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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002288-ME

L.S. (NOW D.) APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 05-CI-500070

B.S. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,[1] SENIOR JUDGES.

HENRY, SENIOR JUDGE: This is an appeal from an order of the Jefferson Family Court[2] which designated the appellee father as the primary residential parent of two minor children and awarded their mother parenting time on alternate

[1] Senior Judges Sheila R. Isaac and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] The appellee has argued that the notice of appeal is fatally defective because it states that the order being appealed from was entered on October 2, 2009, and there is no such order in the record. An amended notice of appeal was filed by the appellant on December 9, 2009, correcting this clerical error to show that the order being appealed from was entered on October 22, 2009.

weekends. The mother argues that her due process rights were violated because the family court delegated its judicial authority to a parenting coordinator, that she received ineffective assistance of counsel, and that the family court improperly relied on the theory of "parental alienation syndrome" in determining that the father should serve as the primary residential parent.

The marriage of the mother and father was dissolved in 2005. The settlement agreement that they entered into upon dissolution provided that the parents would have "joint legal custody" of the children, a son, born on November 1, 2000, and a daughter, born on January 9, 2003. It did not designate a primary residential parent, but provided that the father would have

> the right to liberal parenting time with said children and to have said children with him at reasonable times and places and after reasonable notice so as not to interfere with the health, welfare, and education of said children. This time shall include but not be limited to every other weekend from Friday evening until Sunday evening and two days (for a four hour period each of these days) during the week the exact days and times to be agreed upon.

Since the dissolution, the father has remarried and completed his medical residency. He is a practicing physician in Bullitt County. The mother has also remarried.

Disputes between the parents over the timesharing schedule and other issues involving the children began in 2006. These conflicts were caused in part by the fact that the parents and their respective spouses had moved, and the increased distance between their homes made the exchange of the children more

time-consuming and stressful. In January 2007, the mother filed a complaint with Child Protective Services after the father spanked the son with his hand and a belt, leaving marks on the child's buttocks. The CPS worker who investigated the incident reported that the father was cooperative and had enrolled himself in parenting classes. The father also completed anger management classes.

In an effort to improve their communication and interaction, the parents entered into an agreed order pursuant to which a licensed psychiatrist, Dr. Ronda Mancini, was appointed to undertake counseling and such treatment of the children as she saw "fit and appropriate." The order stated that

> [t]he court requests recommendation of how best to establish and maintain an ongoing relationship with the children, with each of the parents herein and with specific recommendations for how parenting by each of the parents could be improved to implement and enhance the well being of the children, minimize any actual or possible parental alienation and properly incorporate the significant others of each of the parents into a comprehensive treatment and parenting plan.

Although the mother contends that Dr. Mancini was selected and appointed at the urging of the father, there is nothing in the record to indicate that she objected to the appointment of Dr. Mancini at the time the order was entered in June 2007.

On April 18, 2008, Dr. Mancini filed a case status report with the court. It contained various troubling findings about the interaction between the mother and father and their children. Essentially, Dr. Mancini described a scenario wherein the mother has accused the father of being abusive towards the children, particularly the son, whereas the father has accused the mother of trying to alienate

the children from him. The mother has repeatedly cited the spanking episode which occurred in January 2007. The mother also reported to Dr. Mancini that the daughter's preschool teacher had told her that the daughter demonstrated behavior which suggested that she had been abused. When Dr. Mancini contacted the teacher, however, the teacher explained that the child displayed a "startle response" which the teacher attributed to the fact that the child was frequently sleepy and sometimes even fell asleep in class.

On the other hand, when the son was reported to be masturbating at home and at school, the mother and her husband used the occasion to imply that the father was a homosexual, telling him that he should talk to the son and tell him that he "used to like boys" and "liked to take it up the butt and suck d---." The father also claims that the mother has been resistant to therapy for the children, has minimized the daughter's poor grades and speech problems, and unilaterally sought psychiatric treatment for the son. Dr. Mancini also reported that the daughter was attacked and bitten by the family dog, a Rottweiler, while in the mother's care, yet the mother evinced some reluctance in getting rid of the dog.

