

disorders that would make him likely to engage in further acts of sexually predatory conduct. They agreed that he had difficulty controlling his sexual impulses and also agreed in the results of the examinations conducted according to methodology accepted in the profession. The state supreme court opined that the district court's determination was not erroneous.

In dissent, two justices agreed with the majority that the district court's order requiring Mr. Loy to partially pay for Dr. Volk's evaluation was based on "an erroneous view of the law," but disagreed that this was a harmless error under the circumstances. They stated that ordering Mr. Loy to pay for a portion of the independent evaluation was an obligation the court should not have imposed in the first place. They found that these errors (allowing biased testimony and an erroneous interpretation of the law) may have been individually harmless; however, the errors were so intertwined and interrelated, and the cumulative effect so tainted the process that it required reversal.

Discussion

Sexually dangerous individual (or sexually violent predator) laws across the country follow a general scheme. The individual has been convicted of certain sexual offenses and has a mental abnormality or personality disorder that makes him likely to commit similar crimes in the future. Whether decided by a judge or jury, the result is frequently the indefinite commitment of the person. Because the questions at hand are generally outside the expertise of the trier of fact, the testimony of qualified expert witnesses is crucial. Therefore, the admissibility and credibility of mental health testimony are often heavily scrutinized during the proceedings.

Mr. Loy sought to find Dr. Sullivan's and Dr. Volk's testimonies inadmissible on different grounds. Having a license on probation, giving testimony that creates an alleged bias, or, for example, routinely testifying for one side versus the other does not automatically render the witness unqualified or the testimony inadmissible. In most jurisdictions, the case law and statutes governing the admission of expert witness testimony allow for its use if the witness has some degree of expertise in the field in which he will testify and if the testimony helps the trier of fact to understand the evidence or determine a fact at issue.

Inherent in the civil commitment of sexual offenders are complex concerns regarding psychiatric diagnoses, risk assessment, and volitional impairment. The trier of fact depends on expert testimony to understand and decide these questions. If the expert has a skeleton in the closet, has an imperfection in his qualifications, or holds an alleged bias, the trier of fact should appropriately weigh the credibility of that testimony when rendering a decision. Such testimony is not automatically inadmissible. A court's discretion in admitting expert witness testimony will not be reversed unless the district court abuses its discretion in admitting expert testimony. Finally, in most jurisdictions, the court's assessment of witness credibility is granted deference.

Disclosures of financial or other potential conflicts of interest: None.

Child Testimony and Best Interests of the Child in Child Custody or Visitation Cases

Sandeep K. Gude, MD
Fellow in Forensic Psychiatry

Kaustubh G. Joshi, MD
Associate Professor of Clinical Psychiatry
Associate Director, Forensic Psychiatry Fellowship

University of South Carolina School of Medicine
Columbia, SC

Marie E. Gehle, PsyD
Chief Psychologist

South Carolina Department of Mental Health
Columbia, SC

The Supreme Court of Kentucky Considered Whether the Trial Court Can Refuse to Permit Children to Testify in Child Custody or Visitation Cases and Whether the Trial Court Appropriately Applied the Best-Interests-of-the-Child Standard to Each Child in Determining Child Custody

In *Addison v. Addison*, 463 S.W.3d 755 (Ky. 2015), Kevin and Lydia Addison were involved in a child custody dispute. They both appealed to the Kentucky Supreme Court. Mr. Addison appealed the Kentucky Court of Appeals' decision that the trial court erred in refusing to permit the children to testify. Ms. Addison contended that the trial court failed to apply the best-interests-of-the-child

standard to each child (the Court of Appeals did not rule on this question, because of its decision to remand).

Facts of the Case

Kevin and Lydia Addison were married from 1999 to 2006. They had two children (M.A., 7 years old; S.A., 11 years old). Mr. Addison sought a divorce in 2006. The March 2, 2007 divorce decree granted Ms. Addison sole custody of the children, but allowed Mr. Addison to have reasonable parenting time. Before the finalization of the decree, Ms. Addison relocated with their children to Indiana where her new boyfriend was living. At the same time, Mr. Addison deployed to Iraq for six months. Upon his return, Mr. Addison had difficulty enforcing his visitation rights. He filed a motion to compel visitation. Ms. Addison filed motions to change jurisdiction in postdecree matters to Indiana and to modify Mr. Addison's visitation. The Kentucky and Indiana courts conducted a telephonic hearing (in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act) and determined that the jurisdiction for postdecree matters was properly in Kentucky.

In March 2009, Mr. Addison moved for joint custody of the children because he was having difficulty obtaining information about them, and he wanted to include a proposed parenting schedule. Ms. Addison objected to the change and stated that she was cooperating with visitation. After the motion for custodial change was renewed a year later, Ms. Addison informed the circuit court about her concerns that Mr. Addison had sexually abused the children (allegations she had learned of two years prior). Subsequently, the court denied Mr. Addison's motion and ordered supervised visitation. The allegations were investigated but not substantiated. Mr. Addison then moved for unsupervised parenting time and filed a motion for Dr. Kelli Marvin (a forensic psychologist who specialized in matters related to child dependency, neglect, and abuse) to evaluate the parties and children and provide objective recommendations regarding Mr. Addison's parenting time and access to the children.

Dr. Marvin opined that Ms. Addison (regardless of whether she had actively encouraged allegations of sexual abuse) played a significant role in denigrating Mr. Addison in the children's eyes in a manner consistent with parental alienation. In her February

2012 addendum to the court, Dr. Marvin recommended that Mr. Addison be awarded primary care and custody of the children and that Ms. Addison have supervised visitation. She stated that this would be in M.A.'s best interests; she outlined the problems S.A. might have with relocating with her father, but concluded that her best interests were unknowable. However, she recommended that both children stay together.

