692 S.W.3d 418 (2024)

H.N., Appellant

v.

R.H., Appellee.

NO. 2023-CA-1235-DGE.

Court of Appeals of Kentucky.

June 28, 2024; 10:00 A.M.

ON DISCRETIONARY REVIEW FROM HENDERSON CIRCUIT COURT HONORABLE KAREN LYNN WILSON, JUDGE ACTION NOS. 23-H-00058-001 AND 23-XX-00005.

REVERSING AND REMANDING.

BRIEF FOR APPELLANT: Timothy G. Arnold, Frankfort, Kentucky.

NO BRIEF FOR APPELLEE.

BEFORE: EASTON, ECKERLE, AND LAMBERT, JUDGES.

OPINION

LAMBERT, JUDGE:

We granted discretionary review to determine the propriety of an order involuntarily committing H.N.[1] for up to 360 days for substance use disorder. We reverse and remand.

Prior to relating the facts and analyzing the issues, we must discuss the failure of the Appellee, R.H., a foster parent of H.N., to file an appellee brief. RAP 31(H)(3) provides that when an appellee does not submit a brief we may: "(a) accept the appellant's statement of the facts and issues as correct; (b) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (c) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." We elect to accept H.N.'s statement of facts and issues as correct.

In June 2023, R.H. filed a petition seeking to have H.N. involuntarily committed for substance abuse treatment under Casey's Law, Kentucky Revised Statutes ("KRS") 222.430-222.437. We have summarized the proceedings which occur under Casey's Law as follows:

> Under the terms of Casey's Law, a "spouse, relative, friend, or guardian" initiates an involuntary treatment action by filing a verified petition in district court. KRS 222.432(1) and (3). The district court reviews the allegations contained in the petition and examines the petitioner under oath to determine if there is probable cause to believe the respondent (the

individual for whom treatment is sought) should be ordered to undergo treatment. KRS 222.433(1) and (2). If the district court finds probable cause, it sets a final hearing, appoints counsel for the respondent, and directs two qualified health professionals, one of whom must be a physician, to evaluate the respondent. KRS 222.433(2)(a)-(c). The qualified health professionals are required to certify their findings to the court and may be subject to cross-examination at the final hearing. KRS 222.433(2)(c). If, at any time after the petition is filed, the court finds that there is no probable cause to continue treatment or the petitioner withdraws the petition, the proceedings are to be dismissed. KRS 222.433(4).

After conducting the final hearing, the court may order the respondent to undergo treatment only if it finds by proof beyond a reasonable doubt that the respondent:

(1) Suffers from substance use disorder;

(2) Presents an imminent threat of danger to self, family, or others as a result of a substance use disorder, or there exists a substantial likelihood of such a threat in the near future; and

(3) Can reasonably benefit from treatment.

KRS 222.431.

B.D.P. v. Commonwealth, 673 S.W.3d 69, 70 (Ky. App. 2023). Under KRS 222.433(3), the treatment period cannot "exceed sixty (60) consecutive days from the date of the court order or a period not to exceed three hundred sixty (360) consecutive days from the date of the court order, whatever was the period of time that was requested in the petition or otherwise agreed to at the hearing."

Here, the district court found probable cause to believe H.N. should be ordered to undergo treatment. The court thus set a final disposition hearing, before which H.N. was to be examined by Nicole Frields, a certified alcohol and drug abuse counselor, and Dr. Tariq Malik, M.D. Both professionals examined H.N. and submitted reports concluding H.N. met the commitment criteria. Frields' report was certified but Dr. Malik's was not. The lack of certification for Dr. Malik's report matters because KRS 222.433(2)(c)1. states that examining health professionals "[s]hall certify their findings to the court within twenty-four (24) hours of the examinations...." When used in a statute, "`[s]hall' is mandatory...." KRS 446.010(39).

At the commitment hearing, H.N. objected to holding the hearing because Dr. Malik's report was not certified. The district court, essentially, concluded the lack of certification was a harmless error which did not prejudice H.N. because Dr. Malik would testify. Dr. Malik did testify, and even read his report aloud. Frields and R.H. also testified. The district court issued an involuntary commitment order requiring H.N. to undergo inpatient substance abuse treatment for up to 360 days.

