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Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000104-MR

GREG HOPPE

APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE LOVELACE, JUDGE
ACTION NO. 97-CI-00124

MELISSA TALLENT (F/K/A MELISSA
HOPPE)

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON AND NICKELL, JUDGES; GRAVES,¹ SENIOR JUDGE.

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

NICKELL, JUDGE: Greg Hoppe (“Hoppe”) appeals the December 11, 2006, order of the Clinton Circuit Court denying his motion for immediate reinstatement of visitation with his minor daughter. For reasons that follow, we affirm.

Hoppe and Melissa Tallent (“Tallent”) were wed in 1992 in Tennessee. It was the first marriage for Hoppe and the second for Tallent. A daughter, (“K.H.”),² was born to them on February 12, 1995. The couple separated in 1996 and on September 4, 1997, Tallent filed to dissolve the marriage in her native Clinton County, Kentucky. Hoppe lives and works in Tennessee.

While Hoppe and Tallent were separated, Hoppe began visitation with K.H. who was two years old at the time. Hoppe testified it was difficult to be alone with K.H. because Tallent was always present. He also described the divorce as difficult and stated he believed Tallent portrayed him to K.H. as the “bad guy.”

During settlement negotiations in 1997, Tallent alleged Hoppe sexually abused K.H. The record does not explain the nature of the claim nor does it indicate it was ever substantiated. By mutual agreement Hoppe did not pursue visitation with K.H. for about two months. Then, on December 3, 1997, temporary joint custody was granted to both parents with Tallent serving as primary residential custodian and Hoppe paying \$580.00 in temporary monthly child support.³ The separation agreement reached by Hoppe and Tallent was incorporated into the final decree of dissolution. Thereafter,

² Pursuant to the policy of the Court of Appeals, in cases involving allegations pertaining to minor children, the parties shall be referenced by their initials in an effort to protect the interests of such minor children.

³ There is no allegation Hoppe has ever failed to pay child support.

Hoppe had what he considered to be smooth visitation with K.H. on alternate weekends and two hours every other Wednesday evening for many years.

However, unbeknownst to Hoppe, in 1998 Tallent arranged for Sally Sensing (“Sensing”), a certified marriage and family therapist with an M.A., and her husband, Larry Sensing, a certified clinical psychologist with an M.A., to meet with K.H. After two visits, the Sensings concluded K.H. may have been emotionally traumatized, perhaps by a male. They found K.H. reacted normally for her age in all respects except “when interacting with or talking about males.” Then she would “shut down verbally, withdraw and become very cautious.” The Sensings observed “[n]o overt signs of sexual abuse,” but could “not rule out that possibility.” They recommended Hoppe continue visitation with K.H., but suggested a female family member be present and that the visits increase as K.H. adjusted to being around her father.

In the fall of 2003, Tallent alleged K.H. would become anxious before each visit with Hoppe. Dr. Melissa Dennison, a pediatrician, examined K.H. but found no physical explanation for the child's anxiety.

In 2004, Tallent and her mother, Francis Sewell, returned to Sensing for additional help. Sensing testified she did not know other mental health professionals contacted by Tallent had declined the referral because they would not appear in court. Sensing also stated Tallent said nothing to her about testifying in court. Sensing accepted the case and by January 19, 2004, she had met with K.H. three times. According to a letter from Sensing, K.H. told her Hoppe made her feel “very uncomfortable” and she became physically ill before each visit with him. K.H., eight years old at the time, also told Sensing that Hoppe “embarrasses her and gets angry at her for not wanting to visit

him.” Additionally, K.H. told Sensing that while in the home of Hoppe's parent's, Hoppe slept in bed with her and took pictures of her while she was naked in the shower.⁴

Sensing further wrote that K.H. “states her father washed her privates and bathed her all over until this Fall. She asked him not to wash her but he continued until Fall break of last year.” K.H. also reported to Sensing that Hoppe would drink and drive with her in the car, and during Christmas vacation, he left her in a car for about twenty-five minutes while he shopped for a television. As a result of the sessions in 2004, Sensing believed visitation should continue but recommended it be professionally supervised until someone could fully assess K.H. and explore the causes “of her fear and physical reactions to visiting her father.” Sensing also recommended that both Hoppe and Tallent be evaluated. Sensing never met with Hoppe; never suggested psychological testing to determine whether K.H. was being truthful; and never reported any alleged sexual abuse to authorities.

