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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000111-ME

BAILEY JORDAN BROWN-HICKS APPELLANT

v.

APPEAL FROM HARRISON FAMILY COURT
HONORABLE BARBARA L. PAUL, JUDGE
ACTION NO. 10-CI-00373

STEPHEN DALE HICKS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Bailey Jordan Brown-Hicks appeals the order of the Harrison Family Court granting timesharing to Stephen Dale Hicks. Brown-Hicks claims that the family court erred in determining Hicks's counselor was an expert and by admitting her report into evidence and allowing her to testify on matters

relating to timesharing. Brown-Hicks also argues the order improperly creates timesharing for the grandparents. We affirm.

The parties were divorced in February 2012, and have been engaged in an ongoing custody and timesharing battle. Hicks's history includes numerous arrests as well as serious behavioral, legal, and substance abuse issues. During the course of this action, the family court issued a domestic violence order as well as various orders requiring Hicks to undergo counseling, evaluations, and drug testing.

After being arrested in October 2012, Hicks's timesharing with the parties' child was suspended pursuant to the terms of a mediated agreement. Hicks subsequently filed a motion to reinstate timesharing under the mediated agreement, and Brown-Hicks countered with her own motion for permanent sole custody. In January, the family court ordered a reinstatement of supervised timesharing in compliance with a prevention plan developed by the Cabinet for Health and Family Services along with the parties.

In July 2013, Hicks filed a motion to reinstate timesharing under the original mediated agreement, which would remove the supervision requirement and provide him with more frequent timesharing. The family court initially denied the motion based on Hicks's failure to attend the psychological evaluation recommended by his counselor, Karen Adams. In October 2013, the family court revisited the issue in a hearing conducted on all matters related to timesharing and custody between the parties.

At the hearing, the family court determined Adams to be a qualified expert over the objection of Brown-Hicks. Adams provided testimony regarding her opinions on Hicks's mental health, his alcohol and substance abuse history, and timesharing recommendations. The family court also entered her written report into evidence, which included a diagnosis of post traumatic stress disorder (PTSD) and generalized anxiety disorder. Other witnesses testified as to the nature of Hicks's relationship with the child.

The family court issued findings and ordered that Hicks be allowed to resume supervised timesharing. The terms of the order provided that timesharing would increase and supervision requirements would decrease so long as Hicks continued to meet certain requirements, including progressing with his treatment plan. Brown-Hicks appealed. She alleges Adams was improperly determined to be an expert and, therefore, was unqualified to provide opinions on custody and timesharing issues.

We review for abuse of discretion. "A trial court's determination as to whether a witness is qualified to give expert testimony under KRE 702 is subject to an abuse of discretion standard." *Tapp v. Owensboro Medical Health Systems, Inc.*, 282 S.W.3d 336, 339 (Ky. App. 2009).

We agree with Brown-Hicks that Adams was not an expert, but find the error harmless. The case of *Brosnan v. Brosnan*, 359 S.W.3d 480 (Ky.App. 2012), provides a detailed analysis of the qualifications necessary to testify

regarding diagnosis of a party with PTSD. Quoting *Stringer v. Commonwealth,* 956 S.W.2d 883 (Ky. 1997), the Court established:

> Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

Brosnan, 359 S.W.3d at 484. Although the social worker in *Brosnan* had an "impressive" educational background, she was not "trained as a psychologist or psychiatrist" and lacked "the appropriate education and training to diagnose psychological disorders, including PTSD." *Id.* at 485. Her testimony on that matter was, therefore, inadmissible.

This case is similar. Adams holds a bachelor's degree in mental health counseling yet is neither a psychologist nor psychiatrist. The organization for which Adams is the program administrator is licensed as an alcohol and other drug abuse treatment entity (AODE) under 908 KAR 1:370. As an AODE, Adams's organization is certified to provide DUI services as well as other outpatient services and education for drug and alcohol abusers. However, Adams is not individually licensed in any capacity as a mental health professional. Although Adams was originally asked by the family court to perform a substance abuse and mental health evaluation of Hicks, her individual qualifications and the status of her organization's licensure preclude her testimony as an expert in any

field beyond that of substance abuse issues. As Adams was not "trained as a psychologist or psychiatrist" and does not have "the appropriate education and training to diagnose psychological disorders," *Brosnan*, 359 S.W.3d at 485, the family court abused its discretion in allowing testimony regarding her diagnoses of Hicks, including the written report and her opinions on timesharing, to be entered as evidence.

Nonetheless, we conclude the admission of this testimony was harmless. "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." CR 60.01. When the court incorrectly admits improper evidence, such error "is harmless if the facts are otherwise shown by proper evidence, or when the verdict or judgment is supported by other sufficient evidence." *Honaker v. Crutchfield*, 57 S.W.2d 502, 504 (Ky. 1933).

The trial record and findings issued by the family court indicate there was other sufficient evidence to support a finding that resuming supervised visitation between Hicks and the child was in the child's best interest. Multiple witnesses testified that Hicks and the child enjoyed a close, loving relationship, and that they enjoyed quality time together during visits. Additionally, Brown-Hicks testified that it was her desire for Hicks and the child to have a relationship.

Other evidence also supports the findings that visitation could be carried out safely and, over time, it may be appropriate to expand visitation. Testimony at trial indicated Hicks had never been observed under the influence

during visits with the child. Hicks was in the process of undergoing counseling with Adams and agreed to follow her recommendations regarding his treatment. Brown-Hicks also specifically requested during the hearing that Hicks have visits and stated that she would be comfortable if they were supervised by at least two people until Hicks was able to demonstrate more stability. Based on the foregoing, although the testimony and report of Adams were admitted in error, such error was harmless because the order was "supported by other sufficient evidence." *Id.* at 504.

Finally, we address Brown-Hicks's contention that the order of the family court improperly created timesharing for the grandparents. The order provides that should Hicks's visit be canceled by the supervisors due to his intoxication, the child is to remain with the grandmother for the visit. Brown-Hicks argues that this provision creates timesharing for the grandparents without a proper hearing as required by *Mustaine v. Kennedy*, 971 S.W.2d 830 (Ky.App. 1998). We disagree.

The terms of the order merely provide for care of the child should Hicks fail to comply with the other conditions outlined in the order. The child is to remain with the grandmother only in the event that Hicks arrives at the visit while intoxicated or is deemed to be unsafe by the timesharing supervisors. The provision does not create specific timesharing with the grandparents. Its inclusion did not constitute an abuse of discretion.

Accordingly, the order of the Harrison Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jason Rapp
Lexington, Kentucky

NO BRIEF FILED FOR APPELLEE