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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000655-ME

FONDA MORGAN APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 03-CI-00281

DANIEL GETTER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

COMBS, JUDGE: Fonda Morgan appeals the order of the Campbell Family Court which granted custody of her minor child to Daniel Getter. After our review, we affirm.

Morgan and Getter married in 1995. Two daughters, D.G. and A.G., were born during the marriage. Morgan and Getter separated in 1999; their decree of

dissolution was entered in 2003. The decree provided that Morgan had sole custody of the children, and Getter was granted supervised visitation. The children visited periodically with their father throughout the years.

In 2011, D.G. reached the age of majority and moved to Florida to attend college near Getter's residence. On July 21, 2011, Getter filed a motion requesting custody of A.G. in order for her to reside with him in Florida. The court appointed a guardian *ad litem* (GAL) to represent A.G. After the GAL filed his report, the court conducted a hearing on November 21, 2011. Subsequently, it entered an order on December 19, 2011, which permitted A.G. to relocate to Florida to live with her father. This appeal by Morgan follows.

Our standard of review is governed by Kentucky Rule[s] of Civil Procedure (CR) 52.01. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986) (The rule applies to child custody cases); *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. 1980) (CR 52.01 applies to domestic cases). It provides that in actions without juries, the trial court's findings of facts should not be reversed unless they were clearly erroneous. Clear error occurs only when there is not substantial evidence in the record to support the trial court's findings. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

Morgan's first argument is that the trial court committed clear error at the hearing when it did not allow her to examine the guardian *ad litem* (GAL) and then denied her request to strike the GAL's report.

Morgan argues that the GAL was a professional consultant as described in Kentucky Revised Statutes (KRS) 403.290 and 403.300. KRS 403.290(2) permits the court to:

> seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon request. ***Counsel may examine as a witness any professional personnel consulted*** by the court.

(Emphasis added). Similarly, KRS 403.300(1) provides:

> [i]n contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child.

The statute also allows for the investigator to be called to testify. KRS 403.300(3). Morgan contends that pursuant to these statutes, she should have been allowed to examine the GAL concerning his report. We disagree.

Although the General Assembly has not passed legislation authorizing use of a GAL's services in custody proceedings, the Supreme Court has addressed the issue. Kentucky Family Rule[s] of Practice and Procedure (FCRPP) 6(1) provides that a GAL may be appointed by order of the court:

> If disputes regarding custody, shared parenting, visitation or support are properly before the court, a parent or custodian may move for, or the court may order, one or more of the following, which may be apportioned at the expense of the parents or custodians:
> (a) A custody evaluation;
> (b) Psychological evaluation[s] of a parent or parents or custodians, or child(ren);
> (c) Family counseling;

(d) Mediation;
(e) Appointment of a guardian *ad litem*;
(f) Appointment of such other professional(s) for opinions or advice which the court deems appropriate; or,
(g) Such other action deemed appropriate by the court.

Morgan attempts to equate a GAL with other professionals who might be enlisted by the court – such as social workers, psychologists, or custodial evaluators. However, the Court's rule differentiates GALs from other professionals. The Rules do not define what a GAL is. However, the general definition is: "a guardian, usu. [*sic*] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." Black's Law Dictionary 713 (7th Ed. 1999).

In this case, the court stated on the record that it appointed the GAL ***for the purpose of representing A.G.*** The court was authorized by FCRPP 6 to make the appointment. The GAL who was appointed is a licensed attorney and is, therefore, subject to the Rules of the Supreme Court (SCR) governing attorneys' conduct. Under the circumstances, the GAL potentially would have violated two rules if he had testified.

First, SCR 3.130-1.6 prohibits a lawyer from revealing confidential information. If the GAL had been subject to examination and cross-examination, he likely would have been in the untenable position of revealing confidential communications between himself and his client. Furthermore, the GAL's testimony would have been a violation of SCR 3.130-3.7:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness ***except*** where:
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
> (3) Disqualification of the lawyer would work substantial hardship on the client. (Emphasis added.)

Morgan has not suggested that the GAL was subject to any of these exceptions. Therefore, as A.G.'s advocate in the custody proceedings, it would have been unethical for the GAL to be questioned concerning his report. The court properly denied Morgan's motion to examine the GAL.

Morgan also contends that the court erred in denying her motion to strike the GAL's report. This argument is premised on the contention that it was error not to allow her to cross-examine the GAL. Having held that the examination of the GAL would have been improper, we conclude that there is no merit to the allegation that the report should have been stricken. The court appointed the GAL to provide an opinion and advice – essentially to counsel the court in formulating its decision. See FCRPP 6. It would have been counter-productive for the court to have been forced to disregard the GAL's report. The court did not err by considering the report in its exercise of its considerable discretion.

All the attorneys in this case agree that courts and attorneys find themselves in a quandary due to the lack of statutory definition of the proper role of a GAL in a custody proceeding. Opinions submitted by professionals who are not GAL's are subject to cross-examination. KRS 403.290(2). However, because a GAL is

governed by the Rules of Professional Conduct, lawyers serving as GAL's cannot be cross-examined by parties as to the basis of their recommendations sought by the courts appointing them. The conflict is patent: is the GAL acting as advocate for a client or for expert counselor to the court? The ambiguity creates a clear potential for prejudice by precluding cross-examination of a GAL by the parties whose interests are at issue and are the very subject matter of the report prepared by the GAL at the behest of the Court.

We believe that the potential for prejudice and the inherent conflict created by lack of clarity in the statute merits (indeed necessitates) the scrutiny of the General Assembly and/or the Supreme Court to define the proper role of a GAL in child custody issues.