That same month, January 2004, Tallent moved the court to suspend or alter Hoppe's visitation with K.H. because of her outbursts and near hysteria before visits. Hoppe filed an objection, but Tallent stopped the visitation on her own. In response, Hoppe moved the court to hold Tallent in contempt of court.

On February 25, 2004, Domestic Relations Commissioner (“DRC”) Norbert Sohm heard testimony from the Sensings and from Dr. Robert Bruce Fane, a clinical psychologist with a Ph.D. Also testifying that day were Tallent and Hoppe; K.H.'s maternal and paternal grandmothers; K.H.'s third grade teacher; and Hoppe's ex-

⁴ The record contains two photos of K.H. standing behind a shower curtain and modeling a shower cap. Other than the child's head and face, no portion of her body is visible in either photo. The child is smiling widely and one cannot determine whether she is clothed or nude.

wife. K.H.'s grandmothers and teacher all portrayed her as a well adjusted straight A student who has never posed any disciplinary problems.

Sensing testified she has been a licensed marriage and family therapist for 28 years, the last nine of which have been in private practice. Sensing, a former teacher, has handled a variety of cases including child sex abuse and drug and alcohol counseling. In 2004, only about six to seven percent of her work involved children. Sensing testified Tallent contacted her in an effort to quell K.H.'s unexplained outbursts. All Sensing was told was the child did not want to see her father and there was no physical explanation for her avoidance of Hoppe.

Sensing met with K.H. individually in three ninety-minute sessions. Sensing's first goal was to build rapport with K.H. Sensing testified that once K.H. felt "real safe with me," she said she did not want to visit her father and described a recurring nightmare in which her dad chased her, caught her, pushed her into a dungeon and then hugged and kissed her. After three sessions, Sensing concluded K.H. distrusts men. Sensing also believed K.H. had been emotionally and sexually abused because Hoppe was still bathing her at the age of nine. Despite these beliefs, Sensing never reported any abuse to authorities because she wanted to learn more about what had happened. Sensing, who has never met with Hoppe, said she encouraged family therapy all along and would want to work with Hoppe were she to continue counseling K.H.

Dr. Fane completed his Masters in counseling in 1987. A decade later he completed his doctorate in psychology at the University of Louisville and opened a private practice as a clinical psychologist in Bowling Green. Dr. Fane is trained to perform child custody evaluations and has worked with at-risk children. The bulk of his

work, about eighty percent, is devoted to children, but since 1992 he has also been qualified to work with adult sex offenders. In 1995 alone, he conducted 1,250 psychological evaluations. Most of his work is concentrated in the Barren River area. Dr. Fane testified that few people will perform child custody work in that region, so most of the work is referred to him. He estimated he has testified in court about fifty times.

Hoppe was referred to Dr. Fane for a psychological evaluation. He met with Hoppe three times between January 24 and 31, 2004, to conduct a clinical interview. He also interviewed Hoppe's second ex-wife. Thereafter, like Sensing, Dr. Fane saw no reason to stop visitation. Specifically, he found no psychotherapy (mental illness) limiting Hoppe's ability to parent. While Hoppe was mildly depressed, his knowledge of his daughter's history and daily activities was "normal," his knowledge of health care principles was "outstanding," and his balance with discipline was "excellent." Dr. Fane's evaluation revealed no proclivity toward committing sexual abuse or abusing alcohol.

In particular, Dr. Fane stated he had no concerns about the shower photos because of the context in which they were taken (a girl transitioning from a bath to a shower in her paternal grandparent's home and wearing a shower cap loaned to her by her grandmother). Furthermore, Hoppe said he stopped bathing K.H. when she told him she felt uncomfortable and Tallent advised him K.H. was now taking showers.⁵ Similarly, Dr.

