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# Are Kentucky's Children "At Risk" as a Result of J.H. v. Commonwealth?

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# ESSAYS

# Are Kentucky's Children "At Risk" as a Result of *J.H. v. Commonwealth*?*

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Jessica[1] is a five-year-old girl who lives with her four-year-old sister, Kayla, her mother, and her mother's paramour.[2] The paramour, Eddie Johnson, has recently been released from prison, after serving a five-year sentence for raping and sodomizing his five-year-old biological daughter. The children's mother, Carolyn Spencer, is aware that Mr. Johnson pled guilty to rape and sodomy of his daughter; however, she is convinced he is now a changed man.

Jessica has disclosed to her counselor at school that, for the last six months, she has been visited by Mr. Johnson while in her own bedroom, and he has hurt her by putting his "tail" into her private area. In response, the

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* This Essay is inspired by numerous attempts by defense attorneys to seek the return of children who have been removed from their parents or caretakers for being "at risk" of abuse or neglect.

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[1] All names used in connection with this hypothetical are fictitious. Any resemblance to actual persons, living or dead, is purely coincidental.

[2] "Paramour" means, in this instance, a live-in boyfriend who exercises care, custody, and control of the children. Juvenile dependency actions govern abusive or neglectful situations involving parents or persons exercising case, custody, and control over a child. *See* KY. REV STAT. ANN. [hereinafter K.R.S.] § 600.020(1) (Michie 1990) as amended by House Bill 142, Regular Session (Ky. 1998), signed into law by Gov. Paul E. Patton on Mar. 17, 1998 (defining an abused or neglected child as one "whose health or welfare is harmed or threatened with harm when his parent, guardian or *other person exercising custodial control* or supervision of the child" inflicts harm upon the child or allows to be created a risk of harm (emphasis added)).

school counselor telephones the Cabinet for Families and Children's hotline.[3] A social worker from the Cabinet for Families and Children immediately investigates the matter.[4] Jessica's school counselor is present at the initial questioning of Jessica about how her private area was hurt. The counselor is nervous that there will be retaliation against her by the perpetrator of the sexual abuse if this matter goes to court.[5] Jessica tells the same story to the social worker that she told to her counselor. Therefore, the social worker obtains an emergency custody order[6] from the district judge of the county in which Jessica resides. The social worker then takes Jessica to a doctor, who performs a colposcope examination[7] to determine whether there is physical evidence to substantiate Jessica's allegations of sexual abuse. The colposcope reveals that Jessica's hymen is torn in a manner the doctor believes to be the result of physical trauma almost certainly caused by penile penetration. Jessica tells the examining physician that "Eddie hurt me down there," when she is questioned about how she got hurt.[8]

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[3] Section 620.030 of the Kentucky Revised Statutes, commonly referred to as Kentucky's reporting statute, places an affirmative duty upon "any person" who knows or has reasonable cause to believe that a child is dependent, neglected, or abused. Section 620.040(3) prohibits school personnel from conducting "internal investigations in lieu of the official investigations." The school counselor, however, still has the obligation under section 620.030 to report the alleged abuse to the Cabinet for Families and Children. The idea behind this law is that some school officials would not want the general public to know that there are abused children in their school or would possibly hinder or cover up that fact in deference to parents.

[4] *See* K.R.S. § 620.040.

[5] Kentucky law provides some protection, in that anyone who acts upon "reasonable cause" in making a report or who acts in "good faith," enjoys immunity from civil or criminal liability *Id.* § 620.050.

[6] Section 620.060 was amended by House Bill 142, Regular Session (Ky 1998), signed into law by Gov Paul E. Patton on Mar. 17, 1998.

[7] A colposcope is a medical device that allows a physician to enter the vaginal or anal cavity of a child to more closely examine the child in order to ascertain whether trauma has occurred in the area.

