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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000872-ME

L. D. A. APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE
ACTION NO. 10-J-00114

A. W. APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: MOORE, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: L.D.A. appeals from an order of the Marshall Family Court which granted sole custody of his son, M.W.A., to the mother, A.W., and denied him any visitation with the child. L.D.A. primarily argues that the trial court improperly considered the child's incompetent and hearsay statements to the

custodial evaluator. We conclude that the child's statements to the evaluator were not hearsay because the truth of the matters asserted was not directly before the court. Rather, the statements were offered only to explain the evaluator's findings and recommendations. However, we find that the trial court abused its discretion by denying L.D.A.'s motion to allow his experts to evaluate the mother and the child. Without such additional evaluations, the trial court denied L.D.A. his right to effectively challenge the evaluator's findings and recommendation. Therefore, we reverse the trial court's orders concerning custody and visitation and remand for additional proceedings.

L.D.A. and A.W. are the father and mother, respectively of M.W.A., who was born in 2007. L.D.A. and A.W. never married, but they lived together from the child's birth until their separation in May of 2010. Shortly after M.W.A.'s birth, A.W. went to work and L.D.A. remained at home as the child's primary caretaker.

When the parties separated, A.W. and L.D.A. each filed petitions for protective orders. By agreement, the petitions were dismissed and A.W. filed a complaint in the Marshall Family Court to establish paternity, custody and support for their child. Thereafter, the court approved the parties' agreed order on paternity, temporary custody and visitation. Under the terms of the agreed order, L.D.A. stipulated to paternity of M.W.A., and the parties agreed to temporarily share joint custody on an equal, timesharing arrangement.

But also during the same time frame, A.W. reported several concerns that L.D.A. or his mother had physically abused the child. The Cabinet for Families and Children (Cabinet) and the State Police investigated the reports but were unable to substantiate any of the allegations of abuse. Despite these allegations, on July 29, 2010, A.W. filed a motion to establish permanent joint custody with her designated as the primary residential parent. The trial court set the matter for a custody hearing on September 15.

On August 25, 2010, A.W. took M.W.A. to see Anita Williams, Licensed Professional Counselor Associate (LPCA), with regard to nightmares and out-of-control behavior. After two counseling sessions with M.W.A., Williams signed an affidavit stating that the child "never smiles," and appeared to be "emotionally numb and emotionally unresponsive." Williams also wrote that some of the child's drawings raised red flags of sexual abuse with her and the child had alleged that L.D.A. had physically abused him as well. Williams recommended that any further visitation with L.D.A. be supervised until there could be further counseling and more investigating by professionals.

On September 2, 2010, A.W. filed a "Notice of Intent to Withhold Visitation," as well as a motion to modify temporary custody to seek sole custody of M.W.A., with only supervised visitation to L.D.A. Williams's affidavit was attached in support of the motions. L.D.A. filed a response denying the allegations of abuse and seeking primary residential custody of M.W.A.

At the hearing on September 15, a state trooper and two social workers from the Cabinet testified regarding their respective investigations of the allegations. Both testified that they were unable to substantiate the abuse or neglect reports. They also stated that M.W.A. never indicated to them that L.D.A. had done anything sexually inappropriate to him. However, Williams testified that M.W.A. had drawn "troublesome" pictures which indicated sexual abuse. She also stated that M.W.A. was afraid of L.D.A., and that the child made statements which indicated that L.D.A. had physically and sexually abused him.

L.D.A.'s former stepdaughter from a previous marriage, T.H., testified that L.D.A. had sexually abused her starting when she was in the fifth grade. She described how her mother did not believe her assertions against L.D.A. and that she was removed from the home after she reported the allegations. L.D.A. was criminally charged with the abuse, but he was acquitted following a jury trial in the McCracken Circuit Court.

