

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001476-ME

SALLY A. MAY

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE JEFF MOSS, JUDGE
ACTION NO. 05-CI-00972

DONNIE J. HARRISON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE, CLAYTON AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Sally A. May appeals the Jessamine Family Court's Order suspending her visitation with sons, E.H. and Z.H. After careful consideration, we affirm.

Sally A. May (the mother) and Donnie J. Harrison (the father), who were never married, have two sons, E.H. (D.O.B – 3/11/2003) and Z.H. (D.O.B. –

10/25/2004). The case commenced in 2005 when an action seeking child support for E.H. was filed on behalf of the mother under the Uniform Reciprocal Enforcement Support Act (URESA). On July 13, 2006, the trial court ordered that this action be combined with a similar action on behalf of Z.H. Initially, the children's paternity was established, and Donnie Harrison was determined to be the biological father, which he has acknowledged. An order of child support was entered on August 4, 2006.

The children lived with both parents until August 2005. After the parents' relationship ended, the mother married Joseph Yruegas and resided in Ohio. (From August 2005 until May 2010, the mother had physical custody of the children, but since May 2010, the father has had physical custody.) The mother and Joseph have two daughters who were born during their marriage. Joseph became addicted to drugs, and in July 2013, Ohio Child Protective Services removed all the children from the home. Next, Joseph sexually assaulted and physically abused the mother. She then moved out of the home and into a domestic violence shelter and later a hotel.

The mother divorced Joseph in March 2014. She was awarded custody of her daughters in June 2014. The boys, however, who now lived with father, began to exhibit signs of trauma. Ultimately, they expressed that they did not want to have visitation with the mother. Additionally, the boys claimed that they had been sexually abused by Joseph while he was married to their mother and

alleged that their mother abused them, too. The Ohio police department investigated the claims against the mother but chose not to file charges.

The matter has a lengthy history, but the most recent action involves two motions. The first motion, filed on June 1, 2016, is the mother's motion to hold the father in contempt for violating the court-ordered timesharing arrangement. The second motion was filed by the father on July 27, 2016, to suspend, or in the alternative, modify the mother's visitation because of the alleged sexual abuse of the boys. The family court held a hearing on the motions, which commenced on August 1, 2016, and concluded on August 24, 2016. At the August 1, 2016, hearing, both parents testified as well as Sharon Cecil, a social worker for the Commonwealth, and Linda Coats, a friend of the mother. The mother denied that she sexually abused the boys and her friend said that the mother was doing well. Nonetheless, the social workers' testimony supported the allegations of sexual abuse by the mother.

At the August 24, 2016, hearing, Bethany Allen, a clinician for the Cabinet, and Kristin Jenkins, the Child Advocacy Center's forensic interviewer, both testified. During the hearing, father requested that the family court judge view the videos of the boys' testimony to the forensic interviewer at the Child Advocacy Center of the Bluegrass. The family court judge determined that the videos were hearsay not covered by any evidentiary exception.

After making this determination, the family court judge, at the request of E.H.'s guardian ad litem, called E.H. as a witness and conducted an *in camera*

interview of him. (Z.H. was being treated at an in-patient hospital and not available to testify.) While the family court conducted the *in camera* interview, the judge stepped outside the chambers on two occasions to see if any counsel had questions for E.H. After checking with counsel, the judge did ask additional questions.

The family court entered its order on September 2, 2016, wherein it granted mother's motion to hold father in contempt and father's motion to suspend mother's visitation. The family court explained that after hearing all the testimony, including the testimony of E.H., that despite mother's denial of sexual abuse between herself and the boys, E.H. was a credible witness, and his testimony regarding the abuse was persuasive. Besides suspending visitation between the mother and the children and requiring that the children remain indefinitely in counseling, the family court denied all contact between the mother and the children until qualified mental health professionals determined it would be appropriate.

The mother now appeals the order permanently suspending visitation. On appeal, the mother maintains that the family court's *in camera* interview violated her due process by exceeding the scope permitted in such interviews, eliciting testimony to be used against her, and failing to allow the child to be cross-examined.

