

RENDERED: AUGUST 19, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002121-ME

MICHAEL LUTTRELL

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 07-CI-01903

SARAH LUTTRELL

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, MOORE AND STUMBO, JUDGES.

STUMBO, JUDGE: Michael Luttrell is appealing an order of the Hardin County Family Court restricting the contact between his child and his parents. He alleges error on two evidentiary issues and abuse of discretion on the part of the trial court. We find the admission of certain records into evidence without proper authentication to be error. We therefore reverse and remand for a new hearing.

Michael and Sarah Luttrell divorced May 12, 2008. They have one daughter, L.G.L., (hereinafter referred to as Child) age four. They have joint custody of Child, with Sarah the primary residential custodian. Michael frequently takes Child to visit with his parents during his visitation time.

In early September of 2008, Michael and his mother, Ailene Luttrell, were bathing Child when they noticed her vaginal area was red and swollen. The next day he took Child to see her pediatrician. He was afraid that someone might have been sexually abusing her. The pediatrician told Michael that Child might have a urinary tract infection.

Michael's scheduled visitation was over that same day. He then returned Child to Sarah and informed her of the doctor's concern. The next day, Sarah took Child back to the doctor. At this visit, it was apparently alleged that Jack Luttrell, Michael's father, might have been abusing Child. The pediatrician contacted Children's Protective Services (CPS), which initiated an investigation against Jack Luttrell. After a two-month investigation, CPS concluded that the allegations were unsubstantiated.

Sarah testified that after the investigation concluded, Child's behavior began to change. Specifically, she stated that Child would become angry after her visits with Michael, that Child began acting out at school, and that she would behave sexually inappropriately. Sarah sought counseling for Child because of the changes in her behavior. Child was three-years old at this time.

Child began therapy at Restoration House in Louisville, Kentucky. A friend of Sarah works there and was the referral source for Child's counseling. After Child's first therapy session, the therapist notified CPS. This led to another investigation into Michael's parents, which concluded with the allegations being unsubstantiated.

About a month after the CPS investigation concluded, Sarah filed a motion with the court to restrict the contact Michael's parents had with Child. After a hearing, the court eventually ordered that Michael's parents were to have no contact with Child unless it was supervised in the presence of another adult "who has no history of any felony convictions nor any history with any substantiated child abuse by the Cabinet for Health and Family Services" This appeal followed.

Michael's first two arguments revolve around evidentiary issues raised at the hearing, which ultimately led to the restricted visitation of Child with her grandparents. First, Michael argues that it was an abuse of discretion for the trial court to admit counseling records into evidence without proper authentication. During the hearing, Sarah's counsel introduced into evidence Child's counseling records from Restoration House. Michael's counsel objected because a record custodian had not authenticated the records.

Usually, records such as these are authenticated by the testimony of either a records custodian or are self-authenticated by a written statement under oath that the records are what they purport to be. Kentucky Rule of Evidence

(KRE) 902(11). Michael argues that no records custodian testified at the hearing and that the records were not self-authenticating. Michael is correct.

KRE 901(a) states that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” A self-authenticating document or the testimony of a records custodian will satisfy this requirement.

Here, the counseling records were obtained when Michael moved for a court order requiring Restoration House to produce the records. An order was issued stating that Restoration House “shall produce any and all medical and psychological records, assessments or progress notes maintained in the course of business by their facility” When Sarah’s counsel sought to introduce the records into evidence, she had attached to the records a copy of the court order. In the case at hand, this was not sufficient to authenticate the records.

Circumstantial evidence can be used to authenticate a document, *Thrasher v. Durham*, 313 S.W.3d 545 (Ky. 2010), however, attaching the court order was not enough. There is no evidence that the records submitted with the order were in fact the records obtained via the court’s order. It was therefore an abuse of discretion in admitting the records into evidence without proper authentication.

Michael also argues that the counseling records and medical records should not have been considered because they constitute hearsay and did not fall

under one of the hearsay exceptions. The records were introduced pursuant to KRE 803(4), which states:

The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

(4) Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

Michael argues that the records were not for the purposes of medical treatment because they contain statements identifying the alleged perpetrators of sexual abuse. Michael brings our attention to the case of *Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010), which holds that a child's identification of an alleged perpetrator of abuse is not admissible under the KRE 803(4) hearsay exception.

While Michael is correct in his citation to *Colvard*, that case further provides that "we do not hold that statements of a child victim to medical personnel identifying an abuser are always inadmissible. There may be circumstances in which such statements will be found to comport with the requirements of KRE 803(4) or other exceptions to the hearsay rule." *Id.* at 247. We find such is the case here as it regards to the counseling records. Given the familial relationship, the identity of the alleged abuser is directly relevant to the diagnosis and treatment of psychological problems related to said abuse. However,

the identity of the abuser in the pediatrician's medical records should not have been admitted.

Because the counseling records were the cornerstone of Sarah's motion, we find that a new hearing is required. At this hearing, if Sarah seeks to introduce the counseling records, they must be properly authenticated. Further, the name of the alleged abuser should be redacted from the pediatrician's medical records.

Based on the above, we reverse and remand this case to the Hardin County Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lyn Taylor Long
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

No Brief Filed for Appellee.