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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000826-ME

JOHN DARA KILGALLIN APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE JENNIFER UPCHURCH EDWARDS, JUDGE
ACTION NO. 08-CI-00076

CHERRY LEE KILGALLIN APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, MAZE, AND MOORE, JUDGES.

MAZE, JUDGE: Appellant, John Kilgallin, appeals an order of the Russell Circuit Court overruling Appellee's, Cherry Kilgallin, Motion to Modify Custody. While John does not appeal the court's ruling regarding custody, he does appeal the trial court's *sua sponte* decision to expand Cherry's visitation with her children. John also contests the trial court's evidentiary ruling that testimony he sought from

Probation and Parole officers was privileged under Kentucky Revised Statutes (KRS) 439.510.

We hold that the trial court abused its discretion in expanding Cherry's visitation rights, as that decision was not accompanied by the requisite conclusion that it served the best interests of the children involved. We further hold that the trial court abused its discretion in quashing the subpoenas of two Probation and Parole officers, as their testimony was not privileged under Kentucky law. Hence, we reverse and remand.

Background

As a preliminary matter, we note that Cherry, did not file a brief in this appeal. Under Kentucky Rules of Civil Procedure (CR) 76.12(8), this fact entitles us to adopt John's portrayal of the facts and issues as true or to reverse the trial court if John's brief supports such a result.[1] We elect merely to adopt as true John's portrayal of the facts and issues on appeal. Those facts are as follows.

John and Cherry married on January 27, 2001, and had two children during their marriage. John filed for dissolution in February 2008, and in January 2009, the Family Division of Russell Circuit Court entered a decree of dissolution. The court's orders granted, among other things, sole custody to John and supervised visitation to Cherry.

[1] The Rule also provides that we may interpret Cherry's silence as a confession of the trial court's error. However, this specific sanction is inappropriate in the context of a child custody case. *See Galloway v. Pruitt*, 469 S.W.2d 556, 557 (Ky. App. 1971).

On May 9, 2011, Cherry filed a Motion for Modification of Custody. Prior to the evidentiary hearing on this motion, John subpoenaed two Probation and Parole officers who, during 2008 juvenile court cases involving Cherry and her children, obtained and held information concerning the condition of Cherry's home. In those cases, the officers testified before the same trial court concerning their observations of alleged drug paraphernalia and other conditions adverse to the children's well-being. However, in response to John's subpoenas seeking testimony regarding these observations, the Department of Corrections (DOC) filed a Motion to Quash, arguing that the information sought was privileged under KRS 439.510. John responded that the General Assembly's intent was not to exclude each and every fact observed or known by a Probation and Parole officer.

At the subsequent hearing, held over two days in 2012, the court heard extensive testimony from Cherry and John, among others. Cherry and John both expressed concerns for the welfare of their children while in the other's care. John expressed concern that Cherry used illegal drugs, was unable to maintain stable housing, and suffered from a seizure condition which prevented her from holding a valid driver's license. He asserted that Cherry had driven the children several times while her license was suspended.

Cherry denied using illegal drugs and testified that she does not suffer from epilepsy. However, she admitted that she had lost consciousness several times after which her driver's license had been suspended. Cherry also acknowledged past financial difficulty and that she was currently unemployed but

actively seeking employment in the insurance industry. Cherry further voiced concern that, since the divorce, the children's grades had declined, that John had "subjected" the children to several different female caregivers, and that he regularly disparaged her to their children.

Following this hearing, the trial court entered its Findings of Fact, Conclusions of Law, and Order. The court found, *inter alia*, that the information John sought from the two Probation and Parole officers was privileged. The trial court further concluded that Cherry had not shown a change in circumstances justifying a change of custody. However, the court went on to expand Cherry's visitation with her children to every other weekend, one week night per week, and portions of major holidays and the children's spring and summer breaks. The court also ordered that overnight visits take place at the home of a third party, and that Cherry not transport the children without a valid driver's license.

John subsequently filed a Motion to Alter, Amend or Vacate pursuant to CR 59.05. Primarily, he argued that the trial court failed to make several findings which, he contended, were required by the evidence in the record or by statute. These included the trial court's alleged failure to take judicial notice of the Probation and Parole officers' testimony in the prior juvenile court case. He did not take issue with the trial court's finding, or lack thereof, regarding whether the modification of Cherry's visitation was in the children's best interest. The trial court overruled the CR 59.05 motion and John now appeals.

Analysis

On appeal, John takes exception to several of the trial court's rulings. He first argues that the trial court erroneously modified Cherry's visitation without first concluding that such a modification was in their children's best interests as required in KRS 403.320. He further argues that the modification of Cherry's visitation was improper because Cherry did not request it and because such modification was, in fact, not in their children's best interests. Finally, John argues that the trial court erred in finding that the information sought from the Probation and Parole officers was privileged.