H.N. appealed to the Henderson Circuit Court, again arguing that the commitment hearing was fatally flawed because Dr. Malik's report was not certified. The circuit court held the lack of certification "was certainly in contradiction of the statute." Nonetheless, the circuit court affirmed the district court's commitment decision because:

this error was to a great extent cured by the doctor's testimony and is not sufficient to

> overturn the trial court's ruling. Dr. Malik was there to testify at the evidentiary hearing. He testified as to his examination of H.N. He confirmed under oath the written findings were his assessment of H.N. when she came to the clinic to be evaluated. Dr. Malik read his findings into the record. H.N. was able to cross-examine the doctor as to his findings and suffered no substantial prejudice because the certification was not notarized.

H.N. then successfully sought discretionary review by this Court.

Before we may address the merits, we must resolve whether this appeal is moot. Generally, a case is moot if the court's decision "would have no practical legal effect" on the existing controversy. *Morgan v. Getter,* 441 S.W.3d 94, 99 (Ky. 2014). Granting relief to H.N. would not have a practical effect as the treatment period has expired. However, we issued an opinion on the merits challenging a 360-day commitment brought pursuant to a different KRS chapter even though that commitment period had already expired. *Tolley v. Commonwealth,* 65 S.W.3d 531, 532 (Ky. App. 2001) (reviewing a 360-day commitment ordered in October 1999 without discussing mootness). And our Supreme Court has noted, albeit in passing, an exception to the mootness doctrine for "appeals from civil involuntary commitment orders." *Morgan,* 441 S.W.3d at 99 (citing *In re Alfred H.H.,* 233 Ill.2d 345, 331 Ill.Dec. 1, 910 N.E.2d 74 (2009)). In short, we are not persuaded that we must dismiss this appeal on mootness grounds.

Turning to the merits, H.N. raises two arguments. First, she contends the district court lacked the ability to hold a hearing because Dr. Malik's report was not certified. We agree. Thus, we need not address her second argument, which is that the evidence was insufficient to order her to be committed.

To *certify* means, in this context, "1. To authenticate or verify in writing. 2. To attest as being true or as meeting certain criteria." BLACK'S LAW DICTIONARY (11th ed. 2019). Casey's Law does not state what is required to certify a report, but another statute does.

KRS 222.430(2), part of Casey's Law, provides that "[e]xcept as otherwise provided for in KRS 222.430 to 222.437, all rights guaranteed by KRS Chapters 202A and 210 to involuntarily hospitalized mentally ill persons shall be guaranteed to a person ordered to undergo treatment for substance use disorder." Similarly, KRS 222.436 provides that "[t]he definitions in KRS 202A.011 and the procedures in KRS Chapter 202A apply to KRS 222.430 to 222.437 except where terms or procedures used therein are defined in KRS 222.005 or are otherwise provided for in KRS 222.430 to 222.437, respectively." The upshot is that KRS Chapter 202A's provisions generally apply to proceedings under Casey's Law.

KRS Chapter 202A, known as the Kentucky Mental Health Hospitalization Act (*see* KRS 202A.006), addresses involuntarily committing an individual with serious mental health concerns. The basic framework of KRS Chapter 202A is similar to that used in Casey's Law. Specifically, after the court finds probable cause to support commitment, KRS 202A.051(6)(c) also requires the respondent to "be examined without unnecessary delay by two (2) qualified mental health professionals, at least one (1) of whom is a physician. The qualified mental health professionals shall certify within twenty-four (24) hours (excluding weekends and holidays) their findings." To certify their findings, mental health professionals must complete a form which "shall state the facts and circumstances upon which the judgment of the examining physician is based and shall be sworn to before a notary or the clerk or judge of the court." KRS 202A.056(1).[2]

Because Casey's Law contains no specific certification requirements, the requirements in KRS 202A.056(1) apply. Dr. Malik's report does not meet those requirements because the contents of his report were not "sworn to before a notary or the clerk or judge of the court." In sum, we agree that Dr. Malik's report was not certified.[3]

Our conclusion is not changed by the fact that Dr. Malik's report was made a part of the court record via a deputy clerk stamping it with a file stamp which contains the word *attest.* This unusual stamp was not discussed by the district or circuit courts, nor is it mentioned in H.N.'s brief. The stamp contains a blank space for the date to be handwritten. Immediately next to that blank space is the preprinted word *filed* and immediately under that blank space is the preprinted word *attest.* Below the blank space in which the date is to be written is a second blank space for the clerk's signature.

