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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000149-ME

ROBERT TAKAC — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 11-CI-00342

DEVONIE ANN STRICKLEY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellant, Robert Takac, appeals the January 28, 2013, order of the Kenton Circuit Court, overruling his emergency motion for sole custody. Upon review of the record, the arguments of the parties, and the applicable law, we reverse and remand.

On November 14, 2012, Robert moved the court for an emergency order of sole custody based on allegations of emotional abuse on the part of Appellee, Devonie Anne Strickley. On December 18, 2012, the Kenton Family Court held a hearing concerning custody of the minor children of Robert and Devonie following Robert's emergency motion for sole custody.

During the course of the hearing, Robert testified that both R.B.S. (age 15) and M.B.S. (age 15) had given him information concerning their relationship with their mother which had concerned him. Because he was concerned about this information, Robert took his sons to meet with their guardian ad litem. During the course of the hearing, however, Robert was not allowed to testify as to what either R.B.S. or M.B.S. told him, nor was he allowed to call them as witnesses. Upon declining Robert's requests in this regard, the court explained that it did not want the children to feel as if they were in charge, nor did it want them to feel as if they had to choose between their parents.

The children's guardian ad litem was also present during the hearing, and explained that he had met with both boys and was "very concerned" about the relationship between the boys and their mother. Specifically, he stated that he was concerned about emotional issues, including Devonie talking down to the boys,

getting upset and cursing at them,[1] manipulating them, and the overall feeling of tension in the home.

Devonie was called as a witness, and testified that she had lost her temper on only one occasion, and that the boys just happened to film that one occasion. Devonie explained that at that time the boys were "being aggressive" towards her, and that she does not normally lose her temper.

At the conclusion of the testimony, the guardian ad litem stated his opinion that the relationship between the boys and Devonie was breaking down, and that both R.B.S. and M.B.S. wanted to be with their father during the week. Ultimately, however, the trial court concluded that it did not find enough evidence to meet the statutory requirements for a change in custody, and that both R.B.S. and M.B.S. were teenage boys desiring their freedom, and that both parties needed to be cautious of being "sucked into manipulation."[2]

Robert reiterated his desire for the children to testify, and the court responded that it did not need to hear them testify because it understood what was going on, referencing previous filings in the case which demonstrated that these issues were continual. At the conclusion of a bench conference between the parties, Robert's counsel moved to take the children's testimony by avowal. The

[1] During the course of the hearing a videotape, recorded by one of the boys was played, in which Devonie is heard to call her son an "a—hole," and stating that ever since they started going to a particular school her "life has become s—t." Following the video, Robert again asked to call the boys to the stand, but the trial court again declined.

[2] To this end, the trial court explained its opinion that the boys were attempting to cause their parents to be angry at one another such that they would not pay attention to the behavior of their children, thereby allowing the children to behave in whatever manner they wanted.

court responded that she could do so, but that the court would not listen to it. Robert's counsel did not object to the court's statement in that regard, and did not renew her motion.

The trial court subsequently entered the aforementioned January 28, 2013, order overruling Robert's emergency motion for sole custody. It is from that order that Robert now appeals to this Court.

Upon review of the arguments of the parties, we note that our standard of review in the area of child custody is well settled in this Commonwealth. As our Kentucky Supreme Court held in *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008), the party seeking modification of custody or visitation/timesharing is the party who has the burden of bringing the motion before the court. Further, it is clear that the change of custody motion or modification of visitation/timesharing must be decided in the sound discretion of the trial court. *Id.* It is well-settled that an appellate court may set aside a lower court's findings:

> only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing

> evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted).

Additionally, we note that in ruling on an emergency motion for custody a trial court should base its decision upon consideration of the factors set

forth in Kentucky Revised Statutes (KRS) 620.060[3] and KRS 620.080.[4] As always, we review matters of law *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001). We review this matter with these standards in mind.