Because of the level of ongoing conflict between the parents, Dr. Mancini recommended that a parenting coordinator should be appointed to provide long-term assistance and avoid recurrent court motions that would only reinforce the adversarial parenting relationship.

On June 13, 2008, the family court contacted the parties to inform them about Dr. Mancini's recommendations. The parties signed an agreed order

appointing a parenting coordinator, Dr. Sallie Brenzel.[3] The agreed order gave the parenting coordinator the "authority to make decisions regarding the best interest of the children with the exception that the parenting coordinator shall not have authority to make any determination which changes legal custody." It also provided that the

> [t]he PC recommendation shall have the same effect as a recommendation of a Commissioner and either party may move the court to hear exceptions. However, the parties agree that all recommendations of the Parenting Coordinator shall take effect pending the Court's decision regarding exceptions taken.

The order provided that the parenting coordinator could make decisions regarding time-sharing, parenting schedules or conditions, direct education, extracurricular activities, and direct the parties to participate in appropriate evaluations and counseling, and enforce child-related financial obligations. Neither party was permitted to undertake psychological counseling of the children without prior direction of the parenting coordinator. The order further stated that "The Parenting Coordinator is an officer of the Court acting as a private judge to the parties to this action to the extent of this stipulation and, therefore, has quasi-judicial immunity."

The conflict between the parents nonetheless continued. In June 2009, the father allegedly grabbed the son by the throat, leaving bruise marks. The mother took out an EPO against him on behalf of the children, although the family court did not grant a DVO. The son subsequently drew a picture of himself

[3] The appointment of parenting coordinators in Jefferson County is governed by Rule 707 of the Local Rules of the Thirtieth Circuit Family Court.

pointing a gun at his father, and wrote beneath it: "I hate my dad . . . wish my dad was dead . . . because what happen at McDonald's he chocked [choked] me because I wood not move."

On June 23, 2009, the mother filed a motion asking that the father's visitation with the children be supervised and to dismiss the parenting coordinator. It alleged that continued unsupervised visitation with their father would endanger the children's physical, mental, moral and emotional health. The motion also stated that Dr. Mancini, in direct contravention of CPS recommendations, was not assisting the son in dealing with the after-effects of being abused by his father, referring to the episode of January 2007 when the father struck the son with his hand and a belt. Two days later, the father filed a motion and response in which he claimed that the mother was repeatedly and deliberately violating the terms and conditions of the parenting orders prepared by Dr. Brenzel, and that she had violated the orders of the treating therapist. He further alleged that the EPO was an attempt to thwart the visitation schedule set up by the parenting coordinator.

On June 29, 2009, the father filed a motion to modify custody and to grant him the status of primary residential custodian. The family court set the matter for trial on September 24, 2009. On July 15, 2009, the mother's counsel made a motion to withdraw, citing personal reasons. The motion was granted on July 21, 2009.

On June 26, 2009, Dr. Mancini filed a report with the court stating that the mother had stopped bringing the children to appointments and was

resisting therapy for the children. Dr. Mancini noted that the mother filed her EPO on the day that the father was to get the children for an extended period of visitation. She reported that the son apparently knew about his mother's allegations, and claimed that his father was "abusive" and "mentally abusive." The son was unable to explain to Dr. Mancini what these terms meant, claiming that his father did not love him and only wanted to take time from his mother. Dr. Mancini further reported that the mother had said nothing about reports of abuse to her. Dr. Mancini stated that she was gravely concerned about the apparent parental alienation created by the mother, which she stated had a negative impact on the children and interfered with the father's ability to maintain a healthy relationship with his children.

At the beginning of July, the mother filed a complaint against the father with the Kentucky Board of Medical Licensure, alleging that he was an abusive parent and had falsified his medical records. This complaint has been dismissed.

Meanwhile, the parenting coordinator, Dr. Brenzel, submitted a memo to the court stating that she and Dr. Mancini believed that the children were being emotionally harmed by their mother to the degree that immediate protective action was necessary. After the court refused to grant the mother a DVO in connection with the choking incident, she and her husband continued to assert that the father had abused the son and made accusations against their previous counsel, Dr.

