

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001646-ME

SHAWNA SHANDEL BRADFORD

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE WAYNE THOMAS LIVELY, JUDGE
ACTION NO. 13-CI-00185 AND 13-CI-00172

JAMES HAMPTON JOHNSON

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

JONES, JUDGE: The Appellant, Shawna Bradford (“Shawna”), brings this appeal from an Order of the Harlan Circuit Court, awarding the Appellee, Jamie Johnson (“Jamie”), sole custody of the parties’ minor child, G.J. For the reasons more fully explained below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Jamie and Shawna, who were never married, have one child in common, G.J. Jamie and Shawna were not together when G.J. was born. For the first two years of his life, G.J. lived with Shawna in Banner Fork, Kentucky; however, Jamie was involved in G.J.'s life during this time. After two years apart, Jamie and Shawna reconciled and lived together with G.J. for the next three years.¹ This arrangement ended on March 22, 2013, after a dispute between the two resulted in Shawna leaving. Thereafter, the parties operated without a formal custody agreement until Jamie filed an emergency protective order ("EPO") against Shawna and sought sole custody of G.J. In response, Shawna filed an action for joint custody.²

On April 15, 2013, the court held a hearing to consider the EPO filed by Jamie. The Court dismissed Jamie's motion for EPO, entered a temporary joint custody order, and referred the matter to the Harlan Circuit Court Domestic Relations Commissioner ("DRC"). The DRC heard the matter on June 12, 2013.³ After the hearing, the DRC determined that joint custody was unworkable due to the parents being unable to cooperate with each other and recommended that Jamie

¹ Jamie's other two children from a previous marriage and Shawna's other son from a previous relationship also lived with the couple during this time.

² These civil cases were later consolidated.

³ Numerous witnesses testified at the hearing, which lasted over five hours.

be awarded sole custody.⁴ Shawna filed exceptions to the DRC's proposed findings of fact and conclusions of law.

The Harlan Circuit Court Judge, the Honorable Dan Ballou, heard the exceptions. On May 19, 2014, he rendered an order overruling the exceptions. However, he did make modifications to the DRC's recommended order as related to visitation.⁵ For unknown reasons, the Clerk of Court did not enter the Circuit Court's order into the record until July 24, 2014, over two months after the court had rendered it.

Prior to entry of the order, Shawna filed renewed exceptions to the DRC report. Shawna also changed counsel in between the time Judge Ballou signed the order and the Clerk entered it. Shawna's new counsel, Marcia Smith, had a conflict of interest with Judge Ballou. As a result, Judge Ballou recused. On June 4, 2014, this matter was reassigned to Honorable Judge Wayne Lively.

After the Clerk entered Judge Ballou's previous order, on July 24, 2014, Shawna filed a CR⁶ 59 Motion to Alter, Amend or Vacate the Order along with a verified transcript of the DRC hearing. A few days later, Shawna filed a supplement to her motion explaining that in the year since the DRC hearing, the parties had been able to work together concerning custody and visitation matters

⁴ Although the DRC heard the matter on June 12, 2013, the order was not filed until nearly ten months later on April 1, 2014.

⁵ The modifications consisted of adding an additional day of visitation and setting a precise location where the parties were to meet to exchange the child for visitation.

⁶ Kentucky Rules of Civil Procedure.

making joint custody a feasible option. Shawna also argued that the Order should be modified with respect to a holiday schedule and that the written order was not in conformity with Judge Ballou's verbal ruling following the May 1, 2014, hearing.

Judge Lively heard these matters at a hearing on August 15, 2014.

Shawna argued that the parties should have joint custody and this was not the type of case where sole custody was appropriate. She argued that the parties, through counsel, had been able to agree upon summer visitation, and other issues. The parties discussed that they had disagreed about whether their child should change schools and whether he should repeat kindergarten, but since Judge Ballou had verbally ruled on May 1, 2014, that Jamie had sole custody, Jamie had changed the child's school to Ross Elementary to repeat kindergarten for the 2014-2015 school year. Shawna, by counsel, argued that it was not in the child's best interests to repeat kindergarten, that his teacher had recommended that he start first grade, that the child was upset about changing schools, and alleged that this was done because Jamie's ex-wife/current girlfriend would be the child's kindergarten teacher at Ross Point. Jamie argued that the child needed to repeat kindergarten because he had so many absences, 16.5 days of which 7.5 were unexcused.

