

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002187-ME

AND

NO. 2007-CA-001599-ME

SHARON COMPTON

APPELLANT

v. APPEALS FROM BOONE CIRCUIT COURT
HONORABLE DAVID MELCHER, SPECIAL JUDGE
ACTION NO. 02-CI-00663

JASON COMPTON

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,¹ SPECIAL JUDGE.

ROSENBLUM, SPECIAL JUDGE: Sharon Compton appeals the Findings of Fact, Conclusions of Law, and Judgment entered September 13, 2006 by the Boone Family Court granting Jason Compton supervised visitation with the parties'

¹ Retired Judge Paul W. Rosenblum presiding as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution.

daughter, K.C. In addition, Sharon Compton appeals the order entered July 6, 2007 overruling her motion for relief pursuant to Kentucky Civil Rule 60.02 (f) as well as her motion to sanction the guardian ad litem and terminate his appointment and supplement the record.

Sharon Compton married Jason Compton on August 11, 2001. On February 10, 2002, the couple's daughter, K.C., was born. The couple separated in February 2002. A petition for dissolution of marriage was filed in May 2002. In December 2002, the couple entered into a mediation agreement that established joint custody and equal parenting time of their daughter. The decree of dissolution of marriage was entered April 2003. Sharon also has another daughter, K.R., by a prior relationship.

On December 26, 2003, Jason went to Sharon's home to pick up K.C. for a scheduled visit. Sharon claims that Jason threw K.C. into his car and then shoved and punched Sharon. Jason disagrees with Sharon's version of the facts. Jason claims that as he put K.C. into a car seat Sharon tried to pull K.C. out of the car. Jason does, however, admit that a shoving match ensued between Sharon and him. On January 5, 2004 a two year domestic violence order issued against Jason.

The same day, on December 26, 2003, Sharon took K.C. to St. Luke Hospital where she claimed that K.C. had been sexually abused. A vaginal exam was performed that indicated that K.C. had not been sexually abused. Then on January 21, 2004, Sharon called K.C.'s pediatric physicians. She stated that after K.C. resumed visitation with Jason her pupils were dilated and she acted lethargic.

On January 26, 2004, Sharon called the pediatricians' office again and requested that K.C. have tests to determine if she had been given any over the counter medications such as Benadryl or cough medicine. On January 30, 2004, Rose Hemsath, Sharon's mother, went to the pediatricians' office and requested documentation that Sharon could use in a custody proceeding by specifically requesting documentation concerning child abuse by Jason.

On February 4, 2004, Sharon called the pediatricians' office to report that K.C. was sexually abused by her father. The same day, Sharon and her mother took K.C. to Children's Hospital in Cincinnati, Ohio, where Sharon told physicians that she was concerned that Jason had sexually abused K.C. She claimed that upon returning from a visit with Jason two days earlier that K.C.'s genital area appeared red. Dr. Cathy Gouldin performed vaginal and rectal examinations and concluded that both areas appeared normal and was unable to determine if sexual abuse had occurred.

On February 29, 2004, Sharon and her mother again took K.C. to Children's Hospital with another complaint. They claimed that after visiting Jason earlier that day K.C. returned home with redness in the diaper area. An examination was performed and the treating physician found mild vulvar erythema and diagnosed K.C. with vulvitis, otherwise known as diaper rash. Sharon was told to treat the condition with sitz baths, air and desitin.

Due to the sexual abuse allegations against Jason, the court ordered a custody evaluation to be performed by psychologist Dr. Edward J. Connor. Dr.

Connor's report, dated June 1, 2004 concluded that Sharon's accusations against Jason appeared to be false. His report further stated that subjecting K.C. to multiple vaginal examinations could be damaging to K.C. According to a supplemental report prepared by Dr. Connor, dated September 1, 2004, K.C. had undergone fourteen vaginal exams.

On December 14, 2004, Sharon filed a motion in Boone Family Court seeking to terminate or restrict Jason's visitation rights based upon an allegation of sexual abuse upon K.C. The Court's order of December 14, 2004, made no findings of sexual abuse, but ordered that Jason's visitation be supervised.

