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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002210-ME

LYDIA ADDISON — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 06-CI-01275

KEVIN ADDISON — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

CAPERTON, JUDGE: Lydia Addison appeals the trial court's modification of custody awarding Kevin Addison sole custody of the parties' two minor children and restricting Lydia to telephonic and supervised visitation. After a thorough examination of the parties' arguments, the record, and the applicable law, we conclude that the trial court improperly placed a time restriction on the hearing

without considering the admissibility or exclusion of the evidence pursuant to the Kentucky Rules of Evidence (KRE), and thereby denied Lydia the opportunity to offer testimony. Accordingly, we reverse and remand this matter for further proceedings.

The parties were married in 1999 and their dissolution of marriage proceedings commenced in June 2006. The decree of dissolution of marriage was entered on March 2, 2007. The parties have two children together, S.A. and M.A. Consistent with the terms of the settlement agreement Lydia was awarded sole custody of the children with Kevin receiving reasonable parenting time. Prior to the entry of the dissolution of marriage decree, Lydia moved to Valparaiso, Indiana, which Kevin alleges was to be with a man she met online. Lydia moved in with the new boyfriend.[1]

Kevin, who is employed by the Army Corp of Engineers, was deployed to Iraq for a period of six months following the parties' separation. Upon his return, Kevin alleges that he immediately began having problems enforcing his visitation with the children. Less than a month after his return, Kevin filed a motion with the court to compel visitation. Lydia counter-filed a petition to domesticate the foreign order in the state of Indiana and sought modification of Kevin's visitation.

The Hardin Circuit Court, Family Division, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), held a telephone

[1] The court noted that the first allegation of sexual abuse in the children's pediatrician file occurred approximately one year after the two moved in together.

conference with the Hon. James Johnson, the presiding judge over the case in Indiana. The judges concluded that Kentucky was the proper jurisdiction to hear the post-decree issues of the parties.

Thereafter, the Hardin Court heard motions of the parties on various post-decree matters, including matters involving Kevin's visitation over the next few years. Kevin had to file multiple motions to secure his court-ordered visitation. In 2009 Kevin moved the court for modification of custody seeking to be named a joint custodian as he was having difficulty accessing information about the children's medical and education records. Lydia filed a response objecting to modification and stated that she was fully cooperating with Kevin's visitation. The court issued a show cause order for Lydia to explain why she failed to abide by Kevin's parenting time, which was later rescinded and then renewed after her failure to permit Kevin visitation. On March 19, 2010,[2] Lydia brought to the court's attention her concern about sexual abuse of the children. Kevin's motion to modify parenting time was overruled in light of the alleged sexual abuse.

Kevin then learned that in 2009, after he filed his motion with the court to modify custody, the children began to receive counseling at Family Focus and were assigned to a person named Danielle Vance. Vance was unlicensed and was related to Lydia's close personal friend.

The sexual abuse allegations were unsubstantiated following an investigation by the Cabinet for Health and Family Services. Kevin moved to

[2] Lydia had informed Kevin's counsel of her allegations prior to this but the first the court learned of it was in March 2010.

reinstate his parenting time. The court overruled this motion based on a letter purportedly tendered by Vance, though the letter was not on official letterhead and was unsigned. The court granted Kevin's motion to reinstate parenting time on July 19, 2010.

After more motions by the parties, the court held a hearing on Kevin's motion to receive unsupervised parenting time. Kevin subsequently filed a motion to have an independent therapist evaluate the children, which the court granted. The agreed-upon therapist would not see the children as they were still being seen by Vance. Thereafter, Kevin filed a motion for the parties and children to be evaluated by Dr. Kelli Marvin, a forensic psychologist that the Hardin Circuit Court utilizes frequently as an expert in child dependency, neglect, and abuse cases, to give objective recommendations to the court regarding Kevin's parenting time and access to the children. The court sustained this motion and ordered Kevin to pay the costs of the evaluation on February 2, 2011. In July 2011, Kevin filed a motion to make up parenting time, as Lydia had failed to cooperate, and a motion to compel Lydia to cooperate with Dr. Marvin. An agreed order was entered by the court on July 27, 2011. Lydia then filed a motion to clarify Dr. Marvin's role and for an additional thirty days to submit information to Dr. Marvin. The court permitted the additional time. A hearing date was set for January 2012 to address Kevin's parenting time.[3]

[3] The final hearing ultimately addressed Kevin's motion to modify custody and was held much later on, in August 2012.

