

JAMES ENGLAND

*

NO. 2017-CA-0493

VERSUS

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COURT OF APPEAL

ALINA JULIA ENGLAND

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

* * * * *

CONSOLIDATED WITH:

CONSOLIDATED WITH:

JAMES ENGLAND

NO. 2017-CA-0498

VERSUS

ALINA JULIA ENGLAND

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-06137 C\W 2017-02261, DIVISION "D"
Honorable Nakisha Ervin-Knott, JUDGE

* * * * *

Judge Marion F. Edwards, Pro Tempore

* * * * *

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Marion F. Edwards, Pro Tempore)

LOBRANO, J., CONCURS IN PART, DISSENTS IN PART, AND ASSIGNS REASONS.

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JUDGMENT VACATED IN PART AND AMENDED, AND AS

AMMENDED, AFFIRMED

MARCH 2, 2018

In this child custody case, the appellant, Alina England, seeks reversal of the district court's March 30, 2017 judgment awarding the appellee, James England, sole custody of the couple's two young daughters, suspending Ms. England's visitation for ninety days, and ordering her to seek mental health counseling from a specific therapist. For the reasons that follow, we reverse and amend the judgment in part, and as amended, affirm the judgment.

There is a history of contentious litigation between these parties, including filings in this Court.¹ Consequently, we will limit our discussion of the facts and procedural history to what is relevant to the issues raised by this appeal.

Mr. and Ms. England were married in 2006 and divorced in 2015. They have two minor children, S.E. and C.E.² After the divorce, several petitions for protection from abuse were filed by Ms. England seeking protection from Mr. England. The first petition for protection from abuse was dismissed with prejudice after the parties agreed to a consent judgment, and the second and third petitions for protection from abuse were dismissed with prejudice by the district court after a trial. Thereafter, the district court sanctioned Ms. England, and awarded Mr. England attorney fees and costs attributable to the frivolous filing of Ms. England's second and third petitions for protection from abuse, finding that she failed to present any competent evidence to support her allegations of abuse and did not conduct a reasonable or diligent inquiry into the truthfulness of the allegations prior to filing the petitions. Throughout this litigation, Mr. England has denied

¹ See *England v. England*, 2016-0936 (La. App. 4 Cir. 6/28/17), 223 So.3d 582.

² At the time of the hearing in question held in March of 2017, S.E. was ten years old and C.E. was nine years old. Initials are used rather than full names so as to protect the privacy of the minor children who are subject to the outcome of this proceeding. See Uniform Rules, Court of Appeal, Rule 5-1 and Rule 5-2. See also La. Ch.C. art. 337 and *State in the Interest of A.S.*, 2017-0028 (La. App. 4 Cir. 5/10/17), 220 So.3d 179.

abusing the children, and maintained that Ms. England has falsely accused him and has coached the children to do the same.

On March 17-18, 2016, the district court heard a motion Ms. England filed to determine history of family violence and conducted a custody hearing. After the custody hearing, the district court awarded Mr. and Ms. England joint custody and named Mr. England as the domiciliary parent in a judgment signed on March 31, 2016. The March 31, 2016 judgment ordered both parents not to “say or do anything in the presence or hearing of the child that would in any way diminish the child’s love or affection for the other parent....”

Almost a year later, on March 13, 2017, Ms. England filed a fourth petition for protection from abuse. This petition for protection alleged that on March 5, 2017, Mr. England shoved C.E. into her bed and kicked her legs for requesting food, and that S.E. had witnessed the event. Ms. England’s petition further alleged that on January 22, 2017, Mr. England pulled S.E.’s hair, kicked her, and called her an idiot; and that on February 4, 2017, Mr. England kicked S.E. in the legs. As a result, the district court issued an ex parte order of protection awarding Ms. England temporary sole custody of the children and prohibiting Mr. England from having any contact with them. The district court set Ms. England’s fourth petition for protection from abuse for a hearing on March 23, 2017 and appointed an attorney for the children.