⁵ Hoppe's second ex-wife, Jean Hite, testified that when K.H. visited in their Tennessee home, K.H. pleaded for Hoppe to bathe her. This was true even though Hite's teenage daughter would offer to help K.H. with her bath. Hoppe married Hite in September 2001 and they divorced in October 2003. Hoppe told Dr. Fane he stopped bathing K.H. between the summer and fall of 2003. Hoppe told Dr. Fane he stopped bathing K.H. between the summer and fall of 2003. K.H. grew close to Hite during the brief marriage. Hite testified that K.H. always came first with Hoppe, which in part led to their divorce. Hite stated she saw no indication of Hoppe abusing K.H. Hite also testified Hoppe would not drink in the presence of K.H.

Fane saw no problem with Hoppe's stop at the Galleria to pick up a television while leaving K.H. in her pajamas in the car. Dr. Fane saw this as an isolated incident in which Hoppe parked at the door to the store and frequently returned to the car to check on K.H. during a brief period. K.H. did not go inside the store because she had been ill.

While Dr. Fane never met K.H., he surmised her outbursts might be the result of separation anxiety exacerbated by K.H. continuing to sleep with Tallent. He stated abused children are less likely to make straight A's and exhibit excellent school conduct, and if K.H. has been abused, he did not perceive Hoppe as the perpetrator. Furthermore, he noted that during Sensing's testimony earlier that day, even she said K.H. was not suffering from any mental illness. In response to questions from the DRC, Dr. Fane testified children make allegations for a reason; either they are experiencing the anxiety or they are being told to make the allegation. Dr. Fane candidly admitted he has heard only half of the story since he has never spoken to K.H. As a result, he did not have sufficient information on which to form an opinion about why K.H. would say she did not want to see her father. He suggested K.H. be given an anxiety scale as part of an assessment to determine when she experiences anxiety and that Hoppe should be incorporated into visits with K.H. Dr. Fane said he had not seen anything to cause him to recommend that visitation cease.

Despite testimony from both Sensing and Dr. Fane that some form of visitation should continue, the DRC recommended visitation be suspended until Feinberg & Associates could evaluate Hoppe, Tallent and K.H. Hoppe filed exceptions to the DRC's recommendation which the circuit court overruled.

On May 24, 2004, Feinberg & Associates⁶ issued a twelve-page report recommending visitation resume in the context of family therapy with assistance from a counselor familiar with children of divorce. The report recited parenting assets of both Hoppe and Tallent, but also noted areas of concern. For example, Tallent was described as having “inadequate emotional boundaries with” K.H. in that she has slept with K.H. since infancy and K.H., nine years old at the time of the evaluation, was now sleeping with Tallent and her third husband. The report said Tallent was permissive with K.H. and became “excessively emotional” when transferring K.H. to Hoppe. It also said Tallent demonstrated poor parenting judgment in that she “indulges [K.H.], allowing her to get her way” and “has had [K.H.] call [Hoppe] to negotiate timesharing issues.” Tallent was further described as having “engaged in alienating behavior” by severing Hoppe's phone contact with K.H. and repeatedly changing the timesharing schedule. The report also noted Tallent twice initiated therapy for K.H. without Hoppe's knowledge or input; treats K.H. as a peer, shows “poor physical boundaries” and does not always discipline her.

According to the Feinberg report, Hoppe exhibited “inadequate boundaries” with K.H. too, including the fact that he still bathed K.H. when she was eight years old and took photos of her in the bathroom. Like Tallent, Hoppe also indulged K.H. and let

⁶ Feinberg & Associates, located in Lexington, Kentucky, provides counseling services as well as psychological evaluation and consultation. Dr. David Feinberg, a licensed clinical psychologist with a Ph.D. and Rozanne Rucker, a licensed marriage and family therapist with an M.S., evaluated K.H., Hoppe and Tallent in March and April 2004. Each parent underwent clinical and parenting interviews, standardized testing, and a joint interview with the child. K.H. was interviewed, her behavior was observed, she was asked to create projective drawings and she participated in a joint interview with her parents. Individual interviews were also conducted with Tallent's current husband and mother, as well as with Hoppe's ex-wife and mother.

her “get her way.” Hoppe once left K.H. alone in a car at a mall for fifteen to twenty-five minutes which made K.H. feel uncomfortable.