[8] *Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky 1990), is the leading Kentucky case addressing whether Jessica's statement to the doctor regarding who hurt her would be admissible in trial. In *Drumm*, a three-year-old girl and her older brother told a psychiatrist that their parents had been sexually abusing them. The psychiatrist initially saw the children in his role as an investigator hired by the Department of Social Services ("DSS"). He subsequently treated the children for three years for emotional trauma resulting from sexual abuse. At trial, the prosecution called the psychiatrist to testify about the children's statements under

The social worker next meets with Carolyn, Jessica's mother. Carolyn refuses to believe that Eddie could have sexually abused Jessica. Eddie, who is also present during this interview, denies that he has ever touched any child improperly, and asks to speak with his lawyer. The social worker is concerned for the safety of both Jessica and her four-year-old sister, Kayla, if Eddie remains in the home. Eddie is not willing to leave the house and Carolyn refuses to ask Eddie to leave the residence. It probably will be at least a few days before the police charge Eddie with rape, but even if he is arrested, he may post bond, return to the home, and sexually molest Jessica or Kayla, since Carolyn is not willing to protect her children. Therefore, the Cabinet for Families and Children, through the county attorney, files a petition in district court[9] and requests a second emergency custody order to remove Kayla from her home. There is no evidence from interviewing Kayla, however, that she has ever been improperly touched by Mr. Johnson. Kayla appears extremely uncomfortable when the social worker asks her if she has ever been sexually abused.

May Kayla – a child who might not have been sexually abused by Mr. Johnson, but who is at risk of sexual abuse by him – be found to be an "abused child,"[10] and removed from her mother and Mr. Johnson? A cursory

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the medical diagnosis or treatment exception to the hearsay rule. The defense objected, stating that because the psychiatrist initially had been employed as part of the DSS investigative team, it was impossible to differentiate between statements made to him when he was treating the children and statements made to him when he was wearing his "detective hat." *Id.* at 384. The Supreme Court of Kentucky held that for purposes of admissibility, the distinction between a statement made to a treating physician and a testifying physician was no longer relevant: both types of testimony are admissible. The court noted, however, that trial courts may give less weight to out-of-court statements not made for treatment since they are inherently less reliable than those made for treatment. *See id.* at 385. *Drumm* is also discussed in Robert G. Lawson's survey article, *Evidence*, in this volume, at 776-79.

[9] The district court has concurrent jurisdiction pursuant to section 610.010 of the Kentucky Revised Statutes in regard to the removal of the children, although Mr. Johnson will be criminally prosecuted in a separate court. The juvenile session of the district court, commonly referred to as "Dependency Court," has civil jurisdiction over the removal of these children and the plan, if any, for reunification of the family

[10] *See* K.R.S. § 600.020(1). An abused or neglected child is one:

> whose health or welfare is harmed or *threatened with harm* when his parent, guardian, or other person exercising custodial control or supervision of the child:

examination of Judge Combs' opinion in *J.H. v. Commonwealth*[11] could lead one to the conclusion that Kayla could not be protected as an "abused" child; but upon further review, it becomes apparent that the confusing language that might indicate this result is dicta and would not be applicable to a child in Kayla's situation. Most importantly, *J.H.* does not even address the issue of "risk."

In *J.H. v. Commonwealth*, the Bell District Court found two children, ages five and two, to be "dependent, neglected or abused children"[12] and removed them from their natural parent. The family already had a lengthy history with the Cabinet for Families and Children when the removal of the children occurred. Largely, questions revolved around whether the parents properly supervised the children.[13] On May 27, 1987, the five-year-old, C.H., had wandered about 150 yards from his home and been kicked in the head by a horse, suffering a fractured skull. The Cabinet for Families and Children[14] initiated proceedings[15] in Bell District Court to remove both the five-year-old child and the two-year-old child from the custody of their parents. The district

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(a) Inflicts or allows to be inflicted upon the child physical or emotional injury by other than accidental means;

(b) Creates or allows to be created a *risk* of physical or emotional injury to the child by other than accidental means;

(c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child ,

(d) Continously or repeatedly fails or refuses to provide essential prenatal care and protection for the child, considering the age of the child;

(e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;

(f) *Creates or allows to be created a risk* that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child

*Id.* as amended by House Bill 142, Regular Session (Ky 1998), signed into law by Gov. Paul E. Patton on Mar. 17, 1998 (emphasis added).

[11] J.H. v. Commonwealth, 767 S.W.2d 330 (Ky Ct. App. 1988).

[12] The Kentucky Court of Appeals noted the statutory impossibility of the Bell District Court purportedly finding the children to be both "dependent" and "abused or neglected" at the same time. *See id.* at 333.

[13] *See id.* at 332.

[14] In 1987, the Cabinet for Families and Children was called the Cabinet for Human Resources.

