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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001452-ME
&
NO. 2009-CA-002084-ME

ROBYN RANA (F/K/A HAMMOND) APPELLANT

v. APPEALS FROM GREENUP FAMILY COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 07-CI-00681

DENNIS E. HAMMOND APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, THOMPSON, AND VANMETER, JUDGES.

THOMPSON, JUDGE: Robyn Rana (f/k/a Hammond), in Case No. 2009-CA-001452-ME, appeals from a Greenup Family Court order changing the primary residential parent from herself to her husband, Dennis Hammond. In a second appeal, Case No. 2009-CA-002084-ME, Robyn appeals the Greenup Family

Court's order restricting her visitation and timesharing without a hearing. For the reasons stated herein, we affirm.

Robyn and Dennis married and have three minor children, M.H., born on June 19, 2000, and twins, K.H., and S.H., born on August 14, 2002. The parties were divorced pursuant to a decree of dissolution of marriage entered in the Greenup Family Court on January 31, 2008, which incorporated a separation agreement entered into by the parties. Pursuant to the separation agreement, the parties exercised joint custody of the children. Robyn was designated as primary custodian, and Dennis had a visitation schedule of one weekend per month.[1]

On September 24, 2008, Dennis filed a motion for modification of custody. On October 2, 2008, the family court denied the motion. Within several days, Dennis filed a second motion to modify custody, which was also denied. Subsequently, during his ten-week summer child visitation period, Dennis notified Robyn that M.H. alleged that she had been physically abused by Robyn's husband.

Consequently, Dennis filed a motion for immediate temporary custody and modification of permanent custody, alleging that the children's environment may seriously endanger their physical, mental, moral, or emotional health pursuant to KRS 403.340. Attached to the motion were two affidavits from Dennis and M.H., which contained factual allegations of physical abuse by M.H.'s

[1] The parties alternated the Thanksgiving holiday and split time during Christmas break. Dennis received custody during spring break as well as for ten weeks during the summer and at other reasonable times as agreed to by the parties.

stepfather. After Robyn filed a response contesting the motion, the family court conducted a hearing on July 21, 2009.

At the hearing, the family court heard testimony from Robyn, Dennis, and Robyn's real estate agent via telephone from Georgia. After Dennis testified, his counsel asked the family court to interview M.H. Robyn objected and argued that she had the right to cross-examine M.H. if her testimony was used to support Dennis's motion. While stating M.H.'s wishes regarding who she wanted to reside with were not subject to cross-examination, she argued that her testimony regarding the presence of serious environmental danger could be cross-examined.

The family court ruled that Robyn could submit written questions to ask M.H., but that M.H. would not be subject to cross-examination. After the family court's ruling, Robyn's counsel stated, "Okay." Without any further objection or discussion, Robyn was called to the witness stand to testify. After Robyn testified, the family court cleared the courtroom and interviewed M.H.

During the interview, the family court instructed M.H. to state her true feelings and not what either of her parents had coached her to say. The family court stated, "I am sure that your dad has probably said, 'Now, make sure that you tell that judge that you want to live with me.'" The family court continued, "And I am sure that your mom might have said something to the effect, 'You go in there and you tell the judge that [your stepfather] doesn't slap you.'" The family court then obtained M.H.'s affirmation that her testimony represented her true feelings.

M.H. informed the court that she got along fine with her mother but, as she began crying, stated that her stepfather did not like her. When asked why her stepfather disliked her, she recounted past instances of physical abuse by her stepfather. M.H. then tearfully informed the court that she wished to live with her father rather than her mother because of the presence of her stepfather. After the hearing, the family court issued an order maintaining joint custody but changing the primary residential parent to Dennis. This appeal followed.

On appellate review, a trial court's factual findings made in the absence of a jury will not be set aside unless they are clearly erroneous. *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government*, 265 S.W.3d 190, 195 (Ky. 2008). Factual findings are not clearly erroneous if they are supported by substantial evidence which constitutes evidence having the fitness to induce conviction in the minds of reasonable men. *Rivers v. Howell*, 276 S.W.3d 279, 281 (Ky.App. 2008). After reviewing the factual findings, we review the application of law *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998). With this standard in mind, we address the issues raised by Robyn on appeal.

