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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001748-ME

CORY DAVID HOSKINS

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 07-CI-00184

MELISSA HOSKINS (NOW BROWN)

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Cory David Hoskins appeals from an order of the Morgan Circuit Court modifying timesharing with his son. He contends the trial court erroneously considered the report of a guardian *ad litem* (GAL) appointed by the court when modifying the parties' timesharing arrangement. Based on our Supreme Court's recent clarification of the role of GAL's in domestic child custody and visitation matters, we reverse and remand.

Cory and Melissa Hoskins (now Brown) were divorced on June 26, 2008. Pursuant to the court's findings of fact, conclusions of law and decree of dissolution, Cory and Melissa shared joint custody of their son with no designation of a primary residential parent. Melissa was awarded timesharing with the child every Sunday from 6:00 p.m. through the following Wednesday at 6:00 p.m. and Cory was awarded timesharing every Wednesday from 6:00 p.m. until the following Friday at 6:00 p.m. The parties were awarded alternating weekends until the weekend period of timesharing from Friday at 6:00 p.m. until the following Sunday at 6:00 p.m. The court also ordered timesharing on the various traditional holidays.

On March 4, 2013, Melissa filed a motion to modify custody and the parties' parenting schedule, asserting Cory received a speeding ticket, had remarried and divorced, and moved three times since the parties' divorce. On July 3, 2013, the trial court held a hearing on Melissa's motion and each party appeared with counsel. At the conclusion of the hearing, the trial court *sua sponte* appointed a regularly practicing attorney in Morgan County as GAL to represent the child's interest and ordered the GAL to file a report with the court within thirty days.

On August 12, 2013, the GAL filed a report stating she reviewed the file, watched the July 8, 2013 hearing and interviewed the child. The GAL reported the child conveyed his parents were very active in his life and love him. The GAL also reported the child stated Cory becomes upset when he and Melissa attend the same events and complains to the child when he is informed Melissa

will be attending. The child reportedly expressed to the GAL he prefers to spend more time with Melissa than Cory because she does not talk about the pending modification motion.

The GAL recommended the parties refrain from speaking directly to the child or in front of him regarding their personal and legal disputes. She further requested the child's desire to modify timesharing be taken into consideration and the parties be ordered to refrain from discussing the pending motion with the child and making derogatory remarks in front of the child.

The parties reappeared in court on August 19, 2013, at which time Cory requested the GAL to again interview the child. The court ordered the GAL to conduct a second interview. The GAL submitted a second report in which she stated the child had difficulty conveying his feelings and was unwilling to express how things were going at home. The GAL reported his parents continued to discuss the pending court proceeding in the child's presence. The GAL again requested that the parties be ordered to refrain from discussing the modification proceeding in the child's presence as well as refrain from making derogatory remarks regarding the other parent in the child's presence. She further requested counseling for the child and parenting classes for the parties. However, no recommendation was made regarding modification of timesharing.

The trial court entered an order continuing joint custody with the child but ordered the child reside primarily with Melissa. Cory was awarded timesharing in accordance with the local visitation schedule. Cory appealed.

During the pendency of this appeal, our Supreme Court issued its opinion in *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014). As here, the issue was straightforward: “What is the role of a ... GAL in a custody, shared parenting, visitation, or support proceeding?” *Id.* at 96. Although the issue was concisely stated, its resolution required that the Court chronologically detail the evolution of family law in Kentucky to date and the roles of a friend of the court (FOC) and a GAL within the statutory framework of family law and the enactment of the Family Court Rules of Procedure and Practice (FCRPP). Artfully written, the Court’s opinion explains how a hybrid FOC/GAL has emerged in the realm of family law. However, it pointed out that the two are distinct and disavowed the practice of appointing an attorney as counsel for the child and as an investigator and advisor to the court.

The FOC is a creature of statute. *Id.* at 103; Kentucky Revised Statutes (KRS) 403.090. The FOC may or may not be an attorney and is appointed as an officer of the court to “investigate the child’s and the parents’ situations, to file a report summarizing his or her findings, and to make recommendations as to the outcome of the proceeding[.]” *Id.* at 111. As the Court pointed out, with the exception of Fayette County, the use of FOC’s in custody and visitation proceedings appears to have lapsed. *Id.* at 104 n. 4.

Now expressly permitted by FCRPP 6(2), more common in the present-day courts is the appointment of a GAL in vehemently contested domestic custody and visitation matters. However, the GAL is not a replacement for the FOC and has

decidedly different roles. The GAL, who is always an attorney, is appointed to “participate actively as legal counsel for the child, to make opening and closing statements, to call and to cross-examine witnesses, to make evidentiary objections and other motions, and to further the child’s interest in expeditious, non-acrimonious proceedings[.]” *Id.* at 111.

Despite the distinctions between a FOC and GAL, the Court noted the trial courts have often expected the GAL-appointee to “blur” these roles and “to investigate for the court and to litigate for the child.” *Id.* The Court found it problematic for a GAL appointed to represent the child to also examine records, interview family members and file a report with the court. Its concerns were both ethical and constitutional.