Dr. Marvin's report was submitted to the court on January 8, 2012, and consisted of over seventy-five pages. Dr. Marvin recommended that Kevin get liberal and unsupervised access to the children.[4] She concluded that regardless of whether Lydia encouraged or supported the generation of allegations of sexual abuse, she played an active role in denigrating Kevin in the children's eyes and that this behavior was consistent with parental alienation. Dr. Marvin noted that in such cases a transfer of primary custody and care is typically recommended as this is viewed as the only means by which to ensure cessation of denigrating behaviors and afford the target parent the time necessary to repair the parent-child relationships. In extreme cases, supervised contact with the denigrating parent is advised. In light of this, Kevin moved for Dr. Marvin to file an addendum to her report regarding custodial recommendations. The court granted Kevin unsupervised visitation based on this report. Kevin moved to modify custody on January 23, 2012.

Dr. Marvin completed the addendum on February 2, 2012. Therein, she recommended that Kevin be awarded primary residential care and custody of the children. Dr. Marvin concluded that this was in M.A.'s best interest, that the

[4] While Dr. Marvin acknowledged that the possibility that he sexually abused the subject children cannot be conclusively ruled out, the factors detailed certainly cast more than serious doubt. S.A. reported that Daddy had "touched her bottom" while swimming. Dr. Marvin determined that this was normal play between father and child, given that the two were swimming and fully clothed. Lydia reported that M.A. told her that it hurt to pee and that she had been urinating a lot. Lydia said that M.A. had said that Daddy had hurt her. Lydia brought in S.A. for counseling at Duneland to deal with adjustment issues connected with the move from Kentucky and her new boyfriend, Corey. In 2007, S.A. pulled down her pants in a therapy session to show the therapists her tights. The therapists at Duneland, despite the child's age and the reason given by the child for this behavior, referred this to Child Protective Services (CPS). CPS declined to investigate for lack of evidence.

children should remain together, and that the best interests of S.A. were unknowable.[5] Dr. Marvin further concluded that the parties were unable to work cooperatively. Dr. Marvin recommended that Lydia receive visitation, but that supervised visitation should only be undertaken if Lydia is not amenable to therapeutic interventions and there are clear/objective indications that she is attempting to undermine the stability of the subject children's residential/custodial transfer.

Lydia then filed a motion to transfer jurisdiction to Indiana for the first time since 2007, on February 2, 2012. The motion was overruled and a hearing was scheduled for March 30, 2012, regarding modification of custody. Leading up to the hearing both parties filed multiple motions. Lydia filed a motion for an appointment of a guardian *ad litem* (GAL) for the children, which was granted. Lydia filed a motion with the court to have a custodial evaluation performed by Dr. Zamanian. The court overruled this motion.

The court held a six-hour hearing on this matter on August 16, 2012. During the six-hour hearing, the court heard testimony from the GAL, Lydia, Kevin, and Drs. Marvin, Pi, Trifone, and Zamanian. The children were not permitted to testify. Thereafter, the court entered its findings of fact, conclusions of law, and judgment on October 26, 2012, and transferred custody to Kevin. Lydia received supervised telephonic visitation. Lydia filed motions to have

[5] Dr. Marvin outlined the potential problems S.A. might have in this arrangement but concluded that her best interests were unknowable. She nevertheless felt that S.A. should benefit from high quality individual and family-based mental health therapy.

unsupervised visitation; to supplement the record; and to alter, amend, or vacate the judgment as well as a motion for additional findings of fact. The court entered an order overruling Lydia's motion for unsupervised visitation. Lydia then appealed.