Robyn contends that the family court erred when it granted Dennis a hearing on his motion to modify custody based on the two affidavits. She argues that Dennis's affidavit established that his statements were not based on first-hand knowledge about the abuse but were hearsay based upon statements made by M.H. Robyn further argues that M.H.'s affidavit mirrored her father's affidavit and, thus, was insufficient to warrant a hearing pursuant to KRS 403.340(2) and 403.350. She further contends that the affidavits should have been rejected due to M.H.'s young age and Dennis's alleged previous harassing behavior toward Robyn.

Having reviewed the applicable legal authorities, including the recent holding of our Kentucky Supreme Court in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), we believe that Robyn's contentions are moot. Although he characterized his motion as one for modification of custody, Dennis's motion must be viewed as a motion for the modification of the parties' timesharing. Pursuant to their separation agreement, the parties had joint custody of their three minor children and agreed to significant child timesharing. Under this arrangement, Robyn was the children's "primary residential parent," which concept is frequently misnamed "'primary residential custody.'" *Id*. at 765.

As the court noted, parties may motion to modify visitation pursuant to KRS 403.320 or to modify custody pursuant to KRS 403.340. *Id*. at 767. However, as in Dennis's case, parties often "ask for one thing when they are actually seeking the other," due to the confusion regarding the nature of custody.

Id. This Court must determine what is being asked for by deciding whether a party seeks to modify the legal nature of the child's custody or simply how much time a child spends with each parent. *Id*. When the issue is merely deciding how much time a child spends with each parent, timesharing, not custody, is the issue. *Id*. at 768 (a parent who is not seeking a change in joint custody but only where a child will reside needs to file a motion for modification of timesharing).

Having concluded that Dennis's motion should be classified as a motion for modification of timesharing, we conclude that affidavits establishing a serious endangerment pursuant to KRS 403.340 are not required. Our law is clear that if a motion to *modify custody* is filed within two years of a custody decree, the moving party must submit affidavits demonstrating that the child's present environment may seriously endanger his physical, mental, moral, or emotional health. *Petrey v. Caine*, 987 S.W.2d 786, 788 (Ky. 1999). However, this is not the case here because only the best interests of the child need to be considered when determining timesharing. *Pennington*, 266 S.W.3d at 770. Thus, we decline to reverse on the basis of the allegedly deficient affidavits.

Robyn next contends that the family court failed to use the proper legal standard when reviewing the motion to modify custody. Robyn argues that the family court failed to use the legal standard set out in KRS 403.340(2), which provides no motion to modify a custody decree shall be made earlier than two years after its date unless there is reason to believe the child's present environment may seriously endanger his mental, moral, or emotional health.

Notwithstanding Robyn's contention, we previously concluded that Dennis's motion was a motion to modify timesharing pursuant to KRS 403.320. Under this statute, the best interests of the child standard is applicable, not the serious endangerment standard. Additionally, while we acknowledge that Robyn correctly states that the family court cited the best interest standard of KRS 403.270 in reaching its decision, the family court analyzed the issue under the best interests standard in a manner indistinguishable from the standard in KRS 403.320. Accordingly, despite citation to the incorrect statute, we believe the family court's analysis under the best interests of the child standard to be harmless error insofar as the appropriate standard was ultimately applied.

Robyn next contends that the family court erred in precluding her from having the opportunity to cross-examine M.H. as a witness. She contends that Dennis classified M.H. as a "key" witness and wanted her to be interviewed by the family court. When the family court interviewed M.H. and denied Robyn the opportunity to cross-examine her, she contends that her due process rights were violated because she was denied the opportunity to confront M.H.'s testimony.

Although Robyn acknowledges that KRS 403.290(1) permits a family court to interview a child in chambers for the purpose of determining the child's wishes, she argues that M.H was interviewed to provide testimony to demonstrate a serious environmental danger, not for the sole purpose of determining her wishes as to her custodian or visitation as provided in the statute. Thus, she contends that

she should have been permitted to cross-examine M.H. However, we conclude that the denial of her request to cross-examine M.H was not an abuse of discretion.