In August 2012, the circuit court conducted the custody hearing. Ms. Addison wanted to have the children testify, but the court refused. The court transferred custody to Mr. Addison and provided Ms. Addison with supervised visitation.

Ms. Addison appealed the circuit court's decision to the Kentucky Court of Appeals. She requested that her children be allowed to testify as to their wishes regarding custodial and parenting time. Although the court of appeals stated that the Kentucky Rules of Evidence (KRE) gives the trial court discretion to "protect" the witness from harassment or undue embarrassment, it also opined that the KRE does not give the trial court discretion to exclude the testimony of the children unilaterally when they were not found incompetent to testify.

In May 2014, the court of appeals reversed and remanded the circuit court's decision, holding that the circuit court's decision to bar the children from testifying prevented Ms. Addison from having a "full and fair" hearing. Mr. Addison appealed to the Supreme Court of Kentucky, which granted his motion for discretionary review and Ms. Addison's cross-motion for discretionary review. Ms. Addison claimed that the trial court did not apply the best-interests-of-the-child standard to each child. (The court of appeals declined to rule on this question because of its decision to remand).

Ruling and Reasoning

In a unanimous opinion, the Kentucky Supreme Court concluded that the circuit court did not err in refusing to permit the children to testify without finding them incompetent. The Kentucky Supreme Court stated that the court had the facts of this case before it, as well as access to interviews of the children conducted by the *guardian ad litem*, psychologists, and therapists. The court believed that the decision to permit a child to testify in proceedings involving custody or visitation should be left to the dis-

cretion of the court. It cited *Parker v. Parker*, 467 S.W.2d 595, 597 (Ky. 1971), which gave the trial court wide latitude in protecting children in custody battles so that a child is not “placed between its parents.”

Ms. Addison contended that the trial court erred in failing to apply the best-interests-of-the-child standard to each child. The Kentucky Supreme Court opined that a determination of a child’s best interests is a factual finding, and the standard of review is whether the finding of fact is clearly erroneous (i.e., if it is manifestly against the great weight of the evidence). The trial court listed all the factors of Ky. Rev. Stat. Ann. § 403.340 (2006) (modification of custody decree) and § 403.270 (2004) (custodial concerns based on best interests of the child) in its decision. The trial court clearly delineated its reasons for its decision: Dr. Marvin’s recommendation that that the children remain together, that M.A. should live with her father, and that Ms. Addison’s actions had been harmful. The Kentucky Supreme Court stated that the circuit court did not fail to address Dr. Marvin’s concerns about the transfer of S.A. to Mr. Addison’s care. The circuit court determined that the risk of harm to S.A.’s mental health was greater if she remained in her mother’s care compared with the uncertain risk associated with her relocation with her father. The state supreme court cited *Reichle v. Reichle*, 719 S.W.2d 442, 445 (Ky. 1986), which stated that custody decisions should be based on all statutory factors and not solely on psychological evaluations. The supreme court opined that the trial court properly considered the statutory factors and determined the best interests of each child.

Discussion

Custody litigation involves the best-interests-of-the-child doctrine. This concept was promulgated by the Supreme Court of Iowa in *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966), and established that the standard for determining the custody of a child involved the best interests of the child (i.e., the child’s needs, not parental preference). The Uniform Marriage and Divorce Act issued criteria considered relevant in determining the best interests of the child. These criteria (in addition to others) have been adopted by many states, including Kentucky. Psychological evaluations are often conducted in these cases

to probe how mental health problems affect the best interests of the child.

The best-interests doctrine has certain limitations. It can be difficult to determine the possible outcome of placing a child with one parent or the other when neither is clearly unfit. The need for judicial determination of best interests promotes litigation. This doctrine is likely to be defined differently in each state (depending on statutory and case laws). Given that there is not one standard definition for best interests, it is foreseeable that its application and interpretation may vary considerably from jurisdiction to jurisdiction.

Having children testify could assist the court toward a determination of best interests. In its earlier decision in *Coleman v. Coleman*, 323 S.W.3d 770 (Ky. Ct. App. 2010), the Court of Appeals stated that Kentucky Rules of Evidence 611 (1992) does not afford the court the discretion to unilaterally exclude testimony of a child in a custody or visitation proceeding unless that child is incompetent to testify. However, in the current case, the Kentucky Supreme Court recognized the possible negative consequences of permitting a child to testify in such cases (the state supreme court thus overruled this aspect of *Coleman* in deciding *Addison*). In addition to the negative psychosocial impact from testifying, the circuit court may exclude children from testifying because of the lack of probative value of their testimony. Ms. Addison allegedly facilitated negative impressions of Mr. Addison with the children and the children’s counselors. She interfered with his relationship with them and may have exaggerated benign encounters into sexual abuse allegations. These actions subjugated the children to countless interviews, investigations, medical examinations, and therapy for sexual abuse. The circuit court may have believed that the children’s testimonies would have been so tainted as to be unhelpful, and therefore decided to exclude them from testifying. In addition, the court can review other sources of information to determine the child’s wishes. It is incumbent on the court to protect the child from unnecessary embarrassment or harassment (best-interests doctrine applied to a courtroom setting). Although a child may have the ability to testify competently, the child should not automatically be made to testify if the provision of testimony is likely to be psychologically harmful.

Disclosures of financial or other potential conflicts of interest: None.