify the type of expert and explain why that expert is needed in light of the particular allegations of neglect or abuse set forth in the petition.

Id. at 216-17.

We agree with Parents' assertion that they did not have to specify the identity of the expert they wished to hire. However, they were required by *K.S.* to "specify the type of expert" they intend to retain. *K.S.*, 610 S.W.3d at 218. They failed to do so adequately in their motion, notwithstanding their protestations to the contrary.[5] However, Parents' attorney orally stated during a hearing on the Cabinet's motion to vacate that they intended to hire a person board certified in hematology. We discern no abuse of discretion in the family court's acceptance of Parents' counsel's oral, belated representation as to the type of expert Parents

[5] Parents' motion vaguely states they wish to hire "an expert of forensic pediatric medicine related to child abuse[,]" R. at 61, but their brief asserts their motion stated that the expert they wished to hire "is board certified in hematology . . . ." Parents' Brief, p. 9 (emphasis omitted). To prove their point, Parents cite to pages 80-84 of the record. But those pages contain a printout of *K.S.* Moreover, we did not see the hematology language highlighted in Parents' brief elsewhere during our review of the written record. We caution counsel to meticulously and scrupulously ensure the accuracy of all citations to the record in future briefs.

intended to retain. However, we stress that much better practice is for similarly situated parents to provide that information in their motion for funds.

We similarly perceive no abuse of discretion in the family court's conclusion that providing funds to Parents is "reasonably necessary . . . ." *K.S.*, 610 S.W.3d at 216. As Parents aptly note in their brief, the Cabinet only filed the DNA petition after consulting two experts. Indeed, the Cabinet did not file the petition for roughly four months after becoming aware of Child's situation. In other words, it was not immediately obvious that Child's injuries stemmed from abuse. *See id.* at 217 (holding that appointing an expert is "less likely to be necessary" if "the nature of the injuries clearly suggests [inflicted] physical harm"). These facts instead present a situation where "medical or other evidence is likely to be a significant factor in the determination of neglect or abuse." *Id*. As such, it was "reasonably necessary" for Parents to have access to an expert. And a hematology expert would be apt, given the inflicted abuse versus von Willebrand disease conflict.

Having determined that an expert for Parents is reasonably necessary to resolve this DNA petition, we must address the Cabinet's corollary argument that Parents have not sufficiently demonstrated they are indigent. The issue of indigency underlies the holding of *K.S.*, though it is not extensively discussed therein. After all, saying Parents need an expert does not necessarily mean that

they are entitled to pay for that expert with public funds. In other words, Parents must show that they need an expert *and* that they cannot afford to retain one.

Parents' motion asserted that Child's Mother was not employed, and Child's Father worked at Walmart, earning $19 per hour. The motion further asserted that Parents did not own a home or have assets they could use to retain an expert. The Cabinet has not shown those assertions were erroneous.

We recognize there is a curious dichotomy between Parents having private counsel but arguing they cannot afford an expert. However, the Cabinet did not seek to call Parents as witnesses at a hearing or to otherwise explore their financial status. Thus, we do not know with certainty how it is that Parents can apparently afford counsel, but not an expert.

Nonetheless, the basic question is whether the family court's indigency conclusion was so arbitrary or unfair as to be an abuse of discretion. Here, the motion contained uncontradicted assertions showing Parents' relatively meager financial resources. Therefore, we cannot conclude that the family court abused its discretion by finding Parents to be indigent, even though we may have reached a different conclusion or demanded additional proof.[6] *See, e.g.*, *Miller v.*

[6] Pursuant to the Cabinet's request at the hearing on the motion to vacate, the family court ordered Parents to submit affidavits of indigency following the hearing. In other words, Parents submitted affidavits of indigency *after* the family court had already found them to be indigent. We strongly question the efficacy of such a cart-before-the-horse process. We cannot properly place significant reliance upon evidence submitted after a decision had already been made. We merely note that the affidavits align with the financial representations in Parents' motion and

Eldridge, 146 S.W.3d 909, 917 (Ky. 2004) (holding, albeit in a wholly different factual context, that "it is possible for a trial court to rule contrary to what an appellate court would rule without abusing its discretion" and an appellate court "is powerless to disturb such rulings").

We next must assess "whether due process weighs in favor of appointing an expert." *K.S.*, 610 S.W.3d at 216. *K.S.* does not discuss at length, or make entirely clear, what analysis this due process analysis should entail. Our Supreme Court has explained that "[t]he foundational principle of procedural due process" is "fundamental fairness . . . ." *Id.* at 214. Fundamental fairness here would tilt toward Parents having the ability to retain an expert. The Cabinet apparently consulted experts before filing the DNA petition and "[t]he rule of law should, in the interest of justice and fairness, cut both ways since 'what is sauce for the goose is sauce for the gander.'" *Borders Self-Storage & Rentals, LLC*, 636 S.W.3d at 456. And a parent has a "unique . . . liberty interest in the custody of his or her children." *K.S.*, 610 S.W.3d at 212. In sum, we discern no abuse of discretion in the family court's implicit conclusion that the interests of due process are best served by providing funds to Parents to retain an expert.

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their counsel's oral assertions. We caution all future similarly situated litigants that a failure to provide sufficient, timely proof of indigency could constitute adequate grounds to summarily deny a request for state funds since being indigent is the *sine qua non* for receiving such funds.

Next, the Cabinet asserts that the family court should have heard more evidence before making its decision. But the Cabinet has not shown what additional evidence it unsuccessfully asked to submit. And we discern no fatal dearth of evidence by which the family court could have properly resolved Parents' motion for state funds to retain an expert.

Finally, *K.S.* requires a trial court to "set out in specific terms on the record its reasons for approving or denying a parent's request." *K.S.*, 610 S.W.3d at 217. Here, the family court's initial order was likely fatally terse, devoid of sufficient supporting findings and analysis. However, the order issued in response to the Cabinet's motion to vacate, though certainly more bare bones than expansive, adequately explained the basis for the court's decision.[7]

CONCLUSION

Pursuant to the collateral order doctrine, the Cabinet for Health and Family Services may properly file an interlocutory appeal from an order requiring it to provide state funds to indigent parents to retain an expert in DNA proceedings. However, the Cabinet has not shown that it is entitled to relief from the order at issue. Thus, the Jefferson Circuit Court is affirmed.

[7] The Cabinet has not explicitly argued that the $10,000 cap set by the family court was too high. Therefore, we do not address it. And we have carefully considered all arguments raised by the parties in their briefs but decline to extend this already lengthy Opinion by addressing any arguments which are irrelevant, redundant, or otherwise unnecessary for us to examine in order to resolve the narrow issues before us.

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