No allegations of sexual abuse were revealed to Dr. Feinberg and Rucker during their eighteen hours and forty-five minutes of testing and evaluation. Ultimately, Feinberg recommended timesharing resume according to the schedule used in December 2003 and that once on track, the schedule should be followed strictly. The report concluded by stating K.H. needs both parents and both sets of grandparents in her life.

Upon receiving the Feinberg report, the trial court ordered Hoppe, Tallent and K.H. to begin counseling with Ruth Sutton (“Sutton”), a registered play therapist and licensed marriage and family therapist in private practice. Sutton initially declined the referral, believing K.H. should continue in therapy with Sensing. However, upon learning Sensing was no longer an option,⁷ Sutton accepted the referral and developed a plan, consistent with Feinberg's recommendation, to resume visits between K.H. and Hoppe.

On September 8, 2004, Sutton met with Hoppe and Tallent to discuss treatment goals, one of which was resuming the timeshare schedule. Sutton proposed meeting privately with K.H. at least three times before integrating Tallent and Hoppe into the sessions. However, when K.H. learned she was meeting with Sutton to pave the way toward reuniting with her father she became emotionally upset. Thereafter, Sutton told K.H. to journal her feelings so they could talk about them. When K.H. arrived for the second session, she gave Sutton notes explaining her fears, including an allegation that

⁷ The record does not indicate why Sensing was no longer considered an option since she had developed a rapport with K.H. and Sensing described the child as feeling “real safe” with her.

Hoppe had sexually abused her. In the third session, K.H. was nervous, anxious, fidgeting and emotionally distraught. Sutton said she had heard enough from K.H. by their third meeting to report the alleged sexual abuse to authorities, but met with K.H. twice more before contacting the Clinton County Family Services Office. Sutton was of the opinion K.H. had not previously disclosed these allegations of sexual abuse to anyone.

As a result of Sutton's report, Shirley Guffy ("Guffy") of Kentucky Child Protective Services interviewed K.H. in Tallent's home on October 22, 2004. K.H. told Guffy that just after lunch on the Monday of fall break in 2003, Hoppe suggested he and K.H. go to the game room. Once upstairs, Hoppe got a towel, placed it on the couch, pulled down K.H.'s pants, and placed KH atop the towel. Hoppe then spread her legs and her "privates" and K.H. "could feel his fingers in my privates" for about thirty minutes. The next day, K.H. would not eat so Hoppe called Tallent and Tallent and her mother came to Tennessee, picked up K.H. and took her to the doctor.⁸

K.H. also told Guffy she had played doctor with Hoppe and Hannah, one of K.H.'s friends. According to K.H., Hannah and Hoppe bound K.H.'s ankles, knees and hands and then Hoppe pushed on K.H.'s stomach as if he had a stethoscope. K.H. further said that while bathing her, Hoppe "would take two fingers and run them up my butt and he would also do that to my privates at every bath." K.H. described Hoppe as drinking "all the time," driving and drinking while she was in the vehicle, taking pictures of her in the shower, and getting in bed and sleeping with her.⁹

⁸ The record does not indicate the results of this exam.

⁹ At the hearing before the DRC on February 25, 2004, Hoppe commented upon K.H.'s various allegations. He testified K.H. begged him to help with her bath because it was playtime. He testified at holiday meals he may have one drink but he never drinks and drives and certainly does not do so with K.H. in the vehicle. On December 20, 2003, he had arranged to pick up a

Guffy also interviewed Tallent that afternoon. Tallent said K.H. had told her about Hoppe tying her up, playing doctor, being rough while bathing her, sticking a bar of soap “way up inside her” when she was four years old, taking pictures of her in the shower, playing a game in which Hoppe called K.H. his wife and pretended they had three kids, and leaving K.H. alone in a vehicle for about twenty minutes at a mall. Tallent also said K.H. had told her Hoppe stuck his finger inside her during fall break of 2003. Tallent said that after the fall break visit, K.H. would not talk about the visits, she no longer wanted to visit Hoppe, and she wanted to take a phone with her fearing Hoppe would take her somewhere and she would be unable to find her mother. Tallent told Guffy that K.H. did not gain any weight or grow between April 2003 and January of 2004. However, once visitation with Hoppe stopped in December 2003, Tallent said K.H. gained eleven pounds in just seven months.