This Court ordered the trial court to rule upon Lydia's motions to alter, amend, or vacate and for additional findings of fact. The trial court subsequently filed a twenty-eight-page order addressing this Court's ruling on June 21, 2013, which we will discuss as applicable *infra.*

On appeal, Lydia presents a litany of arguments, namely: (1) the trial court erred in retaining jurisdiction over this case where the children had no substantial contact with Kentucky in nearly five years; (2) modification of custody was not in S.A.'s best interest and, thus, this should be reversed; (3) restricting a parent to supervised visitation of one hour per month is reversible error, absent a finding that unsupervised visitation would seriously endanger the child's physical, mental, moral, and emotional health; (4) the court failed to make findings of fact or conclusions of law regarding the parties' financial resources or otherwise address the issue of attorney's fees; (5) the court erred in unnecessarily restricting the time to present evidence and unnecessarily restricting the witnesses who were allowed to testify at trial; (6) the court erred in not allowing Lydia to supplement the record with relevant and probative information; (7) the court erred in relying upon the report of the GAL and her recommendations; (8) the court erred in failing to make

more definite findings of fact; and (9) the court erred in failing to order Kevin to participate in a mental health evaluation with Dr. Zamanian.

Kevin argues: (1) the trial court properly retained jurisdiction over this case under its exclusive, continuing jurisdiction over these child custody proceedings; (2) modification of custody and parenting time was in the best interests of both children; (3) the record supports a finding that unsupervised parenting time would seriously endanger the children's physical, mental, moral, and emotional health; (4) the court properly ruled that each party is responsible for his and her own attorney's fees; (5) the court did not unnecessarily restrict the time to present evidence at trial and there is no order that was issued that restricted the witnesses permitted to testify at trial; (6) the court did not err in denying Lydia the ability to supplement the record with additional evidence after the hearing on the merits; (7) the court did not err when it considered the report of the GAL and her recommendations; (8) the court did not err in failing to make more definite findings of fact as the court filed an amended and supplemental findings of fact, conclusions of law, decree, and order per this Court's direction; and (9) the court did not err in failing to order Kevin to participate in a mental health evaluation with Dr. Zamanian.

We conclude that the trial court improperly placed a time restriction on the hearing without considering the admissibility or exclusion of the evidence pursuant to our Kentucky Rules of Evidence, thereby denying Lydia the opportunity to offer testimony. We decline to address the parties' arguments

concerning custody, visitation, and attorney's fees because of our decision to remand on the issue of the arbitrarily imposed time restriction. In analyzing the remaining arguments we turn to the first issue presented by the parties - that of jurisdiction of the court below.

Lydia argues that the trial court erred in retaining jurisdiction over this case where the children had no substantial contact with Kentucky in nearly five years. Kevin argues that the trial court properly retained jurisdiction over this case under its exclusive, continuing jurisdiction over these child custody proceedings. In support thereof Kevin asserts: (1) both parties and the children had a "significant connection" to Kentucky at the time Lydia filed her motion to transfer; (2) substantial evidence is available in this Commonwealth concerning the children's care, protection, training, and personal relationships; and (3) Kentucky is not an inconvenient forum.

Recently, this Court addressed the continuing jurisdiction of a court in custody disputes:

> UCCJEA directs that an initial custody determination should be made by a court in the child's home state—defined as the state in which the child has resided for six months. KRS [Kentucky Revised Statutes] 403.800(7). In this case, neither party disputes that the Henderson Circuit Court properly made the initial custody determination under KRS 403.822. Therefore, the issue before us is whether it properly declined to exercise continuing jurisdiction in modification matters. Whether a trial court acts within its jurisdiction is a question of law; therefore, our review is de novo. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

The trial court relied on KRS 403.824(1), which provides that the state making an initial custody determination retains jurisdiction unless:

> (a) A court of this state determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships[.]