The next day, on March 14, 2017, Mr. England filed a petition for emergency temporary custody and rule to show cause pursuant to La. C.C.P. art. 3945. That petition requested that Ms. England be limited to supervised visitation due to her harmful and alienating false abuse allegations. As it had issued an order granting Ms. England temporary custody of the children the day before, the district

court declined to issue Mr. England an ex parte order of temporary custody under La. C.C.P. art. 3945. The district court set Mr. England's rule to show cause for March 23, 2017, the same day as the hearing on Ms. England's fourth petition for protection from abuse.

On March 22, 2017, counsel for the children, LaKeisha Jefferson, filed a motion requesting that the district court conduct an in camera interview of the children pursuant to *Watermeir v. Watermier*,³ in light of their strong preferences about visitation and the alleged physical abuse. The district court set the motion for in camera interview for March 23, 2017. During a pretrial conference, counsel for Ms. England argued that the district court should hear testimony from the children. Because Mr. England's counsel did not object to the in camera interview, the district court agreed to interview the children.

Mr. England's counsel then informed the district court of the existence of a video, which purportedly proved that the allegations asserted in Ms. England's fourth petition for protection from abuse were false. The video, taken on March 3, 2017, shows S.E. using headphones with her iPad on her bed, and C.E. jumping on Mr. England's back, falling off, and hitting her shin on S.E.'s bedframe. The video shows that, seconds later, Mr. England brought C.E. some ice, and his mother brought her a fold-up scooter. C.E. left the room using the scooter as a crutch.

The district court and all counsel reviewed the video prior to the start of the in camera interviews. However, the district court did not inform the children of the existence of the video prior to interviewing them.

³ *Watermeier v. Watermeier*, 462 So.2d 1272, 1274 (La. 1985) (holding that a child's competency hearing or interview should be held in the judge's chambers in order to relieve a child from as much pressure as possible from the "glare of the courtroom" and the possibly intimidating presence of his mother and father).

C.E. was interviewed first. She testified that her father shoved her leg into her sister's bed. She further testified that the "abuse" continued in the living room, where her father kicked her shins three or four times while S.E. sat next to her on the couch, and that both girls asked him to "stop." When asked if she had ever jumped on her father's back, she said that she had not. She was specifically asked if she had ever jumped on her father's back and hit her leg on her sister's bed. She denied that happened. At this point, the district court showed C.E. the recording. After she saw it, C.E. acknowledged that she hit her leg on the bed, stating "I forgot about that." However, she maintained that she remembered hurting her leg because her father shoved her into the bed.

Next, the district court interviewed S.E, who told the court that her mother told her they were going to court because their father abuses the children, and they have to stop it. S.E. testified that her father hurts her and her sister when they ask for food. She further testified that her father shoved C.E.'s back, not her legs, causing her to hit the bed. S.E. also testified that she did not sit next to C.E. on the couch, but sat by herself at the dining room table. S.E. did not mention her father kicking C.E. as she sat on the couch, and stated that neither girl said anything to their father while he was in the living room during the alleged incident. When asked if she recalled C.E. jumping on Mr. England's back, she answered that she did not. When asked if she ever uses headphones with her iPad, S.E. stated that she only does that at her mother's house, because she does not have any headphones at her father's house. When the district court showed S.E. the video, she had an emotional breakdown and attempted to run out of the courtroom, screaming hysterically that she wanted to see her mother. At this point, the district court ended the *Watermeier* hearing.

Ms. England proceeded on her fourth petition for protection from abuse. The district court heard testimony from Dr. Neha Mehta, the medical director of the Audrey Hepburn CARE Center, Officer Bionca De'Irish of the New Orleans Police Department Child Abuse Unit⁴, Ms. England, Dr. Kristen Luscher, and Mr. England. Dr. Mehta testified that she examined C.E. on March 6, 2017. She found a "fairly large bruise" located on C.E.'s right upper shin area, and stated that the bruise was consistent with being kicked. However, on cross-examination, Dr. Mehta admitted that the injury was "non-specific for abuse" and that the injury, though consistent with being kicked, could have occurred another way. Dr. Mehta also conceded that the injury could have happened when C.E. hit her shin on the bed rail, and that the bruise could still be present if the incident that caused it took place three days prior to her examination.