KRS 403.290(1) provides the following:

> The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

When applying KRS 403.290(1), family courts have broad discretion in deciding the best manner of ascertaining the child's wishes regarding custody, visitation, and timesharing. *Couch v. Couch*, 146 S.W.3d 923, 925-26 (Ky. 2004).

Having children testify in a family court's chambers in proceedings when their custody, visitation, or timesharing is at issue is a common practice. *Parker v. Parker*, 467 S.W.2d 595, 597 (Ky. 1971). "Most [family] courts are extremely reluctant to permit parents to embroil their children in controversies between themselves, to subject them to questioning in the presence of parents and the rigors of cross-examination, especially where the child is of tender years." *Id*. However, if a family court accepts and acts upon testimony made by a child during an *in camera* interview, minimum due process requires that the child's testimony, if not subjected to cross-examination, must be recorded and disclosed to the parties to provide them an opportunity for rebuttal. *Couch*, 146 S.W.3d at 925. However, these minimum due process rights are subject to waiver by the parties. *Id*.

In determining the modification of timesharing, the family court was statutorily bound to consider the best interests standard found in KRS 403.320. In so doing, the family court necessarily went beyond the inquiry stated in KRS 403.290(1), by using M.H.'s testimony to make findings relevant to modifying timesharing. However, after reviewing the record, we conclude that the family court's questioning of M.H. and its denial of Robyn's request to cross-examine M.H. was proper.

During the hearing, the family court prevented Robyn from cross-examining M.H. because of her tender years. Under *Couch*, a family court has discretion to interview a child outside of the presence of the parties and their counsel. *Id*. at 925. As required by *Couch*, the family court made a recording of M.H.'s testimony whereby the parties could review and rebut M.H.'s testimony. *Id*. Accordingly, we conclude that the family court's decision to interview M.H. and prevent her cross-examination did not violate Robyn's due process rights.

We further note that Robyn's brief contains an allegation that she was denied access to M.H.'s testimony from her interview with the family court. While Robyn only made cursory references to this denial of access, the record indicates that Robyn did not request access to M.H.'s testimony at the hearing and did not file a motion to the family court requesting the testimony prior to its order.

Moreover, after the order was issued, Robyn did not file a motion to obtain M.H.'s testimony and use any improper testimony as a basis for a motion to reconsider. In fact, Dennis filed the first request for M.H.'s testimony for the

purpose of this appeal. Accordingly, to the extent that Robyn alleges that she was denied access to M.H.'s testimony, we conclude that her allegation of error is waived. *See Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky.App. 1980) (an issue not raised before a trial court cannot be considered by an appellate court).

Robyn next contends that the family court erred in modifying custody for all three children when there was no evidence presented regarding her two younger children. She further contends that the family court failed to make specific findings of abuse with respect to her two younger children. Rather, Robyn argues that the evidence presented showed that her two younger children were well-adjusted, doing well in school, and had a good relationship with their stepfather. Therefore, she contends that the family court abused its discretion by modifying custody as to her two younger children.

However, the record reveals that M.H. testified that her stepfather was abusive to her and her two siblings. While Robyn testified that no abuse occurred in her residence, the family court had the authority to believe the facts presented by one witness over the facts presented by another witness. *Bissell v. Baumgardner*, 236 S.W.3d 24, 29-30 (Ky.App. 2007). During M.H.'s testimony, the family court extensively discussed the importance of her telling the truth, and M.H. maintained that she and her siblings had been abused. Ultimately, the family court found M.H. to be a compelling witness and issued a ruling based on her testimony. Therefore, we conclude that the family court's findings were not clearly erroneous.

Robyn contends that the family court erred by failing to provide her with a visitation/timesharing schedule with her children pursuant to KRS 403.320. Citing KRS 403.320, she argues that the family court was required to issue her a visitation/timesharing schedule regarding her children. However, KRS 403.320(1) provides, in relevant part, that "[u]pon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation...." After a review of the record, we observe that Robyn has failed to cite where she requested such an order and, thus, conclude that the family court did not violate KRS 403.320.

Robyn contends that the family court erred by denying her motion for timesharing with her children without a hearing pursuant to KRS 403.320. Robyn contends that she was entitled to a hearing because she was denied reasonable visitation/timesharing pursuant to KRS 403.320. Because the family court denied her a hearing, she contends that the family court's order must be reversed.