"Significant connection" is explained by the following comment to UCCJEA § 202:

> [E]ven if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction ... If the relationship between the child and the person remaining in the State ... becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

As Kentucky law is sparse in construing our counterpart of the UCCJEA, we have looked to sister states for guidance. Michigan has also adopted the UCCJEA, and its Court of Appeals recently found that a significant connection exists if "one parent resides in the state and exercises at least some parenting time in the state." *White v. Harrison–White,* 280 Mich.App. 383, 760 N.W.2d 691, 697 (2008). The Court of Appeals of Tennessee has explained that under the principles of the PKPA and the UCCJEA, "continuing jurisdiction trump[s] 'home state' jurisdiction." *Staats v. McKinnon*, 206 S.W.3d 532, 546 (Tenn.Ct.App. 2006) (quoted by *Wallace v. Wallace,* 224 S.W.3d 587, 589–90 (Ky. App. 2007)).

Our Supreme Court has recently held that a new state may not exercise jurisdiction for purposes of custody unless a Kentucky court first determines that the

> new state would be a more convenient forum according to the factors listed in KRS 403.834. *Mauldin v. Bearden,* 293 S.W.3d 392, 401 (Ky. 2009).

Biggs v. Biggs, 301 S.W.3d 32, 33-34 (Ky. App. 2009).

Sub judice, we must reject Lydia's argument that the trial court erred in asserting its jurisdiction to hear the custody dispute between the parties given that the children had resided in Indiana for five years. There is no dispute that the initial custody determination was properly made in Kentucky. Less than a month after the parties' dissolution of marriage decree with agreed custody and visitation terms was entered in Kentucky, Lydia filed her petition in Indiana to modify custody. The court contacted the Indiana court and had a telephonic hearing on the matter on May 22, 2007, at which time it was determined that Kentucky would retain jurisdiction. We believe that such a determination was not in error. Kevin remained in Kentucky and had visitation with his children in this Commonwealth. Part of the children's family remained in Kentucky. As noted in *Biggs, supra*, continuing jurisdiction trumps home state jurisdiction.

Approximately five years into the proceedings, Lydia sought transfer of this matter to Indiana and argued that Kentucky was an inconvenient forum. Lydia asserts that more factors weighed in favor of transferring the case to Indiana than in keeping the matter in Kentucky and that there is no indication that an Indiana court would not have been able to decide the custody issue expeditiously. Lydia also asserts that the long distance between her home and the court in Kentucky meant she had to bear the cost of litigation and travel with the children,

all while she made substantially less money per year than Kevin. While Lydia argues that it is unclear from the record whether the trial court addressed the factors in KRS 403.834(2),[6] concerning whether Kentucky was an inconvenient forum, we believe that this issue should have been raised years ago after the initial jurisdictional determination by the Hardin Court, as opposed to Lydia waiting years to bring this matter before the court when it appeared that the court would

[6] The entirety of KRS 403.834 states:

> (1) A court of this state which has jurisdiction under KRS 403.800 to 403.880 to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.
> (2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
> (b) The length of time the child has resided outside this state;
> (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
> (d) The relative financial circumstances of the parties;
> (e) Any agreement of the parties as to which state should assume jurisdiction;
> (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
> (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
> (h) The familiarity of the court of each state with the facts and issues in the pending litigation.
>
> (3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.
> (4) A court of this state may decline to exercise its jurisdiction under KRS 403.800 to 403.880 if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

change the custody determination. Moreover, when Lydia brought this matter to the court's attention, the court concluded that it was retaining jurisdiction given the length of time the case had been pending before it. We believe that this demonstrates that the court considered the factors set forth in KRS 403.834 and found that factor, "The familiarity of the court of each state with the facts and issues in the pending litigation," to warrant exercising its jurisdiction instead of declining it. We cannot say that this was error given the lengthy and complex litigation involving the parties *sub judice*. Accordingly, we decline to reverse on this ground.