Ms. England testified that when she picked the children up from school on March 6, 2017, she noticed a large bruise on C.E.'s leg, and took her to the emergency room at Children's Hospital. Ms. England further testified that she filed a protective order and the fourth petition for protection from abuse as a result of the injury.

Dr. Luscher, who provides therapy to the children, testified that the children feel compelled to report mistreatment by their father, and that she believes Ms. England orchestrated certain situations in order to fabricate mistreatment by Mr. England. Dr. Luscher opined that Ms. England's "theatrics" have a detrimental effect on the children, especially in their relationships with their father, his family,

⁴ Officer De'Irish did not provide much testimony due to the open criminal investigation into the abuse allegations. On direct examination, Officer De'Irish only stated that she was called to Children's Hospital regarding an allegation of abuse against C.E., that she saw a bruise on C.E.'s leg, and had twice attempted, unsuccessfully, to call Mr. England. When cross-examined by Jefferson, Officer De'Irish stated that she could still see the bruise on C.E.'s leg on the day of the forensic interview.

and their peers. Specifically, Dr. Luscher stated that the children told her that their mother spoke to them about things that were “too adult,” including telling them negative things about their father. Following the testimony, the district court, noting that the inconsistent allegations made by the children did not support the allegations made by Ms. England, denied the fourth petition for protection from abuse.

After the fourth petition for protection from abuse was denied, the district court heard Mr. England’s petition. Both Mr. and Ms. England testified, and the district court took judicial notice of the other testimony given during the hearing on the fourth petition for protection from abuse. Mr. England testified that Ms. England puts immense amounts of pressure on the children, and that the joint custody arrangement was not improving the circumstances. Ms. England denied speaking to the children about things that were “too adult,” despite Dr. Luscher’s statements. At the conclusion of Ms. England’s testimony, the parties submitted the case to the district court, which deferred its ruling.

Later, on March 30, 2017, after noting that the joint custody arrangement was causing harm to the children, the district court rendered judgment denying Ms. England’s petition for protection from abuse, awarding temporary sole custody of the minor children to Mr. England, suspending Ms. England’s visitation for ninety days, and ordering that following the suspension, Ms. England would be limited to eight hours of supervised visitation per week until she undergoes professional therapy with a specific therapist. Ms. England filed a timely appeal from that judgment.

LAW AND ANALYSIS

In brief to this Court, Ms. England has assigned four errors for our review. Initially, she argues that Mr. England did not meet his burden of proof that a material change in circumstances justified a change in custody.

La. C.C. art. 131 provides that; “(i)n a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child.” This article applies in actions to change custody as well as those that initially set it.⁵ However, in actions to change a custody decision rendered in a prior considered decree, the proponent of change must show that a change of circumstances has occurred such that “the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or ... that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child.”⁶ This burden of proof is imposed by the jurisprudence as a means of implementing the best interest standard in light of the special considerations present in change of custody cases.⁷ The determination of the trial court in child custody matters is entitled to great weight, and its discretion will not be disturbed on review in the absence of a clear showing of abuse.⁸

Among the factors the trial court must consider in determining the child’s best interest is the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.⁹ There is ample evidence to support the trial court’s finding that Ms. England is unwilling or unable to encourage a close and continuing relationship between the children and

⁵ *AEB v. JBE*, 99–2668 (La. 11/30/99), 752 So.2d 756, 761.

⁶ *Bergeron v. Bergeron*, 492 So.2d 1193, 1200 (La. 1986).

⁷ See Revisions Comments - 1993 (d) to La.C.C. art. 131; *AEB v. JBE*, 99–2668, 752 So.2d at 761.

⁸ *Bergeron*, 492 So.2d at 1196.

⁹ La.C.C.P. art. 134 (10).

Mr. England. Dr. Luscher testified that the children feel compelled to report mistreatment by their father. Dr. Luscher opined that Ms. England orchestrated certain situations in order to fabricate mistreatment by Mr. England. Additionally, the conflict between the video and the children's statements, and S.E.'s reaction to the video, support Mr. England's assertion that the children's mother is fabricating abuse allegations and encouraging the children to verify them.