The court appointed another psychologist, Dr. Stuart Bassman, to perform a forensic sex abuse assessment. Dr. Bassman's report, dated June 20, 2005, stated that, "overall, we do not see K.R.'s credibility as firmly established." (T.R. 421). Dr. Bassman noted, "K.R. is reported as saying in one of her CAC interviews that her mother told her to 'tell the truth because if Mommy goes to jail she'll never go back and Jason could hurt me again.'" (T.R. 420) Dr. Bassman's report also noted that K.R., "[i]s reported to have indicated on her CAC interview that she knew certain alleged events had occurred 'because my mommy told me' and said 'mamaw' in response to a question about how she knew something else occurred." (T.R. 420). Dr. Bassman concluded, "so uncertain is the evidence for or against the contention that Jason sexually abused the children that we have determined that we cannot fairly conclude that the children were or were not

victims of sexual abuse, nor that Jason was a perpetrator of sexual abuse.” (T.R. 444).

On November 23, 2005, Sharon took K.C. to her pediatricians’ office and once again alleged that K.C. had been sexually abused by her father. The pediatricians’ report stated there was suspected sexual abuse. The report further stated that Sharon was directed to take K.C. to Children’s Hospital or the Mayerson Center for Safe and Healthy Children (Mayerson Center). Sharon incorrectly reported to the court that the pediatricians’ office confirmed sexual abuse. Further, she failed to report that examinations conducted on November 23, 2005, at both Children’s Hospital and the Mayerson Center for Safe and Healthy Children resulted in normal findings.

Eight days later, on December 1, 2005, Sharon took K.C. to Children’s Hospital and the Mayerson Center again. Sharon claimed that she was still concerned about rectal bruises and requested another exam. Children’s Hospital refused Sharon’s request noting that “[i]n light of normal medical exam last week and no concerns of an abusive incident in the meantime, no exam was performed today” (398-99).

By December 19, 2005, Sharon filed two criminal complaints against Jason alleging sexual abuse of K.C. Both complaints were dismissed. Sharon had also contacted the state police and claimed that Jason sexually abused both her daughters, K.R. and K.C. The state police investigated Sharon’s claims and a special prosecutor was appointed to the case. After a review of the state police

investigation, the special prosecutor concluded that the case did not merit prosecutorial action.

Since 2003, Sharon subjected K.C. to over sixteen vaginal examinations. Although none of the examinations conclusively indicated that K.C. was sexually abused, Sharon continuously claims K.C. told her that Jason hurt her and that she was afraid of him. Sharon claims that both K.R. and K.C. exhibited behavior indicative of sexual abuse. She claims that K.R. acts out sexually by “humping and masturbating”. Sharon also claims that K.C. said that Jason “hurt her pee pee”, inserted her hand into her underwear and rubbed her genitals.

This series of allegations are not the only accusations of sexual abuse made by Sharon. In 2000, Sharon took K.R. to the St. Luke Hospital Emergency Room claiming that K.R.’s biological father, Rick Rodriguez, sexually abused her. At the time, Sharon and Rick were engaged in a custody dispute over K.R. Then in 2001, Sharon took K.R. to St. Luke Hospital again and complained that K.R.’s perineum was red and alleged that she had been sexually abused by an unnamed older male cousin. Dr. Robert A. Hudepohl, the emergency room physician, did not find any indication that K.R. had been sexually abused and recommended that K.R. abstain from bubble baths.

Sharon contends that the trial court erred by granting Jason supervised visitation. She contends that the trial court should only have granted visitation to Jason contingent upon his completion of a state-certified domestic violence perpetrator treatment program and a sex offender treatment program and upon a

finding that any visitation would be in K.C.'s best interest and that such visitation be therapeutically supervised. She further contends that the trial court erred by denying her motion for relief from judgment pursuant to Kentucky Civil Rule 60.02 (f) as well as her motion to sanction the guardian ad litem and terminate his appointment and supplement the record.

We first address Sharon's claim pertaining to the trial court's grant of supervised visitation. Circuit Courts may modify visitation if the court finds that visitation would seriously endanger the child's physical, mental or emotional health. KRS² 403.320 (1). Further, "upon request of either party, the Court shall issue orders which are specific as to frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child." KRS 403.320 (1).

If a court's decision as to visitation is clearly erroneous in light of the facts we must reverse the decision. *Drury v. Drury* 32 S.W. 3d 521 (Ky. App. 2000). "[T]his Court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Id.* at 525, *quoting Wilhelm v. Wilhelm*, Ky., 504 S.W.2d 699, 700 (1973). A trial court has not abused its discretion unless its decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W. 3d 258, 272 (Ky.App. 2004).

² Kentucky Revised Statutes.