[15] "Proceedings" means an emergency custody order and a petition filed in the district court pursuant to sections 620.010-.990.

court granted the Bell county attorney's motion for a temporary removal,[16] and ruled that based upon the "pervasive 'neglectful situation' "[17] that led to C.H.'s injury, there were reasonable grounds to believe that both children would be dependent, neglected, or abused if returned to or left in the custody of their parents.[18]

The mother appealed the Bell District Court's decision to the Bell Circuit Court,[19] which affirmed the district court's decision.[20] The mother then requested relief from the Kentucky Court of Appeals.[21] After hearing arguments, the court of appeals vacated the judgment of the Bell District Court in regard to C.H., the five-year-old child who was injured,[22] and the judgment of the Bell District Court in regard to T.H., the two-year-old sibling, was reversed.[23] This Essay is primarily concerned with the appellate court's reasoning in its reversal of the Bell District Court's decision as to the younger child, who was not injured.[24]

In the written opinion, Judge Combs stated that the removal of the youngest child was improper because evidence proving abuse or neglect of one child could not be used to infer that another child in the same household

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[16] Section 620.080 governs temporary removal hearings in dependency situations. Once a child is removed from a parent or a person exercising care, custody, and control, a temporary removal hearing must take place "within 72 hours, excluding weekends and holidays, of the time when the emergency custody order [was issued by the district court judge] or when [the] child is taken into custody without the consent of his parent or other person exercising custodial control or supervision." *Id.* at § 620.080(1)(a); *see also* 905 K.A.R. 1:230 § 3. If the child is not removed from his or her parent, but the Cabinet has filed a petition of abuse, neglect, or dependency, the Cabinet must go to hearing within 10 days of the date it filed the petition. *See* K.R.S. § 620.080(1)(b).

[17] *J.H.*, 767 S.W.2d at 333 (quoting prosecuting attorney).

[18] *See id.*

[19] The law states that "any party aggrieved by a proceeding under KRS 610.010(1)(e) may appeal from the Juvenile Court to the Circuit Court as a matter of right in the manner provided in the Kentucky Rules of Civil Procedure." K.R.S. § 620.155.

[20] *See J.H.*, 767 S.W.2d at 330.

[21] *See id.*

[22] Because the court of appeals could not tell what the Bell District Court's judgment was – that is, whether C.H. was dependent or neglected or abused – it could neither affirm nor reverse and, therefore, could only vacate the "impossible" disposition. *Id.* at 333; *see also supra* note 12.

[23] *See J.H.*, 767 S.W.2d at 334.

[24] Judge Combs wrote the opinion for the appellate panel, Judge Lester concurred with the opinion, and Judge Gudgel concurred in the result only

is also being abused or neglected.[25] "This reasoning," he insisted, "runs against the grain of not only the Juvenile Code, but also the notion of constitutional due process of law and familial realities as well."[26] The legal assumptions underlying Judge Combs' assessment, however, are incorrect.

First, the Kentucky Juvenile Code recognizes that upon some occasions, in order to protect and preserve the rights and needs of children, it is necessary to remove a child from his or her parents.[27] Kentucky statutory law clearly allows for the removal of children who are in "imminent danger" of physical injury or sexual abuse.[28] The plain meaning of the words "imminent danger" is that a child is at risk of some type of injury or improper care occurring. It does not imply that a child must actually be injured to be removed from harm. Moreover, Kentucky statutory law clearly states that parents and custodians who either create a non-accidental risk of harm to their children or allow such a risk to be created are subjecting their children to abuse or neglect.[29] If the legislature meant to include only children who had been injured, and not children who are exposed to the risk of injury, then most certainly these statutes would have reflected that intent.

Second, in *J.H.* the Cabinet did not provide any evidence to the Bell District Court to show that T.H., the two-year-old sibling, was at risk of being hurt as well. The prosecution presented its theory of pervasive neglect,[30] and the social worker testified that it was the policy of her office to "seek removal of all the children in the home" if one child were removed.[31] In fact, the district judge told the mother that "for the record, for purposes of your appeal, should you end up prosecuting one, I'll state that there's really nothing in the record to base the Court's finding on because there has been no evidence in the record."[32]

On review, the court of appeals rejected the prosecution's pervasive neglect argument and noted that even if the prosecution had offered evidence of such neglect, removal still would have been improper:

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[25] *See J.H.*, 767 S.W.2d at 333.

