RENDERED: July 10, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3152-MR

SUSAN BOYD MAHMOUD — APPELLANT

V.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
ACTION NO. 91-CI-0244

MOHAMED MAHMOUD and ROBERT D. MEREDITH, Commissioner — APPELLEES

OPINION
VACATING AND REMANDING

* * * * * *

BEFORE: COMBS, GUIDUGLI, and JOHNSON, Judges.

COMBS, JUDGE: The appellant, Susan Boyd Mahmoud (Susan), appeals from the order of the Meade Circuit Court adopting the Domestic Relations Commissioner's report, which recommended that the appellee, Mohamed Mohey-Eldin ABD Elkawy Mahmoud, be allowed full, unrestricted visitation with the parties' minor daughter. The appellant argues that the court erroneously excluded the

testimony of several of her witnesses and that the allocation of the DRC's fees was inequitable.

When the parties' marriage was dissolved in June, 1993, Susan was awarded sole custody of their three-year old daughter, S.M., and Mohamed was granted visitation rights. Shortly after the dissolution of the marriage, Susan claims that S.M. started exhibiting behavioral problems, such as wetting her bed, having nightmares, and crying uncontrollably. Susan initially attributed these changed in S.M.'s behavior to the parties' divorce and sought counseling for S.M. However, despite counseling, S.M. continued to behave in an odd manner. In October 1993, a particularly bizarre incident with S.M. prompted Susan to schedule an appointment for S.M. at Children's First in Louisville.[1] S.M. was seen by Dr. Sugarman, who performed a gynecological exam on her. Dr. Sugarman found no physical evidence of the abuse; but she told Susan to watch S.M. for certain behaviors which are generally indicative of sexual abuse.

Susan claims that on March 31, 1994, S.M. told her that her daddy had touched her "pee-pee hole." Susan immediately sought an emergency order to stop S.M.'s visitation with her father that was scheduled for the upcoming weekend. She also took S.M. to Children's First for another examination. Dr. Sugarman again examined S.M. Although she found no physical evidence of abuse, Dr. Sugarman testified in her deposition that

[1]Children's First is an agency in Louisville which specializes in evaluating allegations of sexual abuse.

during the examination S.M. made statements that her father had sexually abused her. Based upon S.M.'s statements and the changes her in behavior that her mother reported, Dr. Sugarman made the diagnosis that S.M. had been sexually abused and referred her to Dr. Abbott, a psychologist, for further treatment.

Mohamed's visitation with S.M. was ordered to be supervised until the DRC could conduct a hearing as to the allegations of sexual abuse. Prior to the hearing, the parties agreed to be evaluated by Lane Veltkamp, the director of the Family Mediation and Evaluation Clinic at the University of Kentucky College of Medicine; Veltkamp has a master's degree in clinical social work. He met with the parties individually and jointly with S.M. for a total of nine sessions. However, the DRC found that Mr. Veltkamp's testimony as to out-of-court statements made by S.M. was inadmissible. The court ruled that Mr. Veltkamp could testify as an expert pursuant to KRS 403.290(2).

After conducting a hearing, the DRC issued his report and found no evidence that Mohamed had abused S.M. He recommended that Mohamed be allowed full, unrestricted visitation with S.M. Susan filed exceptions to the DRC's report, contending that he had failed to properly consider the testimony of Dr. Sugarman, Dr. Abbott, and Mr. Veltkamp. On November 18, 1996, the court entered its order overruling her exceptions and approving and adopting the DRC's report. The court agreed with the DRC that there was no evidence of sexual abuse and set out a

visitation schedule, gradually allowing for the restoration of Mohamed's full, unsupervised visitation rights. This appeal followed.[2]

Susan contends on appeal that the court erred in excluding the testimony of Dr. Sugarman and Dr. Abbott as to S.M.'s out-of-court declarations about her father. The court found that Dr. Sugarman was not a treating physician but an evaluating physician and excluded her testimony on the basis that its prejudicial effect outweighed any probative value. As to Dr. Abbott, the court stated that it could not determine whether she was a treating or nontreating physician; nonetheless, as in the case of Dr. Sugarman's testimony, the court ruled that the prejudicial effect of her testimony outweighed its probative value. Susan argues that the testimony of both Dr. Sugarman and Dr. Abbott is admissible pursuant to the hearsay exception set out in KRE 803(4). In the alternative, she maintains that the probative value of their testimonies far outweighs any arguably prejudicial impact.

In Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990), the Supreme Court of Kentucky adopted the exception to the hearsay rule set out in the Federal Rules of Evidence (FRE)

---

[2]On November 22, 1996, Judge William Knopf of this Court entered an order granting Susan's motion for emergency relief pursuant to CR 76.33, staying the circuit court's order granting unsupervised visits to Mohamed. Susan's motion was then passed to a panel of this Court for a hearing. On December 12, 1996, the panel entered an order denying Susan's motion and setting aside the order entered by Judge Knopf on November 22, 1996.

803(4), which has since been codified in KRE 803(4). KRE 803 provides in pertinent part:

> The following are not excluded by the hearsay rules, even though the declarant is available as a witness:
>
> * * *
>
> (4) Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis and describing medical history, for past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

Prior to the adoption of KRE 803(4), the distinction between a treating versus a nontreating physician served as a bright-line rule for determining admissibility of medical evidence as an exception to the hearsay rule. The rationale for such a distinction was based upon the assumption that statements made to a physician consulted for a purpose other than treatment might tend to have less inherent reliability than similar statements made to a treating physician whose correct diagnosis and treatment were directly dependent upon the veracity of the patient. KRE 803(4) is not a per se bar to the admission of hearsay medical evidence from nontreating physicians. However, in cases involving nontreating physicians, the court is required to take one extra step and perform a probative-value versus prejudicial-effect analysis. After examining the totality of the circumstances, the court must determine whether the probative

value of the evidence outweighs its prejudicial effect. Sharp v. Commonwealth Ky., 849 S.W.2d 542 (1993).

We will first examine the excluded testimony of Dr. Sugarman. The record does not support the court's finding that Dr. Sugarman was a nontreating physician; in fact, it supports a finding to the contrary. S.M. was examined by Dr. Sugarman twice over a period of a couple of months. It was during the second examination that S.M. told Dr. Sugarman that her father had put objects in her "pee-pee hole." These statements were made to Dr. Sugarman in the course of her examination and evaluation of S.M. Significantly, Susan took S.M. to Children's First approximately twelve hours after she claims that S.M. made statements that caused her to believe that the child had been sexually abused. Dr. Sugarman performed her examination in the normal course of her professional duties as a physician -- not as a preparation for testimony in court. On both occasions when Dr. Sugarman saw S.M., she was "treating" the child solely for the purpose of making a diagnosis as to whether she had been sexually abused. Dr. Sugarman diagnosed that abuse had indeed occurred and referred S.M. to Dr. Abbott for further treatment. Dr. Sugarman's testimony as to S.M.'s out-of-court statements was clearly admissible under the exception in KRE 803(4) as these declarations were made for the purpose of obtaining treatment or diagnosis. We hold that the court's exclusion of this evidence was clearly erroneous.

We now turn to Dr. Abbott's testimony. S.M. was referred to Dr. Abbott as a follow-up to Dr. Sugarman's diagnosis that abuse had occurred. At the time of her first deposition, Dr. Abbott had met with S.M. once and had a scheduled appointment for the next week with her; by the time of her second deposition, she had had several sessions with S.M. Presently, Dr. Abbott continues to see S.M. on weekly basis. Dr. Abbott testified that during her sessions with S.M., the child made statements that her father had touched and put various objects in her "pee-pee and poo-poo hole." Dr. Abbott's testimony as to these statements was found to be inadmissible.