The Court agreed with those commentators and courts that have noted the ethical problems for the attorney and the potential deprivation of due process to a parent when the roles of a FOC and GAL are interchanged. The GAL is subject to the Rules of the Supreme Court (SCR) governing attorneys’ conduct including duties of loyalty and confidentiality to his or her client. *Id.* Additionally, the Court pointed out that SCR 3.130-3.7 prohibits an attorney from being an advocate at a proceeding in which he or she is likely to be a necessary witness. Yet, when ordered by the Court, the GAL is required to submit a report in the very action that he or she is acting as the child’s counsel. *Id.*

These same rules that bind attorneys present constitutional implications for the parent. By definition, a GAL represents the child in the custody or visitation

proceeding and, therefore, cannot be a witness. Because the parent cannot cross-examine a GAL as to the basis for any facts or recommendations contained in the GAL's report, there is no opportunity to confront adverse evidence as required by due process. *Id.* at 111. Emphasizing a parent has a protected liberty interest in the care and custody of his or her child, the Court agreed with “the many courts that have held that in these circumstances the party's constitutional due process right trumps the [ethical] rule.” *Id.*

Noting the potential ethical and constitutional implications of the appointment of a hybrid FOC/GAL and the need of our trial courts to have the authority to appoint not only an investigator and advisor to the court but also to appoint an advocate for the child's best interest, the Court asked the rhetorical question: “What is a Court to do?” *Id.* at 112. The Court responded to its own question with exceptional clarity.

The trial court may appoint an attorney as a *defacto* FOC to investigate the circumstances on the court's behalf, file a report, and make custodial recommendations. Unless otherwise provided by statute or rule, the FOC “must promptly be made known to the parties, their reports and their sources must be disclosed, and if duly summoned they must appear at the final hearing for cross-examination.” *Id.* at 118.

The trial court may also appoint a GAL who “shall be understood as representing the child-client's best interest.” *Id.* If “the attorney's assessment of those interests conflict with the child's own wishes, the attorney should, unless the

child rejects the suggestion, apprise the court of the conflict, and briefly indicate what the child desires and why the attorney has concluded otherwise.” *Id.* at 118-19. The Court cautioned that the GAL should not be confused with the FOC.

The FOC “investigates, reports, and makes custodial recommendations on behalf of the court, and is subject to cross-examination[.]” The GAL “is a lawyer for the child, counseling the child and representing him or her in the course of proceedings by, among other things, engaging in discovery, in motion practice, and in presentation of the case at the final hearing.” *Id.* at 119. Important to the outcome of this case, the GAL “*neither testifies (by filing a report or otherwise) nor is subject to cross-examination.*” *Id.* (emphasis added).

Here, the circuit court admittedly was without the benefit of the *Morgan* opinion. Nevertheless, it erroneously appointed the GAL to represent the child and to conduct an investigation and file a report and, by judicial fiat, created a hybrid FOC/GAL disapproved of in *Morgan*.

Melissa points out that Cory did not request to cross-examine the GAL and argues he waived any error. Melissa misunderstands Cory’s contention. Cory does not argue that the trial court should have permitted him to cross-examine the GAL. To the contrary, he argues that because she served in the dual capacity as advisor to the Court and advocate for his son, under the ethical rules governing attorneys’ conduct, he was precluded from cross-examining the GAL. As *Morgan* instructs, the inability to cross-examine a hybrid FOC/GAL is the very reason why

a trial court must limit the role of the GAL to that of an attorney representing the child and not appoint the GAL as an investigator or advisor to the trial court.

Although the trial court's reliance on the report was erroneous, the question remains whether the error was harmless. Kentucky Rules of Civil Procedure (CR) 61.01. Melissa contends the error was harmless because the trial court relied on other evidence produced at the hearing when modifying timesharing.

CR 52.01 provides in part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" In *Anderson v. Johnson*, 350 S.W.3d 453, 455 (Ky. 2011), the Court stressed the importance of findings of fact when considering motions to modify timesharing when it stated:

On motions to modify timesharing, the judge has several factors to consider in making the determination of what the best interests of a child are, which are partially listed in KRS 403.270, but include all relevant *facts*. The basis for a modification decision is thus fact-driven rather than law-driven, because the legal standard is whether the [modification] is in the best interests of the child, which is stated plainly in the statute. To review the judge's decision on appeal, it is important to know what facts the judge relied on in order to determine whether he has made a mistake of fact, or to even determine if he is right at law, but for the wrong facts. If a judge must choose between facts, it is clearly relevant which facts supported his opinion.

The only facts recited in the trial court's modification order to support its decision pertain to those stated in the GAL's report. Although the trial court stated its

decision was also based on evidence produced at the hearing, its order does not recite what evidence supports its decision to modify timesharing. It is impossible for this Court to determine what admissible evidence supported the trial court's decision.

Based on the forgoing, the order of the Morgan Circuit Court is reversed and the case remanded for further proceedings.

ALL CONCUR.

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