[26] *Id.*

[27] *See* K.R.S. § 620.010 as amended by House Bill 142, Regular Session (Ky. 1998), signed into law by Gov Paul E. Patton on Mar. 17, 1998.

[28] *See id.* § 620.060(1).

[29] *See id.* § 600.020 as amended by House Bill 142, Regular Session (Ky 1998), signed into law by Gov Paul E. Patton on Mar. 17, 1998.

[30] *See J.H.*, 767 S.W.2d at 333.

[31] *Id.* This is not the official policy of the Cabinet for Families and Children state-wide.

[32] *Id.*

> [T]here always will be multi-child households where one child is physically or mentally handicapped with a brother or a sister who is physically and mentally healthy. These families unquestionably present situations where the lack of that utmost degree of attentiveness, care and control, appropriate and necessary for the much younger or afflicted child does not mean that the older or healthy child is also dependent, or, neglected or abused. The Commonwealth is constitutionally, statutorily and realistically prohibited from taking its evidence and inferentially leapfrogging from child to child in its efforts to remove them from their natural parents.[33]

In the hypothetical laid out at the beginning of this Essay, it is completely foreseeable that some clever defense attorney might attempt to confuse a district judge faced with the decision whether to remove an at-risk child like Kayla by citing *J.H.* out of context and implying more than it states. The defense might argue that Kayla could not be removed from her mother, Carolyn, and her mother's paramour, Eddie, since even if Eddie had sexually abused Jessica, there was no evidence that Kayla had been sexually abused as well. After all, according to *J.H.*, the Cabinet could not be permitted to use evidence related to Jessica to "inferentially leapfrog" from Jessica to Kayla in order to justify the removal of both children. Fortunately for Kayla, the removal petition filed on her behalf would be completely justified under the Kentucky Juvenile Code.

In Jessica's case, *J.H.* must be carefully distinguished. *J.H.* dealt with neglect, not abuse, in the family home. Because of this, all language in that opinion regarding abuse cases is clearly dicta. The dicta contained in *J.H. v. Commonwealth* should not be applied beyond the fact pattern of that case and certainly should not be extended beyond neglect cases.

Further, the Kentucky Court of Appeals was wrong when it stated that constitutionally and statutorily, a court may not look at the situation of one child when considering whether a sibling is in danger of becoming an abused child.[34] The court in *J.H.* stated, "The process that is due [to parents] includes preponderant proof that *each* child sought to be removed is dependent, or, neglected or abused."[35] The court of appeals cited two cases, *Quilloin v.*

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[33] *Id.* at 334.

[34] *See id.* at 333-34.

[35] *Id.* at 333 (emphasis added). In a case very similar to *J.H.*, *Matter of Edwards*, 335 N.Y.S.2d 575 (Fam. Ct. 1972), a petition for removal was filed regarding M.E. upon a diagnosis of trauma-related shoulder injury and medical neglect. In addition, M.E. had sustained previous injuries that could not be explained as being caused by accident. On the basis of the present abuse and neglect of M.E. (and consideration of past abuse), the Richmond County Family Court extended the

*Walcott*[36] and *Wisconsin v. Yoder*,[37] for the proposition that due process prohibits considering such evidence.

The United States Supreme Court made it very clear in *Quilloin* that the relationship between parent and child is constitutionally protected by the Fourteenth Amendment.[38] The Supreme Court also stated that there is little doubt that if the state were breaking up a natural family "without *some showing of unfitness* and for the sole reason that to do so was thought to be in the children's best interest," a violation of the Due Process Clause would occur.[39] The Court in *Quilloin,* however, does not remotely suggest that a court cannot look at injuries to a sibling to determine if another child, who has not yet been abused, can be removed for risk of abuse. In our hypothetical, certainly Jessica's mother would not argue or maintain that Mr. Johnson's raping and sodomizing five-year-old Jessica is to be included in the "'freedom of personal choice in matters of family life protected by the Due Process Clause of the Fourteenth Amendment.'"[40] The language in *Quilloin* makes it clear that due process is not violated where there is a showing of unfitness. In the hypothetical discussed earlier, Kayla would be at risk of abuse as a result of the unfitness of her caretakers, specifically

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removal petition to cover M.E.'s brother, R.E., holding:

> Although there is not one scintilla of evidence to show abuse or neglect of the child [R.E.], to remove the child from the home is not a violation of due process or a violation of [the parents'] constitutional rights.
>
> There has already been a finding after a long fact finding hearing, of child abuse and neglect against the respondent parents as to child [M.E.] on the original child abuse petition.
>
> The record is therefore sufficient to make the conclusion inescapable that the other child [R.E.] is likely to suffer serious harm from improper guardianship.