Next, Guffy spoke with Francis who said K.H. had complained of Hoppe hurting her as early as 1998 when K.H. was still in diapers or pull-ups. As a result, Tallent took K.H. to Sensing for evaluation. According to Francis, due to K.H.'s tender age, the child provided no real information. Francis stated that on May 11, 1999, K.H. told her that Hoppe “checked her bottom with a light.” Francis also told Guffy that K.H. had told her the previous night about Hoppe placing her on a towel.

previously purchased television at Sears. K.H. had been sick when she arrived for her holiday visit so he placed her in the car and drove to the store where he illegally parked on the sidewalk so he could keep an eye on K.H. During about a ten-minute period, he said he checked on K.H. five or six times. Hoppe also testified K.H. still sleeps with Tallent. When he asked Tallent to stop doing this she never responded. Hoppe said Tallent's sleeping arrangement created a problem for him and K.H. has asked Hoppe to sleep with her when she visits him in Tennessee. Hoppe further stated that only about one of every dozen telephone calls he makes to K.H. is successful.

Finally, Guffy interviewed Jackie Sewell, K.H.'s maternal grandfather. He too recalled the incident with the snake light wherein K.H. said Hoppe would use such a light to check her bottom "for worms and crusties."

On December 15, 2004, K.H. underwent a medical exam at the Lake Cumberland Child Advocacy Center. During that exam, neither K.H. nor Tallent alleged vaginal or anal contact had occurred with a finger, penis or foreign object. The exam revealed nothing abnormal. Indeed, all the results were within normal limits. However, the medical summary did state, "[e]xam was normal, however opening of hymen was large enough and redundant enough to accomodate (sic) a finger without causing tearing of hymen."

Between September 2004 and January 2006, Sutton saw K.H. nineteen times. She conducted seventeen individual sessions and two joint sessions with K.H. and Tallent. After hearing the sexual abuse allegations, Sutton changed from being K.H.'s therapist to being a support person for her and she did not communicate any further with Hoppe. Sutton did not see K.H. between January 2006 and November 2006.

By December 2004 Hoppe had heard nothing from Sutton and sensed she had made no progress toward resuming visitation so he moved the court to immediately reinstate visitation. The court set a hearing for January 18, 2005, at which time he would interview the child *in camera*. That same month, Sutton sent a letter to the court explaining she was not conducting family sessions because of the alleged abuse.

Since some of the alleged sexual abuse was said to have occurred in Tennessee, Guffy filed a child abuse and neglect complaint report with the Metropolitan Police Department in Nashville, Tennessee. Sue Burfield handled the report. On January

20, 2005, Burfield wrote a letter to the Clinton Circuit Court indicating there was an open investigation in Tennessee identifying Hoppe as the perpetrator of sexual abuse upon K.H. On July 16, 2005, upon learning Hoppe was seeking to resume visitation with his daughter, Burfield wrote a follow-up letter to the circuit court stating, “[s]hould access be granted to [Hoppe] and he came to the State of Tennessee with [KH], I would have no choice but to take her into our state's custody to keep this child safe based on Mr. Hoppe being an indicated sexual offender in this state.” Burfield also stated she would be “re-presenting the case to the DA at our next Child Protective Investigative Team (CPIT) due to the previous DA's resignation and my firm belief that this man needs to be prosecuted.” The court canceled its scheduled interview with K.H. upon learning of the allegations since he might be called as a witness if charges were filed against Hoppe in Tennessee. The record does not indicate criminal charges were ever filed or are being actively pursued against Hoppe in either Kentucky or Tennessee.