After an order was issued changing the primary residential parent of their children, Robyn and Dennis attempted to negotiate a timesharing agreement but were unsuccessful. She then filed a motion for visitation/timesharing where she requested that she be permitted to take her children to Georgia. Dennis filed a response arguing that the children's stepfather would endanger them in Georgia.

The family court then issued Robyn a timesharing schedule but precluded the stepfather from contact with the children. Robyn then filed a motion to reconsider contending that the family court's restrictions essentially eliminated her from her children's lives. She further argued that the family court had improperly restricted her visitation/timesharing without conducting a hearing pursuant to KRS 403.320. She contended that her access to her children could not be restricted absent a finding, after a hearing, that her children would be seriously endangered in her care. After Robyn's motion was denied, this appeal followed.

After reviewing the record, we conclude that the family court did not err by issuing a visitation/timesharing schedule without conducting a second hearing in response to Robyn's motion in September 2010. As the family court

noted in its order issued on October 22, 2009, a hearing was held to support the court's restriction of the stepfather's access to the children. The family court wrote that "[t]he [c]ourt has found that [Robyn's] husband is physically and verbally abusive to the children." Accordingly, we conclude that the family court's denial of Robyn's request to take the children to Georgia was not erroneous.

For the foregoing reasons, the orders of the Greenup Family Court are affirmed.

VANMETER, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority opinion except for the following arguments made by Robyn.

Robyn argues that the trial court erred in failing to allow M.H. to be cross-examined as a witness. In support thereof, Robyn notes that Dennis informed the court that M.H. was a "key" witness, and that he wanted her to be interviewed by the court. Robyn objected, and stated that M.H. should testify as a fact witness. That request was denied by the court.

Robyn argues that the admission of this testimony was very prejudicial, and that she was denied an opportunity to effectively defend this case because she could not cross-examine M.H. Robyn asserts that in being denied cross-examination, she was denied due process.

In making her arguments to this Court, Robyn acknowledges that KRS 403.290(1) permits the trial court to interview a child *in camera* for the purpose of determining the child's wishes as to custodian and to visitation. Nevertheless, she asserts that in this instance, M.H. was not interviewed as to her wishes, but instead, was interviewed to provide testimony that might demonstrate a serious endangerment on the part of Robyn toward M.H., which would then be used as a basis for modification of custody or timesharing. Robyn argues that the trial court's decision to allow her to submit questions for the court to ask during the interview did not correct the error, as she had no opportunity to follow-up on the answers or ask additional questions.

In response, Dennis argues that the interpretation of KRS 403.290(1) asserted by Robyn is too restrictive. He further argues, in reliance upon *Brown v. Brown*, 510 S.W.2d 14 (Ky. 1974), that the trial court is in the best position to determine whether cross-examination of an eight-year-old child would be in the best interest of justice. Dennis also argues that the court did allow the submission of questions from counsel for both parties, including inquiry into the issue of any possible coaching or bribing of the children by the father in exchange for their testimony. Dennis asserts that the procedure used by the trial court to interview M.H. enabled it to validate the credibility of M.H.'s testimony**.**

Having reviewed the record below, I believe the resolution of the issue becomes two-fold. First, there is the consideration of the testimony of M.H. as to her wishes under KRS 403.290(1). A second and very distinct issue is the

propriety of the trial court taking *in camera* testimony on issues other than the wishes of the child as allowed by KRS 403.290(1).

M.H. was the only fact witness called on Dennis's behalf. Moreover, M.H was identified as a "key" witness. M.H. testified not only to her wishes but to the behavior of Robyn's husband and the environment of the home, both as it concerned herself, and her siblings. Her testimony was the basis upon which the court ordered the modification of primary residential custodian from Robyn to Dennis. Although Robyn's counsel requested the opportunity to cross-examine M.H., that request was denied by the trial court which decided to conduct an *in camera* interview of M.H. While the interview was recorded, it does not appear from our review of the record that the parties were provided with either the transcript or video record of the interview during the course of the trial.[2] Accordingly, it seems that Robyn had neither the opportunity to cross-examine M.H., nor the opportunity to review M.H.'s testimony and present any rebuttal evidence.