*Id.* at 580.The family court declared that when the "warning flags from the storm of abuse and neglect are still flying and there is a clear and present danger" to the other child in the home, *id.* at 581, a court must remove the other child to protect him from imminent risk to life or health, *see id.* at 580-82 (citing Schenck v United States, 249 U.S. 47 (1919)).

[36] Quilloin v Walcott, 434 U.S. 246 (1978).

[37] Wisconsin v Yoder, 406 U.S. 205 (1972).

[38] *See Quilloin*, 434 U.S. at 255.

[39] *Id.* (emphasis added).

[40] *Id.* (quoting Cleveland Bd. of Educ. v LaFleur, 414 U.S. 632, 639-40 (1974)).

demonstrated by Mr. Johnson having raped Jessica and her mother being unwilling to take steps necessary to protect Kayla from the same fate.

The other case cited by *J.H.* is *Wisconsin v. Yoder*[41] This case involved the issue of whether Amish parents could be prosecuted for not sending their children to school after they reached the age of fourteen.[42] The case dealt entirely with the state's jurisdiction to interfere with the religious upbringing of a child. This case is not on point with the hypothetical, nor with the facts of *J.H.*

Finally, when the *J.H.* court stated that statutorily a child could not be held to be an abused child based on evidence of abuse of another child, it ignored an important portion of the Juvenile Code. The definition of an abused or neglected child includes a child who is "threatened with harm" or is subjected to a "risk" of physical, emotional, or sexual injury[43] The legislature has made it crystal clear that Kentucky's Juvenile Code does not require a court or the Cabinet for Families and Children to wait until an actual physical or sexual injury occurs before a child can be removed from his caretaker. The *J.H.* court completely ignored this portion of the Kentucky Juvenile Code, which expressly protects a child who is subjected to the risk of injury or sexual abuse.

Kayla is therefore constitutionally and statutorily protected from being exposed to the risk of sexual abuse suffered by her sister. Since Jessica appears to have been abused,[44] and her mother is unable or unwilling to take the necessary steps to protect Kayla,[45] Kentucky law clearly defines Kayla as an "abused child."[46]

In conclusion, the case of *J.H.* must be distinguished from almost any other juvenile-at-risk case on several grounds. First, since the *J.H.* fact

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[41] Wisconsin v Yoder, 406 U.S. 205 (1972).

[42] *See id.* at 207-13.

[43] K.R.S. § 600.020(1) (Michie 1990). *See supra* note 10. In addition, the regulations provide specific guidance on assessing risk to surviving children, and removing them if necessary, where there has been a child fatality in the home. *See* 905 K.A.R. 1:330 §§ 13, 14(1-5). After a child fatality, the social worker must conduct an immediate assessment to assure the safety of the remaining children. *See id.* § 14(5).

[44] A preponderance-of-the-evidence standard applies, pursuant to section 620.100(3). *See also* J.H. v Cabinet for Human Resources, 767 S.W.2d 330, 332 (Ky. Ct. App. 1988).

[45] *See* K.R.S. § 620.060(1)(c), as amended by House Bill 142, signed into law by Gov Paul E. Patton on Mar. 17, 1998.

[46] *See id.* § 600.020, as amended by House Bill 142, signed into law by Gov Paul E. Patton on Mar. 17, 1998.

scenario involved neglect only, all statements in the opinion regarding abuse are dicta. Second, the court of appeals' refusal to even consider "risk" directly contradicts an essential part of Kentucky's Juvenile Code that allows the Cabinet for Families and Children to protect children from harm before they are actually subjected to abuse or neglect. Finally, the legislative purpose of Kentucky's Juvenile Code is to protect children who, like Kayla, are at risk of abuse or neglect, but are fortunate enough not to have been directly exposed to abuse.

The answer to the question of whether Kentucky's children are "at risk" as a result of *J.H. v. Commonwealth* is not so clear, though. If judges take the time to examine this case carefully, as has been done in this Essay, the answer is probably "no."