A review of the record reflects that the majority of evidence indicative of sexual abuse was presented by the testimonies of Sharon and her family members. Testimonial evidence presented by Jason and his family members seems to disprove the abuse allegations. Here, the trial court reasoned that neither party proved that sexual abuse did or did not occur. The court noted that although none of the physical examinations indicated sexual abuse, physical evidence of sexual abuse does not always exist. The trial court further noted, “There has been no testimony of any expert to indicate that K.C. has been traumatized or is suffering psychological difficulties as a result of conduct allegedly committed by Father.” (Order, T.R. 677). The trial court found K.R.’s statements, “Mommy told me,” and “Mammaw told me”, to be very disturbing. The court concluded, “Both Parties presented evidence that concerns this Court. It is a tragedy to allow a child contact with a sexual abuser. It is also a tragedy to deny a Father meaningful contact with his child if he is not a sexual abuser”. (Order, T.R. 680).

Our review of the record indicates that there is substantial evidence in the record to support the trial court’s findings. Furthermore, we do not believe that the trial court’s determination granting Jason supervised visitation constitutes a manifest abuse of discretion. Clearly the trial court was faced with a most difficult case and the mandated supervised visitation is a reasonable outcome designed to protect K.C.’s welfare.

Sharon also alleges that the trial court erred when it refused to admit testimony from Sharon, her mother and brother about disclosures made by K.R.

and K.C. concerning physical and sexual abuse by Jason. Sharon claims that the court erred in ruling that the statements were hearsay under KRE³ 803 and that the statements do not fall within the KRE 803 exceptions (1), (2), or (3). Although such statements may fall within those exceptions, a thorough review of this issue is not possible because the videotape containing the relevant avowal testimony was not submitted for this court's review. Kentucky Courts have consistently held that an appellant has a duty to insure that the record on appeal is complete.

Commonwealth, Dept. of Highways v. Richardson, 424 S.W.2d 601, 603

(Ky.1968). To the extent the record is incomplete, we must presume the omitted portion of the record supports the trial court's order. *Id.* at 603.

Next, Sharon claims that the trial court erred by denying her CR⁴ 60.02 (f) motion for relief as well as her motion to sanction the guardian ad litem and terminate his appointment and supplement the record. Specifically, Sharon claims that the court appointed guardian ad litem, Honorable Thomas Willenborg, labored under a conflict of interest because of his representation of Dr. Connor in Dr. Connor's own divorce case. Sharon contends that Mr. Willenborg valued his relationship with Dr. Connor more than the welfare of his current client, K.C. Sharon also argues that Mr. Willenborg failed to disclose this relationship during the pendency of his guardian ad litem representation.

We must review a court's decision on a CR 60.02 motion under an abuse of discretion standard of review. *Bethlehem Minerals Co. v. Church and*

³ Kentucky Rules of Evidence.

⁴ Kentucky Rules of Civil Procedure.

Mullins, Corp., 887 S.W.2d 327, 329 (Ky. 1994). “Relief under CR 60.02 (f) is available where a clear showing of extraordinary and compelling inequities is made.” *Bishir v. Bishir*, 698 S.W.2d 823, 826 (Ky. 1985). When making this determination, courts must consider two factors; “(1) whether the moving party had a fair opportunity to present his claim at the trial on the merits, and (2) whether the granting of CR 60.02 (f) relief would be inequitable to other parties.”

Bethlehem, supra; *Fortney v. Mahan*, 302 S.W.2d 842 (Ky. 1957).

The circuit court order denying Sharon’s CR 60.02 motion, entered July 6, 2007, noted that the guardian ad litem’s sole concern was the best interest of K.C. The court found that the guardian ad litem complied with all applicable rules and regulations associated with his duties. We note that no authority in Kentucky exists for the appointment of a guardian ad litem in a child custody case. It is also significant that Dr. Connor was not being represented by Mr. Willenborg at the time of the trial herein on March 8-10, 2006. The trial court’s determination that, “no reason of an extraordinary nature justifying relief under CR 60.02 (f) has been established” does not constitute an abuse of discretion. Nor does the trial court’s order with respect to the motion filed June 28, 2007 constitute an abuse of discretion.

Accordingly we affirm the trial court’s Findings of Fact, Conclusions of Law, and Judgment entered September 13, 2006 as well as the order entered July 6, 2007.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Richard Ducote
Metairie, Louisiana

Jeffrey Otis
Covington, Kentucky

BRIEF FOR APPELLEE:

Robert W. Carran
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