Mancini, Dr. Brenzel and the court. The mother's husband twice commented "I'll take care of it my way."

On August 10, 2009, in response to Dr. Mancini's report, the family court entered a sua sponte order removing the children from their mother's primary care and placing them with their father. The mother was permitted two supervised visits per week with the children.

On September 10, 2009, new counsel entered an appearance for the mother. She filed motions to increase parenting time, and for the appointment of a guardian ad litem for the children. The motions were denied.

At the beginning of the trial on September 24, 2009, the mother's counsel told the court that her son had been admitted to the hospital the previous week and that his condition was life-threatening. The trial judge asked if her client was comfortable in proceeding under those circumstances. The attorney explained that she was in "a kind of Catch 22 [situation]" because her client had been the primary custodian of the children but was now getting less than three hours per week with them. She further stated that her client would like to proceed with the trial but was willing to accept a continuance if needed. The attorney then stated, "I would like to put a motion on the record to continue and maybe have it overruled because it was such short notice." The trial court denied the motion for a continuance, and the trial proceeded. On October 22, 2009, the trial court entered an order designating the father as the primary residential parent; the mother was awarded parenting time with the children every other weekend from Friday

evening to Sunday evening. The mother filed a motion to alter, amend or vacate which was denied, and this appeal followed.

The mother argues that the family court's sua sponte order of August 10, 2009, in which the father was appointed the primary residential parent and the mother was awarded two periods of supervised visitation per week, did not comply with the requirements of Kentucky Revised Statutes (KRS) 620.060, which governs the issuance of emergency custody orders, and that consequently, the mother's due process rights were violated. KRS 620.060 has no application to this factual scenario. The August 10 order was entered pursuant to the court's ongoing jurisdiction over the dissolution action, not as the result of the filing of a request for an emergency custody order, which under these facts would have been unnecessary, confusing and inappropriate. KRS 403.320 is the statute which governs the modification of timesharing/visitation. *See Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008). In any event, the trial in this matter has rendered the issue moot. The appellant has not suggested any remedy which could redress the purported violation of the mother's rights that occurred between the time of entry of the sua sponte order and the trial order. Although the mother's counsel had withdrawn her representation on July 21, 2009, shortly before entry of the sua sponte order, the appellant has not explained why she was unable to retain new counsel who could presumably have filed a petition for emergency relief.

The mother next argues that the family court's actions placed her new counsel in a "Catch 22" position of needing to proceed in a trial for which she may

have been emotionally unprepared because her client's access to her children was being held hostage by the court. She points out that her new counsel, whose child had been hospitalized with a serious medical condition, was retained only fourteen days before the trial. As a result, she contends that she received ineffective assistance of counsel. There is no right to counsel in civil proceedings except in certain limited circumstances which are not present in this case. *See May v. Coleman*, 945 S.W.2d 426, 427 (Ky. 1997). *See also Parsley v. Knuckles*, 346 S.W.2d 1, 3 (Ky. 1961) ("There is nothing . . . in the common law that requires counsel in civil cases and any step toward that end must be made by the legislature.") Moreover, even if we apply the test for ineffective assistance of counsel that is used in the criminal context, the mother has not explained how her attorney's performance at trial was in any manner deficient, nor has she argued that there is a reasonable probability that, but for her unspecified errors, the result of the proceeding would have been different. *Gall v. Commonwealth*, 702 S.W.2d 37, 43 (Ky.1985), *citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Our review of the proceedings shows that the mother's counsel represented her client ably and actively at the trial. Indeed, at the bench conference at which mother's counsel discussed the matter of a continuance with the trial court, she stated that "I've been eating, sleeping and breathing this case." This statement is fully supported by her subsequent diligent representation of the mother at the trial.

The mother's next argument returns to the subject of the family court's sua sponte order, which she contends represented an improper delegation of its powers to the parenting coordinator. She argues that the family court should have made its own findings of fact and conclusions of law, rather than ratifying the "judgment" made by the parenting coordinator. Although she concedes that the order did not alter the "legal custody" arrangement, it did dramatically alter the mother's access to her children. She also makes a public policy argument that the appointment of parenting coordinators favors the creation of a class system within the family court where more affluent individuals have the opportunity to pay for a "private judge" whereas parties of lesser means must have their issues resolved less expeditiously by a judge.