In its findings of fact entered on September 15, 2010, the trial court rejected Williams's evaluation of M.W.A., finding that her techniques were "highly suggestive, inappropriate and unprofessional. The court further found that "[s]uch conduct taints the witness's testimony regarding any other disclosures the child may have made to her." However, the court found T.H.'s testimony to be credible and raised serious issues about L.D.A.'s fitness to have custody. Consequently, the court ordered an independent custody evaluation be performed to assist in making the final determination of custody. In a separate order entered

on September 20, the trial court appointed Dr. Sarah Shelton, a Licensed Clinical Psychologist, to perform the evaluation.

Dr. Shelton performed the evaluation and submitted her report and psychological evaluations to the court on October 29. In particular, Dr. Shelton concluded that M.W.A.'s allegations of physical and sexual abuse were credible; that L.D.A. was the perpetrator; and, given L.D.A.'s prior history and the results of his psychological evaluation, that L.D.A. is a pedophile. Consequently, Dr. Shelton recommended that L.D.A. was not fit to have custody of M.W.A. or to have any kind of contact with the child. Dr. Shelton expressed concerns about "negative traits" revealed in A.W.'s psychological examination, but concluded that she is otherwise fit to have custody of M.W.A. Based on Dr. Shelton's report, the trial court suspended L.D.A.'s visitation and directed that he have no contact with his son until a final determination could be made.

In response, L.D.A. filed a motion for a supplementary evidentiary hearing to address Dr. Shelton's report. On March 8, and March 15, 2011, L.D.A. presented the reports and testimony of Dr. Mardis D. Dunham, a psychologist, and Dr. Steven Alexander, a Licensed Professional Clinical Counselor (LPCC). Both Dr. Dunham and Dr. Alexander took issue with Dr. Shelton's psychological assessment that L.D.A. is a pedophile. They each concluded that there is no reason to deny L.D.A. access to his son. However, neither interviewed M.W.A. or A.W. during their evaluations.

Following those hearings, the trial court entered its findings of fact, and final custody order on March 21, 2011. The trial court found Dr. Shelton's report and psychological evaluations to be credible. The trial court considered the rebutting reports and testimony by Dr. Dunham and Dr. Alexander. While the court found their evaluations and conclusions were professional, the court noted that they did not interview or evaluate A.W. or M.W.A., nor were they qualified to conduct a forensic evaluation. The court also further criticized Dr. Dunham's and Dr. Alexander's rebutting reports and testimony for the following reasons:

- Dr. Dunham and Dr. Alexander relied primarily on information provided by L.D.A. Based on numerous inconsistencies in L.D.A.'s statements and testimony, the court found that L.D.A. was not credible.

- Dr. Dunham and Dr. Alexander gave little or no weight to T.H.'s allegations of abuse. While the court recognized that L.D.A. was acquitted on the criminal charges arising from those allegations, the court stated that the acquittal did not preclude it from considering those allegations in making its determinations of custody and visitation. The court also noted that the Cabinet had substantiated those allegations, and further found that T.H.'s allegations "very compelling and credible."

- Dr. Dunham and Dr. Alexander gave little weight or consideration to the statements made by M.W.A. to Dr. Shelton, or to the child's "bizarre behavior" during the evaluation.

- Dr. Dunham did not have two pages of Dr. Shelton's seven-page evaluation of L.D.A., but he did not believe that the missing pages would have made a difference in his recommendation.

The trial court also addressed L.D.A.'s objection to its consideration of M.W.A.'s out-of-court statements to Dr. Shelton. The court found that the statements were not hearsay because they were not being considered for the truth of the matters asserted, but only for purposes of the psychological evaluation and to establish how she reached her conclusions. The court added that, even if the statements qualified as hearsay, they would be admissible under the excited-utterance and state-of-mind exceptions in Kentucky Rules of Evidence (KRE) 803(2) and (3).