Next, Lydia argues the court erred in unnecessarily restricting the time to present evidence and unnecessarily restricting the witnesses who were allowed to testify at trial. At the hearing, the trial court restricted the parties to six hours, a decision which Lydia takes issue with as her witness list contained 53 names, and as she believes the court restricted her cross-examination of the witnesses. We review such matters for abuse of discretion. *See Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 577 (Ky. 2000) (abuse of discretion is the proper standard of review of a trial court's evidentiary rulings).

This Court has noted that a trial court has power to impose reasonable time limits on trials:

> A trial court clearly has the power to impose reasonable time limits on the trial of both civil and criminal cases in the exercise of its reasonable discretion. *See, United States v. Reaves*, 636 F.Supp. 1575 (E.D.Ky.1986). As long as these trial time limits are not arbitrary or

> unreasonable we will not disturb the court's decision on review.

Hicks v. Commonwealth, 805 S.W.2d 144, 151 (Ky. App. 1990).

Sub judice we believe that the trial court's time limit was an abuse of discretion given Lydia's lengthy witness list and what appears to be an arbitrarily imposed time limitation.[7] We note that there did not appear to be an individualized assessment by the court regarding the time required by the parties to present their evidence when this matter was raised below by Lydia. While a standardized limitation may work in some instances, clearly the court should consider the individual case before imposition of time restrictions, which necessarily must be balanced with the court's inherent power to control its docket and to resolve matters expeditiously. *See* 75 Am. Jur. 2d *Trial* § 21 (2013) (discussing the general, inherent power of the court to control its docket).

Moreover, prior to exclusion there was no consideration given by the trial court concerning whether the child's testimonial evidence sought to be introduced complied with our rules of evidence. A court in considering the admissibility or inadmissibility of testimony or other evidence is guided by our Kentucky Rules of Evidence. The decision to admit or reject the testimony or evidence is within the court's discretion, but that discretion is not absolute and the court must exercise its discretion as guided by our rules of evidence. We review a trial court's determination of an evidentiary issue for an abuse of discretion. *See*

[7] We decline to address Lydia's arguments concerning restriction of cross-examination because our reversal and remand renders this argument moot.

Love v. Commonwealth, 55 S.W.3d 816, 822 (Ky. 2001) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Of utmost importance, KRE 402 provides that, with some exceptions, all relevant evidence is admissible. That all evidence must be relevant in order to be admissible is perhaps the most fundamental rule of evidence. *See* KRE 402; *see also* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.00 (4th ed. 2003) ("The first critical determination to be made concerning the admissibility of any item of evidence is its relevance; no other principle or concept is of any significance in the absence of a positive determination on this issue.") KRE 401 defines relevant evidence as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Such exceptions to the general admissibility of relevant evidence are likewise found in our rules of evidence. Relevant evidence may, nevertheless, be inadmissible "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. In determining the admissibility of evidence, the court will necessarily have to look to our rules of evidence in determining admissibility.[8]

[8] A partial but not exclusive list: KRE 104(A)(B), 105, 403, 501, 601, 602, 701, 702, 802, 901, 1002.

Understanding the arduous task presented to our courts and the brevity of time in which they must adjudicate cases and dispense justice, they may want to employ docket control measures to manage the caseload.[9] However, any time limitation arbitrarily imposed is not consistent with the expectations of the parties to have a fair and impartial hearing based upon all admissible evidence, nor is it in the interest of justice. Necessarily, on remand, the court will have the opportunity to address any evidentiary arguments and must necessarily do so prior to excluding any relevant evidence.

Lydia also argues that the court erred in not permitting the children to testify. We agree.