Certainly, in previous decisions our courts have acknowledged that:

> Most trial courts are extremely reluctant to permit parents to embroil their children in controversies between themselves, to subject them to questioning in the presence of parents and the rigors of cross-examination, especially where the child is of tender years. Even though

[2] The first reference this Court could find in the record concerning the audio and videotape of the interview in question was on October 16, 2009, well after the close of trial. On that date, Dennis made a motion for release of the audio/visual recording of the hearing, including the testimony of M.H for purposes of use in this appeal.

> proceedings concerning custody of children remain adversary proceedings in our law and even though in such proceedings a party is generally permitted to be present when all witnesses are examined and given the right of cross-examination of all witnesses, the situation here presented is a delicate one. The elementary principles of humanitarianism are so strongly against the placing of a child between its parents that we feel a trial court should have a wide latitude in protecting the child. *Here the child was not interrogated concerning anything except its own desires relative to the parent with whom it wished to live* and even though the better practice might have been to permit appellant's attorney to be present when the out-of-court conference took place, we do not believe it was so prejudicial as to require a reversal of the case. (Emphasis added).

Parker v. Parker, 467 S.W.2d 595 (Ky. 1971).

In the matter *sub judice*, unlike the situation presented in either *Brown* or *Parker*, M.H. was not interviewed simply as to her wishes, but instead to provide substantive evidence which would serve as a basis to establish the best interest of the child in modifying timesharing pursuant to KRS 403.320 and 403.720. I believe this to be a key distinction. And, despite recognizing the validity of the concerns surrounding the involvement of children in domestic litigation, I believe that due process is a keystone of any litigated case and that the parties to a child custody action are entitled to know what evidence is used or relied upon by the trial court. *See Couch v. Couch*, 146 S.W.3d 923, 925 (Ky. 2004). Further, the parties have the right to present rebutting evidence or to cross-examine, unless such right is waived. *Id.*

Certainly, KRS 403.290(1) authorizes a trial court to "interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation." However, insofar as KRS 403.290 is a statutory exception to established case law and evidentiary rules, I believe that it should be strictly construed.

Without question it is proper, pursuant to statute, for the court to interview the child as to the child's wishes on custody and visitation. Nevertheless, there is a substantial difference between the court inquiring into the child's wishes on custody and visitation and the court using the child's perception of facts and conclusions upon which to base its own factual findings and conclusions.

Unquestionably, the statements of the child as to why particular wishes are formulated and the basis for the child's wishes can certainly supply the court with reason to delve deeper into evidentiary issues in open court with the parties and counsel present. However, this was not the case in the matter *sub judice*. While the child's wishes are a relevant consideration under KRS 403.270(2)(b), they provide no basis for finding any of the remaining factors relevant to a custody or timesharing determination found in KRS 403.320 or 403.720.

The next consideration is the propriety of the trial court taking *in camera* testimony on issues other than the wishes of the child. In considering the modification of timesharing the trial court was statutorily bound to consider all

factors found in KRS 403.320. In so doing, the trial court must go beyond the inquiry allowed in KRS 403.290 which is restricted to the wishes of the child. In considering these factors the trial court below necessarily used the testimony of M.H. to make findings relevant to modifying timesharing on other than the wishes and desires of the child on custody and visitation. This use of the *in camera* testimony of M.H. invokes constitutional concerns.

Without question, parties engaged in civil litigation have due process rights which are grounded in the Fifth and Fourteenth Amendments of our United States Constitution. *See Cabinet v. A.G.G.*, 190 S.W.3d 338 (Ky. 2006)(citing *Willner v. Comm. on Character and Fitness*, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224 (1963)). And as we have held in *Couch*, due process affords the parties the right to know the evidence against them, and to address that evidence through either cross-examination or rebuttal evidence.

Couch interpreted KRS 403.290(1). In so doing, it held:

> [W]hile it is certainly within the discretion of the trial court to conduct an in camera interview in the absence of the parties and counsel, a record of such interview must be made so that the parties are afforded the subsequent opportunity to determine and contradict the accuracy of statements and facts given during the course of the interview.

Couch at 926. The reference in *Couch* to the child's statements and facts given during the interview must be viewed in light of its interpretation of KRS 403.290(1), and that is the wishes and desires of the child as to custody and visitation.