Based on these findings, the trial court made the following conclusions:

> It is concluded by the preponderance of evidence that [L.D.A.] is a sexual predator of children, that he sexually abused his step-daughter and that he has either sexually abused his son or is grooming his son for such abuse. As previously stated, custody or visitation with him would place his son at a serious risk of sexual, physical, moral and emotional harm.
>
> It is noted that there are also concerns with regard to [A.W.]'s past conduct, none of which arise, at this time, to a level of a risk of serious endangerment. Specifically, [A.W.] is found to be hot tempered, controlling and foul mouthed. Considering the history of the case, conduct of the parties and recommendation by Dr. Shelton, [A.W.] is to seek mental health counseling for her son and herself as soon as possible with a professional mental health counselor and is to follow the recommendations of the mental health counselor.

Consequently, the trial court granted sole custody of M.W.A. to A.W. and ordered that L.D.A. shall have no visitation or contact with the child. The

court also forwarded a copy of Dr. Shelton's report to the Cabinet with a recommendation that the matter be further investigated. Finally, the court ordered L.D.A. to pay child support of $184.10 per month, and to pay half of the child's day-care and unreimbursed medical expenses.

Thereafter, L.D.A. filed a timely Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend or vacate the judgment. In support of the motion, L.D.A. raised numerous allegations of error. He primarily argued that the child's statements to Dr. Shelton were not admissible without a determination of the child's competency to testify. L.D.A. further argued that the trial court failed to consider the improper techniques employed by the earlier counselor, Anita Williams, as well as A.W.'s conduct around the time she took M.W.A. to Williams. He maintained that Dr. Shelton's assessment of M.W.A.'s credibility might have been affected had she known of this misconduct.

L.D.A. also noted that the trial court did not permit Dr. Dunham and Dr. Alexander to interview or evaluate A.W. and M.W.A. and, therefore, it should not have discounted their conclusions based on their failure to do so. He further argued that the trial court erred by denying his request for further evaluations of A.W. and M.W.A., and by refusing to admit the testimony of another expert.

L.D.A. next argued that the trial court improperly considered T.H.'s allegations of abuse without viewing the record from the criminal trial. In addition, he contended that T.H.'s allegations were not relevant in the current action, and that their admission was unfairly prejudicial. Finally, he argued that

the trial court permanently barred him from any visitation or contact with his son without any consideration of whether lesser remedies were appropriate.

For these reasons, L.D.A. requested that the trial court set aside its prior custody and visitation order and award joint custody of M.W.A. In the alternative, he requested that the court order the parties to undergo a new custodial evaluation by a different counselor, or at least, to postpone a final determination of custody and visitation until the child undergoes further counseling. The trial court denied the motion in an order entered on April 20, 2011. This expedited appeal followed.

In making a decision on custody, Kentucky Revised Statutes (KRS) 403.270(2) mandates that the trial court shall determine custody in accordance with the best interest of the child, giving consideration to all relevant factors and with equal consideration to each parent. Similarly, KRS 403.320(1) provides that "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." In this case, the trial court's custody and visitation rulings are based almost entirely on Dr. Shelton's conclusions that L.D.A. has abused T.H. and M.W.A. in the past and that he continues to pose a risk of harm to M.W.A. in the future.

We review the trial court's factual findings for clear error. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). However, L.D.A. mainly focuses on the trial court's consideration of M.W.A.'s out-of-court statements to Dr. Shelton. We

review evidentiary rulings for abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000), citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The primary issue in this case concerns the trial court's consideration of M.W.A.'s out-of-court statements to Dr. Shelton. L.D.A. does not challenge Dr. Shelton's qualifications to testify to the credibility of the child's statements made during evaluation or to express an opinion that the child's symptoms were indicative of sexual abuse. *See, e.g., Hellstrom v. Commonwealth*, 825 S.W.2d 612, 614 (Ky. 1992). Rather, L.D.A. maintains that Dr. Shelton's and the trial court's conclusions were impermissibly based on the hearsay testimony of a child who was not competent to testify. We disagree, although on different grounds than stated by the trial court.

In making a custody determination, a trial "court may seek the advice of professional personnel[.]" KRS 403.290(2). In addition, KRS 403.300(2) authorizes a trial court to appoint a custodial evaluator and to consider the evaluator's report as evidence in custody proceedings. The trial court is not obligated to accept an expert's recommendations regarding custody, but may determine the weight to be given such testimony.