This Court addressed similar arguments to that *sub judice* in *Coleman v. Coleman*, 323 S.W.3d 770 (Ky. App. 2010), wherein 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

[9] This may include just measures of proffer of testimony considered by the court in chambers for relevance and possible exclusion pursuant to KRE 403 in advance of the hearing on admissibility. *See also* Kentucky Rules of Civil Procedure (CR) 43.04. In addition, the court has inherent control over its docket through CR 16. *See Commonwealth ex rel. Marcum v. Smith,* 375 S.W.2d 386, 387 (Ky. 1964). Moreover, it is the trial court that controls the docket and the admission of evidence, not the litigants. *Commonwealth v. Gonzales*, 237 S .W.3d 575, 579 (Ky. App. 2007). A trial court has the inherent power "to control the disposition of the causes on its docket with economy of time and of effort for itself, for counsel, and for litigants." *Rehm v. Clayton*, 132 S.W.3d 864, 869 (Ky. 2004) (quoting *Landis v. North American Co*., 299 U.S. 248, 254, 57 S.Ct. 163, 166, 81 L.Ed.2d 153 (1936)). *See also* 75 Am. Jur. 2d *Trial* § 21(discussing the inherent power of a court to control its docket).

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 in *Coleman* 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. *Leahman* further 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.

Coleman at 772 (citing *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 witness 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:

> (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, we conclude 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 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. Thus, without any preliminary determination of incompetency below,[10] the court erred by refusing to take the testimony of the children, either on the stand or by as permitted by KRS 403.290, and in doing so denied Lydia the opportunity for a full and fair hearing of her case; consequently, reversal is appropriate on this ground.[11]

Next, Lydia argues the court erred in not allowing her to supplement the record with relevant and probative information, specifically, the affidavits Lydia proffered the court at the hearing. We disagree.

CR 43.04(1) states:

> In all trials concerning alimony or divorce; the enforcement of a lien or the satisfaction of a judgment; judicial sale; surcharge or accounting; settlement of estates; the division of land; or the allotment of dower,

[10] We recognize that the court heard impassioned arguments from the parties and the appointed GAL below on this matter. Ultimately, the court never reached a decision on the competency of the children when it excluded their testimony. While it was proper for the Court to appoint a GAL per FCRPP 6, we have yet to come across any jurisprudence that would permit the GAL to testify in lieu of the children, which we believe to be substantially different than representing and advocating for the best interests of the children.

[11] Additionally, we note that 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.*

> the testimony shall be taken by deposition, unless the court by order or by local rule directs the testimony to be heard under oath and orally in open court. In all other trials the testimony of witnesses shall be heard under oath and orally in open court, unless otherwise provided by these rules or by statute, except that the court may upon motion or upon its own initiative, and with due regard to the importance of presenting the testimony of witnesses orally in open court, order the testimony to be taken by deposition upon any issue which is to be tried by the court without a jury.

Sub judice, Lydia did not present depositions to the court as supplemental evidence but instead proffered affidavits. It is well-established that an affidavit may not be used as substantive evidence at a trial. *Commonwealth v. Clark*, 311 Ky. 710, 225 S.W.2d 118 (Ky. 1949); *Markendorf v. Friedman,* 280 Ky. 484, 133 S.W.2d 516 (Ky. 1939); *Cloud v. Middleton*, 241 Ky. 595, 44 S.W.2d 559 (Ky. 1931); *Tunks v. Vincent*, 241 Ky. 379, 44 S.W.2d 282 (Ky. 1931). An affidavit is generally inadmissible during trial "because it is not subject to cross examination and would improperly shift the burden of proof to the adverse party." 3 Am.Jur.2d *Affidavit* § 19 (2002). Thus, the trial court properly denied Lydia's request to supplement the record with affidavits and we decline to reverse on this ground.[12]

Lydia asserts that the court erred in relying upon the report of the GAL and her recommendations. Specifically, Lydia contends that the report of the

[12] We note that no argument is made concerning CR 43.12, which permits use of affidavits with motions: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Moreover, we believe that any deficiencies perceived by Lydia of the record may be corrected upon remand.