Hoppe testified at a court hearing on December 7, 2006. He denied ever doing anything sexually inappropriate with K.H. He admitted taking hundreds of photos of his daughter but never when she was nude. In describing his attempts at court-ordered telephone calls with K.H. he testified he tried to speak to her for nearly three months but Tallent would answer the phone, say something negative, and then K.H. would say she did not want to speak to him and hang up the receiver. He noticed K.H. acted differently around him when Tallent was not present.

Sutton was the only other witness to testify at the December 7, 2006, hearing. She stated K.H. was doing well in January 2006. Then, Sutton did not see K.H. again until November of 2006, just after Hoppe moved to resume visitation. Sutton

testified that when she saw K.H. in November 2006 she was again fearful, helpless and desperate, all because Tallent had told her Hoppe wanted to resume visitation. Sutton described K.H. as having regressed to the same stage she was in when therapy began in September 2004.

Sutton stated she believed K.H.'s story and because K.H. had identified Hoppe as someone who had sexually abused her, any visitation with him, even if supervised, would cause “emotional, cognitive, developmental damage.” Sutton adamantly opposed any contact between K.H. and Hoppe and went so far as to state that if visitation resumed, K.H. would regress again resulting in sleeplessness, emotional stress, physical damage, and damage to the child's sense of safety and stability in life. However, Sutton predicted K.H. could stabilize if she was not in contact with Hoppe.

On cross-examination, Sutton fumbled when reciting her credentials. She was unclear on the colleges she attended and the years in which her degrees were awarded. She then said the opinions she was expressing were her own and were not based on the reports of Drs. Fane or Feinberg. Sutton acknowledged seeing Dr. Feinberg's report, but could not recall whether she had ever seen Dr. Fane's report or even knew Dr. Fane had evaluated Hoppe. Sutton admitted she had not performed any standardized tests on K.H. or her parents since she is not qualified to conduct such testing. She further admitted certain items in Feinberg's report could be inaccurate. For example, Sutton said she did not believe K.H.'s statement, made during the Feinberg evaluation, that she slept in bed with Tallent and Tallent's new husband. Sutton further admitted there has never been an allegation of inappropriate conduct by Hoppe's parents, but K.H. fears visiting them because she might also see her father.

Shortly after the December 2006 hearing, the trial court issued an order containing findings of fact and conclusions of law. In it, the court found timesharing had been suspended in December 2003 following an accusation of inappropriate contact between Hoppe and K.H. The court further noted K.H. told Sutton in 2004 that Hoppe had sexually abused her. Finally, the court found that in December 2006, Sutton testified that K.H. had made significant improvement by January of that year, but upon learning Hoppe was trying to reunite with her she regressed and was again exhibiting the same nervousness, anxiety and clingy behavior she exhibited prior to entering therapy with Sutton. Sutton opposed any visitation, even if supervised. The circuit court then concluded it was authorized under Kentucky Revised Statutes (“KRS”) 403.320(3) to restrict a non-custodial parent's right to visitation only upon finding, after a hearing, that visitation would seriously endanger the child's “physical, mental, moral or emotional health.” Citing *Hornback v. Hornback*, 636 S.W.2d 24, 26 (Ky.App. 1982), the court concluded that since it was being asked to modify a denial of visitation, there was no presumption that Hoppe, as a non-custodial parent, was entitled to visitation, but rather the question was whether resuming visitation would be in K.H.'s best interest. *See also Smith v. Smith*, 869 S.W.2d 55, 56 (Ky.App. 1994). Based upon Sutton's testimony, the court concluded it would not be in K.H.'s best interest to see her father because any visitation “would seriously endanger [K.H.'s] physical, mental, and emotional health” and KH's regression would “only deepen should any type of visitation be granted.” This appeal followed. We now affirm.

Hoppe alleges the trial court abused its discretion in denying his request to resume visitation with K.H. We disagree. First, it was within the trial court's province to

evaluate the credibility of the witnesses and the evidence presented. The judge did just that and as a reviewing court, we cannot now substitute our opinion for his. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). While we may have weighed the evidence differently, we cannot say the trial court's factual findings were unsupported by substantial evidence. Clearly the moving party, Tallent, met her burden of proving, by substantial evidence, that visitation would harm K.H. It was within the trial court's authority to rely exclusively upon Sutton's uncontradicted testimony. Hoppe was not required to offer proof at the hearing, but had he done so the trial court may have had additional, and perhaps more compelling, proof upon which to deny Tallent's request to alter or deny Hoppe's visitation.