However, a custodial evaluator's report and conclusions will invariably rely on statements given by other parties. For this reason, KRS

403.300(3) requires that the custodial evaluator's report be provided to the parties at least ten days prior to the hearing, along with "the investigator's file of underlying data, and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2), and the names and addresses of all persons whom the investigator has consulted." Furthermore, the investigator and any person who the investigator has consulted may be called for cross-examination. *See also Lewis v. Lewis*, 534 S.W.2d 800 (Ky. 1976), and *Bond v. Bond*, 887 S.W.2d 558 (Ky. App. 1994).

In this case, M.W.A. was never called as a witness, nor was there any determination concerning the child's competency to testify as a witness. However, Dr. Shelton and the trial court relied heavily on the child's statements and behavior during the evaluation. Hearsay is defined as an out-of court "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. KRE 801(c). Hearsay is not admissible except as provided by KRE 802. L.D.A. notes the "testimonial incompetence of [the] declarant should be an obstacle to the admission of the declarant's out-of-court statements if the reason for the incompetence is one which would affect the reliability of the hearsay." *B.B. v. Commonwealth*, 226 S.W.3d 47, 51 (Ky. 2007), citing Robert G. Lawson, *The Kentucky Evidence Law Handbook*, 675, n. 53 (4th ed. 2003). Since M.W.A. was not competent to testify, L.D.A. argues that his out-of-court statements to Dr. Shelton could not be offered to prove the truth of the matter asserted, that he was sexually abused by L.D.A.

However, this approach misinterprets both the role of the trial court and the role of the custodial evaluator in such cases. In *B.B. v. Commonwealth*, *supra*, the child's out-of-court statements were inadmissible to prove the criminal charges against the defendant. Similarly, in *R.C. v. Commonwealth*, 101 S.W.3d 897 (Ky. App. 2002), this Court held that the child's out-of-court statements to a social worker were clearly hearsay when offered to prove allegations of abuse raised in an abuse/neglect/dependency petition under KRS 620.070. But in this case, the controlling issues are whether L.D.A. is a fit parent to have custody of M.W.A., KRS 403.270(2), or whether "visitation would endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(1).

The trial court correctly recognized this distinction when it noted that "Dr. Shelton did not offer the [child's] statements as being true, she offered the statements to show how she reached her ultimate recommendation and conclusion. She offered them to show the effect the statements had on her." Unfortunately, the trial court then proceeded to extensively quote M.W.A.'s statements in Dr. Shelton's report.[1] The trial court compounded this error by concluding that L.D.A. had abused M.W.A. and by finding that he is a "pedophile" and a "sexual predator of children." These findings indicate that the trial court considered M.W.A.'s statements as proof of the matters asserted.

[1] The trial court's March 18, 2011, order includes two and a half pages of a direct quote from Dr. Shelton's report, mostly consisting of a transcript of the interview between Dr. Shelton and the child.

The allegations of abuse by L.D.A. are clearly relevant to the custody and visitation matters. However, the ultimate determination of these issues is beyond the scope of a custody proceeding. It would have been sufficient for the trial court to find simply that there are credible and substantiated allegations of abuse and that those allegations would preclude a finding that L.D.A. is fit to have custody of the child at this time. Similarly, the trial court could have simply stated that the substantiated allegations of abuse support a finding that L.D.A. poses a risk of harm to M.W.A.

We recognize that Dr. Shelton did not rely solely on M.W.A.'s statements to her. Based on the results of her psychological testing, Dr. Shelton concluded that L.D.A. is a pedophile. That opinion was subject to cross-examination and rebutting expert testimony. The trial court was well within its authority to determine the credibility of Dr. Shelton's conclusions. CR 52.01. Dr. Shelton also considered T.H.'s allegations that L.D.A. had abused her as a child. T.H. testified at the September 15 hearing, so there is no hearsay issue related to her testimony. Moreover, L.D.A. does not challenge the admission or the trial court's consideration of that evidence in this appeal.