[3] KRS 620.060 provides that:

> (1) The court for the county where the child is present may issue an ex parte emergency custody order when it appears to the court that removal is in the best interest of the child and that there are reasonable grounds to believe, as supported by affidavit or by recorded sworn testimony, that one (1) or more of the following conditions exist and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child:
>
> > (a) The child is in danger of imminent death or serious physical injury or is being sexually abused;
> > (b) The parent has repeatedly inflicted or allowed to be inflicted by other than accidental means physical injury or emotional injury. This condition shall not include reasonable and ordinary discipline recognized in the community where the child lives, as long as reasonable and ordinary discipline does not result in abuse or neglect as defined in KRS 600.020(1); or
> > (c) The child is in immediate danger due to the parent's failure or refusal to provide for the safety or needs of the child.
>
> (2) Custody may be placed with a relative taking into account the wishes of the custodial parent and child or any other appropriate person or agency including the cabinet.
> (3) An emergency custody order shall be effective no longer than seventy-two (72) hours, exclusive of weekends and holidays, unless there is a temporary removal hearing with oral or other notice to the county attorney and the parent or other person exercising custodial control or supervision of the child, to determine if the child should be held for a longer period. The seventy-two (72) hour period also may be extended or delayed upon the waiver or request of the child's parent or other person exercising custodial control or supervision.
> (4) Any person authorized to serve process shall serve the parent or other person exercising custodial control or supervision with a copy of the emergency custody order. If such person cannot be found, the sheriff shall make a good faith effort to notify the nearest known relative, neighbor, or other person familiar with the child.
> (5) Within seventy-two (72) hours of the taking of a child into custody without the consent of his parent or other person exercising custodial control or supervision, a petition shall be filed pursuant to this chapter.
> (6) Nothing herein shall preclude the issuance of arrest warrants pursuant to the Rules of Criminal Procedure.

On appeal, Robert argues that the court committed reversible error and violated Kentucky Rules of Evidence (KRE) 601 by refusing to allow R.B.S. and M.B.S. to be called as witnesses. That provision provides that:

> A person is disqualified to testify as a witness if the trial court determines that he: (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify; (2) Lacks the capacity to recollect facts; (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

Robert argues that the court erred in refusing to call the boys as witnesses without making a determination as to the competency of the minor children to testify. Robert argues that unless the boys were found to be incompetent, or unless the decision was to protect the boys from harassment or undue embarrassment,[5] the

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[4] KRS 620.080 provides that:

> 1) Unless waived by the child and his parent or other person exercising custodial control or supervision, a temporary removal hearing shall be held:
>
> > (a) Within seventy-two (72) hours, excluding weekends and holidays, of the time when an emergency custody order is issued or when a child is taken into custody without the consent of his parent or other person exercising custodial control or supervision; and(b) In cases commenced by the filing of a petition, within ten (10) days of the date of filing.
>
> (2) At a temporary removal hearing, the court shall determine whether there are reasonable grounds to believe that the child would be dependent, neglected or abused if returned to or left in the custody of his parent or other person exercising custodial control or supervision even though it is not proved conclusively who has perpetrated the dependency, neglect or abuse. For good cause, the court may allow hearsay evidence. The Commonwealth shall bear the burden of proof by a preponderance of the evidence and if the Commonwealth should fail to establish same, the child shall be released to or retained in the custody of his parent or other person exercising custodial control or supervision.

[5] *See Coleman v. Coleman*, 323 S.W.3d 770, 772 (Ky. App. 2010).

court had no legal justification for its refusal to allow them to testify and that to do so was in error, particularly because Devonie was allowed to testify as to her version of events while the court excluded the only evidence from any witnesses who could offer contradictory proof.

In *Coleman v. Coleman*, 323 S.W.3d 770 (Ky. App. 2010), the mother requested that her ten-year-old daughter be allowed to testify in the case. The trial court denied the mother's request stating its concerns about the girl's age and the pressure that testifying would put on her. The trial judge also expressed concerns about putting a child of that age in the position of having to choose between her parents.