GAL contained unsupported speculation that was not based upon the existing record regarding the children's schooling, and the statements of the children therein are completely contrary to the expected testimony of the children.

Sub judice, the trial court appointed the GAL based upon *Lydia's* motion. It is disingenuous for her to now argue on appeal that utilizing the GAL was in error. However, we believe this to be a non-issue given our remand, and it does not appear that the trial court based its voluminous findings on what she asserts is unsupported speculation regarding the children's education.[13] Therefore, we decline to reverse on this basis and on remand the trial court will have the opportunity to review the issues before it and issue new rulings.

Lydia next argues the court erred in failing to make more definite findings of fact. We believe this to be a moot argument given our prior order to the court to rule on her pending motion and the subsequent very detailed supplemental findings of fact filed by the court on June 21, 2013.

Last, Lydia argues that the court erred in failing to order Kevin to participate in a mental health evaluation with Dr. Zamanian. Lydia requested that Kevin participate in a custodial evaluation following Dr. Marvin's report and cited to CR 35.01 in the motion but never asserted that Kevin's mental health was in controversy. Lydia argues that it is axiomatic that each party's mental health state is always at issue in a contested custody matter per KRS 403.270(2)(e), which directs the court to consider, "The mental and physical health of all individuals

[13] We direct the parties' attention to our discussion of the usage of the GAL in footnote 10 of this opinion.

involved." Lydia argues that she was disadvantaged as the court denied her request and, thus, her expert did not have the benefit of interviewing Kevin.

By its own terms, an order pursuant to CR 35.01 requires, "The order may be made only on motion for good cause shown…." In *Taylor v. Morris*, 62 S.W.3d 377 (Ky. 2001), the Kentucky Supreme Court addressed CR 35.01:

> [T]he "in controversy" and "good cause" requirements of Rule 35 are not met by "mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Id.* at 118, 85 S.Ct. 234. The Court went on to note the following:
>
> > Of course, there are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury, cf. *Sibbach v. Wilson & Co.* (citation omitted) places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.

Taylor at 379.

Sub judice we believe that Lydia's motion requesting that Kevin undergo another custodial evaluation with citation to CR 35.01 to be insufficient to establish good cause and that Kevin's mental health was in controversy. The motion does not specifically state how Kevin's mental health was in issue besides stating that this was a custody case or what good cause existed for successive examination deemed to be a custodial evaluation. Therefore, we find no error.

In light of the aforementioned, we reverse and remand this matter for a new hearing.

LAMBERT, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION:

MOORE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the portions of the majority decision wherein it affirms the family court. However, I would affirm on all grounds and respectfully dissent from the majority's decision to reverse and remand this case because the family court put time limitations on the parties and in not permitting the children to testify.

Regarding the time limitations, it is widely known that the family courts in this Commonwealth have heavy dockets. And, it is widely known that custody disputes are often highly contentious; unfortunately, all too often the parents want to win at all costs, even where it may be detrimental to the children. Nonetheless, even in custody disputes, family courts have the authority to run their dockets without interference so long as they comport with due process and the parties have been given a meaningful opportunity to be heard. "A trial court clearly has the power to impose reasonable time limits on the trial of both civil and criminal cases in the exercise of its reasonable discretion. As long as these trial time limits are not arbitrary or unreasonable we will not disturb the court's decision on review." *Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky. App. 1990) (citing *United*

States v. Reaves, 636 F.Supp. 1575 (E.D. Ky. 1986)). In the *Reaves* case, the Court well examined the realities of a trial court managing a heavy docket and the necessities of placing time limitations on parties, so long as the limitations are reasonable and not arbitrary.