In affirming the trial court's opinion, we are compelled to note that six mental health professionals reviewed this case between 1998 and 2006. Only one of them, Sutton, a registered play therapist and licensed family and marriage therapist who stumbled mightily when queried about her education and may have counseled only a handful of children during her six years in private practice, adamantly opposed the resumption of visitation. In contrast, a certified clinical psychologist with an M.A. (Larry Sensing); a certified marriage and family therapist with an M.A. (Sally Sensing); a clinical psychologist with a Ph.D. (Dr. Fane); a licensed clinical psychologist with a Ph.D. (Dr. Feinberg); and a licensed family and marriage therapist with an M.S. (Rucker), all evaluated the child and saw no reason to halt visitation. Despite this plethora of contrary opinion, the trial court was persuaded by Sutton's testimony, perhaps because she was the last therapist to see K.H. and the only professional called to testify at the December 2006 hearing. This is an instance in which a follow-up study with

Dr. Feinberg,¹⁰ or someone with like credentials, might have explained K.H.'s failure to reveal the sex abuse, which allegedly occurred in 2003, to Sensing (with whom she felt “real safe”) in January 2004 or to Dr. Feinberg in March/April 2004 rather than waiting until September 2004 to disclose her story to Sutton. It might have also allayed our underlying concern, raised by Hoppe's counsel, that K.H. may have been coached. It is certainly disconcerting that Hoppe's continued efforts to reinstate visitation with his daughter have remained stuck in a legal quagmire for nearly a decade based solely upon allegations the child made to a therapist and a social worker while no criminal charges have ever been brought, prosecuted or resolved in either Kentucky or Tennessee. Regardless of the outcome of any such criminal charges, we are mindful of the maxim, “justice delayed is justice denied.”

Second, KRS 403.320(3) gives a court discretion to “modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.” Here, Sutton forcefully testified any visitation with Hoppe would cause “emotional, cognitive, developmental damage” to K.H. Her opinion was based upon K.H.'s allegation that Hoppe had sexually abused her, an allegation that Sutton found to be believable. No one with contemporaneous or more current information contradicted Sutton's opinion. Therefore, based upon Sutton's testimony, the court concluded K.H.'s physical, mental and emotional health would be seriously endangered if she were forced

¹⁰ During the December 2006 hearing, Hoppe's counsel suggested a follow-up evaluation with Dr. Feinberg might be in order at which point the trial court noted Dr. Feinberg is now retired.

to see Hoppe and therefore visitation with Hoppe would not be in K.H.'s best interest. In light of Sutton's testimony, we cannot say the trial court's denial of reinstatement of visitation was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Thus, we cannot say the court abused its discretion and therefore affirm its decision.

However, while we affirm the trial court's denial of reinstatement of visitation, nothing in this opinion should be read as prohibiting Hoppe from seeking future visitation with his daughter. Hoppe's parental rights have not been terminated and nothing precludes him from petitioning anew for reinstatement of visitation, particularly upon the submission of new psychological evaluations which might contradict Sutton's opinion. We would expect Tallent to cooperate in making K.H. available for any reasonable medical and or psychological evaluation and testing sought by Hoppe. Furthermore, we are confident the trial court will give fair consideration to any new evidence presented to it in determining Hoppe's future parental rights.

For the foregoing reasons, the order of the Clinton Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

GRAVES, SENIOR JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

GRAVES, SENIOR JUDGE, CONCURRING: The precedents established by application of CR 52.01 compel my concurrence; however the findings of the trial court would be much more reasonable and understandable on appellate review had the trial judge himself actually interviewed K.H. Because criminal charges were never

instituted against the father, the trial judge's failure to interview K.H. impairs the reliability of his conclusions. Appellate review would be much more meaningful if we had the advantage of the inferences that would have been drawn from K.H.'s testimony.

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