In Edwards v. Commonwealth, Ky., 833 S.W.2d 842 (1992), the Supreme Court held that statements made to a licensed clinical psychologist for the purpose of treatment for sexual abuse were admissible under the hearsay exception as to statements made for the purpose of medical treatment or diagnosis (KRS 803(4)). That precise situation exists in this case. S.M. was referred to Dr. Abbott for psychological treatment related to sexual abuse. She had been treating S.M. on a weekly basis since April 1994. The record substantiates that Dr. Abbott is a treating physician. In fact, even the appellee refers to her as S.M.'s "treating physician" in his brief. As Dr. Abbott is treating S.M. for sexual abuse and for behavioral problems, S.M.'s declarations were made in the course of her treatment and are clearly admissible pursuant to KRE 803(4). The exclusion of this evidence was, therefore, erroneous as well.

As the testimonies of both Dr. Sugarman and Dr. Abbott constituted a substantial portion of the appellant's evidence, expulsion of this evidence was reversible error. We therefore vacate the court's order and remand on this issue with directions for the court to consider this evidence.

Susan next argues on appeal that the court erroneously excluded the expert testimony of Lane Veltkamp. Veltkamp became involved in the case (with the approval of both the DRC and the parties) as an expert to evaluate the parties and S.M. and to make recommendations in the case. However, after Veltkamp had evaluated the parties and S.M. and had made his recommendations, the DRC raised the question of his ability to testify as an expert. Although the court found that Veltkamp could testify as an expert under KRS 403.290(2)[3], the DRC nonetheless held his testimony incompetent as to certain issues. It appears that the parties initially presumed that Mr. Veltkamp was either a psychologist or a psychiatrist when instead he is actually a clinical social worker. In its order, the court correctly found that the DRC had given appropriate consideration to the admissible portions of Veltkamp's testimony, that his testimony regarding out-of-court statements by S.M. was inadmissible, and that he could not testify as an expert with regard to the

[3]KRS 403.290(2) provides as follows:

> The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice shall be given in writing and made available by the Court to counsel upon request.

allegation that Mohamed had sexually abused S.M -- the ultimate issue in the case.

The Kentucky Supreme Court has expressed its "discomfort for convictions for child abuse based upon the hearsay testimony and ultimate fact opinion given by social workers." Sharp, supra at 546. The Supreme Court has stated on several occasions that "[t]here is no recognized exception to the hearsay rule for social workers or the results of their investigations." Furthermore, in Hellstrom v. Commonwealth, KY., 825 S.W.2d 612 (1992), the Supreme Court held inadmissible the testimony of a clinical social worker, stating that he did not qualify as an expert on the credibility and the reliability of the statements of the child made while he was evaluating her and that his testimony invaded the province of the jury by determining witness credibility and expressing his unqualified opinion on the ultimate issue. Hellstrom, supra.

We have reviewed Veltkamp's testimony and agree that much of it is inadmissible pursuant to the highly restrictive mandate of Hellstrom with regard to social workers. Throughout his deposition, Veltkamp testified as to hearsay statements made by the parties and by S.M. in the course of his evaluation. He also expressed his opinion as to S.M.'s credibility and as to the ultimate issue of whether sexual abuse had occurred -- all in contravention of Hellstrom.

The court was incorrect in its Order of November 30, 1995, in holding that Hellstrom did not apply. However, it was

correct in determining that Veltkamp could testify pursuant to KRS 403.290(2) -- to the limited extent that that statute permits in light of the severe (if not contradictory) strictures placed upon it by Hellstrom. In its later (and final) Order of November 18, 1996, the court corrected the earlier error and found that Hellstrom did apply and thus served as a bar to much of Veltkamp's testimony.

Appellant correctly points out the ambivalence in this area of the law. KRS 403.290(2) permits consultation with experts; KRE 702 and 703(a) both would seem to permit admission of the kind of opinion evidence offered by Veltkamp. However, Hellstrom cases a pall and imposes a ban specifically on social workers, singling them out and severely limiting their testimony in the area of child sexual abuse. Under that rule (which we are powerless to alter), we hold that the court was, all in all, correct in its treatment of Veltkamp's testimony. Upon remand, we direct that Veltkamp's testimony is admissible but highly limited under Hellstrom.