I. The Trial Court's Modification of Cherry's Visitation

A. Standard of Review

We review the trial court's orders regarding visitation for an abuse of discretion; and we review its factual findings for clear error. *B.C. v. B.T.*, 182 S.W.3d 213, 219-220 (Ky. App. 2005); *see also* CR 52.01. To amount to an abuse of discretion, the trial court's decision must be arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Furthermore, a finding of fact is clearly erroneous if it is unsupported by substantial evidence; that is, evidence sufficient to induce conviction in the mind of a reasonable person. *B.C.*, 182 S.W.3d at 219 (citing *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)).

Overall, the family court is in the best position to evaluate the testimony and to weigh the evidence, and we will not substitute our opinion for that of the family court. The question for this Court is not whether we would have

come to a different conclusion, but whether the family court applied the correct law and whether it abused its discretion. *B.C.*, 182 S.W.3d at 219.

B. Court's *Sua Sponte* Modification of Visitation

We first address John's argument that the trial court abused its discretion in raising the issue of visitation and amending its prior order *sua sponte*. KRS 403.320 states, in relevant part, that

> (1) 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.
>
> ….
>
> (3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

Referencing this statute, this Court has previously held that where a party "did not petition the family court for additional visitation, did not raise the issue of additional visitation … and did not present any evidence that additional visitation would be in the children's best interest[,]" it was only the trial court's failure to make the statutorily required findings which mandated reversal. *VanWinkle v. Petry*, 217 S.W.3d 252, 258 (Ky. App. 2007) (addressing a question of grandparent visitation). We went on to state that, if the trial court satisfied the statutory elements and procedures for modification of visitation in the future, nothing precluded the family court from granting additional visitation. *Id*.

The plain language of KRS 403.320(3) permits a trial court to modify visitation, with or without prompting, whenever it finds the statutory elements listed therein are present. Therefore, we proceed to the more imperative question of whether this trial court "satisfied the statutory elements and procedures for modification of visitation[.]" *VanWinkle*, *supra*. Unfortunately, the court did not.

KRS 403.320(3) clearly states that, although it may do so at its discretion, a court can modify visitation only upon concluding that such "modification would serve the best interests of the child[.]" *See also Anderson v. Johnson*, 350 S.W.3d 458-59 (Ky. 2011) (stating that "best interests of the child" is a required conclusion of law under the statute); *Stewart v. Burton*, 108 S.W.3d 647, 650 (Ky. App. 2003); *Hornback v. Hornback*, 636 S.W.2d 24, 26 (Ky. App. 1982). It is clear from the record before us that the trial court did not so conclude in either of its orders. While it could be implied from the court's statement that "a change warranting modification" existed, we cannot fain an ability to read the trial court's mind, especially concerning so critical and mandatory a conclusion of law. Furthermore, the trial court was considering Cherry's motion to modify custody under KRS 403.340(3).[2] The standards for modifying custody under that statute and modifying visitation under KRS 403.320, while related, are different.

[2] This statute states, in part,

> If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child.

Therefore, we cannot accept the trial court's findings of fact and conclusions of law made pursuant to the former standard as automatically sufficient under the latter.

The trial court's failure to expressly conclude that the modification of custody served the children's best interests constituted reversible error. We remand so that the court may make this conclusion of law, if the facts in the record support it. As a result of this holding, we do not address John's claim that modification was not, in fact, in the best interests of his children. Rather, we leave that critical issue to the court in the best and most-informed position to resolve it.

II. John's Subpoena of Probation and Parole Officers

A. Standard of Review

Our standard of review regarding a trial court's ruling on a motion to quash a subpoena is, once again, whether the trial court abused its discretion. *See Commonwealth v. House*, 295 S.W.3d 825 (Ky. 2009). Indeed, a trial court has the "ultimate discretion in discoverability," even when there is a question of privilege. *O'Connell v. Cowan*, 332 S.W.3d 34, 44 (Ky. 2010) (quoting *Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 727 (Ky. 1997)). Therefore, we again defer to the trial court's considerable discretion, absent an arbitrary, unreasonable, unfair, or unsupported application of the facts to the law. *See English*, *supra*.

B. KRS 439.510 and DOC's Claim of Privilege

The statute at the heart of the present question of privilege provides, in pertinent part,

> All information obtained in the discharge of official duty by any probation or parole officer shall be privileged and shall not be received as evidence in any court. Such information shall not be disclosed directly or indirectly to any person other than the court, board, cabinet, or others entitled under KRS 439.250 to 439.560 to receive such information, unless otherwise ordered by such court, board or cabinet.