But again, the only questions before the trial court and the custodial evaluator concerned whether L.D.A. is a fit parent to have custody and whether L.D.A.'s visitation would seriously endanger M.W.A.'s physical, mental, moral, or emotional health. Dr. Shelton's assessment of L.D.A. was relevant only as it addressed these specific issues in this case. To the extent that the trial court went

beyond this and broadly found that L.D.A. is a "pedophile" and a "sexual predator of children," those findings must be disregarded as dicta.

However, since those issues were not directly before the court, the rules concerning hearsay were not implicated in this case.[2] Likewise, M.W.A.'s competency to testify goes to the weight to be given to his out-of-court statements to Dr. Shelton, but does not affect the admissibility of his statements for the limited purposes presented in this case. Thus, while the trial court's findings exceeded the scope of the issues before it, the court did not err by considering M.W.A.'s statements as they related to the issues which were properly presented.

L.D.A. next argues that the trial court abused its discretion by refusing to order an additional evaluation of A.W. and M.W.A. and by refusing to allow him to introduce the testimony of an additional expert, Dr. Michael Nicholas, to challenge Dr. Shelton's report. On the former issue, the trial court acknowledged that L.D.A. had asked prior to the March hearings that A.W. and M.W.A. undergo a Ph.D.-level psychological evaluation. The court stated that it must balance the

[2] While we agree with the trial court's conclusion that M.W.A.'s statements were not hearsay in this case, we disagree with the trial court's additional holding that, if M.W.A.'s statements qualified as hearsay, then they would be admissible under the "excited utterance" and "state-of-mind" exceptions to the hearsay rule. KRE 803(2) makes it clear that an "excited utterance" must relate to a startling event or condition, and must be made while the declarant was under the stress of excitement caused by the event or condition. *R.C. v. Commonwealth*, 101 S.W.3d at 902. Here, the trial court recognized that M.W.A. did not make the statements while he was being abused, but only "under stress of excitement when he was being interviewed by Dr. Shelton." Similarly, the state-of-mind exception allows hearsay statements which prove the declarant's state of mind, does not include "a statement of memory or belief to prove the fact remembered or believed . . . ." KRE 803(3). Thus, M.W.A.'s out-of-court statements could be introduced to explain the child's fear (to the extent which it is relevant), but not to prove that he was abused by L.D.A.

justifications for ordering such evaluations against the potential benefits, costs and the probative value which would result. The court found that Dr. Shelton, a competent and independent expert, had already conducted those evaluations. The court also noted that M.W.A. had already been subjected to numerous interviews by state police, social workers, counselor Williams and Dr. Shelton. As a result, the court concluded that an additional psychological evaluation would not be necessary.

We agree that the trial court has the discretion to determine how many evaluations a family is required to undergo. We also note that L.D.A. received a copy of Dr. Shelton's report prior to the hearing, and she was subject to cross-examination at the hearing, both of which are required by KRS 403.300(3). In addition, L.D.A. was also permitted to introduce the rebutting reports and testimony of Dr. Dunham and Dr. Alexander. We are concerned that the trial court discounted those experts' testimony, at least in part, because they had not evaluated A.W. or M.W.A. This decision seems somewhat arbitrary considering that the trial court itself did not allow them to evaluate the mother or the child.

If this matter involved a conventional determination of custody and visitation, then we would likely hold that the trial court was within its discretion to deny L.D.A.'s request for additional evaluations. But this is not a normal case. The trial court found that L.D.A. sexually abused M.W.A. and he will likely sexually abuse his child again. Based on these findings, the court entered an order which barred L.D.A. from having any visitation with his son whatsoever. We

recognize that this order is subject to modification under KRS 403.340 and 403.320. But in either case, he would bear the burden of proof, which would be particularly onerous considering the court's finding that he is an unfit parent and that he poses a risk of harm to his child.