When Susan first suspected that sexual abuse had been perpetrated upon S.M., she correctly sought a variety of professional assistance. We note that both parties agreed to an evaluation by Veltkamp and that the DRC himself approved his involvement. The fact that the evaluation provided by Veltkamp ultimately translated into inadmissible evidence for testimonial purposes was not foreseeable -- nor was it the result of any machinations or otherwise wrongful behavior on the part of Susan.

Therefore, to allocate to her a disproportionately heavy share of costs for Veltkamp essentially constitutes a punitive measure -- amounting to a "fine" for failing to foresee that his testimony would be largely incompetent. We agree with appellant that this assessment was inequitable and arbitrary. We therefore vacate the court's order adopting this portion of the DRC's report and direct the court to allocate these fees more equitably upon remand.

In summary, we find that the court erred in excluding the testimony of Dr. Abbott and Dr. Sugarman. Both of their testimonies fall under the hearsay exception set out in KRE 803(4). The DRC improperly allocated 75% of his fees to the appellant because he found that her case was based upon mostly incompetent evidence. As we have discussed, this allocation was arbitrary and inequitable. Upon remand, we direct the court to consider the testimony of both Dr. Sugarman and Dr. Abbott and to apportion the DRC's fees between the parties in a more equitable manner.

For the foregoing reasons, we vacate the order of the Meade Circuit Court and remand for additional proceedings consistent with this opinion.

GUIDUGLI, JUDGE, CONCURS IN RESULT.

JOHNSON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the result reached by the Majority Opinion

as to the admissibility of the testimony of Dr. Sugarman and Dr. Abbott and as to the issue of the DRC's fees. As to the Majority Opinion's discussion of the admissibility of Mr. Veltkamp's testimony, I respectfully dissent.

In my opinion, Susan and the Majority Opinion correctly discuss the applicability of KRS 403.290(2).[1] However, KRE 706 is also applicable since it provides for court appointment of an expert such as Mr. Veltkamp. As to the admissibility of Dr. Sugarman's, Dr. Abbott's and Mr. Veltkamp's testimony, a thorough discussion of the current state of the law in Kentucky on the issues of admissibility of the victim's hearsay statements that were made for purposes of medical treatment or diagnosis and whether opinion evidence concerns the ultimate issue, is provided in the Supreme Court's most recent opinion on these issues, Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997) (cert. denied 118 S.Ct. 1374, 140 L.Ed.2d 522). It is my opinion that pursuant to Stringer Mr. Veltkamp's testimony is admissible.

This case is very disturbing. Obviously, it is very disturbing that a father may have sexually abused his daughter; and it is very disturbing that the father claims that he is "being egregiously and falsely accused by his paranoid, hyper-vigilant ex-wife of a crime that he simply did not commit." It is also very disturbing that Mohamed's counsel, in his brief, has accused Susan's counsel of advising Susan "that the only way to

[1]Surprisingly, the trial court did not interview the child pursuant to KRS 403.290(1).

restrict visitation was if abuse occurred on the child." Not to be outdone, Susan's counsel, in her reply brief, vehemently denies this accusation and assails Mohamed's counsel for referring to statements made by the trial judge, and then proceeds to attack the trial judge herself for "allow[ing] his impressions from outside the record to influence his decision."

On remand, and for the remainder of their lives spent with their daughter, it is imperative for the child's sake that Susan and Mahmoud conduct themselves properly. It is also critical that counsel and all others who enter into this dispute maintain the highest ethical standards and remember the welfare of this innocent child.

BRIEFS FOR APPELLANT:

Christina R. L. Norris
Louisville, KY

BRIEF FOR APPELLEE:

Christopher J. Gohman
Radcliff, KY