

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001634-ME

DARYL GLENN SHULTZ

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 01-FC-003906

MELISSA ANN SHULTZ
(NOW ELLINGSWORTH)

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

STUMBO, JUDGE: Daryl Shultz is appealing an order of the Jefferson Circuit

Court, which denied him visitation rights to his minor child. He argues that he

¹ Senior Judge Ann O'Malley Shake, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

should be allowed visitation with his child and that the trial court erred in not holding a hearing on the matter. We find no error and affirm.

Shultz is currently incarcerated. A previous order of the trial court held that before Shultz would be allowed visitation with his child, he would have to complete a Sexual Offender Treatment Program (SOTP) provided by the Kentucky Department of Corrections (DOC). Shultz applied for the program, but was denied entry. He was informed that he was denied acceptance into the program because he was not within four years of parole eligibility. Shultz then moved to be allowed visitation and informed the trial court that by the time he was eligible to participate in the SOTP, his child would be an adult. The trial court denied the motion and this appeal followed.

KRS 197.400 to KRS 197.440 require that the DOC operate a “specialized treatment program for sexual offenders.” To comply with these provisions, the DOC created the SOTP KRS 197.410(2)(a) and (b). KRS 197.420(1) grants the DOC “the sole authority and responsibility for establishing by regulation the design of the specialized program created in KRS 197.400 to 197.440.”

Seymour v. Colebank, 179 S.W.3d 886, 888 (Ky. App. 2005).

The trial court denied Shultz’s motion for visitation because he had not completed the SOTP or shown that it would be impossible for him to enroll. We agree with the trial court. The record reflects that priority for the SOTP is

given to inmates within four years of their possible release date. This is set forth under the DOC's Corrections Policies and Procedures 13.6. That policy states that priority is given to certain inmates; however, it does not say that only those inmates within four years of possible release are eligible. This suggests that Shultz might still be able to enroll in the program. Since the legislature allowed the DOC to regulate the SOTP as it sees fit, we cannot say this priority policy is impermissible.

If, however, he can provide additional proof that it would be impossible for him to enroll in the program before the four-year priority term, such as a notice of ineligibility with some indication of the DOC's reasoning from the prison or an SOTP officer, then he can present that proof to the trial court and move to modify his visitation pursuant to KRS 403.320. Assuming that Shultz is able to prove it will be impossible for him to comply with the court's order regarding the SOTP, the trial court should then reconsider its decision. This case is analogous to cases like *Robey v. Winn*, 453 S.W.2d 763 (Ky. 1970), *Blakeman v. Schneider*, 864 S.W.2d 903 (Ky. 1993), and *Crowder v. Rearden*, 296 S.W.3d 445 (Ky. App. 2009). These cases deal with a party's inability to comply with a court order and the court charging them with contempt. These cases hold that a court cannot punish a party with contempt for failure to perform an act which is impossible. Although Shultz is not being charged or even threatened with contempt, forbidding visitation due to his inability to complete an impossible act can be seen as a form of punishment. However, even if Shultz is able to provide

evidence his compliance with the court ordered SOTP would be impossible, the trial court could still find it would not be in the child's best interest to have visitation with him. That, however, is a question for a later date.

Shultz also argues that the trial court erred in not holding a hearing before it denied his motion to modify visitation. He does not challenge the court's power to order completion of SOTP training. Therefore, no hearing was required until that condition was met or set aside. *See Hornback v. Hornback*, 636 S.W.2d 24 (Ky. App. 1982).

Based on the above, we affirm the order of the Jefferson Circuit Court.

THOMPSON, JUDGE, CONCURS.

SHAKE, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Arthur W. Chalmers
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