The trial court's drastic ruling on visitation has potentially far-reaching effects on L.D.A.'s relationship with his son. Thus, while the court clearly had discretion to decide whether to require A.W. and M.W.A. to undergo additional evaluations, it must be mindful of the significant due process rights which are involved. '"[D]ue process,' . . . is not a technical conception with a fixed content unrelated to time, place and circumstances" but "is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (internal quotations and citations omitted). The fundamental requirement of procedural due process is simply that all affected parties be given "the opportunity to be 'heard at a meaningful time and in a meaningful manner."' *Id.* at 333, 96 S. Ct. at 902 (citation omitted).

Furthermore, "[t]he parties are entitled to know what evidence is used or relied upon by the trial court, and have the right generally to present rebutting evidence or to [effectively] cross-examine" that evidence. *Couch v. Couch*, 146 S.W.3d 923, 925 (Ky. 2004). In this case, the trial court limited L.D.A.'s ability to effectively challenge Dr. Shelton's report and testimony. Considering the great weight which the trial court gave to Dr. Shelton's findings and recommendations,

we must conclude that the trial court's decision to deny L.D.A.'s request for additional evaluations was an abuse of its discretion.

The trial court excluded Dr. Nicholas's testimony for a different reason. At the start of the March 8 hearing, the trial asked L.D.A. to disclose the identity of his possible witnesses. L.D.A. did not identify Dr. Nicholas as a possible witness at that time or prior to the hearing on March 15. Rather, he simply attempted to call Dr. Nicholas near the close of the March 15 hearing. Trial courts have broad discretion to enforce their own orders concerning identification of expert witnesses. *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 688 (Ky. App. 2009). While it does not appear that the trial court formally entered an order requiring L.D.A. to identify his expert witnesses, the trial court reasonably relied on his counsel's statements at the March 8 hearing identifying only Dr. Dunham and Dr. Alexander as potential witnesses. Under the circumstances, we cannot find that the trial court abused its discretion by excluding Dr. Nicholas's testimony.

But, since we are reversing and remanding to allow L.D.A.'s experts to evaluate A.W. and M.W.A., L.D.A. may have another opportunity to present the testimony of Dr. Nicholas. Of course, the trial court has broad discretion to determine the qualifications and relevance of an expert witness, as well as whether the witness's testimony would be cumulative to other evidence presented. Until those matters are properly presented to the trial court, the admissibility of Dr. Nicholas's testimony is not ripe for review.

In conclusion, we share the trial court's concern about the disturbing allegations of abuse in this case. But, at this point, they have not been proven. There is conflicting evidence concerning the allegations and L.D.A. vigorously disputes them. While the allegations are clearly relevant to the trial court's determination of custody and visitation, this action is not the proper forum to decide whether those allegations are ultimately true. The ultimate issues in this case concern only whether L.D.A. is a fit parent to have custody and whether visitation would present a risk of harm to M.W.A. Any findings beyond these issues must be addressed in another proceeding.

Similarly, Dr. Shelton's assessment that L.D.A. is a pedophile is relevant to the issues presented in this case. However, it is ultimately just a professional opinion. Considering the high stakes involved, L.D.A. must be given a reasonable opportunity to present evidence to rebut her opinion. The trial court has the ultimate responsibility to weigh the credibility of the expert witnesses, but it should do so only after considering all relevant evidence. Here, the court allowed L.D.A. to present expert testimony to rebut Dr. Shelton's opinions, but limited his experts' abilities to effectively challenge her conclusions. For this reason, we must remand this matter for additional evaluations and hearing as appropriate.

Accordingly, the order of the Marshall Family Court is affirmed in part, reversed in part, and remanded. The trial court is directed to allow L.D.A.'s experts to evaluate A.W. and M.W.A. and to consider their conclusions as

rebutting evidence to the custodial evaluator's report. Furthermore, the trial court shall enter new findings based on that evidence and shall limit its findings to the issues which are properly presented in this action.

ALL CONCUR.

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