Following the hearing, Judge Lively found that Jamie should retain sole care, custody, and control of the child for all of the reasons in the DRC's proposed Judgment and added the additional fact that at the hearing, the parties could not agree where the child should attend school or whether the child should repeat kindergarten. Judge Lively stated that he had come to court thinking he

would change to joint custody, but since he found out the parties could not even agree on whether the child should repeat kindergarten, he was going to leave sole custody with Jamie because “someone has to have the final say.” This order was entered on September 26, 2014. This appeal followed.

II. STANDARD OF REVIEW

The standard of review for any custody determination is well-established:

Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and the correct law is applied, a family court’s ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court’s decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Coffman v. Rankin, 260 S.W.3d 767, 770 (Ky. 2008)(quoting *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005)).

III. ANALYSIS

Shawna contends that the court erred by awarding Jamie sole custody.

Shawna contends that both the DRC and the trial court applied the wrong legal standard in determining whether sole or joint custody should be granted, and that the uncontested evidence of this case supports an award of joint custody.

KRS 403.270 governs initial custody determinations and provides that the “court shall determine custody in accordance with the best interests of the child.” In so doing, the court shall “consider all relevant factors” and shall specifically consider:

- (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.

KRS 403.270 mandates that custody be determined according to the best interests of the child and the best interest determination is an issue of law decided by the court. *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). It is incumbent upon the court to specifically set forth the best interests of the child in

the custody order. The failure of a circuit court to do so constitutes reversible error. While cooperation between the parents is a relevant factor, our Supreme Court in *Squires v. Squires*, 854 S.W.2d 765, 768-769 (Ky. 1993), observed:

While we have no doubt of the greater likelihood of successful joint custody when a cooperative spirit prevails, we do not regard it as a condition precedent. To so hold would permit a party who opposes joint custody to dictate the result by his or her own belligerence and would invite contemptuous conduct...To require goodwill between the parties prior to an award of joint custody would have the effect of virtually writing it out of law.

The *Squires* Court went on to describe how a trial court should determine whether to grant sole or joint custody:

Initially, the court must consider those factors set forth in KRS 403.270(1). By application of these, the child whose custody is being litigated is individualized and his or her unique circumstances accounted for. In many cases, appropriate consideration of KRS 403.270(1) may reveal the result which would be in the child's best interest. Thereafter, we believe a trial court should look beyond the present and assess the likelihood of future cooperation between the parents. It would be shortsighted to conclude that because parties are antagonistic at the time of their divorce, such antagonism will continue indefinitely. Emotional maturity would appear to be a dependable guide in predicting future behavior. By cooperation we mean willingness to rationally participate in decisions affecting the upbringing of the child. It should not be overlooked that to achieve such cooperation, the trial court may assist the parties by means of its contempt power and its power to modify custody in the event of a bad faith refusal of cooperation. *Benassi v. Havens*, Ky.App., 710 S.W.2d 867 (1986); *Erdman v. Clements*, Ky.App., 780 S.W.2d 635 (1989).

Squires, 854 S.W.2d at 769. The Court concluded that in every case, the parties are entitled to an individualized determination of whether joint custody or sole custody serves the child's best interest.

Shawna contends that the family court did not apply the correct legal standard in deciding to award sole custody to Jamie. The DRC made the following, relevant, findings of fact and conclusions of law:

1. Both parents are hard-working people. Shawna works three regular twelve-hour shifts per week as a "nursing service clerk" at Harlan Appalachian Regional Hospital, and in the weeks leading up to the hearing, she was working four to six twelve hour shifts. Jamie has been an underground coal miner continuously since 1992, with the sole exception of a six-month lay-off from June 2012, through the first of this year. He has his mine foreman papers. Given their respective schedules, both have help from family and others in caring for the Child. Both parents have nice homes, and each loves the child.
2. Suffice it to say the hearing produced a barrage of accusations and denials, only one of which merits serious consideration. The essence of the parties discord – and the reason Jamie asked Shawna to leave in March- is Shawna's "anger problem," manifested by her acting out in seemingly uncontrollable, sometimes cursing, tirades against Jamie. And this behavior in [G.J.]'s presence lies at the heart of their dispute over his custody. While it is fair to say most adults in the midst of domestic disputes do argue, and often caustically, the evidence presented shows Shawna's rages are disturbingly intense, and by her own admission she probably needs professional help in keeping herself under control. Shawna admits sending Jamie the following message after one of the arguments: "I love you and I am sorry for all the things I've said. I'm mad and I'm hurt and I don't know – that doesn't change the way I feel. But I am – I know I need some kind of counseling or something, because I can't deal

with this all by myself. I'm such a bad mom, and that's not the person I want to be. I have too much making up to [sic] my kids. I'm sorry and I hope you understand and when you cool off you'll change your mind. Please forgive me and I am going to apologize to [G.J.] and talk to him because I know I hurt my baby. I'm so sorry. I have nobody and I just get mad."