KRS 439.510. Though the language of the statute is quite unequivocal, our courts have found a few exceptions to its prohibition on the release of applicable information, albeit in the context of a criminal case. For example, if a defendant makes a showing that the privileged information is essential to his or her defense, a balancing of interests may deem the enforcement of such a privilege improper in the face of certain constitutional rights of the defendant. *See Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Also, in *Tabor v. Commonwealth*, 625 S.W.2d 571 (Ky. 1981), our Supreme Court held that a defendant's status information collected by DOC may be testified to for purposes of proving a defendant's qualification for persistent felony offender status.

The purpose behind KRS 439.510 is obvious: To promote the free flow of information between a parolee and those supervising him. Our challenge in reviewing this case, however, is much less simple. While it is required that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . .," KRS 446.080(1), it is also widely held that privileges, such as the one established in KRS 439.510, are to be narrowly construed. *See O'Connell*, *supra*, at 39 (citing, *e.g.*, *Sisters of Charity*

Health Systems, Inc. v. Raikes, 984 S.W.2d 464, 468 (Ky. 1998)). To resolve this conflict, we look to the intent of the General Assembly, as well as the nature of the information John sought in his subpoena.

As we stated above, the Kentucky Supreme Court in *Tabor* provided an exception to KRS 439.510's privilege. In coming to this conclusion, however, the Court provided the more important analytical holding that the General Assembly's intent in drafting KRS 439.510 "was to create a 'privilege' statute consistent with the general principles of a privileged communication." 625 S.W.2d at 572. Therefore, according to the Court, the legal principles applicable to all evidentiary privileges, including others created by statute such as the priest-penitent, physician-patient, and psychiatrist-patient privileges, apply to the privilege created by KRS 439.510. *Id*. Hence, in resolving the question of John's subpoena, we recount and apply these principles.

Four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

(1) the communication must originate in a confidence that they will not be disclosed; (2) this confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be protected; and (4) the injury to the relationship caused by the disclosure of the communication must be greater than the benefit gained by it. *Tabor*, *supra*, at 572-73 (citing to 8 Wigmore, Evidence § 2285, p. 527). It is also well-established, however, that

> a claim of privilege can be defeated by proof by a preponderance of the evidence, including the communication or material claimed to be privileged, that the privilege has been waived or that the communication or material is either outside the scope of (or "not germane to") the privilege or falls within a specified exception to the privilege.

9 Ky. Prac. Crim. Prac. & Proc. § 27:63 (5th ed.) (citing *Stidham v. Clark*, 74 S.W.3d 719, 727 (Ky. 2002)). A privilege is waived when the person upon whom the privilege is conferred "voluntarily discloses or consents to disclosure of any significant part of the privilege matter." Kentucky Rules of Evidence (KRE) 509.

John argues on appeal that the information he sought from the Probation and Parole officers, to wit, what they observed in Cherry's home, was not the type of information KRS 439.510 exists to protect from disclosure. He bases this argument on the fact that the officers' observations did not constitute a "communication" which Cherry made in confidence. John cites to *Haynes v. Commonwealth*, 625 S.W.2d 575 (Ky. 1981), in which our Supreme Court held that a Probation and Parole officer's testimony is not privileged where the testimony was drawn from his notes and regarded facts, such as the defendant's birth date, which were not obtained from a parolee as the result of a privileged communication. We agree with John that this case, along with other authority enumerated above, is applicable to the present one.

Like the information in *Haynes*, the information the officers obtained in this case came not from information or communication which Cherry offered

under the belief that it was being provided in confidence. Rather, the information came in the form of the officers' observation of items visible to anyone who walked into Cherry's home. Therefore, this information did not "originate in … confidence" and, thus, it lacks an essential element necessary for the privilege to apply under *Tabor* and the general principles of evidentiary privileges.

Furthermore, John points out that the Probation and Parole officers had previously testified to, and therefore "voluntarily disclosed" the very information he sought in a prior hearing during another case before the same judge. KRE 509. Though the exact facts and testimony in the juvenile court cases not in the record on appeal – and therefore beyond the scope of our review – John presents a persuasive, albeit not dispositive, argument that DOC waived any privilege to which it may have been entitled.

One, if not both, of these reasons lead us to conclude that the trial court abused its discretion in quashing John's subpoena of the Probation and Parole officers.

Conclusion

In sum, we reverse the trial court's order regarding both the trial court's order modifying visitation and its order quashing the subpoenas of the Probation and Parole officers. We remand for additional evidence, if necessary, and for entry of findings of fact supporting the trial court's conclusion of law regarding the best interests of the children. Additionally, on remand, this additional evidence can include testimony from the subpoenaed officers. Of

course, their testimony is admissible to the extent that it concerns their observations of Cherry's home and does not convey information or communications Cherry provided to them in true confidence.

ALL CONCUR

BRIEF FOR APPELLANT:

Matthew B. Dehart
Jamestown, Kentucky

NO BRIEF FOR APPELLEE