Among the definitions of *certification* approved by our Supreme Court, albeit in a factually distinct context, is "[a]n attested statement." *Taylor v. Kentucky Unemployment Ins. Comm'n,* 382 S.W.3d 826, 834 (Ky. 2012). However, the stamp containing "attest" was used and signed by a deputy court clerk, not Dr. Malik. And to *attest* in this context means "[t]o affirm to be true or genuine; to authenticate by signing as a witness...." BLACK'S LAW DICTIONARY (11th ed. 2019). There was chatter on the record immediately prior to the hearing, albeit unsworn, to the general effect that Dr. Malik had not personally brought his report to the clerk for filing. Thus, it would appear as if the clerk could not have affirmed the signature on the report was that of Dr. Malik. And the deputy clerk who filed Dr. Malik's report did not testify at the commitment hearing. In short, the face of the record does not explain why the stamp containing the word *attest* was used to mark Dr. Malik's report as being part of the court record but, regardless, the usage of that stamp under these facts is insufficient to satisfy the certification requirement.

The question then becomes what impact the lack of certification has on the commitment order issued in proceedings brought pursuant to Casey's Law. This appears to be a matter of first impression.

The circuit court held that the failure to certify Dr. Malik's report was meaningless because the certification requirement had no practical value. We agree to the limited extent that the practical value of requiring a health professional to certify his or her report is, at best, minimal. After all, the professional is subject to being called to testify at the commitment hearing under KRS 222.433(2)(c)2., and thus the respondent would have an opportunity for cross-examination. But we disagree that a failure to comply with the certification requirement is meaningless.

"We cannot disregard the words of the statute simply because we think the resulting application is harsh or we think the statute would be better without them." *Kentucky Unemployment Insurance Commission v. Wilson,* 528 S.W.3d 336, 340 (Ky. 2017). In fact, the opposite is true as "[a] fundamental rule of statutory construction commands that effect must be given, if possible, to every word, clause, and sentence of a statute." *Id.* (internal quotation marks and citation omitted).

The General Assembly has shown that it believes the certification requirement is important. That requirement has been contained in KRS 222.433 continuously since it was first enacted in 2004. The statute was amended in 2019, 2022, and 2023, but the certification requirement remained. H.N. has not cited, nor have we independently located, evidence definitively showing the legislative intent underlying

the certification requirement, a matter upon which we consequently decline to speculate *sua sponte.* Regardless, courts must not simply ignore facially mandatory statutory language because courts do not perceive the statutory language to have meaningful value. Just as courts expect the other branches of government to respect and honor our decisions, even when they do not agree with them, we must respect and honor the language of a constitutionally valid statute even though its practical utility is hazy.

In analogous circumstances, we have held that failures to comply with statutory predicates or preconditions deprived a court of the ability to conduct proceedings. For example, in a case involving Casey's Law, we held that a court lacked the ability to hold a commitment hearing because neither of the professionals who submitted certified reports was a physician, as is required by KRS 222.433(2). We enforced that statutory language strictly even though there was no dispute that the two professionals who submitted reports were otherwise qualified to do so (one of whom was an advanced practice registered nurse and one of whom, coincidentally, was Frields). *B.D.P.,* 673 S.W.3d at 73 ("The statutory provision in Casey's Law is simple and straightforward. The legislature unequivocally required that at least one of the examiners must be a physician and the term `physician' has a discernible meaning in the law. As promulgated in Kentucky, one must be authorized to practice medicine under the law in any state. KRS 311.1911(20). The trial court failed to follow the clear instructions set out by the legislature and its findings must therefore be set aside.").

Similarly, we held that a trial court erred by declaring minors to be habitual truants because an adequate assessment of the children by a director of pupil personnel, a precondition to filing the truancy petition under KRS 630.060, had not been performed. *T.D. v. Commonwealth,* 165 S.W.3d 480, 483 (Ky. App. 2005) ("In T.D.'s case, we conclude from the evidence, including admissions from Mr. Montgomery, that the requirements of KRS 630.060(2) were not met prior to submission of the complaint to the court designated worker. Thus, the complaint should have been dismissed for lack of jurisdiction due to no home assessment having been conducted."). And we held that a trial court lacked the ability to properly hold a commitment hearing under the Kentucky Mental Health Hospitalization Act when the professionals did not comply with the statutory requirement to certify their reports within twenty-four hours of examining the respondent. *Tolley,* 65 S.W.3d at 533-34 ("Therefore, the only class of cases that can be brought before the court for involuntary commitment proceedings are those cases where there are two timely certifications. Since one of the two professionals required did not comply with the requirements of KRS 202A.061, the circuit court did not have the right to pass upon the particular class of case before the court.") (paragraph break omitted).[4]

