

A concurring opinion by Justice Wecht highlighted his disagreement with *Reginelli's* distinction between “review organizations” and “peer review committees” in determining whether information qualified for peer review protections. He warned of ongoing potential for “confusion and discomfort” in applying PRPA within credentialing and privileging processes.

Discussion

Over the second half of the 20th century, health care professionals and legislators have increasingly focused on peer review as the primary means of evaluating the quality of medical care. In addition to the federal HCQIA, all 50 states and the District of Columbia have enacted legislation regarding peer review, most of which includes some combination of confidentiality and immunity from litigation. These statutes have protected peer review within multiple levels of the health care system, as peer review extends beyond its traditional role in retrospective review of medical error into health care cost-monitoring programs, accreditation reviews, and the privileging and credentialing of staff physicians.

Arguments raised in *Leadbitter* highlight the complexities of peer review protections within the credentialing and privileging process. Medical malpractice cases routinely involve a claim of corporate negligence against the hospital, which has a duty to ensure its physicians are competent by means of careful credentialing and privileging. While both the plaintiff and the hospital had a significant interest in employing quality physicians and protecting patient safety, the arguments in this case reflect an ongoing debate regarding whether protecting or limiting confidentiality within the credentialing and privileging process best achieves this goal.

An *amicus curiae* brief submitted by the American Medical Association (AMA) in *Leadbitter* defends peer review protections as essential safeguards for meaningful assessments of a physician’s abilities and performance in the privileging process (Brief for AMA and the Pennsylvania Medical Society as Amici Curiae Supporting St. Clair Hospital, *Leadbitter v. Keystone*, 256 A.3d 1164 (Pa. 2021)). The brief argues that a decision to deny peer review protections in this case could prevent a physician’s peers from providing candid performance evaluations to their employers, if their feedback could later be discoverable.

But, as alleged by the plaintiffs in this case, peer review protections may also obscure unsafe or unethical

hiring practices. If confidentiality protections are necessary to ensure peer evaluations are honest and accurate, it is not clear how a hospital may be held accountable for responding appropriately to concerns raised within a confidential process. Even if privileged peer review evaluations do have the advantages described by legislators and health care organizations, harm may still arise when review committees do not then utilize confidential peer review data effectively or in good faith.

Within an American tort system otherwise premised on the equal accessibility of information, privileging peer review may infringe on the rights of both patients and physicians. Critics argue that peer review protections prioritize protecting hospitals over the rights of patients to obtain records of potential negligence within the credentialing process. Physicians may also be harmed by peer-review protections, such as in past cases of sham peer review of a competitor for economic gain (see, for example, *Patrick v. Burget*, 486 U.S. 94 (1988)) as well as racism and other civil rights violations within peer review (such as in *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007)). The best interests of the practicing physician may lie somewhere between the opposing advocacy opinions represented in this case.

As Justice Wecht described in his concurring opinion, prioritizing patient safety and health care quality requires a “nuanced balancing of competing interests—here, between protecting the courts’ desire to decide cases based with the benefit of all relevant evidence and ensuring that highly-trained health care professionals with specialized skills candidly police the effectiveness and integrity of their peers” (*Leadbitter*, p 1189). An *in camera* review of contested peer review documents, similar to that ordered in *Leadbitter*, may help to achieve this nuanced balancing.

Substance Use Disorders and Child Maltreatment

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Court Considers Whether Parent's Consumption of Alcohol is Sufficient to Support Finding of Child Abuse or Neglect

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In *M.C. v. Commonwealth of Kentucky*, 614 S.W.3d 915 (Ky. 2021), the Supreme Court of Kentucky reviewed the standards by which parental substance abuse could be regarded as child neglect. A family court, citing a report of alcohol use and treatment noncompliance by M.C., removed his children. An appellate court affirmed. The high court reversed for lack of findings of incapacity per Kentucky statutes and case law.

Facts of the Case

L.C. (mother) and M.C. (father), divorced parents of three children, twins B.C. and S.C. (born in October 2005), and C.C. (born in December 2003), struggled with alcohol use. In July 2017, L.C. lost custody of the children as a result of alcohol use while parenting. Subsequently, the children were placed with M.C. after he agreed to remain sober and not allow visitations from L.C. Subsequently, M.C. violated the agreement, and the children were placed in their paternal grandmother's care in December 2017. The children were removed from their grandmother's care and placed with a foster family in March 2018 after she allowed unsupervised visits by M.C. and expressed that she did not want the children around her.

L.C. and M.C. began working on their respective court-ordered mental health treatment plans. L.C.'s progress was minimal as she was noncompliant with drug screens, failed to manage mental health appointments, and sporadically called the children making nonsensical statements. M.C. had successful supervised visitations and participated in court-ordered mental health counseling. He received conditional custody of the children in March 2019. As ordered by the court, M.C. was required to attend Alcoholics Anonymous meetings, not allow unsupervised visitations between the children and their paternal grandmother, and refrain from alcohol use while in a caregiver role.

The local police conducted a welfare check at M.C.'s home on April 16, 2019, finding no concerns about the children's wellbeing. On April 19, 2019, a social worker from the Cabinet for Health and Family

Services (Cabinet) visited M.C.'s home to investigate allegations of his alcohol use while caring for children. She also found no concerns about the children's welfare. The children were fed properly, clothed, and otherwise provided for. Nevertheless, she issued M.C. an ultimatum that he stop drinking and attend an intensive outpatient program to address his alcohol use. Further, she indicated that she would petition for removal of the children from his care, eventually changing the permanency goal to adoption. M.C. objected, asserting that his drinking around children had no influence on his ability to parent.