Our Supreme Court in *A.A.G.* stated:

> A civil litigant's right of confrontation and cross-examination is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments. Willner v. Comm. on Character and Fitness, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224 (1963) ("[P]rocedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood."); Nevels v. Hanlon, 656 F.2d 372, 376 (8th Cir. 1981). However, confrontation and cross-examination are not rights universally applicable to civil proceedings. Vitek v. Jones, 445 U.S. 480, 494-96, 100 S.Ct. 1254, 1264-65, 63 L.Ed.2d 552 (1980) (prisoner being transferred to mental hospital for involuntary psychiatric treatment may be denied right to confront and cross-examine witnesses upon finding of good cause); Wolff v. McDonnell, 418 U.S. 539, 567, 94 S.Ct. 2963, 2980, 41 L.Ed.2d 935 (1974) (right to confront and cross-examine witnesses may be denied in inmate civil rights proceeding challenging constitutionality of prison disciplinary proceedings); United States v. Alisal Water Corp., 431 F.3d 643, 658 (9th Cir. 2005) ("[I]n the context of a civil suit, cross-examination is not, in every instance, a sine qua non of due process. It all depends on the situation.") (quotations omitted). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). Due process requires only that the evidence be "reliable," and "reliability can be inferred without more in a case where evidence falls within a firmly rooted exception to the hearsay rule." ." Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980), *overruled as applied to criminal cases by Crawford. See also United States v. Medico, 557 F.2d 309, 314 n. 4 (2d Cir.1977)* (Admission of hearsay statements "turns on due process considerations of fairness, reliability and trustworthiness. Experience has taught that the stated exceptions now codified in the Federal Rules of Evidence meet these conditions."); Commonwealth v. Durling, 407 Mass. 108, 551 N.E.2d 1193, 1198 (1990) ("Evidence which would be

admissible under standard evidentiary rules is presumptively reliable.").

Cabinet for Health and Family Services v. A.G.G., 190 S.W.3d 338, 345, 346 (Ky. 2006).

Our Supreme Court recognized in *A.A.G.* that, although the confrontation clause does not apply to civil cases, the due process clause does apply and requires either cross-examination or that the evidence be otherwise shown to be fair, reliable and trustworthy.[3] One such way of demonstrating fairness, reliability and trustworthiness is through firmly rooted exceptions to the hearsay rule. In the case *sub judice* cross examination was denied and no exception to the hearsay rule appears applicable. The testimony of the M.H. should have been excluded on all issues other than M.H.'s desires and wishes as to custody and visitation pursuant to KRS 403.290(1).

If a court declines to allow the parties to cross-examine a child witness, as was the case in the matter *sub judice*, the requirements of due process must nevertheless still be met. In this case, Robyn was afforded neither the opportunity to cross-examine M.H., nor the opportunity to review her testimony and provide rebuttal evidence. In addition, parents of a child are found to have a fundamental, basic, and constitutional right to raise, care for, and control their own children. *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989). Certainly, this

[3] The exception to application of the cross examination or firmly rooted hearsay exception aspects of the due process clause appear to be limited to prisoner and inmate cases. *See Vitek v. Jones; Wolff v. McDonnell*.

right is made hollow if parties are not afforded the opportunity to review the evidence against them and to present their own evidence in rebuttal.

I recognize that KRE 611 does afford the court the discretion to exercise reasonable control over the mode of interrogation for purposes of protecting witnesses. However, I believe it is contrary to our fundamental evidentiary principles and to the mandates of due process to allow evidence to be submitted against a party without giving the party a chance to review and respond to same. Accordingly, while it may be in the discretion of the court to control the mode of cross-examination, there must be procedures available to the parties whereby they can review the evidence considered by the court and present rebuttal evidence which will assure that the demands of due process are met. Any mode used by the court in controlling cross-examination should be open to scrutiny to assure it meets the requirements of due process.

Dennis argues that the trial court satisfied Robyn's right to cross-examination by allowing the parties to submit questions to be asked of M.H. during the course of the interview. I cannot agree. Cross-examination allows for the opportunity to ask follow-up questions and to obtain further testimony, while written questions submitted by the parties to the court for the purpose of interrogating a witness do not. The opportunity by the parties to openly question a witness allows the parties to fully and completely develop their theory of the case. Indeed, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *See A.G.G. v. Cabinet*, 190

S.W.3d at 346, citing *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1076). Accordingly, I do not believe that mere opportunity to submit initial questions satisfies the requirements of due process.