These arguments concerning the August 10 order have been rendered moot by the subsequent trial and entry of the order of October 22, 2009, from which this appeal is taken. In that order, the family court made its own findings of fact and conclusions of law based upon the evidence presented at trial. There was no improper reliance upon the judgment of the parenting coordinator. The following analysis, made in a case involving the trial court's adoption of findings of fact and conclusions of law tendered by one of the parties, is fully applicable to the facts of this case:

> There has been no showing that the decision-making process was not under the control of the trial judge, nor that these findings and conclusions were not the product of the deliberations of the trial judge's mind. The evidence adduced at trial clearly supports the findings of

> fact and conclusions of law announced by the court and in the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility under [Kentucky Rules of Civil Procedure] CR 52.01, they are not to be easily rejected.

Bingham v. Bingham, 628 S.W.2d 628, 629-630 (Ky. 1982).

The mother next argues that the trial court improperly relied on the theory of parental alienation syndrome or PAS to alter the visitation terms. She argues that the theory is unreliable and not recognized by Kentucky courts. She further contends that the condition is very hard to diagnose and that it is often invoked by abusive fathers to gain custody from battered mothers who try to protect their children. We have carefully reviewed the family court's order, and find no reliance on a "theory" of parental alienation syndrome. The trial court found that the mother "demonstrates no real understanding that it is important and desirable that both children feel free to love and enjoy their father as well as their mother." This conclusion was based on the evidence offered at trial, not on an abstract theory of parental alienation syndrome.

Next, the mother argues that the trial was unfair because the father was allowed to put on his case in chief first, although his motion was filed after hers. On June 23, 2009, the mother made a motion with attached affidavit to modify the father's visitation to supervised visitation, and to dismiss the parenting coordinator. On June 25, 2009, the father entered a motion and response, in which he requested the court to strike the affidavit and deny the mother's motion to dismiss the parental coordinator. He also moved the court for a hearing to review

custody. A hearing on these motions was held on June 29, 2009, at which the court continued the action for trial. Our review of the trial record shows that no objection was entered when the judge announced that they were present for a trial on the father's motions to increase parenting time and to be declared the primary residential parent. The alleged error is therefore unpreserved for review, and no argument has been made that it constituted palpable error under CR 61.02. The mother further argues that it was unfair that father was "given" two-thirds of the trial time to present his case, and that the trial court allowed Dr. Mancini and the father to "ramble on" in their testimony whereas the mother was "summarily shut down at every attempt." Our review of the record refutes this allegation. Although the father's case in chief was longer, the trial court placed absolutely no restrictions on the length of the mother's testimony. The father chose not to cross-examine her. At that point, the trial court asked mother's counsel if she had any more witnesses. Counsel replied that she wished to confer with her client. The trial court allowed them to confer without interruption. After a few minutes, mother's counsel informed the court that she had no other witnesses. At no time did the trial court "shut down" or attempt to limit the mother's case in any way.

The mother also argues that she was not allowed to take her children to any other therapist to get a second opinion or to refute Dr. Mancini's testimony. As support for this contention, she refers to an agreed order entered more than a year before the trial, on June 25, 2008, which simply provided that neither party would unilaterally attempt to undertake therapeutic psychological or psychiatric

counseling or consultation with either of the children with any treatment provider not approved in advance by the parenting coordinator. This order simply does not support her argument.

Finally, she argues that there was no testimony to support allegations that the daughter was alienated. But the family court did not base its decision on a finding that the daughter is alienated from her father. In its order, the court noted the following facts which support its decision to appoint the father as the primary residential parent of the daughter: there were concerns about getting the daughter to her speech therapy sessions when she is in her mother's care, that her father has taken the initiative in ensuring that she receives the appropriate therapy, and that both children suffered from poor dental care and lice when in their mother's care.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Vickie Masden Arrowood Louisville, Kentucky	John E. Spainhour, Jr. Shepherdsville, Kentucky