3. Next, and far more disturbing, are the events unfolding immediately after the couple's March 22 breakup. As noted Jamie asked Shawna to leave his house, and she did so without the child. In the days that followed, Shawna returned to Jamie's house "two or three" times urging the child to go home with her, and he refused. It was evidently on one of these returns, on March 24, 2013, that Jamie recorded a conversation with Shawna. The recording consists of about three minutes of Shawna's screaming vile obscenities at Jamie, relentlessly, and in the presence of the Child as well as in the presence of Jamie's mother and father.
4. On the 26th, Shawna's Aunt Bonita Duncan contacted Jamie and asked that the child be allowed to visit his mother. Jamie complied, but on condition that should the child begin crying to leave, Jamie would come get him. However, once the child was in Shawna's custody at Wallins, Shawna promptly blocked her cell phone from receiving calls from Jamie, ostensibly to cut off communication between the boy and his father.
5. On the 29th, Jamie packed the few remaining things Shawna had left at his house and took them to the home of Shawna's mother, Donna Duncan, in Wallins. On arriving, Ms. Duncan invited him inside and told him Shawna was out. The child ran to Jamie asking to go to the Huddle House for breakfast. Jamie agreed and put the child in his vehicle. In what seems like a planned attack, Shawna's sister drove up behind Jamie and blocked the driveway exit. Likewise, Shawna materialized in her car and blocked the main road out of Wallins Creek. Shawna, her mother and her sister began beating on Jamie's vehicle and cursing him Shawna threatened to kill him. [G.J.] was frightened by the scene

and began crying. To stop the melee and try to calm the child, Jamie turned him over to Shawna and left. Jamie called the police and later obtained an EPO against Shawna along with custody of the child, in Harlan District Court.

6. Otherwise, Shawna called several of her co-workers to testify on her behalf. Their testimonies were all about the same; none of them witnessed Shawna taking her anger out on anyone; all of them witnessed Shawna becoming visibly upset whenever she talked on the phone with Jamie. Shawna also called her aunt Bonita Duncan. Ms. Duncan opined that it would be in the Child's best interest to be with his mother, but she believed that to be true in all cases involving young children.
7. In summary, Shawna's demonstrated behavior in [G.J.]'s presence has likely been a detriment to the child's health and well-being and certainly will be if the current situation continues.

CONCLUSIONS OF LAW

Having reviewed this matter considerably, the undersigned concludes and recommends that the following is in the best interest of the child:

1. That his father, Jamie H. Johnson, have sole custody, care and control of him – joint custody, which requires a degree of parental cooperation, being clearly unworkable here.
2. That his mother, Shawna Bradford, have the Court's standard visitation, subject to and with particular emphasis on these factors
3. Otherwise, neither parent shall make any disparaging remarks about the other in the child's presence or under circumstances the child may likely hear such remarks.

Our review of the record leads us to conclude that the DRC and the family court based their decision to award sole custody upon the proper factors

listed in KRS 403.270(2). The DRC heard extensive testimony from both parties as well as other lay witnesses, and the DRC concluded that giving sole custody to Jamie was in the child's best interest. *See* KRS 403.270(2).

As to Shawna and Jamie's ability to cooperate, the DRC found that joint custody, which requires a degree of parental cooperation, was clearly unworkable here. The family court adopted the DRC's recommended order, adding that it had intended to grant joint custody, however the parties could not even agree on whether the child should repeat kindergarten. The family court was in the best position to resolve the conflicting evidence and make the determination of what was in the child's best interest, we cannot say that it failed to do so within the mandate of KRS 403.270.

Shawna's second argument is that the trial court's order should have been consistent with the oral ruling following the May 2014 hearing. As a general rule, however, an oral pronouncement is not a judgment until it is reduced to writing. *Commonwealth v. Hicks*, 869 S.W.2d 35, 37 (Ky. 1994)(overruled on other grounds by *Keeling v. Commonwealth*, 381 S.W.3d 248 (Ky. 2012)). Hence, when there is a conflict between oral pronouncements and a written order, the written order controls. *Id.*; *see also Commonwealth v. Taber*, 941 S.W.2d 463, 464 (Ky. 1997). As such, we find no error.

IV. CONCLUSION

For the foregoing reasons, the order of the Harlan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marcia A. Smith
Corbin, Kentucky

BRIEF FOR APPELLEE:

Russell D. Alred
Harlan, Kentucky

James Hampton Johnson
Harlan, Kentucky