Counsel for the mother then requested that the trial court permit the testimony of the child by avowal, which the trial court also denied. Finally, the mother's counsel requested that the trial court interview the child in chambers and outside of the presence of the parties or counsel, which request was also denied. The mother's motion to modify custody was ultimately denied as well, upon the court's finding that she had failed to meet her burden of proof substantiating the need for same. The mother argued that the trial court committed palpable error by not permitting the testimony of the child by avowal, and that the trial court abused its discretion when it declined to interview the child in chambers.

In response to the mother's arguments concerning the court's refusal to interview the child in chambers, the *Coleman* court held that,

> [T]he decision whether to interview the child is discretionary with the court. KRS 403.290 states that the Court *may* interview the child in chambers to ascertain the child's wishes as to custody. The language of the statute is permissive and is left to the sound discretion of the trial judge. Therefore, we do not find that the trial court's decision refusing to interview the child in chambers was an abuse of discretion.

Coleman at 771.

The mother also argued that the court erred in refusing to call the child as a witness. Concerning that issue, this Court noted that in *Leahman v. Broughton,* 196 Ky. 146, 244 S.W. 403 (Ky. App. 1922), the Court found that it was reversible error for the trial court to exclude the testimony of an eight-year-old girl when the trial court made no determination as to the child's competency. The *Coleman* court noted that in *Leahman*, our Kentucky Supreme Court held that:

> Understanding and intelligence, rather than age, is the test to be applied in determining the competency of an infant to testify as a witness in either civil or criminal cases, and ... it is common practice to admit the testimony of children 8 and 9 years of age where they seem to understand the obligation of an oath.

Leahman at 404.

Thus, this Court in *Coleman* held that though the trial court pursuant to KRE 611(a)(3) retained discretion to exercise reasonable control over the mode and order of interrogating witnesses, it was error to exclude the child's testimony without a preliminary examination by the trial court to determine her competency. In so finding, however, this Court cautioned that even if the court had made a

determination of competency the court still had the authority under KRE 611(a)(3) to protect the child from undue harassment or embarrassment.

We note that KRE 611(a) provides that:

> (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:
>
> (1) Make the interrogation and presentation effective for the ascertainment of the truth;
> (2) Avoid needless consumption of time; and
> (3) Protect witnesses from harassment or undue embarrassment.

Upon review of this provision and applicable precedent, this Court is in agreement with Robert that while KRE 611 gives the court the discretion to "protect" the witnesses from undue harassment or embarrassment, it does not afford the court the discretion to unilaterally exclude the testimony, even by avowal, of the only other two witnesses to the events at issue when they were not found to be incompetent to testify.

Certainly, the court could have taken means to protect the children from undue harassment, and had the authority and discretion to do so. *See Coleman, supra*. Indeed, had the court been concerned that such would occur it could have either taken their testimony by avowal or interviewed them in chambers. 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. However, the court did not do so. We are thus in agreement with Robert that without any preliminary determination of incompetency below, the court erred by

refusing to take the testimony of the children, either on the stand or by avowal, and in doing so denied Robert the opportunity for a full and fair hearing of his case.[6]

Due process is a keystone of any litigated case. *See Couch v. Couch*, 146 S.W.3d 923, 925 (Ky. 2004). The parties have the right to present rebutting evidence or to cross-examine, unless such right is waived. *Id. Sub judice,* Devonie was allowed to testify as to her version of events while the court excluded the only evidence from any witnesses who could offer contradictory proof.

Accordingly, we believe reversal is appropriate. Wherefore, for the foregoing reasons, we hereby reverse the January 28, 2013, order of the Kenton Circuit Court, and remand this matter for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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[6] In so finding, we make no ruling on the merits of the court's actual decision concerning whether or not the evidence at issue would or would not suffice to justify the granting of Robert's emergency motion for custody. That matter will again be within the sound discretion of the trial court on remand, and we decline to comment upon it further herein.