Other jurisdictions that have confronted the dilemma have produced mixed results. Wisconsin does not allow GAL's to testify; they must be treated like any other attorney. *Hollister v. Hollister*, 496 N.W.2d 642 (Wis. Ct. App. 1992). Pennsylvania enacted a statute directing that a GAL may not testify. However, other parties are permitted to file their comments with the GAL's report. 23 Pa.C.S.A. § 5334. Washington's statute specifically permits the investigator – who can be a GAL – to be called to testify and be cross-examined. Revised Code of Washington Annotated (RCWA) 26.10.130. Maine has granted its GAL's quasi-judicial status with attendant immunity. 22 Maine Revised Statutes Annotated § 4005(1)(G). Illinois directs its courts to appoint an attorney to serve as attorney, a GAL, or as a child representative. Each of the roles is defined. If more is needed,

the court is instructed to appoint a second attorney to serve the child's needs. The statute ***mandates*** that GAL's are subject to cross-examination. 750 Illinois Compiled Statutes Annotated 5/506. The Supreme Court of Oklahoma has held that the GAL should be available for cross-examination if his recommendation weighs in the court's decision. *Kelley v. Kelley*, 175 P.3d 400, 403 (Okla. 2007).

We are persuaded that Kentucky courts and the practicing bar need more clarity in this area of the law. Nonetheless, we have determined that the case before us – while highlighting the problem – does not merit exclusion of the GAL report. We are satisfied that the thoroughness of the testimony at the hearing – both that of the child and that of the other witnesses – sufficed as an adequate basis for the court's decision. The court meticulously questioned A.G. and all of the witnesses. Additionally, it does not appear that the court relied heavily upon the GAL report. Therefore, in this particular case, we conclude that any error – if any there were – was harmless and that reversal is not warranted.

Morgan last argues that the court did not properly follow the mandates of the statutes that govern a change of custody. KRS 403.340(3) provides that a court must not change its prior custody determination unless "a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child."

While Morgan argues that the court did not find that a change in circumstances has occurred, we are persuaded that it did. We have reviewed the order of the court. The court did not provide a captioned list of changes in

circumstances, but it described them. It found that Getter has had increased visitation; that D.G. has moved from the home; that A.G. misses D.G.; and that the relationship between Morgan and A.G. has deteriorated. Thus, the court did not fail to consider whether A.G.'s circumstances had changed.

Morgan also contends that the trial court improperly determined whether the modification was in A.G.'s best interest. After finding that circumstances have changed, courts must consider whether modifying custody is in the best interest of the child by applying the factors of KRS 403.270(2). KRS 403.340(3)(c). The statute directs courts to consider all relevant factors, including:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
> (b) The wishes of the child as to his custodian;
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (d) The child's adjustment to his home, school, and community;
> (e) The mental and physical health of all individuals involved;
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
> (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
> (h) The intent of the parent or parents in placing the child with a de facto custodian;
> (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking the custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Morgan essentially argues that the trial court merely relied on the GAL's recommendation rather than making its own findings based on those statutory criteria. On the contrary, the record reveals that the court conducted a thorough hearing before making its findings. It heard testimony from Morgan, Getter, D.G., and A.G. Not only did the court listen to testimony as presented by counsel, but it thoughtfully asked its own questions of each witness. The court questioned A.G. extensively about her reasons for wanting to leave her home, her school, and her community. Contrary to Morgan's claims, the court also questioned Getter and Morgan, and it summarized both of their viewpoints in its findings.

Morgan has provided a litany of issues – such as Getter's child support arrearages, Getter's failure to pay income taxes, Getter's living in multiple states over the years, and A.G.'s academic achievements in her current school – all of which she says the trial court did not properly consider. However, the record indicates that the court did consider all these issues. Although it reached a different conclusion about them than Morgan, it nonetheless alluded to her concerns numerous times in its findings of fact and conclusions of law. Morgan has not offered proof that the court did not consider the factors of KRS 403.270; instead, she offers a different interpretation of them. Her disagreement does not equate with omission by the Court.

A.G. was articulate and confident in her testimony. She described a toxic situation between her mother and herself. Morgan admitted that she had hit A.G. in the past and that the two of them argue. We believe it is significant that A.G.

testified that she and Morgan need space between them in order to preserve their relationship in the future. It appears from the record that A.G. and D.G. have been sources of stability and comfort to one another while dealing with tumultuous situations created by the adults around them. The court's finding that moving to Florida would be in A.G.'s best interest is supported by the record, and we will not disturb it.

Accordingly, we affirm the Campbell Family Court.

NICKELL, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT BY SEPARATE OPINION.

CLAYTON, JUDGE, CONCURRING: I concur with the result reached by the majority, but I write separately. I do not think it was proper for the court in this case to admit the report of the GAL when the GAL was representing A.G.

Neither the appellant nor the appellee should have been placed in a position where A.G.'s attorney not only functioned as her legal representative but also served as an advisor or expert to the court. The GAL was asked to serve in conflicting roles. Further, I do not think that FCRPP 6 (1) differentiates GALs from other professionals. Unlike any other advisor, the GAL in this matter was not subject to examination and, therefore, his report was admitted without challenge. However, I do agree with the majority that any error in this particular case was harmless and the decision of the trial court should be affirmed.

BRIEF FOR APPELLANT:

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Covington, Kentucky

BRIEF FOR APPELLEE DANIEL GETTER:

Blaine J. Edmonds III
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BRIEF OF THE GUARDIAN *AD LITEM* FOR THE MINOR CHILD, A.G.:

Richard Konkoly-Thege
Covington, Kentucky