Statutory guidance is provided in Kentucky Revised Statutes (KRS) 403.290(1) for *in camera* interviews of a child. It states that:

The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

We begin by noting that whether to interview a child in chambers is left to the sound discretion of the trial court. *Addison v. Addison*, 463 S.W.3d 755, 763 (Ky. 2015). In the case at hand, the family court ostensibly interviewed E.H. to determine his desires as to whether to have visitation with his mother. It is unclear the reason that an *in camera* interview was requested by the guardian ad litem and no explanation was provided at the hearing. Nonetheless, no specific objection was made by the mother opposing the *in camera* process.

Keeping in mind the other requisites for the statute, we note that counsel and parties viewed the *in camera* interview via a video monitor. A video record was made and is part of the court record. Finally, after the interview, the family court judge went out into the courtroom and asked the attorneys if they had any questions for E.H. Apparently, they did since the judge asked additional questions when he returned to chambers. To this extent the requisites of the statute were met.

The mother argues that the family court used the *in camera* interview to elicit testimony and evidence. We agree. KRS 403.290(1) permits a trial court to interview a child as to their wishes, but it does not reference allowing a child to testify. Even though, the judge did ask E.H. whether he desired visitation with his

mother during the interview, a question directly corresponding to the purpose of the statute, he also asked fact-finding questions, referenced testimony, and found E. H.'s testimony persuasive. This action exceeds the scope of the statute.

But sufficient evidence was provided without E.H.'s testimony. And in matters where sufficient evidence is presented otherwise, such an error is harmless. *See Sparkman v. Commonwealth*, 250 S.W.3d 667 (Ky. 2008).

Additionally, Kentucky Rules of Evidence (KRE) 611 puts control over the interrogation of witnesses and the presentation of evidence under the control of the court. And KRE 614 allows a trial court to interrogate witnesses. Hence, the family court may have exceeded its scope in eliciting testimony but certainly had authority to call witnesses and question them.

In sum, although the family court did go beyond the scope of KRS 403.290(1) and elicit testimony from E.H., this error was harmless. During the hearing, other evidence was presented that supported the family court's decision suspending parenting time. The additional evidence and testimony corroborated the children's fear and trauma related to spending time with their mother. Cabinet social workers, clinicians, and the forensic interviewer provided information for the family court's decision. Further, the father discussed the boys' troubling behavior at home. Indeed, Z.H. is receiving in-patient treatment and E.H. is in counseling.

And regarding mother's contention that she was denied the ability to properly cross-examine E. H., first, as recognized in her brief, the Kentucky

Supreme Court has recognized that the confrontation clause does not apply in civil cases. *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 344-45 (Ky. 2006). Second, again as noted in the mother's brief and by the record, the family court judge on two separate occasions left his chambers and went to the courtroom, where the attorneys were viewing the interview on a video monitor, to ask if any attorneys had questions for E.H. The judge returned and asked E.H. questions that had been submitted to him. Therefore, mother's right to cross-examine was not impeded.

Therefore, even though the family court went beyond the scope of KRS 403.290(1) in interviewing E.H., this error was not fatal to its decision. And the family court provided an opportunity for the attorneys to ask E.H. questions. Finally, and most significantly, the family court's decision to suspend visitation is supported by E.H.'s statements about parenting time during the interview, which was primarily conducted to ascertain E.H.'s wishes. And further, compelling evidence exists supporting the family court's decision. Hence, any error by the family court was harmless, and it did not abuse its discretion.

CONCLUSION

To conclude, after reviewing the record, we hold that the family court did not abuse its discretion in suspending the mother's visitation with her sons. The order of the Jessamine Family Court is affirmed.

KRAMER, CHIEF JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND WRITES A SEPARATE

OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. The findings of fact in this case, or more appropriately the lack thereof, are totally insufficient for this Court to adequately review and determine whether it was in the childrens' best interest to modify timesharing. The family court failed to comply with Kentucky Rule of Civil Procedure (CR) 52.01 and the Supreme Court mandate in *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). I would remand for additional proceedings and require the family court to make specific findings of fact and conclusions of law, and state them separately for appropriate review on appeal. *Id.*

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Ryan Robey
Lexington, Kentucky