Ms. England has subjected her children to several investigations by the New Orleans Police Department (NOPD), including late night "welfare checks" while her children were visiting with their father. The trial court also considered Ms. England's "long history of filing unverified Petitions for Protection from Abuse," including one that resulted in sanctions against Ms. England in the amount of \$95,450.19.¹⁰ The court further noted Ms. England's lack of veracity that has traversed all of the custody proceedings between these parties.

The court expressed concern that, despite all the advantages enjoyed by the children, they "internalize the belief that they hate their father and verbalize that belief to appease their mother." The court further found that Ms. England "treats her children like pawns in a devious game to prove Mr. England is a child abuser." Ultimately, the trial court determined that Ms. England's actions are "detrimental and deleterious to the children's wellbeing."

Upon review, we find no abuse of discretion in the trial court's award of temporary, sole custody to Mr. England, or in the order of supervised visitation. This assignment is without merit.

¹⁰ The decision in this award was reviewed and affirmed by this Court in *England v. England*, 2016-0936 (La. App. 4 Cir. 6/28/17), 223 So.3d 582, 590.

Ms. England's second assignment of error questions the trial court's decision to suspend her visitation rights for 90 days from April 3, 2017 to July 3, 2017. Mr. England counters that this ruling is moot as the suspension is now over. We agree.

An issue is moot when a rendered judgment or decree can serve no useful purpose and give no practical relief or effect.¹¹ Appellate courts will not render advisory opinions from which no practical results can flow.¹² Accordingly, moot questions are not considered on appeal. We find no purpose will be served in reviewing a ruling by the trial court on a suspension that has terminated and is no longer applicable. Any discussion on this issue would be pure dicta.

In her third assignment of error, Mrs. England asserts the trial court judgment is in violation of her due process rights in that the court ordered suspension of visitation rights went beyond any demand in the pleadings. Since we have ruled that the issue of the suspension of visitation is moot in that it was terminated on July 3, 2017, we find no merit in this argument.

In her final assignment of error, Ms. England argues that the trial court erred in ordering her to obtain mental health counseling by a therapist of the court's choosing. In the judgment, the district court ordered Ms. England to seek professional therapy from Betsey Backe, LSCW. In brief, Ms. England argues, "(t)here is *no* authority for a court to order that a party submit to treatment by an health care provider selected by the court-even in domestic disputes ..." (emphasis in original). Ms. England does not contest the authority of the court to order counseling; rather she points out that typically a court orders a parent to seek

¹¹ *Cat's Meow, Inc. v. City of New Orleans Through Dept. of Finance*, 98-0601 (La. 10/20/98), 720 So.2d 1186, 1193.

¹² *Enmon Enterprises, LLC v. City of New Orleans ex rel. New Orleans Aviation Bd.*, 2015-0763 (La. App. 4 Cir. 5/4/16), 194 So. 3d 709, 711, *writ denied sub nom. Enmon Enterprises, LLC v. City of New Orleans*, 2016-1046 (La. 9/16/16), 206 So.3d 884.

therapy by a therapist of her choice, and asks this Court to vacate that portion of the judgment that orders her to seek counseling with Betsy Backe.

We find merit in this argument. While the court has the authority and discretion to order counseling in custody matters¹³, we find no authority to support the order of a specific therapist to provide that therapy. Accordingly, we hereby vacate that portion of the trial court's judgment mandating Ms. England to seek therapy specifically from Betsey Backe, LCSW. In all other respects, we affirm the judgment.

For the foregoing reasons, we vacate that portion of the judgment that orders Ms. England to seek treatment specifically from Betsey Backe, LCSW, and we amend the judgment on appeal to exclude the provision that orders Ms. England seek professional therapy “**from Betsey Backe, LCSW...**”. We affirm the judgment as amended.¹⁴

**JUDGMENT VACATED IN PART AND AMENDED, AND AS
AMMENDED, AFFIRMED**

¹³ See for example, La. R.S. 9:331, La. R.S. 9:361 et. seq., and La. Ch.C. art. 308.

¹⁴ This amendment also includes the exclusion of Ms. Backe's contact information that follows her name.

