

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002395-ME

BONITA SHAIN

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 98-FC-001467

THOMAS BURNETT

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

BARBER, JUDGE: Appellant, Bonita Burnett Shain (Shain), appeals the order of the Jefferson Family Court granting custody of her minor children to her ex-husband, Appellee, Thomas Burnett (Burnett). The family court's ruling is affirmed.

Burnett filed for dissolution of the parties' marriage in 1998. After a custody hearing, Shain was granted custody of the parties' minor children with Burnett to have extensive visitation due to the young age of the parties' children. Later, problems arose between the parties. Burnett was

incarcerated for violation of a domestic violence protective order. As a result of his actions, Burnett was allowed only supervised visitation with the children conditional upon completion of parenting classes, and Domestic Violence Offender Treatment Programs. An evaluation of the parents conducted in September, 1999, stated that both parties were contentious, and that the relationship between the parties included repeated domestic violence on the part of Burnett. Burnett has an ongoing problem with alcoholism. The same evaluation noted that Shain was found to be impeding the children's relationship with Burnett by encouraging the children to think badly of him.

The court granted Shain custody, but encouraged increased visitation with Burnett upon completion of parenting classes. In April, 2001, the court held a hearing on visitation. Burnett was given visitation in accordance with recommendations of the child's therapist. In January, 2002, the court held another hearing. At the hearing it was determined that no visitation had taken place, and that the parties and the child's therapist had not been able to agree upon visitation. In February, 2002, Burnett's visitation with the children was suspended when he showed up under the influence of alcohol for a visitation. Burnett was required to attend treatment for alcoholism and parenting safety prior to the resumption of visitation. In March, 2002, the court again provided for

supervised visitation between Burnett and the children. In July, 2002, the court held another hearing. At that hearing it was stated that Shain believed Burnett had sexually abused the oldest child. The child's therapist testified that she was treating him for sexual abuse. Shain later contended that the individual supervising visitation had physically abused the child and left him with bruises. The court ordered that the child's therapist be replaced, as concerns were expressed about the validity of the sexual abuse charges. The court took no action on the claim that the social worker supervising the visitation had bruised the child. The charges of sexual and physical abuse of the child were unsubstantiated.

The parties had ongoing conflict regarding visitation with the children. In October, 2003, Burnett made a motion that the children be placed in the temporary custody of his relatives Shelby and Gary Hadley. The trial court held a hearing on that motion. Testimony from Ms. Luttrell, a social worker in the case who had supervised visitation with the children, was to the effect that Shain was alienating the children from Burnett. Following the hearing, the court ruled that "the current environment may seriously endanger the children's physical, mental, moral or emotional health and orders the children to be removed and placed temporarily in the care of Shelby and Gary Hadley, effective immediately." This was a temporary order.

Shain contends that the evidence presented at the hearing did not support the court's ruling. Shain contends that there was insufficient evidence to support removal of the children, and that the court's actions were an abuse of discretion. Burnett contends that the temporary removal order is not on appeal. Burnett argues that the court properly applied the law in determining temporary custody should be placed with a non-parent. The statute permits the court to enter temporary custody orders for the safety and protection of the children. KRS 403.280(1). The court must apply a "best interests" of the children analysis in making such a temporary custody determination. Id. The record shows that the court held a hearing and heard from witnesses before making the temporary custody determination. There has been no showing that this order was clearly erroneous. Under the circumstances, that order, which has long since expired, does not constitute reversible error.

In response to the court's order, Shain took the children and lived in hiding for seven months. During that time, Burnett was not allowed any contact with the children and had no knowledge of their location or their safety. Shain was eventually found and arrested, and the children were placed with the Hadleys. Shain served several months incarceration. Shortly after the children were placed with the Hadleys, Burnett

and his wife took physical custody of the children without seeking court approval. Shain was permitted visitation with the children in accordance with the court's orders.

Burnett made a motion in August, 2004, asking that he be named custodial parent of the children. After a hearing, the court entered a new custody order providing that the children be placed with Burnett as custodial parent. Shain argues that this ruling was in error. The court entered an order mandating that there be no corporal punishment of the children. Burnett defied that order, as the court noted in the order of October 28, 2004. Shain continues to assert that Burnett abused the children. The court found no evidence of such abuse. The court held that the allegations were unfounded and constitute evidence that Shain is attempting to interfere with Burnett's relationship with the children.

A child custody/visitation evaluation was made of Shain in March, 2004. She was evaluated as having a good relationship with the children, and a reasonable knowledge of parenting skills. The evaluation of the children revealed continuing physical abuse by Burnett in violation of court orders mandating no corporal punishment of the children. Despite that finding, the evaluation found that the children were well integrated into school, the neighborhood, and Burnett's home. The evaluation also found a need for the

children to have continued counseling. The recommendation of the guardian *ad litem* and the counselor was that Burnett be given custody and Shain be provided with regular unsupervised visitation.

KRS 403.270 provides factors to be considered in making a child custody determination. Shain contends that the court's action, removing the children from her sole custody and giving sole custody to Burnett, was unsupported by the evidence in the record. Burnett asserts that the trial court's decision giving custody to Burnett was proper. He claims the court's decision to modify the initial custody award is supported by sufficient evidence. KRS 403.340(3) permits modification of an award of custody where "a change has occurred in the circumstances of the child or his custodian" and such modification is necessary for the best interests of the child. A custody determination will not be reversed absent a showing that the decision is clearly erroneous. Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986). Burnett asserts that Shain has failed to make such a showing.

The trial court was within its discretion in modifying the initial custody award where the parents failed to cooperate and the record contains evidence of the harm their actions caused the children. Such modification is permitted by law. Scheer v. Zeigler, 21 S.W.3d 807, 814 (Ky.App. 2000). The trial

court held numerous hearings in this case, and based its determination on the testimony of the parties, the children, and various mental health professionals and social workers involved in the case. The law mandates that "we must affirm the trial court's factual findings unless clearly erroneous, and due regard must be given to the opportunity of the trial judge to view the credibility of the witnesses." Polley v. Allen, 132 S.W.3d 223, 227 (Ky.App. 2004). Shain has failed to show that the court's ruling was clearly erroneous. For this reason, the ruling is affirmed.

MINTON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT.

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BRIEF FOR APPELLEE:

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