The family court granted the emergency custody petition on the grounds that the children were "in danger of imminent death or serious physical injury or [were] being sexually abused" (*M.C.*, p 919). The children were then placed with a foster family. The family court found that the children were neglected under Ky. Rev. Stat. Ann. § 600.020(1)(a)(2), (3), (4), (8) (2018) and that there were no less-restrictive options than removal from M.C.'s care, since he refused to stop drinking and get treatment.

M.C. appealed. The case was heard by the court of appeals, which affirmed the family court's decision. M.C. appealed to the Kentucky Supreme Court, claiming that his alcohol use had no effect on childcare.

Ruling and Reasoning

In *M.C. v. Kentucky*, the Supreme Court examined whether alcohol abuse, by itself, was sufficient grounds to determine that a parent neglected his or her children and warranted removal from parental care. In this case, the court compared evidence against M.C. with Kentucky's statutory criteria. Ky. Rev. Stat. Ann. § 620.100(3) (2018) required the Cabinet to prove parental neglect by a preponderance of the evidence. Ky. Rev. Stat. Ann. § 600.020(1)(a) required that a parent's substance use disorder "renders the parent incapable of caring for the immediate and ongoing needs of the child." The family court, under Ky. Rev. Stat. Ann. § 620.023(1)(c) (2012), considered substance use disorder as behavior "that results in an incapacity by the parent or caretaker to provide essential care and protection for the child."

The court examined Kentucky's statutes, concluding it was not enough for M.C. to have a substance use disorder as a basis for child removal. For M.C.'s actions to be considered as parental neglect, the substance use disorder had to render him incapable to provide appropriate care to his children. Under Ky.

Rev. Stat. Ann. § 600.020(1)(a)(4), (8), the family court construed neglect if parents continuously or repeatedly failed or refused to provide essential parental care and protection for the child, considering the age of the child, or did not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. There was no evidence to prove M.C. failed to meet the standards of childcare. During the investigation, the police officer and social worker found the children to be appropriately provided and cared for. Additionally, two children testified that they liked being in M.C.'s care.

The court discussed two Kentucky cases that were considered by the court of appeals, one readily distinguishable from the instant case, and the other apposite. In *Cabinet for Health and Family Services v. C.B.*, 556 S.W.3d 568 (Ky. 2018), the Cabinet filed against a parent whose baby, C.R., was born with birth defects and positive for buprenorphine/naloxone, indicating sufficient evidence of physical or emotional injury in support of findings of neglect and requiring C.B. to complete drug rehabilitation. Here, mostly due to C.R.'s special needs, the analysis differed from that of the instant case; termination of parental rights was justified, as C.B. failed rehabilitation efforts.

In *K.H. v. Cabinet for Health and Family Services*, 358 S.W.3d 29 (Ky. Ct. App. 2011), the Cabinet substantiated a sexual abuse allegation by the children's 12-year-old cousin against their father. The mother was concerned about the children's being subjected to a potential risk of sexual abuse if the father were to bathe them. The court charged the mother with neglect based on failure to comply with the aftercare plan, while not finding substantial evidence to support the allegations of the father having sexually abused the children. The court highlighted that "risk of harm must be more than a mere theoretical possibility, but an actual and reasonable potential for harm" (*K.H.*, p 32). Similarly, in the instant case, children were not subjected to either actual or reasonable potential harm from father's alcohol use.

Having considered the above cases and statutes, the court held that sufficient evidence existed to support the finding that M.C. had a mild to moderate substance use disorder, but there was no evidence presented to show that M.C.'s disorder caused him to be incapable of caring for his children. The family court's finding that M.C. neglected his children by engaging in substance was an abuse of discretion, overturned in the appellate decision.

Discussion

M.C. v. Commonwealth highlights that finding of alcohol use while parenting does not equate with *per se* child neglect or provide a sufficient basis for removal of children absent an actual finding of harm. Rather, the court ruled that explicit assessment of substance use and its impact on childcare must be considered prior to alleging parental abuse. The court examined Kentucky's statutory framework for child abuse/neglect, reviewed the family court's findings, and compared it to two prior cases with some similarities. The finding focused on lack of actual harm, rather than the presumption that an alcohol-using parent was inherently defective.

Stigma against substance use runs deep, and is evident in the disconnect between the family court's considerations of legal and operational definitions of child neglect and lack of substantial findings to associate it with the latter. It appears that the reporting Cabinet social worker was taken aback by M.C.'s rejection of the alcoholism label and that he exacerbated the situation through noncompliance. The high court looked past these dynamics, ruling on the evidence bearing on the legal question.

This case highlights how parents have the fundamental constitutional right to raise their children, reflected in the Commonwealth's policy of not removing children from their biological parents "except when absolutely necessary" (Ky. Rev. Stat. Ann. § 600.010(2)(c)). While it is important to have a high degree of suspicion in screening for child abuse/neglect during routine interactions with children and families, it is important to assess the interplay of psychiatric and social comorbidities, which often act as potential confounders and add a layer of complexity to assessment of parental neglect. In this regard, the examination for alcohol use disorder, which is a psychiatric matter, was absent from the array of evidence before the family court.

Termination of Employment Due to Mental Illness

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