In the matter *sub judice*, Robyn was afforded neither the opportunity to cross-examine M.H., nor the opportunity to review and rebut the testimony. This depravation is particularly disconcerting in light of the fact that M.H. was the sole fact witness who provided testimony upon which the trial court based its decision to change timesharing. I believe the trial court's reliance on M.H.'s testimony in making its factual findings exceeded its discretion and I would reverse the decision of the trial court on this basis.

Robyn also argues that the trial court erred in modifying custody for all three children, as all of the negative evidence presented dealt only with M.H. She notes that while the court made specific findings of abuse in its order with respect to M.H., it made no such findings with respect to the younger two children. Robyn further asserts that the evidence presented showed that the younger two children were well-adjusted, doing well in school, and had a very good relationship with the stepfather. Robyn asserts that no evidence was submitted to contradict her testimony as to the two younger children being well-adjusted and happy at her home in Georgia. Accordingly, she asserts that the trial court abused its discretion in modifying custody insofar as the two younger children were concerned.

In response, Dennis asserts that the substance of the testimony as to the environment of Robyn's home had to come from one of the children, and that

M.H. was the child who felt comfortable enough to do so before the court. Dennis argues that the information provided by M.H. was sufficient for the court to conclude that all of the children, and not just M.H., were in danger of abuse by the stepfather.

I agree with Dennis that the environment of a home can have an effect on the children; however generalities will not suffice to provide the relevant evidence necessary for modification of timesharing as to the other children living in M.H.'s home. Certainly, all three children, and not just M.H., were residing in the home with Robyn and her husband at the time that the events which served as the basis for the motion to modify allegedly occurred. The information provided by M.H. concerned specifics that relate to M.H. and the general nature of the home environment in which all three children lived.[4]

If we assume the admission of the testimony of M.H. was proper, then in order to satisfy our evidentiary requirements there still must be a nexus between the abuse of M.H. and the other children in the home. Indeed, it is contrary to our evidentiary principles of relevancy and materiality to take the evidence that establishes the abuse of M.H. as proof that it affects the best interests of the other two children. Such an assumption would be mere speculation without an evidentiary nexus that links the abuse of M.H. to what would be the best interests of the other two children.

[4] While we note that M.H. did provide information to the trial court during the course of the *in camera* interview to indicate that the stepfather was also abusive to her younger siblings, for the aforementioned reasons upon which we are reversing the court's decision, we cannot rely on those portions of M.H.'s testimony in rendering our decision herein.

An evidentiary nexus must be established by the evidence and is subject to a finding by the trial court. While the information provided may have concerned specific instances involving M.H. herself, the trial court exceeded its discretion when it implicitly found such would be an endangerment to the other two children absent a finding that the abuse of M.H. affected the best interests of the other children.[5] Accordingly, on this basis I would reverse the decision of the trial court to modify the primary residential custodian of the remaining children in the home.

As a further basis for reversal on the issue of modification of timesharing of the other children in the home, it has been previously discussed herein that the admission of the testimony of M.H. did not pass constitutional muster. Thus, the testimony failed to provide a basis upon which the requisite findings could be made by the trial court to modify timesharing between the parties. As there were no other fact witnesses to provide that testimony, I would further be compelled to reverse on this issue for lack of evidence because of the exclusion of the testimony of M.H.

[5] To find otherwise would create an absurd result. Consider that if a parent were found to be abusive to one child and that the abuse of that child were the basis, without more, for the removal of all children, then the parent would be forever subject to having all future children removed from the home. For if it is reasonable to remove all the children today on the basis of the abuse of one child and if the circumstances were that a new child was born tomorrow or at a later time, then the reasons and basis for removal of the first children could serve as a basis for removal of the newborn without any additional evidence. Contrast the abuse of a parent toward one child with a parent who has an inability to care for a child. The same reasoning may not follow because the inability of the parent may be such that the parent is unable to care for any children, or maybe only unable to care for children that have specific needs associated with age, disability, or special needs.

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