

RENDERED: FEBRUARY 3, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-001238-ME

D.C.O.¹

APPELLANT

v.

APPEAL FROM LESLIE FAMILY COURT
HONORABLE GENE CLARK, JUDGE
ACTION NO. 04-CI-00095

J.A.O.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: D.C.O. appeals from an order of the Leslie Circuit Court which restricted J.A.O.'s visitation with his children, but allowed him limited and supervised visitation.

D.C.O. contends that the trial court erred by excluding a videotaped interview with the younger child, and by denying her

¹ In the interest of the parties' privacy, and in accordance with this Court's policy, the parents and children shall be referred to only by their initials.

motion to terminate J.A.O.'s visitation entirely. After reviewing the record, we find no reversible error or manifest abuse of discretion. Hence, we affirm.

D.C.O. and J.A.O. were married in 1996 and separated in April 2004. Two children were born of the marriage, A.B.O. (born December 1, 1997) and S.J.O. (born April 14, 2001). Following filing of the petition for dissolution of marriage, the trial court granted the parties joint custody of the children, with J.A.O. designated as the residential custodian. During the pendency of the dissolution proceedings, D.C.O. alleged that J.A.O. had physically and sexually abused the children. After conducting a hearing, the trial court found insufficient evidence to warrant removal of the children from J.A.O.'s home, but nonetheless concluded that it was in the best interest of the children to designate D.C.O. as their custodian. In its decree of dissolution entered on November 1, 2004, the trial court awarded sole custody of the children to D.C.O., and granted parenting-time to J.A.O. according to the schedule adopted in the circuit.

On March 23, 2005, D.C.O. filed a motion to terminate J.A.O.'s visitation with the children. D.C.O. made new allegations that the children had been physically and sexually abused by J.A.O. and by J.A.O.'s mother and sister. After filing of that motion, the trial court entered an order allowing

J.A.O. limited and supervised visitation pending further proceedings. A hearing was held on April 18, 2005, at which D.C.O. presented testimony from case workers with the Cabinet for Health and Family Services and the Kentucky River Community Care Program. Officers with the Kentucky State Police also testified concerning their investigation of the allegations. J.A.O., his mother and his sister each testified, denying that they had abused the children in any way.

During the hearing, D.C.O. sought to introduce videotapes of forensic interviews with the children which were conducted by the case workers during the investigation. After reviewing the first five minutes of the interview with the younger child, S.J.O. (who was then four-years old), the trial court determined that the child was unable to adequately recount and recall events and therefore was not qualified to testify. However, the trial court found that the older child was competent to testify and allowed her videotaped interview to be introduced.

On May 19, 2005, the trial court entered its findings of fact, conclusions of law and an order restricting J.A.O.'s visitation. The trial court found that the allegations of physical and sexual abuse involving both children were consistent and credible. The court further found that the conduct by J.A.O. and his family had seriously endangered the

children. Consequently, the court ordered that J.A.O.'s visitation with the children be restricted to one two-hour visit weekly, conducted under the direct supervision of the Cabinet for Health and Family Services.

D.C.O. now appeals, arguing that the trial court erred by excluding the videotaped interview of S.J.O., and by allowing J.A.O. restricted visitation rather than terminating his visitation with the children entirely. J.A.O. has not filed a responsive brief in this appeal.

Turning to the first issue, D.C.O. specifically contends that the trial court should have reviewed the entire videotape interview of S.J.O. prior to making a decision on her competency to testify.

KRE 601(b) sets out the qualifications of competency as a witness as follows:

Minimal qualifications. 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.

Pursuant to KRE 601, a witness is competent to testify if she is able to perceive accurately that about which she is to testify, can recall the facts, can express herself intelligibly, and can understand the need to tell the truth. The competency bar is low with a child's competency depending on her level of development and upon the subject matter at hand.² It is within the sound discretion of the trial court to determine whether a witness is competent to testify.³ The trial judge is in the unique position to observe witnesses and to determine their competency.⁴

Generally, the qualification of child witnesses is done in a testimonial context. In this case, however, the children's videotaped interviews were not made under oath nor were the children subject to cross-examination. Nonetheless, no objection was made to the introduction of the tapes on this ground.⁵ Furthermore, the trial court and the parties apparently consented to introduction of videotapes in lieu of their live

² Pendleton v. Commonwealth, 83 S.W.3d 522, 525 (Ky. 2002); Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky. 1998).

³ Bart v. Commonwealth, 951 S.W.2d 576, 579 (Ky. 1997).

⁴ Id. See also Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978).

⁵ J.A.O. objected to introduction of the videotapes based on authentication and hearsay grounds. The trial court overruled these objections and J.A.O. did not appeal from these rulings.

testimony. Therefore, the witness-qualification rules were applicable in this case.

Given the procedural posture of this case, we agree with D.C.O. that it would have been better practice for the trial court to have reviewed the entirety of S.J.O.'s videotaped interview prior to making a ruling on the child's competency to testify. However, we find that D.C.O. suffered no prejudice as a result of the trial court's failure to do so. The trial court specifically found that the allegations of abuse involving both children were substantiated based upon all of the evidence presented at the hearing.

Moreover, this issue goes to the central matter raised in D.C.O.'s appeal: her contention that the trial court should have terminated J.A.O.'s visitation entirely based upon the abuse allegations and the children's expressed fear of their father. Clearly, the evidence and the trial court's findings would have supported such a decision. Nevertheless, matters involving visitation rights are held to be peculiarly within the discretion of the trial court, and a trial court's determinations as to visitation will only be reversed if they constitute a manifest abuse of discretion or were clearly erroneous in light of the facts and circumstances of the case.⁶

⁶ Drury v. Drury, 32 S.W.3d 521, 525 (Ky.App. 2000).

The allegations of abuse presented in this case are serious and disturbing and the trial court found them to be credible. To protect the children, the trial court properly restricted J.A.O.'s visitation. However, given the history of this case and the ambiguous nature of some of the allegations, the court allowed J.A.O. very limited and supervised visitation with the children. The trial court also has continuing jurisdiction to modify visitation as the facts and circumstances warrant, and we have confidence in the trial court's ability to do so.⁷ Consequently, we find that the trial court did not abuse its discretion by allowing J.A.O. limited and supervised visitation with the children.

Accordingly, the May 19, 2005, order of the Leslie Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

No brief for appellee.

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⁷ Indeed, after considering additional evidence, the trial court entered an order holding all visitation in abeyance pending the outcome of this appeal.