Lydia attacks the family court's time limitation of six hours, asking for yet another hearing in this highly contested case. In part, Lydia argues that it must be an abuse of discretion because the family court stated it always gives six hours for custody hearings and because the family court did not make an individual assessment of the case. We may not have a record of what factors the family court took into consideration into this decision, but I certainly hope that by virtue of the majority's decision the Court is not adding to an already heavy workload of family court judges by asking them to include the rationale on the record for the time limitations they put in place. An appellate court should not micromanage a trial court nor attempt to control an exercise of discretion in managing a trial court docket absent a showing of an abuse of discretion. *See, e.g., Transit Authority of River City v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992):

> A judge should and does have the right and duty, within reasonable limits, to bring out the facts in the case before him clearly, so that important functions of his office may be fairly and justly performed. … He is vested with a large discretion in the conduct of the trial of causes and an appellate court will not interpose to control the exercise of such discretion by a court of original
>
> jurisdiction, unless there has been an abuse or a most unwise exercise thereof.

(Internal citations omitted). Having reviewed this matter in detail, six hours was a sufficient amount of time for a meaningful opportunity to be heard. Moreover, it was not realistic for Lydia to have 53 witnesses on her list that she wanted to call. I do not believe the family court abused its discretion in limiting the hearing in this case to six hours.

Assuming for the sake of argument that the family court abused its discretion, Lydia has not even argued that she was prejudiced by the time limitation - other than the fact that she did not get the outcome she desired from the court. She has not cited to any evidence or witnesses that she did not get to present that would have changed the outcome in this case.

In my view, the family court was quite patient and deliberate in adjudicating this arduous case. It is difficult to imagine that Lydia can produce any evidence - with additional time - to rebut the comprehensive evaluation and report by Dr. Marvin. Moreover, these children have already been unfortunately subjected to several needless mental health and physical evaluations.

Dr. Marvin's report details what these children have been exposed to and sets forth the extent of Lydia's manipulations and interference with Kevin's relationship with the children, particularly the older child, S.A. These facts are certainly disturbing, as the family court noted in its findings:

> The cumulative evidence shows that the Respondent [Lydia] intentionally facilitated negative impressions of the parties' children against the Petitioner [Kevin] and either intentionally facilitated this impression with the

> children's counselors or acted in almost complete disregard of the truth, thus exposing the children to months of interviews, investigations and counseling for sexual abuse and/or physical abuse.
>
> [] It is the best interests of the children that the Petitioner [Kevin] be awarded sole custody and primary physical possession of the children since clearly the evidence indicates that the Respondent [Lydia] is not capable of acting jointly with the Petitioner [Kevin] in any meaningful decision making process. The Court has considered all of the statutory factors and concludes that joint custody for the above stated reasons would not be in the children [sic] best interest and therefore will award sole custody to the Petitioner [Kevin].
>
> []It is in the best interests of the children that the Respondent [Lydia] receive supervised parenting time to ensure the Petitioner [Kevin] has the opportunity to re-build his relationships with his daughters without the influence and manipulation of the Respondent.

The family court entered detailed findings of fact and conclusions of law. Later upon motion, the court entered 27 pages of amended and supplemental findings and conclusions. The family court managed this case and the parties well. Lydia had sufficient time to make her case and to have a meaningful opportunity to be heard. There was no abuse of discretion by the family court in the time limitations put in place.

Regarding the family court's decision to not permit the children to testify or be questioned by the court in chambers, I would likewise affirm. As noted *supra*, these children have been interviewed and evaluated numerous times. And, at Lydia's request, a GAL was appointed. This added to the numerous interviews/evaluations the children have been put through, which in my view

supports the family court's decision not to make the children testify or speak to the court in chambers.

These children deserve finality and to no longer be subjected to further court proceedings—absent something compelling that has occurred since this appeal was filed. Respectfully, I firmly dissent. I would affirm the family court; it did an exceptional job in managing and deciding this case.

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