The common thread running consistently through Kentucky precedent on this point is simple: a court cannot properly grant relief if the statutory prerequisites to doing so have not been met, even if those statutory predicates may make no practical difference in the outcome of the proceedings or a failure to comply with them does not obviously and materially harm the parties. In other words, courts may not excuse a failure to meet statutory prerequisites for granting relief simply because courts subjectively believe those prerequisites lack practical value or are foolish, or a lack of compliance does not prejudice a party.

Statutory prerequisites are the sole province of the General Assembly and courts lack the ability to ignore or circumvent them due to courts' subjective beliefs in their lack of value. "Where that which is

directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity, of the result is out of place." *Western & Southern Life Ins. Co. v. Weber*, 183 Ky. 32, 209 S.W. 716, 718 (1919) (quoting with approval JOHN LEWIS, SUTHERLAND ON STATUTORY CONSTRUCTION § 366 (2d Ed. 1904)). After all, "[i]t is not the province of the courts to supervise legislation and keep it within the bounds of propriety and common sense." *Id.* (quoting with approval JOHN LEWIS, SUTHERLAND ON STATUTORY CONSTRUCTION § 366 (2d Ed. 1904)). Because the district court here committed H.N. even though all of the statutory prerequisites to such a commitment order had not been satisfied, the commitment order cannot stand. "The trial court failed to follow the clear instructions set out by the legislature and its findings must therefore be set aside." *B.D.P.*, 673 S.W.3d at 73.

The Henderson Circuit Court's order affirming the Henderson District Court is reversed and remanded with instructions to reverse the district court's decision and to order the petition be dismissed.

ALL CONCUR.

[1] We use initials in this case since it involves issues related to mental health. Kentucky Rule of Appellate Procedure ("RAP") 5(B)(2). Chief Judge Thompson also issued an order granting H.N.'s motion to treat this case as confidential.

[2] KRS 202A.061 provides in relevant part "if the criteria for involuntary hospitalization are not certified by at least two (2) examining qualified mental health professionals, the court shall, without taking any further action, terminate the proceedings and order the release of the person." H.N. argues that statute applies here and required the petition to be dismissed. But H.N. does not discuss KRS 202A.061's introductory clause, which specifically limits the statute's application to "any proceeding for involuntary hospitalization under the applicable provisions of this chapter...." The proceedings at hand were brought pursuant to a different KRS chapter, so KRS 202A.061 is inapplicable.

[3] There was unsworn chatter on the record immediately prior to the hearing that Dr. Malik could have remedied the lack of certification by quickly having his report notarized and faxed to the court. But notarization on the day of the hearing would not have fixed the problem. KRS 222.433(2)(c)1. requires examining health professionals to "certify their findings to the court within twenty-four (24) hours of the examinations" and more than twenty-four hours had passed since Dr. Malik had examined H.N.

[4] Sometimes we have held that a failure of satisfying a statutory prerequisite deprives a court of subject matter jurisdiction. *See, e.g., Tolley*, 65 S.W.3d at 534 ("Lacking subject matter jurisdiction, the court was without authority to hear the case."). Other times we have held that a failure to meet the statutory prerequisites for granting relief is improper but does not involve a lack of subject matter jurisdiction. *See, e.g., B.D.P.*, 673 S.W.3d at 72 ("The circuit court held correctly that the question in the case at bar is not whether the trial court has jurisdiction over this kind of case; it is whether it exercised its powers correctly."). The circuit court here declined to apply *Tolley* because the court concluded *Tolley* did not properly apply subject matter jurisdiction principles. We acknowledge inconsistencies in precedent regarding the vexing topic of subject matter jurisdiction. Arguably, *Tolley*'s application of subject matter jurisdiction does not optimally align with subsequent opinions from our Supreme Court on the topic. *See, e.g., McGaha v. McGaha*, 664 S.W.3d 496, 502 (Ky. 2022) (discussing effect of lack of meeting verification requirements in probate pleadings). But the circuit court ignored precedent holding that courts cannot grant relief in this sort of case if the statutory predicates for doing so are not met.